Workers' Compensation
Commission Division
Order Filed: August 31, 2018

No. 1-17-2282WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SAM'S CLUB,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	Nos. 15 L 50697
	)	17 L 50401
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorables Kay Hanlon
	)	and Carl Anthony Walker,
(Patricia Burrola, Appellee).	)	Judges, Presiding.

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

ORDER

¶ 1 *Held*: We reinstate that portion of the original decision of the Illinois Workers' Compensation Commission (Commission) (1) finding no causal connection between the claimant's work accident and her bilateral shoulder surgeries; (2) denying the expenses for those surgeries; and (3) denying an award of medical expenses for the conservative treatment rendered to the claimant after July 31, 2008. Additionally, we affirm that portion of the circuit court's order which reversed that portion of the Commission's original decision awarding the claimant permanent partial disability benefits and denying her permanent total disability

benefits. In all other respects, we affirm the circuit court's order which confirmed Commission's decision on remand.

¶ 2 Sam's Club appeals from an order of the circuit court entered on September 14, 2017, which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) on remand awarding the claimant, Patricia Burrola, in addition to other relief, permanent total disability (PTD) benefits under section 8(f) of the Illinois Worker's Compensation Act (Act) (820 ILCS 305/8(f) (West 2008)), medical expenses for bilateral shoulder surgeries, and expenses for conservative medical treatment incurred after July 31, 2008. For the reasons which follow, we: affirm the circuit court's judgment of September 14, 2017 in part, reverse that judgment in part, and vacate that judgment in part; affirm the circuit court's judgment of April 19, 2016 in part and reverse that judgment in part; vacate the Commission's decision of April 4, 2017 in part; and reinstate a portion of the Commission's decision of September 10, 2015.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing held on October 25, 2013.

¶ 4 The claimant testified that, on April 9, 2008, she was employed by Sam's Club in the meat department of its store in Evanston, Illinois. That afternoon, she "slipped and fell" on a wet cement floor and her "whole body" hit the ground, causing pain in her head, back, neck, and hands. She entered into evidence a surveillance video, which, according to the arbitrator, was filmed "from a significant distance" behind the claimant and depicts her "abrupt[ly]" and "involuntar[ily]" falling backwards. Her feet "go*** up in front of her" as she falls, and her arms "shoot out to the side as she lands."[1]

[1] We have viewed the video, which is included in the record, and find that the arbitrator accurately described its content.

¶ 5 That evening, the claimant treated at Saints Mary and Elizabeth Medical Center with Dr. Nathan Svingen, who noted that she "slipped," "fell directly backwards onto [her] butt/back," and reported pain from "head to toe." X-rays of her lumbosacral spine revealed mild degenerative arthritis at "various levels" and "no evidence of fracture or dislocation," while x-rays of her cervical spine showed moderate degenerative arthritis at the "lower" levels, "considerable narrowing" at C5-C6 and C6-C7, and "no definite evidence of fracture." A CT scan of her head was negative. Dr. Svingen prescribed pain medications and discharged her, but she returned the next day complaining of bleeding from her right ear. She was diagnosed with a concussion and instructed to follow-up with her primary care physician.

¶ 6 On April 11, 2008, the claimant treated with Dr. Jaroslaw Slusarenko, a chiropractor, who removed her from work. According to Dr. Slusarenko's notes, the claimant stated that her right foot "slipped out from under her" and she "fell flat on [her] back," hitting the "back of her head." She reported headaches, blurred vision, and neck pain that traveled to her shoulders, hands, and right calf. X-rays of her cervical spine revealed "loss of the normal cervical lordosis[,] possibly indicating the presence of muscular spasm or soft tissue injury," but no fractures, dislocations, or major disc space narrowing. X-rays of her right hand were negative. During the next several days, she presented with "recurrent cephalgia, acute cervical thoracic pain with distal shoulders, *** right hand pain, middle back pain, and lower back pain extending to her right calf."

¶ 7 On April 16, 2008, the claimant treated with Dr. Bassam Osman, a neurologist. According to Dr. Osman's notes, the claimant stated that she slipped, "hit[ting] the back of her head," and that "[h]er arms were hurt as she supported herself against the ground when she fell." Dr. Osman diagnosed "[c]ervical and lumbar radiculopathy; cervical, thoracic, and lumbar

sprain, strain, and spasm; [and] multiple soft tissue trauma and injury." On April 30, 2008, he performed an EMG test, which indicated right-side radiculopathy at C5-C6-C7 and L4-L5-Sl.

¶ 8 On May 12, 2008, the claimant underwent an MRI scan of her cervical spine. Dr. George Kuritza, the radiologist, identified "hypertrophic spurring representing cervical spondyloarthropathy;" degenerative changes at multiple discs; three to four millimeter subligamentous posterior disc herniations indenting the thecal sac, with mild stenosis and bilateral neuroforaminal narrowing at C5-C6 and C6-C7; and two to three millimeter posterior disc bulges indenting the thecal sac at C3-C4 and C4-C5.

