2022 IL App (4th) 210338WC-U
No. 4-21-0338WC
Order filed June 27, 2022

FILED
June 27, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CITY OF SPRINGFIELD, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.* (Robert Talbott, Appellee).	))))))))))	Appeal from the Circuit Court of Sangamon County. No. 20-MR-828 Honorable Rudolph M. Braud, Jr., Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Commission erred in determining claimant's average weekly wage exceeded amount specified in request for hearing form; Commission erred in including wages earned concurrently in determining average weekly wage where there was no evidence respondent was aware of concurrent employment; Commission erred by awarding claimant two days of temporary total disability (TTD) that respondent had already paid for, but Commission's award was not otherwise against the manifest weight of the evidence; permanent partial disability (PPD) award was not contrary to the manifest weight of the evidence, but PPD and TTD awards would be vacated to allow recalculation using proper average weekly wage and time period for TTD. Accordingly, we vacated the circuit court's order in part; affirmed

the circuit court's order in part; affirmed the Commission's decision in part, vacated the Commission's decision in part, and remanded this matter to the Commission for further proceedings, with instructions.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, The City of Springfield, appeals an order of the circuit court of Sangamon County confirming the decision of the Illinois Workers' Compensation Commission (Commission) awarding certain benefits to claimant, Robert Talbott, under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2014)). Specifically, the Arbitrator found that claimant suffered an injury arising out of and in the course of his employment with respondent and that his condition of ill-being was causally related to that accident. Accordingly, he awarded claimant temporary total disability (TTD) benefits in the amount of $1,248 for 5-2/7 weeks (January 6, 2018, through February 11, 2018); $721.66 per week for 250 weeks for 50% loss of the person as a whole; but he ordered that respondent be given a credit for 5-2/7 weeks it had already paid for TTD. The Commission affirmed the Arbitrator's decision, with one modification: it determined that respondent was "not entitled to a [TTD] credit for any payments made by the Springfield Firefighters Pension Board as related to [claimant's] line of duty disability pension."[1] The circuit court of Sangamon County confirmed the Commission's decision, and this appeal followed. For the reason which follow, the decision of the circuit court is affirmed in part and

[1]Before this court, respondent states that it "never claimed such a credit" for these pension payments; rather, respondent asserts, it claimed that, based on various statements claimant made to counselors, it was apparent that he had removed himself from the workforce and considered himself retired and was thus not entitled to temporary total disability.

vacated in part, and the Commission's decision is affirmed in part and vacated in part. We remand this matter to the Commission for further proceedings consistent with this order.

II. BACKGROUND

¶ 4 Claimant was employed by respondent as a captain in the Springfield Fire Department. He was first employed by respondent in May 1990, beginning his career as a firefighter and advancing to the positions of driver-engineer and then captain. He was also certified as an emergency medical technician. As a captain, he oversaw a crew.

¶ 5 On April 11, 2015, claimant was on duty. At about 12:15 p.m., claimant's crew responded to a call involving a dog attack on a child. As they arrived at the scene, they were met by the child's stepmother. She stated that the victim was in the backyard and the dog was secured in a bedroom. Claimant and his crew proceeded immediately to the backyard. It was a large backyard, and they did not immediately see the victim, as there was an intervening hill crest. Another young girl was standing on the crest, and they approached. They observed a young girl lying on the ground. Claimant stated that his "first thought was she had already passed away," due to the wounds he observed and the fact that she was not moving. Claimant explained:

> "She had bite marks on both arms, both legs, on her thoracic cavity, her chest, side of her chest, and a very large laceration of her scalp area. Her hair [had] been scalped. She—I think it would probably be about four or five inches if you put a ruler to it . It was bigger than my hand laying open, completely matted with leaves, dirt."

¶ 6 However, they assessed her and found that she was still alive. They provided treatment to her. An ambulance arrived about two minutes later. The victim was loaded onto a backboard while claimant held her head. The ambulance then removed the victim from the scene.

¶ 7 Claimant returned to the fire station. Claimant described his state during the return trip:

> "The just the general emotion, knots in the stomach, the horrificness of the condition of this little girl and the fact that she was still alive, just very upset, very upset, sad, mad, everything all at one time. It had been—it was one of the worst calls I think I've seen."

He noted that his driver-engineer was crying. Claimant finished his shift, but was "very sad, very withdrawn." He called his wife and asked her to come to the station.

¶ 8 On July 16, 2015, claimant went to the hospital with chest pains. He and his wife went to a movie, and he started crying. They went home. Claimant was sitting on the side of his bed holding his chest. When his daughter saw this, she told his wife that they had to take him to the hospital. He was crying and emotional in the emergency room.

¶ 9 On August 27, 2015, claimant was on duty. They responded to a fire at about 5 or 6 p.m. Claimant and his crew entered the building along with a second crew. As they were working to extinguish the fire, claimant "got very hot and overcome." After the fire was extinguished, claimant left the building and collapsed. He was transported by ambulance to an emergency room. As he was being treated by paramedics, claimant "was crying" and was "very nervous and shaking." He stated he could not say why, "[s]hort of just [his] nerves being totally shot." Claimant testified that he had had other episodes of unexplained crying between April 2015 and August 2015. Claimant also experienced dreams about the April 2015 incident. Prior to April 11, 2015, claimant had never "had any long-term psychological or psychiatric care." Claimant did not return to work with respondent after August 27, 2015.

¶ 10 Claimant followed up with his personal physician, Dr. Cara Vasconcelles. She prescribed Fluoxetine and referred claimant to Dr. Phillip Pan, a psychiatrist. Pan increased claimant's dosage of Fluoxetine and prescribed Praxosin and an as-needed anxiety medication. Claimant also had

begun treating with Vincent Flammini, a psychotherapist, in July 2015 (whom he was still seeing at the time of the arbitration hearing).

