2017 IL App (1st) 161339WC-U

Order filed: September 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

REFUGIO MARQUEZ, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Plainfield Construction), Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County, Illinois Appeal No. 1-16-1339WC Circuit No. 14-L-50932 Honorable Alexander P. White, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Commission's denial of wage differential benefits was not against the manifest weight of the evidence; (2) the Commission's denial of prospective medical treatments and medical expenses incurred after the claimant reached MMI was not against the manifest weight of the evidence; (3) the employer's failure to call a witness to explain the employer's refusal to rehire the claimant after he was released to work full duty did not require the Commission to draw a negative inference that the employer did not believe the claimant was capable of working full duty at that time.

¶ 2 The claimant, Refugio Marquez, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for neck and back injuries he allegedly sustained on November 26, 2008, while he was working for Plainfield Construction (employer). Following a hearing, an arbitrator found that the claimant had sustained strains to his neck and lumbar spine as a result of a work-related accident on November 26, 2008, and that the claimant had reached maximum medical improvement (MMI) from his work-related injuries on November 18, 2009. The arbitrator awarded the claimant temporary total disability (TTD) benefits from November 27, 2008, through November 18, 2009. In addition, the arbitrator awarded the claimant permanent partial disability (PPD) benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)) for 37.5 weeks in the amount of 7.5 percent of the person-as-a-whole. The arbitrator also awarded the claimant $14,517.95 in medical expenses but denied medical expenses for treatments the arbitrator found unrelated to the claimant's work injuries, including charges for certain chiropractic treatments beginning in February of 2009 and certain medical treatments rendered after the date upon which the arbitrator found the claimant had reached MMI. The arbitrator also denied the claimant's request for penalties and attorney fees.

¶ 3 The claimant sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On May 7, 2012, the Commission issued a unanimous decision modifying the arbitrator's decision in three respects: first, the Commission found that the claimant had reached MMI on April 7, 2010, the date his treating physician released him to work full duty; second, the Commission modified the arbitrator's award of TTD benefits and medical expenses to correspond to the new, later MMI date; and third, the Commission increased the PPD award to 15 percent of the person-as-a-whole. The Commission

affirmed and adopted the arbitrator's decision in all other respects. The Commission stated that it had issued its decision after considering the issues of "wage differential benefits" and other issues.

¶ 4 The claimant appealed the Commission's decision to the circuit court of Cook County. On December 4, 2012, Judge Robert Lopez Cepero remanded the matter to the Commission and directed the Commission to reconsider the issues of wage differential, medical expenses, and vocational rehabilitation.

¶ 5 On November 20, 2014, the Commission entered a decision on remand reaffirming and readopting its May 7, 2012, decision in its entirety. The Commission found that, after the claimant reached MMI on April 7, 2010, the claimant "was able to return to work full duty and did not require further medical care." After reviewing the record, the Commission found evidence of "symptom magnification and malingering" on the claimant's part. In reaching these conclusions, the Commission relied upon the opinions of Dr. Michel Malek, the claimant's neurologist and treating physician, and Dr. Frank Phillips, the employer's section 12 medical examiner. The Commission "g[ave] little weight" to the functional capacity evaluations (FCEs) performed on October 15, 2009, and November 9, 2010," "as they were determined to be invalid due to inconsistent effort and symptom magnification" by the claimant. The Commission also gave little weight to the opinions of Dr. Antoine Chami, a pain management specialist who began treating the claimant after he reached MMI and was released to full duty work by Dr. Malek, and James Boyd, the claimant's vocational expert. The Commission discounted Boyd's opinion because Boyd was unaware that Dr. Malek had released the claimant to return to work full duty and because Boyd's opinion was based on "the claimant's subjective complaints of severe disability" and on the erroneous "assumption of a 40 pound lifting restriction." Similarly,

the Commission chose not to credit Dr. Chami's opinions because he "did not review [the claimant's] prior medical records" and "was unaware of" the opinions of Drs. Malek and Phillips" when he treated the claimant for complaints of "severe, disabling symptoms."

¶ 6 The claimant sought judicial review of the Commission's decision on remand before the circuit court of Cook County. The case was again assigned to Judge Lopez Cepero. After oral arguments, Judge Lopez Cepero stated that he was remanding the matter to the Commission for a second time, this time with instructions that the Commission reopen proofs. However, Judge Lopez Cepero retired without issuing a signed, written order to that effect. A stamped but unsigned remand order dated October 29, 2015, was subsequently provided to the employer's counsel. On November 12, 2005, the employer filed a motion to vacate the October 29, 2015, remand order pursuant to Illinois Supreme Court Rule 272 (Ill. S. Ct. R. 272 (eff. Nov. 1, 1990)) and a motion for rehearing. Judge Ponce de Leon denied the motion to vacate but allowed the employer 30 days to file a motion to reconsider. Judge Ponce de Peon subsequently retired and the case was reassigned to Judge Alexander White, who granted the employer's motion for reconsideration and affirmed the Commission's November 20, 2014, decision.

¶ 7 This appeal followed.

¶ 8 BACKGROUND

¶ 9 The claimant worked for the employer as a laborer. He performed carpentry as well as concrete work. His duties including putting in foundations, pumping concrete, and helping the finishers.

¶ 10 The parties stipulated that the claimant sustained an accidental injury at work on November 26, 2008. On that date, the claimant was standing in a truck bed holding foundation panels upright during transit. When the driver pulled away, he accelerated quickly, and the

panels began to fall toward the claimant. The claimant quickly straightened his arms and pushed against the panels. As he did so, he felt a "big shock" and his whole body was "tingling numb."

¶ 11 A co-worker drove the claimant to Will County Medical Associates, where the claimant was evaluated by Dr. Louis Papaeliou. The claimant complained of discomfort "from the neck all the way down in the back" and tingling in his hands. Dr. Papaeliou's examination revealed "very, very diffuse tenderness" in the lower cervical, upper thoracic and lumbar regions, no spasm, full range of motion of the neck but with complaints of pain at endpoints, and pain behavior with lumbar flexion. Dr. Papaeliou diagnosed neck and back strains but noted that he did not "have a reasonable explanation for the tingling in the hands, which is occurring in a glove-like pattern." Dr. Papaeliou took the claimant off work, ordered spine x-rays, and prescribed pain medication.

¶ 12 On December 1, 2008, the claimant returned to Dr. Papaeliou complaining of continued tingling in his hands as well as pain extending from his left buttock down his left leg to his left heel. Due to the claimant's radicular symptoms, Dr. Papaeliou suggested MRIs of the lumbar and cervical spine and an orthopedic consultation with Dr. Michael Dorning.

