CRAIG KOLIN, PETITIONER, v. W. B. OLSON, INC., RESPONDENT.

NO: 06WC 26612

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

*2011 Ill. Wrk. Comp. LEXIS 140*; 11IWCC 0126

February 8, 2011

**JUDGES:** Molly C. Mason; Daniel R. Donohoo

**OPINION:** [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of the extent of temporary total disability, vocational rehabilitation and maintenance, and being advised of the facts and law, corrects and clarifies, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).*

After considering the entire record, including the surveillance DVD offered by Respondent (RX 5), the Commission corrects and clarifies the Decision of the Arbitrator.

On pages nine and eleven of his Decision, the Arbitrator correctly indicated that, since 1997, the Commission has held that a claimant has the right to select his vocational rehabilitation counselor under [*2] Section 8(a). The Arbitrator then stated that the Appellate Court confirmed the existence of this right in *Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500, 812 N.E.2d 65, 2004 Ill.App.LEXIS 725 (5th Dist. 2004).* The Commission corrects this statement. Roper addresses the issue of choice in the sense that it upholds the validity of self-directed job searches but it does not provide that a claimant has the right to choose his own vocational rehabilitation counselor.

Page eleven of the Decision reflects that "in a prior Decision, the Arbitrator found that Petitioner was entitled to vocational rehabilitation." The Commission also corrects this statement. Only one prior Decision has been issued in this case. That Decision, issued on March 12, 2008, lists vocational rehabilitation as a disputed issue but contains no language or order directing Respondent to provide vocational rehabilitation. The Arbitrator addressed only the issues of causation, temporary total disability and penalties/fees and neither party pursued a review.

In the pending review, Respondent urges the Commission to find Petitioner not credible, [*3] to implement the vocational rehabilitation plan (RX 7) of its selected provider, Daniel Minnich, and to order Petitioner to undergo another functional capacity evaluation in accordance with the recommendation of its Section 12 examiner, Dr. Tonino.

The Arbitrator did not specifically address Petitioner's credibility but clearly relied on Petitioner's testimony, along with that of vocational rehabilitation counselor Thomas Grzesik (who was originally agreed upon by both parties), in making his findings. While Petitioner misrepresented the extent of his education on his job application, the Commission finds him to be credible overall. Respondent makes much of its December 2009 and early January 2010 surveillance, which shows Petitioner making regular visits to a health club to exercise, but the Commission finds Petitioner's efforts

to be consistent with the work conditioning recommendations of both the functional capacity evaluator and Respondent's selected vocational rehabilitation counselor, Daniel Minnich. The Commission also notes that Petitioner's surgeon, Dr. Sporer, was fully aware that Petitioner was engaging in cardiovascular exercise when he counseled Petitioner to avoid impact [*4] loading and running on December 9, 2009. Dr. Sporer told Petitioner to continue exercising and Petitioner did so. PX 3.

Like the Arbitrator, the Commission views Daniel Minnich as "less than credible." The "plan" Minnich devised was in some respects a rehash of Grzesik's plan and, as the Arbitrator pointed out, by the time of trial, the problem Petitioner faced was not lack of a CDL but lack of appropriate insurance coverage. By the time of oral arguments, that problem had been solved, so as to permit Petitioner to begin driving a semi, so the Commission finds it unnecessary and inappropriate to order either a repeat functional capacity evaluation or formal vocational rehabilitation. Based on the representations made at oral arguments, the Commission also views the question of whether Petitioner is physically capable of operating a manual transmission truck to be moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 2010 is hereby corrected and clarified and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent [*5] with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 9,300.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT

**ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION 19(b)**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable [*6] **Charles DeVriendt,** Arbitrator of the Commission, in the city of **Chicago,** on **April 20, 2010.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

L. What temporary benefits are in dispute?

Maintenance

O. Other **Vocational rehabilitation**

**FINDINGS**

On the date of accident, **2/1/2006,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **62,712.00;** the average weekly wage was $ **1,206.00.**

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

Respondent ***has in part*** paid all reasonable and necessary charges for all [*7] reasonable and necessary medical services.

Respondent shall be given a credit of $ **0** for TTD, $ **0** for TPD, $ **93,092.40** for maintenance, and $ **0** for other benefits, for a total credit of $ **93,092.40.**

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay Petitioner maintenance benefits of $ 804.00/week for 116 weeks, commencing 1/30/2008 through 4/20/2010, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary vocational rehabilitation services of $ 9,078.54, as provided in Section 8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

**RULES REGARDING APPEALS** Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

**STATEMENT OF INTEREST RATE** If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* [*8] shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

**5-19-10**

Date

**STATEMENT OF FACTS**

This matter was originally tried pursuant to § 19(b) on January 29, 2008. At issue were causal connection, TTD, and vocational rehabilitation. The following evidence was adduced at that hearing:

Petitioner, CRAIG KOLIN, is a long-time union laborer residing in Highland, Indiana. (1/29/08 Trans. p. 6) At the time of his accident, he was 52 years old and working as a construction laborer for Respondent, W.B. OLSON. The parties stipulated that Mr. Kolin sustained an accidental injury arising out of and in the course of his employment on February 1, 2006: he was cleaning up a job site inside a building, gathering debris in a wheelbarrow and hauling it to a dumpster outside; a ramp had been rigged out of a 12-foot by 2-foot plank and as he was going down, the wheelbarrow started to tip: "I jumped and tried to pull it back, stuck my leg out and felt a pop real bad and went down." (1/29/08 Trans. p. 7)

That day, Petitioner [*9] began an extensive course of medical treatment. On February 15, 2006, Mr. Kolin underwent total excision of the posterior horn and body of the medial meniscus and excision of radial tear of the body of the lateral meniscus; cartilage shaving of the medial femoral and tibial condyles; and synovectomy at the hands of Dr. Paulino Chan. (1/29/08 Trans. Pet. Ex. No. 2; Pet. Ex. No. 3)

Following surgery, Claimant continued to treat with Dr. Chan and attended post-op physical therapy; however his symptoms did not improve. (1/29/08 Trans. p. 10) Petitioner underwent a second right knee arthroscopy on May 22, 2006: trimming of fraying of the peripheral rim of the body and anterior horn of the medial meniscus and excision of frayed edges of lateral meniscus; cartilage shaving of the medial femoral and tibial condyles and femoral surface of patellofemoral joint (chondroplasty); and synovectomy. (1/29/08 Trans. Pet. Ex. No. 3) Mr. Kolin again continued to treat with Dr. Chan, undergoing another course of physical therapy and another series of cortisone injections. (1/29/08 Trans. Pet. Ex. No. 2)

In January, 2007, Mr. Kolin sought a second opinion from Dr. Charles Bush-Joseph of Midwest Orthopaedics [*10] at Rush. (1/29/08 Trans. p. 15) Upon examination, Dr. Bush-Joseph concluded that Claimant had three options: 1) although he had lost significant meniscal function, the doctor did not think he was a candidate for meniscal transplantation; 2) an aggressive rehabilitation program may provide significant symptomatic relief; or 3) accept his current level of disability with some permanent restriction. (1/29/08 Trans. Pet. Ex. No. 4) The doctor also opined that major reconstruction surgery would not provide Mr. Kolin with sufficient relief that would allow him to return to a full duty labor position. (1/29/08 Trans. Pet. Ex. No. 4)

