2022 IL App (1st) 211522WC-U

Workers' Compensation
Commission Division
Order Filed: September 23, 2022

No. 1-21-1522WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ASPLUNDH BRUSH CONTROL,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 20 L 050233
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*,	)	
	)	
	)	Honorable
(Benjamin Smith, Appellees).	)	Daniel P. Duffy,
	)	Judge, Presiding.

JUSTICE BARBERIS delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Cavanagh concurred in the judgment.

¶ 1 *Held*: We affirm the circuit court's order confirming the Commission's decision, where the Commission's finding that the job employer offered claimant did not fall within claimant's permanent restrictions was not against the manifest weight of the evidence.

¶ 2 On October 28, 2015, claimant, Benjamin Smith, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)),

seeking benefits for injuries he allegedly sustained to his right elbow while working for employer, Asplundh Brush Control, on April 3, 2015 (15WC035023).[1] On August 2, 2017, claimant filed a second application for adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq*. (West 2016)), seeking benefits for a separate carpal tunnel injury he allegedly sustained to his right arm on November 15, 2016 (17WC016951).[2] The arbitrator consolidated the matters for hearing.

¶ 3 At the outset of the hearing held on June 29, 2018, the arbitrator clarified the disputed issues in each claim. In the first claim (15WC035023), the parties disputed the following issues: causation as to claimant's permanent restrictions; temporary total disability (TTD) benefits; maintenance benefits; and the nature and extent of claimant's injuries. In the second claim (17WC016951), the parties disputed the following issues: accident; notice; causal connection; medical benefits; TTD benefits; and temporary partial disability (TPD) benefits.

¶ 4 On July 10, 2019, the arbitrator issued separate decisions in each claim (15WC035023 and 17WC016951).[3] Regarding the first claim (15WC035023), the arbitrator found that claimant sustained compensable injuries to his right elbow on April 3, 2015, which resulted in permanent work restrictions. The arbitrator awarded claimant maintenance benefits under section 8(a) of the Act (*id.* § 8(a) (West 2018)) and wage-differential benefits under section 8(d)(1) of the Act (*id*. § 8(d)(1) (West 2018)). Employer filed a petition for review of the arbitrator's decisions before the Illinois Workers' Compensation Commission (Commission).

[1] Claimant initially filed an application alleging an injury date of June 9, 2015, but later filed an amended application alleging an injury date of April 3, 2015.

[2] Claimant initially filed an application alleging that he sustained a cubital tunnel injury to his right arm but later filed an amended application alleging a carpal tunnel injury to his right arm.

[3] The parties appear to agree, and the record confirms, that the arbitrator issued separate decisions for each claim; however, the arbitrator's decision in claim 17WC016951 was not included in the record on appeal.

¶ 5 On April 3, 2020, the Commission issued a decision affirming and adopting the arbitrator's decision in claim 15WC035023[4] with changes. The Commission changed the arbitrator's decision by providing a more thorough analysis on the issue of permanency. Employer sought judicial review of the Commission's decision in the circuit court of Cook County.

¶ 6 On October 29, 2021, the circuit court entered an order confirming the Commission's decision. Employer now appeals.

¶ 7 I. Background

¶ 8 The following factual recitation was taken from the evidence adduced at the arbitration hearing held on June 29, 2018.

¶ 9 Claimant testified that he worked as a foreman for employer, a company that performs vegetative maintenance, for seven years. Claimant's job duties as foreman required him to use tools and equipment to clear brush and trees. Specifically, claimant used Barko mowers, excavators, tractors, track chippers, and chainsaws, all of which vibrated during operation. Claimant worked approximately 50 hours per week and earned $19 per hour. Claimant resided in Indiana and traveled for jobs while working for employer, which required him to stay in hotels throughout the week.

¶ 10 Claimant testified that he injured his right elbow while working for employer at a jobsite in Illinois on Friday, April 3, 2015, when he was 37 years old. Claimant's injury occurred while he carried a cylinder up a hill with a coworker in the rain. Claimant's coworker slipped in the mud and dropped his end of the cylinder, causing claimant to drop his end of the cylinder. Claimant's

[4] The parties appear to agree, and the record confirms, that the Commission issued separate decisions for each claim; however, the Commission's decision in claim 17WC016951 was not included in the record on appeal.

right arm twisted backwards, and he felt a tear in his right elbow. He reported the injury to employer. He did not seek immediate medical treatment because his boss told him to "give it the weekend" and see how he felt on Monday. Claimant testified that the condition of his right elbow worsened, and he ultimately sought medical treatment.

¶ 11 Claimant's medical records showed that he sought medical treatment several days after the work accident and began occupational therapy. Claimant next sought treatment with Dr. Conor Dwyer on July 14, 2015. On that date, claimant reported right elbow pain, which radiated into his forearm. Dr. Dwyer recommended additional occupational therapy. At a follow-up appointment with Dr. Dwyer on August 25, 2015, claimant complained of ongoing right elbow pain. At that time, Dr. Dwyer referred claimant to an elbow specialist.

¶ 12 Claimant next sought treatment with Dr. Michael Pannunzio on November 11, 2015. During the initial visit, claimant complained of medial elbow pain without numbness or tingling. Dr. Pannunzio diagnosed claimant with medial epicondylitis and recommended surgery at that time, given that conservative treatment failed to alleviate claimant's symptoms.

