

2018 IL App (3d) 170368WC-U
No. 3-17-0368WC
Order filed June 28, 2018

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

ESTATE OF DANNY E. FRENCH,)	Appeal from the Circuit Court
)	of LaSalle County.
Plaintiff-Appellant,)	
)	
v.)	No. 16-MR-340
)	
THE ILLINOIS WORKERS')	
COMPENSATION COMMISSION,)	
)	Honorable
(Wal-Mart Stores, Inc./Sam's Club,)	Eugene P. Daugherty,
Appellee).)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) Commission's decision to bar decedent's attorney from testifying as a witness did not constitute an abuse of discretion or violate due process; (2) Commission's decision to allow into evidence active surveillance video of decedent was not an abuse of discretion; (3) Commission's decision to terminate decedent's permanent total disability benefits as of February 21, 2014, was not against the manifest weight of the evidence; (4) Commission's denial of decedent's motion for payment of certain medical expenses was not against the manifest weight of the evidence; and (5) Commission's decision to suspend decedent's PTD benefits from March 12, 2015, through July 31, 2015, would be vacated as moot in light of

the Commission's prior determination that decedent was not entitled to PTD benefits after February 21, 2014.

¶ 2

I. INTRODUCTION

¶ 3 Claimant, the Estate of Danny E. French, appeals an order of the circuit court of LaSalle County confirming a decision of the Illinois Workers' Compensation Commission (Commission). In its decision, the Commission ruled on various motions filed by decedent, Danny E. French, and respondent, Walmart Stores, Inc./Sam's Club.¹ Notably, the Commission granted respondent's motion to terminate the arbitrator's December 15, 2008, award of permanent total disability (PTD) benefits pursuant to section 8(f) of the Workers' Compensation Act (Act) (820 ILCS 305/8(f) (West 2014)) and respondent's motion to suspend PTD benefits pursuant to section 12 of the Act (820 ILCS 305/12 (West 2014)). In lieu of the award of PTD benefits, the Commission entered an award of 100 weeks of permanent partial disability (PPD) benefits, representing a 20% loss of use of the person as a whole under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2014)). In addition, the Commission denied decedent's motions for payment of medical expenses pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)), attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2014)), and penalties pursuant to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), 19(l) (West 2014)). On appeal, claimant raises issues related to the Commission's evidentiary rulings and

¹ Danny E. French was originally named as claimant in this case. French passed away on June 5, 2017. On September 7, 2017, French's attorney filed a "Motion to Spread Suggestion of Death and for Extension of Time and Amended Briefing Schedule." On November 8, 2017, this court entered an order substituting French's estate as claimant. In our disposition, we will refer to French individually as "decedent" and his estate as "claimant."

also challenges the Commission's decisions to terminate decedent's PTD benefits, deny decedent's motion for payment of medical expenses, and suspend decedent's PTD benefits. For the reasons set forth below, we affirm in part and vacate in part.

¶ 4

II. BACKGROUND

¶ 5 The procedural history and record in this case are lengthy. Since the parties are familiar with the facts of this case, we provide the following summary to place into context the issues raised in this appeal. Any additional facts necessary to resolve this appeal will be discussed in conjunction with claimant's arguments for reversal.

¶ 6 This case was originally tried before an arbitrator in October 2003. Following that hearing, the arbitrator determined that decedent had injured his lower back as a result of two work-related incidents on September 8, 2002, and June 9, 2003. The arbitrator also found that decedent's testimony regarding his inability to work following the June 2003 accident lacked credibility. Part of the testimony presented by respondent from one of decedent's coworkers indicated that, on June 27, 2003, he had observed decedent operating a jet ski and riding in a boat during the period in which decedent was purportedly incapacitated. Further, the coworker stated that decedent asked him not to tell any of respondent's managers what the coworker had observed. The arbitrator found the coworker credible. The arbitrator awarded decedent 11-3/7 weeks of temporary total disability (TTD) benefits for two distinct time periods (September 9, 2002, through November 10, 2002, and June 9, 2003, through June 27, 2003) as well as reasonable and necessary medical expenses. The Commission modified the award of medical expenses, but otherwise affirmed and adopted the decision of the arbitrator and remanded the matter to the arbitrator pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980), for a

determination of a further amount, if any, of temporary total compensation or of compensation for permanent disability.

¶ 7 On December 15, 2008, the arbitrator issued a decision on remand. Among other things, the arbitrator found that claimant became permanently and totally disabled as of October 27, 2006. The arbitrator's decision was based in part on the testimony of decedent's trial witnesses, which included Julie Ajster, an attorney and decedent's live-in fiancée. The arbitrator ordered respondent to pay PTD benefits of \$376.66 per week for life pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2002)). On November 8, 2010, the Commission affirmed and adopted the decision of the arbitrator. The circuit court of LaSalle County set aside the decision of the Commission, finding that it violated the law of the case. On appeal to this court, however, we reinstated the Commission's decision. *Wal-Mart Associates v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110502WC-U. Thereafter, respondent began paying claimant PTD benefits.

¶ 8 The present appeal involves the Commission's rulings on various motions filed by the parties. On March 19, 2015, respondent filed a "Motion to Suspend Benefits Pursuant to Section 12 of the Act" (820 ILCS 305/12 (West 2014)). On October 19, 2015, respondent filed a "Motion to Terminate PTD Benefits Under Section 8(f) of the Act" (820 ILCS 305/8(f) (West 2014)). In the former motion, respondent requested the suspension of compensation to decedent on the basis that he unnecessarily obstructed and refused to participate in an independent medical examination (IME) with Dr. Steven Mather on March 12, 2015. In the latter motion, respondent requested an order modifying the prior award of PTD benefits on the basis that decedent is able to return to work in the open labor market and earn as much if not more than he did prior to his work injury, or at least part of what he earned prior to his work injury. For his part, decedent

filed a “Motion for Payment of Medical Expenses Pursuant to Section 8(a) [of the Act] and Penalties Puruant [*sic*] to 19(k) and 19(l) [of the Act]” (820 ILCS 305/8(a), 19(k), 19(l) (West 2014)) and a “Motion for Attorney’s Fees as Penalty Pursuant to Section 16 [of the Act]” (820 ILCS 305/16 (West 2014)). In these motions, decedent alleged that since the arbitrator’s December 2008 decision, he had incurred additional medical expenses for, among other things, a mobility scooter, a personal assistant, and medical cannabis. Decedent further alleged that his doctor had prescribed additional surgery. According to decedent, respondent refused to pay for these expenses despite a demand that it do so. Decedent requested an order requiring payment from respondent for these medical expenses and the assessment of penalties and attorney fees against respondent for the failure to do so.