¶ 9 On May 14, 2008, the claimant returned to Dr. Osman and reported right ankle swelling that "persisted since the fall." She next presented to Dr. Ossama Hassan, a pain specialist, who administered cervical epidural injections and nerve blocks on May 21 and June 2, 2008.[2]

¶ 10 On July 31, 2008, at Sam's Club's request, the claimant underwent an independent medical evaluation (IME) by Dr. Avi Bernstein, a spinal surgeon, who set forth his opinions in a letter. According to Dr. Bernstein, the claimant reported that she slipped, fell backwards, and struck her head on the floor. After viewing the surveillance video, however, he believed that she fell "onto her buttock, roll[ed] up her back," and did not "strike her head or neck on the floor." Dr. Bernstein opined that the claimant did not exhibit paraspinal muscle spasm or neurologic weakness, and that the MRI scan of her cervical spine, taken May 12, 2008, shows "pre-existing advanced degenerative changes and no evidence of an acute injury." Dr. Bernstein added that the claimant was a " 'poor historian,' " and exhibited "symptom magnification." In his deposition, Dr. Bernstein testified consistently with his letter of July 31, 2008. He added that, in his opinion, the surveillance video depicted the claimant "squat[ting] down and lean[ing] backwards into a

[2] Throughout the record, Dr. Hassan's name also appears as Dr. Ossama Hassan Abdellatif.

*** protective maneuver." He stated that the claimant did not complain of shoulder pain during the IME of July 31, 2008, and that he "can't imagine" how the incident injured her shoulders. He concluded that she reached maximum medical improvement (MMI) as of July 31, 2008, and could perform "light duty work activity with a 20-pound lifting restriction."

¶ 11 On August 5, 2008, the claimant underwent an MRI scan of her lumbar spine that, according to a radiologist's report, revealed mild degenerative disc disease at Ll-L2 through L4-L5; disc desiccation; reduced intervertebral disc spacing; ventral spondylosis; and mild annular bulging.

¶ 12 The claimant testified that, in September 2008, she returned to work at Sam's Club's request, was assigned a position as a door greeter, and was given a chair. After a few weeks, her manager informed her that she could not sit because she lacked "a letter of accommodation." The record includes a form completed by Dr. Kenneth Sistino, dated October 2, 2008, wherein he states that the claimant "has difficulty standing, sitting for long periods of time," and "must change position 10 minute[s] / hour." However, the claimant continued working without a chair until late October, when she stopped due to pain in her neck, shoulders, low back, legs, and feet.

¶ 13 On October 24, 2008, the claimant treated with Dr. Kirnjot Singh, who observed a positive impingement sign in her right shoulder and positive median nerve compression in her right wrist. Dr. Singh concluded that she sustained a "work-related injury" that left her "in too much pain to work." That day, she underwent an MRI scan of her right shoulder with Dr. Kuritza, who noted (1) mild hypertrophic spurring that slightly indented the supraspinatus tendon, and (2) "mild inflammatory fluid surrounding the distal supraspinatus tendon, probably with mild tendinitis and/or bursitis."

¶ 14 On October 29, 2008, Dr. John Kane operated on two ruptured ligaments in the claimant's right ankle. His report does not state the cause of either rupture.

¶ 15 On November 7, 2008, Dr. Singh administered lidocaine to the claimant's right subacromial bursa, which gave "some" relief to her shoulder but did not substantially reduce the pain "radiating from her neck to her arm." Dr. Singh recommended cervical surgery at C5-C6 and C6-C7, non-surgical treatment for her lumbar spine, and therapy for her shoulder.

¶ 16 On January 23, 2009, Dr. Hassan administered trigger point injections and an L5 facet block. A few days later, Dr. Osman noted that the claimant's symptoms worsened.

¶ 17 On January 27, 2009, the claimant underwent an MRI scan of her left shoulder, which, according to a radiologist's report, revealed "supraspinatus tendinosis," "[o]steoarthritic changes with inferior spurring of the acromioclavicular joint," and "[n]o discrete rotator cuff tears."

¶ 18 The claimant presented to Dr. J.M. Morgenstern, an orthopedic surgeon, on January 30, 2009. According to Dr. Morgenstern's notes, the claimant reported that she slipped and "flew through the air," landed on her back, struck her head, and "sustained injuries to her right foot, lower back, cervical spine, and both shoulders." Dr. Morgenstern observed pain, decreased strength, limited range of motion, and "tenderness to the anterolateral aspects" of both shoulders. He diagnosed bilateral shoulder impingement syndrome and recommended surgery on both shoulders.

¶ 19 The claimant was seen by Dr. Michel Malek, a neurosurgeon, on February 26, 2009. According to Dr. Malek's notes, the claimant reported that she "slipped and fell," "her feet slipped out from under her," and she "hit her back." She reported headaches, pain in her mid and low back, and neck pain that "radiates down" both arms with tingling and numbness. Dr. Malek diagnosed lumbar and cervical radiculopathy.

¶ 20 On March 4, 2009, the claimant saw Dr. Syed Naveed, a neurologist, who noted that she "fell on her back," injuring her neck. Dr. Naveed administered an EMG test, which revealed "bilateral L5-S1 lumbosacral radiculopathy."

¶ 21 On March 9, 2009, the claimant returned to Dr. Morgenstern with "progressive" pain, decreased range of motion, and weakness in both shoulders. He opined that she sustained bilateral shoulder impingement syndrome as a result of the work accident, when she "attempted to *** catch herself by placing her hands behind her body" and struck the ground with "her arms and hands under her full body weight, causing injury to both shoulders." According to Dr. Morgenstern, the claimant could not perform her regular work duties without further treatment.

¶ 22 On March 12, 2009, the claimant underwent an MRI scan of her cervical spine that, according to a radiologist's report, revealed "[s]hallow central disc protrusion at C3-C4 with disc bulge causing neural foraminal narrowing;" "large posterior disc/osteophyte complexes from C5 through C7 causing significant neural foraminal stenosis;" "left paracentral protrusion at C5-C6 impinging upon the left aspect of the cervical cord;" and "central canal stenosis at C5-C6." An MRI scan of her lumbar spine showed "[l]eft neural foraminal/lateral herniation *** at L4-L5 causing left neural foraminal stenosis."