¶ 13 Claimant next saw Dr. Pannunzio on April 12, 2016. On that date, Dr. Pannunzio noted that claimant's grip strength measured at 30 pounds on the right and 140 pounds on the left. Dr. Pannunzio further noted that claimant developed numbness and tingling in his fingers. Dr. Pannunzio concluded that claimant developed cubital tunnel symptoms as a result of his long-standing medial epicondylitis. Dr. Pannunzio recommended that claimant proceed with surgery to treat both the medial epicondylitis and cubital tunnel syndrome.

¶ 14 On May 13, 2016, claimant underwent an electromyography (EMG) study performed by Dr. Ganesh Ghooray. In the EMG report, Dr. Ghooray noted that claimant injured his right elbow

a year prior, and that he continued to experience right elbow pain with intermittent numbness in his fingers. Dr. Ghooray further noted that the EMG study revealed evidence of a mild right ulnar neuropathy at the elbow, a finding consistent with cubital tunnel syndrome, and mild right median mononeuropathy at the wrist, a finding suggestive of carpal tunnel syndrome.

¶ 15 On June 9, 2016, Dr. Pannunzio performed a right ulnar nerve transposition and right medial epicondylectomy with debridement of medial conjoint tendon. Following surgery, Dr. Pannunzio gave claimant light-duty work restrictions, and claimant began a course of occupational therapy. Employer accommodated claimant's light-duty restrictions by allowing him to work at Goodwill.

¶ 16 At a follow-up appointment with Dr. Pannunzio on July 25, 2016, claimant reported moderate right elbow pain. Dr. Pannunzio noted his expectation that claimant would continue to improve and would return to work without restrictions in one month.

¶ 17 Claimant presented for occupational therapy and a follow-up visit with Dr. Pannunzio on August 22, 2016. Claimant's occupational therapist noted that claimant reported soreness and occasional numbness in his right elbow and hand. Claimant's therapist further noted that claimant's grip strength measured at 45 pounds in his right hand and 175 pounds in his left hand. Dr. Pannunzio noted that claimant performed well on the grip test but continued to exhibit less strength in his dominant right hand than his left hand. Dr. Pannunzio noted that he planned to release claimant to unrestricted activities in one month.

¶ 18 Claimant presented for occupational therapy and a follow-up visit with Dr. Pannunzio on September 20, 2016. Claimant's occupational therapist noted that vibration bothered claimant's right arm. Claimant's therapist also noted that claimant's grip strength measured 89 pounds on his

right hand and 175 pounds on his left hand. Dr. Pannunzio noted that claimant reported improvements but that he experienced difficulty using vibrating tools and mowing his lawn. Dr. Pannunzio noted that claimant achieved full range of motion and that his grip strength improved but was "still about half of the contralateral side." Dr. Pannunzio opined that claimant needed restrictions until his grip strength further improved, given that his job required frequent climbing and chainsaw use. Dr. Pannunzio continued claimant's light-duty restrictions of no use of "power/vibrating tools" and no "climbing/crawling" but noted his expectation that claimant would return to full-duty work the following month.

¶ 19 Claimant next presented for occupational therapy and a follow-up visit with Dr. Pannunzio on October 24, 2016. Claimant's occupational therapist noted that claimant attempted to use a weed eater, but the vibration bothered his right arm. Claimant's therapist also noted that his grip strength increased to 114 pounds in his right hand and measured 170 pounds in his left hand. Dr. Pannunzio noted that claimant continued to improve, but he experienced numbness and tingling in his fingers when he used vibrating tools such as a weed eater. Dr. Pannunzio noted that provocative maneuvers for carpal tunnel syndrome were negative. Dr. Pannunzio further noted that claimant previously achieved full range of motion and that claimant's grip strength improved by 25 pounds since the last visit. As such, Dr. Pannunzio released claimant to unrestricted activities to try "his regular job" but directed claimant to report back with any concerns.

¶ 20 Claimant continued to work light duty at Goodwill and did not attempt to return to work for employer. Claimant's medical records showed that he called Dr. Pannunzio's office on November 2, 2016, with complaints of numbness and tingling in his right hand, which weakened

his grip, while using vibrating tools and mowers. On that date, Dr. Pannunzio revised claimant's work restrictions to include no use of vibrating tools or mowers.

¶ 21 Claimant submitted into evidence an exchange of emails between his attorney and employer's attorney, which took place between November 7 and November 15, 2016. Claimant's attorney emailed employer's attorney on November 7, 2016, and indicated that claimant would soon be released with permanent restrictions. Claimant's attorney inquired whether employer would accommodate claimant's restrictions. Claimant's attorney indicated that if employer would not accommodate the restrictions, claimant would either demand vocational rehabilitation or begin a self-directed job search after reaching maximum medical improvement (MMI).

¶ 22 Claimant testified that he received a text message from employer on November 11, 2016, in which employer offered him a new job. Claimant identified the text message he received from employer, which was admitted into evidence at respondent's request. In the text message, employer offered claimant "a full duty position of equipment operator running a 930 Barko on the Ameren project" in Jacksonville, Illinois. Employer indicated that claimant would earn $18 per hour working 50 to 60 hours per week and that the job would begin November 14, 2016.

¶ 23 Claimant testified that he declined the job offer because the job did not fall within his work restrictions, in that the job would require him to operate a vibratory mower and chainsaw. Claimant explained that running a mower for employer "always entails running a chainsaw" and there was "no way" he could operate a chainsaw. While performing his prior job duties as foreman, claimant used the Barko mower, which he described as a "mulcher" with a rotary head on the front of it, to clear and mulch trees measuring up to 36 inches in diameter. Claimant used foot pedals and three joysticks to operate the Barko mower, which vibrated significantly while mowing over heavy trees,

stumps, and rocks. Claimant used a chainsaw to clean up the remainder of the brush in the area and to cut trees in areas the Barko mower or excavator could not reach. Claimant used a "pretty good size" chainsaw, which vibrated "[p]retty bad."

