STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Williams,

Petitioner,

vs.

NO: 11WC 46390
14IWCC0576

Flexible Staffing, Inc.,

Respondent,

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County with instructions "to the Commission for clarification of which facts/evidence support its conclusion." The Arbitrator's decision, dated November 20, 2012, awarded Petitioner 75.9 weeks of permanent partial disability for the 30% loss of use of his right arm. On May 29, 2013, the Commission reduced the award to 25% loss of use of the right arm. On remand, the Commission makes the following clarifications to support its conclusion, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator.

We understand Respondent's argument that Dr. Levin's A.M.A. impairment rating of 6% of the upper extremity was not given enough weight by the Arbitrator. However, we do not agree with the great weight that Respondent wants placed on this rating because to do so would be to disregard the other factors and give them no weight at all. Section 8.1b of the Act requires the consideration of five factors in determining permanent partial disability:

1) Reported level of impairment;
2) Occupation;
3) Age at time of injury;
4) Future earning capacity;
5) Evidence of disability corroborated by treating medical records.

Section 8.1b also states, "No single 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." We initially note that the term "impairment" in relation to the A.M.A. rating is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

Regarding the second factor, we find that Petitioner was employed in a physically demanding occupation. His unrebutted testimony was that he was a welder/fabricator and that he considered it a "physically demanding job." (T.8). We find that Petitioner's upper extremity impairment is more significant for a person with Petitioner's heavier job duties than someone with a lighter-duty job and that this supports a finding of increased disability compared to the impairment rating.

Regarding the third factor, we find that Petitioner was only 45 years old and will live longer with his disability than someone who is older. We find that this warrants an increase in the level of disability in this case.

Regarding future earning capacity, Petitioner testified that he was released to full duty by Dr. Aribindi on March 8, 2012, even though he was still feeling pain and was lacking range of motion in his arm. Despite this full duty release, Petitioner's unrebutted testimony was that, when he took the release form to Respondent the next day, he was told that he no longer had a job there. Petitioner testified that he has been looking for employment as a welder, which is what he has done for the majority of his professional life. Petitioner testified that he tries to do welding work on the side from his garage, but that he still finds it difficult to do. We find that Petitioner's future earning capacity has been diminished and his upper extremity impairment makes him more prone to future injury with an associated loss of income.

As for the fifth factor, evidence of disability corroborated by treating medical records, Petitioner testified that he is right-hand dominant. Petitioner testified that he still has 4 or 5 out of 10 pain, which is consistent with what is reported in his last physical therapy record on February 29, 2012. On March 7, 2012, when Dr. Aribindi released Petitioner to return to work, the assessment still included "elbow pain." Petitioner testified that his primary care doctor, Dr. Ahmed, has prescribed Norco, which he takes three times a week. However, the Commission notes that Dr. Ahmed's records are not in evidence so there is no corroborating medical record for Petitioner's use of Norco for his arm pain. Petitioner testified that he still does not have full range of motion and he has difficulty welding in certain positions. This is corroborated by the March 7th record of Dr. Aribindi who noted that Petitioner had "almost" full extension of the right elbow but lacked full supination of the right forearm. On May 8, 2012, Dr. Levin reported that Petitioner's elbow lacked 3 degrees of full extension. He lacked 15 degrees of pronation and 15 degrees of supination. His right wrist had 75 degrees of flexion compared to 80 degrees on the left. His extension was 85 degrees on the right and 90 degrees on the left. His ulnar deviation on the right was 30 degrees while it was 45 degrees on the left. His mid-forearm circumference measured 26 cm on the right compared to 26.5 cm on the left. We find that these medical records support Petitioner's disability of decreased range of motion. Petitioner testified that he still has numbness in the area of the incision and has tingling sensations in his arm and fingertips. Although Dr. Aribindi reported that Petitioner denied numbness or paresthesias, Dr. Levin noted that Petitioner had decreased pinprick sensation over the ulnar aspect of the right elbow.

Based on the above, the Commission finds that the 6% impairment rating by Dr. Levin does not adequately represent Petitioner's actual disability in this case. When considering the other four factors, we find that Petitioner's permanent partial disability is 25% loss of use of the right arm. The Commission modifies the Arbitrator's Decision, to decrease Petitioner's partial

disability award from 30% to 25% loss of use of the right arm pursuant to Section 8(e) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $435.27 per week for a period of 23.14 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $391.75 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the petitioner a 25% loss of use of his right arm.

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

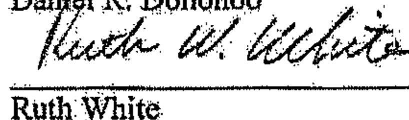
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 22 2014

Charles J. DeVriendt

Daniel R. Donohoo



Ruth White

SE/
O: 6/24/14
049

MARQUE M. SMART, PETITIONER, v. CENTRAL GROCERS, RESPONDENT.

NO. 12WC 08366

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

14 IWCC 374; 2014 Ill. Wrk. Comp. LEXIS 352

May 20, 2014

JUDGES: Daniel R. Donohoo; Charles J. DeVriendt

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering, the issues of the nature and extent of Petitioner's disability and penalties and attorneys' fees for Petitioner, and permanent partial disability, average weekly wage, and impairment rating for Respondent and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 14, 2013 is hereby affirmed and adopted.

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 $ 36,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review [*2] in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

Marque Smart
Employee/Petitioner

v.

Central Grocers
Employer/Respondent

Case # 12 WC 8366

Consolidated cases:

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **February 13, 2013**. 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
C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
G. [X] What were Petitioner's earnings?
K. [X] What temporary benefits are in dispute?
[X] TPD
[X] TTD
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?
O. [X] Other The need for an impairment rating

FINDINGS

On **1/11/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer [*3] relationship ***did*** exist between the Petitioner and Respondent.

On this date, the 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, the Petitioner earned $ 51,480.00; the average weekly wage was $ 990.00

On the date of accident, Petitioner was 40 years of age, ***single*** with 2 children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **23,833.63** for TTD, $ 0.00 for TPD, $ 0.00 for maintenance, and $ 0.00 for other benefits, for a total credit of $ **23,833.63**.

Respondent is entitled to a credit of $ 0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $ **577.50** commencing **1/24/2012** through **2/16/2012**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $ **660.00**/week for **41-2/7** [*4] weeks, commencing **2/17/2012** through **12/2/2012**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 145.32 to Physician's Immediate Care, $ 739.30 to Midwest Orthopedics at RUSH, $ 1,223.34 to Instant Care, $ 1,855.00 to Advance Physical Medicine and $ 5,110.08 to Accelerate Rehabilitation as provided in Sections 8(a) and 8.2 of the Act. Consistent with the stipulation of the parties, Respondent shall receive a credit for all bills paid.

Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of $ **594.00** per week for **125** weeks because the injuries sustained caused **25%** loss to the Person as a Whole as provided in Section 8(d)(2) of the Act.

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* [*5] 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

5/23/13

Date

Attachment to Arbitrator Decision

(12 WC 8366)

STATEMENT OF FACTS

Petitioner, Marque Smart, worked for Respondent, Central Grocers, as an Order Picker. Petitioner testified that he was as an Order Selector in the frozen foods department who goes around the warehouse and select orders for stores. Petitioner testified that his responsibilities include repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. Petitioner testified this is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Petitioner testified that he is a Union Steward for Respondent as well, and his responsibilities also include training new employees on how to be an Order Selector.

Petitioner testified that on January 11, 2012 he was selecting an order of 90 lbs when he felt a sharp pain in his lower back. Petitioner testified it was his first or second day back to work from being released [*6] from a previous injury he sustained. Petitioner testified he was accommodating his supervisor's request to work in the meat department, an area that Petitioner doesn't normally work in. Petitioner testified that he stopped for a minute or two finished his shift and went home. The next day the pain got worse and when he came into work, which was actually that same day as he works the evening shift, he reported it to his supervisor Ozzie, and a report was initiated. Petitioner testified that he continued to work because he felt that he could work through the pain.

Petitioner testified that he began his treatment on January 18, 2012 after he could no longer continue to work because of the pain. Petitioner was sent by Respondent to Physicians Immediate Care. The doctor noted "[Petitioner] had just returned to full-duty work on January 10, 2012 after being off of work for a year with other work-related injuries. He worked as a picker for Central Grocers and he reports that at the end of his shift on Tuesday, January 10, 2012 he was lifting several 90-pound cases of meat when he felt a pain in his left low back. He was able to finish his shift. This incident occurred about a half hour prior [*7] to the end of his shift that day. [He] returned to work the next day and reported his back pain to his supervisor. He was offered evaluation at the clinic. He declined and took what he described as a personal day... He stated that he did return to work on Thursday and Friday and worked 8 hours of full duty on each of those days. He was then off Saturday, Sunday and Monday because of the holiday and returned to work again yesterday, which was Tuesday, January 17, 2012. He said that he had persistent pain in his lower back. He says it is much worse in the morning after being in bed. He denies any radiation into his buttock or leg, except for today, he felt for the first time, tingling down his left leg to his foot. [He] denies any non-work-related incident or event correlating with the development of that condition. He rates his pain at a constant 8/10 which is worse at times, sore in quality." Petitioner was given a back support, and diagnosed with a lumbar strain. He was given the day off and told to report back to full duty the next day. (PX 7)

Petitioner followed up with Physicians Immediate Care on January 24, 2012. He again was diagnosed with a lumbar strain, released to full [*8] duty but was told to work reduced hours of 4-6 hours. (PX 7)

On February 8, 2012, Petitioner sought the care of Dr. Kern Singh at Midwest Orthopedics at Rush. Petitioner provided a consistent history. After performing an examination, Dr. Singh diagnosed a lumbar muscular strain. The doctor ordered physical therapy and returned Petitioner to full duty on a four-hour per day basis. (PX 13) From February 10, 2012 through March 5, 2012, Petitioner underwent Physical Therapy at Advanced Physical Medicine.

