2014 IL App (2d) 131206WC-U

Workers' Compensation
Commission Division
Order Filed: December 26, 2014

No. 2-13-1206WC

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

R & D THIEL, A DIVISION OF CARPENTER CONTRACTORS OF AMERICA Plaintiff-Appellant,	)	Appeal from the Circuit Court of McHenry County, Illinois
v.	)	No. 12 L 51273
ILLINOIS WORKERS' COMPENSATION COMMISSION and ANDY MC GINNIS, Defendants-Appellees.	)	Honorable Michael T. Caldwell, Judge Presiding.

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

ORDER

¶ 1 *Held:* The judgment of the circuit court was reversed in part and affirmed in part where the Commission's determination of the claimant's average weekly wage did not comply with the statutory methods of calculation and where the Commission's decision to award attorney fees and penalties was not against the manifest weight of the evidence.

¶ 2 The employer, R & D Thiel, a Division of Carpenter Contractors of America (Thiel), appeals from the circuit court order which confirmed the decision of the Illinois Workers'

Compensation Commission (Commission) that awarded the claimant, Andy McGinnis, temporary and permanent disability benefits and attorney fees and penalties under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2006)), and modifed the decision to increase the amount of the award for fees and penalties. For the reasons that follow, we reverse the circuit court judgment in part, affirm in part, and remand the cause to the Commission with instructions.

¶ 3 The arbitration hearing was conducted on November 10, 2011, at which the following evidence was presented. At the time of his injury, the claimant had been employed by Thiel as a carpenter for 38 years. On December 8, 2006, he was carrying tools while working when he slipped and fell on an accumulation of ice, landing on his left shoulder.

¶ 4 Several days after his work injury, the claimant went to his family physician, Dr. James Mowrey, who noted that he was "unable to lift his left arm very high" and that there was some hemorrhaging. Dr. Mowrey prescribed pain medication for the claimant and referred him to an orthopedist, Dr. Robert Hall. The claimant saw Dr. Hall on December 13, 2006, at which time the doctor ordered an MRI of the claimant's left shoulder along with physical therapy. Additionally, Dr. Hall's report stated that the claimant will "continue [return to work] with a 30 pound weight lifting restriction." The claimant testified that, following his injury on December 8, 2006, he continued working for approximately two months, but he was inside performing lighter work.

¶ 5 The MRI was performed on December 22, 2006, and revealed extensive supraspinas tendinosis and a full thickness tear of the left rotator cuff. The report of the scan also noted degenerative changes of the glenohumeral joint with labral degeneration and moderate degenerative and hypertrophic changes at the AC joint level. Based upon the MRI, Dr. Hall recommended that the claimant undergo surgery. The claimant followed up with Dr. Hall on

December 27, 2006, at which time the doctor noted that the claimant had not yet begun his physical therapy because of a delay with workers' compensation. He began physical therapy on December 29. On January 10, 2007, Dr. Hall released the claimant to work the following day, subject to a two-week restriction of no overhead lifting of over 30 pounds.

¶ 6 The claimant's surgery had been scheduled for February 14, 2007, but was delayed because he developed a respiratory infection. The procedure went forward on March 6, 2007, at which time Dr. Hall performed an arthroscopic debridement of the claimant's glenohumeral joint, with anterior acromioplasty, distal claviculectomy and repair of his left rotator cuff. Following the surgery, the claimant continued with physical therapy.

¶ 7 On July 12, 2007, the claimant was examined by Dr. Mark Levin at the request of Thiel. Dr. Levin believed that the claimant could return to light duty work if available but with no use of his left shoulder. The claimant returned to work on July 19, 2007, and Thiel initially honored his restrictions by having him walk around job sites to ensure compliance with safety rules. However, Thiel later changed his duties and ordered him to clean out garages, which necessitated heavy lifting. The claimant testified that he continued to follow Thiel's orders as to his duties despite the fact that they violated his work restrictions and caused pain in his left arm.

¶ 8 On November 15, 2007, Thiel again had the claimant evaluated by Dr. Levin, who opined that the additional physical therapy prescribed by Dr. Hall would not aid the claimant, and recommended a formal five-day work conditioning or work hardening program.

¶ 9 On December 7, 2007, the claimant was taken off of work in order to attend the work conditioning program, which was five days a week for four hours per day. On January 2, 2008, the claimant returned to Dr. Hall complaining of increasing pain in his shoulder. In his report of that visit, Dr. Hall stated that the claimant may have re-torn his rotator cuff as a result of the work hardening program, which he believed had been undertaken prematurely. He ordered an

MRI, which was performed on January 28, 2008, and revealed a complete tear of the supraspinatus tendon with retraction of the myotendinous junction and supraspinatus muscle. According to Dr. Hall, the re-tear was the direct result of the premature work hardening mandated by Thiel's worker's compensation carrier. He recommended further surgery, and that the claimant remain off of work.

