

No. 1-21-0477WC

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

---

FIRST PRIORITY ELEVATOR and ILLINOIS	)	Appeal from the
GUARANTY FUND,	)	Circuit Court of
	)	Cook County
Appellants,	)	
	)	
v.	)	No. 20 L 50288
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION <i>et al.</i> ,	)	Honorable
	)	John L. Curry, Jr.,
(Salvatore Bucaro, Appellee).	)	Judge, Presiding.

---

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

**ORDER**

¶ 1 *Held:* We affirmed the judgment of the circuit court which confirmed the decision of the Illinois Workers' Compensation Commission that awarded the claimant, Salvatore Bucaro, benefits pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), including permanent partial disability benefits for a 20% loss of use of the person as a whole.

¶ 2 The Illinois Guaranty Fund (Guaranty Fund) filed the instant appeal from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Salvatore Bucaro, benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)) for injuries he sustained while working for First Priority Elevator (First Priority), including permanent partial disability benefits for a 20% loss of use of a person as a whole. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for injuries to his left shoulder sustained on April 22, 2013, while working for First Priority. After First Priority's workers' compensation insurance carrier, AmTrust Insurance, filed for bankruptcy, the Guaranty Fund was joined as a party-respondent.

¶ 4 The following recitation of the facts relevant to a disposition of this appeal is taken from the evidence adduced at the arbitration hearing held on February 22, 2019.

¶ 5 The claimant was employed by First Priority as an elevator mechanic and had been employed as an elevator mechanic for 27 years prior to the events giving rise to this action. He was a member of the International Union of Elevator Constructors (the Union). On April 22, 2013, the claimant, working as an elevator mechanic foreman, was building an elevator cab with his co-employees. The claimant testified that as they were lifting the transom which weighed from 250 to 275 pounds "something shifted or slipped" and the weight of the object went onto him. He stated that he immediately felt something in his shoulder "tear or pop."

¶ 6 After conservative treatment failed, Dr. Nikhil Verma, who examined the claimant at the request of First Priority, recommended that the claimant have left shoulder surgery. The claimant

underwent that surgery, which was performed by Dr. Ankur Chhadia on October 15, 2015. The operative report indicates that the surgery consisted of a rotator cuff repair, subacromial depression, and biceps tenotomy. That surgery failed to resolve the claimant's left-shoulder symptoms. Subsequently, Dr. Verma became the claimant's treating physician and, on June 30, 2016, performed a second surgical procedure on the claimant's left shoulder.

¶ 7 Dr. William Heller examined the claimant at First Priority's request both before the claimant's first surgery and after his second surgery. He was of the opinion that a causal relationship exists between the claimant's work-related accident and his condition of left shoulder ill-being and the need for both surgeries. Based upon the AMA guidelines for the Evaluation of Permanent Impairment, Dr. Heller found that the claimant had suffered a PPD of 2% of the man as a whole.

¶ 8 The claimant completed a functional capacity evaluation (FCE) on August 23, 2016. The FCE placed the claimant in the medium job classification category which included floor to waist lifting of 70 pounds occasionally, waist to shoulder lifting of 60 pounds occasionally, overhead lifting of 50 pounds, and lifting 25 pounds at all levels. On September 23, 2016, Dr. Verma found that the claimant had reached maximum medical improvement (MMI) and released the claimant from care with permanent restrictions as set forth in the FCE. Subsequent to September 23, 2016, the claimant sought no further treatment for his left-shoulder condition and required only over-the-counter medications for pain.