On February 5, 2007, Dr. Chan directed Claimant to begin another course of physical therapy. (1/29/08 Trans. p. 16; Pet. Ex. No. 3) Therapy continued over the next several weeks and ultimately an FCE was recommended. (1/29/08 Trans. Pet. Ex. No. 3) The FCE was performed at ATI on May 16, 2007. (1/29/08 Trans. p. 18) It was determined to he a valid test and placed Petitioner at the Light-Medium physical demand level; his capabilities fell below those required of a Laborer, which was categorized as Medium to Heavy. (1/29/08 Trans. Pet. Ex. No. 5) Work hardening [*11] was suggested. Upon reviewing the FCE, Dr. Chan "advised that another work hardening program would not benefit him since he already had three courses of physical therapy with one of the best therapists in the area." (1/29/08 Trans. Pet. Ex. No. 2) Mr. Kolin went back to see Dr. Chan on July 12: he reported that "he needs to go to work hardening per his workers' compensation"; the doctor relented and acquiesced in allowing Claimant to undergo work hardening. (1/29/08 Trans. Pet. Ex. No. 2)

The initial evaluation took place on July 25, 2007 at Accelerated Rehabilitation Center; he underwent nine work hardening sessions through August 8, 2007. (1/29/08 Trans. Pet. Ex. No. 6) That day, he returned to see Dr. Chan. The notes from that visit reflect that Mr. Kolin had been in work hardening for two weeks and his knee pain had increased; examination revealed swelling, painful range of motion, tenderness to palpation, and a "noticeable to significant" limp. (1/29/08 Trans. Pet. Ex. No. 2) Dr. Chan directed that he immediately cease the work hardening program; he authored a note stating "patient is to stay off the work hardening program because is hurting his knee more since he started two [*12] weeks ago." (1/29/08 Trans. Pet. Ex. No. 2)

Thereafter, Respondent sent Petitioner for a second Section 12 examination, this with Dr. Pietro Tonino of Loyola. (1/29/08 Trans. p. 21) The doctor concluded Mr. Kolin did not need any further medical treatment and should be discharged within restrictions on FCE and work hardening discharge summary, and also did not need a driving restriction. (1/29/08 Trans. Resp. Ex. No. 6) Dr. Tonino did note that Petitioner may need a total knee replacement in the future but was not a candidate now. (1/29/08 Trans. Resp. Ex. No. 6) When he spoke to Petitioner during the exam, however, the doctor agreed that a partial knee replacement would be beneficial. (1/29/08 Trans. p. 23)

On March 12, 2008, the Arbitrator issued his decision. Therein he found that "the accommodated job offer was inappropriate given Mr. Kolin's condition of ill-being and that his inability to drive more than one hour is related to the extensive damage he suffered in the injury of February 1, 2006." (3/12/08 Arb. Decision)

Subsequent to the § 19(b) decision, Mr. Kolin continued to follow up with Dr. Chan; throughout most of 2008, it was repeatedly documented that Claimant was a candidate [*13] for partial knee replacement. (4/20/10 Trans. Pet. Ex. No. 1) During this same period, Mr. Kolin began vocational rehabilitation activities with Tom Grzesik. (4/20/10 Trans. p. 9) Beginning in May of 2008, Petitioner was to meet with Mr. Grzesik every two weeks, as well as make at least 10 job contacts per week; in addition, Mr. Grzesik directed Petitioner to get his GED and CDL. (4/20/10 Trans. p. 17. 10-11) Mr. Grzesik set him up with a place to study for his GED, as well as giving him job leads, sending out his resume, and preparing him for interviews. (4/20/10 Trans. 30-31)

On the 2nd of December, Claimant returned to see Dr. Bush-Joseph. (4/20/10 Trans. p. 6) The doctor concluded that, per the patient's history and due to the fact that he is getting some benefit from wearing his knee unloading brace, it was very likely he would benefit from a partial knee replacement; Mr. Kolin was referred to the joint replacement team at Rush. (4/20/10 Trans. Pet. Ex. No. 2)

Claimant was evaluated by Dr. Scott Sporer at Rush on January 14, 2009. (4/20/10 Trans. p. 7) Examination revealed clinical varus deformity which is partially correctible and pain to palpation along medial joint line, and [*14] x-rays demonstrated moderate medial compartment degenerative arthritis with subchondral sclerosis and peripheral osteophyte formation. Dr. Sporer agreed that Mr. Kolin was a candidate for medial unicompartmental knee arthroplasty. (4/20/10 Trans. Pet. Ex. No. 3) Petitioner was cleared for surgery and underwent the recommended medial unicompartmental arthroplasty on February 10, 2009. (4/20/10 Trans. Pet. Ex. No. 4) As he was recovering from major surgery, his vocational rehabilitation efforts were necessarily suspended at that time. (4/20/10 Trans. p. 9)

Mr. Kolin followed-up post-operatively with Dr. Sporer and attended physical therapy at Community Hospital beginning in late March. (4/20/10 Trans. p. 8) Therapy continued over the next several weeks and at the May 27, 2009 follow-up appointment, Dr. Sporer directed Petitioner to do a home exercise program and ordered an FCE. (4/20/10 Trans. p. 20-21; Pet. Ex. No. 3) The recommended FCE took place on June 5, 2009; it was a valid test and it placed Mr. Kolin at the Light-Medium PDL. (4/20/10 Trans. Pet. Ex. No. 7)

Petitioner's vocational rehabilitation efforts resumed in the summer. Soon thereafter, Mr. William Fritts, a long-time [*15] friend of Mr. Kolin's who owns his own trucking company, offered to provide him with a truck driving job out of Melrose Park. (4/20/10 Trans. p. 11-12; Resp. Ex. No. 3) There were sonic prerequisites to Claimant getting this job: Dr. Sporer had limited him to driving automatic transmissions only, and he needed to obtain his CDL. (4/20/10 Trans. p. 14, 54) Mr. Fritts was to purchase an automatic transmission truck for Mr. Kolin once he passed his CDL test. (4/20/10 Trans. p. 54) Petitioner spent June and July practicing for the test. (4/20/10 Trans. p. 39) When Mr. Kolin got his CDL, Mr. Fritts contacted his insurance company in order to add him to his policy; however, because Mr. Kolin did not have two years of driving experience in the prior three years, Mr. Fritts was informed that his insurance company would not underwrite his coverage. (4/20/10 Trans. p. 55) Mr. Fritts tried several companies, but none would provide coverage. (4/20/10 Trans. p. 58)

When that possible job fell through, Claimant continued his efforts with Mr. Grzesik. He sends out 40 resumes per month, and Mr. Grzesik sends out the same number. (4/20/10 Trans. p. 22) He spends approximately 20 hours per week on job [*16] contacts, in addition to the time he dedicates to studying for his GED. (4/20/10 Trans. p. 42) Mr. Kolin took the GED and passed all but the math portion. (4/20/10 Trans. p. 11) He has not been able to obtain employment: "response has not been good. I guess because what I know for so many years I can't really do anymore, so I'm trying to go into different fields and it's not working well for me." (4/20/10 Trans. p. 22)