¶ 24 Claimant testified that he did not feel safe operating vibratory tools and machinery due to the symptoms he experienced in his right elbow and hand. Specifically, claimant did not feel he could run the mower or chainsaw safely due to the loss of strength and numbness his right hand. Claimant discovered that he had difficulty operating vibratory tools and equipment, including a weed eater and lawn mower, while performing yard work at home. On cross-examination, claimant testified that Dr. Pannunzio directed him "to try it out at home before [he] gave it a try around where it would hurt anybody ***."

¶ 25 Also on November 11, 2016, employer's attorney responded to claimant's attorney's email. Employer's attorney noted that claimant did not attempt to return to work for employer after Dr. Pannunzio released him to full-duty work on October 24, 2016. Employer's attorney found it troubling that Dr. Pannunzio implemented restrictions without claimant having attempted to return to work. Employer's attorney requested that claimant attempt to return to full-duty work as initially recommended. Employer's attorney indicated that employer addressed claimant's safety concerns by offering him a job that required no heavy or potentially dangerous chainsaw use. Employer's attorney attached to the email a video depicting the Barko mower claimant would be operating and reiterated that claimant would not be operating vibrating machinery that would endanger his safety. Employer's attorney stated that, in employer's view, claimant intentionally refused available work. Lastly, employer's attorney indicated that if claimant refused to return to work, employer would deny TTD benefits and schedule an independent medical examination (IME).

¶ 26 Claimant's attorney responded via email the same day, indicating that the job offered by employer directly conflicted with claimant's work restrictions. Claimant's attorney stated that claimant would return to work if offered a position within his restrictions, or he would be willing to return to light-duty work at Goodwill.

¶ 27 Employer's attorney responded via email the same day, stating that claimant refused a job within his restrictions. Employer's attorney noted that claimant specifically requested the work restrictions of no use of vibratory tools or mowers and that there was no medical basis to support the restrictions, given claimant's grip strength, functional improvement, and Dr. Pannunzio's initial release to full-duty work. Employer's attorney reiterated that the job offered by employer addressed claimant's safety concerns. Employer's attorney and claimant's attorney exchanged several additional emails expressing their disagreement and discussing demands for TTD, maintenance, and vocational rehabilitation.

¶ 28 Claimant returned for a final follow-up appointment with Dr. Pannunzio on November 15, 2016. Claimant complained of ongoing "difficulty with his hand going to sleep and losing grip whenever he [used] vibrating power tools." Dr. Pannunzio noted that claimant's grip strength measured at 80 pounds on his right hand and 130 pounds on his left hand. Dr. Pannunzio noted that the prior EMG study showed evidence of mild carpal tunnel syndrome, which could be provoked by the use of vibratory tools. Dr. Pannunzio questioned "whether his ongoing symptoms and need for permanent restrictions [were] on the basis of an as yet undiagnosed and treated carpal tunnel syndrome." Dr. Pannunzio noted, however, that diagnosis and treatment for claimant's carpal tunnel "would have to be outside the scope of this work comp claim but successful treatment for this if present, certainly could obviate the need for permanent restrictions which could affect

his employment opportunities down the road." With regard to claimant's medial epicondylitis and cubital tunnel syndrome, Dr. Pannunzio opined that claimant reached MMI. Dr. Pannunzio also gave claimant permanent restrictions of no use of "power/vibrating tools" or mowers. Dr. Pannunzio recommended an injection to determine whether claimant's residual symptoms resulted from carpal tunnel syndrome.

¶ 29 Claimant testified that Dr. Pannunzio advised that he likely sustained nerve damage and that the nerves may not heal properly, which necessitated the permanent restrictions. Claimant attempted to return to work for employer after Dr. Pannunzio gave him permanent restrictions in November 2016, but employer only offered him positions that conflicted with his restrictions. Claimant believed that his inability to properly grip vibratory tools and machines presented a safety risk to himself and his coworkers. Claimant did not hear from employer after advising that he was unable to run the mower or use vibratory tools. Claimant left his employment at Goodwill and became unemployed. He received unemployment benefits and began a self-directed job search.

¶ 30 Claimant attended an IME with Dr. Gregory Merrell at employer's request on March 23, 2017. Following the examination, Dr. Merrell prepared a report setting forth his findings and opinions regarding claimant's condition, which was admitted into evidence at the hearing. In his report, Dr. Merrell noted that claimant's static grip strength measured at 140 on his right side and 160 on his left side. Dr. Merrell noted that claimant's rapid exchange grip test measured at 100 on his right side and 120 on his left side. Dr. Merrell believed that claimant gave a reasonable effort on the grip strength testing, and that any questions regarding symptom magnification or secondary gain would be best assessed in a functional capacity evaluation (FCE). Dr. Merrell opined that claimant suffered from chronic ulnar neuropathy of the right elbow, which related to the April 3,

2015, work accident. Dr. Merrell opined that claimant reached MMI for his right elbow condition in November 2016, "because the surgery that was done was reasonably definitive and although, he still has some persistence of symptoms it is possible that nerves might not fully heal and patients can have persistence of symptoms." Dr. Merrell further opined that additional surgery would not likely benefit claimant and that, although claimant had not recovered his original grip strength, he had reasonable function of his right arm.

