2013 IL App (5th) 120576WC-U

Workers' Compensation
Commission Division
Filed: September 18, 2013

No. 5-12-0576WC

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

DOBBS TIRE & AUTO, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al*., (Ted Adams, Appellee).	))))))))))))	Appeal from the Circuit Court of St. Clair County. No. 12-MR-0039 Honorable Stephen P. McGlynn, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Illinois Workers' Compensation Commission's awards for medical expenses and permanent total disability benefits were not against the manifest weight of the evidence; additionally, the cause did not need to be remanded for consideration of the rehabilitation specialist's evidence.

¶ 2 The employer, Dobbs Tire & Auto (Dobbs), appeals from an order of the circuit court of St.

Clair County confirming a decision of the Illinois Workers' Compensation Commission (Commission), which awarded the claimant, Ted Adams, permanent total disability (PTD) benefits of $847.10 per week for life and $239,549.16 for necessary medical expenses under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), for a neck and left shoulder injury he sustained while in Dobbs' employ. On appeal, Dobbs argues that (1) the Commission's awards for necessary medical expenses and PTD benefits are against the manifest weight of the evidence; and (2) the PTD award must be vacated and remanded for reconsideration in light of previously-excluded evidence from a vocational rehabilitation specialist. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on September 29, 2009.

¶ 4 This case was originally heard by the arbitrator on August 19, 2005, after which the claimant was awarded: $847.10 per week for 293 5/7 weeks for temporary total disability (TTD) pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2008)) for January 1, 2000, through August 19, 2005; and $131,526.96 for medical expenses pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)). The matter was not appealed to this court. In this case, the arbitrator adopted all findings of fact and conclusions of law from the first decision and noted that the present issue involved the claimant's condition after August 19, 2005. We therefore summarize the claimant's history through that date based on the arbitrator's earlier decision.

¶ 5 The claimant was employed by Dobbs as a mechanic. On December 31, 1999, he sustained

injuries arising out of and in the course of his work after a pry bar broke and caused him to fall backwards, launching him through the air and into a water cooler. His back, neck, shoulder, and lower hip and thoracic area hit the water cooler. The claimant had immediate pain in his chest and left shoulder. He testified that he first attempted to return to work in 2000, as a part-time tire salesman, but he had to stop because the pain medications made it unsafe for him to drive to and from work. The claimant also tried to return to work in February 2004 as an assistant service manager, but he had to stop because he was having another surgery. Between January 1, 2000, and August 19, 2005, the claimant underwent the following surgeries: a cervical discectomy and fusion at C5-C6 (January 2000); left shoulder surgery (October 2000); left sternoclavicular joint resection (July 2002); excision of the left sternoclavicular joint (February 2004); and a second cervical discectomy and fusion using a plate from C3-C6 (November 2004). After the prior arbitration hearing, the arbitrator concluded that the claimant's condition of ill-being was causally related to the December 31, 1999, accident and that he was temporarily totally disabled from January 1, 2000, through August 19, 2005.

¶ 6 On December 28, 2005, the claimant was referred to Dr. Catherine Wittgen by his family physician, Dr. Robert Farmer, for his continued shoulder and clavicle pain. Dr. Wittgen ordered vascular lab studies to determine if there was any excessive clavicular motion. Following those lab studies, Dr. Wittgen referred the claimant to Dr. Robert Thompson for a second opinion regarding her suspicion that the claimant had developed thoracic outlet syndrome.

¶ 7 On February 21, 2006, the claimant saw Dr. Thompson, who recommended thoracic outlet decompression surgery with resection of the first rib and further resection of the clavicle. Dr. Thompson opined that it was not unreasonable to conclude, after all of the previous surgeries and treatment, that the claimant's continued left arm and shoulder pain was caused by thoracic outlet decompressions.

¶ 8 On February 24, 2006, the claimant saw Dr. William Sprich, who previously had operated on his cervical spine. Dr. Sprich noted that the claimant continued to have pain around the clavicle joint and impairment of his subclavian pulse. He recommended that the claimant have surgery to repair his clavicle and ordered more tests for the claimant's cervical and lumbar spine.