¶ 23 The claimant treated with Dr. Ronald Michael, a neurosurgeon, on June 15, 2009. According to Dr. Michael's notes, the claimant reported that she slipped, her right leg "flew up before her," and she "placed her arms behind her in an attempt to break her fall and thus landed on her arms on her low back." According to Dr. Michael, an MRI scan of her cervical spine revealed "herniated discs from C3-C4 through C6-C7." Dr. Michael also identified preexisting degenerative changes that "were clearly and unequivocally aggravated by the work-related injury." As for the claimant's lumbar spine, he opined that an MRI scan revealed "lumbar

radiculitis and mild lumbar degenerative disc changes with aggravations secondary to the work-related injury," and recommended conservative care.

¶ 24 The claimant was seen by Dr. Christos Giannoulias, an orthopedist, on June 22, 2009. According to Dr. Giannoulias's notes, the claimant reported that she "fell at work, slipped forward, and landed on both of her arms," causing, *inter alia*, bilateral shoulder pain. Dr. Giannoulias observed that she had difficulty reaching above her shoulders and that "extensive physical therapy" and "injections" had not alleviated her symptoms. He administered bilateral subacromial injections and stated that, if her symptoms persist, she "could be a candidate for decompression and removal of the distal clavicle." Dr. Giannoulias released her to work with a "10-15 lbs. maximum" and no climbing, overhead activity, or pushing and pulling for four weeks.

¶ 25 On June 25, 2009, the claimant underwent a functional capacity exam (FCE) at Best Practice Physical Therapy. In a report, the therapist found that the claimant's tolerance for standing, sitting, walking, lifting, carrying, pushing, and pulling did not meet the requirements of a "light strength" occupation and, therefore, she "may not return to work as a Deli Cutter-Slicer." According to the therapist, the claimant was unable to work "in any capacity" because she cannot lift and "[h]er maximum carrying capacity is 5.0 pounds."

¶ 26 On July 13, 2009, the claimant informed Dr. Giannoulias that her left shoulder injection did not alleviate her symptoms. As to her right shoulder, Dr. Giannoulias noted impingement signs, pain, and weakness.

¶ 27 On September 3, 2009, the claimant presented to Dr. Ronald Silver, an orthopedic surgeon. In a letter, Dr. Silver noted that the claimant reported having slipped and "land[ed] upon her outstretched arms[,] jamming her shoulders." She exhibited impingement signs and minimal

motion in both of her shoulders, and MRI scans revealed inflammation and impingement of her rotator cuffs. Dr. Silver recommended bilateral shoulder surgeries and, on October 3, 2009, performed an arthroscopic subacromial decompression, debridement, and distal clavicle resection on her right shoulder. In a letter dated October 17, 2009, he stated that the claimant's preoperative right shoulder pain resolved but she required physical therapy and remained temporarily disabled.

¶ 28 In a "final" report dated October 22, 2009, Dr. Slusarenko stated that the claimant "benefitted" from treatment for her cervical spine and low back, but "remained disabled and unable to work." That day, she returned to Dr. Malek for a surgical consultation.

¶ 29 The claimant underwent an MRI scan of her cervical spine on October 23, 2009. According to Dr. Kuritza's report, the scan revealed "[r]eversal of the usual cervical curvature with some straightening and mild anterolisthesis at the C4 on C5 vertebral bodies;" "[h]ypertrophic spurring *** representing spondylosis;" and, at C4-C5 through C6-C7, "subligamentous posterior disc protrusions/herniations *** elevating the posterior longitudinal ligament and indenting the thecal sac."

¶ 30 On December 15, 2009, Dr. Malek performed an anterior cervical diskectomy at C4-C5, C5-C6, and C6-C7; bilateral foraminotomy; spinal cord and nerve root decompression; excision of a herniated disc; and debulking of a spur. In February and March 2010, he noted that the claimant's cervical spine was "doing pretty well," although she required physical therapy. According to Dr. Malek, an MRI scan of the claimant's lumbar spine, taken on March 18, 2010, showed "evidence of multi-level disc desiccation, disc osteophyte complex, [and] no distinct disc herniation." The radiologist's report, however, identified disc bulging at L1-L2 through L5-S1.

¶ 31 Between February and May 2010, the claimant underwent physical therapy and work conditioning for her right shoulder. In May 2010, the therapist concluded that she functioned at a "sedentary" duty level and was hindered by pain in her low back and left shoulder.

¶ 32 On May 14, 2010, the claimant presented to Dr. Theodore Fisher, an orthopedic spine surgeon. In a letter, Dr. Fisher noted that the claimant reported having "slipped forward and *** landed on her buttocks and hands." He diagnosed right trochanteric bursitis, degenerative changes to her lumbar spine, anterior knee pain, and "[l]eft L4-5 intraforaminal disk herniation without left L4 radicular symptoms." He administered a right trochanteric bursa injection, resulting in "significant improvement in [the claimant's] right lateral thigh symptoms."

¶ 33 On June 11, 2010, Dr. Silver performed an arthroscopic subacromial decompression, debridement, and distal clavicle resection on the claimant's left shoulder. She began physical therapy in July, but, on August 20, 2010, informed Dr. Malek that pain in her lumbar and cervical spine worsened when she lifted objects. Dr. Malek suspended physical therapy, but Dr. Silver, in a letter dated August 24, 2010, advised that she could continue therapy and "use *** her left arm below the shoulder level with no lifting."

