

No. 1-16-0006WC

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

PHILLIP LEVATO,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 15 L 50465
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION <i>et al.</i> ,	)	Honorable
	)	Carl Anthony Walker,
(City of Chicago, Appellee).	)	Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* We affirmed the judgment of the circuit court which confirmed a decision of the Illinois Worker's Compensation Commission (Commission) denying the claimant a wage differential award under section 8(d)(1) of the Workers' Compensation Act, finding that the Commission's determination that the evidence of record did not enable it to assess the claimant's actual physical capabilities or actual earning potential in some suitable employment is not against the manifest weight of the evidence.

¶ 2 The claimant, Phillip Levato, appeals from an order of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) which awarded him benefits pursuant the Workers' Compensation Act (Act) (820 ILCS 305 /1 *et seq.* (West 2006)), but denied his claim for a wage differential award under section 8(d)(1) of the Act (820 ILCS 305 /8(d)(1) (West 2006)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the Commission's decisions of May 4, 2012, and May 29, 2015, and this court's opinion in *Levato v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC.

¶ 4 The claimant began working for the City of Chicago (City) in 1994 in the Graffiti Unit of the Streets and Sanitation Department. On September 6, 2006, he injured his lower back while moving a five-gallon bucket of paint. The next day, he saw a physician at Mercy Works, reporting numbness, tingling, and pain shooting down his right leg. On September 14, 2006, the claimant underwent a lumbar MRI, which revealed disc dessication at L3-L4 through L5-S1 with minimal disc bulging at L4-L5, an annual tear at L5-S1, and bilateral facet arthropathy.

¶ 5 On October 19, 2006, the claimant saw Dr. Charles Slack for a second opinion. Dr. Slack examined the claimant and diagnosed him with persistent lumbar radiculopathy with degenerative lumbar disc and facet disease with an annular tear at L5-S1. The doctor ordered epidural steroid injections and prescribed Lidoderm patches to treat the claimant's back pain. In March 2007, the claimant began physical therapy for his back.

¶ 6 On October 22, 2007, the claimant returned to Dr. Slack, who ordered a second lumbar MRI. The MRI, taken October 26, 2007, showed disc desiccation changes at L3-L4, L4-L5, and L5-S1, with diffuse disc bulging at L3-L4, facet and ligament hypertrophy, and slight narrowing

of the central canal. It also showed diffuse disc bulges at L4-L5 and L5-S1 with small posterior disc protrusions that were more pronounced at L5-S1. Dr. Slack ordered lumbar facet nerve block injections to treat the claimant's lumbar spine pain. The claimant and Dr. Slack also discussed the possibility of surgery, but they agreed not to proceed with surgery as Dr. Slack did not consider him a good surgical candidate.

¶ 7 On April 1, 2008, the claimant underwent a functional capacity evaluation (FCE), which determined that he could work at a sedentary physical demand level, meaning he could not lift more than 10 pounds. However, the evaluator noted that the claimant's subjective complaints were not consistent with his varying performances on the physical tests, suggesting that he was not demonstrating his true capabilities on the tests.

¶ 8 Steven Blumenthal, a vocational rehabilitation specialist, evaluated the claimant. In a report dated June 17, 2009, Blumenthal noted that the claimant completed the eighth grade, lacked computer skills, had experience as a laborer and cable installer, and that he was unable to sit, stand, or drive for any length of time. On general educational testing, the claimant performed around the high school or community college level, demonstrating an ability to learn on-the-job skills. However, based on the claimant's work history, education, vocational testing, and medical history, Blumenthal opined that "there is not a stable labor market for him to obtain competitive employment" and that the claimant "is not seen as a good candidate for vocational rehabilitation services."

¶ 9 The City submitted a labor market survey report prepared by Patrick Conway of Genex. Although Conway never met or tested the claimant, his report stated that he located 15 prospective employers which had positions appropriate for the claimant and that the positions paid between \$8 and \$20 per hour.

¶ 10 The claimant testified that the City informed him that he was required to look for employment and submit a list of at least 10 jobs he applied for on a weekly basis. He stated that he complied with the City's requirement and applied for over 200 jobs. He admitted, however, that he applied randomly to employers, some of which were not hiring at the time he submitted an application.

¶ 11 The claimant also testified to his current physical limitations. He stated that he cannot raise his right shoulder "very high" and the joint "pops and clicks." He requires a cane to walk and he cannot traverse stairs easily or walk more than half a block without his back "locking up." The claimant testified that, at times, he cannot get out of bed, it takes him three hours to get ready in the morning, and he has his son tie his shoes for him.