¶ 9 On March 17, 2006, the claimant underwent the thoracic outlet surgery at Barnes-Jewish Hospital with Dr. Thompson. Dr. Thompson described the surgery as successful. On April 6, 2006, Dr. Thompson noted that the claimant was making good postoperative progress.

¶ 10 On May 24, 2006, upon referral from Dr. Farmer, the claimant saw Dr. Barbara Sudholt for breathing problems. Dr. Sudholt determined that his breathing problems were a complication of the thoracic outlet and rib resection surgery, which caused left hemidiaphragm paralysis. She ordered inhaler medication and saw the claimant for follow-up exams on June 5 and September 29, 2006.

¶ 11 On June 26, 2006, Dr. Sprich noted that he reviewed the claimant's cervical spine x-rays and determined that he would be a good candidate for nerve block injections to manage his pain. He also referred the claimant to see Dr. Scott Kutz for a second opinion.

¶ 12 On July 6, 2006, Dr. Thompson reported that the claimant's recovery had slowed because he likely had phrenic nerve palsy on his left side. He believed that the phrenic nerve, which controls the diaphragm, would heal over time. The claimant returned for follow-up visits with Dr. Thompson on November 28, 2006; February 22 and June 21, 2007; and February 21, 2008. In treatment notes after each of those visits, Dr. Thompson wrote that the claimant's phrenic nerve palsy was not improving. In his February 21, 2008, note, Dr. Thompson stated that he did not see the claimant ever returning to work because of his health problems, and he characterized the claimant as totally disabled.

¶ 13 On July 12, 2006, Dr. Kutz saw the claimant and ordered testing to determine the best course of treatment for his cervical spine pain. On July 26, 2006, Dr. Kutz reviewed the claimant's tests and recommended that he pursue nerve block injections to manage the cervical pain. He stated that if the claimant had transient relief with injections, a posterior cervical fusion could be an option.

¶ 14 On August 10, 2006, the claimant saw Dr. Mahendra Gunapooti for the nerve block injections for his neck and shoulder pain. Upon follow-up for that procedure, the claimant reported to Dr. Gunapooti that the injections provided only one week of pain relief. The claimant was referred back to Dr. Kutz for surgical intervention.

¶ 15 The claimant saw Dr. Kutz on September 22, 2006, and they discussed cervical spine surgery. Dr. Kutz testified that, because the nerve block injections had provided the claimant relief, he and the claimant decided that a supplemental fusion might provide additional relief. He testified that total pain relief would be very unlikely in the claimant's case, but that

surgical intervention could reduce the overall pain level. On October 19, 2006, Dr. Kutz performed a posterior cervical fusion on the claimant at DePaul Health Center, employing lateral mass screws from C3 through C7. Dr. Kutz saw the claimant on November 1, 2006, noting that he reported less clicking in his neck and that the postoperative swelling had reduced. On December 6, 2006, Dr. Kutz wrote that the claimant reported that he developed a fine, bilateral hand tremor as well as some right shoulder numbness but otherwise felt that his neck pain improved. The claimant reported the same at his March 7, 2007, follow-up appointment. Dr. Kutz testified that the claimant's pain was improving and that he was attempting to decrease his pain medications.

¶ 16 The claimant saw Dr. Guy Burrows for pain management on March 1, 2007, reporting persistent difficulty turning his head to the left, an aching in the left chest area, and difficulty holding objects. He further reported to Dr. Burrows that he had left diaphragm palsy, which interfered with his breathing and ability to sleep. The claimant also had low back pain. Dr. Burrows ordered MRI exams of the claimant's spine and steroid injections for the pain over the course of several months.