¶ 9 The claimant requested that First Priority accommodate his permanent restrictions or provide him with vocational rehabilitation services. Having received no response to his request, the claimant hired Kathy Mueller of Independent Rehab Services and underwent an initial

assessment on October 28, 2016. In her report dated November 30, 2016, Mueller found that the claimant was able to perform medium-demand-level work with two-hand occasional lifting of 70 pounds from floor to waist and two-hand occasional lifting of 50 pounds from waist to shoulder. According to Mueller, the claimant's FCE found that his job as an elevator mechanic was in the heavy-physical-demand level. According to Mueller, the position of elevator mechanic foreman was considered to be in the medium-physical-demand category. She noted, however, that the claimant's position at First Priority at the time of his accident had different requirements, including regular lifting of up to 50 pounds, frequent lifting of 51 to 74 pounds, and occasional lifting of 75 to 100 pounds. Mueller concluded that the claimant would be unable to return to his former position at First Priority because the requirements of the position were outside of his permanent restrictions. According to the claimant, lifting objects as heavy as the one being lifted when he was injured on April 22, 2013, was not an uncommon event. Mueller developed a rehabilitation plan that included training as an elevator inspector, vocational testing, job readiness preparation, job-seeking skills training, and job placement assistance.

¶ 10 According to the claimant, First Priority was not able to accommodate his permanent restrictions. However, he also stated that he had not heard from First Priority, and that was the reason why he had not gone to the Union to seek other employment. The claimant testified that, with the help of a former co-worker, he secured a position as a maintenance mechanic with Smart Elevators (Smart) in April or May of 2017. As of 2019, the claimant was working for Smart as an elevator mechanic foreman. He admitted that he was making more money working for Smart than he was making at First Priority when he was injured. He attributed the increase to the increase in union scale wages over the intervening years. He also admitted that, as a foreman, he was earning

12% more than a journeyman elevator mechanic.

¶ 11 The claimant testified that, due to his permanent lifting restrictions, he cannot return to his normal occupation of a journeyman elevator mechanic. He stated that, in his present position, he does “troubleshooting maintenance” when an elevator shuts down, and if something bigger needs to be done, he calls in a service crew to fix the problem. He does no heavy lifting. Addressing the current condition of his left shoulder, the claimant testified that he has “quite a bit less motion than before.” He stated that “once I get my arm above my shoulder, it’s pretty sharp pain.” Even trying to sleep on his left side wakes him up. The claimant testified that, when he goes home at night, he puts ice on his shoulder and takes over-the-counter ibuprofen. According to the claimant, Dr. Verma also limited his climbing. He testified that he does not pick up anything heavy. He stated that his left arm tends to tire or fatigue more quickly and that he experiences difficulty putting on a shirt, washing his hair, and reaching to wash his back. He also testified that he no longer shovels snow.

¶ 12 An arbitration hearing was held on February 22, 2019. The parties stipulated that the only disputed issues to be decided were the claimant’s current condition of left-shoulder ill-being as it relates to the nature and extent of the claimant’s injury and the claimant’s entitlement to vocational rehabilitation services. All of the claimant’s medical expenses and temporary total disability benefit payments had been paid, and there was no issue relating to First Priority’s entitlement to a credit pursuant to section 8(j) of the Act (820 ILCS 305/8(j) (West 2018)) for medical expenses paid. Following the arbitration hearing, the arbitrator issued a written decision on June 5, 2019, finding that the claimant had proven that his current condition of left shoulder ill-being is causally related to his agreed work-related accident of April 22, 2013.

¶ 13 As to the nature and extent of the claimant's disability, the arbitrator addressed the five factors to be considered in determining permanent partial disability (PPD) as set forth in section 8.1b(b) of the Act (820 ILCS 305/8.1b(b) (West 2018)). The arbitrator noted Dr. Heller's finding that the claimant sustained a level of impairment equal to 2% of the man as a whole but assigned minimal weight to this factor. Finding that the claimant was 49 years old at the time of his injury and had many years of work-life expectancy, the arbitrator placed minimal weight on the claimant's age in determining his PPD. Addressing the claimant's occupation, the arbitrator found that he currently holds the identical job title that he held before his work-related accident and was making 12% more in salary than a journeyman elevator mechanic. The arbitrator found incredible the claimant's testimony that, "but for" his former co-worker offering him a job at Smart, he would not have been able to work as an elevator mechanic. The arbitrator placed significant weight on the occupation factor. The arbitrator also placed significant weight on the claimant's future earning capacity, finding that the claimant failed to establish either an actual or potential loss, diminishment, or impairment of his future earning capacity. As to evidence of the claimant's disability, the arbitrator noted both the claimant's permanent restrictions imposed by Dr. Verma and the fact that the claimant had not sought any medical care for his left shoulder or used any prescription medication since September 23, 2016, when he was released from care by Dr. Verma. The arbitrator did not assign any specific weight to this factor other than to note that continued care would have been "solid evidence of continued impairment." The arbitrator then wrote the following:

"Having identified each element as outlined in Section 8.1(b) to consider in order to assess PPD, the Arbitrator finds that the evidence and testimony along with each factor

support a determination that \*\*\* [the claimant] has sustained the permanent partial disability to the person as a whole pursuant to Section 8(d)(2) of the Act to the extent of 20% (100 weeks) thereof. \*\*\* [The claimant] sustained a serious left shoulder injury that resulted in permanent restrictions – although not to the proven extent that his restrictions render \*\*\* [him] unable to engage or participate in his usual and customary occupation and employment as a union elevator mechanic.”

Finally, the arbitrator found that the claimant had failed to prove his entitlement to vocational rehabilitation services and declined to order payment for the rehabilitation services the claimant had received.

¶ 14 The claimant and the Guaranty Fund both filed petitions for review of the arbitrator’s decision by the Illinois Workers’ Compensation Commission (Commission). On June 15, 2020, the Commission, with one Commissioner dissenting, issued a decision, reversing the arbitrator’s denial of rehabilitation services, ordering the Guaranty Fund to pay for the vocational rehabilitation services rendered to the claimant through April 2017, and affirming and adopting the arbitrator’s decision in all other respects.

¶ 15 Both the claimant and the Guaranty Fund sought a judicial review of the Commission’s decision in the circuit court of Cook County. On April 19, 2021, the circuit court entered an order confirming the Commission’s decision. On April 27, 2021, the Guaranty Fund filed a notice of appeal.

¶ 16 Before addressing the claim of error raised by the Guaranty Fund in this appeal, we again find it necessary to admonish a litigant for failure to comply with the requirements for briefs filed with this court. Illinois Supreme Court Rule 341(h)(9) (eff. Oct. 1, 2020) requires that an

appellant's brief contain an appendix as required by Illinois Supreme Court Rule 342 (eff. Oct. 1, 2019). Rule 342 requires that the appendix to an appellant's brief contain a complete Table of Contents, with page references of the record on appeal, including, *inter alia*: the nature of each document, order, exhibit, pleading, and motion; and the names of all witnesses and the pages on which their direct examination, cross-examination, and redirect examination begin. The Table of Contents of the record contained in the Guaranty Fund's brief contains three entries which are labeled "Administrative Review Volume." These three entries cover 1063 pages of the record before the Commission within which the pleadings, the exhibits introduced at the arbitration hearing, and the testimony of each of the witnesses are located. The pleadings and exhibits introduced at the arbitration hearing are not enumerated, nor are page references listed for the beginning of direct examination, cross-examination, and redirect examination of each witness who testified at arbitration. As a consequence, this court was required to search through 1063 pages of the record to find the pleadings, exhibits, and testimony relevant to the disposition of this appeal. In addition, Illinois Supreme Court Rule 342 requires that, in cases involving the review of proceedings before the Commission, the appendix to the appellant's brief shall include a copy of the arbitrator's decision. The appendix attached to the Guaranty Fund's brief does not contain a copy of the arbitrator's decision. The Guaranty Fund is reminded that Illinois Supreme Court Rules covering the required content of briefs before this court are not suggestions; rather, they are rules which have the force of law, and the presumption is that they will be followed as written. *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995).