¶ 11 Claimant testified that, at the arbitration hearing, he was feeling very nervous and scared. He stated that his condition is triggered by unfamiliar situations and sirens. He has to be careful about what television shows he watches.

¶ 12 Claimant stated that as of May 21, 2017, he was not retired. He discussed his retirement status with Flammini regarding retirement and disability. When he has tried to take money out of his deferred compensation account, his requests have been denied because, according to respondent, he is not a separated employee.

¶ 13 Respondent offered claimant a light-duty position. Pan recommended he reject it, as Pan "did not recommend that [claimant] be anywhere around the firehouse" due to the many triggers he would encounter. Claimant has never known an employee to be on permanent light-duty status with the fire department. The position offered by respondent would have been a temporary one. He believed this position was offered to him in November or December of 2017. Claimant stated that the position offered to him was the same as a position that already existed and was already filled. During his employment with respondent, there had only been one such position at any given time. The union objected to respondent offering claimant this position.

¶ 14 Claimant was awarded a line-of-duty disability pension on June 30, 2017. The Commission subsequently found that this did not render claimant ineligible for TTD.

¶ 15 Claimant had also worked for Butler Funeral Home while employed by respondent. He was a part-time staff member who assisted on days of a visitation or funeral. He would meet and greet families and assist them with parking. He began working for the funeral home in February

2001, and stopped from September 2015 to February 2018, as he could not do that job due to his emotional state. In February 2018, he resumed employment with the funeral home.

¶ 16 On cross-examination, he explained that he was paid a flat amount by the funeral home, unless the shift exceeded a certain number of hours. When he returned in February 2018, he tried to maintain full-time employment. In addition to the duties described above, he was acting as a courier and performing other odd jobs. He acknowledged telling Flammini on August 17, 2017, that "this isn't how [he] planned to retire." In the spring of 2019, claimant stopped seeing Pan, who had stopped seeing patients. Pan advised him to continue treating with Vasconcelles and, he also continued to see Flammini. In addition to his work for the funeral home, claimant and his wife operate "a small booth in an antique mall."

¶ 17 Claimant agreed that the collective bargaining agreement under which he was employed listed the salary of a captain with 25 years' experience as $92,924.34. He has never received short-term psychiatric care. He understood "separated employee" to mean a person who was no longer working for respondent.

¶ 18 On redirect-examination, claimant testified that in addition to his base pay, there were other additions to an employee's salary.

¶ 19 Claimant next called Gary Self. Self testified that he is employed by respondent and is a member of Springfield Firefighters Local 37 union. He is the president of the local union. He was in that capacity in December 2017, and, at that time, he learned of a job offer respondent had extended to claimant. He reviewed the job description and concluded that the job was not currently a position with the Springfield Fire Department during Self's tenure—nor had it ever been one. Self filed a grievance, alleging "non-bargaining," and demanding "to bargain with the city" to "clarify" the position. The grievance proceeded to arbitration, but was "currently set aside

pending" the outcome of the instant case. The position remains unfilled. Self stated that "as far as we know, [it] no longer exists." Self agreed that there were no firefighting duties assigned to the position. However, personnel from the division of the department to which the job would be attached had been called out for emergency responses.

¶ 20 On cross-examination, Self explained that when he said the arbitration was on hold, he meant that they had instructed their attorney to refrain from filing for arbitration since the job offer had been rescinded.

¶ 21 Jane Talbott was claimant's next witness. She testified that she is claimant's wife. They have been married since April 1981. She stated that they "had a good marriage." She noted a change in claimant after April 11, 2015. On that day, claimant called her and asked her to come to the station. Claimant was sitting outside at a patio table when she arrived. She could see he was visibly shaken. She asked what was wrong, but claimant would not respond initially. Eventually, he told her about the call involving the dog attack on the little girl. When he got home, he laid in bed and cried all day. Claimant began having difficulty sleeping; he would have nightmares about that call and "every horrific call that he's ever been on." Claimant became very withdrawn. She added, "He was aggravated [and] agitated very easily." Also, "Early on, he shook constantly." Claimant cannot be in a large group of people. On cross-examination, she confirmed that all of claimant's symptom started "pretty much immediately after the incident on April 11 or 2015." She also stated that the little girl who was the victim of the dog attack had survived and "the reports are she's a healthy young lady."

¶ 22 Claimant then rested, and respondent called Jeph Bassett. Bassett testified that he is the deputy division chief of operation for the Springfield Fire Department. He was familiar with the job offered to claimant. This position was in Division 2; firefighting was Division 1. He testified

that the position would not have "exposed [claimant] to any emergency situations." It also did not involve fire investigations, which is trying to determine the cause of a fire. Instead, the job involved fire inspections, that is, inspecting buildings for code violations, and public education. Bassett stated that claimant would have received the same salary he had earned in his prior position with respondent.

¶ 23 On cross-examination, Bassett testified that the position offered to claimant would not have required him to work at a fire station. He would, however, be required to wear a uniform. When asked whether claimant would have had to carry a radio, Bassett explained that some employees do carry radios; however, others simply use their cell phones for communication. Defense counsel inquired as to "what circumstances would someone from Division 2 * * * be called into an operational mode." Bassett answered that some Division personnel had been called into such service for "an extremely large incident when the power plant exploded."

¶ 24 Respondent then called Stephanie Barton. She was formerly employed by respondent as a labor relations officer. This position was in human resources. She is an attorney. She was familiar with the position offered to claimant and the union's objection to it. She explained that the position had been created specifically for claimant. She opined that respondent had the right to create such a position under the Illinois Labor Relations Act. The union asserted that the position was collective bargaining work; respondent contended that is was not. After claimant rejected the offer, respondent no longer intended to fill the position—Barton opined that this mooted the issue.

