2014 IL App (2d) 130922WC-U
No. 2-13-0922WC
Order filed November 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ALDI, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-MR-696
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION and	)	
SHARI KOTH,	)	Honorable
	)	David R. Akemann,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Arbitrator did not abuse her discretion in denying respondent's motion to continue arbitration hearing; (2) Commission did not abuse its discretion in denying respondent's motion for remand to present additional evidence; (3) Commission's finding that claimant established that she was unable to pursue her "usual and customary line of employment" was not against the manifest weight of the evidence; and (4) Commission's calculation of wage-differential award was not against the manifest weight of the evidence.

¶ 2 Respondent, Aldi, Inc., appeals from the judgment of the circuit court of Kane County, which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding claimant, Shari Koth, benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)), including a wage-differential award pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2008)). Respondent's arguments on appeal can be grouped into three distinct categories. First, respondent argues that the arbitrator abused its discretion in denying its request for a continuance of the arbitration hearing pending further developments in the vocational-rehabilitation process. Second respondent challenges the Commission's decision to deny its motion to remand the cause to the arbitrator for additional evidence. Finally, respondent contests the Commission's award of a wage-differential benefit on various grounds. We do not find any of respondent's arguments persuasive. Accordingly, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 17, 2008, claimant filed an application for adjustment of claim alleging that she sustained multiple injuries on June 30, 2008, while working for respondent. An arbitration hearing was scheduled for July 14, 2010. On July 9, 2010, respondent filed an "Objection to Trial Setting." Respondent argued the objection at the arbitration hearing, contending that it was premature to set a trial because claimant has not reached her "maximum vocational potential." Respondent explained that it wanted to postpone the matter to allow claimant to continue the job search that she started with Edward Minnich, a vocational counselor, so as to "upgrade her from the current job that she has *** to a job that would remunerate her more similarly to what she has previously earned with [respondent]." The arbitrator denied the motion, finding that the issue of whether claimant is at maximum vocational potential is "a legitimate question for trial." The following evidence was presented at the arbitration hearing.

¶ 5 Respondent operates a chain of grocery stores and hired claimant in May 2000. Claimant initially worked as an assistant manager at respondent's Streamwood store. Early in 2002, claimant was promoted to manager and transferred to respondent's St. Charles location. Claimant testified that while stocking produce on June 30, 2008, her low back gave way. That same day, claimant sought treatment at Dreyer Medical Clinic, where she was diagnosed with a lumbosacral strain. Claimant was authorized to return to work on modified duty with no lifting more than 20 pounds and only occasional bending, stooping, and twisting. The following day, claimant consulted her family physician, who took her off work.

¶ 6 On July 3, 2008, claimant began treatment with Dr. Richard Rabinowitz. Dr. Rabinowitz ordered an MRI, which revealed a small central disc herniation at L5-S1 with slight compression of the thecal sac in the S1 nerve root sleeve. Dr. Rabinowitz ordered a course of physical therapy. On July 31, 2008, Dr. Rabinowitz authorized claimant to return to work as of August 4, 2008, limited to sedentary work with no lifting more than five pounds and no repetitive bending, lifting, or twisting. Respondent initially accommodated the restrictions. However, on September 15, 2008, claimant was taken off work pursuant to respondent's in-house policy of allowing modified duty for only a period of six weeks. Meanwhile, claimant began a series of lumbar epidural steroid injections. On November 25, 2008, Dr. Rabinowitz released claimant to return to work full duty on a trial basis. Claimant returned to work on December 1, 2008, but, because of continued back pain, she worked for only 10 days. On December 11, 2008, Dr. Rabinowitz recommended a microdiscectomy at L5-S1. At that time, he also restricted claimant from lifting more than 20 pounds. Respondent did not accommodate the restrictions imposed by Dr. Rabinowitz.

¶ 7 On January 6, 2009, claimant sought a second opinion from Dr. Stephen Heim. Dr. Heim ordered a discogram with CT pain study and a lumbar MRI. The discogram and CT study revealed a small disc herniation at L5-S1 with reproducible and severe concordant pain at the same level. The MRI revealed a left paracentral disc protrusion at L5-S1 mildly effacing the left S1 nerve root. Dr. Heim prescribed a left L5-S1 microdiscectomy surgery followed by an L5-S1 fusion procedure. Claimant opted not to undergo surgery, citing her youth (then 33 years old), the one-year recovery period, and the fact that Dr. Heim could not guarantee success. On April 10, 2009, Dr. Heim released claimant with work restrictions of no lifting greater than 20 pounds, no bending, twisting, squatting, stooping, or standing for prolonged periods of time, and the ability to alternate between sitting and standing as needed. Respondent was not able to accommodate these restrictions.