¶ 34 On September 3, 2010, Dr. Malek noted that the claimant's neck was "a lot better" and ordered an MRI scan of her lumbar spine, which was taken on September 8, 2010. According to Dr. Malek, the scan revealed "straightening of the normal lumbar lordosis" and "bulging discs at multiple levels, but no focal extrusion." The claimant reported low back pain, but Dr. Malek did not consider her a surgical candidate because "[s]he has not done the physical therapy well."

¶ 35 In a letter dated September 21, 2010, Dr. Silver released the claimant to work with "a five pound lifting restriction." On October 28, 2010, he noted that she "regained good strength in her

shoulders" and "may return to normal work activities with regard to her shoulders only as of November 1, 2010."

¶ 36 Dr. Jeffrey Coe, an occupational medicine specialist, examined the claimant at her attorney's request on March 22, 2011. In a letter, Dr. Coe stated that he viewed the surveillance video and observed the claimant "fall*** onto her back with her arms outstretched." Based on his examination of the claimant, her treatment history, and the MRI reports, Dr. Coe opined that the work accident (1) aggravated degenerative disc disease and arthritis in her lumbar spine, producing chronic lumbar discogenic, facetogenic, and myofascial pain; (2) caused an upper back contusion, strained her neck, and aggravated degenerative disc disease and arthritis in her cervical spine, producing chronic cervical discogenic and myofascial pain; and (3) caused her to "forcefully thr[ow] back both shoulders," which aggravated her "preexisting degenerative arthritis" and contributed to "the development of her bilateral shoulder impingement syndromes," which required surgery.

¶ 37 In his deposition, Dr. Coe testified consistently with his letter of March 22, 2011. He added that there was "considerable overlap" between the claimant's injuries, and explained that, because the shoulders connect to the upper back, the pain in her upper back that she experienced soon after the accident was "equally likely" to have originated "from her shoulders." He stated that the mechanism of her fall can "jar the shoulders" and "stress the acromioclavicular joints," especially given her preexisting arthritis, and that she would have needed bilateral shoulder surgery whether her arms were "stretched out to the side" or "up above her shoulder." Dr. Coe opined that the claimant's treatment from April 2008 through September 2010 was reasonable.

¶ 38 In November 2011, the claimant presented to Dr. Michael Rock, a pain specialist, who diagnosed "chronic pain syndrome," facetogenic low back pain, lumbar spondylosis, and right-

side facet joint arthropathy at L3-L4 and L5-S1. Dr. Rock administered facet joint injections to her right lumbar spine and performed radiofrequency rhizotomies.

¶ 39 On April 10, 2012, the claimant underwent an FCE at Elite Physical Therapy. In a report, the therapist noted that the claimant exhibited "full and consistent effort" and could perform sedentary work with a lifting restriction of 10 pounds from knee to chest level. However, the therapist also noted "severe functional limitations" beyond the sedentary work category, including decreased tolerances for standing, sitting, walking, reaching, and lifting above shoulder level. The therapist did not specifically attribute each limitation to the claimant's condition in her cervical spine or shoulders, but observed that she exhibited multiple musculoskeletal deficits which had "a negative impact on her overall level of functioning." These deficits included (1) limited range of cervical motion and tenderness over the cervical vertebrae, (2) reduced strength in her shoulders, neck, low back, right ankle, and foot; and (3) tenderness over the anterior shoulder joints, low back, and right ankle. According to the therapist, the claimant could not resume "her previous full duty work activities," and "may attempt to return to work only in a modified duty position respectful of [her] physical capabilities and tolerances."

¶ 40 On September 27, 2012, the claimant underwent a second IME by Dr. Bernstein, who memorialized his opinions in a letter. He concluded that the claimant reached MMI as of that date and could function at the sedentary or light duty levels. Dr. Bernstein did not review film of the MRI scans of the claimant's cervical spine but, based on Dr. Kuritza's description of the scan from October 23, 2009, had "no confidence" in his opinion that it showed "protrusions and herniations from C4 to C7." In his deposition, Dr. Bernstein testified consistently with his letter of September 27, 2012. He added that the claimant's work accident may have aggravated a preexisting degenerative cervical condition, but did not require cervical surgery or low back

treatment; notwithstanding, he agreed the cervical surgery was "reasonable." As to the claimant's shoulders, Dr. Bernstein reiterated that she did not report shoulder pain during the initial IME, and he did not believe that her treatment with Dr. Silver was causally related to the work accident. Dr. Bernstein did not have an opinion whether the shoulder surgeries were reasonable or necessary because he does not specialize in "shoulder issues," but stated that the claimant's conditions of ill-being in various parts of her body were "diffused types of complaints that possibly wouldn't relate to the fall" depicted in the surveillance video.

¶ 41 On April 9, 2013, the claimant consulted a vocational rehabilitation counselor, Susan Entenberg. According to Entenberg's report, the claimant was 54 years old, graduated from high school, had an associate's degree in liberal arts, and took college classes in early childhood education, business, and computers. She spoke English and Spanish, but was "an extremely poor historian" and had difficulty recalling dates, her address, and her telephone number. From 2003 to the date of her accident, she earned $10 to $11 per hour as a cashier and deli processer at Sam's Club; as a deli processor, she was required to stand, walk, bend, and stoop, while lifting 25 pounds "frequently" and 50 pounds "occasionally." Previously, she worked as a clerk at a medical center for approximately 6 years, a teacher aide for 11 years, and a group home aide for 7 or 8 years.