¶ 17 In addition to the briefs filed by the claimant and the Guaranty Fund, *Amicus Curiae* filed briefs in support of both the Claimant and the Guaranty fund.



¶ 18 The Guaranty Fund has raised two issues in this appeal: whether the Commission's award of PPD benefits for 20% loss of use of the person as a whole is against the manifest weight of the evidence and whether, in determining the PPD award, the Commission improperly considered factors beyond those stated in section 8.1b(b) of the Act. Because a resolution of the first issue is dependent in part on a resolution of the second, we will address the issues together.

¶ 19 Section 8.1b(b) of the Act provides that:

“(b) 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.” 820 ILCS 305/8.1b(b) (West 2018).

¶ 20 The Guaranty Fund argues that the enumerated factors set forth in section 8.1b(b) are the only factors which the Commission may consider in awarding PPD benefits and that the arbitrator, whose decision the Commission adopted on the issue of PPD, considered factors beyond those stated in section 8.1b(b), “albeit unnamed and unknown.” The claimant argues that a plain reading of section 8.1b(b) contains no indication that the list of factors for consideration was intended to be exclusive. He also argues that the Commission did not rely on factors outside of the list contained in section 8.1b(b). Because we do not believe that a fair reading of the arbitrator's decision supports the Guaranty Fund's assertion that, by adopting the arbitrator's PPD award, the

Commission considered factors beyond those stated in section 8.1b(b), we need not address the asserted exclusivity of the statute.

¶ 21 The fifth factor set forth in section 8.1b(b) for consideration in determining PPD is evidence of disability corroborated by treating medical records. In addition to addressing each of the first four statutory factors and assigning weight to each, the arbitrator addressed the fifth factor. He noted both the claimant's permanent restrictions imposed by Dr. Verma and the fact that the claimant had not sought any medical care for his left shoulder or used any prescription medication since September 23, 2016, when he was released from care by Dr. Verma. The arbitrator continued on, however, stating that, after having identified each factor for consideration set forth in section 8.1b(b) of the Act, he found that the evidence and testimony along with each factor supported a determination that the claimant had sustained PPD to the extent of 20% of the person as a whole. The arbitrator specifically noted that the claimant sustained a serious left shoulder injury that resulted in permanent restrictions. That finding is supported by the records of the claimant's two surgeries and Dr. Verma. The claimant testified to the current condition of his left shoulder and its reduced mobility, the pain that he experiences when raising his arm above the shoulder, his inability to lift heavy objects, and the difficulty he experiences when attempting normal functions such as putting on a shirt, washing his hair, and washing his back. The claimant's testimony goes directly to the extent of his disability and, as to his inability to lift heavy objects, is corroborated by the restrictions imposed by his FCE and Dr. Verma. The evidence and testimony along with each factor which the arbitrator stated that he relied upon in determining the level of the claimant's PPD is evidence and testimony relating to his disability. We are not suggesting that in drafting his decision on this issue the arbitrator could not have been more precise. We do find, however, that

the evidence and testimony in the record supports the arbitrator's finding that the claimant sustained a serious left shoulder injury that resulted in permanent restrictions, which is relevant to a consideration of his disability as required by section 8.1b(b) of the Act.

¶ 22 Having rejected the Guaranty Fund's argument that the Commission improperly considered factors beyond those stated in section 8.1b(b) of the Act in determining the claimant's level of PPD, we are left with the argument that the Commission's award of PPD benefits for 20% loss of use of the person as a whole is against the manifest weight of the evidence.