¶ 17 On August 22, 2007, the claimant was examined by Dr. Philip George, an orthopedic surgeon, at the request of Dobbs. Dr. George opined that this was a "mind boggling history and present[ed] the picture of a surgical saga, the likes of which [he had] never seen." He opined that the claimant was not able to enter the open labor market as a result of the multiple surgeries to his neck and upper extremities and had reached maximum medical improvement (MMI). Dr. George testified that the claimant's cervical spine range of motion

was limited by almost 95% in all planes and that his left shoulder's range of motion was also limited by 40% to 60%. However, on September 4, 2007, Dr. George issued a letter stating that he reviewed a May 2007 surveillance video of the claimant performing yard work and said that he "would certainly agree that [the claimant was] able to return to the open labor market. As a matter of fact, I would suggest only restricting his overhead work." Dr. George testified that the video changed his opinion as to whether the claimant could work. He admitted that he could not recall the length of the video and did not know how the claimant felt after performing the yard work. On October 23, 2007, Dr. George treated the claimant in his office for his left shoulder pain. Dr. George administered steroid injections into the claimant's shoulder for left shoulder impingement.

¶ 18 On December 17, 2007, the claimant saw Dr. Traves Crabtree at Washington University upon referral from Dr. Farmer, for his continued breathing problems. Dr. Crabtree advised the claimant against having a diaphragmatic plication for his postoperative phrenic nerve paralysis unless his chronic pain symptoms improved.

¶ 19 In January 2008, Dr. Sudholt ordered a sleep study to ensure that the claimant's breathing issues were not related to sleep apnea. The sleep study did not indicate sleep apnea but did indicate decreased oxygenation during sleep.

¶ 20 On February 13, 2008, upon referral from Dr. Farmer, the claimant saw Dr. Jay Keener for treatment of his continued pain in the area of his scapula and clavicle. Dr. Keener ordered a steroid injection and advised the claimant to return after his upcoming diaphragm surgery. The claimant received a steroid injection on February 19, 2008, from Dr. Devyani Hunt at

Washington University.

¶ 21 On February 27, 2008, upon referral from Dr. Sudholt and Dr. Farmer, the claimant saw Dr. Hon Chi Suen for treatment of his left hemidiaphragm paralysis. Dr. Suen testified that the left side of the claimant's diaphragm was paralyzed, which impaired his ability to breathe. He diagnosed this condition following a "sniff" test, which is a fluoroscopic x-ray study. On March 3, 2008, Dr. Suen performed a left thoracotomy and plication of the claimant's left hemidiaphragm to strengthen the diaphragm muscle. During the surgery, the claimant lost cardiac function and was given emergency electric cardioversion shock treatment. Dr. Suen released the claimant from his care on September 10, 2008.

¶ 22 Dr. Suen testified that he did not think that the claimant could work a manual labor job because of his impaired pulmonary function. He believed the surgery was necessary because, without surgery, the claimant's organs received insufficient oxygen and he suffered shortness of breath, especially upon exertion. He testified that "from a surgery standpoint," the claimant should be able to work about three months after surgery. However, Dr. Suen testified that he had no opinions regarding the claimant's prognosis for any cervical or thoracic outlet problems. Further, Dr. Suen testified that the phrenic nerve could be injured during cervical spine surgery.

¶ 23 Dr. Keener saw the claimant again on April 9 and July 9, 2008. Dr. Keener indicated that the claimant demonstrated dynamic scapular winging on the left side and weakness of the shoulder muscles. He diagnosed the claimant with scapulothoracic bursitis caused by the complications and treatments of his cervical spine and sternoclavicular joint injuries. Dr.

Keener told the claimant that he would consider arthoscopic scapulothoracic bursectomy surgery once he recovered from the diaphragm surgery.

¶ 24 On August 8, 2008, Dr. Keener performed the shoulder surgery for the bursitis. He saw the claimant again on August 20, 2008, and the claimant reported that he was doing well, had less tightness and crunching at the top part of the scapula, but still had pain. Dr. Keener ordered physical therapy treatments, which the claimant underwent in September. On September 22, 2008, Dr. Keener wrote that the claimant reported less pain and popping posteriorly in the shoulder, but that he had episodic sharp jabs of pain where he felt like his clavicle was poking his rib. The claimant asked Dr. Keener about further surgery to resect or remove his clavicle bone. Dr. Keener advised the claimant against that and referred him to Dr. Leesa Galatz for a second opinion regarding the clavicle. Dr. Galatz saw the claimant on September 30, 2008, and agreed that a clavicle resection was not a viable option.