¶ 13 The MRIs were performed on December 3, 2008. The lumbar spine MRI report identified a small, broad-based disc bulge at L4-L5 and a focal central disc bulge at L5-S1. There was no evidence of significant central canal stenosis or neuroforaminal narrowing. The cervical spine MRI showed mild degenerative changes throughout contributing to mild to moderate left-sided neuroforaminal stenosis at C3-C4, mild right-sided narrowing at C4-C5, and a small focal disc protrusion at C4-C5 which did not cause significant central canal stenosis or cervical spinal cord compression. The radiologist noted that the claimant's spinal cord remained grossly normal in caliber and signal intensity throughout.

¶ 14 The claimant saw Dr. Dorning on December 9, 2008. After examining the claimant and reviewing the MRI scans, Dr. Dorning diagnosed a disc herniation at C4-C5 and lumbar myositis.[1] Dr. Dorning kept the claimant off work and prescribed physical therapy.

¶ 15 That same day, the claimant also saw Dr. Aldrin Carrion, a chiropractor, at Activa Chiropractic. After performing a "chiropractic, orthopedic, and neurological examination," Dr. Carrion diagnosed lumbar IVD Syndrome with myelopathy, cervicobrachial syndrome, pain in the thoracic spine, and myofascitis. Dr. Carrion initiated a course of chiropractic treatments, which including stretching and other exercises.

¶ 16 The next day, the claimant saw Dr. Carl Lambiasi, a physician who practiced family medicine in the same building as Activa Chiropractic. Dr. Lambiasi recommended both chiropractic treatments and physical therapy, prescribed a Medrol Dosepak, and kept the claimant off work. The claimant underwent daily chiropractic sessions with Dr. Carrion that week. On December 16, 2008, the claimant followed up with Dr. Lambiasi, who ordered further physical therapy and chiropractic care as well as neurological examination and testing, including an EMG.

¶ 17 Two days later, an EMG was performed on the claimant. The test revealed possible radiculopathy affecting L5-S1 bilaterally and possible neuropathy affecting C5-T1 bilaterally. When the claimant returned to Dr. Lambiasi on December 30, 2008, Dr. Lambiasi referred the claimant to Dr. Michel Malek, a neurologist. Dr. Lambiasi also ordered continued chiropractic care and physical therapy and kept the claimant off work.

¶ 18 On January 14, 2009, the claimant began treating with Dr. Malek. Dr. Malek recorded a history of the November 2008 work accident and noted that the claimant complained of

[1] "Myositis" is a condition causing inflammation in muscles. Weakness, swelling, and pain are the most common symptoms of myositis.

headaches and pain throughout his neck, spine and back. The neck pain radiated with cramps into the right upper extremity with tingling, numbness, and weakness in both upper extremities. The pain in the claimant's lower back radiated down both lower extremities with associated pain, numbness, and weakness. The claimant also reported dizziness, especially when lying down. After examining the claimant and reviewing the MRI and EMG reports, Dr. Malek's impression was musculoligamentous sprain and cervical and lumbar radiculopathy. Dr. Malek recommended repeat MRIs of the claimant's cervical and lumbar spine as well as a CT scan of the claimant's brain. He also recommended that the claimant continue treating with Dr. Lambiasi and prescribed a regimen of pain medication and muscle relaxants. He kept the claimant off work.

¶ 19 On January 23, 2009, the claimant was examined by Dr. Frank Phillips, the employer's Section 12 medical examiner. Dr. Phillips reviewed the MRI scans and concluded that they showed no significant structural injury to the claimant's spine.[2] During the examination, Dr. Phillips noted the presence of numerous Waddell's signs[3] and non-anatomic pain behaviors. He noted his suspicion that the claimant's clinical recovery "will likely be compromised by these pain-focused behaviors." After examining the claimant and reviewing the MRI films, Dr. Phillips opined that the claimant had likely sustained a spinal sprain or strain. He anticipated that the claimant would reach MMI within six to eight weeks. Dr. Phillips concluded that the claimant was currently capable of working in a light duty capacity.

[2] Dr. Phillips identified a "tiny central non-compressive disc bulge at C4-C5" and some very mild spondylitic changes at C6-C7 causing no foraminal or central narrowing. He concluded that the remaining levels of the claimant's cervical spine showed no evidence of significant neural compressive pathology. Dr. Phillips found the claimant's lumbar MRI scan to be essentially unremarkable, with a tiny non-compressive central bulge at L5-S1 and a fairly diffuse bulge at L4-L5 with no evidence of neural compression.

[3] "Waddell's signs" are physical reactions that may indicate a non-organic or psychological component to chronic pain. They have also been used to detect symptom magnification.

¶ 20 On January 28, 2009, the claimant saw Dr. Malek, who prescribed an epidural steroid injection. On February 13, 2009, the claimant went to the Fullerton Medical Clinic for the recommended injection but did not undergo the procedure. The claimant later testified that he had a "panic attack" and refused the injection because two men ahead of him screamed "like a chicken with a head cut off" when they received the injection.

¶ 21 Three days later, the claimant returned to Dr. Lambiasi, who again prescribed physical therapy and chiropractic care. Dr. Lambiasi's medical record of that visit does not mention that the claimant had a traumatic experience involving a prescribed epidural injection three days earlier. On May 4, 2009, Dr. Lambiasi administered myofascial trigger point injections which the claimant testified did not help him. Dr. Lambiasi subsequently referred the claimant to Dr. Igor Russo for vertebral decompression therapy treatments, which the claimant received from June 22, 2009, through July 15, 2009. The claimant testified that these treatments were very painful and did not improve his condition.

¶ 22 On August 7, 2009, the claimant returned to Dr. Malek. At that time, Dr. Malek believed that surgery would help the claimant, "especially in view of his disc herniation and also the lumbar spine MRI scan showing evidence of disc herniation." However, Dr. Malek's medical record indicates that the claimant "would like to hold off on injection and surgery." Dr. Malek noted that, "[s]hort of surgical intervention," the claimant had reached MMI. Later in his medical record, Dr. Malek noted that MMI was "likely to be reached after surgical intervention." Dr. Malek recommended injections and noted that surgery was "deferred." He took the claimant off work and ordered a four-week work hardening program followed by a FCE.