On February 20, 2012 Petitioner returned to Dr. Singh. The doctor noted that Petitioner had started therapy and was experiencing increased pain especially in the refrigeration unit at work. It extended in the axial low back down the left leg into the posterior thigh and posterolateral calf. His pain was increasing. He was diagnosed with a lumbar strain and was taken off work and prescribed an MRI. On February 27, 2012 Dr. Singh took Petitioner off work until March 7, 2012. (PX 9)

On February 28, 2012, Petitioner underwent an MRI at Instant Care which showed: (PX 9)

> 1. L3-4 subligamentous posterior disc herniation with extruded nucleus pulposus measuring 5-6 mm indenting the ventral [*9] surface of the thecal sac with generalized spinal stenosis and bilateral neuroforaminal narrowing slightly greater on the left.
>
> 2. L4-5 6-7 mm broad-based subligamentous posterior disc herniation with extruded nucleus pulposus elevating the posterior longitudinal ligament and indenting the thecal sac with generalized spinal stenosis greater on the right with bilateral neuroforaminal narrowing also greater on the right.
>
> 3. At L5-S1 there is a 3-4 mm subligamentous posterior disc protrusion herniation also elevating the posterior longitudinal ligament and indenting the ventral surface of the thecal sac without spinal stenosis with mild bilateral neuroforaminal narrowing, slightly greater on the right.

On March 7, 2012, Dr. Kern Singh noted that he reviewed the MRI which he felt demonstrated a large central disc herniation at L4-5 causing severe spinal stenosis. He also noted there was a central disc osteophyte at L3-4 with moderate to severe stenosis. Dr. Singh diagnosed L3-L5 spinal stenosis and opined that Petitioner needed a minimally invasive L3-5 laminectomy. (PX 10)

At Respondent's request Petitioner underwent an IME with Dr. Carl Graf on March 12, 2012. Dr. Graf obtained a [*10] history, and reviewed medical documentation through Dr. Singh's February 8, 2012 visit. After performing an examination, Dr. Graf opined that Petitioner suffered from a lumbar strain. He opined that four weeks of therapy prescribed by Dr. Singh would be considered reasonable and appropriate and further opined that after that point Petitioner would be at maximum medical improvement. The doctor did not feel there was any reason Petitioner required limited hours and stated that he agreed with Physician's Immediate Care that Petitioner could have worked full duty throughout this time. He felt Petitioner could return to work at full duty in an unrestricted fashion. (RX 3)

On May 2, 2012 , Petitioner followed up with Dr. Singh. The doctor continued Petitioner's off work status and prescribing an L3-5 laminectomy/discectomy pending approval. (PX 10)

On May 10, 2012, a deposition of Dr. Singh was performed. Dr. Singh testified that the initial history Petitioner provided was consistent with the injury that he presented with. Dr. Singh stated "...I would say this is definitely an acute event that there appears to be a causal connection in the sense that lifting heavy objects in a forward flexed [*11] position would result in a disk herniation which I do believe was reasonable in [Petitioner's] case." The doctor provided that his provisional diagnosis was L4-5 central disk herniation, L3-L5 spinal stenosis. He recommended a L3-L5 laminectomy and an L4-5 discectomy. Dr. Singh added "[Petitioner has a large disk herniation that would be unlikely to be asymptomatic. His mechanism of injury is a plausible source for a disk herniation. His symptoms are progressive and correlate with an L5 radiculopathy. He develops motor weakness over a period of six to eight weeks once again suggesting an acute change..." (PX 13)

Petitioner testified that following the deposition testimony of Dr. Kern Singh, Respondent authorized the surgical procedure and paid TTD forward from the date of the procedure until he returned to work. Petitioner testified that he did not receive TTD benefits until this time, nor did he receive TPD for reduced shift hours.

On July 6, 2012, Petitioner underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. (PX 10)

On August 6, 2012 Petitioner was seen by Dr. Singh. Petitioner provided [*12] that he had complete resolution of his left leg pain and only had residual low back pain but felt significantly improved. He was to continue off work and start therapy three times a week for four weeks. Documents submitted also provide that Petitioner could work with a ten pound lifting, pushing and pulling restriction. As well as minimum bending and stooping. (PX 9)

On August 14, 2012, Petitioner began therapy at Accelerated on referral from Dr. Singh. (PX 8)

On September 10, 2012, Petitioner returned to Dr. Singh stating he had complete resolution of his leg pain and occasional lower back pain. He did still have some symptoms but they were mainly improved. He had been attending therapy and noted increased strength in his low back as well. The diagnosis was the same. The doctor at this time recommended he remain off work and attend a functional capacity evaluation and work conditioning. He would return to the office in six weeks. (PX 10)

On September 21, 2012, Petitioner underwent a FCE at Accelerated Rehabilitation which indicated he provided consistent performance and gave maximum effort. The FCE indicated that he could only perform 91.6% of the physical demands of his job as an [*13] order picker. It was determined that Petitioner was unable to successfully achieve occasional squat lifting, occasional overhead lifting, occasional bilateral carrying, frequent power lifting and frequent shoulder lifting. The FCE determined that he was functioning at a medium-heavy level of work which did not meet the requirements of an Order Selector. It was recommended that Petitioner participate in a daily Work Conditioning program 4hrs/day for 3-4 weeks. (PX 8)

On October 22, 2012 Petitioner returned to Dr. Singh in follow-up. Dr. Singh noted that he had a functional capacity evaluation exam on September 21, 2012 that showed valid, consistent effort and put him at the medium to heavy category of work when his job is heavy duty in nature. The doctor also noted that Petitioner's last work conditioning note placed him at 97.6% of his job demand level. Petitioner reported that overall he was doing quite well but still had some increased axial back pain with bending and squatting. The therapist suggested four more weeks of work conditioning. The doctor recommended that he complete the course of work conditioning and remain off work. He was also prescribed Mobic. (PX 10)

On November [*14] 26, 2012, Petitioner returned to Dr. Singh. The doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was only having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. He was also having trouble with the occasional bilateral carry of more than 60 pounds. Dr. Singh provided that Petitioner was at maximum medical improvement and was to return to work in the medium to heavy physical demand level as of December 3, 2012. Dr. Singh provided that if Petitioner had an increase in symptoms he could return to the office as needed. The doctor also added that Petitioner had permanent restrictions per his last work conditioning note dated November 21, 2012. (PX 10) (The November 21, 2012 work conditioning functional progress note indicates Petitioner demonstrated the ability to perform 97.3% of the physical demands of his job as an order picker. The test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated [*15] the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. Petitioner was discharged from work conditioning. (PX 8))

On November 28, 2012 Dr. Singh prepared a work status note indicating that per the last work conditioning note dated November 21, 2012 Petitioner was placed at the heavy demand level and could return to full-time work. (PX 10)

Petitioner testified that he returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

Petitioner testified that when he returned to work in January of 2012 he was earning $ 24.95/hour and that was based on his union contract (Pet. Ex. # 1). Petitioner testified that all Central Grocers employees that are full time are guaranteed 40 hours per week, and that on May 1st every year based on their union contract, all Central Grocers full time employees receive a pay increase based on the [*16] type of shift they work day or night, and the type of department that they work in. Petitioner testified that all employees in the same classification would receive the same rate of pay. Further, Petitioner testified that all overtime is mandatory.

Petitioner testified that he received a back TTD check dated November 14, 2012 paying him from his first day off of February 17, 2012 to June 3, 2012. Petitioner testified that he never received his TPD benefits at all during the time that he worked reduced hours and that he followed all company policies and procedures. Petitioner testified he was given no justification for why he did not receive his TPD benefits after he was placed on a reduced shift schedule by both the company doctor at Physicians Immediate Care and his treating physician, Dr. Kern Singh.

Petitioner testified that he currently does not experience a lot of pain, "just stiffness in [the] lower back from time to time." Petitioner stated that he was unable to "do any heavy lifting below my waist." He provided that lifting anything over 50 lbs "really bothers my lower back" and he was unable to participate in sports.

Petitioner offered the testimony of both Dominic Rossi [*17] and Robert Ryske who are also union stewards for Central Grocers, Union 703. Mr. Ryske has more than 27 years of experience along with Mr. Rossi who are full time employees of Central Grocers. Both of these witnesses testified that Articles 10 and 11 of the Collective Bargaining Agreement, or Union Contract cover hours worked, wages earned, and talk about mandatory overtime. Both witnesses testified that all full time employees of Central Grocers earn a wage increase on May 1st of each contract year. (Pet. Ex. # 1) Both witnesses testified that the wage is based on the department classification and that all employees in the same classification would receive the same rate of pay. Both witnesses testified that they were aware that Petitioner was injured on January 11, 2012, and that it is not a requirement that any employee sign any written statements regarding an injury. Further, both testified that it is Management's responsibility to fill out the accident report. It is only the job of the injured employee to report it to their supervisor.

Respondent offered the testimony of Jorge A. Villadares who is the safety supervisor at Central Grocers. Mr. Villadares testified that he was aware [*18] that Petitioner was injured on January 11, 2012. Mr. Valladeres confirmed Petitioner's testimony that he did not seek medical attention initially and that he attempted to return to work. Mr. Valladeres testified that it is his job to fill out to prepare all of the injury report documentation for injuries that occur on the night shift. Mr. Valladeres testified that Petitioner complied with all procedures of reporting the accident.

WITH REGARD TO ISSUE (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he worked for Respondent as an order selector. As an order selector, Petitioner "picks" orders, which involves lifting boxes to fulfill orders. Petitioner testified while selecting an order on January 11, 2012, while working in the meat department, he lifted between 90 and 95 pounds of boxes containing meat when he felt a sharp pain in his lower back. Petitioner testified that he reported this accident the next day, January 12, 2012, to his supervisor, Ozzie. An accident report was initiated at that time. Petitioner testified that he attempted to continue to work, but could [*19] not do so due to severe pain. Petitioner was sent by Respondent for treatment with Physician's Immediate Care on January 18, 2012. Petitioner's initial visit to Physician's Immediate Care on January 18, 2012 contains a history of the accident that is consistent with his testimony at trial. Additionally, the histories provided to his medical providers as well as Respondent's IME physician are also consistent with his testimony at trial. The Arbitrator finds Petitioner's testimony credible.

Accordingly, the Arbitrator finds that Petitioner has proved that he was injured in an accident that arose out of and in the course of his employment by Respondent on January 11, 2012.

WITH REGARD TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he had returned to his employment with Respondent following a period of absence due to a previous work related injury. The injury was adjudicated in 11 WC 07226. According to that award, Petitioner was temporarily totally disabled from December 21, 2010 through January 10, 2012, the day before this accident. Accordingly, Petitioner did not accrue any wages for the 52 week period immediately [*20] preceding this injury.