¶ 9 The parties’ motions were heard before Commissioner Joshua Luskin at a hearing over three dates on February 18, 2016, February 19, 2016, and March 14, 2016. At the hearing, Ajster represented decedent. The following witnesses testified at the hearing: (1) decedent; (2) Donna Craig, decedent’s sister and personal assistant; (3) Brett King, an acquaintance of decedent and a defendant in a civil lawsuit brought by Ajster on decedent’s behalf; (4) Kevin Knop, a private investigator with Delta Investigations who took surveillance video of decedent; (5) Megan Ahrens, the administrative assistant for Mark Matranga, respondent’s former attorney; (6) Daniel Minnich, a vocational rehabilitation counselor; and (7) Devin Borostowski, decedent’s nephew. The parties also introduced extensive documentary evidence, including medical records, medical bills, still photographs, a February 21, 2014, YouTube video of decedent arm wrestling, stationary and active video surveillance of decedent taken by Knop, security video from a casino decedent visited, profanity-laced messages purportedly left by decedent on Matranga’s

voicemail, surveillance reports, a vocational assessment, and correspondence between the parties.

¶ 10 In an opinion and order entered on September 12, 2016, the Commission granted both of respondent's motions and denied both of decedent's motions. In its decision, the Commission emphasized that it did not find decedent to be a credible witness. Further, the Commission found that Ajster displayed a "lack of candor" and "intellectual dishonesty" at the hearing, thereby "undermin[ing] her client's case." The Commission noted, for instance, that Ajster sought to testify for decedent after witness testimony had commenced on the first day of the hearing. Ajster had not made this intention known to either respondent's attorneys or Commissioner Luskin before that moment even though she had the opportunity to disclose such an intention at the start of the hearing when a motion to exclude witnesses was made by respondent's attorneys. Ajster was barred at the hearing from testifying on decedent's behalf.

¶ 11 The Commission determined that decedent's disability ceased to be total no later than February 21, 2014, and thereafter his condition was one of partial disability. In support of this finding, the Commission found the video evidence admitted at the hearing "dramatically impeaches [decedent's] testimony regarding his physical limitations and concomitant ability to return to work." In particular, the Commission cited the February 21, 2014, YouTube video of decedent arm wrestling. The Commission found that the video showed decedent "energetically engaging with a brawny opponent" and "vigorously exerting himself with no apparent ill effects, at an activity requiring physical effort significantly in excess of his claimed abilities." The Commission also found that decedent's testimony at the hearing was "at odds with the narrative of a bedridden, physical and mental invalid crippled by constant pain and drugs." The Commission cited conflicting evidence from decedent regarding his ability to engage in physical

activity, drive long distances, read and write, and use a computer. Accordingly, the Commission granted respondent's motion to terminate decedent's PTD benefits as of February 21, 2014. In lieu of the award of PTD benefits, the Commission entered an award of 100 weeks of PPD benefits, reflecting a 20% loss of use of the person as a whole under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2014)).

¶ 12 The Commission also granted respondent's motion for suspension of benefits under section 12 of the Act (820 ILCS 305/12 (West 2014)), concluding that respondent had proven that decedent unnecessarily obstructed or otherwise refused to submit to an IME scheduled for March 12, 2015, with Dr. Mather. Specifically, the Commission found that although decedent showed up for the IME, he used abusive language towards Dr. Mather's staff and a patient in the waiting room and threatened the patient with physical violence. The Commission further found that Dr. Mather acted reasonably in refusing to complete the IME that day. The Commission acknowledged that decedent denied the specific account of his behavior. However, the Commission found that decedent's behavior, as recounted by Dr. Mather and his assistant, was "wholly consistent" with the abusiveness and combativeness displayed in voicemails decedent left for Matranga, which were admitted at the hearing.² As a result, the Commission concluded that decedent's denials were not credible. The Commission suspended benefits from March 12,

² To impeach decedent's testimony, respondent introduced a written statement dated March 19, 2015, from Kristi Chirumbolo, Dr. Mather's assistant. Chirumbolo recounted that decedent used profanity, yelled at another patient, and was asked to watch his language around the patient's child. Chirumbolo further documented that decedent was asked to leave the office due to his behavior.

2015, through July 31, 2015, the date when Dr. Mather ultimately performed the IME in a hearing room at the Commission's offices.

¶ 13 The Commission denied decedent's section 8(a) motion, finding that decedent failed to prove a need for a motorized scooter, personal assistant, medical marijuana, or prospective surgery. The Commission found that two doctors who conducted IMEs (Dr. Mather and Dr. Kern Singh) provided medical opinions that were far more authoritative and credible regarding decedent's condition and reasonable ongoing needs than any witness presented by decedent. The Commission noted that Dr. Stephen Rittmann, decedent's primary-care physician and the physician who prescribed the motorized scooter, personal assistant, and medical marijuana, had himself expressly noted in his records that he was not a pain specialist and that he was not educated enough to advise decedent about medical marijuana. The Commission also found that the opinion of Dr. Thomas McNally, who suggested fusion surgery, was based on false information. In this regard, the Commission noted that decedent told Dr. McNally in July 2014 that he is "very inactive and lies in bed most of the day." However, this representation was contradicted by the video evidence. The Commission also determined that decedent's lay witnesses—Craig and Borostowski—were not trustworthy witnesses insofar as they were decedent's close relatives and the evidence at the hearing showed that they had financial ties to decedent. Given these findings, the Commission also denied decedent's request for penalties and attorney fees. On judicial review, the circuit court of LaSalle County confirmed the decision of the Commission in its entirety. This appeal followed.