¶ 23 On September 9, 2009, the claimant returned to Dr. Malek and told him that he "would like to hold off on any intervention for the time being." Dr. Malek noted that the claimant's

"exam is unchanged." He continued the claimant's medications and recommended that the claimant return for a follow-up examination after the FCE. In the "recommendations" section of Dr. Malek's September 9, 2009, record, Dr. Malek noted "[i]njections, surgery deferred" (just as he did in his August 7, 2009 record).

¶ 24 On September 28, 2009, the claimant underwent a FCE at Advanced Physical Medicine. The test placed the claimant at the medium physical demand level, meaning that he was capable of carrying up to 25 pounds and occasionally lifting up to 50 pounds. The FCE report noted that the Dictionary of Occupational Titles placed the claimant's job as a Construction Worker II in the "very heavy strength" category. The FCE report concluded that the claimant did not meet these strength requirements and could not return to his prior position at that time. The report further noted that, in order for the claimant to successfully return to work in the medium strength category, certain work restrictions must be observed, including: (1) no walking for more than three-tenths of a mile continuously; (2) no pushing more than 75 pounds; (3) no pulling more than 70 pounds; (4) no stooping; and (5) no kneeling on both knees. The September 28, 2009, FCE did not include validity testing or monitoring to ensure that the claimant had given maximum effort.

¶ 25 Dr. Malek subsequently referred the claimant for a second FCE, which was performed on October 15, 2009. This FCE test included validity criteria to measure the claimant's effort. The October 15, 2009, FCE report indicated that the claimant's abilities could not be assessed because the claimant terminated the FCE due to pain "so severe that he felt as if he was going to throw up." The evaluator recorded that, during the portion of the evaluation that was completed, the claimant failed seven out of seven validity criteria, indicating a sub-maximal effort. The

evaluator also noted that the claimant had displayed abnormal pain behaviors during the test, including four out of five Waddell's signs, which is indicative of symptom magnification.

¶ 26 On October 29, 2009, the claimant followed up with Dr. Malek. Dr. Malek noted that the claimant had undergone a FCE on October 15, 2009, but the evaluation "was not valid due to inconsistent effort" according to the evaluator. Dr. Malek stated that, due to the claimant's inconsistent effort, the FCE evaluator was "unable to make a recommendation." He further noted that, although the claimant was complaining of persistent symptoms, the claimant "did not want to consider any intervention," such as injections. As such, Dr. Malek advised the claimant that he "would pretty much have reached MMI." He released the claimant to work light duty with a 40-pound lifting restriction. The claimant was to return for reassessment one month later.

¶ 27 The claimant returned to Dr. Malek on November 4, 2009, but still refused injections or other medical intervention. Dr. Malek noted the claimant had completed a conditioning program and reiterated that the October 15, 2009, FCE was invalid. Dr. Malek opined that the claimant had reached MMI and made no further recommendations. He noted that,"[s]hort of injection and surgery, MMI has been reached."

¶ 28 On November 18, 2009, the claimant returned to Dr. Malek and informed Dr. Malek that the light-duty work restrictions the doctor had imposed had not been accommodated by the employer. Dr. Malek again noted that the October 15, 2009, FCE "was said to be invalid due to inconsistent effort" "and therefore [a] recommendation was unable to be made." Dr. Malek noted that, "[b]ased on the [claimant's] anatomical findings and evaluation" he had "[given] the claimant a weight limit[] of 40 pounds and that "condition is permanent." However, because the claimant "could not be accommodated," and because October 15, 2009, FCE was "inconsistent and not valid," Dr. Malek decided to give the claimant a "trial return to work regular duty for one

month" to "see how he does with it." Dr. Malek repeated this recommendation on December 2, 2009.

¶ 29 At the employer's request, the claimant returned to Dr. Phillips for a second Section 12 examination on January 8, 2010. After examining the claimant and reviewing the MRI scans and the updated medical records (including the October 15, 2009, FCE), Dr. Phillips opined that: (1) the imaging findings "revealed no evidence of acute structural injury related to the 2008 work injury"; and (2) the claimant had reached MMI. Dr. Phillips noted that the claimant complained of ongoing, diffuse neck and back pain "without any radicular findings." He opined that, while the claimant's initial complaints were the result of the November 2008 work injury, his current subjective complaints "outweigh[ed] any objective findings" and were unrelated to the 2008 injury.[4] Dr. Phillips did not believe that the claimant was a candidate for surgery. However, given the length of time the claimant had been inactive, Dr. Phillips recommended a one-month work conditioning program. Dr. Phillips predicted that the claimant was unlikely to complete this program, however, because of his "pain-focused behavior." Dr. Phillips noted that, if the claimant either completed or opted out of the work conditioning program, he would allow the claimant to return to work regular duty.

¶ 30 The initial work hardening evaluation took plane on January 21, 2010. The therapist documented that the claimant failed five out of seven validity criteria during the evaluation. The claimant did not complete the work hardening program. He testified that he got very dizzy on the first day and that, over the next few days, the pain became so severe that he started throwing up and nearly blacked out.

[4] Dr. Phillips noted that the claimant complained of limited shoulder and hip range of motion but opined that these were "not spinal complaint[s]."

¶ 31 Dr. Malek reevaluated the claimant on February 3, 2010. According to Dr. Malek's medical record of that visit, the claimant told Dr. Malek that he was "not able to tolerate therapy." Dr. Malek reviewed the latest report from Dr. Phillips and indicated that he was in "general agreement" with Dr. Phillips's opinion. He noted that the claimant's work conditioning reports placed the claimant at the "sedentary/light" level, but he stressed that there had been "no FCE with validity testing." Dr. Malek ordered a FCE with validity testing and noted that the claimant would return for reassessment thereafter. Dr. Malek noted that the claimant's "require[d] physical demand level is medium duty." In an addendum to his February 3, 2010 record, Dr. Malek stated: "The second conditioning program showed a Waddell's sign of 4/5 with physical demand level of light. At this point I do believe that the [claimant] can return to work medium duty."

¶ 32 The claimant later testified that he attempted to return to work at that time, but when he contacted the employer's owner, John Szupancic, he was told there was not enough work and the company had been laying off its employees. The claimant testified that he believed this was a "lie" because he saw that other employees with less seniority than the claimant were still working for the employer.

¶ 33 The claimant returned to Dr. Malek on March 3, 2010, requesting a refill of his medication. Dr. Malek recommended that the claimant use over-the-counter medication and Ultram as needed. Dr. Malek had no new treatment recommendations at that time. He reiterated that the claimant was at MMI and had been released to work regular duty.