The evidence deposition of Tom Grzesik was entered into evidence as Petitioner's Exhibit Number 9. Mr. Grzesik is a certified rehabilitation counselor and licensed clinical professional counselor, working in that field for 30 years. (4/20/10 Trans. Pet. Ex. No. 9 p. 4) He first met with Mr. Kolin in June of 2008; he interviewed him, tested him, then interpreted those tests in formulating a vocational rehabilitation plan. (4/20/10 Trans. Pet. Ex. No. 9 p. 7-8) Mr. Grzesik determined that Petitioner had average learning potential with some significant academic deficiencies. (4/20/10 Trans. Pet. Ex. No. 9 p. 24) The plan for Claimant was to "get a GED, continue with a modified job placement which is, in fact, getting experience in how to interview, et cetera, and after [*17] the GED retest and look at the possibilities of alternative training regarding education." (4/20/10 Trans. Pet. Ex. No. 9 p. 22) The possible areas of alternative training were construction management, contingent on Petitioner's performance on reading and math testing subsequent to passing the GED. (4/20/10 Trans. Pet. Ex. No. 9 p. 22-23) With Mr. Kolin's reading difficulty, Mr. Grzesik anticipated that it would take longer for him to pass the GED; as such, he arranged for Claimant to get individualized tutoring from the GED instructors at Ivy Technical College. (4/20/10 Trans. Pet. Ex. No. 9 p. 39-40, 79)

Mr. Grzesik described Petitioner as "a very cooperative person" and stated he never had a problem with Mr. Kolin not being diligent in his efforts. (4/20/10 Trans. Pet. Ex. No. 9 p. 14, 19) The fact that Claimant was over 50 years old was a deficit. (4/20/10 Trans. Pet. Ex. No. 9 p. 13) The unemployment rate in Petitioner's geographic area is 9%, with shadow unemployment at 16 to 17%. (4/20/10 Trans. Pet. Ex. No. 9 p. 11-12) The employment picture has worsened since Mr. Kolin began his vocational rehabilitation efforts; Mr. Grzesik opined it was not likely that he would be able [*18] to find a job in the next six months. (4/20/10 Trans. Pet. Ex. No. 9 p. 20) With respect to pursuing truck driving positions, Mr. Grzesik testified that there is only one company in the area that has automatic transmission vehicles; that company, U.S. Express, only does over the road; which exceeds Petitioner's restrictions. (4/20/10 Trans. Pet. Ex. No. 9 p. 73) Smaller companies have automatic transmission trucks, but those require the driver to load and unload which also exceeds Mr. Kolin's restrictions. (4/20/10 Trans. Pet. Ex. No. 9 p. 74)

Daniel Minnich testified on behalf of Respondent. Mr. Minnich is president of Aegis Rehabilitation Services; he is a certified rehabilitation counselor and licensed clinical professional counselor. (4/20/10 Trans. p. 62-63) Mr. Minnich

was contacted by Respondent in September or October of 2009 to take over rehabilitation efforts but was refused permission to contact Petitioner. (4/20/10 Trans. p. 64) He formulated a vocational plan based on the medical records. (4/20/10 Trans. p. 66) At the outset, he opined that Mr. Kolin would benefit from a work conditioning program because the therapist had recommended that the on the FCE; he later acknowledged [*19] that Dr. Sporer did not send Petitioner for work conditioning, and Dr. Sporer would be more qualified than a therapist in determining what treatment Mr. Kolin required. (4/20/10 Trans. p. 66, 83)

Mr. Minnich was unaware of the unemployment rate and acknowledged that the job market in Northwest Indiana has gotten worse. (4/20/10 Trans. p. 84, 90-91) Mr. Minnich nonetheless concluded that Mr. Kolin is "employable." (4/20/10 Trans. p. 76) In fact, he opined that "older gentlemen do pretty well, very well, when they look for work that they have experience with doing." (4/20/10 Trans. p. 88) If he had been given this assignment, Mr. Minnich would have "just helped him a little more with the CDL process." (4/20/10 Trans. p. 74) Mr. Minnich testified that he could circumvent the experience issue with insurance by sending a driver who already had a CDL to truck driving school. (4/20/10 Trans. p. 69-70) Upon further questioning by the Arbitrator, Mr. Minnich admitted that he'd never actually tried this tactic before and therefore had no basis for his assumption that it would negate the insurance problem for prospective employers:

> Q. Now you've testified here that one of things that you [*20] might try to do differently is this truck driving school at South Suburban College?
>
> A. Sure.
>
> Q. From your experience are you telling me that by going through this school whether it's 6 weeks or 8 weeks or 12 weeks that prospective employers would then waive that 3 years or 2 years of experience after 6 or 8 weeks?
>
> A. Well, see that's - the truck driving school are alternatives for that requirement, because if I wanted to become a driver I would never have experience, but the driving schools they have license with the state they have minimum state requirements, and when they complete that the employers come in and actually recruit the drivers out of the school because it does eliminate that.
>
> Q. Eliminate the insurance problem with prospective employers?
>
> A. Exactly, yes, because if you go to the school you will see the recruiters on-site, who have no experience whatsoever.
>
> Q. Have you ever had any experience with not a new student, with an experienced driver that is out of the field for years and wants to get covered?
>
> A. That's why he might have to go back to school, if he had experience at a different job he wouldn't have to go back because of that requirement, because he's driving [*21] and he needs the experience.
>
> Q. But have you ever done of these with an experienced driver that has to go back?
>
> A. No, but I'm sure they would be better students. (4/20/10 Trans. p. 79)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**L. What temporary benefits are in dispute? Maintenance.**

Petitioner testified that he has been attending at the directive of the voc rehab specialist, Thomas Grzesik, training classes for the purpose of obtaining his GED. He testified in a credible fashion that he has continued to follow up on job leads, not only as directed by Mr. Grzesik, but also independently. There was a period when he had hoped to obtain a driving job with a friend of his who was going to accommodate him in such a fashion that he would buy him an automatic transmission vehicle so that he could perform the work necessary. This restriction was imposed by his treating physician, Dr. Sporer, because of his knee arthroplasty which was a result of his injury.

Mr. Grzesik testified by way of deposition in very credible fashion. He testified that the Petitioner has been very cooperative and that at the commencement of his activity in 2008 there was agreement by the Respondent that [*22] Mr. Grzesik was the appropriate candidate. The Commission in the past has found that the right to select a voc rehab specialist is akin to selecting a medical provider and that the Petitioner's choice is the appropriate one. Here, the Respondent attempts to challenge that finding of law by this Commission as also validated by the Appellate Court in the case of *Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500, 505 (2004).* In opposition to Mr. Grzesik's testimony as to the efforts made by not only himself, but his firm and the Petitioner himself, the Respondent presented the vocational rehabilitation person hired by them, Mr. Daniel Minnich.

