2011 IL App (2d) 100763WC-U

Order filed

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

A.D., 2011

MUSA AZEMI,	)	Appeal from the Circuit Court
	)	of the 16th Judicial Circuit,
Plaintiff-Appellant and Cross-Appellee,	)	Kendall County, Illinois.
	)	
v.	)	Appeal No. 2-10-0763WC
	)	Circuit No. 09-MR-66
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Menards, Inc., Appellee	)	Timothy J. McCann,
and Cross-Appellant).	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in finding that the claimant's petition for judicial review of the Commission's decision was timely filed under section 305/19(f) of the Act. In addition, the Commission's finding that the claimant proved a causal connection between his current condition of ill-being and a work-related accident was not against the manifest weight of the evidence.

¶ 2 The claimant, Musa Azemi, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)) seeking benefits for

injuries he sustained while working as an employee of respondent Menards, Inc. (employer). Following a section 19(b) hearing, an arbitrator found that the claimant's injuries were causally connected to a work-related accident and awarded the claimant temporary total disability (TTD) benefits, medical expenses, and other benefits. Neither party appealed this decision. After conducting a permanency hearing, the arbitrator found that the claimant was totally and permanently disabled and awarded permanent disability benefits. The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). In a unanimous decision, the Commission found that the claimant failed to prove that he was permanently and totally disabled, concluded that the claimant was partially permanently disabled to the extent of 75% person as a whole, and awarded partial disability benefits. The claimant sought judicial review of the Commission's decision in the circuit court of Kendall County, which confirmed the Commission's decision. This appeal followed.

¶ 3 FACTS

¶ 4 The claimant worked for the employer as a forklift operator. On December 12, 2003, he fell while attempting to unload a carpet roll from a trailer, injuring his neck, right shoulder, and side. He was taken to the emergency room at Valley West Community Hospital where the attending physician diagnosed a contusion and right arm strain. He returned to the emergency room and to Valley West's Department of Occupational Health over the next several days, complaining of severe pain in his arm and in the right side of his back. He was referred to Dr. Steven Treacy, an orthopedic surgeon.

¶ 5 The claimant saw Dr. Treacy on December 22, 2003. Dr. Treacy ordered an MRI to rule out a rotator cuff tear. The claimant underwent an MRI of his right shoulder on December 31,

2003. The radiologist reported diffuse rotator cuff tendinopathy with complete tearing of the subscapularis fibers. After discussing the MRI results with other orthopedic surgeons, Dr. Treacy recommended surgery.

¶ 6 On February 18, 2004, Dr. Treacy operated on the claimant's right shoulder to repair the torn subscapularis tendon. After his shoulder surgery, the claimant underwent physical therapy. On April 20, 2004, Dr. Treacy released the claimant for full-time, light-duty work but specified that the claimant was not to use his right arm. The claimant began working light duty on May 6, 2004.

¶ 7 In June 2004, the claimant underwent an electromyography nerve conduction study (EMG) which indicated that the claimant had carpel tunnel syndrome in his right wrist, cubital tunnel syndrome, and sensory neuropathy in the wrist. The radiologist also noted possible brachial plexopathy.[1] Dr. Treacy diagnosed carpel tunnel syndrome, cubital tunnel syndrome, ulnar sensory neuropathy, brachial plexitis,[2] and cervical myelopathy.[3] Dr. Treacy initially maintained the claimant's work restrictions. However, on June 22, 2004, he modified the claimant's work restrictions to no lifting of more than one pound with the right arm, no repetitive use of the right arm, no work above waist level, and no working more than four hours per day.

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[1] Brachial plexopathy is pain, decreased movement, or decreased sensation in the arm and shoulder due to a nerve problem.

[2] Brachial plexitis is an inflammation of the brachial plexus (a network of nerves leading from the cervical spine) that can cause arm pain.

[3] Cervical myelopathy is the clinical syndrome that results from a disorder that disrupts the flow of neural impulses through the cervical spinal cord.

¶ 8 On July 7, 2004, the claimant saw Dr. Christina Marciniak at the Rehabilitation Institute of Chicago. Dr. Marciniak performed a neuromuscular electro-diagnostic study, which revealed evidence of demeyliniating median motor and sensory neuropathy at the right wrist.

¶ 9 After undergoing another MRI, the claimant returned to Dr. Treacy. Dr. Treacy diagnosed postoperative arthofibrosis[4] and recommended surgery to improve the range of motion in the claimant's right shoulder. The claimant declined to undergo another surgery. Dr. Treacy continued the claimant's work restrictions.