¶ 34 The claimant's final appointment with Dr. Malek occurred on April 7, 2010. Dr. Malek noted that the claimant's symptoms "persisted" and that there had been "no clinical change" since November 18, 2009. Dr. Malek further observed that "[a]t this point, [the claimant] has

straight leg raising even with touching the leg." Nevertheless, Dr. Malek made no further treatment recommendations and reiterated that the claimant was at MMI and had been released to work regular duty. Dr. Malek also noted that the claimant had not returned to work and "[said] he has not been called."

¶ 35 Thereafter, the claimant sought treatment from another physician. Pursuant to a referral by Dr. Lambiasi, the clamant was evaluated by Dr. Antoine Chami, a pain specialist, on April 29, 2010. Dr. Chami's medical record of that visit reflects that the claimant saw Dr. Chami "because he and his wife were concerned that his right calf was smaller than the left calf by at least two inches." Dr. Chami measured the girth of the claimant's calves and informed the claimant that his right calf was only .5 centimeters smaller than his left calf. Dr. Chami noted that the claimant was reassured but was "still not convinced that one calf [was] not pathologically smaller than the other."

¶ 36 Dr. Chami also had a long discussion with the claimant about his neck and back issues and the treatment options for those conditions. Dr. Chami did not believe the claimant was a surgical candidate but he agreed with Dr. Malek's recommendation of epidural injections. He told the claimant that, after six weeks of physical therapy (which the claimant had already received with little benefit), "it is strongly advisable" that more aggressive interventions like epidural injections be performed. However, Dr. Chami noted that the claimant "[did] not wish to undergo any injections." Dr. Chami further opined that the claimant may benefit from work hardening and "long term chronic pain management," which he noted "should include psychological oversight."

¶ 37 On July 13, 2010, the claimant returned to Dr. Chami complaining of persistent and debilitating back pain radiating into his right leg with numbness, tingling, and weakness in that

leg. The claimant said he was taking over-the-counter Ibuprofin and aspirin for these symptoms but had not undergone any treatments since Dr. Chami saw him in April 2010. Dr. Chami's medical record indicates that the claimant was "very reluctant to undergo any intervention because of apprehension and anxiety." Dr. Chami advised the claimant that these symptoms could worsen and become more difficult to treat as time wore on, and he suggested that a "targeted intervention may alleviate his symptoms" without surgery. He noted that the claimant did not require any prescription pain medications. He further noted that the claimant underwent a FCE "on December 28, 2009"[5] which "placed him at the medium capacity level." Dr. Chami found the claimant to be at MMI as to his November 26, 2008, work injury. He released the claimant for medium level work duty "[p]er the [FCE] findings."

¶ 38 On November 9, 2010, the claimant underwent a third FCE.[6] This FCE exam included 14 "performance criteria," *i.e.*, tests and portions of tests designed to identify consistency of effort, quality of effort, and non-organic signs (such as "anatomic distribution," "illness behavior," and "distress"). The claimant failed 10 of 14 performance criteria during the test. The evaluator noted that the claimant's performance during the FCE indicated "[l]ess than full participation" and was "consistent with possible symptom magnification." The evaluator indicated that "[b]ehavioral obstacles" were affecting the claimant's participation in activities to such a degree that it was "not possible to accurately identify [his] abilities and limitations at this time." Accordingly, the evaluator stressed that the FCE results "should not be used to project [the claimant's] current work capacity since the [claimant] could likely have functioned higher

[5] This is presumably a typographical error. As noted above, the claimant's first FCE was administered on September 28, 2009, not December 28, 2009.

[6] There is no referring physician listed on this FCE report. During oral argument before the trial court on October 8, 2015, the claimant's attorney conceded that the claimant was referred for a third FCE at his office's request.

than [he was] willing." Notwithstanding this caveat, the evaluator concluded that the claimant should be able to function on a full-time basis handling materials of at least 15 pounds occasionally. The evaluator also noted that, according to the Dictionary of Occupational Titles, the claimant "[did] not meet the requirements for his position as a concrete laborer for standing, walking, bending, squatting, gripping, climbing to a constant level, and reaching to a frequent level."

¶ 39 The claimant last saw Dr. Chami on November 11, 2010. In his medical record of that visit, Dr. Chami stated that he had discharged the claimant at MMI during his previous visit on July 13, 2010, "per [the claimant's] request" because the claimant "did not feel that he needed any further treatment" at that time. Dr. Chami noted that the claimant was now "concerned about persistent neck pain and low back pain." The claimant reported that his neck pain was radiating into his right shoulder and upper right arm. Upon examination, the claimant exhibited guarding behavior with range of motion of the cervical and lumbar spine. Dr. Chami noted "nondermatomal" decreased sensation in the claimant's right upper extremity and "decreased pinprick sensation in the distribution of L5 and S1 on the right side." Dr. Chami diagnosed lumbar disc herniation, lumbosacral radiculopathy, and cervical radiculopathy. He referred the claimant for a neurosurgical consultation to obtain a second opinion "as it related to the chronic pain syndrome resulting from [the claimant's] work injury in 2008."

¶ 40 During the arbitration hearing, the claimant testified that he is no longer able to perform the physical requirements of his former construction job. He stated that his former job required him to carry 80 to 100 pounds and to lift 150 pounds to work the hose of the concrete pump. The claimant testified that he can no longer do the pushing, pulling, and carrying required by his old

job, and he can no longer shovel, dig, or push a wheelbarrow. He stated that he now gets cramps and pain if he tries to lift a gallon of milk in each hand.

¶ 41 The claimant further testified that, when he spoke with Szupancic (the employer's owner) about returning to work after Dr. Malek had released him to work full duty, Szupancic told him that the employer "[didn't] have enough work." The claimant thought this was "a lie" because he "saw" that employees with less seniority than him were working for the employer. The claimant stated that, when the employer refused to take him back, he conducted a thorough job search but was unable to obtain another job. The claimant introduced his job search records into evidence. He testified that he contacted approximately 86 prospective employers but received only one job offer from a friend for a landscaping job that was not consistent with his work restrictions.

¶ 42 The claimant testified that, although he initially declined surgery, he has now changed his mind and wants to undergo the surgery initially recommended by Dr. Malek.