The Illinois Supreme Court has held that when it is impractical to determine average weekly wage by calculating the total amount of wages earned prior to an injury, one must look to the wages earned or those that would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. *Sylvester v. Indus. Comm'n., 197 Ill. 2d 225, 231 (2001).* Accordingly, the fourth method of average weekly wage calculation is applicable to this case. (*Id.*)

Petitioner introduced a copy of the Labor Agreement with Respondent that was in place at the time of Petitioner's January 11, 2012 injury. (Pet. Ex. # 1) According to Article 10 of that document governing "hours", Petitioner is guaranteed 40 hours of work per week. Further, workers for Respondent receive an increase in hourly every May 1. Petitioner testified that fellow employees employed on the same pay scale were making $ 24.30 per hour prior to May 1,2011. After May 1, 2011 and according to Petitioner's pay stubs introduced as Petitioner's Exhibit # 3, Petitioner's pay at the time of the accident [*21] was $ 24.95. Therefore, taking the hourly rate of $ 24.30 in conjunction with pay raise to $ 24.95 that a worker in Petitioner's position would earn after May 1, 2011, Petitioner's average weekly wage at the time of the accident was $ 990.00, or the average that a worker in Petitioner's position would have made during the 52 weeks immediately preceding this work related injury.

IN REGARD TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims entitlement for TPD benefits for the period between January 24, 2012 and February 16, 2012 for 3-2/7 weeks. Petitioner was released by Dr. Jim Kell of Physician's Immediate Care on January 24, 2012 with restrictions of only working four to six hour shifts. These restrictions were initially accommodated by Respondent. Petitioner's Exhibit 4 outlines that of the 3-2/7 weeks he is claiming TPD he was paid for working a full day on January 25, January 30 and February 6. He testified that some days he can be a floater; this is an excused absence for which he receives full compensation. He was a floater, and thus paid full salary, on February 2, 7 and 14. He was not scheduled to work on January [*22] 28 or 29, February 1, 3, 4, 5, 11 or 12. He had an excused absence on February 8th. Thus, 6 of the days he is claiming TPD he was paid full salary and 8 of the days he was not scheduled to work, 1 day was an excused absence, for a total of 10 of the 23 days. (PX 4)

Petitioner worked partial days on January 24 (6 hours), 26 (5 hours), 27 (4 hours), 31 (5 hours), February 9 (4 hours), 10 (4.5 hours), 13(4 hours), 15 (4 hours) and 16 (.5 hours) for a total of 9 days. This results in a net of TPD rate of 35 hours. Applying an average weekly wage of $ 990.00, that results in an hourly wage of $ 24.75. Two-thirds of those hours at the regular rate is $ 577.50 that he would be owed in TPD. (PX 4) The Arbitrator notes that Petitioner submitted three pay stubs into evidence for the period between January 21, 2012 and February 9, 2012. (PX 3) Since he is claiming benefits between January 24, 2012 and February 16, 2012, these stubs are not helpful in calculating the proper TPD. Lastly, the Arbitrator notes Petitioner received 8 hours of floater compensation on February 18th. (PX 4) Petitioner received TTD between February 17, 2012 and December 2, 2012. (RX 5) The Respondent therefore is awarded [*23] a credit of one day, or $ 81.91.

With respect to TTD benefits from February 17, 2012 through December 2, 2012, Petitioner was provided work restrictions on February 8, 2012 by Dr. Kern Singh. (Pet. Ex. # 10) Petitioner testified that Respondent initially accommodated these work restrictions. However, after February 17, 2012 Respondent was unable to provide further accommodation. Thereafter, Petitioner was taken off work completely by Dr. Singh during his next appointment of February 20, 2012. (*Id.*) Petitioner was kept in an off work status by Dr. Singh until being released on November 28, 2012 consistent with the last work conditioning note dated November 21, 2012 placing him at the heavy demand level. (*Id.*) Petitioner returned to work for Respondent on December 2, 2012.

Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 17, 2012 through December 2, 2012, a period of 41-2/7 weeks, less the stipulated credit for TTD benefits previously paid.

WITH REGARD TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE PETITIONER'S INJURIES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a permanent partial disability can and shall [*24] be awarded in the absence of an impairment rating or impairment report being introduced. The plain language of Section 8.1(b) reads that, "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."

It is axiomatic that the plain and ordinary meaning of statutory words be used in determining how to construe the law. The plain language of the Act dictates that an impairment rating is but one of the factors to be use in determining permanent partial disability. Further, the use of the word "factor" merely shows that it is to be considered. Further, the fact that the Act dictates that no single factor shall be determinant shows that logically, the converse is also true. This means that the absence of one of the enumerated factors cannot be determinant of the permanent [*25] partial disability award.

Further, Petitioner's Exhibit # 14, a memorandum from the Illinois Workers' Compensation Commission dictates that "If an impairment rating is not entered into evidence, the Arbitrator is not precluded from entering a finding of disability." The plain language of this memorandum indicates that an Arbitrator is not precluded from entering a finding of disability in the absence of an impairment rating. The language is definitive and leaves no room for misinterpretation. Accordingly, the Arbitrator finds that the absence of an impairment rating does not preclude this Arbitrator from making a finding as to disability.

Based on the factors enumerated in Section 8.1b of the Act, the Arbitrator finds the follow:

i. Neither party submitted evidence of a reported level of impairment.

ii. On the date of accident Petitioner worked for Respondent as an Order Picker. As an Order Picker Petitioner's responsibilities included repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. This is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Subsequent to the accident, Petitioner [*26] returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

iii. Petitioner at the time of the injury was 40 years old.

iv. Petitioner's future earning capacity is likely unimpaired by his accident. His future earnings is dictated by his Union contract.

v. There is evidence of disability corroborated by the treating medical records. Petitioner was diagnosed with L4-5 central disk herniation, L3-L5 spinal stenosis. As a result he underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. Petitioner last saw his treating physician, Dr. Singh on November 26, 2012. At that time the doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. The work conditioning functional progress note [*27] indicated that the test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. The Arbitrator observed the demeanor of Petitioner while he was testifying and finds his current complaints to be credible and consistent with the treating records.

Based on the above criterion, the Arbitrator finds that as a result of accidental injuries sustained on January 11, 2012, Petitioner is permanently disabled to the extent of 25% under Section 8(d)2 of the Act.

WITH REGARD TO ISSUE (M), SHOULD PENALTIES AND FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Arbitrator finds that Respondent's conduct in this matter was not unreasonable. A legitimate dispute existed as to whether Petitioner sustained an accident on the first day he returned to work after being off for a previous work accident. As such, Petitioner's [*28] request for penalties are hereby denied.

DISSENTBY: RUTH W. WHITE

DISSENT: I do not believe the Arbitrator had the authority to determine permanent partial disability because no impairment rating based on the AMA Guides was submitted into evidence. Accordingly, I respectfully dissent from the affirmation of that award by the majority. P.A. 97-18, the Workers' Compensation reform legislation enacted in 2011, added the new section 8.1b, which established that the AMA Guides regarding impairment shall be considered in the determination of permanent partial disability. The new section provides (emphasis added):

"For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements [*29] that estab-

lish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(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."

It is cardinal rule of statutory construction that the word "shall" is mandatory, as opposed to the word "may" which is directory. *See, Schultz v. Performance Lighting, Inc., 984 N.E.2d 569 (2nd Dist. 2013).* In addition, in debate in the Senate, [*30] the sponsor of the bill, Senator Kwami Raoul, informed the body (emphasis added):

"For the first time ever, the State of Illinois will be embracing the AMA's guidelines with regards to rating impairment. So the Illinois Workers' Compensation Act will have a provision in there that says physicians' impairment shall be rated by physicians that are certified to apply AMA guidelines to rate impairment and that will be the only way that rating of impairment will take place within the Illinois Workers' Compensation System. Thereafter, **rating of disability by arbitrators will take into account the rating impairment**, the occupation of the injured employee, the age of the injured employee, and the employee's future earning capacity and finally, evidence of disability corroborated by the treating medical records."

In addition, although the language of the new section specifies that no single factor shall be the sole factor in establishing determining permanent partial disability, the section also specifies that "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." That provision does not [*31] apply to any other of the specified factors. Therefore, while the impairment rating is not the exclusive factor, it is a factor of such importance that the relevance and weight of any other factor must be "explained in a written order." That language indicates to me that the General Assembly intended the impairment rating to be a fundamental basis for a disability award and deviation from that rating shall be explained. In my opinion the impairment rating becomes a preeminent piece of evidence, similar to a proper utilization review report, which presumptively absolves an employer from the imposition of penalties and fees if it acts in accordance with the report.

Finally, I believe the interpretation of the new section 8.1b is of sufficient importance that it should be addressed by the Appellate Court or the General Assembly. I hope this dissent brings this issue to their attention for possible clarification or amendment. For these reasons, I respectively dissent from the decision of the majority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

2014 IL App (2d) 130532WC
No. 2-13-0532WC
Opinion filed September 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

WALTER MATUSZCZAK,	)	Appeal from the Circuit Court of
	)	Du Page County.
Appellee,	)	
	)	
v.	)	No. 12-MR-1631
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION *et al.*	)	Honorable
	)	Bonnie M. Wheaton,
(Wal-Mart, Appellant).	)	Judge, Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Hoffman, Hudson, and Stewart concurred in the judgment and opinion.
Presiding Justice Holdridge specially concurred, with opinion.

OPINION

¶ 1 On March 26, 2010, claimant, Walter Matuszczak, filed an application for adjustment of claimant pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, Wal-Mart. Following a hearing, the arbitrator determined claimant sustained accidental injuries that arose out of and in the course of his employment on March 7, 2010, and awarded him (1) $23^2/_7$ weeks' temporary total disability (TTD) benefits from June 13 to November 22, 2011; (2) $14,227.41 in medical expenses; and (3) prospective medical expenses in the form of a surgical procedure recommended by one of claimant's doctors.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) vacated the arbitrator's TTD award but otherwise affirmed and adopted his decision. On judicial review, the circuit court of Du Page County reversed the portion of the Commission's decision that vacated the arbitrator's TTD award. The employer appeals, arguing the Commission correctly determined claimant was not entitled to TTD after June 12, 2011, the date of his for-cause termination from employment. We affirm the circuit court's judgment, reversing the portion of the Commission's decision that vacated the arbitrator's award. We reinstate the arbitrator's TTD award and remand to the Commission for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 3 I. BACKGROUND

¶ 4 At arbitration, claimant testified he worked for the employer for over three years as a full-time night stocker. His job duties included taking 5- to 100-pound boxes off skids and neatly placing products in proper areas. On March 7, 2010, claimant injured his neck, back, and right arm at work when several fully stocked shelves of glass cleaner fell on top of him.