¶ 10 In September and October 2004, the claimant saw Dr. Guido Marra at Loyola University Medical Center. The claimant underwent another EMG, after which Dr. Marra noted evidence of carpel tunnel syndrome and an injury to the medial cord of the right brachial plexus. Dr. Marra diagnosed a "frozen shoulder"[5] and discussed the possibility of surgery with the claimant. On December 7, 2004, Dr. Marra noted that the claimant had completed a functional capacity examination (FCE) and concluded that the claimant had reached maximal medical improvement unless he considered surgery. Dr. Marra released the claimant to work within the limits of his FCE.

¶ 11 On December 23, 2004, the claimant suffered a second work-related accident. On that day, the claimant was working light duty dusting a rack when a portion of a fence leaning against the rack fell on his left shoulder and knocked him down. The claimant became caught between

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[4] Arthofibrosis a severe complication in joints that can occur after a trauma or after surgery. It is characterized by the loss of motion due to the formation of fibrous tissues.

[5] A "frozen shoulder" is characterized by pain and loss of motion in the shoulder due to inflammation.

the rack and the fence and injured his left knee and right hand. He also reinjured his right shoulder.

¶ 12 On January 24, 2005, the claimant was examined by Dr. Robert Eilers, a physician who is board certified in physical medicine and rehabilitation. Dr. Eilers diagnosed the claimant as suffering from a rotator cuff tear and a brachioplexus injury which Dr. Eilers opined were caused by the claimant's fall at work on December 12, 2003. Dr. Eilers also diagnosed "a double-crush carpel tunnel phenomenon with associated carpel tunnel syndrome," and opined that the claimant's brachioplexus injury predisposed him to "carpel tunnel involvement." Dr. Eilers noted that the claimant had "limitations with *** bathing, hygiene, grooming, and dressing" due to his shoulder and plexus injuries, and he opined that "these deficits will continue to be permanent." He also noted that the claimant "lacks significant use of the dominant right upper extremity for heavy activity and will be limited to light sedentary work activity at best, primarily using a left arm." Dr. Eilers concluded that the claimant "will not be able to return to the competitive employment he had previously done," and that competitive employment of any kind "may be unlikely" for the claimant because of his limited education and his age.

¶ 13 On March 4, 2005, Dr. Arif Saleem, an orthopedic surgeon with Castle Orthopedics, performed an arthroscopic capsular release on the claimant's right shoulder. A few weeks after the procedure, Dr. Saleem noted that the claimant's right shoulder had "significantly improved." Specifically, Dr. Saleem's March 24, 2005, notes indicate that the claimant's overall motion was improving and that he "[did] not have as much pain or discomfort" in the shoulder. However, the claimant still complained of significant pain in his cervical spine and left knee with limited range of motion in his neck and knee. He also continued to complain of pain in his right forearm

and wrist. Dr. Saleem held the claimant off work because it concluded that the claimant had "multiple complaints that will probably continue to aggravate his right shoulder."

¶ 14 On June 23, 2005, Dr. Saleem concluded that the claimant had reached MMI concerning his right shoulder and noted that there was no further treatment for the right shoulder that would improve his range of motion. Dr. Saleem noted that he "did not think that [the claimant's] right shoulder will lend him to working in the previous occupation that he was in." However, Dr. Saleem stated that he would "leave evaluation of [the claimant's] shoulder, in terms of him being able to return to his original job, up to his work comp advisor," and noted that "[i]f an FCE would be required," that "certainly would be acceptable."

¶ 15 On August 11, 2005, Dr. Saleem wrote a letter to the Illinois Department of Human Services in which he stated that the claimant had "multiple orthopaedic issues," nerve problems, tendon injuries, and "chronic low back pain." Dr. Saleem noted that "[a]ll of these issues together have severely limited [the claimant's] function and ability to work."

¶ 16 On May 8, 2006, Dr. Saleem examined the claimant and noted that the range of motion in his right shoulder had "improved substantially." However, Dr. Saleem noted that the claimant was having "quite a bit of pain still" in his neck and back. Although the claimant experienced some shoulder pain with resisted elevation, Dr. Saleem noted that "most of his pain [was] in the cervical spine and going down the back of his mid thorax." Dr. Saleem also observed that the claimant's cervical range of motion was limited with pain and discomfort. He also noted that the claimant had undergone an arthroscopy of his knee and that he was being treated by Dr. Marciniak for that condition. Dr. Saleem recommended holding off on an FCE until the claimant's back and left knee had been treated and the claimant reached MMI as to those injuries.