¶ 14

III. ANALYSIS

¶ 15 On appeal, claimant raises five distinct issues. First, it argues that the Commission erred in barring Ajster as a witness at the 2016 hearing. Second, it argues that the Commission abused

its discretion in admitting into evidence surveillance video of decedent. Third, claimant argues that the Commission's decision to terminate decedent's PTD benefits as of February 21, 2014, was against the manifest weight of the evidence. Fourth, claimant argues that the Commission's denial of decedent's motion for payment of medical expenses was against the manifest weight of the evidence. Finally, claimant argues that the Commission's decision to suspend his PTD benefits from March 12, 2015, through July 31, 2015, was against the manifest weight of the evidence. We address each contention in turn.³

¶ 16

A. Ajster's Testimony

³ Respondent argues that claimant's appellant brief should be stricken and its appeal before this court should be dismissed for failure to provide a statement of facts in compliance with Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017). Specifically, respondent asserts that claimant failed to provide a statement of facts containing "the facts necessary to an understanding of the case stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." It is well settled that the absence of a complete statement of facts, in and of itself, justifies striking an appellant's brief and dismissing the appeal. *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶ 8; *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001). Nevertheless, we decline to strike claimant's brief or dismiss the appeal in this case because the issues presented are not complex and we are familiar with the facts as this case has previously been before this court. Additionally, we have the benefit of a cogent decision of the Commission and respondent's brief, both of which contain an extensive discussion of the facts leading to the present appeal.

¶ 17 Claimant's first assignment of error concerns the Commission's decision to bar Ajster, decedent's attorney, from testifying as a witness at the 2016 hearing. Claimant's argument in this regard is twofold. First, claimant argues that the Commission's decision to exclude Ajster's testimony was erroneous. Second, claimant argues that the Commission violated decedent's due process rights by excluding Ajster's testimony. Prior to addressing these matters, we provide some additional background to place claimant's arguments in context.

¶ 18 Ajster was permitted to testify for decedent at the 2008 hearing at which decedent was found to be permanently and totally disabled. Ajster did not serve as decedent's attorney at the 2008 proceeding. Ajster entered an appearance for decedent on August 29, 2014. Prior to the commencement of testimony on February 18, 2016, respondent moved to exclude witnesses. Commissioner Luskin asked Ajster if decedent's only witness was his personal assistant (Craig). Ajster responded in the affirmative. After Craig left the hearing room, Ajster began decedent's case-in-chief by calling decedent to testify.

¶ 19 During her direct examination of decedent, Ajster sought to introduce a photograph purporting to show decedent while he was asleep or unconscious. Respondent objected to the foundation for the photograph. Ajster advised the court that she "will testify later as to the foundation since [she] was the one who took the photograph[]." At that point, Commissioner Luskin asked Ajster whether she believed it was appropriate for her to be both a witness and counsel in this matter. Ajster responded in the affirmative. The parties then discussed Illinois Rule of Professional Conduct 3.7 (Rule 3.7) (Ill. R. Prof'l Conduct (2010) R. 3.7 (eff. Jan. 1, 2010)), which provides that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless" one of three exceptions applies. Ill. R. Prof. Conduct R. 3.7 (eff. Jan. 1, 2010). The parties concentrated on one of these exceptions, whether barring

Ajster's testimony would create a substantial hardship to decedent (see Ill. R. Prof'l Conduct (2010) R. 3.7(a)(3) (eff. Jan. 1, 2010)) and also whether Ajster had a conflict of interest with decedent. Commissioner Luskin agreed with respondent's assertion that Ajster should have been identified as a witness in response to respondent's earlier motion to exclude witnesses. Ajster advised Commissioner Luskin that her testimony "would bounce off what [decedent] has already testify [*sic*] to just with more clarity." Ajster acknowledged that this meant that her testimony would go beyond the mere foundation for the photograph and she would be testifying as an eyewitness about decedent's perceived disability. Commissioner Luskin concluded that Ajster had a conflict of interest with decedent since she would be was a witness in a case in which she had a financial interest in the outcome. Commissioner Luskin provided Ajster with two choices—either decline to testify and proceed as decedent's attorney or continue the case so that decedent could seek outside counsel. Following a recess, Ajster advised Commissioner Luskin that she would not testify and that the hearing could proceed.

¶ 20 At the March 14, 2016, hearing date, Ajster revisited the Commission's prior decision to exclude her from testifying as a witness. Ajster noted that subsequent to her initial request to testify, respondent submitted surveillance video of decedent in which she also is seen. Ajster asserted that she was not aware that she appeared in the video because she was not given a copy until after the hearing began. Ajster reiterated that she should be allowed to testify pursuant to Rule 3.7(a)(3), because she "is likely to be a necessary witness" and her disqualification would work a substantial hardship on decedent. Regarding the latter, Ajster asserted that decedent would be unable to find new representation because decedent's case "has a stigma attached to it" and decedent "has a history of not being able to cooperate with lawyers."

¶ 21 Commissioner Luskin acknowledged that Ajster may not have initially known that respondent possessed video evidence which included her, but added that “maybe [she] should have anticipated it.” Commissioner Luskin noted that decedent was given the opportunity to find new counsel but “didn’t even try” and that Ajster “didn’t even attempt to withdraw” from the case. Further, Commissioner Luskin reiterated that Ajster did not tell him that she intended to testify when respondent moved to exclude witnesses on the first day of the hearing. When Ajster was asked hypothetically to state what she would testify to in the form of an offer of proof, Ajster responded, “I would testify with regard to the tapes,” referring both to the stationary surveillance and the live surveillance. Ajster added, “So, I’m going to testify or I would testify to the events leading up to, because we’re looking at this video in a vacuum and you don’t see the events leading up to it. And so mine would just be contained to the specific portions that would begin and end with the tapes.” Commissioner Luskin noted that decedent was present and would have the opportunity to discuss those facts on rebuttal. Commissioner Luskin further found that Ajster’s disqualification would not have created a substantial hardship to decedent. Following Commissioner Luskin’s ruling, Ajster called decedent and Borostowski to testify in rebuttal. She also introduced an additional 19 exhibits.