¶ 10 The claimant testified that a surgery was subsequently set and then postponed at the request of Thiel, who directed that he undergo an examination with Dr. Pietro Tonino. Following an examination on March 17, 2008, Dr. Tonino noted that the claimant had a recurrent left rotator cuff tear and that he was a candidate for revision.

¶ 11 On April 2, 2008, with Thiel's authorization, Dr. Hall performed a second arthroscopic surgery on the claimant's left shoulder, consisting of anterior acromioplasty, distal claviculectomy and rotator cuff repair. His sutures were removed about two weeks later and Dr. Hall directed that the claimant begin post-operative physical therapy. On June 11, 2008, Dr. Hall reported that, while the claimant was doing a pulley session during therapy, he experienced shoulder pain after several attempts, and that therapy was then stopped, but resumed later with less strenuous exercises.

¶ 12 On June 23, 2008, at the request of Thiel, the claimant returned to Dr. Tonino, who reported that the claimant had significant pain while doing exercises in physical therapy and had severely reduced range of motion. Dr. Tonino recommended an MR-arthrogram, which was apparently never performed.

¶ 13 On June 30, 2008, Dr. Hall ordered an MRI for the claimant to rule out a possible rotator cuff tear of the claimant's left shoulder. While awaiting approval from Thiel for the MRI, the claimant was maintained on "off work" status. On September 8, 2008, the MRI was performed,

and revealed a partial tear of the supraspinatus tendon. Dr. Hall released the claimant to return to one-handed work only.

¶ 14 On September 16, 2008, Thiel began providing the claimant with light-duty work on a part-time basis, which the claimant performed until October 15, 2009.

¶ 15 On December 22, 2008, the claimant underwent another examination under section 12 of the Act (820 ILCS 305/12 (West 2010)) with Dr. Tonino, who believed that the claimant possibly had a recurrent rotator cuff tear, but indicated that he wanted to review the claimant's last MRI. The claimant underwent a functional capacity examination (FCE) in April of 2009, and on July 23, 2009, had another section 12 examination by Dr. Tonino. Following a review of the MRI, Dr. Tonino gave the opinion that the scan did not show a recurrent tear, but that it did exhibit evidence of rotator cuff tendinopathy following rotator cuff surgery. Dr. Tonino recommended additional surgery, but stated that if the claimant did not desire another procedure, he would be at maximum medical improvement (MMI) within the restrictions of the FCE.

¶ 16 On December 2, 2009, the claimant returned to see Dr. Hall who agreed that surgery would be appropriate. In his report, the doctor noted that the claimant had undertaken what appeared to be a return to his regular work "despite my admonition that he have restrictions."

¶ 17 On January 5, 2010, the claimant underwent a third arthroscopic surgery to the left shoulder which included anterior acromioplasty and rotator cuff repair.

¶ 18 The claimant returned to Dr. Tonino on May 27, 2010, at which time the doctor noted that the claimant had progressed slowly, most likely due to the fact that it was his third surgery. Dr. Tonino reported that recovery could be anticipated in about two months with strengthening exercises and that at that point the claimant could possibly reach MMI.

¶ 19 On October 4, 2010, the claimant underwent another section 12 examination with Dr. Tonino, who noted that the claimant was making slow progress in therapy and that, in light of his

multiple surgeries, it was unlikely he would be able to return to carpentry in an unrestricted fashion. Dr. Tonino believed that the claimant was at MMI and was a candidate for an FCE.

¶ 20 On January 4, 2011, the FCE was completed. The report states that the claimant put forth consistent effort and was very willing to try activities which he knew would be difficult. Nonetheless, his previous job was classified at the heavy duty level, and the claimant was able to perform only at the light physical demand level, and was found to be unable to perform the repetitive or prolonged arm activity required for carpentry. The claimant could not continuously lift anything with the left arm but could lift 1 pound overhead frequently and 2 pounds overhead occasionally.

¶ 21 On January 28, 2011, the claimant returned for his final visit with Dr. Hall. The examination revealed restriction on forward flexion and internal rotation. After reviewing the FCE, Dr. Hall classified the claimant at MMI and released him to duty with permanent restrictions of no overhead lifting and no lifting in excess of 5 pounds.

¶ 22 The parties submitted evidence of the claimant's vocational rehabilitative potential. The claimant testified that he completed grammar school in ten years, after which he attended high school for one year, dropping out at the age of 17. He then began working for Thiel, where he was employed continuously until after the accident at issue. The claimant never obtained a GED and had no other formal education or training. He testified that, throughout his employment with Thiel, his duties consisted primarily of framing houses, including building walls, decks and roofs, and that he was able to "figure out" a blueprint by looking at the diagrams.