¶ 25 On December 2, 2008, the claimant returned to Dr. Kutz with complaints of neck pain and occipital headaches. Dr. Kutz testified that the claimant had chest surgery in the interim and had jerked his neck during an intubation procedure for that surgery, triggering the neck pain. Dr. Kutz ordered new imaging exams, which showed that the screw at C2 was misaligned, and he recommended nerve root block therapy and possible surgery. Dr. Kutz testified that he did not know if the claimant had been seen cutting trees in May 2007, but he agreed that type of activity was not advisable. He further testified that either the neck-jerking during the intubation procedure or the tree-cutting activity could have caused the screw in the claimant's neck to move. As of December 2008, he agreed that the claimant could not return to work

as a mechanic and would be limited to sedentary work.

¶ 26 On October 29, 2008, the claimant returned to Dr. Thompson for a follow-up visit after having surgery on his diaphragm and shoulder surgery. The claimant reported persistent pain in his neck and shoulder areas.

¶ 27 On January 29, 2009, the claimant was examined by Dr. Matthew Gornet, upon referral from Dr. Kutz, regarding the misaligned screw in his neck. Dr. Gornet had a CT scan performed on the claimant that day, which he reviewed before noting that the screw at C2 was "slightly outside the bone into the neural foramen." Dr. Gornet opined that there was little chance of the screw moving, as it appeared stable and the fusion appeared solid. Dr. Gornet opined that further surgery would not benefit the claimant and he did "not believe [the claimant would] ever return back to gainful employment."

¶ 28 In June 2009, Dr. Thompson ordered imaging exams to determine whether the screw in the claimant's cervical spine was impinging on his vertebral artery; the exam showed no impingement.

¶ 29 On April 1, 2009, Dr. Keener saw the claimant again for pain in his trapezius and ordered another steroid injection and a CT scan.

¶ 30 In September 2009, after Dr. Burrows moved out of state, the claimant sought pain management treatment, including cervical and lumbar epidural injections, from Dr. Naheed Bashir.

¶ 31 Dr. David Lange examined the claimant on May 11, 2009, at the request of Dobbs. In his report, Dr. Lange summarized the claimant's various surgeries and medical records. The

claimant reported to Dr. Lange that he had left shoulder and sternoclavicular pain which travels down his left arm, incapacitating pain in the back of the neck which travels upward into his head, dizziness and severe headaches, inability to hold an object with his left arm, inability to bend or flex his left elbow or shoulder because of a severe tearing sensation in the left neck and shoulder joint, and pain in his chest when he breathes.

¶ 32 Dr. Lange also reviewed a two-hour video from May 2007 in which the claimant is seen using a chainsaw to cut tree branches from a downed tree. Dr. Lange stated that he observed that the claimant did not extend his neck in a normal fashion, tended to ambulate with the left upper extremity dangling down by his torso, and did not have a normal swinging motion. He opined that the video did not allow him to state that the claimant could tolerate a full eight-hour day at any physical demand level. Dr. Lange further opined that the claimant is unlikely to be able to cease taking any of his medications and is unlikely to become employable even if he has the misaligned screw removed from his neck.

¶ 33 Regarding the claimant's conditions, Dr. Lange concluded that the claimant's shoulder surgeries contributed to his thoracic outlet syndrome. Specifically, Dr. Lange wrote in his report that "the thoracic outlet syndrome was related to the clavicle resections, which in turn were related to the sternoclavicular discomfort and in turn the December 31, 1999 incident." He therefore concluded that the subsequent surgeries, including the diaphragm surgery to repair the injured phrenic nerve, were indirectly related to the workplace incident. Dr. Lange opined that the claimant has reached MMI. While he questioned the soundness of the final shoulder surgery because the claimant had had no success with the previous surgeries, Dr.