¶ 43 During the arbitration hearing, the claimant presented the testimony of Mary Sue Softcheck, the nurse case manager assigned to his case. Softcheck testified that she attended the claimant's appointment with Dr. Malek on January 20, 2010. She stated that Dr. Malek reviewed Dr. Phillips's report and told Softcheck that he agreed with it. She further testified that Dr. Malek told her that the claimant did not desire work hardening, so Dr. Malek planned to release him from care. Softcheck stated that Dr. Malek did not recommend surgery on January 20, 2010; he only recommended work hardening at that time. In her report, Softcheck noted that Dr. Malek stated that the claimant may undergo four weeks of work conditioning or would be released at the next appointment if he chose to opt out of work conditioning.

¶ 44 James Boyd, a certified rehabilitation counselor and a certified vocational evaluation specialist, also testified on the claimant's behalf by way of an evidence deposition. Boyd conducted a vocational rehabilitation assessment of the claimant. In preparing his assessment, Boyd interviewed the claimant, reviewed the medical records of Drs. Lambiasi and Carrion and the September 28, 2009, FCE results, and tested the claimant's academic and problem solving abilities. Boyd testified that his testing revealed that the claimant reads at the sixth grade level, has basic math skills, and has verbal skills that are considered functional for routine activities of everyday living. Boyd stated that he attempted to administer a dexterity test which required the claimant to match different sized nuts to bolts in a standing position but he had to discontinue the test because the claimant was unable to tolerate it for more than two minutes. Based on the claimant's pain and observed test behavior, Boyd initially suggested that the claimant was not qualified for any type of competitive employment. However, upon considering the September 28, 2009, FCE and the medical opinions of Drs. Lambiasi and Carrion, Boyd opined that the claimant was capable of performing some entry-level, service-related jobs. Boyd testified that those jobs fell within the $8.50 to $9.00 per hour wage range. A letter from the claimant's Laborer's Union to all unionized employees (which was introduced into evidence) indicates that the base wage for unionized laborers from June 1, 2010, through May 31, 2011, was $35.20 per hour, which amounts to $1408.00 per week.

¶ 45 During cross-examination, Boyd agreed that the determination of whether and to what extent vocational rehabilitation is needed is based in part on the treating physician's conclusion as to what the claimant is capable of doing. Boyd acknowledged that, at the time he performed his vocational assessment of the claimant, he had not been provided with Dr. Malek's treatment records. Accordingly, Boyd agreed that his opinion was limited because he was unaware of what

the claimant's treating physician had determined his physical capabilities to be. Boyd further acknowledged that, if a subsequent FCE that included validity testing was performed, and it raised questions regarding the effort that the claimant had put forth during the FCE, Boyd would rely on the claimant's treating doctor to make a "medical call" on whether vocational services were necessary. Boyd agreed that, if Dr. Malek concluded that the claimant was able to return to full duty work, then there would be no need or reason for him to be involved in helping the claimant return to work.

¶ 46 The employer never offered the claimant any retraining or vocational rehabilitation. During the arbitration hearing, the employer did not present the testimony of a vocational rehabilitation expert. Nor did the employer offer any rehabilitation report into evidence to rebut Boyd's report and testimony.

¶ 47 The arbitrator found that the claimant had sustained strains to his neck and lumbar spine as a result of a work-related accident on November 26, 2008, and that the claimant had reached MMI from his work-related injuries on November 18, 2009. The arbitrator awarded the claimant TTD benefits from November 27, 2008, through November 18, 2009. In addition, the arbitrator awarded the claimant PPD benefits for 37.5 weeks in the amount of 7.5 percent of the person-as-a-whole. The arbitrator also awarded the claimant $14,517.95 in medical expenses but denied medical expenses for treatments the arbitrator found unrelated to the work injuries, including charges for chiropractic treatments with Dr. Carrion beginning in February of 2009, and charges for the claimant's visits to Dr. Chami, which occurred after the claimant had reached MMI. The arbitrator also denied the claimant's request for penalties and attorney fees.

¶ 48 The claimant sought review of the arbitrator's decision before the Commission. On May 7, 2012, the Commission issued a unanimous decision modifying the arbitrator's decision in

three respects: first, the Commission found that the claimant reached MMI on April 7, 2012, the date his treating physician released him to work full duty; second, the Commission modified the arbitrator's award of TTD benefits and medical expenses to correspond to the new, later MMI date; and third, the Commission increased the PPD award to 15% loss of the person-as-a-whole. The Commission affirmed and adopted the arbitrator's decision in all other respects. The Commission stated that it had issued its decision after considering the issues of "wage differential benefits" and other issues.

¶ 49 The claimant appealed the Commission's decision to the circuit court of Cook County. On December 4, 2012, Judge Robert Lopez Cepero remanded the matter to the Commission and directed the Commission to consider "vocational rehabilitation" and "Dr. [Antoine] Chami's bill for consultation and anything from the time of his consultation to the close of evidence." Judge Lopez Cepero also stated in his remand order that "it is hereby ordered, adjudged and decreed that there is competent evidence that there is wage differential." Following a series of conflicting circuit court orders, the matter was ultimately remanded to the Commission pursuant to Judge Lopez Cepero's December 4, 2012, remand order. The parties stipulated that Judge Lopez Cepero had directed the Commission to reconsider the issues of wage differential, medical expenses, and vocational rehabilitation.

¶ 50 On November 20, 2014, the Commission entered a decision on remand in which the Commission reaffirmed and readopted its May 7, 2012 decision in its entirety, including its prior determination that the claimant had sustained a strain to his neck and lumbar spine during the November 26, 2008, work accident and had reached MMI on April 7, 2010. The Commission found that, after the claimant reached MMI, the claimant "was able to return to work full duty and did not require further medical care." After "carefully" reviewing the record, the

Commission found evidence of "symptom magnification and malingering" on the claimant's part. In reaching these conclusions, the Commission expressly relied upon the opinions of Drs. Malek and Phillips. The Commission stated that it "g[ave] little weight" to the FCEs performed on October 15, 2009, and November 9, 2010," "as they were determined to be invalid due to inconsistent effort and symptom magnification" by the claimant. The Commission also gave little weight to the opinions of Boyd and Dr. Chami. The Commission discounted Boyd's opinion because: (1) Boyd "was completely unaware that Dr. Malek had agreed with the opinions of Dr. Phillips and [had] released the claimant to return to work full duty"; and (2) Boyd's opinion was based on the claimant's "subjective complaints of severe disability and an assumption of a 40 pound lifting restriction." Similarly, the Commission chose not to credit Dr. Chami's opinions because he "did not review [the claimant's] prior medical records" and "was unaware of" the opinions of Drs. Malek and Phillips" when he treated the claimant for complaints of "severe, disabling symptoms."[7]

¶ 51 The claimant sought judicial review of the Commission's decision on remand before the circuit court of Cook County. The case was again assigned to Judge Lopez Cepero. When the parties appeared for oral argument on October 8, 2015, Judge Lopez Cepero announced his intention to retire that same day. After oral arguments, Judge Lopez Cepero stated that he was remanding the matter to the Commission for a second time, this time with instructions that the Commission reopen proofs. On November 5, 2015, counsel for the employer appeared in Judge Lopez Cepero's courtroom and was provided with a copy of an order purportedly entered on

[7] The Commission also granted the employer's motion to strike the exhibits attached to the claimant's brief on remand pursuant to section 19(e) of the Act (820 ILCS 305/19(e) (West 2012)) because the exhibits improperly sought to introduce new evidence on remand.