¶ 23 The claimant presented the testimony of Joseph Belmonte, a certified rehabilitation counselor, who evaluated the claimant on two occasions: the first time on July 31, 2009, and the second on March 2, 2011, following the claimant's final surgery. In the first assessment, Belmonte noted that, at 57, the claimant was considered to be of advancing age based upon

social security criteria; that his lack of a high school diploma, GED, or other educational training rendered him of very limited educational background; and that he was not keyboard proficient or computer literate. Belmonte further noted that the claimant had significant difficulty in reading, doing so only on a limited basis; therefore, his literacy could not be presumed and a learning disability was possible. Belmonte also noted the claimant's limited employment history, having worked exclusively as a carpenter for Thiel since he left school in 1967. Even in this capacity, however, the claimant did not perform trim work or any sales or administrative work, and lacked the temperament for work as a foreman or supervisor. Based upon these factors and the claimant's lack of transferrable skills, Belmonte believed he would have extreme difficulty finding employment in the current economic environment. Belmonte believed that the claimant was "theoretically employable" in such unskilled occupations as cashier, parking lot attendant, limited retail sales, and light delivery work, but opined that, at this point, vocational testing for the claimant was imperative, and withheld any definitive determination as to his employability until such testing was completed.

¶ 24 In his second assessment on March 2, 2011, Belmonte amended his opinion to conclude that, based upon the claimant's recent and more limiting work restrictions, combined with his previously noted limitations, the claimant was totally disabled and there is no viable stable labor market for him.

¶ 25 In response, Thiel offered the opinion of Edward Steffen, of EPS Rehabilitation, who evaluated the claimant on March 23, 2011. Steffen testified that the claimant would benefit from vocational placement assistance beginning with a self-directed job search. However, Steffen acknowledged that, based upon the claimant's age, he was not a candidate for long-term job training. Steffen also admitted that the claimant's age, lack of a high school diploma, physical restrictions and lack of transferrable skills, would likely be a negative factor in his ability to

obtain employment. Steffen testified that he had no information about the claimant's ability to read or write, and that, prior to embarking on any job search program, he would need to conduct interest and aptitude testing of the claimant and train him in job-seeking skills. However, Steffen believed that, based upon the results of such testing, the claimant could possibly pursue employment as a security monitor, a cashier in a cafeteria or in a ticket sales occupation.

¶ 26 Duane Bigelow, a certified rehabilitation counselor, testified that on October 20, 2011, he administered a reading and math test to the claimant. The test results placed the claimant's reading capability at the 4.5 grade level, his math computation capability at the 3.8 grade level, and his applied math capability at the 4.6 grade level.

¶ 27 The claimant's wife of 38 years, Elaine, testified that the claimant had never handled any of the household finances because he has difficulty with math and cannot read well. When the claimant drove to an unfamiliar location, she usually accompanied him because he has difficulty reading street signs. Elaine also testified in detail as to how she assisted the claimant in a job search following his injury.

¶ 28 Finally, the claimant provided testimony regarding his average weekly wage. It was undisputed that the claimant was a full-time, union employee and that he was required to report to work 52 weeks per year, five days per week, even if it had rained the night before. When inclement weather arose during the work day, the claimant would be sent home without pay.

¶ 29 Wage records submitted by Thiel revealed that, in the year prior to the claimant's work injury, he had earned $61,067.68 and had worked a total of 1,664 hours. The claimant testified that, during that year, he was sent home on some days due to bad weather, or, less typically, because they had not received materials to complete a project. The claimant also testified that he had missed entire work days that year due to weather or lack of work, explaining that, for example, a 32-hour work week could consist of four days, or a 28-hour work week could be

comprised of three full days and one half-day. Finally, the claimant testified that he took two weeks off that year for vacation.

¶ 30 On January 5, 2012, following a hearing, the arbitrator awarded the claimant temporary total disability (TTD) benefits in the amount of $1007.72 per week for 139 5/7 weeks commencing December 8, 2006 through July 18, 2007, December 7, 2007 through September 15, 2008, and October 15, 2009 through January 27, 2011; temporary partial disability (TPD) benefits totaling $32,939.94 commencing July 19, 2007, through December 6, 2007, and September 16, 2008, through October 14, 2009; permanent total disability (PTD) benefits of $1,007.72 per week for life, commencing January 28, 2011; accrued compensation from December 8, 2006; and reasonable and necessary medical expenses pursuant to the fee schedule in the amount of $9,064.34. The arbitrator further imposed penalties under sections 19(l) and (k) of the Act (820 ILCS 305/19(l), (k) (West 2010)) and awarded attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2010)) on the basis that Thiel was delinquent in the payment of TPD benefits. Specifically, he awarded $10,000 in late fees under section 19(l), penalties in the amount of $6,114.15 under section 19(k), representing half of the unpaid TPD benefits, and attorney fees in the amount of $1,222.93.

¶ 31 In calculating the claimant's average weekly wage, the arbitrator found that, based upon payroll records agreed upon by the parties, the claimant had worked 202 days in the year prior to his work injury and had earned $61,067.68. The arbitrator divided 202 days by the claimant's expected 5-hour workweek, arriving at 40.4 weeks for the year, and then divided $61,067.68 by 40.4 weeks, arriving at an average weekly wage of $1,511.58.