¶ 42 Based on the claimant's medical records, the FCE of April 10, 2012, and the interview, Entenberg found that the claimant cannot resume work as a deli processor. According to Entenberg, "no stable labor market exists" for the claimant in view of her education, work history, and limited ability to sit, stand, walk, and lift, which restricts her to "less than sedentary work." In Entenberg's opinion, those factors, along with the claimant's lack of transferable skills and difficulty communicating, preclude her from vocational training or working as a bank teller,

receptionist, or front desk clerk. In her deposition, Entenberg testified consistently with her report. She added that, based on the FCE of April 10, 2012, she did not know whether the physical limitations that prevented the claimant from working resulted from her condition in her cervical spine or shoulders. She noted that the claimant reported laying down 12 hours per day, did not perform a job search, and described herself as "not a reliable worker at this point."

¶ 43 Sam's Club entered into evidence a labor market survey prepared by Workfinders USA, dated June 21, 2013. The survey identified eight available jobs paying $8.25 to $13.75 per hour. These included positions as a customer service agent, receptionist, and guest services agent, which required combinations of sitting, standing, and walking; a position as a telephone operator, which required sitting and moving equipment carts; a front desk clerk position, which required sitting, standing, and walking, but could accommodate lifting restrictions; and a sales representative position and two bank teller positions, all classified as "[s]edentary."

¶ 44 The claimant testified that she lacked problems with her back, neck, or shoulders prior to the work accident but, at the time of the hearing, experienced "sharp pain" in her low back and spasms that affected her neck, arms, hands, and legs. She could sit for two hours, stand for one hour, and walk with a cane for "a couple of blocks." She had difficulty climbing stairs, required help putting on shoes and socks, and could not lift gallon containers of milk.

¶ 45 Following the arbitration hearing, the arbitrator issued a written opinion on November 13, 2013, finding that the claimant sustained a work accident arising out of and in the course of her employment with Sam's Club when she slipped and fell on April 9, 2008. The arbitrator found a causal connection between the claimant's work accident and (1) her cervical spine condition and surgery; (2) her "non-surgical" lumbar spine condition, "initial course of therapy," and an MRI scan; and (3) "contusions or strains" to her right hand and both shoulders, with an "initial

evaluation, radiographic studies and conservative care through July 31, 2008." The arbitrator found no causal connection between the work accident and the claimant's bilateral shoulder surgeries, and denied expenses for both of those surgeries. The arbitrator awarded the claimant medical expenses totaling $240,084.39. However, the arbitrator denied compensation for "conservative care" by Drs. Slusarenko, Osman, and Hassan after July 31, 2008, as the claimant "derived little lasting benefit from this care" and Dr. Bernstein found that she reached MMI on that date. Additionally, the arbitrator awarded temporary total disability (TTD) benefits of $275.52 per week for 65 6/7 weeks, from April 10, 2008, through August 31, 2008, and from October 22, 2009, through September 3, 2010, under section 8(b) of the Act (820 ILCS 305/8(b) (West 2008)),[3] and permanent partial disability (PPD) benefits of $247.97 per week for 200 weeks under section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2008)) because her injuries caused a 40% loss of use of the person as a whole. The arbitrator denied PTD benefits under section 8(f) of the Act (820 ILCS 305/8(f) (West 2008)). Finally, the arbitrator granted Sam's Club credit for $2519.01 in paid TTD benefits, and rejected its argument that the claimant exceeded her choice of physicians as to Dr. Malek.

¶ 46 In her findings, the arbitrator stated that she found no causal connection between the work accident and the claimant's bilateral shoulder surgeries because (1) although Drs. Giannoulias and Silver found causation, their descriptions of the mechanism of injury conflicted with a surveillance video of the accident; (2) neither Dr. Silver's operative reports nor the MRI readings documented "discrete tears" in the claimant's shoulders; and (3) Dr. Coe is not an orthopedic surgeon and did not explain how the claimant's "backward fall, with [her] arms going

[3] The arbitrator's decision includes a different, incorrect figure for the total weeks of TTD benefits awarded, which was later corrected by the Commission.

out to the side, could result in aggravation of pre-existing impingement syndrome." As for the arbitrator's decision to award PPD benefits rather than PTD benefits, she stated that (1) the FCE report of April 10, 2012, related the claimant's difficulty standing to her conditions of ill-being in her low back, which did not require surgery, and her right ankle, which she never attributed to the work accident; (2) Entenberg "conceded" that the report showed that the claimant is "capable of sedentary duty;" and (3) the claimant "never looked for work" and "long ago gave up any notion of returning to the workplace." The arbitrator did not address whether the claimant was permanently and totally disabled based on her age, training, education, experience, or condition.

¶ 47 The claimant filed a petition for review of the arbitrator's decision before the Commission. On September 10, 2015, the Commission issued a unanimous decision that affirmed and adopted the arbitrator's decision.

¶ 48 The claimant sought a judicial review of the Commission's decision in the circuit court of Cook County (case No. 15 L 50697). On April 19, 2016, the court (1) confirmed the Commission's decision as to TTD benefits; (2) reversed its determination that the claimant's bilateral shoulder surgeries were not causally related to the work accident, and awarded expenses for those surgeries; (3) reversed its denial of expenses for conservative treatment from Drs. Slusarenko, Osman, and Hassan after July 31, 2008; and (4) remanded to the Commission "to complete the analysis of [the claimant's] entitlement to PTD." The court stated that, based on Entenberg's opinion, "any finding that [the claimant] failed to meet her burden of establishing entitlement to PTD under the odd-lot category is against the manifest weight of the evidence."