¶ 25 On cross-examination, Barton testified that it was her understanding that respondent created the position to accommodate claimant. Respondent then rested.

¶ 26 The records of Flammini, a licensed clinical social worker, were also submitted as evidence. Claimant began treating with Flammini on July 2, 2015. Records from that date indicate

that as a result of the April 11, 2015, dog attack on the young girl, claimant was experiencing abnormal fears, anxiousness, concentration problems, depressed mood, flashbacks, guilt, hopelessness, isolation, nightmares, panic attacks, issues falling and remaining asleep, tearfulness, and feelings of worthlessness. Flammini's "diagnostic impression" was "PTSD – moderate tending toward severe."

¶ 27 Claimant next saw Flammini on July 15, 2015. Claimant reported experiencing fewer flashbacks, "but other [traumatic] call memories [were] 44surfacing much more frequently." They discussed having Dr. Vasconcelles prescribe an antidepressant. Notes from the July 29, 2015, visit indicate that "PTSD symptoms continue." Also, Flammini wrote that he contacted Vasconcelles and she prescribed Flouxetine. On August 5, 2015, Flammini noted that claimant's "symptoms seemed decreased somewhat." However, he also suggested that claimant cease working at the funeral home, as claimant "was experiencing significantly increased anxiety at that job." On August 20, 2015, Flammini recorded that claimant "continues to experience intrusive thinking re traumatic calls and nightmares re calls that occur anytime he sleeps." Flammini contacted Vasconcelles about prescribing Alprazolam, which she did; however, claimant reported "minimal effect" from it. Three visits later, on September 9, 2015, Flammini noted that while some sleep disturbances continued, they were of "decreasing frequency." The note from this date also indicates that claimant was struggling with the issue of whether he should retire. Claimant was leaning toward retiring rather than risk "experiencing significant PTSD again." Claimant visited Flammini on September 15, 2015, and was seeing him every week at this point. Claimant saw Flammini on September 24, 2015. On this date, notes indicate that a "significant stressor" was claimant's desire to return to work in the face of "clear evidence that he cannot do the job at this point." Also, claimant "[w]alked twice over the weekend to the point of exhaustion

(intentionally)." Notes from September 30, 2015, indicate that during this week, claimant "passed out." He went to the ER for a "stroke work-up," which was negative. Over the next several weeks, notes indicate that claimant was making some progress.

¶ 28 On December 3, 2015, the notes state, "Symptoms of PTSD are beginning to lessen." However, claimant was still experiencing "significant worry and fear" about returning to work. When claimant saw Flammini on December 29, 2015, he reported that he enjoyed Christmas and getting to spend time with his family. However, he had to limit the amount of time he spent with everyone, as he felt anxiety "when he is around more people/activity." He was able to manage his anxiety effectively. On January 25, 2016, claimant stated that he was triggered by television violence and by reading accounts of violence or trauma. He was "50/50 regarding return[ing] to work," and he continued to have bad dreams, though not every night. Claimant's Prazosin prescription was increased to a dosage of 5 mg. The notes from February 20, 2016, indicate that claimant "[o]verall has been feeling well and experiencing fewer symptoms." On February 18, 2016, Flammini opined that it would "not make sense" for claimant to attempt to return to work at that time. On March 16, 2016, claimant reported decreasing anxiety and lessening sleep issues. However, on April 13, 2016, claimant had "been experiencing a bit more anxiety and troubled sleep." Notes from the April 27, 2016, session state that claimant "[h]as had [a] relatively good few weeks," and notes from the next visit on May 11, 2016, state, "Less anxiety since last session." On May 18, 2016, claimant told Flammini that he wanted to try hypnotherapy. Flammini supported the idea and suggested postponing their sessions until claimant had seen the hypnotherapist.

¶ 29 Claimant next saw Flammini on September 29, 2016. Claimant reported that the hypnotherapist had not helped with his sleep issues, but "he thinks [she] may have helped him a

bit with relaxation and increasing exercise." He stated that he had "been feeling better over the last few months." On October 29, 2016, claimant was "feeling well," but sleep was still "problematic." Notes from December 1, 2016, state that claimant continued to have "significant anxiety and some panic."

¶ 30 During the next visit on February 16, 2017, claimant was experiencing less panic, but still had significant anxiety. On May 25, 2017, Flammini wrote that claimant was experiencing "[s]ignificantly more stress related to legal issues [regarding] PTSD and retirement." Claimant next saw Flammini on August 17, 2017. Claimant stated he had an "OK summer." He wished he could return to work but knew he could not. He stated, "This isn't how I planned to retire." On December 18, 2017, claimant told Flammini that he was using copaiba oil and it helped him sleep "a bit better." During their meeting on February 15, 2018, claimant was "[f]eeling more stressed about [the] slow pace of retirement/legal issues." The note from April 19, 2018, states that claimant was still experiencing sleep difficulties, anxiety, and mild panic. It further states that claimant would soon commence full-time employment at the funeral home. The May 17, 2018, note indicates that claimant was experiencing '[s]ignificantly increased symptoms since increasing [his] hours at" the funeral home. Flammini suggested he reduce the hours he was working. The note from July 23, 2018, states that claimant's "[m]ood and sleep have been bad." Finally, the note generated on August 20, 2018, which was the last visit before the arbitration hearing, states that claimant reported that "he has found some peace about [the] situation." He was "[s]leeping a bit better."

¶ 31 Records from claimant's primary physician, Dr. Vasconcelles, from a visit on July 29, 2015, stated that claimant "is very emotional and cries easily." She noted that claimant was experiencing short-term memory loss and had difficulty concentrating. Further, claimant was not

sleeping well. On September 8, 2015, Vasconcelles noted that claimant was having difficulty sleeping.