¶ 32 The claimant sought review before the Commission. On January 10, 2013, the Commission modified the arbitrator's calculation of average weekly wage, finding that the claimant had worked 208 days, or 41.6 weeks, in the year prior to the accident, and that his

average weekly wage was therefore $1,467 per week. The Commission further granted Thiel credits in the amount of $165,400.34, representing $100,966.68 for payments made for TTD benefits, $20,711.64 for TPD benefits, $31,497.80 for maintenance benefits, and $12,194.22 for "other benefits." The Commission otherwise affirmed and adopted the arbitrator's decision.

¶ 33 The claimant then sought judicial review of the Commission's decision in the circuit court of McHenry County. On June 6, 2013, the circuit court confirmed and adopted the Commission's decision with the modification that, by stipulation of the parties, the section 19(k) fees would be reduced to $5,604.35, and attorney fees would be reduced to $1,120.87. The instant appeal followed.

¶ 34 Thiel first contends that the Commission's determination of the claimant's average weekly wage was contrary to law because it was based upon a misapplication of section 10 of the Act. 820 ILCS 305/10 (West 2010). In particular, Thiel argues that the Commission erred by using the second method of calculation under that section, because there was no actual proof that the claimant lost five or more calendar days of work in the year prior to his accident as required for that method. Thiel further contends that the Commission improperly used the number of hours the claimant worked for that year in order to ascertain the number of days he worked.

¶ 35 Generally, the calculation of average weekly wage involves a question of fact for the Commission; however, where the issue concerns solely the proper construction of section 10, our standard of review is *de novo*. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 231-32, 756 N.E.2d 822 (2001); *Elgin Board of Education School Dist. U-46 v. Industrial Comm'n*, 409 Ill. App. 3d 943, 951, 949 N.E.2d 198 (2011). The facts underlying the Commission's determination on this issue may be briefly summarized as follows. It is undisputed that the claimant was a full-time, union carpenter who was expected to report to work 5 days per week. However, he was at times sent home due to inclement weather or lack of materials, and would not be paid for the

time lost. According to a wage statement submitted by Thiel for the year prior to the claimant's injury, he was paid in all 52 pay periods based upon the number of hours he worked for each respective week. The claimant's hours varied from 20 to 40 per week, for a total of 1,664 hours for the year, although the wage statement did not indicate the number of days he worked. The Commission apparently calculated the claimant's average weekly wage by taking the 1,664 hours that he worked for the year and dividing them by his expected 8-hour workday, to arrive at 208 days, then dividing 208 by five, for a total 41.6 weeks worked for that year. Finally, the Commission divided the claimant's salary for the year, $61,067.68, by 41.6, to arrive at an average weekly wage of $1,467.

¶ 36 Section 10 establishes four methods by which an employee's average weekly wage may be calculated. 820 ILCS 305/10; *Sylvester*, 197 Ill. 2d 225 (2001). There is no dispute that the third and fourth methods are inapplicable to this case. The first and second methods are contained in the following language of section 10:

> "The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; *but if the injured employee lost 5 or more calendar days* during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." (Emphasis added.) 820 ILCS 305/10 (2010).

¶ 37 The parties agree that the Commission employed the second method, as italicized above. Thiel argues that there was no actual proof as to the number of days the claimant worked or that he in fact "lost five or more calendar days" of work as required under the italicized phrase above. Rather, according to Thiel, the record established that the claimant had reported to work every single day, with the exception of a two-week vacation period. Accordingly, the Commission should have based its calculation upon 52 weeks, rather than 41.6. Thiel further contends that the Commission's use of his total hours for the year as a basis to determine the days worked has been rejected as an improper method of calculation by this court. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1018, 832 N.E.2d 331 (2005). We address each argument in turn.

¶ 38 Under the second method, if the employee lost five or more calendar days during the 52 weeks preceding his injury, whether or not in the same week, his earnings for that year are divided not by 52, but by the number of weeks "and parts thereof" that he actually worked after the time lost has been deducted. *Sylvester*, 197 Ill. 2d at 230; *D.J. Masonry Co. v. Industrial Comm'n*, 295 Ill. App. 3d. 924, 932-33, 693 N.E.2d 1201 (1998); *Peoria Roofing & Sheet Metal Co. v. Industrial Comm'n*, 181 Ill. App. 3d 616, 620, 537 N.E.2d 381 (1989); *McCartney v. Industrial Comm'n*, 174 Ill. App. 3d 213, 529 N.E.2d 250 (1988). Time "lost" contemplates the time that is missed by an otherwise continuous employee through no fault of his own, and has been recognized to include time lost to construction workers as a result of inclement weather or unavailability of work. See *Sylvester v. Industrial Comm'n*, 314 Ill. App. 3d 1100, 732 N.E.2d 751 (2000), *aff'd* 197 Ill. 2d 225.