¶ 49 On April 4, 2017, the Commission issued a unanimous decision on remand that vacated its prior decision and modified the arbitrator's decision according to the circuit court's directive. The Commission (1) determined that the claimant's bilateral shoulder surgeries were causally

related to the work accident and awarded expenses for those surgeries, finding that it is "likely, based on the fall depicted [in the surveillance video] that [she] injured both her shoulders as she fell backwards onto the floor;" (2) awarded the claimant expenses for conservative care both prior and subsequent to July 31, 2008, rejecting Dr. Bernstein's opinions as "unpersuasive;" and (3) vacated the arbitrator's award of PPD benefits and granted PTD benefits of $413.28 per week for life, beginning September 4, 2010, as "no jobs are available to a person in like circumstance based upon [the claimant's] age, training, education, experience and physical limitations." In all other respects, the Commission affirmed and adopted the arbitrator's decision.

¶ 50 Sam's Club sought a judicial review of the Commission's decision in the circuit court (case No. 17 L 50401). On September 14, 2017, the court confirmed the Commission's decision. This appeal followed.

¶ 51 Sam's Club initially contends that the Commission's decision on remand of April 4, 2017, "should be vacated in its entirety" because it reflects the findings of the circuit court, which "exceeded its authority" by reweighing the evidence in its order of April 19, 2016. We disagree, as the Commission must follow the circuit court's order on remand. See *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 11. Moreover, when the circuit court reverses the Commission's original decision because it is against the manifest weight of the evidence and a new decision is entered on remand, "this court initially considers the propriety of the original Commission decision before reviewing the Commission decision entered following remand." *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001). Therefore, we turn to the merits of Sam's Club's appeal and consider the propriety of the Commission's original decision of September 10, 2015.

¶ 52 Sam's Club contends that the Commission's original determination that the claimant's bilateral shoulder surgeries were not causally related to the work accident is not against the manifest weight of the evidence. It argues that, because the surveillance video of the claimant's accident and her initial hospital records show that she fell backwards without using her arms to brace herself, the Commission properly rejected the opinion of each physician who found causation based on her claim that she fell onto her arms. In response, the claimant maintains that the video depicts her "throw[ing] her arms behind her" and that the Commission had no basis to reject the opinion of Dr. Coe, who viewed the video and believed that the work accident caused the condition in her shoulders requiring surgery.

¶ 53 To obtain compensation under the Act, a claimant has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (*O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)), including a causal relationship between her work accident and her condition of ill-being (*Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003)). Whether a causal connection exists between a claimant's work-related accident and her condition of ill-being is a question of fact to be resolved by the Commission. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984)). "The Commission's determination of factual issues, including the resolution of conflicting medical evidence, and the credibility and weight of testimony, will not be disturbed unless against the manifest weight of the evidence." *McLean Trucking Co. v. Industrial Comm'n*, 96 Ill. 2d 213, 219 (1983). For a factual finding made by the Commission 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 a reviewing court might have reached the same conclusion is not the test for determining whether the Commission's finding is 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 v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 54 In this case, the Commission was presented with conflicting evidence as to whether the claimant's bilateral shoulder surgeries were causally related to the work accident. Dr. Bernstein opined that the claimant's mechanism of injury during the accident did not cause the condition in her shoulders requiring surgery. He stated that (1) the claimant did not report shoulder pain during the initial IME, (2) her "diffused" complaints were not certain to originate from the incident depicted in the video; and (3) based on the video, he could not "imagine" how the fall injured her shoulders. His opinion, therefore, supports the Commission's original decision that the claimant did not establish causation as to her bilateral shoulder surgeries.

¶ 55 Unlike Dr. Bernstein, Drs. Morgenstern, Michael, Giannoulias, and Silver all opined that the claimant's work accident caused the condition in her shoulders requiring surgery. However, their opinions were not based on the surveillance video, but rather, depended on the claimant's assertion that she fell onto her arms or hands. Because the video contradicted the mechanism of injury that the claimant described to these physicians, their opinions were not supported by the underlying evidence. See *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24 ("[e]xpert opinions must be supported by facts and are only as valid as the facts underlying them" (internal quotation marks omitted)). Dr. Coe also found a causal connection between the claimant's work accident and bilateral shoulder surgeries, and based his opinion on the surveillance video. The Commission, however, rejected his opinion because he was not an orthopedist and did not adequately explain how the mechanism of injury caused the claimant's condition in her shoulders requiring surgery. It was the Commission's function to judge Dr. Coe's credibility and resolve the conflict between his opinion and that of Dr. Bernstein (*McLean*

Trucking Co., 96 Ill. 2d at 219), and it is well-established that a reviewing court "will not reverse the Commission merely because some evidence incompatible with its finding exists in the record." *Riteway Plumbing v. Industrial Comm'n*, 67 Ill. 2d 404, 409 (1977).

¶ 56 Based on the foregoing, the Commission's original decision that the claimant's bilateral shoulder surgeries were not causally related to the work accident is not against the manifest weight of the evidence. Because the opposite conclusion is not clearly apparent from the record, the circuit court erred in reversing the Commission's original decision on that issue. See *Sisbro*, 207 Ill. 2d at 215 (the Commission's decision must be confirmed if the record provides an adequate basis for its finding with regard to causation).

¶ 57 Sam's Club next argues that the Commission's original decision to award PPD benefits and deny PTD benefits is not against the manifest weight of the evidence. According to Sam's Club, the Commission correctly determined that the claimant's inability to work resulted from her conditions of ill-being in her low back and right ankle rather than her cervical spine and, therefore, did not result from her work accident. The claimant, in response, contends that the Commission's original decision misstates both Entenberg's opinion and the FCE report of April 10, 2012, which establish that she is, in fact, permanently and totally disabled.