¶ 32 In a letter to claimant's attorney authored on August 1, 2018, Vasconcelles stated that claimant developed PTSD following the dog-attack incident and it was causing emotional symptoms that were preventing him from returning to work. Claimant was referred to Dr. Pan, a psychiatrist. Claimant continued to experience "emotional and physiological symptoms of PTSD." His PTSD was under "good control as long as he is not exposed to any triggers that can exacerbate his PTSD symptoms." She added, "Unfortunately, that seems to be any activities that remind him of his job as a fireman and EMT." Vasconcelles reviewed the job description of the position respondent offered to claimant. She did not "see any [aspects of the job] that would be a clear concern," though she noted that she had not reviewed them with claimant. She further stated that as a primary care doctor, she was "not equipped" to "render a decision in this regard."

¶ 33 Claimant first saw Dr. Philip Pan on September 15, 2015. Claimant was experiencing flashbacks and anxiety. He was not sleeping well. Pan opined that claimant seemed to be benefitting from Fluoxetine, though noted that it was too early to assess the effect of a higher dose. Pan prescribed Prazosin for sleep issues. On October 1, 2015, claimant reported that night terrors were diminishing, though he was still having nightmares. Pan's notes from October 29, 2015, state that claimant was doing better, but not back to normal. On December 1, 2015, claimant stated that his dreams were "intensifying again." On December 10, 2015, Pan noted that Prazosin had not helped much with claimant's dreams. Notes from January 21, 2016, indicate that Pan did not feel that claimant was ready to return to work. On March 3, 2016, Pan noted that claimant seemed calmer. On April 5, 2016, Pan wrote a letter in which he recommended that claimant not return to work as an active-duty firefighter. On April 28, 2016, Pan felt that claimant "[s]eem[ed] pretty

stable." Claimant related that his dreams were "coming and going." He recalled being attacked in his dreams. He kicked his wife in his sleep. During the September 15, 2016, visit, claimant stated he was doing "[o]kay," but his sleep was "so-so, same." He was still having some nightmares, but things seemed to be improving. Notes from the November 10, 2016, appointment state that claimant was "[s]tressed out by anything outside of [his] normal routine." Further, his "[n]ightmares have come back a bit." On January 5, 2017, claimant reported that the holidays went well. He was still having nightmares. On March 2, 2017, claimant stated that he was having nightmares, but "not that bad . . . not that often." During the June 1, 2017, visit, claimant related he was sleeping "pretty well," albeit "long and restless." Pan believed claimant was "doing well." On August 15, 2017, which was claimant's last appointment with Pan, he stated that "things have been pretty decent." On some nights, claimant was having nightmares and flashbacks, though this was improving.

¶ 34 At the request of claimant's attorney, Pan authored a letter in which he opined that "it would not be prudent for [claimant] to accept the position" that respondent had offered him because "being on the scene and investigating the aftermath of fires would still be likely to trigger his PTSD." Pan also opined that claimant could perform the work in any of the jobs contained in a Labor Market Survey Report provided by respondent. Further, Pan opined that claimant's PTSD was caused by his employment with respondent.

¶ 35 Elizabeth Skyles performed a vocational evaluation of claimant and authored a report. In it, Skyles detailed claimant's skills, noting many were transferrable. She note that claimant had not performed any job-search activities. Claimant stated, "I am still employed with the City of Springfield." Claimant further stated that he wanted to return to work or own a business. Skyles opined that claimant was employable "within the parameters established in this report." She added

that positions were currently available for claimant within the local labor market. She performed a labor market survey in which she identified 10 jobs that she believed were suitable for claimant. Salaries for these jobs ranged from $35,000 to $110,000.

¶ 36 A number of letters appear in the record.

¶ 37 On November 21, 2017, claimant's attorney wrote to respondent stating his position that claimant could not accept the position offered by respondent because it was a full-time union position. As such, it would cause claimant to lose his line-of-duty, disability pension (Claimant was awarded the pension on June 30, 2017). Claimant's attorney also stated that claimant had told him that any position in the fire department requires the employee to respond to emergency calls and fire suppression. Further, claimant's attorney asserted, the mere tendering of a job description did not amount to an offer of employment.

¶ 38 On December 13, 2017, Jim Kuizin, the human resources director for respondent replied to the letter from claimant's attorney. In it, he asserted that the position respondent offered to claimant would not require claimant to respond to emergency call or engage in fire suppression activities.

¶ 39 On January 12, 2018, respondent, by letter, terminated claimant's TTD benefits, explaining that it was "clear" that claimant did not intend to accept a job offer from respondent.

¶ 40 Claimant underwent two independent medical examinations—one on behalf of respondent and the other on behalf of the City of Springfield Firefighters' Pension Fund. The former was conducted by Dr. Ronald Ganellen and the latter by Dr. Terry Killian. Ganellen opined that claimant's emotional state precluded his return to firefighting. He left open the possibility that claimant might return to the fire department if he learned to manage his anxiety; however, he added that the odds of this happening were low in the near term. Killian stated that claimant "is clearly

totally disabled from his position as a firefighter as a result of his PTSD." He noted Ganellen's opinion that there might be a possibility that claimant could return to work in the future and commented that this was "increasingly unlikely as time progresses." Killian pointed out that at the time he met with claimant, claimant was two years removed from the dog attack and still experiencing significant symptoms. He characterized the possibility of a return to firefighting as "theoretical."