¶ 8 At respondent's request, claimant was examined by Dr. Alexander Ghanayem on September 16, 2009. Dr. Ghanayem opined that claimant "aggravated her standard disc injury at the L5-S1 level at work in June 2008." Dr. Ghanayem thought a lumbar fusion at L5-S1 was medically reasonable. He stated that absent surgical intervention, claimant was at maximum medical improvement and that a 20-pound lifting restriction was reasonable. Claimant declined to undergo surgery, and she remained off work because of respondent's inability to accommodate the restrictions. By letter of November 10, 2009, respondent informed claimant that she would be terminated if she could not return to work. Respondent terminated claimant effective December 10, 2009.

¶ 9 Claimant testified that as a manager for respondent, she was paid an hourly wage based on a 50-hour workweek, irrespective of the number of hours she actually worked. At the time of her injury, claimant was earning $21.54 per hour. At the time of her termination, she was

earning $22.58 per hour. Claimant's W-2 forms for 2007 and 2008 were admitted into evidence. Those forms reflect that claimant's gross earnings for 2007 were $62,512 and her gross earnings for 2008 were $34,072. Claimant further testified that as a store manager, she received a "sales bonus" at the end of the month. Although the sales bonus varied, it typically ranged between $1,200 and $1,500. According to claimant the sales bonus is based on a productivity component and a store-sales component. Claimant explained that the productivity component is a multiple of a manager's productivity as calculated by respondent. The store-sales component is the sum of (1) a percentage (not specified by claimant) of store sales below $400,000 and (2) 0.10% of stores sales over $400,000, if any.

¶ 10 Claimant testified that she began a self-directed job search on November 16, 2009. She applied for 22 positions between November 16, 2009, and January 5, 2010. On January 14, 2010, claimant had an interview with Edward Minnich, a certified vocational counselor hired by respondent. With Minnich's help, claimant found a job as an assistant manager at a Marathon gas station in South Elgin. Both Minnich and respondent advised claimant to accept the position at Marathon. Claimant began working at Marathon on March 22, 2010, earning an annual salary of $27,500. Claimant testified that she works between 40 and 45 hours per week for Marathon, but will not be eligible for vacation or fringe benefits until after one year of employment.

¶ 11 With her return to work, claimant noticed that her low-back pain increased. She went to Sherman Hospital on March 29, 2010, where she was given pain medication and instructed to follow up with her primary-care provider. Claimant saw Dr. Heim on May 4, 2010, with complaints of low-back pain that radiated to the left buttock and posterior thigh. Dr. Heim prescribed a course of physical therapy and authorized claimant to continue working for

Marathon within her limitations. On June 25, 2010, Dr. Heim released claimant pursuant to the work restrictions of April 10, 2009.

¶ 12 Claimant testified that Marathon will conduct a review after her first year of employment for a possible raise, but she has not been promised anything. Claimant acknowledged that she does not have any expectation for advancement within Marathon, but that she plans to continue working there because she likes the position. Claimant testified that her last paycheck from Marathon reflects net earnings of $829.71 for the two-week pay period. Minnich told claimant that, while working for Marathon, she could still seek employment with another company that might have more desirable pay or hours. To this end, claimant has followed up on the job leads Minnich provided. Claimant noted that some of the leads provided by Minnich pay more than Marathon while others pay a salary comparable to what she is currently earning. Claimant applied for management positions at various stores, including Dress Barn, Oberweis Dairy, and Hobby Lobby. Nevertheless, claimant has not had any job interviews since beginning with Marathon. Claimant testified that the week before the arbitration hearing, Minnich offered to meet with her to help her look for a better paying job. They did not meet because she was working. Minnich offered to meet the week following the arbitration hearing, and claimant said that she would get back to him. Claimant testified that while she would like to earn more money, she would not have taken the Marathon job if she thought she would be leaving in four months.

¶ 13 Minnich testified that he has worked in the vocational placement field for 21 years, 18 of which he has been a certified rehabilitation counselor. Minnich related that he first met claimant on January 14, 2010. Following an initial assessment, Minnich developed a plan, suggesting direct job placement using claimant's experience as a store manager. Minnich also helped claimant develop a resume and interviewing skills. Minnich and claimant then established an

email account with a shared password to allow them to share job leads, exchange resumes, and otherwise communicate. Given claimant's restrictions, Minnich ruled out the possibility of claimant returning to work for respondent, explaining, "[t]he problem with [respondent] is that it's one of those unique jobs that requires really physical labor as part of the management position where they have to unload trucks and things like that."