¶ 39 First, we agree with Thiel that the Commission erred in proceeding to its calculation under the second method without making a threshold finding of the number of days lost by the claimant. Under the plain language of section 10, application of the second method is contingent

upon an initial determination that the employee "lost 5 or more *calendar* days" of work, though not necessarily in the same week. (Emphasis added.) 820 ILCS 305/10 (West 2010). The claimant's wage statement established that, although he worked 40 hours per week when work was available, there were many weeks when he worked only between 24 and 32 hours, and often in partial days. The claimant testified that he had missed some full days during the year prior to his injury due to inclement weather. However, there was no specific proof as to how many work days, or calendar days, he actually lost. As stated above, without proof that the employee lost five or more full days, the second method cannot properly be employed to determine average weekly wage. It was the claimant's burden to prove the number of days that he lost in the year prior to his injury. See *Ricketts v. Industrial Comm'n*, 251 Ill. App. 3d 809, 810, 623 N.E.2d 847 (1993). We conclude, therefore, that the calculation of the claimant's average weekly wage is against the manifest weight of the evidence.

¶ 40 We disagree with Thiel, however, that the Commission may not use the number of hours the claimant worked to arrive at the number of "weeks and parts thereof" he worked. This issue is disposed of by the supreme court's decision in *Sylvester*, a case which also involved the second method under section 10. There, the claimant was a roofing foreman who was required to be on call for his employer all week and year-round, although work typically dwindled in the winter months. He worked 40 hours per week when work was available, but during the off-season, his employer would assign him small projects for about 5 hours per week. Wage records established that, in the year before his injury, the claimant ultimately worked only 48 weeks, with some of these "weeks" consisting of less than a full day. The court rejected an average weekly wage calculation based simply upon dividing the claimant's salary for the year by 48 weeks, finding that it disregarded the second phrase of section 10, "after the time so lost has been deducted." *Sylvester*, 197 Ill. 2d at 233; 820 ILCS 305/10. Instead, in formulating the equation for average

weekly wage, the "weeks or parts thereof" lost by the claimant must first be deducted, or factored out. See also *D.J. Masonry*, 295 Ill. App. 3d 924. Accordingly, finding sufficient evidence of the number of hours the claimant had worked for each week, and the amount he had earned for the year, the court approved a calculation in which the hours worked per week were used to arrive at the number of days and then weeks worked. See *Sylvester*, 197 Ill. 2d at 237 ("[f]or each week he worked he estimated the number of days worked, based on the number of hours he worked"). Then, having determined that the claimant actually worked only 26.2 weeks, the court divided his salary by that amount to arrive at his average weekly wage.

¶ 41 In this case, as in *Sylvester,* the claimant's lost time under section 10 must include the parts of those days when he was required to report to work, and did so report, but was then sent home without pay. In order to factor out this time and arrive at the number of weeks "and parts thereof" that the claimant actually worked, it will be necessary to begin with the number of hours the claimant worked per week.[*] Accordingly, on remand, the Commission must first determine whether the claimant lost 5 or more calendar days in the year before his work injury, so as to trigger the application of the second method under section 10. If it finds this method to be applicable, it should then use the number of hours worked by the claimant per week as a basis to arrive at the number of days and/or weeks he worked that year. Finally, the Commission should take his salary for that year and divide it by the weeks he actually worked to arrive at his average weekly wage.

[*] Our decision in *Greaney*, 358 Ill. App. 3d 1002, does not compel a different result. That case concerned the application of the third method of calculation under section 10, for employees who worked for their employer less than 52 weeks, and, more importantly, did not involve an employee who could be sent home from work by the employer after a fraction of a workday.

¶ 42 Thiel next argues that the Commission erred "as a matter of law" in its award of TTD benefits from the period of December 9, 2006, through March 6, 2007, when the evidence proved that the claimant had continued to work light duty from the date of his injury until his first surgery on March 6, 2007. Accordingly, Thiel posits, his TTD benefits should have commenced on March 6. In response, the claimant contends that his own testimony established that he was in fact off of work from December 9 until his surgery because Thiel was unable to provide him with work to accommodate the 30-pound weight restriction imposed by Dr. Hall.

¶ 43 Preliminarily we note that, on appeal, we will not reverse a decision by the Commission unless that decision is contrary to law or against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006). Put another way, reversal is not warranted unless an opposite conclusion is readily apparent from the evidence. *Mendota Township High School District vs. Industrial Comm'n*, 243 Ill. App. 3d 834, 836-837, 612 N.E. 2d 77 (1993). It is the Commission's role to assess the credibility of witnesses and to resolve conflicts in the testimony and evidence. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 65, 442 N.E.2d 908 (1982); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474 (2009). A court of review must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn. *Sisbro, Inc. v. The Industrial Commission*, 207 Ill. 2d 193, 206, 797 N.E.2d 665 (2003); *Kawa v. Illinois Workers' Comp. Comm'n*, 2013 IL App (1st) 120469, 991 N.E.2d 430. Whether a claimant is entitled to TTD benefits generally is an issue of fact to be resolved by the Commission, and we will not disturb the Commission's findings unless they are contrary to the manifest weight of the evidence. *Whitney Products, Inc. v. Industrial Comm'n*, 274 Ill. App. 3d 28, 30, 653 N.E.2d 965 (1995). TTD benefits are to be awarded under the Act from the time an

injury incapacitates an employee for work until he is fairly recovered or stabilized as far as the character of the injury will permit. *Id.*