¶ 41 The arbitrator issued a corrected decision (it appears the original contained an additional erroneous award, which was deleted) awarding claimant temporary total disability (TTD) benefits in the amount of $1,248 for 5-2/7 weeks; $721.66 per week for 250 weeks for 50% loss of the person as a whole; but he ordered that respondent be given a credit for 5-2/7 weeks it had already paid for TTD. The arbitrator determined that claimant annual salary was $97,418.47. This was based on $90,537.97 working for respondent and $6,880.50 working for the funeral home as concurrent employment. The arbitrator declined to consider overtime worked by claimant, as there was no evidence regarding whether overtime was mandatory. He found claimant was entitled to TTD from January 6, 2018, through February 11, 2018 (5-2/7 weeks), rejecting respondent's assertion that claimant had considered himself retired as of May 27, 2017. He found that claimant's receipt of a firefighters' line-of-duty pension did not eliminate respondent's obligation to pay TTD. Regarding respondent's offer of employment to claimant on December 13, 2017, the arbitrator found that "[n]o physician ever cleared [claimant] to return to work in that position."

¶ 42 Finally, regarding the nature and extent of claimant's injury, the arbitrator noted that claimant testified that he was completely unable to perform his former job as a firefighter and stated he was giving great weight to this factor. He found that as claimant was 53 years old, he would likely "live the rest of his life afflicted by the ongoing psychological trauma sustained in

this injury"—attributing great weight to this factor as well. He then observed that claimant is unable to work in "any emergency field due to the psychological triggers from the trauma of the incident." This was his chosen profession and would thus likely have great impact on his future earning capacity. Additionally, the medical evidence corroborates the effect the injury had upon claimant. Therefore, the arbitrator determined claimant "sustained permanent partial disability to the extent of 50% loss of use of the person as a whole."

¶ 43 The Commission adopted the arbitrator's decision, with one modification, finding that respondent was not entitled to the TTD credit awarded by the arbitrator. Citing section 4-114.2 of the Illinois Pension Code (40 ILCS 5/4-114.2(a) (West 2018)), it held that claimant's disability pension did not preclude an award of TTD (respondent does not challenge this ruling on appeal). It also found that claimant had not retired from the workforce. The Commission noted that claimant was "unanimously determined to be medically unable to return to work as a firefighter by Dr. Ganellen, Dr. Pan, and Dr. Killian." Moreover, claimant's anxiety prevented him from working at the funeral home as well. The Commission noted that there was no evidence of record to show that claimant had retired, though he had discussed retirement with Flammini. As for the position offered by respondent, the Commission observed that no doctor had determined that claimant would be able to perform the duties of this position. Hence, the offer did not affect claimant's entitlement to TTD. It continued that the offered position did not constitute an adequate accommodation, as there were occasions where such employees "had been put back on rigs and involved in firefighting duties." Finally, it held that claimant's receipt of a line-of-duty pension did not terminate respondent's duty to pay TTD.

¶ 44 The circuit court of Sangamon County confirmed the Commission's decision, and this appeal followed.

¶ 45 III. ANALYSIS

¶ 46 On appeal, respondent raises three main issues. First, it asserts that the Commission erred in calculating claimant's average weekly wage. Second, it contends that the Commission's award of TTD and its failure to grant respondent a credit for TTD benefits paid is contrary to the manifest weight of the evidence. Third, respondent argues that the Commission's award of permanent partial disability (PPD) benefits is against the manifest weight of the evidence.

¶ 47 Factual decisions rendered by the Commission are entitled to great deference; thus, we review them using the manifest-weight standard of review. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35. A finding is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id*. It is primarily the function of the Commission to assess the credibility of witnesses, weigh evidence, and resolve conflicts in the record. *Id*. We owe great deference to the Commission on medical matters due to the substantial expertise it has acquired in this area. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Questions of law are reviewed *de novo*. *Simpson v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160024WC, ¶ 38.

¶ 48 A. AVERAGE WEEKLY WAGE

¶ 49 Respondent has three complaints about the Commission's determination that claimant's average weekly wage was $1873.95. First, respondent contends that the amount determined by the Commission exceeded the amount claimant sought in the request for hearing form. Second, respondent argues that the Commission erroneously considered claimant's employment at the funeral home, as claimant nowhere indicated that he was seeking to have his average weekly wage calculated on the bases of anything outside of his wage earned from respondent. Moreover, respondent continues, there is no evidence that it was aware of claimant's concurrent employment.

Third, respondent points out that the Commission calculated average weekly wage using two wage rates, one for 46-2/7 weeks and the other for 5-6/7 weeks, which adds up to 52-1/7 weeks.

¶ 50 Turning to respondent's first argument, respondent notes that in the request for hearing form, claimant alleged his average weekly wage was $1778.85 based on an annual salary of $92,500. The Commission determined that, based on an annual salary of $97,269.58, claimant's average weekly wage was $1873.95. Respondent contends that the Commission erred by awarding an amount in excess of what claimant claimed in the request for hearing form.

¶ 51 Respondent calls our attention to *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084 (2004). In that case, this court held that the Commission lacked the power to enter an award of TTD below the 84 weeks the employer indicated in the request for hearing form (the employee sought 111 weeks). *Id.* at 1087-88. The court first cited section 7030.40 of Title 50 of the Illinois Administrative Code (now codified at 50 Ill. Adm. Code § 9030.40), which provides, in pertinent part, as follows: "The completed Request for Hearing form, signed by the parties (or counsel), shall be filed with the Arbitrator *as the stipulation of the parties* and a settlement of the questions in dispute in the case." (Emphasis added.) We then noted, "The language of section 7030.40 indicates that the request for hearing is binding on the parties as to the claims made therein." *Walker*, 345 Ill. App. 3d at 1088. Accordingly, we held that the "employer was bound by its stipulation that 84 weeks' TTD benefits was appropriate." *Id.* Respondent asserts that the same logic applies here.