¶ 5 On March 9, 2010, claimant began seeking medical care. Thereafter, he received conservative treatment from various providers and was consistently given modified-duty work restrictions. Following his accident, claimant returned to work for the employer in a light-duty capacity. On May 23, 2011, claimant saw Dr. Mark Lorenz, who recommended surgery on claimant's cervical spine.

¶ 6 Claimant testified, on June 12, 2011, he was terminated from his employment for an incident unrelated to his work injury. Thereafter, claimant remained unemployed. On cross-examination claimant agreed that, at the time of his termination, he prepared a handwritten statement acknowledging that he stole cigarettes from the employer on June 3, 2011, and on a

"couple of days" in May 2011. He agreed that, at the time he took the cigarettes, he understood that stealing is a crime and stealing from his employer could result in termination. Further, claimant acknowledged that, had he not stolen cigarettes, he might still have been working for the employer in a light-duty capacity at the time of arbitration. Claimant asserted he had looked for work within his light-duty restrictions but had not been successful.

¶ 7 On January 25, 2012, the arbitrator issued his decision in the matter. As stated, he determined claimant sustained accidental injuries that arose out of and in the course of his employment on March 7, 2010, and awarded him (1) $23^{2}/_{7}$ weeks' TTD benefits; (2) $14,227.41 in medical expenses; and (3) prospective medical expenses in the form of the surgery recommended by Dr. Lorenz. The arbitrator's TTD award extended from June 13, 2010, the day after claimant was terminated from his employment for stealing, to November 22, 2011, the date of the arbitration hearing. With respect to TTD, the arbitrator noted claimant was subject to light-duty restrictions that were being accommodated by the employer at the time of his termination, he did not return to work after being terminated, and claimant testified that he tried looking for work within his restrictions. He further stated as follows:

> "In *Interstate Scaffolding Inc. v. Illinois Workers' Compensation Commission*, 236 Ill[.] 2d 132, 923 N.E.2d 266 (2010), the court found that the employer was obligated to pay TTD benefits even when the employee has been discharged, whether or not the discharge was for cause, and that when an injured employee has been discharged by his employer the inquiry for deciding his entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. More to the point, the court noted that if the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work[-]related injury, the employee is entitled to these benefits."

The arbitrator based his TTD award on findings that claimant had "remained under the same light[-]duty restrictions imposed at the time of his termination." Further, he determined claimant's condition had not stabilized at the time of arbitration and claimant had not reached maximum medical improvement (MMI).

¶ 8 On October 5, 2012, the Commission vacated the arbitrator's award of $23^2/_7$ weeks' TTD benefits but otherwise affirmed and adopted his decision. It noted that a claimant's benefits may be terminated or suspended if he refuses work within his physical restrictions and agreed with the employer's position that claimant's theft of cigarettes from the employer, coupled with claimant's knowledge that his theft could lead to termination, constituted a refusal of work within his physical restrictions by claimant. The Commission further stated as follows:

> "We do not believe the *Interstate Scaffolding* court was proscribing all use of discretion in cases involving employment termination; rather, as stated previously, we believe the court was rejecting an analysis of the propriety of the discharge and rejecting an automatic suspension or termination of [TTD] benefits in cases involving employment termination."

¶ 9 On April 23, 2013, the circuit court of Du Page County reversed the portion of the Commission's decision that vacated the arbitrator's TTD award.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, the employer argues the Commission's finding that claimant was not entitled to TTD benefits following his June 2011 termination from employment was neither contrary to law nor against the manifest weight of the evidence. It maintains that, although *Interstate Scaffolding* prohibits the *automatic* suspension or termination of TTD benefits when a claimant

is fired for reasons unrelated to his injury, it does "not proscribe all use of discretion [by the Commission] when deciding whether an employer remains liable for TTD" following an employee's discharge. Thus, the employer contends the Commission was free to exercise its discretion in the instant case to determine that claimant's decision to steal from the employer when he admittedly knew such action could result in his termination was the equivalent of refusing work within his physical restrictions and a valid basis for suspending or terminating TTD.

¶ 13 Claimant argues the analysis used by the Commission to deny him TTD benefits following his termination from employment was contrary to law pursuant to *Interstate Scaffolding*. He contends that case is factually similar to the present case and prohibits the Commission from delving into the reasons for termination, which he alleges the Commission impermissibly did in this case.

¶ 14 "A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542, 865 N.E.2d 342, 356 (2007). "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached [MMI]." *Interstate Scaffolding*, 236 Ill. 2d at 142, 923 N.E.2d at 271. Further, "[t]o be entitled to TTD, a claimant must show not only that he did not work but that he could not work." *Residential Carpentry, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 975, 981, 910 N.E.2d 109, 115 (2009). TTD benefits may be suspended or terminated if the employee (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) fails to cooperate in good faith with rehabilitation efforts; or (3) refuses work

falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding*, 236 Ill. 2d at 146, 923 N.E.2d at 274.

¶ 15 "Before a reviewing court may overturn a decision of the Commission, the court must find that the award was contrary to law or that the Commission's factual determinations were against the manifest weight of the evidence." *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 822 (2009). Generally, the period during which a claimant is entitled to TTD benefits is a factual determination for the Commission and its decision will not be disturbed unless it is against the manifest weight of the evidence. *Westin Hotel*, 372 Ill. App. 3d at 542, 865 N.E.2d at 356. However, "if the Commission relies on a legally erroneous premise to find a fact, the resulting decision is contrary to law and must be reversed." *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 282-83, 811 N.E.2d 684, 691 (2004). "On questions of law, review is *de novo*, and a court is not bound by the decision of the Commission." *Beelman Trucking*, 233 Ill. 2d at 370, 909 N.E.2d at 822.

¶ 16 Here, the parties disagree on whether the Commission utilized the correct legal analysis in vacating the arbitrator's award of TTD benefits following claimant's termination from his employment. This issue presents a question of law and is subject to *de novo* review.

¶ 17 In *Interstate Scaffolding*, 236 Ill. 2d at 136, 923 N.E.2d at 268, the claimant sustained work-related injuries to his head, neck, and back but was able to return to work for the employer in a light-duty capacity. Following his return to work, a conflict arose between the claimant and the assistant to the employer's president, culminating in the claimant's termination from employment. *Interstate Scaffolding*, 236 Ill. 2d at 136-37, 923 N.E.2d at 268-69. The stated reason for the claimant's dismissal was defacement of the employer's property due to the claimant writing religious graffiti in the employer's storage room. *Interstate Scaffolding*, 236 Ill.

2d at 137-38, 923 N.E.2d at 269. Although the claimant admitted to writing religious slogans in the storage room, he did not believe those writings were the reason for his dismissal, stating other employees had written on the shelves or walls of the storage room without repercussion. *Interstate Scaffolding*, 236 Ill. 2d at 138-39, 923 N.E.2d at 269-70.

¶ 18 Following a hearing, the arbitrator determined the claimant was not entitled to TTD benefits subsequent to his termination. *Interstate Scaffolding*, 236 Ill. 2d at 139, 923 N.E.2d at 270. The Commission modified that portion of the arbitrator's decision, finding the claimant's condition had not stabilized as of the date of arbitration and he was entitled to TTD benefits for the period of time between his termination and the arbitration hearing. *Interstate Scaffolding*, 236 Ill. 2d at 140, 923 N.E.2d at 270. On appeal, this court reversed the Commission's award of TTD benefits, "holding that an employer may cease paying TTD benefits if the injured employee commits a volitional act of misconduct that serves as justification for his termination." *Interstate Scaffolding*, 236 Ill. 2d at 142, 923 N.E.2d at 271 (citing *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 385 Ill. App. 3d 1040, 1047, 896 N.E.2d 1132, 1139 (2008)).

¶ 19 Ultimately, the supreme court reversed this court's decision and reinstated the Commission's TTD award, holding "that when an employee who is entitled to receive workers' compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employer's obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and he has reached [MMI]." *Interstate Scaffolding*, 236 Ill. 2d at 135-36, 923 N.E.2d at 268. In reaching its decision, the court rejected this court's finding that the critical inquiry in determining a claimant's entitlement to TTD benefits when leaving the workforce was whether the departure was voluntary. *Interstate Scaffolding*, 236 Ill. 2d at 143-45, 923 N.E.2d at 272-73. The court noted that

"worker's compensation is a statutory remedy" and "[a]ny action taken by the Commission must be specifically authorized by statute." *Interstate Scaffolding*, 236 Ill. 2d at 145, 923 N.E.2d at 273-74. Further it stated as follows:

> "Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for 'volitional conduct' unrelated to his injury. A thorough examination of the Act reveals that it contains no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been 'cause' for the employee's dismissal. Such an inquiry is foreign to the Illinois workers' compensation system." *Interstate Scaffolding*, 236 Ill. 2d at 146, 923 N.E.2d at 274.

¶ 20 The supreme court held "that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged—whether or not the discharge was for 'cause' " and "[w]hen an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, *whether the claimant's condition has stabilized.*" (Emphasis added.) *Interstate Scaffolding*, 236 Ill. 2d at 149, 923 N.E.2d at 276. Further, the court stated as follows:

> "It remains the law in Illinois that an at-will employee may be discharged for any reason or no reason. [Citation.] Whether an employee has been discharged for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases. An injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge." *Interstate Scaffolding*, 236 Ill. 2d at 149, 923 N.E.2d at 276.

¶ 21 Cleary, the supreme court's holding in *Interstate Scaffolding* prohibits the *automatic* denial of TTD benefits to an injured employee when the employee has been discharged from work by the employer. However, that is not the extent of the court's holding. In addition to proscribing the denial of TTD based solely on an employee's discharge, the court also clearly held that when an employee who is entitled to benefits under the Act is terminated for conduct unrelated to his injury, the employer's TTD obligation continues "until the employee's medical condition has stabilized." *Interstate Scaffolding*, 236 Ill. 2d at 135-36, 923 N.E.2d at 268. This is true even in cases of for-cause dismissal. In so holding, the court expressly rejected an interpretation of the Act that would support a denial of TTD where an employee's volitional conduct was the basis for termination.

