2011 IL App (1st) 103542WC-U
No. 1-10-3542WC
Order filed: December 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CITY OF CHICAGO, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION and WILLIAM BARHOUMEH, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 10-L-50667 Honorable Sanjay T. Tailor, Judge, Presiding.

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

ORDER

Held: (1) Claimant did not forfeit award of maintenance by failing to advance such a claim at arbitration or before the Commission; (2) manifest-weight-of-the-evidence standard applied to review of Commission's award of maintenance benefits; (3) Commission erred in awarding claimant maintenance benefits for a period during which claimant had been placed at maximum medical improvement and was not participating in a vocational rehabilitation program; and (4) Commission's award of a wage-differential benefit beginning January 25, 2008, and lasting through the duration of claimant's disability, would not be disturbed where claimant established a partial incapacity that prevents him from pursuing his usual and customary line of employment and an impairment of earnings.

¶ 1 Claimant, William Barhoumeh, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2002)) alleging an injury to his right shoulder while working for respondent, the City of Chicago. Following a hearing, the arbitrator found a causal connection between the condition of claimant's right shoulder and his employment. The arbitrator awarded temporary total disability (TTD) benefits (see 820 ILCS 305/8(b) (West 2002)) and a wage differential (see 820 ILCS 305/8(d)1 (West 2002)). The Illinois Workers' Compensation Commission (Commission) affirmed, but modified the decision to reflect that claimant was also entitled to maintenance benefits. Thereafter, the circuit court of Cook County confirmed. On appeal, respondent challenges the Commission's awards of maintenance and a wage differential. We modify the Commission's decision to reflect that an award of maintenance was improper and to substitute a wage-differential in its stead but otherwise affirm.

¶ 2 I. BACKGROUND

¶ 3 The following relevant facts were established by the testimony presented and the exhibits admitted into evidence at the hearing on claimant's application for adjustment of claim, which was held on March 25, 2009. In March 2003, claimant was employed as a union laborer in respondent's water department. Among other things, this position required claimant to construct valve and catch basins using a variety of tools, including shovels, picks, axes, saws, and jack hammers. According to a job description admitted into evidence, the physical demands of claimant's laborer position include the ability to lift and carry 100 pounds continuously.

¶ 4 On March 5, 2003, claimant was working for respondent building a valve basin. On that particular day, claimant was unloading material. As he was lifting a bag of cement, claimant felt pain in his right arm and noted limited arm motion. The following day, claimant was directed by respondent to MercyWorks, an occupational clinic, where he was seen by Dr. Edward Bleier. Dr.

Bleier's note of March 6, 2003, documents that claimant reported a sharp pain in his right shoulder while being handed a bag of cement at work. The only prior documented injury to claimant's right arm was a deltoid muscle strain in 2000. Following an examination, Dr. Bleier diagnosed an acute strain of the right shoulder. He prescribed medication, a home exercise program, and instructed claimant to return to work in a light-duty capacity with no lifting greater than 25 pounds and no overhead work.

¶ 5 On March 10, 2003, claimant was evaluated by Dr. David Raab. Dr. Raab diagnosed right shoulder impingement and bicipital tendonitis. Claimant's right shoulder was injected with cortisone. He was also instructed to begin a formal physical therapy program, remain on light duty, and return for a follow up. Respondent was unable to accommodate claimant's light-duty restrictions, and he remained off work. On March 18, 2003, claimant underwent a right shoulder MRI, after which Dr. Raab diagnosed a rotator cuff tear and recommended continued physical therapy.

¶ 6 On June 5, 2003, after conservative treatment failed, claimant underwent surgery on his right shoulder. Dr. Raab noted a "quite extensive," "full thickness" tear of the rotator cuff and performed various procedures, including a rotator cuff repair. Claimant resumed physical therapy after surgery. However, he continued to have difficulties with his right shoulder, prompting a recommendation for an MR arthrogram, which was taken on December 5, 2003. On December 11, 2003, claimant was evaluated at MercyWorks, where the MR arthrogram results were reviewed, and claimant was diagnosed with a suspected recurrent rotator cuff tear. At that time, claimant was instructed to discuss further surgery with Dr. Raab.