Lange stated that "one can't fault his surgeons for trying to improve [the claimant's] function status and decrease his pain." He opined that the claimant "probably is not a candidate for the general employment pool considering his multiple musculoskeletal maladies, fairly obvious psychological disease, and his multiple, multiple medications."

¶ 34 Exhibit no. 48 is a summary of the claimant's pharmacy bills for various pain medications from August 2005 through August 2009, which total $31,120.81 from the Injured Workers Pharmacy and $33,178.69 from Eisele's Pharmacy. The bills encompass prescriptions for Vicodin, Ambien, fentanyl patches, and various other drugs connected to the claimant's injury. Exhibit no. 49 is a summary of the claimant's medical expenses from August 2005 through August 2009, broken down by physician and hospital, which total $180,138.96. Both exhibits contain the supporting pharmacy and medical bills. Dobbs did not object to the admission of these exhibits but stated it was disputing liability for them.

¶ 35 Jim Bernardini, executive vice president and chief financial officer of Dobbs, testified that the claimant contacted him about returning to work in late 2003 or early 2004. Bernardini recalled that the claimant worked for about a week in February 2004, but he had to stop working because he was having another surgery. Bernardini admitted that he was unaware that the claimant had a third cervical spine surgery, thoracic outlet decompression surgery, diaphragm surgery, or additional shoulder surgery. He testified that there was an assistant service manager position available for the claimant, which would primarily involve paperwork, telephones, and sales. Yet, he admitted that he does not have the authority to hire or fire anyone in Dobbs' store locations and that the claimant had not been offered any

position or contacted about any positions for the last five years.

¶ 36 The surveillance video is contained in the record and depicts the claimant using a chainsaw to cut small branches from a tree that his friend was cutting down for him. The claimant pulled the chainsaw string a few times, using his right arm, and cut some branches to smaller pieces; he pulled some small branches into a pile. The claimant predominantly used his right arm in the video and the left arm is shown dangling near his torso.

¶ 37 The claimant testified that he recalled applying for over 100 positions while working with a vocational rehabilitation specialist. He began working with the vocational specialist in December 2007 and continued until February 2008, when he had diaphragm surgery. After that surgery, he was never offered any vocational rehabilitation services and Dobbs never contacted him about any positions it might have available for him.

¶ 38 Regarding the surveillance tape, the claimant testified that he was working with his friend to remove a small tree from his yard. He admitted that he was taking his medications at the time and admitted he used a chainsaw to cut up the brush that was already on the ground. However, he explained that the saw had a compression release feature, which made it easy to pull the string to start the saw, and a shock absorber feature, which prevented the user from feeling vibrations. He testified that the project took about an hour or an hour and 15 minutes, and he said that, during the project, he had to take a break and lie down while his friend worked. The claimant testified that, after the project, he felt terrible. The claimant testified that he believed the video was spliced and that the time stamp on the video was not accurate.

¶ 39 The claimant testified that his daily medications included: Vicodin, Paxil, Flexeril, Xanax, Fentanyl patches, and Lidoderm patches. He also used Ambien and trazadone to help him sleep. Without these daily medications, he testified, he could not function and had trouble walking, experienced "massive pain," and vomited. The claimant testified that the misaligned screw caused pain because it was pressing on a nerve. However, he was told additional surgery to remove the screw would be potentially life-threatening. In describing his current condition, he testified that he cannot turn his head more than a few inches in any direction and has massive neck pain, muscle tearing, headaches, and muscle spasms in his neck. He also testified that he can no longer lift his left arm over his head or hold any amount of weight with his left arm. Following his chest surgeries, he has pain in his back and stomach areas. The claimant further testified that he has numbness and pain in his lower back on the left side.

¶ 40 Regarding his current breathing issues, the claimant testified that he is able to maintain 91% to 92% oxygen rate unless there is high humidity; upon exertion, his oxygen rate drops to 85%. Because of his condition, he testified that he can no longer sleep through the night. The claimant testified that he can no longer walk any distance because he gets short of breath. He testified that his general life activities, including walking, running, moving, lifting anything, driving, and sleeping, have been adversely affected by his condition.