¶ 52 Claimant attempts to avoid this result, citing to *Lusietto v. Industrial Comm'n*, 174 Ill. App. 3d 121, 127 (1988), and *Neal v. Industrial Comm'n*, 141 Ill. App. 3d 289 (1986). *Lusietto* simply announces that "[t]he parties cannot by stipulation bind the Commission" with no further analysis.

Lusietto, 174 Ill. App. 3d at 127. *Neal* concerns the scope of a stipulation rather than whether it was binding on the Commission:

> "A stipulation that the petitioner sustained accidental injuries arising out of and in the course of employment, which also limits the disputed issues to the nature and extent of the injury, if any, only admits that an accident occurred which injured the petitioner and that the accident and injury arose out of and during the course of the employment. Questions preserved for decision include the nature and extent of the petitioner's injury, if any, and causality between the accident and the injury." *Neal*, 141 Ill. App. 3d at 292-93.

Moreover, neither case mentions the language contained in section 7030.40 of the Administrative Code (now codified at 50 Ill. Adm. Code § 9030.40) that makes a stipulation in a request for hearing form "a settlement of the questions in dispute in the case." Given that *Walker* contains a more complete and recent analysis of this issue, we will follow it here.

¶ 53 Also, we find unpersuasive claimant's suggestion that these cases can be reconciled by holding that *Lusietto* establishes a floor for an award pursuant to an employer's stipulation, but that no ceiling exists when an employee similarly stipulates. Claimant suggests no plausible reason for such disparate treatment of the two parties. Therefore, we hold that the Commission erred in awarding a sum in excess of the amount claimant claimed in the request for hearing form.

¶ 54 In a related argument, respondent points out that at the beginning of the arbitration hearing, the arbitrator, reviewing the request for hearing form, stated his understanding that claimant was calculating average weekly wage based on the employment contract while respondent was making the calculation based on claimant's actual earnings. No concurrent employment was indicated. While the rule set forth in *Walker* might seem to apply here, a conflicting statute exists. Section 19(b) of the Act (820 ILCS 305/19(b) (West 2018)) states, "The jurisdiction of the Commission to

review the decision of the arbitrator *shall not be limited to the exceptions* stated in the Petition for Review." (Emphasis added.) Where a statute and an administrative regulation conflict, the statute controls. *Klein Construction/Illinois Insurance Guaranty Fund v. Illinois Workers' Compensation Comm'n*, 384 Ill. App. 3d 233, 237 (2008). Thus, the absence of an issue on the request for hearing form does not affect the Commission's ability to address it, though, as explained above, such an omission might affect the relief ordered by the Commission.

¶ 55 Respondent also contends that there was no evidence that it was aware that claimant was concurrently employed by another employer. Section 10 of the Act mandates that an employer have knowledge of concurrent employment for it to be considered in calculating claimant's average weekly wage. 820 ILCS 305/10 (West 2014); *Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444, 448 (1995). In response, claimant points to two facts—that he had worked for the funeral home concurrent with his employment with respondent for 14 years and that "personnel records from [the funeral home] indicat[e] its ability to communicate with the City." Neither of these facts is sufficient to show awareness of claimant's concurrent employment by respondent. To assume that respondent had knowledge of claimant's work at the funeral home because he had been there a long time would require one to speculate that the subject must have been discussed at some point during that time. Similarly, it would be speculation to conclude that the funeral home had contacted respondent simply because it was able to do so. An award under the Act cannot be based on mere speculation. *A.O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536 (1972). Therefore, the Commission erred in considering claimant's concurrent employment in determining his average weekly wage. This case must be remanded to allow the Commission to recalculate claimant's average weekly wage without considering concurrent employment.

¶ 56 Before leaving this section, respondent points out that the arbitrator added two different time periods where claimant's earnings were different in calculating his average weekly wage. One period used by the arbitrator was 46-2/7 weeks, and the other was 5-6/7 weeks, which adds up to 52-1/7 weeks for the year, or 52 weeks and one day, which is 1/7 of a week. Of course, there are 365 days in a year, which is consistent with the arbitrator's math (52 * 7 = 364; 364 + 1 = 365). Thus, there was no error in the calculation.

¶ 57 B. TEMPORARY TOTAL DISABILITY

¶ 58 Respondent next challenges the Commission's award of TTD. Respondent contends that claimant was not entitled to TTD for two reasons. First, respondent claims that claimant retired as of August 17, 2017. Second, respondent asserts that it is clearly apparent that claimant could have obtained employment outside the firefighting field. Generally, a claimant is entitled to TTD from the time of the injury until he or she is restored as far as the character of the injury will permit. *Matuszczak v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d), ¶ 14. To be entitled to TTD, a claimant must show that he or she was unable to work. *Id*. An award of TTD by the Commission will not be disturbed unless it is against the manifest weight of the evidence. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). A finding is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35.

¶ 59 Respondent's assertion that claimant had retired is ill-founded. It is primarily based on a conversation claimant had with his Flammini on August 17, 2017, where claimant stated, "This isnt [*sic*] how I planned to retire." The Commission found "that there was no evidence in the record to show that [claimant] retired from employment with respondent and voluntarily removed himself from the workforce." It added, "Although [claimant] expressed concerns as to whether he

should retire to Mr. Flammini, there was no indication that he began a formal retirement process." Respondent disingenuously claims that it is "not sure what the Commission means about a formal process." It goes on to assert that, "A formal process is not necessary [and claimant's] actions speak loudly." However, respondent cites no authority to substantiate its *de facto* retirement theory, and we do not find it persuasive. Moreover, our review of the record and notes of treatments indicated that claimant desired to return to work as a firefighter. Further, where an injury forces a claimant into retirement, an award of TTD benefits is not necessarily foreclosed. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 595 (2005). Hence, even if respondent is correct and claimant was retired, this would not preclude an award of TTD. In short, respondent has not carried its burden of showing that it is clearly apparent that the Commission's findings regarding claimant not retiring are contrary to the manifest weight of the evidence.