¶ 7 Claimant returned to MercyWorks on December 22, 2003, when he was instructed to discontinue physical therapy and start a program of work conditioning. The work-conditioning program began on December 24, 2003, and continued into January 2004. The initial work-

conditioning report noted that claimant failed five of the eight validity criteria, indicating probable magnification of symptoms and submaximal effort. The evaluator also noted that while claimant reported not being able to raise his arm above shoulder level, he was observed on two occasions to actively raise his arm above his head to remove his sweater.

¶ 8 On January 21, 2004, Dr. Raab discussed the need for additional surgery to repair claimant's right rotator cuff. On February 2, 2004, claimant was evaluated by Dr. David Garelick by way of referral from Dr. Raab. Dr. Garelick noted claimant complained of persistent pain in the right shoulder. Although an examination showed that claimant had only 90 degrees of active forward elevation, Dr. Garelick noted that claimant reached 120 degrees of forward elevation actively when putting a sweater over his head. Ultimately, Dr. Garelick recommended a second surgery and instructed claimant to discontinue work conditioning. Claimant testified that he did not want to have additional surgery at that time.

¶ 9 Dr. Bleier of MercyWorks examined claimant again on February 6, 2004. Dr. Bleier also instructed claimant to discontinue work conditioning and he discharged claimant from medical care. In addition, Dr. Bleier authorized claimant to return to work "limited duty MMI [maximum medical improvement]" with restrictions of no lifting more than 50 pounds and no overhead lifting more than 10 pounds.

¶ 10 Claimant testified that respondent was unable to accommodate the restrictions recommended by Dr. Bleier and he was enrolled by respondent into a vocational program. As part of this program, claimant reported to respondent's personnel department at 30 South State Street. Claimant reported to this address shortly after he was released by MercyWorks with permanent restrictions and was instructed to complete a job application for a position as a watchman. Claimant was told that he would be contacted if there was a position available for him. According to claimant, he cooperated fully with the vocational program, but remained off

work receiving weekly payments from respondent through 2006.

¶ 11 Meanwhile, on April 24, 2006, claimant returned to Dr. Raab complaining of intermittent right-shoulder pain. At that time, claimant told Dr. Raab that he did not believe he could return to work in a full-duty capacity. Around September of 2006, claimant was informed by respondent that he was to report to work as a watchman on October 1, 2006. Claimant testified that as a watchman, he worked an eight-hour shift (from 3 p.m. until 11 p.m.) and earned an initial rate of pay of $16.59 per hour. Claimant was not paid a differential between his former rate of pay as a laborer and his new position as a watchman. Claimant testified that after he started as a watchman he spoke to Carol Hamburger by telephone about receiving a wage differential. Claimant stated that Hamburger, an employee in respondent's budget department, told him to consult a lawyer if he wanted a wage differential. Hamburger also stated that if claimant wanted to return to his old job as a laborer, he needed a full-duty release.

¶ 12 Claimant testified that, despite his permanent work restrictions, he sought a full-duty release to attempt to return as a laborer because of financial hardship. To this end, claimant returned to Dr. Raab on October 18, 2006. Claimant explained that he had been off work for an extended period of time and had avoided strenuous activities with his right arm. Therefore, he reported his right arm was okay and requested a full-duty release. Dr. Raab's notes indicate that he authorized claimant to return to work, but noted that if objective criteria were required, he would recommend a functional capacity evaluation (FCE). Claimant could not recall whether Dr. Raab provided the full-duty release before or after he spoke with Hamburger.

¶ 13 On January 9, 2007, claimant reported to MercyWorks at the request of respondent's Committee on Finance and was examined by Dr. Bleier. At that time, claimant requested a return to work full duty and he was instructed to undergo an FCE. A January 12, 2007, FCE noted that claimant put forth maximum effort. Claimant was noted to lift 100 pounds occasionally. Based

on the results of the FCE, and given his ability to lift 100 pounds, claimant was discharged to full duty by MercyWorks. Claimant testified that despite the full-duty release, respondent refused to return him to work as a laborer. Instead, claimant continued working as a watchman, and he was not paid a wage differential.