¶ 14 Minnich testified that claimant was successful early on, getting the lead for the Marathon job very quickly. According to Minnich, this showed a "significant amount of motivation" on claimant's part. Minnich testified that he told claimant to "definitely" accept the job offer from Marathon. Although the position was not "full management," it could lead to a job at Marathon as a manager, additional remuneration, or the development of additional skills. After claimant accepted the position at Marathon, Minnich amended her job search plan. Minnich talked to claimant to assess the possibility of a raise or a promotion to full management at Marathon. Claimant did not think either was possible because the company only owns two stores, both of which already had a store manager. As a result, Minnich and claimant decided to look for other positions and they exchanged job leads over the internet. However, around that time, claimant returned to Dr. Heim with medical issues, so she was not able to "ramp up any kind of substantial program."

¶ 15 Minnich related that he and claimant plan to meet in the coming week. He testified that he has sent claimant additional leads. He is looking primarily for full management positions, but is not convinced that claimant's next position will "be the one that gives her the absolute full pay." He noted that many retailers hire assistant managers who are then promoted to full manager. It is his opinion that there is a reasonable stable job market in which claimant has the potential to earn an annual salary of between $50,000 and $60,000. Minnich testified that his

opinion regarding claimant's earning potential is based primarily on a United States Department of Labor (DOL) survey. Minnich testified that claimant's position with Marathon falls in the 25th percentile of incomes in the retail management field as reflected on the DOL survey. However, given claimant's management experience, Minnich stated that she has the potential to earn between the 75th and 90th percentile of incomes, or between $44,000 and $63,000 per year. Minnich opined that claimant is capable of earning closer to the 90th percentile based on her nine years of experience with respondent, her advancement in that job, and her personality.

¶ 16 Minnich stated it may take six months to a full year to place claimant in a job at full income, or if not at full income, then a job that would allow her to reach that potential. Minnich believed that, during this time, respondent should continue to pay claimant a differential and provide vocational services. In this manner, claimant could be more selective about jobs. In Minnich's experience as a vocational counselor, it is more difficult to transition from being off work completely to the first job after an injury than it is to go from the first job after an injury to the second job.

¶ 17 On cross-examination, Minnich testified that claimant's performance in vocational counseling has been "excellent" and that she is in the top 10 of people with whom he has ever worked. Minnich testified that prior to accepting employment with Marathon, claimant told him that the pay for the position was between $25,000 and $30,000 per year. Knowing this, Minnich advised her to take the position. At the time, claimant and Minnich thought the Marathon job might have higher earning potential, but it does not. Minnich agreed that, as far as he knows, claimant has been following up with the job leads he has sent her. He acknowledged that some of these leads are at the same rate of pay as claimant's position with Marathon. It was Minnich's position that claimant continue in the Marathon job until she finds another position that could

lead to a higher wage or a better chance of advancement. Minnich acknowledged that this plan could take an indefinite amount of time, although he did not anticipate that it would.

¶ 18 The arbitrator issued her decision on August 10, 2010. The arbitrator concluded that claimant's low-back condition is causally connected to her undisputed work accident of June 30, 2008. The arbitrator determined that claimant earned $55,089.45 in the year preceding her injury, resulting in an average weekly wage of $1,059.41. The arbitrator awarded temporary total disability benefits of $706.27 a week for 57-1/7 weeks (see 820 ILCS 305/8(b) (West 2008)), maintenance benefits of $706.27 a week for 26-4/7 weeks (see 820 ILCS 305/8(a) (West 2008)), temporary partial disability benefits of $336.82 a week for six weeks (see 820 ILCS 305/8(a) (West 2008)), and $566.51 for reasonable and necessary medical services (see 820 ILCS 305/8(a), 8.2 (West 2008)). In addition, the arbitrator found that claimant has become partially incapacitated from pursuing her job as a store manager for respondent. As a result, the arbitrator awarded a wage-differential benefit of $601.56 per week commencing March 22, 2010, and lasting for the duration of claimant's disability. See 820 ILCS 305/8(d)(1) (West 2008). In so holding, the arbitrator stated that there is nothing in the Act or case law that requires claimant to defer a permanency determination or participate in further vocational rehabilitation once she has found suitable post-injury employment.

¶ 19 Early in September 2010, both parties filed a petition for review of the arbitrator's decision. On March 17, 2011, after the parties filed their statements of exceptions and briefs, but before the Commission issued its decision on review, respondent filed with the Commission a "Motion for Remand to Present Additional Evidence." In the motion, respondent alleged that it recently learned that claimant received a raise from Marathon. As such, respondent sought a remand to the arbitrator for the admission of additional evidence regarding claimant's current

rate of pay at Marathon. Claimant filed a response to respondent's motion for remand and a motion to dismiss the same. A hearing on the motion was held before Commissioner Thomas Tyrell on June 8, 2011.