¶ 44 On this issue, Thiel's contention presents a question of fact, not law, as it requires a determination of whether or not the claimant returned to work in the period immediately following his injury. Based upon our review of the record, the Commission's finding on this issue was contrary to the manifest weight of the evidence. When the claimant first sought treatment from Dr. Hall on December 13, 2006, the doctor stated that the claimant "will continue RTW with a 30 pound weight lifting restriction." We disagree with the claimant that Thiel was unable to provide work to accommodate this restriction. The claimant testified as follows:

> "MR. NEWMAN: When you had your occurrence back on December 8, 2006, did you continue working until February 17 of 2007?
>
> THE CLAIMANT: I don't remember the date, but I did continue working.
>
> MR. NEWMAN: For about two months?
>
> THE CLAIMANT: Yeah. Until my surgery. But it wasn't framing work. They put me inside doing lighter work.
>
> MR. NEWMAN: Yes, but you still worked and you still were being paid, true?
>
> THE CLAIMANT: Yes."

¶ 45 This testimony is supported by payroll records submitted by Thiel, which show that the claimant worked 30 to 38 hours per week during the period from December 9, 2006, through February 17, 2007, at which point he was "off for personal illness" until March 5, 2007. There is no dispute that the "personal illness" was a respiratory infection that was unrelated to the claimant's work injury. He was then taken off of work effective March 6, 2007, for his surgery.

¶ 46 The claimant refers us to his testimony on direct examination, wherein he acknowledged a stipulation that he was "off of work through July 18, 2007." However, we are unable to find

any stipulation that the claimant was off of work from the date of his injury until July 18. The record instead shows that he was off work from the date of his surgery on March 6 until July 18, 2007, when he returned to light duty. It is our view that, read in context, the cited testimony was referring to the period between March 6 and July 18. In light of the fact that the claimant worked light duty from February 9, 2007, through February 17, 2007, and that he was on sick leave unrelated to his work injury from February 17 through his surgery, TTD benefits should not have begun until the surgery on March 6, 2007. Accordingly, the Commission's award of TTD benefits to the claimant from December 8, 2006, through March 5, 2007, is against the manifest weight of the evidence.

¶ 47 Next, Thiel contends that the Commission erred as a matter of law in its award of TPD benefits, because its determination was premised upon an erroneous average weekly wage calculation. For the reasons stated previously, we have concluded that the calculation of average weekly wage is against the manifest weight of the evidence. We disagree with Thiel's contention, however, that that an employee's average weekly wage is, as a matter of law, an improper basis upon which to calculate TPD benefits.

¶ 48 Section 8(a) provides that an employee working light duty is entitled to TPD benefits equal to two-thirds of the difference between the "average amount that the employee would be able to earn" in the full performance of his duties and the net amount he is earning in the modified job. 820 ILCS 305/8(a) (West 2010). According to Thiel, this language dictates that such benefits be based upon the average wage he earned for the 52 weeks he worked the year prior to his injury.

¶ 49 Thiel cites no authority for its assertion that the average weekly wage is an improper basis for computing TPD benefits. Under Supreme Court Rule 341(h)(7) (eff. July 1, 2008), a party must provide citations to relevant authority in support of its arguments on appeal. Because

Thiel has failed to support this argument with relevant authority, the argument has been forfeited for purposes of this appeal. *Vallis Wyngroff Business Forms, Inc. v. Workers' Compensation Comm'n*, 402 Ill. App. 3d 91, 94, 930 N.E.2d 587 (2010). Forfeiture aside, section 10 of the Act explicitly states that that section is the basis for computing the compensation provided in section 8. Accordingly, we find no error in the use of average weekly wage as a basis to arrive at TPD benefits.

¶ 50 Thiel further contends that, with regard to TPD benefits, the Commission should have specified an award amount instead of merely a "formula" for calculating such amount. We agree.

¶ 51 When the Commission modified the arbitrator's average weekly wage calculation, it set forth the time periods for the corresponding TPD benefits, and simply stated that such benefits should be "the sum of two-thirds of the difference between the [claimant's] average weekly wage of $1,467.97 and the gross amount which he earned in the performance" of his modified duties. On remand, following the recalculation of the claimant's average weekly wage, the Commission should compute and provide an exact amount of TPD benefits payable to the claimant based upon its revised average weekly wage calculation.

¶ 52 In its next argument, Thiel urges that we find the Commission's award of PTD benefits to be against the manifest weight of the evidence. In response, the claimant maintains that the Commission properly found him to be permanently and totally disabled under the "odd lot" category of employees. We agree with the claimant.