¶ 14 On May 23, 2007, claimant returned to Dr. Raab complaining of occasional discomfort with overhead activity. Claimant was noted to have mild impingement and received a cortisone injection to his right shoulder. However, the injection did not alleviate his shoulder complaints, and claimant sought a referral from his primary-care doctor for a second opinion. To that end, on May 30, 2007, claimant was evaluated by Dr. David Hoffman. Dr. Hoffman performed an examination and noted diminished range of motion, weakness, and impingement signs in the right shoulder. Dr. Hoffman recommended an MR arthrogram to rule out a recurrent rotator cuff tear, and he instructed claimant to refrain from lifting with his right arm. The MR arthrogram was performed on June 8, 2007, and indicated a rotator cuff tear of the right shoulder. On June 13, 2007, Dr. Hoffman recommended surgery and instructed claimant to return to desk work only with no lifting of the right arm.

¶ 15 Claimant was directed to MercyWorks at the request of the Committee on Finance on June 14, 2007. On June 28, 2007, claimant was instructed by MercyWorks to return to Dr. Raab for re-evaluation prior to surgical authorization. Dr. Raab noted a recurrent rotator cuff tear and concurred with Dr. Hoffman's surgical recommendation. MercyWorks' notes indicate authorization for surgery was initially received from Bob Serafin of the Committee on Finance on July 13, 2007. However, five days later, Serafin rescinded his approval.

¶ 16 Dr. Hoffman performed a mini-open rotator cuff repair with subacromial decompression of the right shoulder on July 20, 2007. Respondent did not pay for the surgery. The operative report noted fraying of the labrum as well as the "remnant of suture, where he had had a previous

arthroscopic repair. One of the suture ends probably broke and was about ½ inch long." On July 26, 2007, claimant was instructed to begin a regimen of physical therapy. In his November 13, 2007, note, Dr. Hoffman states, given the finding of a tear in the December 2003 MR arthrogram so soon after the original surgery, "either the initial surgery was incomplete and/or [claimant] suffered further damage to the rotator cuff while he was rehabbing his shoulder, I feel that this all dates back to the original injury of 2003."

¶ 17 Claimant completed therapy in January 2008. Dr. Hoffman released claimant to normal duty work without restrictions effective January 14, 2008. Claimant returned to work as a watchman on January 24, 2008. Claimant was not paid TTD benefits from the time of the second surgery through January 24, 2008. At the time of the Mach 2009 arbitration hearing, claimant earned $17.56 per hour as a watchman for respondent. The rate of pay for a laborer as of January 2009 was $34.75 per hour. Claimant was not receiving a wage differential.

¶ 18 According to claimant, at the time of the arbitration hearing, he continued to experience limited movement in his shoulder and problems lifting his shoulder over his head. He did not believe he could return to work as a laborer. Claimant further explained that he did not have the same strength in his arm. He also testified to weather sensitivity, limited grip strength, and a throbbing pain in his shoulder.

¶ 19 Dr. Hoffman testified by evidence deposition that he first examined claimant on May 30, 2007. At that time, Dr. Hoffman's examination was consistent with inflammation of the rotator cuff and impingement. Dr. Hoffman placed claimant on work restrictions of no lifting with his right arm. Claimant subsequently underwent an MRI and Dr. Hoffman diagnosed a full-thickness rotator cuff tear. On July 20, 2007, Dr. Hoffman performed arthroscopic surgery on claimant's shoulder, consisting of a subacromial decompression and a rotator cuff repair. Prior to giving his opinions, Dr. Hoffman reviewed the operative report from the initial surgery, the MRI from June

2007, and a post-surgical MR arthrogram from 2003. Dr. Hoffman concluded that either claimant's initial surgical reconstruction was incomplete or he suffered damage during physical therapy. Dr. Hoffman further explained that he found a ruptured suture during his surgery which likely tore after claimant's first surgery. Dr. Hoffman opined that more likely than not, the recurrent tear was from physical therapy. Dr. Hoffman also concluded that the rotator cuff tear he saw was related to claimant's accident in 2003.