¶ 31 Dr. Merrell opined that claimant also suffered from carpal tunnel syndrome in the right arm, which was exacerbated by the use of vibratory tools. In other words, Dr. Merrell agreed with Dr. Pannunzio that claimant's use of vibratory tools was "probably provoking" claimant's carpal tunnel. Dr. Merrell concluded, however, that claimant's carpal tunnel did not relate to the April 3, 2015, injury, "given the time in terms of onset of symptoms as well as the location of the injury versus the location of his carpal tunnel." Thus, Dr. Merrell opined to a reasonable degree of medical certainty that claimant's carpal tunnel was not covered under the claim relating to the April 3, 2015, injury.

¶ 32 Dr. Merrell opined that claimant did not require any specific work restrictions with respect to his April 3, 2015, injury, given his "excellent grip strength" and the surgery performed by Dr. Pannunzio. Dr. Merrell noted that it would have been reasonable to allow claimant to return to unrestricted work on October 24, 2016, which was over four months after surgery, as initially recommended by Dr. Pannunzio. Despite this, Dr. Merrell noted that claimant performed a lot of work with chainsaws and questioned whether claimant could safely operate a chainsaw due to his carpal tunnel syndrome. Dr. Merrell noted that claimant's carpal tunnel, although outside the scope of his claim pertaining to the April 3, 2015, injury, could affect claimant's ability to safely operate

a chainsaw because it caused him increased pain, discomfort, numbness, and loss of grip strength. Thus, Dr. Merrell opined that claimant "would need his employer or an Occupational Safety person to evaluate whether he is truly safe to operate equipment that could have been [*sic*] potential significant downside if he lost control of it."

¶ 33 Dr. Merrell testified via evidence deposition on August 29, 2017. Dr. Merrell's testimony largely corroborated his report. Dr. Merrell formulated his opinions based on a single examination of claimant and a review of claimant's medical records. Dr. Merrell believed that claimant primarily suffered from symptoms relating to his carpal tunnel at the time of the examination. While claimant exhibited some degree of numbness and pain in his right arm during the examination, Dr. Merrell noted that claimant exhibited good range of motion and good strength in his right side. Dr. Merrell indicated that he was unaware of the specific tools that claimant used on a daily basis either at work or at home. Dr. Merrell agreed that the use of vibratory tools, such as a chainsaw, could continue to aggravate claimant's elbow condition, but Dr. Merrell opined that claimant could likely run a lawn mower for a few hours. When asked if claimant required any work restrictions at the time of the examination, Dr. Merrell responded that he felt it was reasonable for claimant "to go back to basically any kind of work." Dr. Merrell noted, however, that if an employer wanted claimant to operate a chainsaw, the employer needed "to decide, through their own, you know, occupational safety and health people or whoever, whether the guy is safe to do it." Dr. Merrell indicated that he was unable to fully make such an assessment without observing claimant operate a chainsaw.

¶ 34 On cross-examination, Dr. Merrell agreed that the use of vibratory tools, including the use of a chainsaw, could exacerbate, or aggravate, carpal tunnel syndrome. Dr. Merrell further agreed

that the surgery claimant underwent to alleviate the April 3, 2015, injury was reasonable and that a carpal tunnel release surgery would be an appropriate procedure to alleviate claimant's carpal tunnel symptoms. However, Dr. Merrell lacked sufficient information to form an opinion on whether further treatment was warranted for claimant's carpal tunnel. Dr. Merrell clarified that if claimant spent the entire day using a chainsaw, he could experience aggravation to either his elbow condition or carpal tunnel. Dr. Merrell lacked sufficient information to formulate an opinion on claimant's use of other types of vibratory machinery but believed he could safely operate a car.

¶ 35 Dr. Pannunzio testified to the following details via evidence deposition on March 6, 2018. Dr. Pannunzio opined that claimant's medial epicondylitis and cubital tunnel resulted from the April 3, 2015, work accident. Dr. Pannunzio performed surgery to correct claimant's conditions and placed claimant on light-duty restrictions while he recovered from the surgery. Dr. Pannunzio released claimant "back to do his regular job for a trial return to unrestricted activities" on October 24, 2016. When claimant followed up with Dr. Pannunzio on November 15, 2016, claimant complained of difficulty with his hand going to sleep and losing grip while using vibrating power tools, such as a chainsaw or mower. Dr. Pannunzio attributed claimant's symptoms to his unrecovered grip strength and untreated carpal tunnel syndrome. Dr. Pannunzio suspected that claimant suffered from carpal tunnel syndrome based on claimant's complaints of hand numbness and his original EMG study. Dr. Pannunzio noted it was unusual for a patient to have permanent grip strength loss following surgery, but he had no reason to doubt claimant's efforts on the grip strength tests.

¶ 36 Based on the symptoms claimant exhibited on November 15, 2016, Dr. Pannunzio concluded that claimant was unable to perform his prior job duties and gave claimant permanent

restrictions. Dr. Pannunzio attributed the restrictions to both claimant's medial epicondylitis, which caused claimant's decreased grip strength, and carpal tunnel syndrome, which caused claimant's hand numbness. Dr. Pannunzio recommended that claimant undergo carpal tunnel surgery if he continued to experience similar symptoms. Dr. Pannunzio indicated that repetitive grasping with force can aggravate or cause carpal tunnel syndrome. Dr. Pannunzio further indicated that claimant's use of a chainsaw and heavy machinery for extended time periods could cause the development of carpal tunnel syndrome.