¶ 23 The Guaranty Fund has not seriously argued that the claimant is not entitled to an award of PPD benefits, as evidenced by its prayer for relief which asks this court to, *inter alia*, "set aside the Commission's decision and enter a 2% PPD determination." The Guaranty Fund contends that the Commission "effectively ignored" Dr. Heller's 2% AMA impairment rating. It asserts that Dr. Heller's 2% rating has never been challenged or refuted and that none of the other statutory enumerated factors for consideration support a PPD determination in excess of 2%. The Guaranty Fund concludes, therefore, that the Commission's award of PPD benefits for a 20% loss of use of the person as a whole is against the manifest weight of the evidence. The claimant asserts that the Guaranty Fund's argument ignores the evidence before the arbitrator establishing that he sustained a serious injury to his left shoulder which required two surgeries and resulted in a noticeable loss of use of his shoulder as determined by his FCE and the imposition of permanent lifting restrictions. He argues that the Commission's PPD determination is supported by the evidence of record and should be given substantial deference. We agree with the claimant.

¶ 24 The nature and extent of an injured employee's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256

(1980). For the Commission's resolution of a fact question to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Tolbert v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130523WC, ¶ 39. Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 25 Contrary to the Guaranty Fund's assertion, the arbitrator did not ignore Dr. Heller's reported level of impairment. The arbitrator specifically noted Dr. Heller's 2% impairment rating but assigned "minimal weight" to the rating. The arbitrator reasoned, in part, that in calculating the impairment rating, Dr. Heller utilized the default extremity rating related to residual loss with normal motion, which was contradicted by the claimant's testimony that he suffered a loss of motion. Nothing within the statutory language of section 8.1b(b) required the Commission to automatically adopt Dr. Heller's reported level of impairment merely because he was the only physician who submitted an impairment report. To the contrary, the Commission was "obligated to weigh all of the factors listed within section 8.1b(b) and make a factual finding with respect to the level of the injured worker's permanent partial disability with no single factor being the sole determinant of disability." *Continental Tire of America, LLC v. Illinois Workers' Compensation Commission*, 2015 IL App (5th) 140445WC, ¶ 18. The weight to be given Dr. Heller's impairment report was a matter for the Commission to decide. *Id.* ¶ 24.

¶ 26 As noted earlier in his decision on the issue of PPD, which the Commission adopted, the arbitrator stated that he identified each factor for consideration set forth in section 8.1b(b) of the

Act and found that the evidence and testimony along with each factor supported a determination that the claimant had sustained PPD to the extent of 20% of the person as a whole. The arbitrator's finding that the claimant sustained a serious left shoulder injury that resulted in permanent restrictions is supported by the record, as is the fact that the claimant required two surgical procedures. The claimant testified that he has reduced left shoulder mobility and experiences pain when raising his arm above his shoulder. That testimony is corroborated by Dr. Verma's records. In a report dated August 12, 2016, Dr. Verma wrote that the claimant complained of limited range of motion. On examination, Dr. Verma found that the claimant was tender to palpation over his AC joint and sensitive to light touch in all nerve distributions. Six weeks later, Dr. Verma found the claimant to be at MMI. The claimant also testified to his inability to lift heavy objects which is corroborated by the report of his August 23, 2016, FCE and the permanent restriction imposed by Dr. Verma. At arbitration, the claimant also testified to the difficulty he experiences when attempting normal functions such as putting on a shirt, washing his hair, and washing his back. The claimant's testimony and the evidence in the record relating to the severity of his injury and resulting permanent restrictions are relevant to a determination of the extent of his disability.

¶ 27 It was the Commission's function to assign weight to the evidence and draw reasonable inferences from the evidence. *ABBF Freight System v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 141306WC, ¶ 19. Because of the Commission's expertise, its findings as to the nature and extent of disability should be given substantial deference. *Continental Tire of America, LLC*, 2015 IL App (5<sup>th</sup>) 140445WC, ¶ 20. We believe there is sufficient evidence in the record to support the Commission's PPD determination and find nothing in the record that compels us to second-guess the Commission's factual findings with respect to the nature and extent of the

claimant's disability. We conclude, therefore, that the Commission's award of PPD benefits to the claimant for a 20% loss of use of the person as a whole is not against the manifest weight of the evidence.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 29 Affirmed.