¶ 20 Dr. Hoffman reviewed the job description of a water department laborer and noted that one of the physical requirements was lifting 100 pounds consistently. Dr. Hoffman opined that it is "pretty unlikely that [claimant is] going to be able to repetitively lift and carry up to 100 pounds continuously" given that he has undergone two shoulder surgeries. Dr. Hoffman added that claimant would be unable "to do repetitive overhead activities above shoulder level and he can't do it with significant amounts of weight." Dr. Hoffman also testified that he would not "push" claimant "to lift a lot of stuff above shoulder level and certainly not repetitively either intermittently or continuously." He believed claimant could continue working as a watchman. Dr. Hoffman testified that at the time he released claimant to return to work, he had "incomplete knowledge" as to the laborer job description. Dr. Hoffman opined that claimant was at MMI.

¶ 21 Respondent presented the evidence deposition of Dr. Kevin Walsh. Dr. Walsh performed an examination of claimant on September 6, 2007, at the request of respondent and issued a report. Dr. Walsh testified that his examination of claimant revealed limited motion of the right shoulder. It was Dr. Walsh's opinion that claimant's rotator cuff tear in 2007 was not connected to his work injury in 2003 and that, therefore, no work restrictions were necessary as a result of his 2003 accident. Dr. Walsh further opined that claimant was able to return to work in a full-duty capacity based on the job description as a laborer in respondent's water department.

¶ 22 Dr. Walsh acknowledged that his opinion was only as valid as the information he was

asked to review and his opinion could change if additional relevant records were available for review. Dr. Walsh testified that he did not review the operative report from Dr. Hoffman's surgery, any of Dr. Hoffman's notes after September 6, 2007, actual films from any MRI, the intraoperative photos taken by Dr. Raab during his surgery, Dr. Hoffman's deposition, the FCE of January 2007, or the records from Athletico, one of claimant's physical therapy providers. Dr. Walsh also agreed that he had never reviewed any FCE from any time that indicated claimant was capable of meeting the physical demands required of a laborer. Nevertheless, it was Dr. Walsh's understanding that claimant had returned to work as a laborer.

¶ 23 Respondent also presented the testimony of Donald O'Malley, its Director of Labor Relations. O'Malley testified that the majority of respondent's jobs are "career service" positions. According to O'Malley, an individual cannot hold two career service positions at the same time. O'Malley testified that a watchman position and a laborer position are separate career service positions. As such, an individual cannot hold the position of a watchman and a laborer at the same time. O'Malley explained that when an employee is appointed to a new career-service position, that appointment "severs and separates" the individual from the old career-service position. On cross-examination, O'Malley confirmed that placement for positions within the City of Chicago is handled by respondent. As such, labor unions do not have any control over hiring for respondent's positions and any decision whether claimant could be reinstated as a laborer would be made by respondent.

¶ 24 Carol James, the business manager for Laborers' Local Union 1092, was also called to testify by respondent. James explained that prior to claimant going for his FCE with MercyWorks, the decision had already been made by respondent that he would not be returning to work as a laborer. James testified that the union does not control who respondent hires for what positions, although there is a collective bargaining agreement that controls how a vacancy is

filled. It was James's understanding that once an injured employee reaches MMI, if he is offered a position, he must accept it or his benefits will be stopped. James described it as a "no choice situation," explaining that if the employee does not accept an offered position, disability benefits will cease. James stated that claimant was placed in a watchman position outside of local 1092 because the water department had no openings at the time.

