No. 3-10-0186WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

IVEX CORPORATION/KAMA CORPORATION, DIVISION OF ALCOA,	)	Appeal from the Circuit Court of Kankakee County.
Appellant,	)	
v.	)	No. 09-MR-42
ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Larry Holston,	)	Honorable Kendall O. Wenzelman,
Appellees).	)	Judge, presiding.

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

Held: The employer's brief violated Supreme Court Rules, but no sanctions were warranted because our review of the record was not impeded by these violations. Additionally, the Commission's awards of PTD, TTD, and medical bills are not against the manifest weight of the evidence. Finally, the evidence was sufficient to support the Commission's decision that the claimant's AWW of $502.51 should include his overtime earnings.

ORDER

Ivex Corporation/Kama Corporation, a division of Alcoa (the employer or Alcoa) appeals from a decision of the circuit court of Kankakee County which confirmed a decision of the Illinois Workers' Compensation Commission (the Commission) awarding the claimant, Larry Holston, temporary total disability (TTD), permanent total disability (PTD), and

$672.98 for unpaid medical expenses pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)). The Commission affirmed the decision of the arbitrator with modifications, and one Commissioner dissented. We affirm.

BACKGROUND

The claimant filed an application for adjustment of claim for an accident that occurred on December 20, 1999 (1999 accident). He later filed a second application for adjustment of claim for an accident that occurred on March 28, 2001 (2001 accident). Both claims were consolidated for trial before the arbitrator. Neither party appealed from the arbitrator's decision concerning the 1999 accident. Accordingly, we discuss the facts of the 1999 accident only as they are essential for our consideration of the issues pertaining to the 2001 accident. The employer does not dispute that the 2001 accident arose out of and in the course of the claimant's employment.

At the hearing before the arbitrator on February 3, 2006, the claimant was 49 years old, 6 feet 1 inch tall, and weighed 175 pounds. He had been working full time for the employer since 1997. He did not finish high school but had obtained his general education diploma (GED). He had always been employed as a manual laborer and had never been employed in any other capacity.

The employer manufactures rolls of plastic sheeting. At the time of the 2001 accident, the claimant's job involved lifting shafts he estimated to weigh 120 to 125 pounds each. The employer's human resources representative, Kristen Brai, estimated the shafts weighed 70 to 100 pounds or more each. The claimant placed the shafts onto a machine, and plastic sheeting was then rolled onto the shafts. The claimant testified that he bent down to pick up a shaft, and "something popped." He felt a sharp pain shoot through his back, fell to the floor, and was taken to the hospital where he received pain medication. After the 2001

accident, he underwent a magnetic resonance imaging (MRI) test on April 4, 2001.

Dr. Andrew Chenelle, a board certified neurological surgeon, saw the claimant after the 2001 accident on May 21, 2001. He stated that the claimant's April 2001 MRI showed some mild stenosis and superimposed disc bulge at L3-4 and the possibility of recurrent disc at L4-5. He noted that the claimant's chief complaint was pain in his left buttock and posterior thigh. On July 12, 2001, Dr. Chenelle noted that the claimant was experiencing "intractable left-sided back, buttock and lateral thigh pain." The CT myelogram taken earlier that month showed "fairly significant disc herniation at L3-4 with a foraminal component as well as some scar around the left L5 nerve root with a small recurrent disc herniation." Dr. Chenelle felt the conservative care the claimant had been receiving had failed and that he needed surgery. On October 26, 2001, Dr. Chenelle performed a left L3-4 partial hemilaminectomy, a medial facetectomy and foraminotomy, a left L4-5 redo recurrent herniated nucleus pulposus with partial hemilaminectomy, microdiskectomy, and removal of scar tissue.