¶ 37 On cross-examination, Dr. Pannunzio testified that he relied on claimant's verbal job description in formulating his opinions and the permanent work restrictions. Dr. Pannunzio clarified that, in his opinion, claimant's carpal tunnel syndrome did not relate to the April 3, 2015, injury because "the single fall while carrying a hydraulic cylinder is not sufficient to produce or aggravate a carpal tunnel syndrome without any injury to the hand, which [claimant] did not describe." Dr. Pannunzio did not believe claimant had reached MMI on October 24, 2016, but he believed that it was safe and reasonable for claimant to do a trial return to unrestricted activities four months after surgery. Claimant complained about his hand going to sleep and losing grip strength when using vibrating power tools and mowers at the follow-visit on November 15, 2016, but Dr. Pannunzio had no independent documentation that verified claimant's reported use of vibratory tools and mowers. Dr. Pannunzio stated that claimant's grip strength measured 80 pounds on the right side on November 15, 2016, which was "very good" grip strength, but noted that it was significantly less than the grip strength of claimant's left side.

¶ 38 Dr. Pannunzio agreed that claimant would likely have sufficient grip strength to operate a joystick on a machine or drive a machine with power steering. Dr. Pannunzio expected claimant's

grip strength to continue to improve but was unable to comment on claimant's ability to use vibrating tools or mowers following further improvements. When claimant stated he used a vibrating mower, Dr. Pannunzio believed that claimant was using a commercial zero-turn mower or a push mower. Dr. Pannunzio expressed concerns about claimant operating a chainsaw if he lacked sufficient grip to control it and prevent injury but believed claimant could operate a tractor with power steering. On re-direct, Dr. Pannunzio indicated that that he was unfamiliar with the vibration produced by a tractor but stated he would have concern if claimant operated a tractor or piece of machinery that vibrated similar to a zero-turn mower or chainsaw.

¶ 39 Claimant testified that he noticed his hands going numb after using vibratory equipment at work prior to the April 3, 2015, work accident and that his symptoms worsened following the accident. Claimant explained that he had difficulty performing yard work following the April 3, 2015, work accident and claimed he was unable mow his own lawn after the accident. Claimant testified that continued to suffer from tingling in his fingers and lack of grip strength at the time of the hearing. Claimant obtained unemployment benefits from November 2016 until his self-directed job search led to new employment in March 2017.

¶ 40 Claimant testified that he began working at Midwest Manufacturing on March 13, 2017, and that he continued working for the company at the time of the hearing. In his current position, claimant operates a robotic laser cutter. His job duties include typing on a computer and using a forklift to load metal onto a table. He generally works 42 hours per week. Claimant started out earning $11 per hour but earned $17 per hour at the time of the hearing. Claimant explained that "after 90 days [he] was there [he] got a dollar raise and hour," and then he "went from 11 to 12; and then 12 to 14" before earning $17 per hour. Claimant received the raises every 90 days after

he began working for the company, but he did not expect to receive any additional raises. Claimant testified that the company does not offer health insurance, and he denied having health insurance at the time of the hearing. As a result, claimant denied receiving further medical treatment for his right arm.

¶ 41 Chance Fivecoat, claimant's former coworker, testified to the following details on claimant's behalf. Fivecoat previously worked for employer as an operating foreman for 11 years. Fivecoat performed the same job duties as claimant while working for employer. Fivecoat claimed that the job required daily use of a 15 to 20-pound chainsaw and Barko mower. When asked if the chainsaw vibrated, Fivecoat responded, "Oh yeah." Fivecoat further testified that a Barko mower vibrated when the machine hit rocks and tree stumps. In Fivecoat's opinion, the Barko mower caused the most vibration of all the machines he used while working for employer. When asked to describe operating a 930 Barko mower, Fivecoat responded, "You cut the trees down and trees fall, you mow them up; it beats the hell out of you; you take your beating and go to bed and do it again the next day."

¶ 42 Fivecoat testified that his current job involves the use of the same equipment used by employer but on a larger scale. Fivecoat currently makes $45 per hour working in Virginia. According to Fivecoat, claimant could have obtained the same job but for the injuries he sustained while working for employer. Fivecoat explained that a worker who struggled with their grip presented a safety concern.

¶ 43 Michael Bishop, claimant's former coworker, testified on behalf of employer. Bishop worked for employer in 1996 and continued working for employer at the time of the hearing. He began his employment as a foreman operator but currently works as an equipment operator. Bishop

estimated that he performed 90% of his job duties with equipment. Bishop explained that "a grounds person" cut down the trees, and that he used a 930 Barko mower to mow all the brush. Bishop claimed that he did not have to use a chainsaw because the "grounds people" performed that job. When asked how often a Barko operator used a chainsaw, Bishop responded, "Today, none."

¶ 44 Bishop identified photographs of a Barko mower, which were admitted into evidence at the hearing. Bishop agreed that the Barko mower depicted in the photographs would have been the same mower used by claimant. Bishop estimated that, on a scale of 1 to 10, a Barko mower vibrated at a 3 if it was in good working order. Bishop stated that it was "all about the maintenance[,]" explaining that "if you lose a tooth, break a tooth, break a tooth holder, a bearing goes out you are going to get a vibration."

¶ 45 Employer played a video of a person operating a Barko mower, which was admitted into evidence at the hearing. Bishop testified that he was present when the video was recorded. On cross-examination, Bishop admitted that the video depicted the Barko mower running over cleared ground, not clearing brush and trees. Bishop claimed that if his equipment could not run over a certain area, an in-house crew would come in and clear the area. Bishop admitted, however, that when claimant worked for employer, "everybody did whatever they could do to get the jobs done, but now it has all changed." Bishop agreed that claimant possibly used a chainsaw when he worked for employer before the policy changed.