The Arbitrator finds that Mr. Minnieh's testimony is less than credible inasmuch as he did not have any definitive approaches, rather his vocational rehabilitation plan is almost identical to that posited by Mr. Grzesik. For example it provides that the Petitioner should obtain a GED. At the time of this hearing, the Petitioner had passed all of the relevant tests except for mathematics and he is currently undergoing tutoring at the same facility, Ivy College, as suggested [*23] by Mr. Minnich.

Furthermore, Mr. Minnich's plan provides that the Petitioner obtain a CDL license; Petitioner testified that he is now in possession of a valid Indiana CDL license.

The difficulty in Petitioner obtaining a driving position with his friend or in any other guise, is the fact that insurance will not be available for someone of Mr. Kolin's experience. That is, the insurance company, as testified to by Mr. Fritts, Respondent's witness, Mr. Kolin's friend, that he had received information from his broker that Mr. Kolin was uninsurable unless he had two to three years of driving experience in order to be considered for underwriting purposes. Respondent in fact, had the witness identify an exhibit that disclosed this information from the broker. (Resp: Ex. No. 4)

The Arbitrator finds that the Petitioner is entitled to maintenance on an ongoing basis as he is participating in an appropriate vocational rehabilitation program as outlined by Mr. Grzesik in his testimony as well as the prior reports of Mr. Grzesik as noted. Mr. Minnich's testimony does not in any way affect this Arbitrator's conclusion that Mr. Grzesik is well qualified to provide the appropriate services as provided [*24] by law. Therefore, the Arbitrator finds that Petitioner is entitled to ongoing payment of maintenance and should continue under the aegis of Mr. Grzesik's firm.

**O. With regard to the issue of vocational rehabilitation:**

The Arbitrator finds that the more credible position is that of Mr. Grzesik and finds that his plan is appropriate. The Respondent attempts to collaterally attack a finding by the Commission that has been in existence since 1997; which is that the Petitioner has the right to select a vocational rehabilitation specialist.. The right to choose medical providers is sacrosanct in Illinois law and it appears by the Commission's decisions as well settled authority in the case of Roper that the law is now applicable to vocational rehabilitation specialists. Respondent further asserts that the progress made by Petitioner's vocational rehabilitation specialist proceeds too slowly. This is akin to an attack on a treating physician that the Respondent would deem to be too slow or too dilatory in treating a Petitioner for his physical injuries Though this defense may be available, it is not applicable to the instant case. Petitioner has made progress though hindered by the [*25] severity of his injury and the terrible economy and job market. Further, what is interesting is the fact that the Respondent had paid a majority of Mr. Grzesik's charges without quarrel until they unilaterally decided that they were going to suspend payments for these efforts and challenge the efficacy of this program. The Arbitrator finds that this matter had been resolved previously, that in a prior decision the Arbitrator found that Petitioner was entitled to vocational rehabilitation. Therefore, the Arbitrator awards the Petitioner the sum of $ 9,078.54 as and for vocational rehabilitation expenses due and owing to Mr. Grzesik for his services on behalf of this Petitioner.

The Arbitrator finds that the Petitioner is entitled to maintenance on an ongoing basis as he is participating in an appropriate vocational rehabilitation program as outlined by Mr. Grzesik in his testimony as well as the prior reports of Mr. Grzesik as noted. Mr. Minnich's testimony does not in any way affect this Arbitrator's conclusion that Mr. Grzesik is well qualified to provide the appropriate services as provided by law. Therefore, the Arbitrator finds that Petitioner is entitled to ongoing payment of [*26] maintenance and should continue under the aegis of Mr. Grzesik's firm.

**DISSENTBY:** NANCY LINDSAY

**DISSENT:** The issue in dispute at the time of the second 19(b) hearing was vocational rehabilitation. As the Majority notes, the Arbitrator incorrectly stated in his Decision that Petitioner had been found entitled to vocational rehabilitation in an earlier decision. There has never been such a finding. Thus, it seems that the purpose behind the second 19(b)

proceeding was to determine the appropriateness of vocational rehabilitation and, if so, what the plan would entail. Since the Arbitrator proceeded under the mistaken belief that vocational rehabilitation had already been ordered, I would remand the case back to him for a determination as to whether vocational rehabilitation is necessary and, if so, what would constitute an appropriate plan of vocational rehabilitation.

In addition, any vocational plan should be based upon Petitioner's true physical capabilities. Petitioner underwent right knee surgery on February 10, 2009 and he was discharged from physical therapy on May 19, 2009. Less than three weeks later, he underwent a functional capacities evaluation (FCE) which found him to be capable of light to [*27] medium physical demands. However, the FCE evaluator concluded his report with the following statement:

> If a return to work is not considered feasible at this point, I feel [Petitioner] would benefit from a full 4-6 week course of work conditioning/work hardening to improve functional capabilities such as lifting, carrying, and overall muscular endurance - with the goal of improving his return-to-work options.
>
> (PX 17)

Video surveillance of Petitioner was conducted over a period of time from December 7, 2009 through January 5, 2010. Among the activities portrayed on the video are Petitioner's workouts at a health club which include lifting weights and stair climbing. The only physician who has examined Petitioner since the June 5, 2009, FCE is Dr. Tonino. He also reviewed the surveillance videos and opined that Petitioner did not need impact loading or running restrictions, could drive a manual transmission vehicle (including a truck), and would benefit from an updated FCE to better determine specific lifting restrictions. Respondent requested the FCE but Petitioner declined to attend. While the Majority finds Petitioner's activities at the health club consistent with the recommendation [*28] of the FCE evaluator it has overlooked the point behind the recommendation - ie., Petitioner's abilities might improve and, with it, his return-to-work options.

Since the issue of vocational rehabilitation hasn't been formally determined at this stage of the proceedings and there seems to be a difference of opinion between the parties as to what Petitioner's true functional capabilities are and, in turn, what would constitute appropriate rehabilitation, now is an excellent time to address all of those issues. The record suggests that Petitioner can do more than the initial FCE suggests and Dr. Tonino (whose opinions are not challenged) has, at a minimum, suggested certain restrictions are no longer necessary. For effective vocational rehabilitation to occur in this case, Petitioner's current physical abilities need to be known, an additional FCE needs to be undertaken per the recommendation of Dr. Tonino and the FCE evaluator, and a vocational plan needs to be formulated based upon current information. Vocational rehabilitation requires cooperation between the parties and flexibility in the plan. Even the Commission's applicable vocational rehabilitation rules anticipate the need [*29] for modification and change as efforts progress. Both parties herein have expressed valid concerns about vocational rehabilitation in this case. By remanding the matter back for formulation of a plan, those concerns can be voiced, addressed, and, hopefully, a worthwhile plan reflective of Petitioner's true impairment as a result of the accident may be created and implemented.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

2012 IL App (1st) 113129WC

Workers' Compensation
Commission Division
Filed: November 5, 2012

No. 1-11-3129WC

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

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| W. B. OLSON, INC., | ) | Appeal from the Circuit |
| | ) | Court of Cook County |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 11 L 50222 |
| | ) | |
| ILLINOIS WORKERS' COMPENSATION | ) | |
| COMMISSION, *et al*., (CRAIG KOLIN, | ) | Honorable |
| | ) | Margaret Brennan, |
| Appellee). | ) | Judge Presiding. |

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JUSTICE HOFFMAN delivered the judgment of the court, with opinion.