¶ 25 The arbitrator found a causal connection between the March 5, 2003, accident and claimant's right shoulder condition. In doing so, the arbitrator specifically found the opinions of Dr. Walsh to be unpersuasive. The arbitrator also ordered respondent to pay for all claimed medical expenses. The arbitrator awarded TTD benefits from March 6, 2003, until October 1, 2006, and from June 13, 2007, until January 24, 2008. See 820 ILCS 305/8(b) (West 2002). The arbitrator also ordered respondent to pay a wage differential of $458.40 per week from October 1, 2006, through June 13, 2007, and from January 24, 2008, through the duration of claimant's disability. See 820 ILCS 305/8(d)1 (West 2002). The arbitrator explained:

> "The [claimant] participated in the Respondent's vocational program and was placed as a watchman. If he did not do so, he might have lost his compensation benefits or been fired or both. The [claimant] then requested a return to his prior laborer position, which he was told required a full duty release. He obtained a full duty release. The Respondent then had the ultimate power to rehire the [claimant] and return him to his prior career service position. The Respondent had the ultimate control of the matter. The final determination of whether the [claimant] worked as a laborer or as a watchman was the Respondent's. The Respondent chose to have the [claimant] remain as a watchman. It would be contrary to the remedial purpose of the Act, if the respondent would now be allowed to claim that the [claimant] is not entitled to wage differential benefits."

¶ 26 A unanimous Commission affirmed the arbitrator's causation finding. However, the

Commission modified the arbitrator's award to find that claimant was entitled to TTD from March 6, 2003, through October 1, 2006; maintenance benefits from October 2, 2006, until June 12, 2007; and TTD from June 13, 2007, through January 24, 2008. The Commission specifically held that the maintenance award was proper because claimant had not reached MMI when he returned to work as a watchman in October 2006. See 820 ILCS 305/8(a) (West 2002). The Commission further held that "[t]he Arbitrator's finding that [claimant] is unable to return to his job as a laborer for [respondent] and must accept a lower paying job as a Watchman should be affirmed and adopted." However, the Commission determined that claimant's wage differential did not begin until January 25, 2008, when he returned to work as a watchman for a second time and had reached MMI. Thereafter, the circuit court of Cook County confirmed the decision of the Commission. This appeal ensued.

¶ 27 II. ANALYSIS

¶ 28 A. Maintenance

¶ 29 On appeal, respondent first challenges the Commission's award of maintenance. Initially, we address respondent's suggestion that claimant forfeited an award of maintenance by failing to advance such a claim at arbitration or before the Commission. We point out that respondent cites no authority in support of this claim in contravention of Illinois Supreme Court Rule 341(h)(7) (eff. September 1, 2006). Under Rule 341(h)(7), any argument unsupported by citation to legal authority is itself deemed forfeited. Ill. S. Ct. R. 341(h)(7) (eff. September 1, 2006); *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 504-05 (2004). In any event, we have previously determined that a claimant is not required to request vocational rehabilitation before being entitled to an award of maintenance. *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002, 1019 (2005); *Roper Contracting*, 349 Ill. App. 3d at 504. As such, we decline to find that claimant has forfeited the issue of his entitlement to maintenance.

¶ 30 Before advancing to the merits, we must also determine the appropriate standard of review. Entitlement to maintenance is typically a question of fact. See *Nascote Industries v. Industrial Comm'n,* 353 Ill. App. 3d 1067, 1074 (2004). Because it is within the province of the Commission to determine the facts, judge the credibility of witnesses, and draw reasonable inferences therefrom (*City of Waukegan v. Industrial Comm'n,* 298 Ill. App. 3d 1086, 1089 (1998)), a court of review will generally not set aside the Commission's ruling on such issues unless it is against the manifest weight of the evidence (*Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920, 926 (2000)). The manifest-weight-of-the-evidence standard also applies if more than one inference may be drawn from the undisputed facts on a particular issue. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 349 (2000). Only where the facts are undisputed and susceptible to but a single inference does the inquiry become one of law subject to *de novo* review. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 104-05 (2006). In this case, respondent urges that the Commission's decision to award maintenance was incorrect as a matter of law. Claimant contends that the award of maintenance should be reviewed under the manifest-weight-of-the-evidence standard. We agree with claimant that in this case we are presented with a factual dispute subject to review under the manifest-weight-of-the-evidence standard. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *City of Chicago v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1093 (2007).