¶ 53 An injured employee can establish his entitlement to PTD benefits under the Act in one of three ways: (1) by a preponderance of medical evidence; (2) by showing a diligent but unsuccessful job search; or (3) by demonstrating that, because of age, training, education, experience, and condition, there are no available jobs for a person in his circumstance.

Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n, 2012 IL App (3d) 100783WC, 966 N.E.2d 40; *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1129, 864 N.E.2d 838 (2007). It is well settled that a claimant need not be reduced to complete physical incapacity before a permanent total disability award may be granted. *Professional Transportation*, 2012 IL App. (3d) 100783WC at ¶ 34. However, a person is totally disabled when he is shown to be incapable of performing services except those for which there is no reasonable stable market. *Id.* In determining a claimant's employment potential, his age, training, education, and experience must be taken into account. *Id.*, citing *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 489, 397 N.E.2d 804 (1979). Initially, if the claimant's disability is limited so that he is not clearly unemployable, or if there is no evidence of his total disability, the burden lies with him to prove the unavailability of employment to a person in his circumstances. However, once the claimant shows that he falls into the "odd-lot" category, meaning one who, though not altogether incapacitated, is so handicapped that he is not regularly employable in any well-known branch of the labor market, the burden then shifts to the employer to establish that the claimant is capable of finding work in an existing, stable labor market. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546-47 (1981); *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007).

¶ 54 In this case, there was no medical evidence that the claimant was totally disabled from working. However, we conclude that the evidence was sufficient to support the Commission's conclusion that he fell into the "odd lot" category. It was undisputed that the claimant could no longer work as a carpenter and that there was no possibility of light duty in his field. Belmonte, whom the arbitrator considered credible and persuasive, testified that the claimant's three surgeries and his advanced age, together with his limited education, literacy, and transferrable job skills, rendered him unemployable in any job market.

¶ 55 Thiel argues that its own expert testimony was sufficient to refute the claimant's evidence of permanent disability. However, Steffen's opinion that, with vocational training, the claimant "may" be employable, was contingent upon the anticipated results of interest and aptitude testing. Steffen admitted that, in light of the claimant's age and other characteristics, he was not a candidate for long-term job training. And finally, Thiel presented no real evidence of any stable job market for the claimant's skills. Consequently, there is no basis to disturb the Commission's finding that the claimant was permanently and totally disabled. Further, in light of our conclusion, we need not reach Thiel's contention that the claimant failed to conduct a sufficiently diligent job search. However, as the calculation of PTD benefits was also based upon the determination of the claimant's average weekly wage (820 ILCS 305/8(f) (West 2010)), held above to be against the manifest weight of the evidence, we remand for recalculation of PTD benefits.

¶ 56 Thiel's next assignments of error relate to the award of medical expenses for the services of Dr. Hall. First, Thiel contends that the Commission erred as a matter of law by basing its award upon medical bills introduced by the claimant that were not in compliance with section 8.2 of the Act. 820 ILCS 305/8.2 (West 2010)). Specifically, Thiel argues that medical bills from Dr. Hall lacked “Current Procedural Terminology” (CPT) codes, which therefore, made it impossible for Thiel to calculate the fee schedule amounts due under the Act.

¶ 57 Initially, we note that Thiel never objected to the lack of CPT codes when Dr. Hall's bills were introduced as evidence before the arbitrator, and further, raised no issue about any alleged inability to calculate the fee schedule amounts. The failure to raise an issue before the arbitrator normally results in its forfeiture on appeal. See *Greaney*, 358 Ill. App. 3d at 1020. Further, before this court, Thiel has failed to cite authority for the proposition that the lack of CPT codes in a medical bill, standing alone, render that bill unreliable or otherwise insufficient as a basis for

the determination of medical expenses. Again, the failure to cite to relevant authority in support of an argument constitutes a forfeiture of the argument. Supreme Court Rule 341(h)(7); *Vallis Wyngroff*, 402 Ill. App. 3d at 94. Forfeiture aside, the arbitrator in this case concluded that the medical bills submitted by the claimant were reasonable, necessary and causally related to his work injury, and accordingly ordered Thiel to "pay reasonable and necessary medical services, *pursuant to the medical fee schedule*, or $9,064.34, as provided in Sections 8(a) and 8.2 of the Act." (Emphasis added.) Based upon the record, we conclude that the arbitrator sufficiently complied with the requirements of section 8.2 of the Act. See *Springfield Urban League v. Workers' Compensation Comm'n*, 2013 Ill. App. (4^{th}) 120219WC, 990 N.E.2d 284.

¶ 58 Thiel also argues that the award of medical expenses based upon Dr. Hall's services between October 27, 2010, and November 9, 2010, is against the manifest weight of the evidence, because it fails to credit payments subsequently made by Thiel. We disagree. The bills admitted into evidence by the claimant reflect that there were no payments made to Dr. Hill between those dates. The alleged payments to which Thiel refers do not readily appear to correspond to the charges submitted by Dr. Hill, and do not provide a basis to disturb the Commission's determination as to the proper medical award.