¶ 22 Here, the employer agrees claimant sustained a compensable work injury on March 7, 2010. Also, it is undisputed that claimant was discharged by the employer for acts unrelated to his injury. Thus, the appropriate inquiry for the Commission was whether claimant's medical condition had stabilized at the time of his termination. As to that issue, the undisputed facts show claimant was placed on light-duty work restrictions following his accident and he remained under light-duty restrictions after his June 2011 termination. Both the arbitrator and the Commission determined claimant was entitled to prospective medical expenses for surgery necessary to treat his work injury, that claimant had not reached MMI, and that claimant's condition had not stabilized. These findings are not challenged on appeal. Thus, the evidence was sufficient to show, at the time of his termination, claimant continued to be temporarily totally disabled as a result of his work-related injury. Such a showing entitled him to TTD benefits from the time of his termination to the date of arbitration. *Interstate Scaffolding*, 236 Ill. 2d at 149, 923 N.E.2d at 276 ("If the injured employee is able to show that he continues to be

temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits.").

¶ 23 Nevertheless, despite finding claimant's condition was not stabilized, the Commission determined it had discretion to find the conduct that resulted in claimant's termination amounted to a refusal of light-duty work and was, therefore, a sufficient basis for denying TTD benefits. In *Interstate Scaffolding*, 236 Ill. 2d at 146-47, 923 N.E.2d at 274, the supreme court acknowledged that TTD benefits may be suspended or terminated when a claimant refuses work within his physical restrictions; however it also determined such a situation did not exist in the case before it—a case where the claimant was entitled to benefits under the Act and had returned to light-duty work for the employer but was later terminated for conduct unrelated to his injury. We find these circumstances are the same as those presented in the case at bar.

¶ 24 On appeal, the employer argues *Interstate Scaffolding* is factually distinguishable because claimant in this case acknowledged that he knew his conduct (stealing from the employer) could have resulted in his termination. We disagree. Like the claimant in *Interstate Scaffolding*, claimant in this case sustained compensable work-related injuries, returned to work in a light-duty capacity for the employer (for over a year in the case at bar), and was terminated by the employer for conduct unrelated to his work injury. Just as the facts of *Interstate Scaffolding* did not amount to a refusal of light-duty work, the facts here also fail to present such a situation.

¶ 25 Additionally, we find nothing in the supreme court's decision that would show the result in *Interstate Scaffolding* was dependent upon the claimant's knowledge, or lack thereof, as to whether his conduct could result in termination. As the supreme court pointed out, in Illinois, an at-will employee may be discharged for any reason or no reason and whether an employee is justifiably discharged is a matter "foreign to workers' compensation cases" and completely

separate from issues related to an injured employee's entitlement to TTD. *Interstate Scaffolding*, 236 Ill. 2d at 149, 923 N.E.2d at 276. Whether claimant was appropriately discharged, or knew he could be as a result of his conduct, was not an appropriate consideration for the Commission under the circumstances presented.

¶ 26 The record shows claimant was entitled to benefits under the Act as a result of his work-related injury but was terminated from his employment for conduct unrelated to his injury. Per *Interstate Scaffolding*, the critical inquiry for the Commission when determining claimant's entitlement to TTD was whether his medical condition had stabilized and he had reached MMI. The Commission went beyond such considerations in vacating the arbitrator's award of TTD and its decision is contrary to law.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the circuit court's judgment, reversing the portion of the Commission's decision which vacated the arbitrator's award. We reinstate the arbitrator's TTD award and remand to the Commission for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 29 Judgment affirmed and arbitrator's award reinstated; cause remanded.

¶ 30 PRESIDING JUSTICE HOLDRIDGE, specially concurring.

¶ 31 I agree that the judgment of the circuit court should be affirmed and the arbitrator's award should be reinstated with the cause remanded to the Commission. I write separately in order to clarify the majority's analysis of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). In that case, a majority of this court held that an employer could cease payment of TTD benefits if the injured employee committed a volitional act of misconduct that justified his termination. *Interstate Scaffolding, Inc. v. Illinois Workers'*

Compensation Comm'n, 385 Ill. App. 3d 1040, 1047 (2008). As the majority herein points out, our supreme court subsequently rejected this analysis, holding that an employer's obligation to pay TTD benefits does not cease when an employee has been discharged. *Interstate Scaffolding*, 236 Ill. 2d at 145. Rather, "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, *whether the claimant's condition has stabilized*." (Emphasis added.) *Interstate Scaffolding*, 236 Ill. 2d at 149.

¶ 32 I write separately to point out that the appellate court's decision in *Interstate Scaffolding* was not unanimous. The dissent pointed out that the determinative inquiry should not be whether the employer had just cause to terminate the employee, but whether the employer's refusal to continue to pay TTD benefits after the termination was permissible under the Act. *Interstate Scaffolding*, 385 Ill. App. 3d at 1052 (Donovan, J., dissenting, joined by Holdridge, J.). The dissent further pointed out that, even if the employer could establish that a claimant's employment was terminated for misconduct, the claimant should nonetheless be allowed to establish that his work-related injuries and medical restrictions "prevent[ed] him from securing employment at pre-injury work levels." *Id.* If so, the dissent reasoned, he should be allowed to continue receiving TTD benefits. *Id.* While our supreme court did not expressly adopt the analysis articulated in the dissent, I maintain that the analysis in the dissent is fully consistent with the supreme court's holding.

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).

2014 IL App (1st) 132137WC-U

FILED: November 21, 2014

NO. 1-13-2137WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RG CONSTRUCTION SERVICES,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County
v.	)	No. 12L51429
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Alfredo Martinez, Appellee).	)	
	)	Honorable
	)	Robert Lopez-Cepero,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The employer was not denied its due process right to cross-examine witnesses or present rebuttal evidence by the admission of claimant's medical records, which contained the opinions of two of his treating physicians.

(2) The Commission's finding that claimant's left knee condition of ill-being was causally connected to his work accident was not against the manifest weight of the evidence.

(3) The Commission's award of temporary total disability benefits was not against

the manifest weight of the evidence.

(4) The Commission's award of medical expenses was not against the manifest weight of the evidence.

¶ 2 On June 12, 2009, claimant, Alfredo Martinez, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, RG Construction Services, for alleged work-related injuries to both knees. Following a hearing, the arbitrator determined claimant sustained injuries arising out of and in the course of his employment on December 15, 2008, to only his right knee and awarded him (1) 107-4/7 weeks' temporary total disability (TTD) benefits and (2) medical expenses associated with claimant's right knee/leg condition. Additionally, the arbitrator rejected the employer's contention that its fourteenth amendment (U.S. Const., amend. XIV) due process rights were violated by the admission of medical records that contained the medical opinions of two of claimant's treating physicians.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's award, finding claimant injured both knees at work on December 15, 2008, and the current condition of ill-being in claimant's left knee was also causally connected to his work accident. The Commission determined claimant was entitled to (1) prospective medical expenses for the left knee arthroscopic surgery recommended by one of claimant's doctors, (2) an additional 17-3/7 weeks' TTD benefits, and (3) outstanding medical expenses related to both his left and right knees. Although in agreement with the arbitrator's rejection of the employer's due process argument, the Commission further addressed the issue, finding no due process violation and stating claimant's medical records were properly admitted at arbitration pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)). The Commission otherwise affirmed and adopted

the arbitrator's decision. It also remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 4 On judicial review, the circuit court of Cook County confirmed the Commission's decision. The employer appeals, arguing (1) it was denied its due process right to cross-examine witnesses and present rebuttal evidence by the admission into evidence of claimant's medical records, which contained the opinions of two of claimant's treating physicians; (2) the Commission's finding that claimant's left knee condition of ill-being was causally connected to his December 2008 work accident was against the manifest weight of the evidence; (3) the Commission's TTD award was against the manifest weight of the evidence; and (4) the Commission's award of medical expenses was against the manifest weight of the evidence. We affirm.

¶ 5 I. BACKGROUND

¶ 6 On October 18, 2011, an arbitration hearing was conducted in the matter. Prior to the presentation of evidence, the employer asked that the matter not proceed with a hearing on that day. It asserted that, pursuant to the fourteenth amendment to the U.S. Constitution (U.S. Const., amend. XIV), it was entitled to cross-examine two of claimant's treating physicians, orthopedic specialists Dr. Ellis Nam and Dr. Ronald Silver, with respect to opinions contained in their medical records, which claimant wanted to have admitted into evidence.

¶ 7 With respect to the employer's due process argument, the arbitrator stated as follows:

> "We had a long discussion about this before we went on the record here. We talked about it. I offered the compromise of allowing [the employer's counsel] to—I thought at that time it was just Dr. Silver's deposition, but now we have Dr. Nam's and Dr.

> Silver's. But I would be willing to allow a continuance here, but I had asked since it was at the [employer's] request and given that [claimant] is here and they have also rights and they also have fully conformed with the Statute with respect to the Section 19(b) request for immediate hearing, I had requested that [the employer] pay for the deposition ***. [The employer's counsel] *** has indicated he didn't feel it's his obligation to pay for the deposition of the treating witness.
>
> It's my opinion we have certain provisions under the Act, this is an administrative agency, it's supposed to be simple and summary proceedings. This is the second setting for this case for an individual who has properly filed a motion for immediate hearing. I offered the opportunity to take this deposition, but I felt it only fair that the [employer] pay for it since I think under the Act the only thing that [claimant] needs to do is have a certified record or have these records via subpoena which I understand [he has] adhered to those requirements."

The arbitrator noted the employer declined his offer and he would allow the matter to proceed. He further stated he did not believe the employer's fourteenth amendment rights were being impinged, noting the employer would have the ability to provide rebuttal evidence in the form of reports from its examining physicians.

¶ 8 The matter next proceeded with the arbitration hearing and the record reflects the parties agreed claimant sustained accidental injuries that arose out of and in the course of his

employment on December 15, 2008. Claimant, who testified with the aid of an interpreter, stated he worked for the employer as a drywall finisher. On the date of his accident, he was performing his work on stilts, which were affixed to his feet and lifted him approximately four feet off the ground. While on the stilts, claimant stepped on a pipe or piece of trash and slipped and fell. He testified he struck the ground with both of his knees and his right shoulder.