¶ 22 We first address whether the Commission’s decision to exclude Ajster’s testimony was erroneous. Initially, we note that the parties dispute the applicable standard of review. As respondent observes, evidentiary rulings made during a workers’ compensation proceeding are generally reviewed for an abuse of discretion. *National Wrecking Co. v. Industrial Comm’n*, 352 Ill. App. 3d 561, 566 (2004). Citing to *Paoletti v. Industrial Comm’n*, 279 Ill. App. 3d 988 (1996), however, claimant argues that the issue of witness testimony and rebuttal evidence in this case is a question of law subject to *de novo* review. We disagree with claimant. In so finding,

we note that there is no language in *Paoletti* that would support imposition of the *de novo* standard of review to the Commission's evidentiary rulings, and claimant does not provide a pinpoint citation to *Paoletti* where such support may be found.⁴ An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the Commission. *Oliver v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 143836WC, ¶ 50.

¶ 23 As noted above, Commissioner Luskin offered two grounds for barring Ajster's testimony. First, he found that Ajster had a conflict of interest with decedent since she has a financial interest in the outcome of the case. Second, he rejected Ajster's claim that she should be allowed to testify pursuant to Rule 3.7 because she was a necessary witness in the case and her disqualification as decedent's attorney would work substantial hardship on decedent. On appeal, however, claimant addresses only the latter finding. Claimant's failure to challenge both of Commissioner Luskin's grounds to exclude Ajster's testimony results in forfeiture of this issue on appeal. See Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) (noting that points not argued are waived); *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 12 (finding that failure to comply with Illinois Supreme Court Rule 341 results in forfeiture). Forfeiture notwithstanding, we find no merit in claimant's argument that the Commission erred in barring Ajster's testimony under Rule 3.7.

⁴ We also observe that at the hearing before the trial court on judicial review, the judge asked Ajster if she agreed that the applicable standard of review for this issue was abuse of discretion. Ajster responded in the affirmative.

¶ 24 Rule 3.7 of the Illinois Rule of Professional Conduct (Ill. R. Prof. Conduct R. 3.7 (eff. Jan. 1, 2010)), also referred to as the advocate-witness rule, provides that “a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless” one of three exceptions applies. Ill. R. Prof. Conduct R. 3.7(a) (eff. Jan. 1, 2010). One of these exceptions is that disqualification of the attorney “would work a substantial hardship on the client.” Ill. R. Prof. Conduct R. 3.7(a)(3) (eff. Jan. 1, 2010). Claimant suggests that under Rule 3.7, Ajster should have been allowed to both represent decedent and testify at the 2016 hearing because she was a “necessary witness” and disqualification would have resulted in a substantial hardship on decedent. We disagree.

¶ 25 Our research has not revealed any Illinois cases specifically addressing the meaning of the term “necessary witness” in the context of Rule 3.7. We note, however, that other states have enacted rules that mirror our Rule 3.7. Those cases hold generally that an attorney is “likely to be a necessary witness” when his or her testimony is material, relevant, and unobtainable through other means. See, e.g., *Gonzalez-Estrada v. Glancy*, 85 N.E.3d 273, 276 (Ohio Ct. App. 2017); *Commonwealth v. Delnegro*, 75 N.E.3d 73, 80 (Mass. App. Ct. 2017); *State v. O’Neil*, 393 P.3d 1238, 1243 (Wash. Ct. App. 2017); *Brooks v. South Carolina Comm’n on Indigent Defense*, 797 S.E.2d 402, 405 (S.C. Ct. App. 2017); *Furstenfield v. Pepin*, 869 N.W.2d 353, 365 (Neb. Ct. App. 2015); *State v. Van Dyck*, 827 A.2d 192, 194 (N.H. 2003); *State v. Smith*, 749 S.E.2d 507, 510 (N.C. Ct. App. 2013); *Mettler v. Mettler*, 928 A.2d 631, 633-34 (Conn. Super. Ct. 2007). In this case, we find that Ajster was not “likely to be a necessary witness” because the evidence to which she sought to testify was cumulative of other evidence. Significantly, when the issue of Ajster’s testimony first arose on February 18, 2016, she told Commissioner Luskin that her testimony “would bounce off what [decedent] has already testify [*sic*] to just with more clarity.”

In other words, Ajster merely intended to elaborate on decedent's own testimony rather than offer new or unique testimony. The hearing then proceeded without Ajster making a formal offer of proof. On March 14, 2016, when Ajster revisited the Commission's denial of her request to testify, Commissioner Luskin asked her to state what she would testify about in the form of an offer of proof. Ajster advised that she would offer testimony to the events leading up to decedent's activities on the surveillance video. Ajster's statement, however, does not establish any facts that were unique to her experience. Indeed, as Commissioner Luskin noted, decedent was present and would have the opportunity to discuss those facts on rebuttal. Because Ajster's testimony was not unobtainable through other means, she was not "likely to be a necessary witness" in the context of Rule 3.7. Therefore, the Commission did not abuse its discretion in barring her from testifying at the 2016 hearing where she served as decedent's attorney.

¶ 26 Additionally, claimant has failed to establish that disqualifying Ajster would have worked substantial hardship on decedent. At the March 14, 2016, hearing date, Ajster argued that decedent would be unable to find new representation if she were disqualified because decedent's case "has a stigma attached to it" and decedent "has a history of not being able to cooperate with lawyers." Commissioner Luskin rejected this argument, noting that decedent was given the opportunity to find new counsel but "didn't even try" and that Ajster "didn't even attempt to withdraw" from the case. The record supports this finding. Significantly, following the first two hearing dates on February 18 and February 19, 2016, decedent had more than three weeks to seek new counsel. Yet, other than her statement, Ajster offered no evidence that decedent would be unable to find new representation if she were disqualified. For instance, Ajster presented no evidence that either she or decedent contacted any attorney or law firm about taking over

decedent's representation or that such a request was rejected. Given this evidence, we find the Commission did not abuse its discretion in barring Ajster for testifying at the 2016 hearing.