¶ 31 Respondent alleges that claimant is not entitled to maintenance because, contrary to the Commission's finding, claimant had reached MMI prior to the period for which he was awarded maintenance. Respondent further asserts that claimant was not participating in a vocational rehabilitation program after he started working as a watchman in October 2006. Respondent also points out that claimant was authorized by two physicians to return to full duty and that an FCE

placed him at a physical demand level within the laborer position in the water department. For these reasons, respondent insists that claimant is not entitled to maintenance benefits from October 2, 2006, until June 12, 2007. Claimant responds that the Commission correctly determined that he had not reached MMI when he started his watchman position in October 2006, because the evidence demonstrates that he needed additional rotator cuff surgery at that time and he was unable to meet the requirements of his position as a laborer for the water department.

¶ 32 Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2002)), an employer "shall *** pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." This court has stated that an employee may be entitled to maintenance benefits incidental to a rehabilitation program before he has reached MMI. *Nascote Industries*, 353 Ill. App. 3d at 1075. Even where an employee has reached MMI, he may still be entitled to maintenance under section 8(a) of the Act while he is in a prescribed rehabilitation program. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 430-31 (1983); *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55 (1988). Here, we agree with respondent that the Commission erred in awarding claimant maintenance for the period from October 2, 2006, through June 12, 2007. The basis for the Commission's maintenance award was that claimant had yet to reach MMI as of October 2, 2006. The Commission did not explain this finding. More important, the evidence does not support it. Indeed, the evidence establishes that claimant was placed at MMI well before October 2006.

¶ 33 MMI occurs when an injured employee's physical condition has stabilized. *Interstate Scaffolding v. Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142 (2010). The factors to be considered in determining whether an employee has reached MMI include a release to return to work (with restrictions or otherwise), medical evidence concerning the claimant's injury, and the extent of the injury. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d

170, 178 (2000). Here, the evidence establishes the following. On February 6, 2004, Dr. Bleier placed claimant at MMI, discharged claimant from his care, and released claimant to return to work with restrictions of no lifting more than 50 pounds and no overhead lifting more than 10 pounds. Respondent was unable to accommodate Dr. Bleier's restrictions, and, according to claimant's undisputed testimony, he was enrolled by respondent into a vocational program. Claimant testified that he cooperated fully with the vocational program, until he was informed by respondent in September 2006, that he was to report to full-time duty as a watchman on October 1, 2006. There was no evidence that claimant continued to participate in any vocational program once he began working as a watchman in October 2006.

¶ 34 Although Drs. Raab and Garelick recommend surgery prior to Dr. Bleier's MMI finding, claimant testified that he decided against additional surgery at that time. See *Fermi National Accelerator Lab v. Industrial Comm'n*, 224 Ill. App. 3d 899, 909 (1992) (considering evidence that the claimant had no intention of undergoing recommended surgery in determining period of TTD). Claimant did not change his mind regarding the need for additional surgery until after he was examined by Dr. Hoffman in mid 2007. Further, while claimant insists that he would have been physically incapable of meeting the physical demands of a laborer in the water department as of October 2006, this is not relevant to a finding of MMI. As noted above, the relevant inquiry in assessing whether an employee has reached MMI is whether his physical condition has stabilized, not whether he can return to the position in which he was working at the time the injury occurred. See *Interstate Scaffolding*, 236 Ill. 2d at 142. Thus, we find that as of October 2006, claimant's physical condition had stabilized and he had completed a rehabilitation program which would enable him to resume employment. Accordingly, we find that the Commission award of maintenance for the period from October 2, 2006, through June 12, 2007, on the basis that he had yet to reach MMI, is against the manifest weight of the evidence. *Cf. Greaney*, 358

Ill. App. 3d at 1019 (upholding award of maintenance after the claimant was placed at MMI but during period in which the claimant was participating in a self-created vocational program); *Nascote Industries*, 353 Ill. App. 3d at 1075 (upholding award of maintenance for period during which claimant worked part time for the employer pursuant to a physician-approved rehabilitation plan and prior to time in which the claimant had been placed at MMI); *Roper Contracting*, 349 Ill. App. 3d at 55 (upholding award of maintenance after the claimant was placed at MMI but during period in which the claimant was participating in a self-created vocational program).