After the operation, the claimant followed-up with physical therapy at Newsome Physical Therapy. He had another MRI on January 2, 2002. The employer sent him to Dr. Charles Mercier on May 30, 2002, for an independent medical examination. Dr. Mercier testified that he believed the claimant falsely reported his symptoms on that date because those symptoms were not confirmed by Dr. Chenelle's physical exam or by Dr. Mercier's review of the claimant's MRI. Dr. Mercier concluded that the claimant could return to work at that time. Dr. Chenelle released the claimant to return to light duty work on June 11, 2002, but Dr. Mercier had already released the claimant to return to full duty work. Dr. Mercier examined the claimant again on September 20, 2002, and, at that time, he concluded that the claimant was still able to work full duty.

The claimant worked full duty between June 12, 2002, and February 1, 2003, and he has not worked since February 2, 2003. Dr. Chenelle saw the claimant on February 4, 2003. On that date, his opinion was that the claimant was "disabled from any employment" due to intractable back pain and radiculopathy. He recommended that the claimant obtain a lumbar myelogram with post myelogram CT scan for a definitive diagnosis. On April 10, 2003, he met with the claimant and reviewed the myelogram and CT scan. He noted that the claimant's symptoms had not changed since the previous examination and that the lumbar myelogram showed "postoperative changes to the left at L4-5 with a diffuse disk bulge at L4-5 and L5-S1."

Dr. Chenelle testified that, on April 10, 2003, the claimant was not capable of working. He noted that the claimant's condition was "[b]ordering on failed back syndrome" and that he needed "coordinated comprehensive medical management." He explained that "failed back syndrome" was a condition under which a person "continues to have radicular symptomatology and back pain despite appropriately performed operations probably due to chronic nerve root irritation and damage prior to the surgery." According to Dr. Chenelle, a person with failed back syndrome is not a candidate for additional back surgeries, and the pain must be managed with conservative measures such as narcotic analgesics, nonsteroidal antiinflammatory drugs, and epidural steroid injections. He referred the claimant to Dr. Nelson Escobar, a pain management specialist, but the claimant never saw Dr. Escobar because he could not afford to pay for it, and the workers' compensation insurance carrier refused to cover that treatment.

Dr. Chenelle testified that the claimant was a "reliable patient" who did not exaggerate his complaints or falsely report his symptoms because his "subjective complaints [were] grounded in pathophysiological fact." He opined that the claimant's prognosis was "very

poor" if he did not receive treatment for pain management. If the claimant did not improve after pain management treatment, he would then be a candidate for a "salvage operation" such as "an instrumented lumbar fusion" as a last resort. He stated that whether the claimant had reached maximum medical improvement (MMI) could not be accurately known until he finished pain management treatment.

Dr. Mercier examined the claimant on June 19, 2003, observed "classic" signs of malingering, and determined that the claimant could return to regular work. Dr. Mercier noted that, when the claimant had returned to full duty prior to February 2, 2003, he had "intermittently missed days off work due to back pain." Nevertheless, after he reviewed the claimant's medical records, he found no disabling pathology. He concluded that the test results "objectively confirmed" his feelings of false reporting, his opinion that the claimant could return to his normal job duties, and that he had reached MMI.

On October 4, 2003, Dr. Samuel Jay Chmell, a board certified orthopedic surgeon, examined the claimant at his attorney's request. He also reviewed the medical records available at that time. Relevant to the 2001 accident, he diagnosed the claimant with three permanent conditions: (1) traumatic aggravation of degenerative disk disease of the lumbosacral spine, (2) lateral recess foraminal stenosis, bulging disk L3-4 and recurrent left L4-5 disk herniation with left L4 and L5 radiculopathy, status post left L3-4 hemilaminectomy, medial facetectomy and foraminotomy, left L4-5 redo recurrent L4-5 disk herniation with laminectomy, discectomy, and removal of scar tissue, and (3) failed back sydrome secondary to the first two diagnoses. He stated that the claimant needed to continue taking pain medications and that he should be treated at a pain management facility. He did not believe that any other treatments would benefit the claimant because he had reached MMI.