¶ 27 Claimant also contends that the Commission's decision to bar Ajster's testimony violated decedent's due process rights. "Due Process includes the right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence that is offered." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 49. In an administrative proceeding, due process requires that the parties have an opportunity to cross-examine witnesses and to offer rebuttal witnesses. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 297 Ill. App. 3d 662, 667 (1998).

¶ 28 Despite the Commission's decision to preclude Ajster from testifying at trial, the record clearly establishes that decedent was provided with the opportunity to present and call witnesses and introduce evidence in support of his claim. On February 18, 2015, decedent testified on his own behalf. Decedent also called Craig as a supporting witness. Decedent introduced 12 exhibits into evidence at that time, which included medical records and reports, photographic and video evidence, written correspondence, and other documentary evidence. Decedent introduced a thirteenth exhibit during the presentation of respondent's case on February 19, 2016. Also during respondent's case, decedent was provided the opportunity to cross-examine King, Knop, Ahrens, and Minnich. Although aware of respondent's reliance on the reports of Dr. Singh and Dr. Mather, decedent did not object to the admission of those reports at trial. On March 14, 2016, decedent testified as a rebuttal witness, obtained rebuttal testimony from Borostowski, and introduced an additional 19 exhibits.

¶ 29 Ajster was the only witness for decedent who was barred from testifying at trial. As noted above, she was barred due to the advocate-witness rule and Commissioner Luskin's

finding that she had a conflict of interest. Despite these findings, Commissioner Luskin still provided decedent with the opportunity to continue the hearing and obtain new counsel so that Ajster could testify at trial. After a recess to discuss the matter, decedent elected to proceed to trial and presented the evidence discussed above. Hence, the record reflects decedent had a sufficient opportunity to present evidence and argument in his own behalf, cross-examine adverse witnesses, and offer rebuttal evidence. Under these circumstances, we reject claimant's argument that the Commission's decision to bar Ajster's testimony violated decedent's due process rights.

¶ 30

B. Surveillance Video

¶ 31 Next, claimant argues that the Commission abused its discretion in admitting into evidence the active surveillance video taken by Knop.⁵ A video recording may be introduced as evidence if it is properly authenticated and relevant to a particular issue. *Carroll v. Preston Trucking Co., Inc.*, 349 Ill. App. 3d 562, 566 (2004). To establish authenticity, a foundation must be laid by someone having personal knowledge of the filmed object. *People ex rel. Sherman v. Cryns*, 327 Ill. App. 3d 753, 760 (2002). The foundation may be established “ ‘by the testimony of any competent witness who has sufficient knowledge to testify that the

⁵ It is unclear from claimant's brief whether it is also challenging the admission of the stationary surveillance video taken by Knop. To the extent that it is, we find claimant forfeited its right to object to the admission of the stationary surveillance video because no objection was raised at the hearing when that evidence was presented. See *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004) (noting that failure to object before arbitrator waives any challenge to evidence on appeal).

videotape fully represents what it purports to portray.’ ” *Cryns*, 327 Ill. App. 3d at 760 (quoting *Missouri Portland Cement Co. v. United Cement, Lime, Gypsum & Allied Workers International Union, Division of Boilermakers, AFL-CIO, Local No. 438*, 145 Ill. App. 3d 1023, 1027 (1986)). The admissibility of evidence is a matter committed to the discretion of the Commission, and its decision on such matters matter will not be disturbed on review absent an abuse of that discretion. *RG Construction Services*, 2014 IL App (1st) 132137WC, ¶ 35; *Greaney v. Industrial Comm’n*, 358 Ill. App. 3d 1002, 1010 (2005); see also *Cryns*, 327 Ill. App. 3d at 760 (noting that the decision to admit a video recording into evidence is solely within the discretion of the court and will not be reversed on appeal absent an abuse of discretion). An abuse of discretion occurs when the Commission’s ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the Commission. *Oliver*, 2015 IL App (1st) 143836, ¶ 50.

¶ 32 The Commission admitted the active surveillance video after respondent laid the foundation for it through the testimony of Knop. Knop testified that he obtained in-person surveillance of decedent on September 3, 2015, and September 7, 2015, that the camera he used was in good working order, and that the video submitted truly and accurately represented what his own eyes saw on those dates without alteration or enhancement. Further, although Knop admitted that there were times when he zoomed in and out, he denied editing the video in any way. Knop’s testimony meets the requirements for admissibility set forth in *Cryns*. Since claimant does not direct us to anything in the record which would compel a conclusion that the Commission’s admission of the active surveillance video constituted an abuse of discretion, we determine that the active surveillance video was properly admitted.

¶ 33 Although Knop denied editing the video, claimant suggests that the video was constructively edited because Knop zoomed in and out and repeatedly turned the camera on and off during the recording. According to claimant, this “editing” resulted in an inaccurate depiction of decedent’s activities. While any alleged edits to the video might impact the weight to which the evidence is entitled, claimant cites no authority that they affect its admissibility. See *People v. Taylor*, 2011 IL 110067, ¶ 44 (noting that, typically, any edits to a video recording affect the weight of the evidence and not its admissibility); *Paganelis v. Industrial Comm’n*, 132 Ill. 2d 468, 479 (1989). Claimant further complains that “not all of the video surveillance obtained by [Knop] was provided to [decedent] and not all of the video surveillance was presented at [the] hearing.” However, the record establishes that the video recordings were made available to decedent’s attorney, and claimant does not direct us to anything in particular that was not presented to decedent. Similarly, claimant does not direct us to any authority requiring respondent to present all of the video evidence at the hearing. The record reveals that over a course of more than 60 hours of surveillance, Knop recorded more than 90 minutes of video and prepared a 25-page report of his observations. Not all of the surveillance video was played at the hearing, but several clips were presented. To the extent that claimant believes some of the video that was not shown at the hearing was relevant, it does not indicate why decedent could not have introduced that footage himself. The fact that he did not is not grounds for barring admission of the surveillance video at issue, and claimant cites no authority to the contrary.