In the interim, Dr. Saleem continued the claimant on work restrictions for his left knee, back, and right shoulder, some of which had already been imposed by Dr. Marciniak. The work restrictions imposed by Dr. Saleem included no squatting or kneeling, bending or twisting, no climbing (other than short stairways), no lifting with his right shoulder, and no "repetitive activities with the right arm."

¶ 17 On June 14, 2006, the claimant was examined by Dr. Ira Goodman, a physician and pain specialist. The claimant complained of severe neck pain, pain in his right shoulder, low back, and left leg, and numbness in his hands and left leg. Dr. Goodman concluded that the claimant was suffering from several medical conditions which caused these symptoms, including degenerative disc disease of the cervical spine, cervical and lumbar facet arthropathy, carpel tunnel syndrome, and "[c]omplex regional pain syndrome" in his left leg.[6] He recommended diagnostic cervical facet injections and other treatments to manage the claimant's pain. Dr. Goodman concluded that the claimant "should be off work at this time due to his inability to sit for any longer than 20 minutes with the need for opiod medication" and noted that the work limitations imposed by the claimant's orthopedist (including restrictions on the use of the claimant's right arm and hand and lifting limitations) "make it impossible for him to work at this time." However, Dr. Goodman concluded that the claimant was "no where near [MMI]" and that it was "impossible to determine when [MMI] will be reached" because the claimant had not yet received treatment for several of his underlying conditions. Dr. Goodman found that the

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[6] Complex regional pain syndrome (CRPS) is an uncommon form of chronic pain that usually affects an arm or leg. It typically develops after an injury, surgery, stroke or heart attack, but the pain is out of proportion to the severity of the initial injury.

claimant's prognosis was "unclear" because of his many pain problems and the lack of treatment for those problems other than his shoulder and knee. However, Dr. Goodman stated that he was "fairly certain that [the claimant's] pain can be dramatically improved" over time, although the extent and duration of the improvement (and the time it would take to achieve any such improvement) remained unclear.

¶ 18 On August 17, 2006, the claimant was examined by Dr. Richard Lazar, the employer's section 12 medical examiner. Dr. Lazar is a board certified neurologist and rehabilitation specialist. After reviewing the claimant's medical records and examining the claimant, Dr. Lazar prepared a report containing his diagnostic impressions and professional opinions. In his report, Dr. Lazar noted that, at the time the claimant saw Dr. Lazar, he complained of "persistent" and "sharp" right shoulder pain radiating to the middle of his back. The claimant told Dr. Lazar that, on a scale of one to ten (with ten being the "worst pain imaginable"), the pain is usually a six but can be as high as ten or as low as three to four when he is relaxed. The claimant also reported weakness in his right hand, with numbness in some of the digits in that hand, and difficulty with his right shoulder and overhead reaching.

¶ 19 After noting that the claimant had "a long-standing history of Diabetes Mellitus," Dr. Lazar diagnosed the claimant as suffering from: (1) diabetic sensorimotor peripheral polyneuropathy (a type of nerve damage caused by diabetes); (2) right brachial plexus mononeuritis multiplex (due to Diabetes Mellitus); (3) right and left carpel tunnel syndrome, diabetic mononeuropathy; (4) a medial meniscus tear in the left knee; and (5) an injury to the right rotator cuff. With the exception of the knee and shoulder injuries, Dr. Lazar concluded that all of the claimant's conditions were caused by the progression of his diabetes, rather than his

work-related accidents or his shoulder surgery. He opined that the claimant's diabetes explained all of his "neurologic complaints," and he found no evidence of complex regional pain syndrome.

¶ 20 However, Dr. Lazar noted that he did not "offer any opinions on the state of [the claimant's] right shoulder subscapulars [*sic*] tendon injury, nor the injury to the left medial meniscus" because he was "not an orthopedic surgeon." Dr. Lazar noted that he would "defer to orthopedic specialists in this regard." Consequently, Dr. Lazar did not conduct a "detailed history" of the claimant's shoulder and knee conditions. He did note, however, that the claimant's knee and shoulder injuries could have been caused by his work-related accidents, although he "defer[red] to the orthopedist" on that issue.