Justices Hudson, Holdridge, Turner, and Stewart concurred in the judgment and the opinion.

**OPINION**

¶ 1 W. B. Olson, Inc. (Olson) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Craig Kolin, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)) for injuries to his right knee that he received while in Olson's employ. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 2 The following factual recitation is taken from the record, including the evidence adduced at the various arbitration hearings conducted in reference to the claimant's application for adjustment

of claim.

¶ 3 The 56-year-old claimant is a long-time union laborer residing in Highland, Indiana. Prior to his employment as a laborer, the claimant had worked as a truck driver, but he had not maintained his commercial driver's license (CDL). On February 1, 2006, the claimant was working as a construction laborer for Olson. He was cleaning up a job site inside a building, gathering debris in a wheelbarrow and hauling it to a dumpster outside. In performing this task, the claimant was using a ramp that had been constructed of a plank that was 12 feet long and 2 feet wide. As he was moving down the plank, the wheelbarrow started to tip. When the claimant tried to pull the wheelbarrow back, he stuck his leg out and felt a "pop," before falling to the ground.

¶ 4 After the accident, the claimant began an extensive course of medical treatment. Dr. Paulino Chan performed two successive right-knee arthroscopy procedures on February 15, 2006, and May 22, 2006. After each of these procedures, the claimant was followed by Dr. Chan, attended post-operative physical therapy, and received cortisone injections.

¶ 5 During September 2006, the claimant continued to treat with Dr. Chan, who recommended use of a brace to help alleviate the claimant's ongoing pain. The claimant also was examined by Dr. Mark Levin, Olson's section 12 examiner. Dr. Levin suggested a functional capacity examination (FCE) and possible work hardening.

¶ 6 In October 2006, Olson offered the claimant light-duty employment performing an accounts payable position in its offices in Northbrook, Illinois. The claimant drove from his home in Highland, Indiana, which took approximately two hours. After several days, the claimant returned to Dr. Chan and reported that the had experienced knee and hip pain while driving. Dr. Chan

restricted the claimant to one hour of driving per day and prescribed the use of a Donjoy brace. Thereafter, Dr. Chan restricted the claimant from performing any work that involved heavy lifting and the use of stairs or ladders.

¶ 7 In January 2007, the claimant sought a second opinion from Dr. Charles Bush-Joseph. Upon examination, Dr. Bush-Joseph advised that he did not think the claimant was a candidate for meniscal transplantation. He further advised that the claimant could accept his current level of disability with some permanent restriction, or he could engage in an aggressive rehabilitation program, which may provide significant symptomatic relief. In addition, Dr. Bush-Joseph opined that major reconstruction surgery would not provide the claimant with sufficient relief to allow him to return to full duty as a construction laborer.

¶ 8 On February 5, 2007, Dr. Chan directed the claimant to begin his third course of physical therapy, after which an FCE was performed on May 16, 2007. The results of the FCE indicated that the claimant was capable of performing work at the light-to-medium level of physical demand, which fell below that required of a construction laborer, and work hardening was suggested. Upon reviewing the FCE results, Dr. Chan advised that another work-hardening program would not be beneficial because the claimant already had participated in three courses of physical therapy "with one of the best [physical] therapists in the area." When the claimant returned to Dr. Chan on July 12, 2007, he reported that Olson's workers' compensation insurance carrier required him to engage in work hardening. Dr. Chan acquiesced and allowed the claimant to undergo work hardening.

¶ 9 The claimant underwent nine work-hardening sessions during the 14-day period between July 25 and August 8, 2007. On August 8, the claimant returned to Dr. Chan, who noted that the claimant

had increased knee pain, swelling, painful range of motion, tenderness to palpation, and a "noticeable to significant" limp. Dr. Chan directed the claimant to cease the work-hardening program immediately, and he authored a note to that effect.

¶ 10 Thereafter, the claimant was examined by Dr. Pietro Tonino, at the request of Olson. Dr. Tonino concluded that the arthroscopic findings were sufficient to be responsible for the claimant's clinical condition, which is related to his employment accident. Dr. Tonino opined that the claimant did not require any further medical treatment and that he should be discharged from medical care within the restriction specified in the FCE report and the work-hardening discharge summary. Dr. Tonino also opined that the claimant did not require any driving restriction. Dr. Tonino noted that the claimant may require a total knee replacement in the future, but he currently was not a candidate for such a procedure. According to the claimant, Dr. Tonino told him during the examination that a partial knee replacement would be beneficial.

¶ 11 The claimant subsequently returned to Dr. Chan, who disagreed with Dr. Tonino's conclusions. Dr. Chan ordered the continued use of the Donjoy brace maintained the claimant's work restrictions, including the limitation of driving no more than one hour per day.

¶ 12 In December 2007, Olson again offered the claimant light-duty employment in the Northbrook office. Although the required amount of driving exceeded the limitation imposed by Dr. Chan, the claimant was directed to attempt the commute. The claimant reported for work in Northbrook on five days, and his trip averaged two hours each way. When he returned to Dr. Chan, he reported that he was experiencing pain in his right knee and hip. Dr. Chan advised him to avoid prolonged driving to work and administered another cortisone injection.

¶ 13 An arbitration hearing was held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)) on January 29, 2008. In a decision issued on March 12, 2008, the arbitrator found that the claimant sustained an accidental injury that was causally connected to his employment and awarded the claimant TTD benefits for 104 weeks, but denied his request for penalties and fees. Neither party appealed the arbitrator's decision.

¶ 14 Thereafter, the claimant continued treating with Dr. Chan, who repeatedly noted that the claimant was a candidate for partial knee replacement. The claimant also undertook vocational rehabilitation with Thomas Grzesik. Beginning in May 2008, the claimant was to meet with Grzesik every two weeks, in addition to making at least 10 job contacts per week. Grzesik also directed that the claimant obtain his GED certificate and CDL. In preparation for the GED examination, Grzesik arranged for the claimant to participate in Ivy Technical College's Adult Learning Program. Grzesik also provided the claimant with leads for job opportunities, assisted in preparing him for interviews, and sent resumes to potential employers on the claimant's behalf.

¶ 15 On December 2, 2008, the claimant returned to see Dr. Bush-Joseph, who concluded that the claimant would benefit from a partial knee replacement. Consequently, he referred the claimant to the joint-replacement team at Rush hospital.

¶ 16 The claimant was evaluated by Dr. Scott Sporer on January 14, 2009. Dr. Sporer agreed that the claimant was a candidate for knee arthroplasty, and the procedure was performed on February 10, 2009. Following the surgery, the claimant continued to treat with Dr. Sporer and attended post-operative physical therapy beginning in late March. During his recovery from the knee arthroplasty, the claimant suspended his vocational-rehabilitation efforts with Grzesik.