¶ 34 C. Termination of PTD Benefits

¶ 35 Claimant next challenges the Commission’s decision to terminate decedent’s PTD benefits as of February 21, 2014. PTD benefits are governed by section 8(f) of the Act (820 ILCS 305/8(f) (West 2014)), which provides for the payment of compensation “[i]n case of

complete disability, which renders the employee wholly and permanently incapable of work.” *King v. Industrial Comm’n*, 189 Ill. 2d 167, 171-73 (2000). Section 8(f) also sets forth a procedure for modifying an award of PTD benefits. *King*, 189 Ill. 2d at 172. In this regard, section 8(f) provides as follows:

“If any employee who receives an award under this paragraph afterwards returns to work or is able to do so, and earns or is able to earn as much as before the accident, payments under such award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, such employees have the right at any time within 30 months after the date of such termination or reduction to file petition with the Commission for the purpose of determining whether any disability exists as a result of the original accidental injury and the extent thereof.” 820 ILCS 305/8(f) (West 2014).

Thus, a section 8(f) petition examines whether the employee has returned to work or is able to do so and the employee’s earnings or ability to earn. *King*, 189 Ill. 2d at 172. As such, a section 8(f) modification is not limited to situations where an employee has actual earnings. *King*, 189 Ill. 2d at 175. Rather, a modification pursuant to section 8(f) may be entered where the employer proves that the employee is able to return to work and able to earn. *King*, 189 Ill. 2d at 175.

¶ 36 The burden of proof is on the employer to establish that the employee’s award should be modified pursuant to the provisions of section 8(f). *Boyd Electric v. Illinois Workers’ Compensation Comm’n*, 403 Ill. App. 3d 256, 259 (2010). The Commission’s finding regarding a section 8(f) modification is a question of fact. *Keystone Steel & Wire Co. v. Industrial*

Comm'n, 85 Ill. 2d 178, 185 (1981). In resolving factual matters, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). This is especially true with respect to medical issues, where we owe heightened deference to the Commission due to the expertise it has long been recognized to possess in the medical arena. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). We review the Commission's factual determinations under the manifest-weight-of-the-evidence standard. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987); *Keystone Steel & Wire Co.*, 85 Ill. 2d at 185. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶ 17.

¶ 37 At the 2016 hearing, decedent testified that since this court's December 2012 decision, his condition had deteriorated. Decedent recounted that he had difficulty bending at the waist, his leg gives way while walking, he can walk only about 100 feet without an assistive device, and he drives only "once in a great while" to nearby places, such as a gas station. Decedent also stated that he does not read "real good," does not own a computer, and does not know how to use a computer. During a July 22, 2014, examination by Dr. Thomas McNally, decedent advised that he "is very inactive and lies in bed most of the day." As noted previously, however, the Commission concluded that the video evidence "dramatically impeaches [decedent's] testimony regarding his physical limitations and concomitant ability to return to work." In particular, the Commission cited the February 21, 2014, YouTube video of decedent arm wrestling. The Commission found that the video showed decedent "energetically engaging with a brawny opponent" and "vigorously exerting himself with no apparent ill effects, at an activity requiring

physical effort significantly in excess of his claimed abilities.” The Commission also found that decedent’s testimony at the hearing was “at odds with the narrative of a bedridden, physical and mental invalid crippled by constant pain and drugs.” As a result of these findings, the Commission concluded that claimant’s disability ceased to be total no later than February 21, 2014, terminated his PTD benefits as of that date, and substituted in its stead an award of PPD benefits. After reviewing the record, we cannot say that a conclusion opposite that of the Commission is clearly apparent.

¶ 38 Significantly, the video evidence admitted at the 2016 hearing amply supports the Commission’s finding that decedent’s purported disability was not as extensive as he claimed.⁶ Although the Commission focused on the February 21, 2014, YouTube video of decedent arm wrestling, that was not the only video evidence admitted at the hearing or referenced by the Commission. The Commission was also presented with security video from a casino taken in May 2015, stationary video surveillance of decedent taken in June 2015, and active video surveillance of decedent taken in August and September 2015. The security video showed decedent walking into the casino without difficulty and without an assistive device. Another clip showed decedent leaving the casino in a wheelchair, but decedent “while seated, is swinging his lower legs back and forth making contact with the ground, in a manner of walking and propelling the chair forward, while the chair is being pushed from behind.” The Commission noted that the stationary video surveillance showed decedent driving an SUV, riding a bicycle or moped, “bending effortlessly” to wipe something off the bumper of a car, and removing a seat from a jet

⁶ None of the video footage admitted at the hearing was included in the record on appeal.

The descriptions of the video evidence provided are taken from the Commission’s decision.

ski. The active video surveillance captured decedent on a recreational boating excursion, during which he drove an SUV, hoisted himself from the ground over the edge of a boat and into the watercraft, bended at the waist to check the boat's engine after it apparently failed, and paddled the boat to shore. This evidence contradicts decedent's testimony of extensive physical limitations and supports the Commission's finding that decedent's physical limitations were not as extensive as he claimed.

¶ 39 The Commission's finding was buttressed by other evidence as well. King, a former friend of decedent, testified that he played basketball with decedent two or three times at the local YMCA late in 2013 or early in 2014. King also testified that in October 2013, he and decedent went on a daylong excursion riding all-terrain vehicles. While the Commission noted that King's impartiality as a witness could be questioned give that he was named as a defendant in a lawsuit brought by Ajster on decedent's behalf, the Commission found that King's testimony was "not inconsistent with the videos and other evidence of [decedent's] physical capability."

¶ 40 The other evidence referenced by the Commission came principally from decedent himself, which the Commission found to be "at odds with the narrative of a bedridden, physical and mental invalid crippled by constant pain and drugs." The Commission cited conflicting evidence from decedent regarding his ability to engage in physical activity, drive long distances, read and write, and use a computer. For instance, decedent represented that he only drove "once in a great while" to local places, such as a gas station. However, this testimony was contradicted by claimant's admission that in November 2015, he drove from his home in Dalzell, Illinois, to Canton, Illinois, to purchase medical cannabis. The Commission noted this is a distance of about 100 miles. The Commission also observed that despite decedent's claim that he did not know how to use a computer, he testified that he researched medical treatment on the internet. The

Commission also found evidence of decedent's reading and writing skills "plentiful." The Commission cited "[s]cores of emails and other documents purporting on their face to be authored by [decedent]" and evidence that decedent had an email address in his name. While Ajster attempted to stipulate at the hearing that she authored the correspondence and that the email address was hers, the Commission, as the trier of fact, was not required to accept Ajster's statement. *Hosteny*, 397 Ill. App. 3d at 674. In short, given the evidence of record, we cannot say that a conclusion opposite that of the Commission is clearly apparent or that, in turn, the Commission's decision to terminate decedent's PTD benefits was against the manifest weight of the evidence.