October 29, 2015, which was stamped but not signed by the trial court. Judge Cepero has not conducted any hearings or court business since October 8, 2015.

¶ 52 On November 12, 2005, the employer filed a motion to vacate the October 29, 2015, remand order pursuant to Illinois Supreme Court Rule 272 (Ill. S. Ct. R. 272 (eff. Nov. 1, 1990)) (which the employer argued required a signed order) and a motion for rehearing. Judge Ponce de Leon denied the motion to vacate but allowed the employer 30 days to file a motion to reconsider. The employer timely filed a motion to reconsider on December 17, 2015, and the matter was scheduled for hearing on January 13, 2016. By that time, however, Judge Ponce de Leon had retired. The case was then assigned to Judge White, who granted the employer's motion for reconsideration and affirmed the Commission's November 20, 2014, decision.

¶ 53 This appeal followed.

¶ 54 ANALYSIS

¶ 55 1. Wage Differential Benefits

¶ 56 On appeal, the claimant argues that the Commission failed to properly consider his claim for wage differential benefits under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2008)) and erred by refusing to award him such benefits. "The object of section 8(d)(1) is to compensate an injured claimant for his reduced earning capacity" attributable to a work-related injury. *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260, 265–66 (1999); see also *Rutledge v. Industrial Comm'n*, 242 Ill. App. 3d 329 (1993). To qualify for a wage differential award under section 8(d)(1), a claimant must prove: (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment," and (2) an impairment of his earnings. 820 ILCS 305/8(d)(1) (West 2008); *Chlada v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150122WC, ¶ 32; *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1014 (2005). 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*, 308 Ill. App. 3d at 266; see also *Chlada*, 2016 IL App (1st) 150122WC, ¶ 32.

¶ 57 Whether a claimant has introduced sufficient evidence to establish each element of a claim for wage differential benefits is a question of fact for the Commission to determine, and we will not disturb the Commission's decision on this matter unless it is against the manifest weight of the evidence. *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.*; see also *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 58 Applying these standards, we cannot say that the Commission's ruling on wage differential benefits was against the manifest weight of the evidence. The Commission expressly stated that it had considered the issue of wage differential benefits, and there was sufficient evidence in the record to support the Commission's denial of such benefits. Specifically, there was ample evidence suggesting that that the claimant failed to prove a partial incapacity which prevented him from pursuing his usual and customary line of employment. Beginning in late 2009, Dr. Malek, the claimant's treating neurologist, opined that the claimant had reached MMI and had no permanent restrictions, and he released the claimant to return to his regular duty work without restriction by March 3, 2010. Although Dr. Malek had initially recommended surgery, limited the claimant to light duty work, and imposed a 40-pound lifting restriction, he changed

his opinion on these matters after the claimant repeatedly refused epidural injections or any other medical interventions and after the FCE and work hardening results suggested that the claimant was giving inconsistent effort and engaging in symptom magnification.

¶ 59 Moreover, in his second IME report, which was issued on January 8, 2010, Dr. Phillips opined that: (1) the claimant's imaging findings "revealed no evidence of acute structural injury related to the 2008 work injury"; (2) the claimant had reached MMI; and (3) although the claimant's initial complaints were the result of the November 2008 work injury, by January 8, 2010, the claimant's subjective complaints "outweigh[ed] any objective findings" and were unrelated to the 2008 work injury. Dr. Phillips recommended a one-month work conditioning program but predicted that the claimant was unlikely to complete such a program because of his "pain-focused behavior" Dr. Phillips noted that, if the claimant either completed or opted out of the work conditioning program, he would recommend returning the claimant to work regular duty.

¶ 60 The initial work hardening evaluation took place on January 21, 2010. The therapist documented that the claimant failed five out of seven validity criteria during the evaluation. As Dr. Phillips predicted, the claimant did not complete the work hardening program. When Dr. Malek reevaluated the claimant on February 3, 2010, he indicated that he was in "general agreement" with Dr. Phillips's opinion. He noted that the claimant's work conditioning reports placed the claimant at the "sedentary/light" level, but he stressed that there had been "no FCE with validity testing." Dr. Malek ordered a FCE with validity testing and noted that the claimant would return for reassessment thereafter. Dr. Malek noted that the claimant's "require[d] physical demand level is medium duty." In an addendum to his February 3, 2010 record, Dr. Malek stated: "The second conditioning program showed a Waddell's sign of 4/5 with physical

demand level of light. At this point I do believe that the [claimant] can return to work medium duty." Thereafter, Dr. Malek reiterated that he had released the claimant to full duty work without restrictions.

¶ 61 In contrast to Drs. Malek and Phillips, Dr. Chami opined that the claimant was restricted to light/medium duty. However, as noted by the Commission, Dr. Chami did not review the claimant's prior medical records (including Dr. Malek's treatment records and the opinions of Drs. Malek and Phillips) or the two invalid FCEs. Accordingly, unlike Drs. Malek and Phillips, Dr. Chami accepted the claimant's complaints of persistent and debilitating pain at face value. Because Dr. Chami was unaware of critical aspects of the claimant's clinical history, including his well-documented history of exaggerating his pain complaints, the Commission could have reasonably found that Dr. Chami's conclusions were less reliable than those of the claimant's treating physician and the employer's section 12 medical examiner. It is the Commission's province to judge the credibility of witnesses, to weigh witness testimony, and to resolve conflicts in the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003); *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). This is particularly true with respect to medical issues, where we owe heightened deference to the Commission due to its long-recognized expertise in such issues. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). We cannot say that the Commission's decision to credit Dr. Malek's and Dr. Phillips's opinions over Dr. Chami's opinion was against the manifest weight of the evidence. Nor was the Commission required to credit the claimant's testimony regarding his current physical limitations, especially given the multiple failed FCEs and the claimant's repeated instances of symptom magnification.