¶ 20 On February 10, 2012, the Commission entered an order denying respondent's motion for remand. The Commission determined that respondent is seeking a modification of the wage-differential award with the presentation of evidence after trial. Citing *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519 (2006), the Commission concluded that it did not have the authority to grant such relief. The Commission explained that it may only reopen or modify an award: (1) to correct a clerical error or an error in computation (see 820 ILCS 305/19(f) (West 2008)); (2) to review of a claimant's change in condition (see 820 ILCS 305/19(h) (West 2008)); or (3) to reassess a permanent and total disability award (see 820 ILCS 305/8(f) (West 2008)). *Cassens Transport Co.*, 218 Ill. 2d 519; *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547 (2005). The Commission noted that this case does not involve a request pursuant to section 19(f) or section 8(f) of the Act. Moreover, the Commission determined that it was premature for respondent to file a section 19(h) petition as the arbitrator's decision is pending review and is therefore not yet a final decision. The Commission allowed that respondent may file a section 19(h) petition once the decision is final. Nevertheless, it stated that a change in economic circumstances is not a proper basis for modification of an award pursuant to section 19(h). See *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165 (1987); see also *United Airlines v. Workers' Compensation Comm'n*, 407 Ill. App. 3d 467 (2011). Finally, the Commission pointed out that section 19(e) of the Act (820 ILCS 305/19(e) (West 2008)) bars the parties from introducing additional evidence to the Commission on review of an arbitrator's decision.

¶ 21 Respondent sought judicial review of the Commission's decision denying its motion for remand. On August 14, 2012, the circuit court of Kane County dismissed the appeal and remanded the matter to the Commission for a decision on the merits of the arbitrator's underlying decision. On November 30, 2012, the Commission issued a decision affirming and adopting the decision of the arbitrator. On judicial review, the circuit court of Kane County confirmed the decision of the Commission. This timely appeal by respondent followed.

¶ 22 II. ANALYSIS

¶ 23 A. Procedural Matters

¶ 24 1. Motion to Continue

¶ 25 On appeal, respondent first challenges the arbitrator's ruling on its objection to setting the trial. Respondent argues that the arbitrator should have granted its request to postpone the arbitration hearing so claimant could continue vocational rehabilitation placement with Minnich and obtain employment in a position more commensurate with her "maximum vocational potential." Whether to grant a motion for a continuance lies within the sound discretion of the arbitrator or the Commission, whose decision will not be reversed absent an abuse of that discretion. *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 650 (2003). An abuse of discretion occurs where no reasonable person would take the view adopted by the lower tribunal. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947 (2006).

¶ 26 The Act provides for a wage-differential award under section 8(d)(1) (820 ILCS 305/8(d)(1) (West 2008)). At the time of claimant's injury, this section provided:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth

> in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 205/8(d)(1) (West 2008).

Thus, to receive an award under section 8(d)(1), an injured worker must prove that (1) he is partially incapacitated from pursuing his or her usual and customary line of employment and (2) he has suffered an impairment in the wages he earns or is able to earn. *Cassens Transport Co.*, 218 Ill. 2d at 531. Our supreme court has stated that the proper focus of the second prong of the inquiry is earning capacity. *Cassens Transport Co.*, 218 Ill. 2d at 531.

¶ 27 We find nothing in section 8(d)(1) that would require the postponement of an arbitration hearing until an injured worker obtains a position more commensurate with his "maximum vocational potential," and respondent does not cite any other statutory provision that would so require. Instead, respondent directs us to the following language from *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 25 (quoting *Cassens Transport Co.*, 218 Ill. 2d at 531): " 'Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity.' " However, it is unclear to us how this language supports respondent's position. We point out that despite the fact that the arbitrator denied the request to continue the arbitration hearing, respondent had the opportunity to establish claimant's earning capacity. To this end,

respondent presented the testimony of Minnich. Minnich testified regarding claimant's earning capacity supported by both his extensive experience as a vocational counselor and statistics from the DOL survey. Respondent does not indicate what additional evidence it could have garnered had the arbitrator granted its request for a continuance. By all accounts, claimant fully cooperated with the vocational rehabilitation process and the Marathon position was the only offer of employment she received. Moreover, Minnich was not convinced that claimant's next job would "be the one that gives her the absolute full pay." Further, Minnich conceded that his plan to find claimant a job with better pay or advancement opportunities could take an indefinite amount of time. Under these circumstances, we decline to find that the arbitrator abused its discretion in denying respondent's objection to setting the trial.

¶ 28 2. Motion to Remand for Additional Evidence

¶ 29 Next, respondent argues that the Commission abused its discretion by denying its motion to remand the matter for additional evidence to show that claimant received a salary increase from Marathon while the matter was pending review before the Commission. We review the Commission's ruling on such a motion for an abuse of discretion. See *Edward Don Co.*, 344 Ill. App. 3d at 650. As noted above, an abuse of discretion occurs where no reasonable person would take the view adopted by the lower tribunal. *Certified Testing*, 367 Ill. App. 3d at 947.