¶ 17 On May 27, 2009, Dr. Sporer ordered an FCE and directed the claimant to begin a home-exercise program. The FCE was performed on June 5, 2009, and the results of that examination indicated that the claimant was capable of performing work at the light-to-medium level of physical demand. The therapist found that the claimant was able to lift up to 20 pounds frequently and 35 pounds occasionally. In addition, she found him able to sit for six hours, in 60-minute increments; stand for three to four hours, in 30-minute increments; and walk frequent, moderate distances for five to six hours. The therapist who administered the FCE indicated that she believed the claimant could benefit from work conditioning. After the FCE, Dr. Sporer authored a work-status slip stating that the claimant was capable of driving an automatic tractor-trailer.

¶ 18 The claimant resumed his vocational rehabilitation efforts in the summer of 2009, and he was offered a truck-driving position by William Fritts, a long-time friend of the claimant's who owns a trucking company. However, before the claimant could accept this job, he was required to obtain his CDL and arrange to drive only vehicles with automatic transmissions, due to the restriction imposed by Dr. Sporer. Fritts agreed to purchase a truck with an automatic transmission after the claimant passed his CDL examination. The claimant spent June and July 2009 preparing for that test. On several of those days, the claimant went to Fritts' business in Melrose Park, Illinois, and practiced driving. Fritts subsequently contacted his insurance carrier in order to add the claimant to his policy. However, Fritts' insurer refused to cover the claimant because he did not have two years of driving experience within the prior three-year period. Fritts then contacted several other insurance companies, but was unable to obtain the necessary coverage. The claimant ultimately obtained his CDL in October 2009.

¶ 19 After the truck-driving job with Fritts fell through, the claimant continued his vocational-rehabilitation efforts with Grzesik. The claimant sent out 40 resumes per month, and Grzesik sent out the same number. The claimant also spent approximately 20 hours per week pursuing job contacts, in addition to the time he dedicated to studying for his GED. The claimant took the GED test and passed all but the math portion.

¶ 20 On February 8, 2010, the claimant was again examined by Dr. Tonino, at Olson's request. During that examination, the claimant reported "minimal knee discomfort," and Dr. Tonino found some restriction in the right-knee flexion, but no tenderness and no effusion. Dr. Tonino concluded that the claimant had reached maximum medical improvement (MMI). In addition, Dr. Tonino determined that the claimant had no limitations on his ability to drive, including his ability to drive a manual-transmission tractor-trailer truck. Dr. Tonino acknowledged the restrictions previously imposed by Dr. Sporer, but he recommended an FCE, based on his belief that it is "probably a more reliable objective indication" of the claimant's capability.

¶ 21 The matter subsequently proceeded to a second section 19(b) hearing, which was conducted on April 20, 2010. The claimant testified that he had not been able to find employment. He stated that "response has not been good. I guess because what I [have known] for so many years I can't really do anymore, so I'm trying to go into different fields and it's not working well for me."

¶ 22 Thomas Grzesik testified at his evidence deposition that he is a certified rehabilitation counselor and licensed clinical professional counselor and that he has worked in that field for 30 years. He first met with the claimant in June of 2008. At that time, he interviewed the claimant, tested him, and then interpreted those test results in formulating a vocational rehabilitation plan.

Grzesik determined that the claimant had an average learning potential with some significant academic deficiencies. He devised a plan for the claimant, which consisted of his obtaining his GED certificate and continuing with a modified job-placement program. As part of that program, the claimant would gain experience in how to interview and consider possibilities of alternative training regarding his education. The potential areas of alternative training consisted of construction management, depending on the claimant's performance on reading and math testing after having passed the GED. Grzesik stated that he anticipated it would take the claimant longer than usual to pass the GED, due to his difficulty in reading. As a result, Grzesik arranged for the claimant to receive individualized tutoring from the GED instructors at Ivy Technical College.

¶ 23 Grzesik described the claimant as being "very cooperative," and he stated that he never had an occasion to admonish him for not being diligent in his rehabilitation efforts. According to Grzesik, the fact that the claimant was over 50 years old was an obstacle in his attempt to obtain employment. Grzesik explained that the unemployment rate in the claimant's geographic area is 9%, with "shadow unemployment" between 16% and 17%. In addition, the unemployment situation had worsened since the claimant began his vocational rehabilitation efforts. Grzesik opined that it was not likely that the claimant would find employment in the next six months. He also stated that the possibility of the claimant's being hired as a truck driver was "remote," given his work restrictions and the physical limitations noted in the June 2009 FCE. Grzesik testified that he knows of only one company in the area that has automatic transmission vehicles. That company is U.S. Express, but it only hires drivers to do long-distance "over-the-road" trips, which exceed the claimant's driving restrictions. Grzesik also explained that, although some smaller companies have automatic-

transmission trucks, those companies require the driver to load and unload, which also exceeds the claimant's employment restrictions.

¶ 24 Olson presented the testimony of Daniel Minnich, who stated that he is a certified rehabilitation counselor and licensed clinical professional counselor. Minnich further stated that he was contacted by Olson in September or October 2009 to take over the claimant's rehabilitation program, but the claimant's attorney refused to allow him to contact the claimant. Consequently, he formulated a vocational rehabilitation plan based on the claimant's medical records and Grzesik's reports. Minnich testified that the claimant would benefit from a work-conditioning plan. This conclusion was premised on the fact that the physical therapist had recommended work conditioning after the FCE performed on June 5, 2009. Yet, Minnich acknowledged that Dr. Sporer had not directed the claimant to engage in work conditioning, and he also admitted that Dr. Sporer was more qualified than a physical therapist to determine what treatment the claimant required.

¶ 25 Minnich stated that, based on the claimant's slow progress in obtaining his GED, he would have sought additional resources for training or a personal tutor or a school that has expanded hours for tutoring. Minnich testified that he was unaware of the unemployment rate for the claimant's geographic area, but he acknowledged that the job market in Northwest Indiana had gotten worse. Despite this fact, Minnich expressed his belief that the claimant was "employable," and he stated that "older gentlemen do pretty well, very well, when they look for work that they have experience doing." Minnich stated that his recent "success rate" in helping clients find employment was above 90%.

¶ 26 Minnich also testified that, if he had been assigned to assist the claimant in his vocational-

rehabilitation efforts, he would have "just helped him a little more with the CDL process. According to Minnich, the insurance-coverage obstacle, based on the claimant's lack of recent driving experience, could be overcome by having the claimant enroll in a truck-driving school. Minnich stated that the insurance problem would be eliminated because employers recruit directly through the schools which meet the minimum state requirements. Upon questioning by the arbitrator, Minnich admitted that he had never actually tried this strategy with an experienced driver who already had obtained his CDL, but he stated that he was "sure they would be better students."