Dr. Chmell opined that the claimant could not return to his former employment but might be able to work in a part-time sedentary position with no bending, lifting, pushing, or pulling, and very limited walking and standing. He felt that the claimant was a "reasonable candidate for vocational rehabilitation" in order to provide him with the training he needed to do the types of jobs he could handle with his physical limitations. He noted that by part-time sedentary work, he meant working no more than four hours per day at a job in which he could sit for 45 to 50 minutes and stand or walk around the remaining 10 to 15 minutes of each hour. He concluded that, if vocational rehabilitation was not successful, the claimant would not be able to perform any gainful employment and would be totally disabled. Dr. Chmell disagreed with Dr. Mercier's conclusion that the claimant was malingering.

In May 2004, the claimant saw Dr. Chenelle for continuing problems with his back. Dr. Chenelle's notes indicate that the claimant had severe back pain that required bed rest for three days the week before the visit, that his pain was much more severe than at his previous examination, and that he still needed to begin treatment with Dr. Escobar.

On June 29, 2005, the claimant went to the emergency room of the Riverside Medical Center, where Dr. Stonewall McCuiston noted that the claimant had an acute exacerbation of back pain, ordered another MRI, and prescribed pain medication. On September 13, 2005, the claimant followed up with Dr. McCuiston, who determined that the claimant's MRI showed degenerative changes that should be evaluated by Dr. Chenelle. The claimant testified that he saw Dr. Chenelle on October 27, 2005, that Dr. Chenelle recommended another back surgery, and that he declined any additional surgery. In October 2005, Dr. Chenelle continued to prescribe pain medication for the claimant.

At the arbitration hearing in February 2006, the claimant testified that he had "good days and bad days." On the bad days, he was not able to get out of bed and could not walk

due to the pain from his back down his left leg to his toes. When he felt better, he could walk if he wore a back brace and used a cane. He took pain medication to relieve the pain. Before his injuries, he played basketball, but he had not played since his 1999 accident. In 2006, he sometimes worked as a volunteer answering phones or serving lunch at the Salvation Army for a couple of hours. He could not lift anything or twist or bend. He had a driver's license but could not drive longer than an hour without pain. He had not looked for employment since he stopped working for the employer in 2003.

The claimant testified that, during his employment at Alcoa, working overtime was mandatory. The employer presented evidence that the claimant was required to work 36 hours one week and 48 hours the next and that, occasionally, he was required to work additional hours beyond his typical schedule based upon the employer's billing needs.

The arbitrator found that, in the year before the claimant's 2001 accident, he earned $26,130.52 and that his average weekly wage (AWW) was $502.51. He based his calculation of the AWW on the claimant's testimony that all overtime was mandatory and the employer's evidence that the claimant was required to work overtime and that his normal work schedule alternated weekly between 36 and 48 hours. The arbitrator also found that the claimant's wage records showed that, in the 27 weeks preceding the 2001 accident, he had worked overtime in 16 of those weeks, and that his total earnings for that period were $13,567.84, of which $2,946.84 was overtime pay. The arbitrator ordered the employer to pay $672.98 for the claimant's unpaid medical bills.

The arbitrator awarded the claimant $335.02 per week PTD commencing February 4, 2006, finding that the preponderance of the evidence showed that the claimant's medical condition required him to remain off work and under the care of physicians indefinitely. The arbitrator relied on the claimant's testimony about his ongoing pain and difficulties with his

lower back and the opinions of Drs. Chenelle and Chmell. He noted that Dr. Chenelle felt that the claimant still needed intensive rehabilitation and pain management, without which his prognosis was very poor. The arbitrator relied on Dr. Chmell's diagnosis of failed back syndrome and his opinion that the claimant could never return to the only type of work he had ever done-heavy, unskilled manual labor. The arbitrator noted Dr. Chmell's opinion that the claimant was a reasonable candidate for vocational rehabilitation, but that, without it, he would not be able to obtain gainful employment.