¶ 35 Once the employee's physical condition has stabilized and he has completed a rehabilitation program which will enable him to resume employment without further training or education, maintenance is not appropriate. See *National Tea Co.*, 97 Ill. 2d at 430-31; *Freeman United Coal Mining Co.*, 318 Ill. App. 3d at 177-78; *Archer Daniels Midland Co. v. Industrial Comm'n*, 174 Ill. App. 3d 918, 922 (1988), *reversed in part on other grounds*, 138 Ill. 2d 107 (1990). At that point, however, the employee may be entitled to permanent partial disability compensation under section 8(d) of the Act (820 ILCS 305/8(d) (West 2002)) or permanent total disability compensation under section 8(f) of the Act (820 ILCS 305/8(f) (West 2002)). *Archer Daniels Midland Co.*, 138 Ill. 2d at 118; *Freeman United Coal Mining Co.*, 318 Ill. App. 3d at 178. In this case, the arbitrator awarded a wage-differential award (see 820 ILCS 305/8(d)1 (West 2002)) for the period between October 1, 2006, when claimant started working as a watchman, and June 13, 2007, when Dr. Hoffman imposed work restrictions. We find that the arbitrator's award of a wage-differential for this period of time was appropriate. See *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729 (2000) ("If claimant has requested a wage-differential award and he proves that he qualifies for one, the plain language of section 8(d)(1) requires that he be awarded a wage-differential award").

¶ 36 To qualify for a wage-differential award, an employee must establish by a preponderance

of the evidence (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/8(d)1 (West 2002); *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 835 (2002); *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886, 890 (1990).

¶ 37 With respect to the first element, we note the following. According to the job description admitted into evidence, the duties of an individual employed as a laborer in respondent's water department include removing earth from valve basins and vaults, loading and unloading construction materials from trucks, and helping lift and place materials such as pipes, valves, hydrants, and castings into trenches for installation. Among the physical requirements set forth in the job description is the ability to lift and carry 100 pounds continuously. In February 2004, Dr. Bleier cleared claimant to return to work "limited duty MMI" with restrictions of no lifting more than 50 pounds and no overhead lifting more than 10 pounds. The restrictions imposed by Dr. Bleier were clearly outside the physical demands of a laborer in the water department. We acknowledge that in mid-October 2006, after claimant began working as a watchman, Dr. Raab did authorize claimant to return to work as a laborer. At that time, Dr. Raab noted that if objective criteria were required, he would recommend an FCE. An FCE was ordered in January 2007, after claimant was examined by Dr. Bleier at the request of respondent's Committee on Finance. The FCE revealed that claimant was capable of lifting 100 pounds *occasionally*. Thus, the FCE confirmed that claimant was not capable of meeting the physical demands of a laborer in the water department, as that position required the ability to lift and carry 100 pounds *continuously*. Respondent cites no evidence to the contrary before Dr. Hoffman imposed work restrictions in June 2007.

The evidence also establishes an impairment of earnings for the period between the date that claimant began working as a watchman and the date Dr. Hoffman imposed work restrictions.

When claimant began working as a watchman in October 2006, he was earning $16.59 per hour. Further, evidence taken at the arbitration hearing establishes that the prevailing wage of a laborer in the water department was greater than claimant's wage as a watchman, and claimant testified that he was not paid a wage differential between what he was making as a watchman and what he would have been earning as a laborer in the water department.

In conclusion, the evidence demonstrates that with respect to the period from October 1, 2006 (when claimant began working for respondent as a watchman) and June 13, 2007 (when Dr. Hoffman imposed work restrictions), claimant established both an inability to pursue his usual and customary line of employment as a laborer in the water department and an impairment of earnings. Thus, the arbitrator correctly determined that claimant was entitled to a wage-differential award pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2002)) with respect to this period of time. As a result, we modify the Commission's decision to substitute a wage-differential award at the rate determined by the arbitrator in place of the maintenance award ordered by the Commission.