¶ 30 As an administrative agency, the Commission's powers are limited to those granted by the legislature. *Cassens Transport Co.*, 218 Ill. 2d at 525. Accordingly, any action by the Commission must be specifically authorized by statute. *Cassens Transport Co.*, 218 Ill. 2d at 525. Here, respondent does not cite any authority, statutory or otherwise, that allows the Commission to re-open proofs to present additional evidence regarding a wage differential while the matter is pending on review from the arbitrator. To the contrary, section 19(e) of the Act

(820 ILCS 305/19(e) (West 2008)) states, "In all cases in which the hearing before the arbitrator is held after December 18, 1989, no additional evidence shall be introduced by the parties before the Commission on review of the decision of the Arbitrator." Thus, the Act expressly prohibits the Commission from hearing additional evidence upon review of the arbitrator's decision. Respondent's attempt to circumvent this prohibition by filing a motion with the Commission requesting a remand to the arbitrator is not well taken. See *Cassens Transport Co.*, 218 Ill. 2d at 528 (noting that it is inappropriate for a court to read into a statute a provision that the legislature has not included). For these reasons, we conclude that the Commission did not abuse its discretion in denying respondent's motion to remand for additional evidence.

¶ 31 B. Wage-Differential Issues

¶ 32 1. Usual and Customary Line of Employment

¶ 33 Respondent next claims that the Commission erred in awarding claimant a wage-differential benefit because claimant failed to establish that her work-related injury prevents her from pursuing her "usual and customary line of employment." According to respondent, claimant has not changed her line of employment as her position with Marathon is still in the field of "retail store management."

¶ 34 In a proceeding under the Act, the employee has the burden of proving by a preponderance of the evidence all of the elements of his or her claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). As stated earlier, to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents her from pursuing her "usual and customary line of employment" and (2) an impairment of earnings. 820 ILCS 305/8(d)(1) (West 2008); *Cassens Transport Co.*, 218 Ill. 2d at 531; *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 730 (2000). Whether a claimant has

introduced sufficient evidence to establish each element is a question of fact for the Commission to determine, and its decision in the matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494 (2007). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent.[1] *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 22.

¶ 35 We recently addressed the issue respondent raises in *First Assist, Inc.*, 371 Ill. App. 3d 488. In that case, we affirmed the Commission's award of a wage-differential benefit to a nurse who was injured while lifting a 350-pound patient. The claimant had previously worked as an operating room nurse, which required her to frequently lift patients on and off the operating table. After her injury, various restrictions were imposed, including no overhead use of her left arm and no lifting more than 25 pounds. When the claimant informed her employer of these restrictions, she was terminated. The claimant conducted a job search, but was not able to find a position within her restrictions as lucrative as that of an operating room nurse. At the time of the

[1] Respondent seeks to avoid the application of this deferential standard of review by framing the issue as a question of law under the guise of statutory construction. However, respondent does not cite any authority analyzing the issue presented here utilizing a *de novo* standard of review. Moreover, it is clear to us that whether an employee established that her work-related injury prevents her from pursuing her "usual and customary line of employment" is a question of fact for the Commission and therefore subject to the manifest-weight standard of review. See *Wood Dale Electric v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 113394WC, ¶ 22; *First Assist, Inc.*, 371 Ill. App. 3d at 494-95.

arbitration hearing, the claimant was working as a staff nurse in a nursing home, a position which did not require lifting in excess of 25 pounds. Three doctors restricted the claimant from performing functions which were part of her regular duties as an operating room nurse, and a functional capacity examination concluded that she could not tolerate her previous position as an operating room nurse. A vocational rehabilitative consultant also testified that the claimant's weight restrictions prevented her from working as an operating room nurse.

¶ 36 On appeal, the employer argued that the claimant failed to demonstrate that she was incapacitated from pursuing her "usual and customary line of employment" because she continued to work as a nurse. The Commission rejected this argument and determined that the claimant's usual and customary line of employment at the time of her injury was that of an *operating room nurse*, not merely a nurse. *First Assist, Inc.*, 371 Ill. App. 3d at 495. In affirming the Commission's decision, we found that the evidence had established that, "although all registered nurses might be members of the same profession, they do not all perform the same functions." *First Assist, Inc.*, 371 Ill. App. 3d at 495. We noted that the claimant's position as a staff nurse fell within her restrictions and her duties were less physically demanding than her work as an operating room nurse. *First Assist, Inc.*, 371 Ill. App. 3d at 495. Thus, we concluded that the Commission's determination that the claimant's injury prevented her from pursuing her usual and customary line of employment as an operating room nurse was not against the manifest weight of the evidence. *First Assist, Inc.*, 371 Ill. App. 3d at 496.