The arbitrator awarded the claimant TTD benefits of $335.02 per week for 219 2/7 weeks, from March 29, 2001, through June 11, 2002, and from February 2, 2003, through February 3, 2006. In support of this decision, the arbitrator made extensive findings about the treatment, diagnoses, and referrals of Drs. Chenelle, Chmell, and McCuiston during those time periods. He found the testimony of Drs. Chenelle and Chmell persuasive and credible. He also noted Dr. Mercier's findings and Dr. Chmell's disagreement with Dr. Mercier's assessment that the claimant was exaggerating . The arbitrator noted the claimant's testimony that, at the time of the arbitration hearing, he had good days, but on his bad days, he could not get out of bed or walk. The arbitrator found that the claimant sometimes had to use a cane to walk, he no longer played basketball, and he had to sleep with a pillow between his legs to relieve the pain. The arbitrator determined that the claimant had no education beyond his GED, had never done any work besides heavy manual labor, and that he occasionally volunteered answering phones because it was better than doing nothing. The arbitrator noted that the claimant had not requested a light duty job from the employer nor had he looked for work elsewhere since he stopped working on February 2, 2003.

The Commission affirmed and adopted the arbitrator's decision, but it modified that decision to correct the number of weeks of TTD from 219 2/7 weeks to 219 5/7 weeks . The

Commission agreed with the arbitrator that, as a result of the 2001 accident, the claimant was temporarily totally disabled from March 29, 2001, through June 11, 2002, and from February 2, 2003, through February 3, 2006. In all other respects, the Commission affirmed and adopted the arbitrator's decision. One commissioner dissented, finding that the claimant had failed to meet his burden of proof regarding TTD and PTD benefits. The dissenting commissioner discounted Dr. Chenelle's testimony, stating that he had not expressed any opinion that the claimant was unable to work less than full duty. The dissenter questioned Dr. Chenelle's opinion, stating that Dr. Chenelle had no knowledge of the details of the claimant's work duties between June 2002 and February 2003, and because the claimant had only three visits with Dr. Chenelle from 2003 through 2006. The dissenter focused on Dr. Chmell's tesimony that the claimant was a reasonable candidate for vocational rehabilitation, the claimant's failure to explain the reason he left work permanently in February 2003, and his failure to ask the employer for restricted duty work or look for alternative employment since then. The dissenter found the claimant "not obviously unemployable."

The circuit court confirmed the Commission's majority decision. This appeal followed.

ANALYSIS

(1) Employer's Brief

We initially consider the claimant's argument that the employer has waived its arguments on appeal for failure to comply with Illinois Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)) which requires the appellant to provide citations to the pages of the record supporting its arguments. The claimant argues that the employer did not provide any citations to the record in the argument section of its brief and that it misstated the record four times in its brief. The claimant urges us to impose an appropriate sanction ranging from

finding a waiver of the issues the employer raises to dismissing the appeal. The employer has listed only one citation to the record in the argument section of its brief, but it provided record citations in its statement of the facts, and the claimant has provided additional record citations in its brief. As to the inaccuracies in the employer's argument, we have noted and disregarded any such misstatements.

Our Supreme Court Rules are not suggestions but are mandatory, and failure to cite the appropriate pages of the record in the argument section of a party's brief can result in waiver of that argument. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 533, 898 N.E.2d 145, 157 (2008). Nevertheless, the waiver rule is a limitation on the parties and not on the court. *Johnson*, 386 Ill. App. 3d at 533, 898 N.E.2d at 157. While we do not condone the employer's failure to strictly follow the rule regarding proper citation to the record and accurate factual recitations, we do not agree that any sanctions are warranted because our review of the record was not impeded by these violations. Accordingly, we choose to address the merits of the case.

(2) PTD Benefits

We next consider the employer's argument that the claimant failed to establish facts from which the Commission could conclude that he was entitled to PTD benefits. The employer bases this argument on the proposition that the PTD benefits fall under the odd-lot category for PTD benefits. "[O]nce the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market [citation]), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant [citation]." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547, 419 N.E.2d 1159, 1163 (1981).