¶ 27 Following the second section 19(b) hearing conducted on April 20, 2010, the arbitrator issued a decision finding that the claimant is entitled to 116 weeks of maintenance benefits (from January 30, 2008, though April 20, 2010) because he was participating in an appropriate vocational-rehabilitation program, as outlined by Grzesik. In reaching this conclusion, the arbitrator found that both the claimant and Grzesik testified credibly regarding the claimant's vocational-rehabilitation efforts. However, the arbitrator found that the testimony of Minnich was less than credible because "he did not have any definitive approaches" and because his plan is "almost identical" to that of Grzesik. In particular, the arbitrator noted that Minnich recommended that the claimant obtain a GED, which is a primary aspect of Grzesik's plan. The arbitrator also observed that, as of the date of the hearing, the claimant had passed all of the relevant tests, except for mathematics, and was undergoing tutoring at Ivy Technical College, the same school suggested by Minnich. The arbitrator further observed that Minnich's plan includes a recommendation to obtain a CDL, which the claimant had already accomplished. Moreover, the arbitrator noted the difficulty in the claimant's obtaining a truck-driving position due to the insurance-coverage impediment. In addition, the arbitrator

determined that Olson was required to pay $9,078.54 for the vocational rehabilitation services previously provided to the claimant by Grzesik. The arbitrator specifically rejected Olson's assertion that the claimant's vocational-rehabilitation efforts under Grzesik's plan were proceeding too slowly, and he noted that the claimant had made progress but was hindered by the severity of his injury and the "terrible economy and job market."

¶ 28 Olson sought review before the Commission of the arbitrator's decision following the second section 19(b) hearing. On review, the Commission, with one commissioner dissenting, corrected and clarified certain misstatements in the arbitrator's decision, but affirmed and adopted the arbitrator's decision in all other respects. In so doing, the Commission found that the claimant was a credible witness and that Minnich was "less than credible." The Commission observed that Minnich's plan "was in some respects a rehash of Grzesik's plan" and that the insurance-coverage impediment had been resolved, "so as to permit [the claimant] to begin driving a semi." The Commission determined, therefore, that it was unnecessary and inappropriate to order either a repeat FCE or formal vocational rehabilitation. Accordingly, the Commission affirmed and adopted the awards of maintenance and vocational rehabilitation benefits for the services previously rendered and remanded the cause for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 29 Olson sought judicial review of the Commission's decision in the circuit court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 30 On appeal, Olson initially argues that the Commission's finding as to the appropriateness of the claimant's vocational-rehabilitation plan is against the manifest weight of the evidence. We do

not agree.

¶ 31 The determination of whether a claimant is entitled to an award of vocational-rehabilitation benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. See *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 426, 454 N.E.2d 672 (1983); see also *Vestal v. Industrial Comm'n*, 84 Ill. 2d 469, 473-74, 419 N.E.2d 897 (1981). In resolving such a question, it is the function of the Commission to judge the credibility of the witnesses, resolve any conflicts in the testimony, and draw reasonable inferences from the evidence presented. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 207, 797 N.E.2d 665 (2003); *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). For a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006). Where the Commission's decision is supported by competent evidence, its finding is not against the manifest weight of the evidence. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1992); *University of Illinois*, 365 Ill. App. 3d at 911-12.

¶ 32 Awards for vocational rehabilitation are granted pursuant to section 8(a) of the Act, which provides, in pertinent part, that an employer shall compensate an injured employee "for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee * * *." 820 ILCS 305/8(a) (West 2010). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. 820 ILCS 305/8(a) (West 2010). Yet, section 8(a) is flexible and does not limit rehabilitation to formal training. See *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500,

506, 812 N.E.2d 65 (2004) (citing *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265 (1988)).

¶ 33 Here, Olson concedes that the claimant could not return to his previous employment and that some form of vocational rehabilitation was necessary. Olson also acknowledges that resolution of this issue depends upon the consideration of the opinions of Grzesik and Minnich. In challenging the award of vocational-rehabilitation benefits based on the plan devised and implemented by Grzesik, Olson contends that the Commission erred in its assessment of the evidence, the credibility of the witnesses, and the weight to be accorded their testimony. Thus, Olson essentially is asking us to reweigh the evidence that was presented at the hearing. However, as noted above, it was within the province of the Commission to judge the credibility of the witnesses, resolve conflicting testimony, and draw reasonable inferences from the evidence presented. See *Sisbro Inc.*, 207 Ill. 2d at 207; *O'Dette*, 79 Ill. 2d at 253.

¶ 34 In this case, the Commission affirmed and adopted the arbitrator's determination that the vocational-rehabilitation plan directed by Grzesik was appropriate. This conclusion was predicated on the finding that the claimant and Grzesik presented credible testimony as to the claimant's vocational-rehabilitation efforts. The Commission also agreed with the arbitrator that Minnich's testimony was "less than credible" and that his vocational-rehabilitation plan was not substantively different from that devised and implemented by Grzesik. Both plans included a recommendation that the claimant obtain a GED, and, as of the date of the arbitration hearing, the claimant had passed all but the math portion of the test. The claimant also was receiving tutoring services at Ivy Technical College, the same school suggested by Minnich. In addition, Minnich's plan included a

recommendation to obtain a CDL, which the claimant had previously accomplished.

¶ 35 Olson claims that the plan proposed by Minnich should have been approved because it was more focused and promised a more expedient return to the work force. Yet, the record demonstrates that, although Minnich asserted that the claimant could overcome the insurance-coverage obstacle by enrolling in a truck-driving school, he also admitted that he had never tested this strategy with an experienced driver who already had his CDL. In addition, Minnich offered vague and ill-defined suggestions, such as the proposition that he would have "just helped [the claimant] a little more with the CDL process." Moreover, we observe that Minnich testified as to his opinion that the claimant was "employable," explaining that "older gentlemen do pretty well, very well, when they look for work that they have experience doing." The record establishes, however, that the claimant cannot return to the type of employment in which he has experience: he cannot continue as a construction laborer, he would have difficulty working as a painter because he cannot climb ladders, and his weight-lifting and driving restrictions hamper his ability to apply for many truck-driving positions. Contrary to Olson's argument, we do not believe the record supports the assertion that Minnich's plan is "manifestly superior" to that of Grzesik.

¶ 36 Lastly, we note that Olson criticizes the Commission for citing statements made at oral argument. We find, however, that there is sufficient evidence to support the Commission's decision, without regard to the challenged statements.

¶ 37 Based on the record presented, we cannot conclude that the Commission's finding that Grzesik's vocational-rehabilitation plan is appropriate is against the manifest weight of the evidence. In light of our resolution of this issue, we need not address the claimant's argument that, as a matter

of law, section 8(a) of the Act confers upon claimants the right to select their vocational-rehabilitation provider and precludes employers from dictating that choice.

¶ 38 Olson also contends that the Commission's award of maintenance benefits is against the manifest weight of the evidence. This argument too is unpersuasive.

¶ 39 Section 8(a) of the Act permits an award of maintenance benefits while a claimant is engaged in a prescribed vocational-rehabilitation program. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019, 832 N.E.2d 331 (2005); *Connell*, 170 Ill. App. 3d at 55. As with a vocational-rehabilitation award, the determination of whether a claimant is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. See *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1074, 820 N.E.2d 570 (2004). Thus, the Commission's decision will not be reversed on review unless an opposite conclusion is clearly apparent. *University of Illinois*, 365 Ill. App. 3d at 910. Where the Commission's decision is supported by competent evidence, its finding is not against the manifest weight of the evidence. *Benson*, 91 Ill. 2d at 450; *University of Illinois*, 365 Ill. App. 3d at 911-12.