¶ 41 Brad Stephens, the private investigator hired by Dobbs, testified that he performed the video surveillance on May 7, 2007. He denied splicing the video or otherwise editing the video. He admitted he turned off the camera when vehicles or persons blocked his view; however,

he testified that the time stamp on the video was accurate.

¶ 42 Dobbs presented testimony from Lisa Simonin, a vocational rehabilitation specialist, who recalled that she first met with the claimant in October 2007 and continued meeting with him on a weekly basis for approximately 13 to 14 weeks. She testified that he participated in the job search program, providing her with documentation of his job search efforts. However, Simonin testified that the claimant was not as serious about the job search as she would have preferred. After the claimant's February 2008 surgery, he contacted Simonin to resume the job search program, but Simonin was told by the insurer to keep his case on hold. Vocational services were never resumed for the claimant's case. Simonin admitted that she had no contact with the claimant after February 2008 and never received any medical information about him. She testified that, as of February 2008, the claimant was employable in the automotive industry in positions that were sedentary or required light work duty. Simonin's reports from early 2008 state that the claimant was uncooperative in his job search responsibilities and complained that he was unable to work in almost any capacity. The reports indicate that the claimant was evaluated by Dr. George on September 4, 2007, who released the claimant to return to work with a restriction on overhead work. Simonin concluded that, within a reasonable degree of vocational certainty, the claimant was employable in the realm of his former occupation within his restrictions, or in another job field.

¶ 43 Upon the claimant's objection, the arbitrator excluded Simonin's testimony and vocational rehabilitation reports on the basis that she was not a certified vocational counselor as

required under section 8(a) of the Act.

¶ 44 On January 13, 2010, following the arbitration hearing, the arbitrator awarded the claimant 488 3/7 weeks of TTD at a rate of $847.10 per week for the time period of December 31, 1999, through May 11, 2009, and ordered Dobbs to pay the claimant $847.10 per week for life in PTD benefits pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2008)). The arbitrator further ordered Dobbs to pay $239,549.16 for necessary medical services pursuant to section 8(a) of the Act.

¶ 45 The arbitrator specifically noted that she had previously determined that the claimant's prescriptions for hydrocodone, paroxetine, fentanyl patches, lidoderm patches, trazadone and oxycodone were causally connected and reasonable to treat his condition. She additionally determined that the prescriptions from Dr. Burrows, Dr. Farmer, Dr. Thompson, Dr. Suen, and Dr. Sudholt for Ambien, diazepam, Lyrica, methocarbamol, methylpred, Miralax, alprazolam, azithromycin, zolipedem, and warfarin were causally connected to his workplace accident. The arbitrator excluded the claimant's medications for his diabetes. The total pharmacy expenses from Eisele's Pharmacy calculated by the arbitrator were $28,798.82. The total pharmacy expenses from the Injured Workers Pharmacy calculated by the arbitrator were $25,728.58.

¶ 46 The arbitrator included a medical expense breakdown, indicating whether each expense was connected to the claimant's cervical spine injury, left shoulder injury, lumbar spine, thoracic outlet syndrome or respiratory injury. The total medical expenses calculated by the arbitrator as being causally connected to the claimant's workplace accident were $182,498.13.

¶ 47 The arbitrator found that the opinions of Dr. Gornet and Dr. Lange were credible, especially given the claimant's extensive medical history, and that she could not place any weight on Dr. George's opinion because of his sudden change in opinion after viewing the May 2007 surveillance video and because he began treating the claimant as a private patient. The arbitrator further found Bernandini's testimony suspect because no one had ever contacted the claimant regarding any job openings for five years and because Bernandini was unaware of the claimant's multiple surgeries. Bernardini also agreed that the claimant's multiple pain medications would likely interfere with his employment opportunities. Finally, the arbitrator stated that, despite the exclusion of Simonin's testimony and exhibits, her opinions "would have been worthless had they been admitted" because Simonin last saw the claimant in February 2008.