¶ 60 We now turn to respondent's contention that claimant did not prove he could not work in some position other than firefighting. The Commission found that claimant "was unanimously determined to be medically unable to return to work as a firefighter by Dr Ganellen, Dr. Pan, and Dr. Killian." Respondent does not dispute this. The Commission further found that, "[d]ue to his anxiety, [claimant] also stopped working at his second job at [the funeral home] from September 2015 until February 18, 2018." Thus, the Commission found that claimant was disabled from employment other than firefighting as well. We note that when claimant returned to the funeral home in 2018, Flammini counseled him about "self-care, potential triggers, and how to manage." Thus, even at this relatively late date, Flammini was concerned about claimant returning to employment in a field other than firefighting. Flammini's concerns turned out to be prescient, for, by May of that year, claimant was experiencing increased PTSD, and he counseled claimant to

reduce his hours. These facts clearly support the Commission's conclusion that claimant was not capable of work besides firefighting.

¶ 61 Respondent identified various medical records showing claimant's condition improving over time. For example, respondent notes that in a letter dated March 2, 2017, Pan stated that claimant "had made a great deal of improvement and is reasonably stable." We note that Pan also opined that at this time, claimant should not return to work as a firefighter, so it is inferable that he was still experiencing problems. Respondent further points out that, in March 2016, Flammini observed that claimant was experiencing fewer sleep issues and less anxiety. We note that claimant's purported progress was far from linear, as other records show setbacks. For example, Flammini's notes from December 1, 2016, state that claimant continued to have "significant anxiety and some panic." On May 25, 2017, Flammini noted that the legal issues flowing from his injury were causing claimant "[s]ignificantly more stress." As late as July 23, 2018, Flammini wrote that claimant's "[m]ood and sleep have been bad." In other words, the evidence of record is conflicting. As noted, resolving such conflicts is a matter primarily for the Commission. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35. Respondent does not explain how the evidence that it cites is so much more persuasive than that supporting the Commission's decision such that it is contrary to the manifest weight of the evidence.

¶ 62 Respondent relies heavily on claimant's purported rejection of a job offer it allegedly made to claimant in December 2017. The Commission specifically addressed this issue, stating:

> "Additionally, the Commission finds that [claimant's] decision to decline [r]espondent's job offer does not affect his entitlement to temporary total disability benefits, because none of his doctors had determined that [claimant] would be medically able to pursue this position. Instead, Dr. Pan opined that it would not be prudent for

> [claimant] to accept the fire inspector/public educator position, because being on the scene to investigate the aftermath of fires would likely trigger his PTSD. Although such Division II positions were not generally involved in firefighting activities, Mr. Bassett and Mr. Self discussed occasions when employees in Division II had been put back on rigs and involved in firefighting duties. Thus, the offered position does not constitute an adequate accommodation, as [claimant's] treatment records show that anything related to being a firefighter could induce his PTSD symptoms."'

Respondent criticizes the Commission's reliance on Pan's opinion because Pan erroneously believed that the offered position would involve claimant going to the aftermath of fires. Generally, a defect in the basis of an expert's opinion affects the weight to which it is entitled. See *In re L.M.*, 205 Ill. App. 3d 497, 512 (1990). Moreover, though respondent set forth evidence that the position in question would not have required claimant to go to fire scenes, claimant responded with evidence indicating Division II personnel were, albeit rarely, dispatched in such a manner. The Commission was not required to accept respondent's evidence on this point.

¶ 63 Evidence in the record also exists that supports an inference that respondent's purported job offer was not a *bona fide* one. The Commission may rightfully disregard such an offer. *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 993 (1999). When the union learned of the position respondent created for claimant, it filed a grievance. Respondent called Barton to testify to respondent's right to create such a position; however, again, the Commission was not required to accept this testimony. Thus, we cannot say that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 64 We acknowledge that other evidence of record supports respondent's position. Respondent points to a statement in a letter authored by claimant's attorney that claimant would lose his line-

of-duty, disability pension if he accepted respondent's offer. Respondent notes that Vasconcelles commented that she did not see anything in the job description that would be a clear concern for claimant's PTSD; however, she also stated that she was not qualified to render such an opinion. Respondent also points to various statements by claimant's doctors indicating that they thought it would be a positive if claimant returned to work in some other field. For example, a letter authored by Ganellen contains the following statement:

> "[Claimant] expressed a desire to work in a field unrelated to being a firefighter. It would be positive for his emotional state, sense of self-worth, and outlook to resume involvement in the work force. I would encourage efforts to support and facilitate [claimant] pursuing a meaningful new career."

While this certainly suggests that there would be some utility in claimant obtaining a new career, it says nothing as to whether he was capable of doing so. Indeed, Ganellen references "efforts to support and facilitate" such a venture, indicating that this was not something claimant could simply go out and obtain at will. Further, while it is true that Pan characterized claimant's condition as reasonably stable during their last visit, it is also true that when claimant returned to work at the funeral home, his symptoms increased. Quite simply, the record contains conflicting evidence, and we cannot say that it so favors respondent that a decision opposite to the Commission's is clearly apparent.