¶ 58 In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of her injury. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843 (1994). A worker is entitled to PPD benefits when a work accident leaves her "permanently partially incapacitated from pursuing *** her usual and customary employment, and is reasonably certain to permanently prevent [her] from earning as much as [she] would have earned absent the injury." *DiFoggio v. Retirement Board of the County Employees Annuity & Benefit Fund of Cook County*, 156 Ill. 2d 377, 379 (1993). In

contrast, a worker is entitled to PTD benefits when she is unable to make some contribution to industry sufficient to justify the payment of wages. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979).

¶ 59 Where, as here, a claimant's disability does not render her "obviously unemployable," or no medical evidence supports a claim of total disability, the claimant has the burden "to prove by a preponderance of the evidence that [she] fits into an 'odd lot' category; that being an individual who, although not altogether incapacitated, is so handicapped that [she] is not regularly employable in any well-known branch of the labor market." *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 53 (citing *Valley Mould & Iron Co. v. Industrial Comm'n of Illinois*, 84 Ill. 2d 538, 546-47 (1981)). A claimant may satisfy this burden by (1) "a preponderance of medical evidence;" (2) "showing a diligent but unsuccessful job search;" or (3) "demonstrating that, because of age, training, education, experience, and condition, there are no available jobs for a person in [her] circumstance." *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 34. Once the claimant establishes that she falls within the "odd lot" category, the burden shifts to the employer to prove that she is employable in a stable, existing labor market. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). Whether a claimant falls within the "odd lot" category is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 60 In this case, the Commission based its original decision to award PPD benefits and deny PTD benefits on three factors. First, the Commission found that the FCE report of April 10, 2012, related the claimant's difficulty standing to her conditions of ill-being in her low back, which did not require surgery, and her right ankle, which she never attributed to the work

accident. A careful reading of the FCE report, however, reveals that it does not exclusively relate the claimant's difficulty standing to any single condition of ill-being. Instead, the report states that she exhibited multiple musculoskeletal deficits that have "a negative impact on her overall level of functioning." According to the report, those deficits also include (1) a limited range of cervical motion and tenderness over the cervical vertebrae, (2) reduced strength in her shoulders and neck; and (3) tenderness over the anterior shoulder joints. On appeal, it is uncontested that a causal relationship exists between the claimant's work accident and her condition of ill-being in her cervical spine. Thus, even if the claimant's difficulty standing results from several conditions of ill-being, the FCE report shows that at least one of those conditions—namely, her condition in her cervical spine—is causally related to the work accident. See *Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 249 (1976) (noting that the claimant "ha[s] the burden to prove that his employment was a causative factor of his physical disability," but "d[oes] not have to prove[ ] *** that his employment was the sole causative factor or even that it was the principal causative factor"). Consequently, the FCE report of April 10, 2012, does not support the Commission's decision to deny PTD benefits.

¶ 61 Second, the Commission's original decision relied on its finding that Entenberg "conceded" that the claimant is "capable of sedentary duty." Our review of the record, however, reveals that Entenberg's report states that the claimant is capable of "less than sedentary work" due to her limited ability to sit, stand, walk, and lift. Therefore, Entenberg's opinion does not support the denial of PTD benefits.

¶ 62 Third, the Commission's original decision to deny PTD benefits relied on the fact that the claimant did not conduct a work search. However, as the circuit court recognized in its order of April 19, 2016, the Commission failed to analyze other factors relevant to whether the claimant

was permanently and totally disabled under the "odd-lot" category, including her age, training, education, experience, and condition. See *Professional Transportation, Inc.*, 2012 IL App (3d) 100783WC, ¶ 34. With respect to these factors, the record shows that the claimant graduated from high school, had an associate's degree, and took college classes in early childhood education, business, and computers. According to Entenberg, however, the claimant exhibited difficulty communicating; struggled to recall dates, her address, and her telephone number; and lacked transferable job skills. Further, the FCE report of April 10, 2012, states that the claimant has decreased tolerances for standing, sitting, walking, reaching, and lifting above shoulder level, which, together, constitute "severe functional limitations" beyond the sedentary work category. Notably, in the labor market survey proffered by Sam's Club, each of the identified jobs are classified as "sedentary" or require some combination of sitting, standing, and walking.

¶ 63 In view of the foregoing, the manifest weight of the evidence does not support the Commission's original determination that the claimant is not permanently and totally disabled. The circuit court, therefore, correctly reversed that part of the Commission's decision granting the claimant PPD benefits and denying her PTD benefits. As the record shows that the claimant's inability to work results at least partly from a condition of ill-being caused by the work accident and no jobs are available for a person in like circumstances, the Commission's decision on remand to grant her PTD benefits is well-supported and not against the manifest weight of the evidence.

¶ 64 Next, Sam's Club argues that the Commission's original decision to deny medical expenses for the claimant's conservative treatment with Drs. Slusarenko, Osman, and Hassan after July 31, 2008, is not against the manifest weight of the evidence. According to Sam's Club, the denial of those expenses is "[c]onsistent with" the Commission's original findings that the

claimant's bilateral shoulder surgeries were not causally related to her work accident and that she was not permanently and totally disabled. The claimant, in response, maintains that Sam's Club forfeited any challenge to the Commission's decision on remand to award medical expenses for conservative treatment specifically as to her low back after July 31, 2008, by failing to adequately develop an argument in its brief on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). We note, however, that "the forfeiture rule is an admonition to the parties and not a limitation on the court," and, in the interest of developing a sound body of law, we "may review any issue so long as the record contains facts sufficient for its resolution." (Internal quotation marks omitted.) *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 115. Therefore, we elect to address this issue.