¶ 9 Claimant testified he reported his accident and, the following day, the employer sent him to Concentra Medical Center (Concentra). Medical records reflect claimant was seen at Concentra on December 16, 2008. He reported falling at work from a height of five feet, "hit[ting] his knees," and "hurt[ing] [his] right shoulder and right knee." Records note claimant described mild pain in his shoulders but that his prominent pain was in his right knee. He underwent an x-ray of the right knee and was diagnosed with a knee contusion and shoulder pain. Claimant was given Ibuprofen and modified activity restrictions of no prolonged standing or walking longer than tolerated, no climbing stairs or ladders, no squatting, and no kneeling. He returned to work for the employer in a light-duty capacity. Claimant continued to follow up at Concentra and, pursuant to recommendation, underwent physical therapy.

¶ 10 On December 22, 2008, Concentra records reflect claimant was progressing with therapy and reported "resolution of symptoms and restoration of pre-injury status." On January 2, 2009, records show claimant reported improvement but that he had "persiste[nt] pain of the medial side of the knee which [was] worse and severe with crossing [his] leg and walking." Claimant described his pain as moderate and aching and stated it radiated to his right thigh. He was again assessed as having a knee contusion and given modified activity restrictions of no prolonged standing or walking for longer than tolerated. A magnetic resonance imaging (MRI) was recommended. On January 20, 2009, an MRI was performed on claimant's right knee, which

showed "[s]oft tissue edema at the infrapatellar fat pad with suggestion of calcification or possibly foreign body at the inferomedial aspect of the infrapatellar fat pad."

¶ 11 At a follow-up appointment on January 27, 2009, claimant reported his symptoms were the same and denied any knee pain or problem prior to his work accident. His doctor encouraged him to increase his activity level progressively but continued claimant's modified activity restrictions. He also referred claimant to an orthopedic surgeon.

¶ 12 On February 11, 2009, claimant returned to Concentra and saw Dr. James Cohen. Dr. Cohen recorded claimant's accident history as walking on stilts at work and falling "directly onto both knees." He noted claimant reported pain "at the anterior aspect of his knees" and that claimant had recently been laid off by the employer. Dr. Cohen examined both of claimant's knees and reviewed his x-ray and MRI, the latter of which he found to be "essentially normal except for some edema in the patellar tendon fat pad area." His impression was that claimant "had a contusion to both knees and *** some mild chondromalacia patella." Dr. Cohen released claimant to return to full-duty work and recommended Ibuprofen. Claimant testified he did not return to work because he had been laid off. He described his condition at that time, stating both of his knees "were hurting *** a lot." He asserted he could not go up stairs because he experienced too much pain and his knees hurt more at night.

¶ 13 Claimant testified he did not seek medical treatment again until June 13, 2009, when he began seeing Dr. Nam. Then, beginning November 24, 2009, he sought treatment from Dr. Silver. At arbitration, claimant sought to admit exhibits containing both doctors' medical records. The record reflects the employer objected, raising the same arguments it raised at the outset of the arbitration hearing regarding its inability to cross-examine either doctor with respect to medical opinions contained within those records. The arbitrator overruled the employer's ob-

jections and the doctors' medical records were admitted into evidence.

¶ 14 Dr. Nam's records reflect he saw claimant on June 13, 2009, for a chief complaint of right knee pain. Claimant reported he fell onto his right knee at work in December 2008, and experienced persistent pain on a daily basis. Dr. Nam noted that, although he did not have the report from claimant's January 2009 MRI and the MRI was poor in quality, he did feel claimant had "evidence of abnormal medial meniscus." His impression was "[r]ight knee rule out medial meniscus tear." Dr. Nam stated claimant needed a better imaging study. He recommended an MRI arthrogram of claimant's right knee. Dr. Nam also determined claimant was unable to work "until further notice." On August 15, 2009, claimant underwent an MRI arthrogram.

¶ 15 On August 22, 2009, claimant returned to Dr. Nam who noted claimant continued to have persistent pain in his right knee "with some catching and giving away symptoms." Dr. Nam stated he reviewed claimant's August 2009 MRI and noted as follows:

> "As I pointed out to [claimant], he does have abnormal appearance of the medial meniscus and I am not sure if this represents a true medial meniscus tear. He also has some abnormal appearance of patellofemoral joint representing a possible chondral lesion of the patellofemoral joint."

Dr. Nam's impression was "[r]ight knee possible medial meniscus tear with possible chondral lesion of the patellofemoral joint." He discussed his findings with claimant, whom he noted was "still having persistent pain despite physical therapy." Claimant and Dr. Nam discussed nonoperative management but elected to proceed with surgery. Dr. Nam recommended "a right knee arthroscopy, possible partial medial meniscectomy, and possible chondroplasty/abrasion arthroplasty." Further, he continued claimant's work restrictions.

¶ 16 The exhibit containing Dr. Nam's medical records also contains a letter dated October 5, 2009, which was authored by Dr. Nam and directed to "To Whom It May Concern." In the letter, Dr. Nam summarized his contact with claimant and additionally stated as follows:

> "To a reasonable degree of medical and surgical certainty, although I did not treat nor see [claimant] from January 27, 2009[,] up until June 13, 2009, given that [claimant] was suffering from the same magnitude of pain involving his right knee secondary to his injury from December 2008, I do feel that [claimant] would have not been able to work in a full duty capacity at that time."

¶ 17 On November 24, 2009, claimant began seeing Dr. Silver, who documented each one of claimant's visits in the form of a letter directed to the attention of Steven Borgstrom at "Employers Claim Services." In the letter dated November 24, 2009, Dr. Silver noted claimant was injured "when he fell off stilts while doing dry walling [in December 2008,] injuring both knees." He stated claimant's right knee was "much worse" and "[t]he left one ha[d] recovered." Dr. Silver noted upon examination that claimant had "patellofemoral crepitation and medial joint line tenderness." His impression was that claimant had "damaged the articular cartilage of the patella due to his work injury and ha[d] a loose body in the right knee due to the *** work injury." Dr. Silver recommended arthroscopic surgery "[b]ecause of claimant's persistent symptoms of almost one years [*sic*] time." He stated he believed claimant was temporarily disabled. Dr. Silver's records show he took claimant off work pending surgery.

¶ 18 On August 10, 2010, claimant was examined by Dr. Charles Bush-Joseph at the request of both parties. Claimant reported falling on December 15, 2008, while wearing stilts and "suffering injuries to his back, both knees, [and] left shoulder and arm region." Dr. Bush-

Joseph noted: "Apparently all symptoms have resolved except for residual pain of the right knee. He clearly, on repeated questioning stated that he had no residual symptoms of his back, left knee[,] or left arm and shoulder." Following an examination and review of claimant's medial records and previous diagnostic tests, Dr. Bush-Joseph's impression was "[r]esidual patellofemoral contusion, possible chondral injury with possible medial meniscal tear, right knee." He opined claimant suffered a work-related injury to his right knee in December 2008 with residual symptoms that warranted further treatment. Dr. Bush-Joseph found "[i]njuries to [claimant's] left shoulder and left knee ha[d] resolved with no residual." He further believed, "given the length and duration of symptoms," diagnostic arthroscopy was warranted. Finally, he stated as follows:

> "I believe that based on the initial reports of Dr. *** Cohen and current physical examination findings, [claimant] was most likely able to work on a full-duty basis with only limitations of kneeling in the interval. Certainly, his current examination would allow such work tolerance."

¶ 19 On November 13, 2010, approximately one year after their first meeting, Dr. Silver performed surgery on claimant's right knee in the form of an arthroscopic partial lateral meniscectomy and arthroscopic debridement. Surgical records reflect claimant's postoperative diagnoses were a "[t]orn lateral meniscus" and "[a]rticular cartilage fragmentation of the patellofemoral joint and medial femoral condyle." On November 23, 2010, Dr. Silver prescribed claimant physical therapy three times a week for 12 to 16 weeks. He also restricted claimant from working.

¶ 20 After his surgery, claimant underwent physical therapy and continued to follow

up with Dr. Silver. He testified he also began to notice pain in his left knee. An initial physical therapy evaluation report, dated November 30, 2010, shows claimant provided a history of his work accident, stating "he was at work on stilts when he fell, landing directly on both knees." In addition to right knee symptoms, claimant complained "of left knee pain which he relate[d] to overuse since the time of injury."

¶ 21 In a letter directed to Borgstrom and dated December 21, 2010, Dr. Silver noted claimant "continue[d] to improve with regard to his right knee after arthroscopic surgery." However, he stated claimant's left knee was "deteriorating with medial joint line pain and peripatellar pain." Dr. Silver noted claimant also injured his left knee as a result of his December 2008, work accident and recommended an MRI of the left knee. He recommended claimant continue with physical therapy for his right knee and limited him "to sedentary work only."

¶ 22 On January 6, 2011, claimant underwent an MRI of his left knee, which revealed as follows:

> "1. A small joint effusion.
>
> 2. Large horizontal tear involving the midbody and posterior horn of the medial meniscus.
>
> 3. Intact lateral meniscus, collateral and cruciate ligaments."

In a letter to Borgstrom dated January 22, 2011, Dr. Silver stated claimant's right knee continued to improve and his left knee MRI demonstrated what appeared to be a torn meniscus. He recommended left knee arthroscopic surgery once claimant's right knee had recovered. Dr. Silver continued claimant's work restrictions.

¶ 23 On January 25, 2011, Dr. Silver authored a letter to Borgstrom's attention, stating claimant's MRI demonstrated a large tear of the medial meniscus, which was "due to his work

injury of [December 2008]." He further stated as follows:

> "As you know [claimant] injured both of his knees at that time. The right one was initially mores [*sic*] severely painful and underwent arthroscopic surgery and slowly the left knee pain has persisted to the point where he can no longer tolerate it. He will require arthroscopic surgery of his left knee."

On February 22, 2011, Dr. Silver authored a letter directed to Borgstrom's attention. He reiterated claimant's need for left knee surgery and stated claimant was limited to sedentary work with occasional walking and standing.