¶ 59 Thiel's final contentions pertain to the imposition of penalties against it under sections 19(k) and (l) of the Act, and the award of attorney fees to the claimant under section 16 of the Act, based upon its delay in paying TPD benefits. As indicated previously, the Commission found that Thiel owed TPD benefits in the amount of $32,939.94 for the periods of July 19, 2007, through December 6, 2007, and September 16, 2008, through October 14, 2009. However, despite repeated efforts by the claimant to obtain such payment, Thiel failed to make any TPD payments until over two years later, paying $5,000 (actually designated as "PPD advance") on August 21, 2009, $20,711.64 on October 14, 2009, and $2000 (designated "advance against

compensation") on November 25, 2009. The Commission concluded that Thiel had paid $20,711.64 out of the accrued $32,393.94 in TPD benefits. Accordingly, it awarded the claimant $10,000 in late fees under section 19(l), along with section 19(k) penalties representing half of the outstanding TPD benefits, and attorney fees. In the circuit court, by stipulation of the parties, the section 19(k) penalties and attorney fees were reduced to $5,604.35, and 1,120.87, respectively. The reduction was based upon the Commission's modification of the TPD award to reflect its recalculation of the average weekly wage.

¶ 60 The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n.*, 82 Ill. 2d 297, 301, 412 N.E.2d 468 (1980). Under section 19(l) of the Act (820 ILCS 305/19(l) (West 2010)), the penalties are in the nature of a late fee, and are mandatory if the payment of benefits is late and the employer cannot show an adequate justification for the delay. *Jacobo v. Illinois Workers' Comp. Comm'n*, 2011 IL App (3d) 100807WC, ¶20. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id.* The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id.* The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Id.*

¶ 61 Thiel does not dispute the arbitrator's finding that it was delinquent in making the required payments, but posits that it should not have been assessed late fees under section 19(l) because its actions were "in good faith." Specifically, it refrained from making payments because it believed, based upon its own ultimately erroneous calculations of the claimant's

average weekly wage, that the claimant's earnings for light duty work actually exceeded TPD payments then due. This argument is without merit. Thiel's misunderstanding of the law and its miscalculation of the amounts it owed does not provide a reasonable basis to simply withhold payments for over two years.

¶ 62 With regard to the penalties under section 19(k), Thiel contends that the award was contrary to law because such penalties cannot be imposed for amounts that were paid prior to the arbitration hearing, but only on amounts still outstanding. Thus, because it paid a total of $27,711.64 in advances to the claimant prior to trial, the penalties under sections 19(k) and 16 were erroneous.

¶ 63 Sections 16 and 19(k) are based upon a finding that the employer's denial of benefits was unreasonable or vexatious. *Compass Group v. Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC. That is, the refusal to pay must be shown to result from bad faith or improper purpose. *Id.* Further, contrary to Thiel's assertion, the amount of additional compensation to be paid under these sections is a matter of the Commission's discretion, and either may be based upon the entire amount of the benefit found to be due, or upon only the unpaid portion thereof. *Anders v. Industrial Comm'n*, 332 Ill. App. 3d 501, 512, 773 N.E.2d 746 (2002); *Navistar International Transportation Corp. v. Industrial Comm'n*, 331 Ill. App. 3d 405, 415, 771 N.E.2d 35 (2002).

¶ 64 We note that a portion of the $27,711.64 that Thiel relies upon for this argument was actually advanced towards other benefits, not TPD. The Commission determined that, as of the arbitration hearing, Thiel had paid $20,711.64 out of the $32,393.94 in accrued TPD benefits, and properly imposed a penalty based upon ½ of the difference between these amounts. We conclude, therefore, that the Commission's award of penalties and attorney fees was neither contrary to law nor against the manifest weight of the evidence. However, because the amount

of this award is dependent upon the amount of benefits owed to the claimant, we affirm the award of penalties and fees, but we remand for a recalculation of its amount.

¶ 65 Based on the foregoing reasons, we reverse that portion of the circuit court's judgment confirming the Commission's determination of the claimant's average weekly wage, and the dependent calculation of TTD, TPD, and PTD benefits, attorney fees and penalties, and its award of TTD benefits for the period of December 8, 2006, through March 5, 2007, and we affirm the remainder of the circuit court's judgment confirming the Commission's decision. We reverse that portion of the Commission's decision determining the amount of the claimant's average weekly wage, along with its dependent calculation of TTD, TPD, PTD benefits, attorney fees and penalties, and its award of TTD benefits for the period of December 8, 2006, through March 5, 2007; and we remand the cause for a recalculation of the claimant's average weekly wage and proper amount of TTD, TPD, and PTD benefits and attorney fees and penalties, consistent with the findings in this order.

¶ 66 Circuit court judgment affirmed in part and reversed in part; Commission decision reversed in part and cause remanded with instructions.