¶ 46 William Merithew, employer's regional supervisor, also testified on behalf of employer. Merithew worked for respondent for seven years, and he previously worked as a general foreman with claimant. As a general foreman, Merithew operated a Barko mower and occasionally operated

a chainsaw. Merithew estimated that he used a chainsaw around an hour a day, explaining that "grounds people" primarily run chainsaws. Merithew knew employer offered claimant a job operating a Barko 930 mower after his work accident. When asked if claimant would have been expected to operate a chainsaw as well, Merithew responded, "Given the history probably not because we have grounds people on the crew as well. So probably primarily stay in the machine, operate the machine." Merithew estimated that a Barko mower vibrated at a 1 on a scale of 1 to 10 unless there was a mechanical issue with the machine.

¶ 47 On cross-examination, Merithew testified that some foremen used chainsaws but employer tried "to keep equipment operators in the machine." When a crew encountered an area where the Barko mower could not operate, they "would have a ground crew come in or if the operators were willing to cut it out to stay working then we would have them cut that area clear." Merithew claimed that employer kept all machinery in a safe, operable condition, but he explained that the machines occasionally wore out and required maintenance.

¶ 48 Claimant was recalled as a witness. After viewing the video exhibit, claimant testified that it was an accurate depiction of the Barko mower clearing light brush, but that it failed to show the mower hitting a mature tree, which would have increased the vibration. Claimant claimed that 80 percent of the time he mowed full trees as opposed to light brush. Claimant also testified that the equipment did not always operate at top performance, which increased the vibration. On cross-examination, claimant testified that, based on his prior experience working for the company, he assumed he would operate a chainsaw if he accepted the job offered by employer in November 2016.

¶ 49 On July 10, 2019, the arbitrator issued a written decision in claim 15WC035023, finding that the permanent restrictions Dr. Pannunzio imposed for claimant's right arm were causally related to the April 3, 2015, work accident. The arbitrator also determined that "[o]n November 15, 2016[,] [claimant] was placed at MMI for his right elbow injury and allowed to return to work with permanent restrictions of no operating mowers or power equipment." The arbitrator determined that the job employer offered claimant violated claimant's permanent restrictions, finding that the credible testimonies of claimant and Fivecoat outweighed the evidence presented by employer. The arbitrator further found that claimant began searching for employment following his restricted release on November 15, 2016, after employer denied his requests for vocational assistance and maintenance. The arbitrator noted that claimant previously earned $875.63 per week while working for employer and that he obtained new employment working 42 hours per week earning the following wages: $11 per hour from March 14, 2017, to June 11, 2017 ($413.63 less per week); $12 per hour from June 12, 2017, to September 9, 2017 ($371.63 less per week); $14 per hour from September 10, 2017, to May 31, 2018 ($287.63 less per week); and $17 per hour from June 1, 2018, to the date of the hearing ($161.63 less per week).

¶ 50 Thus, the arbitrator awarded claimant the following maintenance benefits: $583.75 per week for the time period of November, 15, 2016, to March 13, 2017; $275.75 (2/3 of $413.63) per week for the time period of March 14, 2017, to June 11, 2017; $247.75 (2/3 of $371.63) per week for the time period of June 12, 2017, to September 9, 2017; $191.75 (2/3 of $287.63) per week for the time period of September 10, 2017, to May 31, 2018; and $107.75 (2/3 of $161.63) per week for the time period of June 1, 2018, to June 28, 2018. The arbitrator also awarded claimant wage-differential benefits in the amount of $107.75 per week beginning June 29, 2018, to the time

claimant turned 67 years old, finding that claimant was partially incapacitated from pursuing his usual line of employment and that his injuries caused a loss of earnings. Employer sought review of the arbitrator's decision before the Commission.

¶ 51 On April 3, 2020, the Commission issued a decision affirming and adopting the arbitrator's decision in 15WC35023 with changes. Specifically, the Commission included in its decision a more detailed analysis of the permanency award. Employer sought judicial review of the Commission's decision before the Cook County circuit court.

¶ 52 On October 29, 2021, the circuit court issued a written decision confirming the Commission's decision. In doing so, the court found that the Commission's decision was neither contrary to law nor against the manifest weight of the evidence. Employer now appeals.

¶ 53 II. Analysis

¶ 54 Employer raises two arguments on appeal. First, employer contends that the Commission erred by awarding maintenance and TPD benefits. Second, employer contends that the Commission erred by awarding wage-differential benefits. We address these contentions in turn.

¶ 55 1. Maintenance and TPD Benefits

¶ 56 Employer first argues that the Commission erred by awarding claimant maintenance and TPD benefits because claimant declined its job offer. Claimant argues that the Commission correctly awarded maintenance benefits because the job offered by employer conflicted with his permanent work restrictions.

¶ 57 As employer correctly notes, benefits may be denied to a claimant who refuses to work within his physical restrictions. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 147 (2010). Whether a claimant refused work within his physical

restrictions 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. *Otto Baum Company, Inc. v. Illinois Worker's Compensation Comm'n*, 2011 IL App (4th) 100959WC, ¶ 13. A finding of fact is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Village of Deerfield v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 131202WC, ¶ 44.