¶ 24 Claimant continued to follow up with Dr. Silver while awaiting approval for surgery. Dr. Silver continuously noted improvement in claimant's right knee. He also recommended continued physical therapy for claimant's right knee, surgery for claimant's left knee, and that claimant remain off work. In a letter dated March 24, 2011, Dr. Silver stated claimant was temporarily disabled "[b]ecause of the tearing situation with regard to his left knee." Further, he consistently reiterated his belief that claimant's left knee condition was connected to his December 2008, work accident. On October 6, 2011, Dr. Silver authored a final letter directed to Borgstrom, stating as follows:

> "We are still awaiting approval for [claimant's] arthroscopic surgery of his left knee related to his work injury of December *** 2008[,] when he injured both knees causing torn medial meniscus in the left knee. Lacking appropriate arthroscopic surgery he will be permanently disabled."

¶ 25 On June 23, 2011, claimant was evaluated by Dr. Troy Karlsson at the employer's

request. The employer submitted Dr. Karlsson's report, dated June 28, 2011, into evidence at arbitration. That report shows claimant provided a history of falling on stilts at work and "landing onto both knees, more so on the right than the left." Claimant reported having some pain in his left knee initially but that his left knee pain "got much worse after [his] right knee surgery when he favored that leg somewhat." He stated physical therapy made his left knee worse. Dr. Karlsson's report states claimant reported "no problems with the right knee at present" but that he complained of swelling in his left knee and pain "around the kneecap as well as medially." Claimant asserted his pain increased with walking or physical therapy.

¶ 26 Dr. Karlsson diagnosed claimant with right knee osteoarthritis, lateral meniscal tear, and chondral fissuring. He determined claimant's left knee had a medial meniscal tear that was degenerative in nature. Dr. Karlsson opined that "at least a portion" of claimant's right knee problems were caused by his work accident and his right knee arthroscopic surgery was also "related to the occurrence of December 15, 2008." However, he did not believe the condition of ill-being in claimant's left knee "to be in any way related to that single fall." In particular, Dr. Karlsson noted claimant initially complained only of symptoms in his right knee and made no left knee complaints. Additionally, he noted claimant expressly denied experiencing any symptoms in his left knee to Dr. Bush-Joseph in August 2010. Dr. Karlsson found there was "simply too wide a period of symptom-free times with the left knee and normal exams of the left knee to relate it to" claimant's work accident. Rather, he opined claimant likely had "a degenerative tear of the medial meniscus in his left knee, unrelated to his action of December 15, 2008."

¶ 27 Dr. Karlsson further opined claimant was at maximum medical improvement (MMI) and could return to regular-duty work. He stated he would not recommend any restrictions for claimant whatsoever "other than times he may need off following arthroscopy of

the left knee which is unrelated to the work injury."

¶ 28 Claimant testified that after Dr. Nam restricted him from working in June 2009, no doctor released him to return to work and he had not returned to work in any capacity. He was also continuing to wait for authorization for the left knee surgery recommended by Dr. Silver. Claimant testified he felt a lot of pain in his left knee, especially when ascending a staircase.

¶ 29 On December 28, 2011, the arbitrator issued his decision in the matter. He determined claimant sustained accidental injuries to his right knee that arose out of and in the course of his employment on December 15, 2008. However, relying on Dr. Karlsson's opinions, the arbitrator determined the condition of ill-being in claimant's left knee was not causally related his work accident. He found claimant entitled to medical expenses "relating solely to the right knee condition." The arbitrator also awarded claimant 107-4/7 weeks' TTD benefits, finding claimant was temporarily totally disabled from February 5 to February 11, 2009, and from June 13, 2009, when he first saw Dr. Nam, "through June 28, 2011, or the date Dr. Karlsson found [claimant] had reached MMI with respect to his work[-]related right knee injury." Finally, the arbitrator's decision addressed the employer's due process argument, finding its rights had not been violated or abridged.

¶ 30 Both parties sought review of the arbitrator's decision with the Commission, which issued its decision in the matter on October 18, 2012. The Commission modified the arbitrator's decision to find the current condition of ill-being in claimant's left knee was causally connected to the work injury he sustained on December 15, 2008, and claimant was entitled to prospective medical expenses in the form of the arthroscopic left knee surgery recommended by Dr. Silver. It found claimant "sustained injuries to both knees" when he fell at work in December 2008. The Commission noted claimant's right knee arthroscopy, which had been recom-

mended by two of claimant's treating physicians, was not authorized "for almost two years from the date of accident" and following "an agreed third opinion by Dr. Bush-Joseph" that "was favorable to [claimant]." It stated it also relied "on the credible record and the opinion of Dr. Silver that [claimant's] left knee injury from December 15, 2008[,] progressed with the overuse of his left leg over several years of right knee impairment, and that he now requires the left knee surgical treatment recommended by Dr. Silver."

¶ 31 As stated, the Commission awarded claimant an additional 17-3/7 weeks' TTD, "representing the time period [of] June 30, 2011 through October 18, 2011, during which time [claimant] remained temporarily totally disabled per Dr. Silver." Further, it stated as follows:

> "While we are in agreement with the decision of the Arbitrator on this issue, we further address [the employer's] constitutional argument. We find no violation [of the employer's] Fourteenth Amendment right to due process. The Arbitrator offered to continue the hearing if [the employer] elected to obtain the depositions of the Drs. Nam and Silver, but [the employer] declined. The treatment records were therefore properly admitted pursuant to Section 16 of the Act [(820 ILCS 305/16 (West 2008))]."

One Commissioner issued a concurring opinion, stating as follows:

> "I agree with the majority result; however, I do not agree that [the employer] is required to take depositions of [claimant's] witnesses at its own expense in order to protect its right to cross[-]examine these witnesses on opinions that go beyond treatment. The records should have been admitted only for those purposes permissible un-

der Section 16 of the Act. I, nevertheless, concur in the result because the Commission could reach the same result without reliance on the objectionable opinions in the records of Drs. Silver and Nam."

¶ 32 On June 13, 2013, the circuit court confirmed the Commission's decision. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, the employer first argues the Commission erred in finding its due process rights had not been violated. It notes the medical records of Dr. Nam and Dr. Silver were admitted into evidence at arbitration and argues those records improperly included the doctors' opinions with respect to claimant's ability to work and causation. The employer contends allowing such medical opinions into evidence, when the doctors rendering the opinions had not first been subject to cross-examination, constituted a due process violation.

¶ 35 "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." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 49, 981 N.E.2d 25. In the context of administrative proceedings, "[d]ue process of law requires that all parties *** have an opportunity to cross-examine witnesses and to offer evidence in rebuttal." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 297 Ill. App. 3d 662, 667, 697 N.E.2d 934, 937 (1998) (citing *Paoletti v. Industrial Comm'n*, 279 Ill.App.3d 988, 998, 665 N.E.2d 507, 513 (1996)). "[A] party claiming that a due process violation has occurred must establish that it was prejudiced by the alleged violation." *All American Title Agency, LLC v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 113400, ¶ 36, 994 N.E.2d

636.

¶ 36 Additionally, "[e]xcept when the Act provides otherwise, the Illinois rules of evidence govern proceedings before the Commission or an arbitrator." *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561, 566, 816 N.E.2d 722, 726 (2004). "Evidentiary rulings made during a workers' compensation proceeding will not be disturbed on review absent an abuse of discretion." *National Wrecking*, 352 Ill. App. 3d at 566, 816 N.E.2d at 726.

¶ 37 To support its position in this case, the employer relies heavily on *Paoletti*, 279 Ill. App. 3d at 999, 665 N.E.2d at 514, wherein this court determined the Commission committed reversible error by refusing to allow the claimant to present rebuttal evidence to a video surveillance tape. Although we agree with the propositions set forth in *Paoletti* regarding due process and the holding in that case, we find neither that case, nor the other cases cited by the employer, speak to the precise issues presented here. Initially, we note the record shows the employer was permitted to cross-examine the only witness to testify at arbitration—claimant. Neither Dr. Nam nor Dr. Silver were called as a witness at arbitration. Rather, the doctors' medical records were admitted into evidence. The record further reflects the employer had the opportunity to present evidence to rebut claimant's case and the employer does not assert otherwise.

¶ 38 The Commission found the employer's due process rights were not violated and the treatment records of Dr. Nam and Dr. Silver were properly admitted pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)). We agree. The Act provides:

> "The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of accidental injuries in question, certified to as true and correct by the hospital, physician,

> or other healthcare provider or by designated agents of the hospital, physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician, or other healthcare provider, *shall be admissible without any further proof as evidence of the medical and surgical matters stated therein*, but shall not be conclusive proof of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct. This paragraph does not restrict, limit, or prevent the admissibility of records, reports, or bills that are otherwise admissible. This provision does not apply to reports prepared by treating providers for use in litigation." (Emphasis added). 820 ILCS 305/16 (West 2008).

Thus, pursuant to section 16, the records and reports of a claimant's treating physician, which are certified as true and correct, are admissible "as evidence of the medical and surgical matters" contained within the records or reports. 820 ILCS 305/16 (West 2008).

¶ 39 Here, both Dr. Nam and Dr. Silver were claimant's treating physicians. Additionally, on appeal, the employer agrees their records were "subpoenaed and certified pursuant to section 16" of the Act. The employer does assert that "[i]t is undeniable that the doctors' records contain opinions beyond medical and surgical matters admissible pursuant to Section 16." However, it cites no authority for this statement other than section 16 itself. After reviewing the statutory language, we find no indication that the legislature intended to exclude a treating doctor's opinion, which was offered during the course of the doctor's treatment of the employee and me-

morialized in the doctor's treating records, from the phrase "medical and surgical matters."

¶ 40 It stands to reason that the records and reports of a treating physician are likely to contain medical opinions relating to a variety of aspects in the care, treatment, and evaluation of the employee. As a result, we are not persuaded by the employer's position that the simple inclusion of medical opinions within a treating physician's records is sufficient to exclude it from admission pursuant to section 16. Further, although the employer criticizes the arbitrator's comment that Commission proceedings should be "simple and summary," we note section 16 of the Act actually contains that explicit phrase. That section provides that "[t]he process and procedure before the Commission shall be as simple and summary as reasonably may be." 820 ILCS 305/16 (West 2008). The provisions of section 16 at issue in this appeal assist in accomplishing that goal by easing the foundational requirements for the admission of a treating physician's records. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 50, 976 N.E.2d 1 (stating the 2005 amendments to section 16 were meant "to ease the foundational requirements for the admission of medical bills and records").