¶ 12 The claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for an injury he sustained to his lumbar spine on September 6, 2006, while in the employ of the City. Following an arbitration hearing, the arbitrator found that the claimant sustained accidental injuries arising out of and in the course of his employment. The arbitrator awarded the claimant 75 weeks of permanent partial disability (PPD) benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)) because the lumbar spine injury resulted in a 15% loss of use of a person as a whole. The arbitrator further found that the claimant was not permanently and totally disabled under section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)) as his injuries were not the type "generally associated with wage differential or odd-lot awards."

¶ 13 The claimant filed a petition for review of the arbitrator's decision before the Commission. In addition, the claimant filed a petition to supplement his prayer for relief to include a request for wage differential benefits under section 8(d)(1) of the Act. On May 4, 2012, the Commission issued a unanimous decision modifying the arbitrator's decision in part

and affirming and adopting it in part. In that portion of the decision modified, the Commission increased the claimant's PPD benefits to 35% loss of use of a person as a whole, finding that the claimant's work injuries resulted in permanent restrictions which prevented him from returning to work with the City. The Commission otherwise affirmed and adopted the arbitrator's decision. The Commission did not comment on the claimant's eligibility for wage differential benefits.

¶ 14 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On January 10, 2013, the circuit court confirmed the Commission's decision.

¶ 15 The claimant appealed from the circuit court's order. On appeal, this court affirmed the Commission's finding that the claimant was permanently partially disabled, but vacated its award of PPD benefits based on a percentage of a person as a whole under section 8(d)(2) of the Act. We held that the Commission erred by failing to address the merits of the claimant's request for a wage differential award under section 8(d)(1) of the Act. As a consequence, we vacated the award of PPD benefits and remanded the matter to the Commission with directions to decide the claimant's entitlement to a wage differential award on the merits. See *Levato*, 2014 IL App (1st) 130297WC, ¶ 30.

¶ 16 On May 29, 2015, the Commission issued its decision on remand. In that decision, the Commission reviewed the claimant's testimony, his FCE, the vocational rehabilitation report, and labor market survey. The Commission noted the arbitrator's findings that the claimant's testimony was not credible and that his physicians noted symptom magnification. It also recited the arbitrator's finding that the FCE evaluator noted that the evaluation was inconclusive due to the claimant's variable efforts. The Commission also questioned the results of the FCE, observing that the claimant did not exert consistent effort. As to the labor market survey, which posited that the claimant could earn between \$8 and \$20 per hour, the Commission found that the

range is too great to enable it to assess an appropriate wage differential. Concluding that, in the absence of evidence establishing the claimant's actual physical capabilities or actual earning potential, it was unable to assess an appropriate wage differential, the Commission declined to award the claimant a wage differential under section 8(d)(1) of the Act and, therefore, reinstated its award of PPD benefits for 35% loss of use of a person as a whole under section 8(d)(2) of the Act.

¶ 17 The claimant sought a judicial review of the Commission's decision on remand. The circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 18 Prior to addressing the claimant's assignment of error, we comment on, and reject, his assertion that our prior decision made clear that a wage differential award should have been entered on remand. Although we acknowledged that the evidence of record "disclose[d] an issue concerning the propriety of a wage differential award," we remanded the matter back to the Commission to weigh that evidence and determine whether the claimant was entitled to a wage differential award. *Levato*, 2014 IL App (1st) 130297WC, ¶ 30. We unambiguously stated as follows:

"We wish to be clear that we are not instructing the Commission on the conclusion it should reach on remand, only that it should decide the issue. In the event that Commission determines that the claimant is entitled to a wage differential award, it should make the award. If, on the other hand, the Commission decides that he is not entitled to a wage differential [a]ward under section 8(d)(1) of the Act, it is directed to reinstate its award of PPD benefits for 35% loss of use of a person as a whole under section 8(d)(2)." *Id.*

¶ 19 Nothing in our opinion required the Commission to award the claimant wage differential benefits. Rather, we simply held that the Commission was obliged to resolve the question on the merits since the claimant never waived his right to a wage differential award. Our review of the Commission's decision on remand reveals that the Commission complied with our mandate by addressing the merits of the claimant's request for a wage differential award.

¶ 20 The claimant's sole contention on appeal is that the Commission erred when, on remand, it declined to award him wage differential benefits under section 8(d)(1) of the Act and reinstated the award of PPD benefits based upon loss of a percentage of the person as a whole under section 8(d)(2) of the Act.