¶ 65 Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)), a claimant may recover reasonable medical expenses that "are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (2011). "The question of whether medical treatment is causally related to a compensable injury is one of fact to be determined by the Commission, and its finding on the issue will not be reversed on review unless contrary to the manifest weight of the evidence." *Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764-65 (2001).

¶ 66 The record shows that the claimant began conservative treatment both for her cervical spine and low back with Dr. Slusarenko on April 11, 2008, two days after the work accident. In April and May 2008, she began treating for her cervical and lumbar spine with Drs. Osman and Hassan. Dr. Bernstein found that the claimant reached MMI on July 31, 2008. On November 7, 2008, Dr. Singh recommended that the claimant undergo cervical spine surgery and continue

with nonsurgical treatment for her lumbar spine. Notwithstanding, the claimant continued with conservative care both for her cervical and lumbar spine through October 2009, when Dr. Slusarenko concluded that she still could not return to work and the claimant finally sought a surgical consultation with Dr. Malek. In light of this medical history, the opinions of Drs. Bernstein and Singh support the Commission's original determination that the claimant's conservative care for her cervical spine after July 31, 2008, was unnecessary. While Drs. Bernstein's and Singh's opinions diverged as to the necessity of the claimant's conservative treatment for her lumbar spine after July 31, 2008, the Commission was charged with resolving the conflict in the medical evidence. *McLean Trucking Co.*, 96 Ill. 2d at 219. Notably, the record shows that the claimant did not benefit from ongoing conservative care for her low back, as Dr. Osman found that her condition worsened following trigger point injections and an L5 facet block that Dr. Hassan administered in January 2009. Based on the foregoing, the Commission's original decision to deny medical expenses for the claimant's conservative treatment with Drs. Slusarenko, Osman, and Hassan after July 31, 2008, is not against the manifest weight of the evidence. The circuit court, therefore, erred in reversing the Commission's original decision on that issue.

¶ 67 Finally, Sam's Club argues that the Commission's original decision to award the claimant TTD benefits from April 10, 2008, through August 31, 2008, and from October 22, 2009, through September 3, 2010, is not against the manifest weight of the evidence. The record, however, shows that the Commission's original TTD award was confirmed by the circuit court, remained undisturbed throughout the litigation, and is not challenged by the claimant on appeal. The Commission's original award of TTD benefits is, therefore, affirmed.

¶ 68 Based upon the foregoing analysis, we: (1) reverse that portion of the circuit court's order of April 19, 2016, which reversed that portion of the Commission's original decision finding no causal connection between the claimant's work accident and her bilateral shoulder surgeries and denying the expenses for those surgeries; (2) vacate that part of the Commission's decision on remand finding a causal connection between the claimant's work accident and her bilateral shoulder surgeries and awarding medical expenses therefore; (3) vacate that portion of the circuit court's order of September 14, 2017, which confirmed that portion of the Commission's decision on remand finding a causal connection between the claimant's work accident and her bilateral shoulder surgeries and awarding medical expenses therefore; (4) reinstate that portion of the Commission's original decision finding no causal connection between the claimant's work accident and her bilateral shoulder surgeries and denying the expenses for those surgeries; (5) reverse that portion of the circuit court's order of April 19, 2016, which reversed that portion of the Commission's original decision denying an award of medical expenses for the conservative care treatment rendered to the claimant after July 31, 2008; (6) vacate that portion of the Commission's decision on remand awarding medical expense for the conservative treatment rendered to the claimant after July 31, 2008; (7) vacate that portion of the circuit court's order of September 14, 2017, which confirmed that portion of the Commission's decision on remand awarding medical expenses for the conservative treatment rendered to the claimant after July 31, 2008; (8) reinstate that portion of the Commission's original decision denying an award of medical expenses for the conservative treatment rendered to the claimant after July 31, 2008; (9) affirm that portion of the circuit court's order of April 19, 2016, which reversed that portion of the Commission's original decision awarding the claimant PPD benefits and denying her PTD benefits; and (10) affirm the circuit court's order of September 14, 2017, in all other respects.

¶ 69 PRESIDING JUSTICE HOLDRIDGE, concurring in part and dissenting in part:

¶ 70 I would affirm the Commission's original decision in its entirety. I therefore dissent from that portion of this order that reversed the Commission's award of PPD benefits and ordered an award of PTD benefits. An award of PTD benefits is appropriate only when the claimant has established that she make no contribution to industry sufficient to earn a wage. *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 32. If the claimant is qualified and capable of obtaining gainful employment without seriously endangering her health or life, she is not entitled to PTD benefits. *Id*. I would find that the claimant failed to establish her entitlement to PTD benefits.

¶ 71 Here, the majority has determined that the claimant established her entitlement to PTD benefits under the odd-lot theory based on her age, training, education, experience, and condition. I disagree. The record established that the claimant's level of education, including a high school diploma and Associates degree; her training in early childhood, computers and business; and her prior retail experience, together support a finding that she was employable in the local labor market. The burden was on the claimant to establish entitlement to an award of PTD benefits under the odd-lot theory. I find nothing in this record to establish that the claimant met her burden by showing that her age, training, education, experience or condition made her unemployable. There was evidence that the claimant was employable in certain "sedentary" occupations; evidence that the Commission apparently relied upon in finding that the claimant was partially disabled to the extent of 40% of the person as a whole. While the evidence is contradictory as to whether the claimant could perform in "sedentary" or "less than sedentary" positions, the record supports a finding that there were jobs available in the relevant market that were within the claimant's qualifications and limitations. I would find, therefore, the

Commission's determination that the claimant was qualified and capable of obtaining gainful employment without seriously endangering her health or life was not against the manifest weight of the evidence.