¶ 37 Similarly, in this case, although claimant continues to work in retail store management, not all retail managers perform the same functions. Following extensive treatment, claimant was released to work with various restrictions, including limitations on lifting, bending, twisting, squatting, stooping, and standing. Minnich stated that "[t]he problem with [respondent] is that

it's one of those unique jobs that requires really physical labor as part of the management position where they have to unload trucks and things like that." Thus, Minnich acknowledged that respondent's management positions are more physically demanding than other retail management jobs, and, as a result, claimant's restrictions prevented her from working as a manager for respondent. Claimant eventually found a position within her restrictions as an assistant manager with Marathon. Although claimant continues to work in retail management, her current position is less physically demanding than her work for respondent. Accordingly, based upon the foregoing authority, we conclude that the Commission's determination that claimant's injury prevents her from pursuing her usual and customary line of employment is not against the manifest weight of the evidence.

¶ 38 D. Maximized Earning Potential

¶ 39 Next, respondent argues that the Commission's award of a wage-differential benefit was against the manifest weight of the evidence. In support of this claim, respondent, citing *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886 (1990), maintains that when an employee has not maximized his earning potential because of a matter of personal preference, he does not qualify for a wage-differential award pursuant to section 8(d)(1). However, *Durfee* is clearly distinguishable from the present case.

¶ 40 In *Durfee*, the claimant was a repairman who injured his stomach and groin area while lifting heavy equipment. The claimant's treating physician placed no physical restrictions on him and suggested that he attempt to return to his position as a repairman on a trial basis. Instead, the claimant obtained a position as a school administrator at a church, a job that the claimant enjoyed and which coincided with his clerical interests. We noted that while the claimant testified that the school administrator position was "the best job he could find," there

was no evidence that he attempted to obtain any other form of employment. *Durfee*, 195 Ill. App. 3d at 890. In light of these facts, we held that the Commission could reasonably conclude that the claimant had not shown a loss of earning capacity. *Durfee*, 195 Ill. App. 3d at 890-91. *Durfee* was based in part on the fact that the claimant made a personal choice to accept a lower paying position and failed to prove that he could not obtain a higher-paying job. See *Copperweld Tubing Products Co. v. Industrial Comm'n*, 402 Ill. App. 3d 630, 634 (discussing *Durfee*).

¶ 41 In the present case, claimant cooperated fully with the vocational program developed for her. Indeed, Minnich, claimant's vocational counselor, stated that claimant showed a "significant amount of motivation." He further testified that claimant's performance in vocational counseling was "excellent" and that claimant was in the top 10 people with whom he has worked in his 20-plus years in vocational placement. Nevertheless, claimant's participation in the rehabilitation process yielded only one offer of employment. Although the position with Marathon pays less than claimant's salary with respondent, it utilizes claimant's management skills and experience. In addition, Minnich was aware of the salary range for the Marathon position, yet he advised her to accept the offer of employment. Respondent, too, urged claimant to take the position. Furthermore, Minnich told claimant that, while working for Marathon, she could still seek employment with another company that might have a more desirable salary or advancement prospects. To this end, claimant has continued to follow up on job leads given to her by Minnich even after securing the position with Marathon. Claimant applied for management positions with various retailers, but has yet to be offered an interview. Thus, unlike in *Durfee*, claimant did not make a "personal choice" to accept a lower-paying job.

¶ 42 Relying on *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828 (2002), respondent also contends that, "based on *** claimant's management experience, she should be able to earn a salary similar to what she had earned [with respondent] if she would follow the guidance of the vocational counselor." According to respondent, "the resistance to help in finding a second placement with better pay and benefits is the refusal of cooperation." However, the record simply does not support this claim. To the contrary, as noted above, the record establishes that claimant fully cooperated with the vocational-rehabilitation process. Further, we find respondent's reliance on *Pietrzak* misplaced.

¶ 43 In *Pietrzak*, we affirmed the Commission's finding that the claimant was not entitled to a wage-differential award. Aside from the fact that the claimant in *Pietrzak* failed to establish that he was incapable of pursuing his usual and customary employment, we also agreed with the Commission that the claimant failed to establish an impairment of earnings. *Pietrzak*, 329 Ill. App. 3d at 835-36. In particular, we noted that a labor market survey showed the claimant was employable at a salary near his pre-injury level, but he accepted a position with only the second company that he contacted at a salary that was below the pay range identified in the labor market survey. *Pietrzak*, 329 Ill. App. 3d at 835-36. Several factors distinguish this case from *Pietrzak*. First, although the Marathon position pays less than what claimant was earning with respondent and less than what Minnich opined that claimant was capable of earning, it was the only job offer she received. Moreover, claimant took the position with Marathon at the urging of both respondent and Minnich. In addition, claimant has continued to look for a position with a more desirable salary or advancement potential. Thus, we are not persuaded that *Pietrzak* requires a conclusion opposite of that of the Commission.