¶ 41 Notwithstanding the foregoing evidence, claimant complains that the Commission's decision does not reference any medical testimony that decedent was no longer permanently totally disabled. Claimant, however, cites no authority that the Commission was required to rely on medical evidence to terminate decedent's PTD benefits and has therefore forfeited the argument. *Esquinca v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150706WC, ¶ 64 n.4 (citing Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)). More important, claimant's suggestion that the Commission did not consider any medical evidence is belied by a review of its decision. At the beginning of its decision, the Commission states that it "has considered the entirety of the lengthy record and been advised of the facts and law." The Commission then sets forth almost 14 pages of facts, a significant portion of which is devoted to decedent's physical condition and medical treatment. Further, in the introductory paragraph of its discussion of decedent's PTD benefits, the Commission stated that its finding that decedent's disability was "far from total" was made "[t]aking the evidence as a whole." For these reasons, claimant's

argument that the Commission's decision must be overturned because it was not based on any medical evidence is not persuasive.

¶ 42 Claimant also contests the Commission's decision to terminate decedent's PTD benefits as of February 21, 2014. Claimant argues that respondent did not have any medical or vocational evidence as of that date to establish decedent was capable of returning to work or earning wages in the open labor market and that the sole evidence to support this termination date is the YouTube video of decedent arm wrestling. As noted above, however, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. Here, the Commission had before it evidence that as of late 2013 or early 2014, claimant had played basketball and had participated in a daylong all-terrain excursion—activities that were inconsistent with his claimed physical limitations. In August 2014, Dr. Singh performed an independent medical record review and opined that decedent could return to work without restrictions. Thereafter, decedent was recorded on video performing additional activities that were inconsistent with his claimed physical limitations. In August 2015, Dr. Mather performed an IME of claimant and concluded that decedent had “some capability for employability.” Specifically, Dr. Mather found that claimant had computer skills and that his upper extremities were “very strong, impressively strong.” Accordingly, Dr. Mather found that decedent could return to work with a 25- to 50-pound lifting restriction and limited bending of no more than 6 to 8 times per hour in an 8-hour workday. In addition, Minnich, who conducted a vocational assessment, identified 158 “Generally Transferrable Occupations” within decedent's capabilities and opined decedent “could expect to find employment that provides remuneration in this case” and earn wages commensurate with his previous wage. Given the totality of this

evidence, the Commission could have reasonably concluded that the February 21, 2014, video of decedent arm wrestling was significant because it was the first recorded example of decedent acting in a manner inconsistent with his claimed physical limitations and it showed the ease with which decedent was able to engage in such behavior without any signs of disability or limitation. While claimant characterizes Dr. Mather's report as "defective and contradictory," we perceive nothing in the alleged deficiencies cited by claimant that is so compelling as to render the Commission's decision to terminate decedent's PTD benefits as of February 21, 2014, to be against the manifest weight of the evidence.

¶ 43 In sum, the Commission concluded that decedent was no longer permanently and totally disabled based on the totality of the evidence presented, including the video evidence, the medical records, contradictions in decedent's own testimony, other witness testimony, and the documentary evidence. After reviewing the record, we cannot say that a conclusion opposite that of the Commission is clearly apparent, or that, in turn, the Commission's decision to terminate decedent's PTD benefits is against the manifest weight of the evidence.

¶ 44 D. Medical Expenses

¶ 45 Claimant also challenges the Commission's decision to deny his motion for payment of certain medical expenses.⁷ Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)), an employer is required to provide or pay for "all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental

⁷ Claimant's request that respondent be ordered to cover the cost of prospective surgery is moot given decedent's death during the pendency of this appeal.

injury.” Specific procedures or treatments that have been prescribed by a medical service provider are “incurred” within the meaning of section 8(a) even if they have not been performed or paid for. *Bennett Auto Rebuilders v. Industrial Comm’n*, 306 Ill. App. 3d 650, 655 (1999). The employee bears the burden of proving, by a preponderance of the evidence, his or her entitlement to an award of medical care under section 8(a). *Westin Hotel v. Industrial Comm’n*, 372 Ill. App. 3d 527, 546 (2007). Questions regarding entitlement to medical care under section 8(a) are factual inquiries for the Commission to resolve. *Dye v. Illinois Workers’ Compensation Comm’n*, 2012 IL App (3d) 110907WC, ¶ 10. The Commission’s decisions on factual matters will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Dye*, 2012 IL App (2d) 110907WC, ¶ 10.

¶ 46 The Commission determined that decedent failed to prove a need for a motorized scooter, personal assistant, or medical cannabis. In so concluding, the Commission found that the medical opinions of Dr. Singh and Dr. Mather were “far more authoritative and credible regarding [decedent’s] condition and reasonable ongoing needs than any witness presented by [decedent].” Claimant contends that the Commission’s reliance on the opinions of Dr. Mather and Dr. Singh was improper because Dr. Mather saw decedent for less than an hour for an IME and Dr. Singh only performed a review of decedent’s medical records. We disagree.