The employer asserts that, because the claimant presented no expert testimony to show that there was no reasonably stable labor market for him "given his physical restrictions and transferable skills," he failed to establish a *prima facie* case of entitlement to odd-lot PTD benefits.

The claimant argues that the arbitrator, whose decision was adopted and affirmed by the Commission, did not base the PTD award on a finding that the claimant qualified for odd-lot PTD benefits, but, rather, based it on the preponderance of the evidence. The claimant points out that the Commission found that the claimant's medical condition required him to remain off work and under the care and treatment of physicians indefinitely and that its decision was based "on the preponderance of the evidence" with no findings to indicate that the claimant's disability was in the odd-lot permanent total category. We agree with the claimant.

"[P]ursuant to the analytical framework set forth in *Valley Mould*, there are three ways by which employees can demonstrate that they are permanently and totally disabled: by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience, and condition, no jobs are available to a person in their circumstances." *ABB C-E Services v. Industrial Comm'n*, 316 Ill. App. 3d 745, 750, 737 N.E.2d 682 685-86 (2000). In the case at bar, the Commission found that the claimant had demonstrated entitlement to PTD benefits by the first method, a preponderance of the medical evidence, rather than by the other two methods, a diligent job search or the odd-lot category in which no jobs are available under the circumstances. Therefore, the case the employer relies on to show that the claimant is not entitled to odd-lot PTD benefits is inapplicable. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 358 (2007) (evidence was insufficient to support

determination that the claimant proved odd-lot permanent disability status).

Rather, the cases the Commission relied on via the arbitrator's decision are more relevant to our analysis. In *Heritage House v. Industrial Comm'n*, 219 Ill. App. 3d 19, 24, 578 N.E.2d 1016, 1019 (1991), the court affirmed the Commission's award of PTD benefits based largely upon the claimant's testimony, finding that it "was entitled to do so." There, the claimant testified that she had undergone spinal fusion surgery, had not been able to return to her former jobs as a waitress and a nurse, could not do simple household chores, and could not sit or stand for any extended period of time. *Id.* "Under the evidence adduced, the Commission could find that [the] claimant was incapacitated to the point that she was totally unable to secure permanent employment." *Heritage House*, 219 Ill. App. 3d at 24, 578 N.E.2d at 1020. The court ruled that the employer could have rebutted the evidence that the claimant was unable to secure employment by demonstrating that work within her limited capacity was available. *Heritage House*, 219 Ill. App. 3d at 25, 578 N.E.2d at 1020. In that case, although there was scant medical evidence to show that the claimant could not work in any capacity, the court affirmed the Commission's award of PTD benefits. *Heritage House*, 219 Ill. App. 3d at 24-25, 578 N.E.2d at 1019-20 (one physician's testimony was "not dispositive," another physician "had no opinion," and a third opined that the claimant "might not be able" to return to her former employment).

In *Grischow v. Industrial Comm'n*, 228 Ill. App. 3d 551, 558, 593 N.E.2d 720, 725 (1992), the court affirmed the Commission's decision overturning the arbitrator's ruling that the claimant was entitled to PTD benefits, finding that she was only 40% disabled. The rules set forth in *Grischow* apply in our case:

> "For purposes of section 8(f) of the Act, a person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market

exists. [Citation.] Because of the Industrial Commission's expertise in the area of workers' compensation, its finding on the question of the nature and extent of permanent disability should be given substantial deference. [Citation.] It is not the province of a court to substitute its judgment for that of the Industrial Commission merely because it might have made a different finding. [Citation.] The Commission is the judge of the credibility of the witnesses and the weight to be given their testimony. [Citation.] It is for the Commission to resolve disputes in the evidence and draw reasonable inferences and conclusions from that evidence, and the Commission's decision will not be set aside on review unless it is contrary to the manifest weight of the evidence." *Grischow*, 228 Ill. App. 3d at 559, 593 N.E.2d at 726.