¶ 65 Before leaving this section, we must address two additional issues. First, respondent challenged the Commission's denial of a credit for TTD paid. Respondent states that the reason it was claiming a credit was because claimant was not entitled to TTD for 32-2/7 weeks for which respondent had paid him (respondent states that the Commission denied its request on a basis it had not sought, namely, claimant's disability pension; however, this is immaterial, as we review

the result at which the Commission arrived rather than its reasoning (See *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002))). Respondent basis its claim to a credit on claimant's purported retirement. As explained above, the Commission's finding the claimant had not retired is not contrary to the manifest weight of the evidence. Having previously rejected respondent's arguments that claimant was not entitled to TTD for the periods at issue, respondent is entitled to no credit

¶ 66 Second, respondent points out a minor error in the calculation of a period of TTD that resulted in it paying for two additional days. As we are remanding as a result of respondent's arguments in the first section of this analysis, respondent can raise this issue and seek a correction below.

¶ 67 3. PERMANENT PARTIAL DISABILITY

¶ 68 Respondent further contends that the Commission's decision concerning PPD is against the manifest weight of the evidence. Section 8.1b of the Act (820 ILCS 305/8.1b (West 2014)) sets forth five factors to consider in assessing a claimant's level of PPD:

> "In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order."

These factors are not exclusive, so the Commission may consider other relevant evidence as well. *Flexible Staffing Services v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 151300WC, ¶ 22. We review this issue using the manifest-weight standard. *Id*. A finding is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35.

¶ 69 The Commission, adopting the decision of the arbitrator, found that claimant was 53 years old and would thus probably "live the rest of his life afflicted by the ongoing psychological trauma sustained in this injury." It further observed that claimant is unable to work in "any emergency field due to the psychological triggers from the trauma of the incident." Furthermore, the medical evidence indicates that the injury suffered by claimant had a profound and lingering effect upon him. Hence, there is sufficient evidence in the record to support the Commission's decision that claimant had "sustained permanent partial disability to the extent of 50% loss of use of the person as a whole."

¶ 70 Some of respondent's argument on this issue is a rehash of arguments it advanced concerning TTD. For example, respondent again points to its job offer and the fact that claimant rejected it. As we rejected respondent's contentions for the reasons stated above, we find this consideration no more persuasive here. Moreover, we further note that the job description provided by respondent stated that the job would involve regular contact with fire department personnel. Based on the medical evidence, it is inferable that this could be a trigger for claimant's PTSD. Also, one of the requirements set forth in the job description is the ability to "[c]ontrol personal feelings and emotions." Again, based on the medical evidence, it is inferable that this position would not be suitable for claimant.

¶ 71 Respondent points to Skyles's labor market survey purporting to identify 10 jobs claimant could perform, with wages ranging from $35,000 to $110,000. Initially, we note that the Commission, as trier of fact, is free to reject the testimony of any witness. *Sorenson v. Industrial Comm'n*, 281 Ill. App. 3d 373, 384 (1996). Moreover, we note that conflicting evidence existed in the record on this issue, such as claimant's continuing struggles with employment after he returned to the funeral home. Resolving conflicts in the evidence is a matter primarily for the Commission. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35.

¶ 72 Respondent erroneously criticizes the arbitrator's decision, which the Commission adopted, for "giving greater weight to the future earnings capacity factor because he said that [claimant] cannot return to work in the emergency field." Respondent continues, "Unfortunately, that is not the proper analysis because the question is whether [claimant] has lost earning capacity." Contrary to respondent's position, section 8.1b of the Act does not make lost earning capacity the sole determinant of PPD. Rather, it directs the Commission to consider, *inter alia*, age, occupation, and "evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b (West 2014). Thus, the inquiry goes beyond immediate impairment in earnings and mandates a consideration of "*future* earning capacity." (Emphasis added.) *Id.* In other words, that respondent offered claimant a job that would result in no diminution in earnings presently does not speak to claimant's ability to secure such a job in the future, should it become necessary. Conversely, claimant's inability to work in his chosen field of employment goes directly to this issue. Thus, impairment to present earning capacity is but one factor of many that the Commission could rightly consider.

¶ 73 Respondent points to the relative improvement of claimant's condition between 2015 and 2018. Undoubtedly, this is true and well-documented in the medical records. However, it is also

true that prior to February 11, 2018, claimant was temporarily *totall*y disabled. Going from total disability to 50% partial disability would obviously entail significant improvement. Indeed, the progress documented in the record is consistent with an improvement from totally to partially disabled in claimant's condition.

¶ 74 In short, we find respondent's arguments regarding PPD unpersuasive. Respondent certainly mustered evidence regarding claimant's current earning capacity. The Commission placed greater weight on evidence of disability and occupation. Respondent asserts that this was against the manifest weight of the evidence; however, respondent never really comes to terms with why the evidence it prefers is entitled to so much weight that the Commission's reliance on other evidence is contrary to the manifest weight of the evidence.

¶ 75 IV. CONCLUSION.

¶ 76 In light of the foregoing, we vacate the circuit court's order to the extent it confirmed the Commission's decisions—which pertained to the calculation of the amount of TTD or PPD—regarding average weekly wage, concurrent employment, and duration of TTD (as it pertains to the two days respondent paid for but was not credited). We affirm the trial court's order confirming the Commission's decisions regarding claimant's entitlement to TTD and PPD as well as its denial of respondent's request for a credit for TTD paid (outside of the two days referenced above). We vacate the Commission's findings regarding average weekly wage, concurrent employment, and duration of TTD (regarding the two days referenced earlier in this paragraph) and its associated awards of TTD and PPD. We affirm the Commission's findings regarding entitlement to PPD and TTD and its denial of respondent's request for a credit for TTD paid (outside of the two days referenced above). We remand this cause to the Commission so that the Commission may recalculate the awards and enter awards consistent with this opinion.

¶ 77 Circuit court order affirmed in part and vacated in part; Commission decision affirmed in part and vacated in part; cause remanded with instructions.