¶ 58 Here, the Commission, in affirming and adopting the arbitrator's decision, found that employer failed to offer claimant a job that fell within his permanent work restrictions. The medical records showed that Dr. Pannunzio released claimant to return to work full duty for a trial period on October 24, 2016, but that Dr. Pannunzio directed claimant to report back with any concerns. It is undisputed that claimant did not attempt to return to work for employer in his prior position following Dr. Pannnunzio's initial release. Instead, claimant continued working in the light-duty position at Goodwill. Claimant testified that he felt unsafe returning to work for respondent after he attempted yard work at home. Claimant's medical records showed that claimant called Dr. Pannunzio on November 2, 2016, complaining of difficulties operating a weed eater and mower. Claimant testified that Dr. Pannunzio instructed him to attempt yard work at home before he returned to work. Based on claimant's complaints on November 2, 2016, Dr. Pannunzio revised claimant's work restrictions to include no use of vibratory tools or mowers.

¶ 59 The evidence showed that employer offered claimant a job running a Barko mower on November 11, 2016. Claimant declined the job, advising that it was outside of his restrictions. Claimant testified that the job offered by employer required him to operate vibratory mowers and tools, including the Barko mower and chainsaw, in violation of Dr. Pannunzio's permanent

restrictions. Fivecoat's testimony corroborated claimant's testimony that the Barko mower and chainsaw vibrated during operation. Claimant testified that his operation of vibratory tools and mowers presented a safety concern.

¶ 60 When claimant returned to Dr. Pannunzio on November 15, 2016, Dr. Pannunzio concluded that claimant was at MMI and gave him permanent work restrictions of no use of vibratory tools or mowers. Dr. Pannunzio testified that he gave claimant the permanent restrictions based on claimant's loss of grip strength and hand numbness, which presented a safety concern at work. Based on this evidence, the Commission could have reasonably concluded that the job employer offered claimant did not fall within claimant's permanent restrictions.

¶ 61 We acknowledge that employer presented conflicting evidence on this issue. Specifically, employer presented the testimonies of Bishop and Merithew, who both testified that the job employer offered claimant required neither the use of a chainsaw nor the operation of a vibratory machine. However, the Commission found the testimonies of claimant and Fivecoat more credible than the testimonies of Bishop and Merithew. In so finding, the Commission noted several inconsistencies in the testimonies of Bishop and Merithew. Bishop agreed that equipment operators operated chainsaws when claimant worked for employer, but he explained that employer had since made policy changes. Employer also submitted into evidence a video of the Barko mower traveling over an area of land. However, the Commission did not find the video persuasive, noting that the video depicted the mower operating over a cleared area as opposed to an area of brush or trees. "[A] reviewing court must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its

judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003).

¶ 62 Lastly, employer presented the medical opinions of Dr. Merrell, who opined that claimant required no permanent restrictions as a result of the April 3, 2015, work accident. However, the Commission found the medical opinions of Dr. Pannunzio more credible than those of Dr. Merrell. The Commission additionally noted that, although Dr. Merrell opined that claimant required no permanent restrictions, Dr. Merrell indicated that he was unaware of the specific tools claimant used while working for employer and that claimant should be evaluated for further determination on the safety of his operation of a chainsaw. It was the function of the Commission to resolve conflicts in the medical testimony and we will not substitute our judgment or reweigh the evidence because a different inference could be drawn from the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980).

¶ 63 While different inferences could have been drawn from the evidence, this court cannot say that the Commission's finding that the job offered by employer did not fall within claimant's permanent restrictions was against the manifest weight of the evidence. Therefore, we conclude that the Commission did not err by awarding benefits based on its determination that employer failed to offer claimant a job within his permanent restrictions.

¶ 64 We find it necessary, however, to further discuss the Commission's award of benefits in the present case. Section 8(a) of the Act provides that the employer shall pay for "vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a) (West 2020); *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1075 (2004). If the claimant is not engaged in some type of physical rehabilitation program, formal

job training or a self-directed job search, there is no obligation to provide maintenance. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005). An employee's self-initiated and self-directed job search or vocational training may constitute a "vocational-rehabilitative program" under section 8(a). *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). Additionally, "rehabilitation efforts may be undertaken even though the extent of the permanent disability cannot yet be determined." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 180 (2000). Whether a claimant is entitled to maintenance benefits is a question of fact to be resolved by the Commission, and its determination of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *W.B. Olson, Inc. v. Illinois Worker's Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶¶ 31, 39.

¶ 65 Section 8(a) of the Act also provides that "[w]hen the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits." 820 ILCS 305/8(a) (West 2020). TPD benefits "shall be 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 or her duties in the occupation in which he or she was engaged at the time of accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working." *Id.* Whether a claimant is entitled to TPD benefits is similarly a question of fact for the Commission.

¶ 66 Here, contrary to employer's argument, neither the arbitrator nor the Commission expressly awarded claimant TPD benefits. The arbitrator and Commission's decisions in claim 15WC035023—the only decisions contained in the record on appeal—indicate that the

Commission, in affirming and adopting the arbitrator's decision, awarded claimant maintenance for specified time periods without referencing TPD benefits. The record further reveals that claimant's entitlement to TPD benefits was not at issue in claim 15WC035023 but was, instead, at issue in claim 17WC016951. Employer failed to include the decisions issued by the arbitrator and Commission in claim 17WC160951 in the record on appeal. Thus, we are limited to considering the propriety of the Commission's award of benefits in 15WC035023.