¶ 48 Dobbs filed a petition for review of the arbitrator's decision before the Commission, arguing that the medical expenses were not reasonable, that its vocational expert's testimony was improperly excluded, and that the claimant was not permanently disabled. On January 6, 2012, with one commissioner partially dissenting, the Commission affirmed and adopted the decision of the arbitrator, but modified the medical expense award to $237,025.53 to correct a clerical error. The Commission determined that the vocational expert's testimony should have been admitted because the amendment to section 8(a), which required the vocational expert to be certified, did not apply to cases involving injuries occurring before February 1, 2006. However, even with that vocational expert testimony, the Commission, which relied particularly on Dr. Lange's opinions, determined that the evidence demonstrated that the

claimant was permanently disabled. Commissioner Kevin Lamborn dissented from the majority's interpretation of the vocational expert's testimony and reports, stating that he would remand the case for rehearing on the employment issue and permit the expert to testify regarding her opinions concerning the claimant's search for and ability to work.

¶ 49 Thereafter, Dobbs filed a petition for judicial review of the Commission's decision in the circuit court of St. Clair County. On November 20, 2012, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 50 Dobbs first argues that the award of medical bills, without any evidence that they were reasonable or necessary, is against the manifest weight of the evidence. Dobbs argues that it was the claimant's burden to submit an affidavit or deposition testimony from any of the treating physicians indicating that the charges for the services rendered were reasonable and customary. Dobbs asserts that the claimant failed to submit such evidence and did not testify that any of his medical bills were paid. It argues that merely submitting the bills into evidence does not establish that the bill must be awarded. We disagree.

¶ 51 Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of his employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164, 596 N.E.2d 823 (1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the

manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18 (2001). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

¶ 52 In this case, the claimant submitted his pharmacy bills, which the Commission reviewed before excluding any amount related to the claimant's diabetes. The prescriptions that were included in the Commission's award were connected to the claimant's injuries and prescribed by his treating physicians. The Commission clearly itemized the drugs and the physicians and determined those medications were reasonable and necessary to treat the claimant's condition. The Commission also reviewed the medical bills and labeled each as being connected to the claimant's conditions. At the hearing, Dobbs did not dispute the existence of these bills but only the extent of its liability for them. Thus, Dobbs waived any argument regarding the amount of the bills. See *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 718, 609 N.E.2d 775 (1993) (finding employer waived any argument regarding the amount of medical bills where, at the arbitration hearing, the employer stated it was not objecting to the existence of the bills but only the extent of its liability for them). As to the reasonableness of the bills, Dobbs failed to present any evidence to show these bills were not reasonable with respect to what other medical providers charge in the claimant's

area. Moreover, Dobbs presented no evidence to show that these services were not necessary to cure or relieve the effects of the claimant's injury. See *id.* (finding that Commission's determination that medical expenses were reasonable and necessary was not against the manifest weight of the evidence where the employer failed to present any evidence to show the bills were not reasonable or that the treatments were not necessary to cure or relieve effects of the claimant's injury); see also *Shafer v. Illinois Worker's Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1 ("If the employer fails to introduce any evidence to suggest that services rendered were not necessary or that the charges were not reasonable, an award to a claimant who presents some evidence in support of the award will be upheld."). Accordingly, the Commission's finding that these medical expenses were reasonable and necessary is not against the manifest weight of the evidence.

¶ 53 Dobbs next argues that the Commission's award of PTD is against the manifest of the weight of the evidence. Alternatively, it argues that the award of PTD benefits must be vacated and reconsidered in light of the Commission's admission of the vocational rehabilitation specialist's testimony and documents. We reject both arguments.

¶ 54 In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842 (1983), the supreme court held that:

"[A]n employee is totally and permanently disabled when he is 'unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations.] The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. [Citations.] Rather, a person is totally disabled when he

is incapable of performing services except those for which there is no reasonably stable market. [Citation.] Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. [Citation.] In determining a claimant's employment potential, his age, training, education, and experiences should be taken into account. [Citations.]