¶ 62 The claimant argues that both the Commission and Dr. Phillips (upon whose opinion the Commission relied) "failed to consider" the November 28, 2009, FCE, which established that the claimant was unable to perform his former construction job and was "never found to be invalid." However, the November 28, 2009, FCE did not include validity criteria, *i.e.*, it did not test for inconsistent effort symptom magnification. The subsequent FCEs, which did include such tests, suggested that the claimant was giving submaximal effort and magnifying his symptoms. That casts doubt upon the results of the November 28, 2009, FCE as well, because it suggests a pattern of malingering and exaggeration by the claimant. Thus, the Commission could have reasonably decided not to accord much weight to the results of any of the FCEs.

¶ 63 The claimant also argues that, because the October 15, 2009, and November 9, 2011, FCEs were found to be "invalid," they should not have been considered for any purpose, and the Commission erred by relying on them as evidence of the claimant's malingering or symptom magnification. We disagree. As an initial matter, because the claimant introduced the FCE reports into evidence, he cannot now attempt to bar the Commission from considering them. See, *e.g.*, *Luby v. Industrial* Commission, 82 Ill. 2d 353, 362 (1980). Moreover, the fact that those FCEs indicated that the claimant had provided an invalid effort (and, therefore, should not be treated as evidence of the claimant's functional abilities), does not mean that they could not be treated as valid evidence of the claimant's *credibility*. The Commission is always entitled to consider evidence introduced and presented to it that bears on the credibility of a claimant. *Dunker v. Industrial Comm'n*, 126 Ill. App. 3d 349, 354 (1984). An FCE evaluator's conclusion that a claimant's performance suggests inconsistent effort and symptom magnification is probative evidence of the claimant's credibility, and the Commission properly treated it as such.[8]

[8] Contrary to the claimant's assertion, the Commission did not "punish" him by "finding him not credible

¶ 64 The claimant also argues that the Commission erred in relying on Dr. Malek's and Dr. Phillips's opinions because those opinions were internally inconsistent and otherwise unreliable. Specifically, the claimant notes that, although Dr. Malek said the claimant could return to work full duty in early 2010, he made no finding that the claimant was able to do the heavy work of a construction laborer; in fact, Dr. Malek noted that there had been no clinical change in the claimant's condition at that time, and he never revoked the 40-pound lifting restriction he had imposed in November 2009. We do not find this argument to be persuasive. First, as noted above, Dr. Malek did revoke his prior 40-pound lifting restriction when he subsequently released the claimant to work full duty without re-imposing any work restrictions. Moreover, in light of the two invalid FCEs and the claimant's pattern of refusing treatments and exaggerating his symptoms, Dr. Malek could have reasonably concluded that the claimant was no longer (or, perhaps, was never) as disabled as he claimed to be. Thus, Dr. Malek's opinion that the claimant was capable of returning to work full duty in March 2010 is entitled to weight despite the fact that the claimant's reported symptoms had not changed at that time.

¶ 65 In any event, Dr. Malek can hardly be faulted for failing to conclusively determine what the claimant's physical capabilities were at that time. Dr. Malek tried to do exactly that by ordering the October 15, 2009, FCE, but the claimant's symptom magnification and inconsistent effort during that test invalidated the test results. Thus, the claimant's own conduct made it impossible for Dr. Malek to determine the claimant's capabilities in a more conclusive fashion.

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for allegedly failing to complete a [FCE] and/or allegedly failing to use his best efforts in an FCE." Rather, as noted above, the Commission appropriately drew reasonable inferences regarding the claimant's credibility from the evidence presented, including the failed FCEs and the FCE evaluators' reports of the claimant's inconsistent effort and symptom magnification. The claimant argues that such inferences may not properly be drawn in this case because there was "no medical opinion" of the claimant's "malingering" or "symptom magnification." Contrary to the claimant's argument, however, the Commission's credibility determination was supported by the opinions of Drs. Malek and Phillips. In any event, the Commission could have reasonably inferred that the claimant lacked credibility based on the FCE reports alone.

The claimant bore the burden of establishing that he was incapable of performing his former job. He cannot meet that burden by declining treatment and then refusing to give an honest and consistent effort during a FCE.

¶ 66 The claimant also challenges Dr. Phillips's opinion. Specifically, the claimant argues that, in his second IME report, Dr. Phillips acknowledged for the first time that there was at least *some* "compressive pathology" in the claimant's lumbar spine (at L4-L5 and L5-S1) and at least *some* "very slight" foraminal narrowing in the claimant's cervical spine (at C3-C4.) The claimant also observes that Dr. Phillips documented that the claimant was experiencing hip symptoms but failed to "further probe" this issue because he found it to be "non-spinal." However, the claimant fails to explain how these statements or omissions invalidate Dr. Phillip's opinions that the claimant was at MMI and was capable of performing his prior job duties without restriction. Despite acknowledging some compressive pathology and some foraminal narrowing in the claimant's spine, Dr. Phillips opined that: (1) the claimant's imaging findings "revealed no evidence of acute structural injury related to the 2008 work injury"; (2) the claimant had reached MMI; and (3) although the claimant's initial complaints were the result of the November 2008 work injury, by January 8, 2010, the claimant's subjective complaints "outweigh[ed] any objective findings" and were unrelated to the 2008 work injury. The issues raised by the claimant do not rebut any of these findings. Moreover, the claimant does not argue that he sustained a work-related hip injury that partially incapacitated him from performing his former occupation. Rather, his claim has always centered on his alleged work-related spinal injuries.

¶ 67 Accordingly, we hold that the Commission's finding that the claimant failed to prove a partial incapacity which prevents him from pursuing his usual and customary line of

employment, and its denial of wage differential benefits on that basis, was not against the manifest weight of the evidence. Because we uphold the Commission's denial of wage benefits on this ground, we do not need to address the claimant's alternative claim that he proved an impairment of earnings.[9] Nor need we address the claimant's argument that he did not waive his claim for wage differential benefits (which the employer does not dispute).

¶ 68 2. Medical Expenses and Prospective Medical Care

¶ 69 The claimant argues that the Commission's denial of certain medical expenses incurred after the claimant reached MMI (including charges for Dr. Chami's pain management consultations) and its denial of prospective medical care (including the surgery initially recommended by Dr. Malek) was against the manifest weight of the evidence.