¶ 67 In claim 15WC035023, the Commission, in affirming and adopting the arbitrator's decision, awarded claimant 17 weeks of maintenance benefits in the amount of $583.75 per week for the time period from November 15, 2016, to March 13, 2017. Claimant testified that he conducted a self-directed job search during this time period. Thus, the Commission's award of maintenance benefits for this time period was not against the manifest weight of the evidence.

¶ 68 Employer maintains that the Commission should have denied claimant benefits during this time period because he received unemployment benefits while conducting the self-directed job search. However, the fact that an employee applies for or receives unemployment compensation does not preclude or diminish her eligibility to receive temporary benefits. See *Crow's Hybrid Corn Co. v. Industrial Comm'n*, 72 Ill. 2d 168, 178–79 (1978); *Schmidgall v. Industrial Comm'n*, 268 Ill. App. 3d 845, 849 (1994) ("temporary total disability benefits are not precluded or even reduced by collecting unemployment compensation benefits"). We find the reasoning set forth in these cases applies equally to a claimant's collection of maintenance and TPD benefits.

¶ 69 We next note that the Commission, in affirming and adopting the arbitrator's decision, also awarded claimant "maintenance" benefits for certain time periods when claimant was working for Midwest Manufacturing. The Commission's calculation of benefits for these additional time

periods equaled two-thirds of the difference between the average amount that claimant earned while working for employer and the average amount claimant earned while working for his new employer—the calculation applicable to awards of TPD benefits. As such, it appears that the Commission essentially awarded claimant TPD benefits during the time periods that he was working for his new employer. We find the Commission's award of TPD benefits during the time periods when claimant was working for Midwest Manufacturing improper, given that claimant was placed at MMI on November 15, 2016. The Commission, instead, should have awarded claimant additional wage-differential benefits for these time periods, as will be more fully discussed below. See *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (Once an injured employee's physical condition stabilizes, he is no longer eligible for temporary benefits, but he may be entitled to permanent partial disability compensation or permanent total disability compensation.).

¶ 70 2. Wage-Differential Benefits

¶ 71 Employer next argues that the Commission erred by awarding claimant wage-differential benefits because he fully recovered from the April 3, 2015, injury, mislead Dr. Pannunzio into authoring "erroneous" work restrictions, and refused available work in his usual and customary line of employment. Claimant argues that the Commission's award of wage-differential benefits was not against the manifest weight of the evidence because the evidence showed that he was partially incapacitated from his usual line of employment and that he suffered a loss of earnings as a result.

¶ 72 Under section 8(d) of the Act, a claimant who suffers a permanent partial disability may receive a wage-differential award (*id.* § 8(d)1) or a percentage-of-the-person-as-a-whole award

(id. § 8(d)2). To prove entitlement to a wage-differential award under section 8(d)1, a claimant must show that (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." *Id.* § 8(d)1. In contrast, a claimant is entitled to PPD award based on a percentage-of-a-whole under three circumstances: (1) when his injuries do not prevent him from pursuing the duties of his employment but he is disabled from pursuing other occupations or is otherwise physically impaired; (2) when his "injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity;" or (3) when he suffers an "impairment of earning capacity" but he "elects to waive his right to recover under [8(d)(1)]." *Id.* § 8(d)2.

¶ 73 Our supreme court expressed a preference for wage-differential awards and "where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead." *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727-29 (2000) (citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438 (1982)). "The purpose of a wage-differential award is 'to compensate an injured claimant for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation.' " *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 44 (quoting *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008)). "Because the determination of whether the claimant is entitled to an award of benefits under section 8(d)1 or 8(d)2 requires resolution of factual matters, the manifest weight of

the evidence standard is the proper standard of review." *Village of Deerfield*, 2014 IL App (2d) 131202WC, ¶ 44. A finding of fact is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id*.

¶ 74 Here, the Commission found that claimant's permanent work restrictions precluded him from returning to his former job as foreman. Both claimant and Fivecoat testified that claimant's prior job as foreman required the use of vibratory mowers and chainsaws. The Commission found their testimonies credible. While Dr. Pannunzio testified that claimant's grip strength could continue to improve, Dr. Pannunzio opined that vibratory machines and tools could continue to aggravate claimant's right elbow and present a safety concern. While employer argues that Dr. Pannunzio's opinions and restrictions were based on claimant's exaggerated complaints and symptoms, the Commission found claimant credible. Thus, we cannot say that the Commission's finding that claimant's permanent work restrictions precluded him from returning to his former job as foreman was against the manifest weight of the evidence.

¶ 75 The Commission additionally found that claimant proved he sustained a reduction in his earning capacity as a result of his permanent work restrictions. Claimant testified that he previously earned $19 per hour and worked 50 hours per week for employer. Claimant testified that he currently earns $17 and works 42 hours per week at Midwest Manufacturing. Claimant explained that he received raises every 90 days after he began working for Midwest Manufacturing on March 13, 2017. When asked if he expected to receive additional raises at Midwest Manufacturing, claimant responded in the negative. Thus, the Commission's finding that claimant sustained a reduction in his earning capacity was not against the manifest weight of the evidence.

¶ 76 Therefore, we cannot say that the Commission's award of wage-differential benefits was against the manifest weight of the evidence. We note, however, that claimant should have received a wage-differential award, not maintenance, for the time periods he worked for Midwest Manufacturing. Because TPD benefits are calculated in the same manner as wage-differential benefits, we merely rename the benefits awarded during the time periods when claimant worked for his new employer as wage-differential benefits.

¶ 77 III. Conclusion

¶ 78 For the reasons stated, we affirm the judgement of the circuit court of Cook County confirming the decision of the Commission.

¶ 79 Affirmed.