¶ 40 In disputing the Commission's award of maintenance benefits for June, July, and August 2009, Olson asserts that the claimant was not pursuing any of the recommendations in Grzesik's rehabilitation plan, nor was he diligently engaged in his own self-directed plan to obtain a truck-driving position. Again, Olson seeks to have us reweigh the evidence and disregard the inferences drawn by the Commission.

¶ 41 The claimant testified that he resumed his vocational rehabilitation efforts in the summer of

2009, when Fritts offered him a truck-driving position. The claimant further testified that he spent spent June and July 2009 preparing to obtain his CDL and that, on several days, he went to Fritts' business to practice driving. Based on this testimony, the arbitrator and the Commission apparently drew the inference that the claimant was engaged in a self-directed plan to obtain a truck-driving position and that his efforts were sufficiently diligent to warrant granting him maintenance during the disputed months. Considering the evidence presented, we must decline invade the province of the Commission, whose function it is to judge the credibility of the witnesses, resolve conflicting testimony, and draw reasonable inferences from the evidence presented. See *Sisbro Inc.*, 207 Ill. 2d at 207; *O'Dette*, 79 Ill. 2d at 253. Consequently, we cannot say that the Commission's award of maintenance benefits is against the manifest weight of the evidence.

¶ 42 Olson next argues that the Commission erred in requiring it to pay for the services rendered by Grzesik. In support of this argument, Olson asserts that such an award is contrary to the law and against the manifest weight of the evidence, where the Commission found "it unnecessary and inappropriate to order *** formal vocational rehabilitation." However, as the claimant correctly points out, the Commission affirmed and adopted the arbitrator's award of $9,078.54 for the vocational rehabilitation services previously provided to the claimant by Grzesik. The fact that the Commission also determined that future vocational rehabilitation services were not necessary does not negate the legal or factual basis for the award of payment for reasonable and necessary services previously rendered. We note that Olson apparently has conceded this point because it did not refute the claimant's argument in its reply brief. Based on these circumstances, we find no reversible error in the Commission's finding that Olson was liable for the payment of the fees due and owing

Grzesik.

¶ 43 Olson also challenges the Commission's refusal to order that the claimant submit to an FCE, as recommended by Dr. Tonino. In response, the claimant argues that this issue presents a question of statutory construction and that the Act does not provide any authority enabling the Commission to require the claimant to submit to an FCE. We must agree.

¶ 44 Statutory construction is a question of law, which is reviewed *de novo*. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 12, 678 N.E.2d 1009 (1996). The primary rule of statutory construction requires that effect must be given to the intent of the legislature. *Advincula*, 176 Ill. 2d at 16. In determining legislative intent, we first look to the statutory language. *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189, 561 N.E.2d 656 (1990). Where the language of the statute is clear, we will give it effect as written. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 473-74, 837 N.E.2d 1 (2005). In interpreting a statute, we give undefined terms their ordinary meaning. *Comprehensive Community Solutions, Inc.*, 216 Ill. 2d at 473; see also *Bowes v. City of Chicago*, 3 Ill. 2d 175, 201, 120 N.E.2d 15 (1954) (recognizing that a dictionary may be used as a resource to determine the ordinary and commonly accepted meaning of words).

¶ 45 As the claimant correctly points out, section 12 of the Act is the only statutory provision permitting an employer to require a claimant to submit to any type of medical evaluation. See 820 ILCS 305/12 (West 2010). That section provides, in relevant part, that "[a]n employee *** shall be required, if requested by the employer, to submit himself *** for examination to a duly qualified medical practitioner or surgeon selected by the employer ***." 820 ILCS 305/12 (West 2010). Thus, the language of section 12 expressly limits the right of an employer to demand an examination

by a "medical practitioner or surgeon." A medical "practitioner" is "one who has complied with the requirements and who is engaged in the practice of medicine." Dorland's Illustrated Medical Dictionary 1248 (25th ed. 1974). A "physical therapist" is "person skilled in the techniques of physical therapy and qualified to administer treatments prescribed by a physician and under his supervision." Dorland's Illustrated Medical Dictionary 1597 (25th ed. 1974). Clearly, a physical therapist does not fall within the meaning of a "medical practitioner" as specified in section 12.

¶ 46 Also, section 19(c) of the Act grants the Commission the authority to order "an impartial physical or mental examination of a petitioner whose mental or physical condition is in issue." See 820 ILCS 305/19(c) (West 2010). Yet, that authority is similarly limited to examinations by "a member or members of a panel of physicians." See 820 ILCS 305/19(c) (West 2010).

¶ 47 Thus, neither section 12 nor section 19(c) of the Act provides statutory authority for the assertion that either an employer or the Commission may require a claimant to submit to an evaluation by a physical therapist. Accordingly, we reject Olson's contention that the Commission erred in refusing to order the claimant to submit to the FCE recommended by Dr. Tonino.

¶ 48 Finally, we reject Olson's suggestion that the preceding statutory-construction analysis results in a deprivation of the constitutional right to due process because it denies employers a meaningful hearing and a "level playing field" on which to defend claims.

¶ 49 The due process clauses of the Illinois and United States constitutions prohibit only an arbitrary, unreasonable and improper use of the State's police power. *City of Decatur v. Chasteen*, 19 Ill. 2d 204, 210, 166 N.E.2d 29 (1960). When it is determined that an evil exists which affects the public health, safety, morals or general welfare and the legislative means used to counter that evil

is reasonable, the exercise of the State's police power is proper and there is no want of due process despite interference with individual property and contract rights. *Chicago Real Estate Board v. City of Chicago*, 36 Ill. 2d 530, 541-42, 224 N.E.2d 793 (1967). In applying this standard, courts generally seek to ascertain whether the means selected are reasonably necessary for the accomplishment of the purposes of the statute and not unduly oppressive upon individuals. *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary District*, 52 Ill. 2d 320, 327, 288 N.E.2d 436 (1972). Due process includes the right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence that is offered. *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, ¶ 16 (citing *Bartlow v. Shannon*, 399 Ill. App. 3d 560, 927 N.E.2d 88 (2010).

¶ 50 Here, the fundamental purpose of the Act is to afford protection to employees by providing them with prompt and equitable compensation for their injuries (*McNamee v. Federated Equipment and Supply Co.*, 181 Ill. 2d 415, 421, 692 N.E.2d 1157 (1998)), which includes the employee's right to seek treatment from the doctor of his or her choice (820 ILCS 305/8(a) (2008)). The requirement that a claimant submit to an examination by a doctor chosen by his or her employer, under section 12 of the Act, clearly is designed to provide the employer with a meaningful hearing and a "level playing field." A doctor who performs such an examination is free to contradict or challenge the test results and opinions presented by the claimant's medical professionals. Yet, nothing in section 12 indicates that an employer's doctor is vested with the authority to order that the claimant submit to a further FCE. We conclude that the statutory scheme set forth above is reasonably necessary for the accomplishment of the fundamental purpose of the Act and does not constitute a violation of

Olson's right to due process merely because a section-12 examiner lacks authority to require additional FCE testing.

¶ 51 Based upon the foregoing reasons, we affirm the judgment of the circuit court which confirmed the Commission's decision, and we remand the matter back to the Commission for further proceedings.

¶ 52 Affirmed and remanded.