Applying those rules to the instant case, we find that the Commission's decision, which was based upon conflicting evidence, is entitled to substantial deference. The claimant was 49 years old, with no education beyond a GED, had worked only at heavy, unskilled manual labor, and was in almost constant lower back and leg pain. His condition required him to regularly take narcotic pain medication. On his good days, he required the use of a back brace and a cane in order to walk. On his bad days, he could not get out of bed or walk. He could not drive a car for longer than an hour without experiencing pain. He could not lift anything or twist or bend.

Dr. Chenelle determined that the claimant was unable to work in any capacity when he examined him on April 10, 2003, and he testified that the claimant's prognosis was very poor unless he received pain management therapy, which the employer had refused to pay for, and that the claimant's condition was bordering on failed back syndrome. Dr. Chmell concurred with Dr. Chenelle that the claimant required pain medications and treatment at a pain management facility. Although Dr. Chmell stated that the claimant might be able to

work at a part-time sedentary job, he based that opinion on the contingencies of finding work that would accommodate his severe limitations, treatment for pain management, which the employer had denied, and vocational rehabilitation, which the employer had not offered. The employer's expert, Dr. Mercier, based his opinion that the claimant could return to work full duty on his conclusion that the claimant was exaggerating his symptoms. Drs. Chenelle and Chmell both disagreed with Dr. Mercier's opinion that the claimant was malingering. The employer presented no evidence to show that any gainful employment was available to the claimant.

It was within the province and expertise of the Commission to find that the claimant is permanently and totally disabled based upon the preponderance of the medical evidence. It was the Commission's responsibility to resolve the conflicts in the evidence, and in doing so, it found the testimony of Drs. Chenelle and Chmell persuasive and credible. There was evidence to support a finding that the claimant's condition of ill-being was permanent and that he could not perform any services except those for which no reasonably stable labor market existed. *Grischow*, 228 Ill. App. 3d at 559, 593 N.E.2d at 726. The award of PTD benefits is not against the manifest weight of the evidence.

(3) TTD and Medical Payments after February 2, 2003

The employer next argues that the award of TTD from February 2, 2003, through February 3, 2006, is against the manifest weight of the evidence because the claimant did not present sufficient evidence of treatment during those three years to warrant TTD benefits. Similarly, the employer argues that the claimant did not timely prosecute his case, and that had he done so, "the issues could have been addressed and, if necessary, vocational rehabilitation [could have] been ordered if the arbitrator agreed with the treating physician." The employer maintains that all TTD should have been denied after June 19, 2003, the date

Dr. Mercier released him to full duty.

The claimant responds that the arbitrator made extensive findings about the doctor and emergency room visits, the tests performed, the pain the claimant experienced, and the limitations of his condition during this time period. According to the claimant, the Commission's TTD award is "supported by the overwhelming weight of the medical evidence."

TTD benefits are available only during the time an employee is injured and unable to work until he has recovered as much as the character of the injury will permit, *i.e.* until he has reached MMI. *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880, 558 N.E.2d 127, 131 (1990). The duration of TTD benefits is a question of fact for the Commission and will not be set aside unless it is against the manifest weight of the evidence. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819, 825 (2003). To establish entitlement to TTD benefits, a claimant must demonstrate not only that he did not work, but also that he was unable to work. *Id.* "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached [MMI]." *Mechanical Devices* , 344 Ill. App. 3d at 759, 800 N.E.2d at 825-26. After the employee reaches MMI, he is no longer eligible for TTD benefits because the disabling condition has become permanent. *Mechanical Devices*, 344 Ill. App. 3d at 759, 800 N.E.2d at 826.

In our case, the claimant returned to regular duty work on July 19, 2002. He returned to Dr. Chenelle on February 2, 2003. On that date, Dr. Chenelle found that the claimant's condition had become more severe since his last visit. The Commission found it "undisputed" that Dr. Chenelle authorized the claimant to be off work after February 2, 2003. The record indicates that, between February 2, 2003, and February 2, 2006, the claimant had at least five visits with Dr. Chenelle, at least two with Dr. McCuiston, and one each with Dr.