¶ 70 "Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services 'thereafter incurred' that are reasonably required to cure or relieve the effects of the injury." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 593 (2005) (quoting 820 ILCS 305/8(a) (West 2002)). Whether medical expenses are reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence. *Cole v. Byrd*, 167 Ill. 2d 128, 136–37 (1995); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 51. Questions regarding a claimant's entitlement to prospective medical care are

[9] However, even if we were to address this argument, we would reject it. The claimant sought to prove an impairment of earnings based upon Boyd's testimony. But, during cross-examination, Boyd conceded that: (1) his opinion was "limited" because he was unaware of Dr. Malek's opinion as to the claimant's capabilities when he performed his vocational assessment of the claimant; (2) if a FCE that included validity testing was performed, and it raised questions regarding the effort that the claimant had put forth during the FCE, Boyd would rely on the claimant's treating doctor to make a "medical call" on whether vocational services were necessary; and (3) if Dr. Malek concluded that the claimant was able to return to full duty work, then there would be no need or reason for Boyd to be involved in helping the claimant return to work.

also questions of fact for the Commission to resolve, and the Commission's determinations on these matters will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193.

¶ 71 In this case, the Commission declined to award the claimant medical expenses for services provided by Dr. Chami. By the time the claimant first saw Dr. Chami, Drs. Malek and Phillips had declared the claimant to be at MMI and opined that he did not need further medical treatment. Both doctors opined that the subjective pain complains and other symptoms the claimant claimed to be experiencing at that time were not related to the November 2008 work accident. They based these opinions on their examinations of the claimant, their review of the claimant's MRIs and other diagnostic studies, and the failed FCE and work hardening evaluation which suggested that the claimant was exaggerating his symptoms. Dr. Chami was not aware of any of this when he saw the claimant, and his treatment recommendations were based upon the claimant's subjective complaints, which Dr. Chami took at face value. Given this evidence, the Commission appropriately found that the services rendered by Dr. Chami were not reasonably required to cure or relieve the effects of the claimant's November 2008 work injury.

¶ 72 Moreover, there is no evidence in the record supporting an award for any prospective medical care. The claimant notes that Dr. Malek initially recommended surgery. However, Dr. Malek made that recommendation before he learned of the claimant's failed FCE and before he reviewed and agreed with Dr. Phillips's second IME report, which concluded that the claimant was not a candidate for surgery. Clearly, Dr. Malek changed his mind about surgery once he came to doubt the credibility of the claimant's pain complaints and other symptoms. Softcheck confirmed that Dr. Malek did not recommend surgery when she met with him and the claimant

on January 20, 2010. Dr. Malek subsequently found the claimant to be at MMI and released him for full duty work with no further treatment recommendations. In addition, Drs. Phillips and Chami each agreed that the claimant was not a candidate for surgery.

¶ 73 There is no other medical evidence in the record supporting an award of prospective medical care. Although Dr. Chami referred the claimant for a consultation with another neurosurgeon, he provided no opinion or recommendation for further treatment. There is no evidence of any further medical treatments in the record. The claimant attempted to introduce additional medical records evidencing ongoing treatment during the Commission's proceedings on remand from the circuit court, but the Commission granted the employer's motion to strike those records. Thus, there is no basis in the existing record upon which to award prospective medical care. In any event, even if there were evidence of ongoing medical treatments, the Commission could properly refuse any prospective medical care based upon the opinions of Drs. Malek and Phillips.

¶ 74 3. Whether an Adverse Inference May Be Drawn from the Employer’s Failure to Call a Witness

¶ 75 The claimant also argues that an adverse inference should be drawn from the employer's failure to call Szupancic (the employer’s owner), or some other witness to testify regarding the employer's reason for not rehiring the claimant after he was released for full duty work. The claimant testified that, when spoke with Szupancic about returning to work after Dr. Malek had released him to work full duty, Szupancic told him that the employer “[didn’t] have enough work.” The claimant thought this was “a lie” because he “saw” that workers with less seniority than him were working. The employer never called a witness to rebut the claimant's testimony or to explain its reasons for not rehiring the claimant. The claimant argues that this gives rise to

an adverse inference that the employer did not believe the claimant was capable of working full duty.

¶ 76 We disagree. While an adverse inference may be drawn from a party's failure to call a witness in certain circumstances, the claimant has not established that those circumstances are present here. Generally, an adverse inference may be drawn where "the missing witness was under the control of the party to be charged and could have been produced by reasonable diligence, the witness was not equally available to the party requesting that the inference be made, a reasonably prudent person would have produced the witness if the party believed that the testimony would be favorable, and no reasonable excuse for the failure to produce the witness is shown." *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 22 (1989). In this case, it is not clear that the employer's failure to call a witness to explain its refusal to rehire the claimant satisfies the final two elements. The claimant's testimony that he thought the employer's explanation was a lie does not necessarily support the inference that the employer did not believe he could work full duty. Thus, the employer might reasonably have concluded that it was unnecessary call a witness to rebut that testimony. Whether to draw an adverse inference from a party's failure to call a witness is within the sound discretion of the Commission. *Szkoda v. Illinois Human Rights Comm'n*, 302 Ill. App. 3d 532, 544 (1998); see also *Schaffner*, 129 Ill. 2d at 22. Under the circumstances presented here, we cannot say that the Commission abused its discretion by declining to draw such an inference.

¶ 77 In any event, even assuming *arguendo* that the Commission should have drawn the inference urged by the employer, it would not change the result. To prevail on his claim for wage differential benefits, the claimant had to establish that he was partially incapacitated from pursuing his usual and customary line of employment. As noted above, there was ample

evidence in the record suggesting otherwise, including the medical opinions of the claimant's treating neurologist and the employer's section 12 medical examiner, both of whom opined that the claimant could work full duty. The employer's subjective belief that the claimant was unable to work full duty would not have outweighed those medical opinions.[10]

¶ 78 CONCLUSION

¶ 79 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of Commission on remand.

¶ 80 Affirmed.

[10] We also note that the claimant has forfeited two other issues that he identified in the "Issues Presented" section of his opening brief, namely: (1) whether the claimant has proven that he is entitled permanent total disability benefits under an "odd lot" theory; and (2) "[w]hether the testimony of Dr. Marino, the employer's utilization review opinion witness, should have been stricken for lack of foundation and/or reliance on inadmissible hearsay." The claimant has presented no argument in support of either of these issues on appeal. He has therefore forfeited both arguments. *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 33 ("The failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.") (internal quotation marks omitted). The claimant does not and cannot dispute the employer's argument that these issues are forfeited.