¶ 44 E. Calculation of Wage-Differential Benefit

¶ 45 Next, respondent challenges the Commission's calculation of claimant's wage-differential benefit. As noted above, section 8(d)(1) instructs that the wage-differential benefit is "equal to 66-2/3% of the difference between the average amount which [the employee] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2008). The Commission's calculation of a wage differential award is a factual finding, which will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *United Airlines, Inc.*, 2013 IL App (1st) 121136WC, ¶ 28; *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 635.

¶ 46 Here, the Commission, in affirming and adopting the decision of the arbitrator, calculated claimant's weekly wage-differential as $601.56. In reaching this figure, the Commission initially determined that, but for her injury, claimant could be earning an annual salary of $74,421.78, or $1,431.19 per week ($74,421.78 divided by 52). This figure consisted of two components—an annual base salary plus sales bonuses.

¶ 47 The Commission calculated that claimant's base salary would be $58,708 per year, based on a multiple of the hourly wage in effect at the time of her termination ($22.58), the number of weekly hours for which she was compensated as a manager (50), and the number of weeks in a year (52). The Commission calculated claimant's yearly bonus as $15,713.76 by multiplying the average monthly sales bonus ($1,309.48) by the number of months in a year (12). The Commission determined that claimant's average weekly wage at Marathon is $528.85.[2] The

[2] Although the Commission did not explain how it calculated claimant's average-weekly

Commission then subtracted claimant's average weekly wage at Marathon ($528.85) from the average weekly wage claimant could be earning with respondent ($1,431.19) and multiplied the difference ($902.34) by two thirds to yield a wage differential of $601.56.

¶ 48 Respondent argues that the Commission's calculation of the wage-differential benefit is erroneous for various reasons. Respondent initially challenges the first prong of the wage-differential calculation, *i.e.*, the average amount which claimant would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident. Initially, we note that respondent's precise argument in this regard is not entirely clear from its brief. However, we interpret respondent as raising two distinct contentions. First, the Commission erred in considering the "sales bonus" in calculating the amount she would be able to earn in the full performance of her duties. Second, the Commission should have used claimant's average weekly wage in the 52 weeks preceding her injury as the basis for the amount she would be able to earn in the full performance of her duties.

¶ 49 We first address if the Commission erred in considering claimant's sales bonuses in calculating the amount she would be able to earn in the full performance of her duties. Section 10 of the Act (820 ILCS 305/10 (West 2008)) explicitly excludes bonuses and overtime from the calculation of an employee's average weekly wage. This court has previously determined that the exclusion of bonuses and overtime from an employee's wages also applies when calculating a wage-differential benefit. See *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 636.

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wage at Marathon, we note that this figure equates to claimant's yearly salary at Marathon ($27,500) divided by the number of weeks in a year (52).

¶ 50 In *Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n*, 2011 IL App (1st) 102180WC, this court addressed what constitutes a "bonus" as contemplated by section 10 of the Act. In that case, the claimant, a unionized steelworker, received "incentive pay" on top of his base salary. The claimant testified that the purpose of the incentive pay is to produce as much high-quality steel as safely as possible. The amount of incentive pay varied weekly based on productivity and the plant's safety record. If the requirements that triggered a productivity or safety incentive were not met, no incentive was paid. The employer's human resources manager noted that the incentive pay was not given due to the generosity of management. Rather, it was provided for in a collective-bargaining agreement and was an important part of an employee's payment package. The human resources manager also noted that if an employee is sick or does not work, he does not qualify for the incentive pay. In calculating the claimant's average weekly wage, the Commission included claimant's incentive pay.

¶ 51 On appeal, the employer argued, *inter alia*, that the Commission erred in considering the claimant's incentive pay when calculating his benefits because the incentive pay constituted a bonus under section 10 of the Act. In addressing the employer's argument, we remarked as follows:

> " 'Bonus' is commonly defined as 'something in addition to what is expected or strictly due.' Webster's Third New International Dictionary 167 (1981). We note a distinction between incentive-based pay, which an employee receives in consideration for specific work performed as a matter of contractual right, and a bonus, which an employee receives for no consideration or in consideration of overall performance at the sole discretion of the employer. See, *e.g.*, *Levkovitz v. Industrial Comm'n*, 256 Ill. App. 3d 1075, 1081 (1993) ('There is nothing in the record to indicate [the] claimant received

> these meals "as consideration for work." *** These meals appear to more closely resemble a "bonus," *i.e.*, extra benefits given to the employee by the employer.')." *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 40.