¶ 41 We note section 16 does not apply to reports prepared by a treating medical provider for use in litigation. 820 ILCS 305/16 (West 2008). In a single sentence in its opening brief, the employer concludes that some of the opinions in the records of Dr. Nam and Dr. Silver were contained within "reports appearing to be prepared in the aid of litigation." However, the employer offers no basis or argument to support its conclusion, nor does it identify or cite to the offending "reports." "The 'failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.' " *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 33 (quoting *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37, 992 N.E.2d 103); Ill. Sup. Ct. R. 341(h)(7) (eff. July 1,

2008) (providing that points not argued in an appellant's brief are waived). We find any arguments by the employer that portions of Dr. Nam's and Dr. Silver's records were prepared in anticipation of litigation have been forfeited due to the employer's failure to present any reasoned argument to support such a position.

¶ 42 Despite the employer's forfeiture, we note Dr. Nam's letter, dated October 5, 2009, and addressed to "To Whom It May Concern," is the most suspect document for having been prepared in anticipation of litigation. In the letter, Dr. Nam provided an opinion that does not appear to have been relevant or necessary to his treatment of claimant as it concerned claimant's inability to work from January to June 2009, a period of time immediately prior to when his own treatment and evaluation of claimant began. However, to the extent the Commission committed error by allowing the letter into evidence, we find no reversible error occurred. The record fails to reflect that either the arbitrator or the Commission relied on this particular opinion of Dr. Nam. In fact, although Dr. Nam opined claimant was unable to work from January to June 2009, and claimant was off work for much of that time, he was not awarded TTD benefits for that time period except for a short period in February 2009, when he was under work restrictions at Concentra and had been laid off by the employer. Thus, as Dr. Nam's opinion in his October 5, 2009, letter was not relied upon by the Commission, the employer did not suffer prejudice and any error was harmless.

¶ 43 Finally, we note that in the context of hearsay objections to medical records the supreme court has held that "under certain circumstances the probability of accuracy and trustworthiness [of a document] may serve as a substitute for cross-examination under oath." *United Electric Coal Co. v. Industrial Comm'n*, 93 Ill. 2d 415, 420, 444 N.E.2d 115, 117 (1982). In *United Electric*, 93 Ill. 2d at 417-18, 444 N.E.2d at 116, the employer objected to two exhibits

the employee offered into evidence, each of which contained a physician's audiogram and a letter from the physician to the employee's attorney, containing the physician's opinions as to the nature and cause of the employee's condition. The exhibits were admitted into evidence over the employer's objections. *United Electric*, 93 Ill. 2d at 418, 444 N.E.2d at 116. On review, the employer asserted the exhibits contained hearsay and "should not have been admitted because [the employer] had no opportunity to subject [the physician] to cross-examination concerning the statements contained in the reports and because [the physician's] statements were not made under oath." *United Electric*, 93 Ill. 2d at 420, 444 N.E.2d at 117. In rejecting the employer's contentions, the supreme court stated as follows:

> "The reports and audiograms at issue here were based on examinations performed upon [the employee] by a specialist to whom he had been referred by his family physician for evaluation and treatment. There is no challenge to their authenticity. Moreover, the audiograms were examined by [the employer's] medical witness, whose evaluation of them, to some extent, formed the basis for his opinion concerning the cause of [the employee's] condition. Under the circumstances we believe the information contained in the challenged exhibits was trustworthy and conclude that the arbitrator did not err in admitting the exhibits into evidence." *United Electric*, 93 Ill. 2d at 420-21, 444 N.E.2d at 117-18.

¶ 44 Here, although the employer did not object to claimant's exhibits on hearsay grounds, we nevertheless find *United Electric* instructive. In particular, it stands for the proposition that the probability of accuracy and trustworthiness of an exhibit may substitute for cross-

examination under oath. Cross-examination of claimant's doctors in this case was exactly what the employer was seeking. However, like the exhibits in *United Electric*, claimant's exhibits in this case included the records of physicians he saw for evaluation and treatment; the authenticity of the records was not challenged by the employer; and the records were reviewed by the employer's evaluating physician, Dr. Karlsson. The record reflects the employer had a sufficient opportunity to rebut claimant's evidence. Under the circumstances presented, we find the employer failed to show its due process rights were violated and the Commission committed no error in rejecting the employer's due process argument.

¶ 45 On appeal, the employer next argues the Commission erred in finding claimant's left knee condition of ill-being was causally connected to his December 2008 work accident. He argues the evidence overwhelmingly shows claimant injured only his right knee in December 2008. The employer points out claimant initially sought and received treatment for only his right knee, did not begin making left knee complaints until almost two years later in November 2010, and the record contains no medical evidence to support claimant's overuse theory of causation with respect to his left knee.

¶ 46 Initially, the employer contends the Commission's decision, which reversed the arbitrator's finding as to causation and claimant's left knee injury, should be reviewed using an "extra degree of scrutiny." However, this court has previously declined to apply such a standard, even when reviewing the Commission's rejection of the arbitrator's credibility determinations. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 676, 928 N.E.2d 474, 483 (2009); see also *R & D Thiel v. Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010) (recognizing "the Commission exercises original jurisdiction and is not bound by an arbitrator's findings" and stating a reviewing court determines "whether the

Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence"). We similarly decline to apply the extra-degree-of-scrutiny standard in this case.

¶ 47 "Whether a causal connection exists between a claimant's condition of ill-being and h[is] work related accident is a question of fact to be resolved by the Commission, and its resolution of the matter will not be disturbed on review unless it is against the manifest weight of the evidence." *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 913, 851 N.E.2d 72, 79 (2006). "It is the Commission's duty to resolve conflicts in the evidence, particularly medical opinion evidence." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005). "The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion." *Land & Lakes*, 359 Ill. App. 3d at 592, 834 N.E.2d at 592. "For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Land & Lakes*, 359 Ill. App. 3d at 592, 834 N.E.2d at 592.

¶ 48 Here, as stated, the Commission determined claimant's left knee condition of ill-being was causally connected to his December 2008 work accident. The record supports that decision, showing claimant fell while working on stilts on December 15, 2008, and landed on both of his knees. Prior to that date, he had no history of knee problems. Following his accident, claimant immediately began receiving treatment for his right knee where the pain was most prominent and, ultimately, underwent right knee surgery. He also consistently reported an accident history of falling onto both of his knees and, on February 11, 2009, Dr. Cohen diagnosed claimant with "a contusion to both knees." Claimant testified he experienced pain in both knees

following his lay off from the employer in February 2009. In November 2010, after his right knee surgery, claimant's medical records show he began reporting worsening symptoms in his left knee.

¶ 49 Although the record does not support the Commission's statement that Dr. Silver opined claimant's left knee "progressed with overuse of his left leg over several years of right knee impairment," Dr. Silver's records do show he believed claimant's left knee condition was causally related to his December 2008 accident. As the employer points out, its examining physician offered an opposing opinion as to causation. However, conflicts in the medical evidence were for the Commission to resolve. We cannot say an opposite conclusion from that of the Commission was clearly apparent from the record. Its decision as to causation was not against the manifest weight of the evidence.

¶ 50 The employer next challenges the Commission's TTD award. It argues that because claimant's left knee condition was not causally related to his work accident claimant was only entitled to TTD benefits from February 5 to February 10, 2009, and from November 13, 2010, the date of claimant's right knee surgery, to March 24, 2011, when the employer contends claimant's right knee had recovered from surgery and, per Dr. Silver, claimant remained off work due to only his left knee condition of ill-being.

¶ 51 "A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of her injury will permit." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. "The issues of whether an employee is temporarily totally disabled, as well as the period of such disability, are questions of fact for the Commission, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence." *Kishwaukee Community Hospital v.*

Industrial Comm'n, 356 Ill. App. 3d 915, 925, 828 N.E.2d 283, 293 (2005).

¶ 52 Here, the arbitrator awarded claimant 107-4/7 weeks' TTD benefits, representing the time periods of (1) February 5, 2009, when claimant was laid off from the employer to February 11, 2009, when he was released by Dr. Cohen to return to full-duty work and (2) June 13, 2009, when Dr. Nam examined claimant and determined him unable to work to June 28, 2011, when claimant was evaluated by Dr. Karlsson and found to have reached MMI. After modifying the arbitrator's decision with respect to causal connection, the Commission awarded claimant an additional 17-3/7 weeks' TTD benefits, representing the time period of June 30, 2011, through October 18, 2011, "during which time [claimant] remained temporarily totally disabled per Dr. Silver." The TTD periods awarded by the Commission were supported by the record, which contains the off-work restrictions of claimant's treating physicians. Additionally, the employer's main challenge to the Commission's TTD award is based on its contention that the Commission's causation decision was against the manifest weight of the evidence. As discussed, we disagree with that contention. We find the Commission's TTD award is supported by the record and not against the manifest weight of the evidence.

¶ 53 Finally, the employer argues the Commission's award of medical expenses is against the manifest weight of the evidence. "Whether medical expenses are reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1.

¶ 54 First, the employer again bases its challenge to the Commission's medical expenses award on the same due process and causation arguments already raised and rejected. For the same reasons already stated, its arguments fail. Second to the extent the employer argues claim-

ant was required to present the testimony of his treating physicians to establish the reasonableness and necessity of his claimed expenses, we disagree.

¶ 55 In *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1, this court rejected a similar argument by an employer. Noting the reasonableness and necessity of medical expenses was a question of fact for the Commission, we pointed out that the claimant's medical records documented her injuries, symptoms, "and the medical procedures that her doctors believed were necessary and appropriate to treat her pain and injuries." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1. We then stated as follows:

> "The employer presented no evidence suggesting that these treatments were not necessary to cure or relieve the effects of [the] claimant's injury. Nor did it present any evidence showing that these bills were unreasonable in light of what other healthcare providers typically charge for the same services in the relevant geographical area. Thus, we cannot say that the Commission's finding that the medical treatments performed by the claimant's doctors and the prospective medical treatments they recommended were reasonable and necessary was against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1.

¶ 56 The same rationale set forth in *Shafer* applies here. Claimant's medical records documented his injuries, symptoms, and treatment. The employer presented no evidence showing the treatments claimant received were unnecessary or that amounts billed were unreasonable. As a result, the record contained sufficient evidence to support the Commission's award of medi-

cal expenses and its decision was not against the manifest weight of the evidence.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision and remand for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 59 Affirmed and remanded.