¶ 38 B. Wage Differential for Period Commencing January 2008

¶ 39 Respondent also contends that the Commission erred in awarding claimant a wage differential under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2002)) for the period beginning in January 2008. We disagree.

¶ 40 As noted above, to qualify for a wage-differential award, an employee must establish by a preponderance of the evidence (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/8(d)1 (West 2002); *Pietrzak*, 329 Ill. App. 3d at 835; *Durfee*, 195 Ill. App. 3d at 890. Whether the employee has established each of these elements is a question of fact for the Commission. *Copperweld Tubing Products Co. v. Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633 (2010). A

reviewing court will not overturn the Commission's decision on a factual matter unless it is against the manifest weight of the evidence. *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008). As stated previously, a decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *City of Chicago*, 373 Ill. App. 3d at 1093.

¶ 41 Here, there was sufficient evidence to support the Commission's award of a wage differential beginning January 25, 2008, and lasting for the duration of claimant's disability. As noted elsewhere, among the physical requirements set forth in the job description of a laborer for the water department is the ability to lift and carry 100 pounds *continuously*. The medical records indicate that following the second surgery, Dr. Hoffman released claimant to normal-duty work without restrictions effective January 14, 2008. In accordance with Dr. Hoffman's release, claimant returned to work for respondent on January 24, 2008. He did so not as a laborer, however, but as a watchman.

¶ 42 Dr. Hoffman subsequently testified by deposition. Dr. Hoffman recounted that prior to his deposition, he did not have a detailed job description of claimant's duties as a laborer and that his initial opinion was based on "incomplete knowledge." Upon reviewing the job description, Dr. Hoffman opined that it is "pretty unlikely that [claimant is] going to be able to repetitively lift and carry up to 100 pounds continuously" given that he has undergone two shoulder surgeries. Dr. Hoffman added that claimant would be unable "to do repetitive overhead activities above shoulder level and he can't do it with significant amounts of weight." Dr. Hoffman also testified that he would not "push" claimant "to lift a lot of stuff above shoulder level and certainly not repetitively either intermittently or continuously." Although Dr. Walsh indicated that claimant could return to work as a laborer, it is the function of the Commission to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve conflicting evidence.

City of Waukegan, 298 Ill. App. 3d at 1089. Dr. Walsh admitted that his opinion was only as valid as the information he was asked to review and that he did not review all of claimant's medical records. Given the foregoing evidence, it was reasonable for the Commission to conclude that Dr. Hoffman was more persuasive than Dr. Walsh and that claimant met his burden of establishing that he was unable to pursue his usual and customary line of employment as a laborer in respondent's water department.

¶ 43 Although respondent does not challenge whether claimant established an impairment of earnings, we conclude that the record easily supports such a finding. Claimant testified that when he returned to work as a watchman in January 2008, he was paid $17.56 per hour. Further, evidence taken at the arbitration hearing establishes that at that time, the prevailing wage for a laborer in the water department was $34.75 per hour. Accordingly, the evidence demonstrates both that claimant was unable to pursue his usual and customary line of employment as a laborer in the water department and that his earnings were reduced as a result of the accident at issue. Therefore, claimant is also entitled to a wage-differential award pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2002)) beginning January 25, 2008, and lasting for the duration of his disability in the amount of $458.40 per week.

¶ 44 III. CONCLUSION

¶ 45 For the reasons set forth above, we agree with the Commission that claimant is entitled to a wage-differential award pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2002)) beginning January 25, 2008, and lasting for the duration of his disability. However, we modify the Commission's decision to reflect that claimant is entitled to a section 8(d)1 wage-differential award for the period from October 1, 2006, through June 13, 2007, instead of an award of maintenance for this period of time. Accordingly, the judgment of the circuit court of Cook County, which confirmed the decision of the Commission in its entirety, is affirmed as modified.

¶ 46 Affirmed as modified.