In considering the propriety of a permanent and total disability award, this court recently stated:

'Under *A.M.T.C. [of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 489 (1979)], if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market [citation], then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant [citation].' [Citations.]" (Emphasis omitted.)

¶ 55 Whether an employee has sustained an injury which renders him permanently and totally disabled is a question of fact to be resolved by the Commission. *Reynolds v. Industrial Comm'n*, 151 Ill. App. 3d 695, 696-97, 502 N.E.2d 1178 (1986). It is the function of the

Commission to resolve conflicting evidence, to draw reasonable inferences from the facts, and to conclude from a proper evaluation of all the evidence whether the employee is permanently and totally disabled. *Id.* The Commission's decision will not be set aside on review unless it is against the manifest weight of the evidence. *Id.* at 697.

¶ 56 Dobbs argues that the May 7, 2007, video and the testimony of Dr. Kutz, Dr. Keener, and Dr. George demonstrate that the claimant was not permanently disabled but was able to work with an overhead restriction. Dobbs also argues that the claimant's tree-cutting activities caused the misaligned screw. However, the Commission was not convinced that one isolated incident of yard work caused the misaligned screw and noted that the record contained no such opinion given to a reasonable degree of medical certainty. We agree that there is no medical opinion as to the cause of the misaligned screw in the claimant's neck, and we further note that the voluminous medical record establishes that the claimant's neck pain was never completely relieved by any treatment or surgery before the May 7 video was taken. Therefore, the Commission's conclusion that the tree-cutting incident did not affect the causal connection between the claimant's current condition of ill-being and his workplace accident is not against the manifest weight of the evidence.

¶ 57 Likewise, we do not find that the testimony of the doctors requires a reversal of the claimant's PTD award. While Dr. George stated that the claimant could work with an overhead restriction, the Commission did not find his opinion to be credible, because he changed his original opinion after reviewing the May 2007 videotape and began treating the claimant as a private patient shortly thereafter. Dr. Keener wrote in an April 1, 2009, note

that he would guess that the claimant should have a lifting restriction of 10 pounds but that he would need a functional capacity evaluation to make an adequate determination. While Dr. Kutz testified that the claimant could be employed only in a sedentary job, the Commission was convinced by the medical opinions of Dr. Gornet and Dr. Lange that the claimant was permanently and totally disabled. Dr. Gornet, who had most recently reviewed the claimant's neck condition, opined that the claimant was not a candidate for general employment. Dr. Lange, who examined the claimant at the request of Dobbs, opined that the claimant was not a candidate for general employment because of his multiple maladies and his need for numerous pain medications. It is the Commission's function to resolve conflicting evidence, determine the credibility of witnesses, and determine the weight to be given to the evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405, 459 N.E.2d 963 (1984); *Reynolds*, 151 Ill. App. 3d at 696-97. In this case, the Commission found the opinions of Dr. Gornet and Dr. Lange to be more credible than other medical opinions. It further found persuasive that Dobbs terminated vocational rehabilitation services after the claimant's February 2008 diaphragm surgery and the claimant's overall medical record, which encompassed nine surgeries that have not alleviated his pain or restored his mobility. Based on this record, we cannot disturb the findings of the Commission.

¶ 58 Finally, we reject Dobbs' alternative argument that the Commission should have remanded the cause to the arbitrator following its decision to admit the evidence and testimony of the vocational rehabilitation specialist. The Commission stated that, "[d]espite the admission and consideration of" Simonin's opinions, it was affirming the arbitrator's finding that the

claimant was permanently and totally disabled. Despite excluding the evidence, the arbitrator specifically stated that Simonin's opinions "would have been worthless had they been admitted" because she last saw the claimant in February 2008 and admitted she was unaware of the claimant's current condition. Thus, despite its exclusion, the arbitrator considered the evidence, and the Commission agreed the evidence had no impact. Under these circumstances, remanding the cause is unnecessary.

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

¶ 60 Affirmed.