¶ 47 The Commission was presented with conflicting evidence regarding decedent’s need for a motorized scooter, a personal assistant, and medical cannabis. Dr. Rittmann, decedent’s primary-care physician, prescribed the motorized scooter and medical cannabis. Dr. Singh did not address the propriety of the motorized scooter or medical cannabis, but Dr. Mather found these modalities were not necessary. According to Dr. Mather, decedent was not a candidate for medical cannabis because he did not meet the “minimum accepted conditions to qualify for this

program.” Further, Dr. Mather did not recommend a motorized scooter for decedent on the basis that “walking is one of the best exercises one can do to maintain a healthy lifestyle.” The Commission found the opinion of Dr. Mather more persuasive than that of Dr. Rittman, observing that Dr. Rittman expressly noted in his record that he was “not a pain specialist” and that he was “not educated enough” to advise decedent about medical cannabis. Although Dr. Rittman continued to treat decedent, the Commission noted that he also continued to express doubts about his ability to care for decedent, writing that decedent’s condition was “outside the scope of [his] expertise.” Given the Commission’s reservations about Dr. Rittman’s ability to treat decedent, the Commission was entitled to give Dr. Mather’s opinion deference over that of Dr. Rittman. See *Hosteny*, 397 Ill. App. 3d at 674 (noting that it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom). We further observe that the Commission had before it video evidence and witness testimony contradicting decedent’s claim of extensive physical limitations and therefore his need for a motorized scooter and medical cannabis. Thus, we find that Dr. Mather’s opinion coupled with the other evidence of record provided sufficient factual evidence to support the Commission’s decision that neither a motorized scooter nor medical cannabis was reasonable and necessary. These findings were not against the manifest weight of the evidence.

¶ 48 We reach the same conclusion with respect to decedent’s request for the need of a personal assistant. Dr. Rittman recommended a personal assistant. Decedent hired Craig, his sister, to serve in this role. Craig was paid for her services. When discussing the duties she would perform for decedent, Craig testified that she feeds decedent his breakfast, administers his medication, helps decedent with his towel as he exits the shower, gets decedent dressed, and

assists him with various household chores. However, decedent's testimony regarding the need for a personal assistant was contradictory. At one point during the 2016 hearing, decedent testified that he needed a personal assistant to help him get up, each morning, dress, and cook. However, at another time he related that he is able to get himself up in the morning without assistance, Craig does not help him take a shower or a bath, and he only needs assistance getting out of the tub. Decedent also recounted that he can feed himself and take his pills by himself. The Commission found claimant was not a credible witness. It also questioned Craig's credibility, finding that she was not trustworthy "insofar as [she has] not just blood ties but financial ties to [decedent]." Given the conflicting evidence regarding decedent's need for a personal assistant and the questions about the credibility of decedent and Craig, we find sufficient factual evidence to support the Commission's finding that a personal assistant was not reasonable and necessary. Therefore, the Commission's decision was not against the manifest weight of the evidence.

¶ 49

E. Suspension of PTD Benefits

¶ 50 Finally, claimant challenges the Commission's decision to suspend decedent's PTD benefits under section 12 of the Act (820 ILCS 305/12 (West 2014)). The Commission suspended claimant's PTD benefits pursuant to section 12 based on its finding that decedent unnecessarily obstructed or otherwise refused to submit to an IME scheduled for March 12, 2015, with Dr. Mather. Specifically, the Commission determined that although decedent appeared for the IME, he was asked to leave after he used abusive language towards the doctor's staff and a patient in the waiting room and he threatened the patient with physical violence. Dr. Mather later agreed to conduct the IME in a hearing room at the Commission's offices on July

31, 2015. The Commission suspended decedent's PTD benefits from March 12, 2015, through July 31, 2015.

¶ 51 Claimant argues that the Commission's decision to suspend decedent's PTD benefits from March 12, 2015, through July 31, 2015, was against the manifest weight of the evidence. Claimant's argument in this regard is twofold. First, claimant asserts that the Commission's decision to suspend his benefits is "inconsistent" with its prior termination of PTD benefits under section 8(f) of the Act (820 ILCS 305/8(f) (West 2014)) effective February 21, 2014. Second, claimant argues that the suspension was improper because decedent attended the examination but was asked to leave. Respondent answers that the Commission's decision to suspend decedent's PTD benefits from March 12, 2015, through July 31, 2015, was correct and should be affirmed because the right enumerated in section 8(f) is entirely different than the right granted under section 12. Respondent further contends that the Commission properly suspended decedent's PTD benefits under section 12 because the evidence clearly establishes that decedent failed to cooperate with the scheduled IME.

¶ 52 At the outset, we agree with respondent that section 8(f) and section 12 serve different purposes. As noted previously, section 8(f) sets forth a procedure for modifying a PTD award and provides for the termination or reduction of such an award where the employee thereafter returns to work or is able to do so and earns or is able to earn wages on the open labor market. *King*, 189 Ill. 2d at 172. As such, a section 8(f) petition for modification looks to whether the employee has returned to work or is able to do so and to the employee's earnings or ability to earn. *King*, 189 Ill. 2d at 172. In contrast, section 12 of the Act (820 ILCS 305/12 (West 2014)) authorizes an employer to obtain a medical examination of the employee and provides for the temporary suspension of compensation payments when an employee refuses to submit to the

examination or unnecessarily obstructs the same. Accordingly, section 12 cannot be used to suspend an employee's compensation unless the employee refuses to comply with or unnecessarily obstructs a proper request for a medical examination. See *King*, 189 Ill. 2d at 176.

¶ 53 While recognizing that the purposes of section 8(f) and section 12 are distinct, we find that the Commission's decision to suspend his PTD benefits under section 12 of the Act was moot given the Commission's earlier decision to terminate decedent's PTD benefits. Quite simply, there were no PTD benefits to suspend from March 12, 2015, through July 31, 2015, as the Commission had already terminated decedent's PTD benefits pursuant to section 8(f) effective February 21, 2014. Despite our finding, we do not condone decedent's behavior at Dr. Mather's office on March 12, 2015, and note that claimant cites no authority that decedent's mere attendance at the IME was sufficient to meet his obligations under section 12. Our point is simply that once the Commission determined that decedent was not entitled to PTD benefits after February 12, 2014, it could not suspend the payment of benefits that had already been terminated. Accordingly, we vacate that portion of the Commission's decision suspending decedent's PTD benefits from March 12, 2015, through July 31, 2015.

¶ 54

IV. CONCLUSION

¶ 55 For the reasons set forth above, we vacate that portion of the Commission's decision suspending decedent's PTD benefits from March 12, 2015, through July 31, 2015, but otherwise affirm the judgment of the circuit court of LaSalle County, which confirmed the decision of the Commission.

¶ 56 Affirmed in part and vacated in part.