Applying the foregoing principles, we concluded that the Commission did not err by including the claimant's incentive pay when calculating his average weekly wage. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 41. We reasoned that the claimant received the incentive pay in consideration for work performed pursuant to his collective-bargaining agreement and not as an extra benefit provided by the employer gratuitously. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 41. We also noted that the incentive pay was an important part of the claimant's compensation package, based upon measures of volume and quality of steel produced and the number of days worked without a safety infraction. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 41. Further, the employer was obligated to pay the production bonuses if earned by its employees. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 41. We also found that the fact that an employee who did not work would not receive the incentive pay, suggested that the incentive pay was received in consideration for work actually performed. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 41.

¶ 52 In the present case, the Commission, in affirming and adopting the decision of the arbitrator, included claimant's sales bonuses in calculating the wage-differential benefit. The Commission reasoned that the sales bonuses "represented incentive payments which were part of [claimant's] salary as a store manager." We find that the record supports the Commission's finding. Significantly, there is no evidence that the sales bonus was paid gratuitously, unrelated to the employee's work or efforts. Rather, claimant testified that the sales bonus is based on a manager's productivity and the sales volume of the store. Although there is no indication that

respondent was contractually required to pay the bonus, the record suggests that it was paid on a regular basis as part of an ongoing compensation package it paid to all managers. Respondent presented no testimony to the contrary. Accordingly, based on the record before us, the Commission could reasonably conclude that the sales bonus constituted a measure of claimant's productivity. As such, we cannot say that the Commission's decision to classify the sales bonus as "incentive pay" and include it when calculating claimant's wage-differential award is against the manifest weight of the evidence.

¶ 53 In a related argument, respondent suggests that the Commission's calculation of claimant's bonus was erroneous because it was premised on a sales bonus received by her successor at the St. Charles store. We find no evidence to support this claim. An examination of the record reveals that the sales bonus figures considered by the Commission were all taken from a payroll document provided by respondent. This document clearly indicates that the compensation information relates to claimant and not some other individual. Accordingly, this claim is without merit.

¶ 54 Respondent also claims that the Commission should have used claimant's average weekly wage in the 52 weeks preceding her injury to determine the amount that claimant would be able to earn in the full performance of her duties. We disagree. Under section 8(d)(1) of the Act, a qualifying claimant is entitled to receive compensation for the duration of his disability equal to 66-2/3% of the difference between "*the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident* and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." (Emphasis added.) 820 ILCS 305/8(d)(1) (West 2008). This court has previously held that the award should be calculated based on the amount

the claimant would have been able to earn at the time of the arbitration hearing, not his average weekly wage at the time of the injury. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1021-22 (2005). Respondent cites no persuasive reason for us to disturb this precedent.

¶ 55 In order to calculate the amount of a wage-differential award to which a claimant is entitled, a determination must also be made regarding the average amount which he is earning or is able to earn in some suitable employment or business after the accident. 820 ILCS 305/8(d)(1) (West 2008). Respondent argues that the Commission should have used the midpoint salary ($53,500) on the DOL survey as the amount claimant is earning or is able to earn at present instead of her salary at Marathon. The Commission rejected this position, commenting that Minnich's testimony on this point was "interesting, but speculative." The Commission noted that at the arbitration hearing, Minnich did not provide evidence of any specific job opening paying more money than the Marathon job. Instead, he testified it could take a year to find such a job, and even then, it might only be a job with a higher earning potential, assuming subsequent promotions. The Commission refused to base the award on speculation. See *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 73-74 (1986) (noting that the Commission could properly discount testimony based on speculation). Given the Commission's role in weighing the evidence (see *City of Springfield, Illinois Police Department v. Industrial Comm'n*, 328 Ill. App. 3d 448, 452 (2002)), we cannot say that an opposite conclusion is clearly apparent. Thus, the Commission's decision to use claimant's salary at Marathon as the amount claimant is earning or is able to earn is not against the manifest weight of the evidence.

¶ 56 Before concluding, we briefly address claimant's suggestion that claimant's position at Marathon does not constitute "suitable employment" because claimant's "expected path to advancement" is not available in this position. We initially note that both Minnich and

respondent advised claimant to accept Marathon's offer of employment. This was a tacit acknowledgment that this position was suitable. Respondent notes that Minnich originally expected the Marathon job to provide advancement opportunities, but he later learned that it would not. Even so, it is undisputed that, at the time of the arbitration hearing, claimant continued to cooperate with Minnich's vocational program. She followed up on Minnich's job leads while working for Marathon, yet was not contacted for any interviews, much less made an offer of employment. Given these circumstances, we cannot say that the Commission's finding that the Marathon position constituted suitable employment for the purposes of section 8(d)(1) is against the manifest weight of the evidence. See *City of Springfield, Illinois Police Department*, 328 Ill. App. 3d at 452 (noting that it is within the province of the Commission to weigh and resolve conflicts in the evidence).

¶ 57 III. CONCLUSION

¶ 58 For the reasons set forth above, we affirm the judgment of the Circuit Court of Kane County, which confirmed the decision of the Commission.

¶ 59 Affirmed.