¶ 21 The parties disagree as to the proper standard of review to be applied by this court. The claimant asserts that we are tasked with resolving a matter of statutory interpretation, and our review is *de novo*. See *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524 (2006) (matters involving a question of statutory construction are reviewed *de novo*). The City, on the other hand, contends that the question presented in this case is whether the claimant satisfied his burden of establishing the elements of a claim for wage differential benefits; a factual question subject to the manifest weight standard. See *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 45. We agree with the City.

¶ 22 In their briefs before this court, the parties dispute whether the claimant met his burden of proving his entitlement to a wage differential award. The issue of whether a claimant is entitled to a wage differential award is a question of fact for the Commission to decide. *Id.* We review the Commission's factual findings under the manifest-weight-of-the-evidence standard. *Id.* "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must

be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009).

¶ 23 In this case, there is no dispute that the claimant sustained a disability as a result of a workplace accident and is entitled to a PPD award under section 8(d) of the Act. Section 8(d) provides for two distinct types of PPD awards: a wage differential award under section 8(d)(1), and a percentage of the person as a whole award under section 8(d)(2). 820 ILCS 305/8(d)(1), 8(d)(2) (West 2006). Our supreme court has expressed a preference for wage differential awards over scheduled awards. *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438 (1982).

¶ 24 The purpose of a wage differential award under section 8(d)(1) of the Act is to compensate an injured employee for reduced earning capacity. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 39. Pursuant to section 8(d)(1), an injured employee is entitled to a wage differential award when: (1) he is "partially incapacitated from pursuing his usual and customary line of employment[;]" and (2) there is a "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 305/8(d)(1) (West 2006).

¶ 25 In its original decision, the Commission awarded the claimant PPD benefits based upon a percentage of a person as a whole, finding that his injuries partially incapacitated him from pursuing his usual and customary line of employment with the City. Therefore, the only issue that the Commission was required to resolve on remand was whether the claimant met his burden of proving whether, and to what extent, he suffered an impairment in his "earning capacity." See *Jackson Park Hospital*, 2016 IL App (1st) 142431WC, ¶ 42.

¶ 26 To establish a diminished earning capacity, a claimant "must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event he is unable to return to work, he must prove what he is able to earn in some suitable employment." *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260, 265-66 (1999). On remand, the Commission found that, based upon the evidence of record, it was unable to assess an appropriate wage differential because it did not know the claimant's "actual physical capabilities or his actual earning potential." We cannot say that the Commission's determination in this regard is against the manifest weight of the evidence.

¶ 27 In order to assess a wage differential for an employee who is permanently and partially incapacitated from pursuing his usual and customary line of employment as the result of a work-related accident, the Commission must know: (1) the average amount that 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 his accident; and (2) 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 2006). When, as in this case, the claimant is not employed in a suitable occupation at the time of an award, the Commission must be able to determine what employment is suitable to the claimant's condition and the average amount which he would be able to earn in that employment. In this case, due to the claimant's varied efforts in the FCE, the Commission found itself unable to determine his physical capabilities. If the Commission was unable to determine the claimant's physical capabilities, it follows that it was also unable to make a finding as to employment which is suitable for him. In addition, the Commission found that the only evidence in the record going to the issue of the amount that the claimant is able to earn is contained in a labor market survey provided by the City. That survey indicates that 15 prospective employers were located that had

positions available which were appropriate for the claimant and that those positions paid between \$8 and \$20 per hour. *Levato*, 2014 IL App (1st) 130297WC, ¶ 13. The Commission concluded that the range is "too great to assess a precise and appropriate wage differential." Aside from the fact the Commission found the range too great, there is nothing in the record before us from which a calculation could be made as to the average amount that the claimant would have been able to earn in any of the positions identified. Stated otherwise, there is no evidence in the record before us which the Commission found credible that would enable it to make a determination as to employment which is suitable for the claimant or the average amount that he would be able to earn in some suitable employment.

¶ 28 Based upon the foregoing analysis, we conclude that the Commission's finding that it was unable to access an appropriate wage differential for the claimant due to a lack of credible evidence is not against the manifest weight of the evidence. We, therefore, affirm the judgment of the circuit court which confirmed the Commission's decision on remand declining to award the claimant a wage differential under section 8(d)(1) of the Act and reinstating its PPD award under section 8(d)(2).

¶ 29 Affirmed.