Chmell and Dr. Mercier. During the entire period of February 2003 through February 2006, the claimant was continuously prescribed narcotic pain medication. In March 2003, he underwent a lumbar myelogram. In April 2003, Dr. Chenelle referred the claimant to Dr. Escobar for pain management, but the employer refused to pay for that treatment. The claimant went to the Riverside Hospital emergency room in June and August of 2005 seeking treatment for his severe lower back pain. In August 2005, he underwent another MRI. He met with Dr. McCuiston in August and September 2005.

All of the claimant's medical care and treatment during the period of February 2003 through February 2006 was a continuation of the treatment he had been receiving before February 2003 for the lower back problems. The length of the claimant's TTD benefits was a question of fact for the Commission to decide. Although only Dr. Chmell testified that the claimant had reached MMI, the Commission was entitled to rely on his opinion and to disregard the other opinions that he had not yet reached MMI. Additionally, Dr. Chenelle did not state that the claimant had not reached MMI but only that he could not assess that possibility until the claimant received pain management treatment. The Commission's decision that the claimant was entitled to 219 5/7 weeks of TTD benefits, which includes the weeks between February 2, 2003, and February 3, 2006, is not against the manifest weight of the evidence. The employer's related argument, that the claimant did not establish a causal connection between his 2005 medical treatment and bills and his 2001 accident, is not persuasive for the same reasons.

(4) AWW Calculation

The employer finally argues that the Commission improperly calculated the claimant's AWW because it included the claimant's overtime earnings. The employer contends that the correct AWW is $430, or the amount the claimant received when he worked 40 hours. The

Commission adopted the arbitrator's finding that, "for the year preceding the accident [the claimant] worked a total of 27 weeks," during which he earned $13,567.84, which included $2,946.84 in overtime pay. The Commission included that overtime pay in its AWW calculation based on the claimant's testimony that overtime was mandatory and his wage records showing that he worked overtime in 16 of the 27 weeks (roughly 60 percent of the time) preceding the 2001 accident.

Section 10 of the Act provides that the weekly benefits to which an injured employee is entitled for TTD is to be computed on the basis of his AWW. 820 ILCS 305/10 (West 2008); *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 552, 865 N.E.2d 979, 982 (2007). AWW is defined as "the actual earnings of the employee *** during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of his injury *** excluding overtime, and bonus divided by 52 ***." 820 ILCS 305/10 (West 2008). Because the claimant worked only 27 weeks in the year preceding his injury, his AWW was calculated on the basis of the actual number of weeks worked. 820 ILCS 305/10 (West 2008) ("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"). "Section 10 of the Act explicitly states that overtime is to be excluded in calculating an employee's [AWW]. However, the statute fails to define 'overtime.'" *Airborne Express, Inc.*, 372 Ill. App. 3d at 552-53, 865 N.E.2d at 982. "Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc.*, 372 Ill. App. 3d at 554, 865 N.E.2d at 984.

The AWW determination is a question of fact for the Commission, the resolution of which will not be overturned unless it is against the manifest weight of the evidence. *Airborne Express, Inc.*, 372 Ill. App. 3d at 554-55, 865 N.E.2d at 984. In defining AWW, the legislature took a flexible approach, recognizing that different occupations have different regular hours of employment. *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666, 575 N.E.2d 1234, 1238 (1991) (where the employee "actually averaged 67 hours per week," the Commission's determination that his AWW included only 60 hours per week was against the manifest weight of the evidence).

In the case at bar, the claimant testified that overtime was mandatory, and there was evidence from the employer that it required employee's in the claimant's job classification to work additional hours beyond the regular schedule depending on its billing needs. Additionally, the claimant's wage records show that he actually worked more than 40 hours 60 percent of the time. This evidence is sufficient to support the Commission's decision that the claimant's AWW of $502.51 should include his overtime earnings.

CONCLUSION

For the foregoing reasons, we affirm the decision of the circuit court confirming the decision of the Commission

Affirmed.