¶ 21 Regarding the claimant's ability to work, Dr. Lazar noted that he was "concerned about [the claimant's] diabetic peripheral neuropathy" and the complications caused by his diabetes, including weakness in his feet, poor balance, unsteadiness, and weakness in his right hand. Despite these concerns, Dr. Lazar opined that the claimant "was capable of working a full workweek [*sic*], but only at a sedentary level." However, Dr. Lazar concluded that "[a] more aggressive approach to [the claimant's] neuropathic pain will be required before he can return to sedentary work, including but not limited to the use of drugs like Neurontin and Topamax."

¶ 22 The claimant filed an application for adjustment of claim for the injuries that he claimed resulted from his December 12, 2003, accident and a separate application for adjustment of claim for the injuries he claimed resulted from his December 23, 2004, accident. On September 17, 2007, an arbitrator issued a decision in the latter case, finding that the claimant's right shoulder, left knee, cervical, and lumbar conditions were all causally related to his December 23, 2004, accident. The arbitrator also found that the claimant had failed to prove that he suffered from

CRPS. The arbitrator found that the claimant had reached MMI in 2006 and, therefore, awarded TTD benefits from December 23, 2004, through 2006. Neither party appealed the arbitrator's decision.

¶ 23 On January 11, 2008, the arbitrator conducted a permanency hearing. During the hearing, the claimant testified that he is in a lot of pain daily and that he abstains from any lifting. He claimed to have continual pain in his neck, back, knee, and right shoulder. He stated that he was receiving social security disability benefits. However, he admitted that he walks up to a mile per day for health reasons on the orders of his physician.

¶ 24 Because the claimant's employability was at issue in the permanency proceeding, the parties presented evidence regarding the claimant's educational level and his ability to understand and communicate in English. The claimant testified that, in 1975, he came to the United States from Macedonia, where he had received a 12th grade education.[7] He does not have a high school diploma or GED. He claimed that his primary language is Albanian and that he is very limited in his ability to read and write in English. He testified that his daughter had to help him fill out his job application at Menards and his application for social security benefits. However, he was able to testify in English. Moreover, Will Harris, the employer's Human Resources Coordinator and the claimant's former supervisor, testified that the claimant could not

[7] This testimony contradicted statements that the claimant had made to others regarding his level of education. The claimant told the Social Security Administration that he only attended school through the fourth grade, and he told his vocational expert that he had attended school through the eighth grade.

have performed his position as a forklift operator as well as he did without having at least a high school education.

¶ 25 The claimant testified that, other than his work for the employer, his only prior employment in the United States was as a cook. He stated that he had no formal training in any occupation.

¶ 26 Edward Pagella, a certified vocational expert, testified by deposition on the claimant's behalf. The claimant's attorney had retained Pagella to perform a labor market survey and to render a professional opinion regarding the claimant's employability. Pagella evaluated the claimant on November 26, 2007, when the claimant was 58 years old. Pagella noted Dr. Saleem's statements regarding the claimant's physical limitations (including his August 11, 2005, letter to the Illinois Department of Human Services), Dr. Goodman's opinion that the claimant could not perform any type of sedentary work, and Dr. Lazar's opinion that the claimant could perform sedentary work only if his pain were treated more aggressively. Based largely on these medical opinions, Pagella opined that the claimant would be unable to return to his prior occupations as a forklift operator or a cook and that he would be "unable to perform any type of occupation."

¶ 27 Pagella admitted that, if the claimant were employable at the sedentary level, there would be positions available to him in the labor market. However, he opined that there would be "severe erosion" of those positions if a worker had only a limited ability to read and write in English. Pagella testified that there are three basic types of sedentary positions available in the labor market: clerical, service, and manufacturing. According to Pagella, clerical and service positions require a high school diploma or GED and the ability to read, write, and thoroughly

understand the English language. Pagella opined that the claimant would not be able to perform these types of jobs without retraining. Moreover, Pagella testified that sedentary positions in manufacturing require employees to "be able to utilize their bilateral upper extremities on a repetitive basis." Thus, barring vocational retraining, Pagella opined that the claimant would be ineligible for any type of sedentary position.

¶ 28 Pagella admitted that his conclusions regarding the claimant's educational limitations were based upon what the claimant had told him and that he did not independently test the claimant's abilities. Moreover, Pagella admitted that he did not know how many positions the employer had available.

¶ 29 Harris testified that the employer had a progressive policy of bringing injured employees back to work and accommodating "any" work restriction. He produced a list of jobs that he claimed were available for anyone with "sedentary restrictions." However, with the possible exception of the "wood sorter/ operator" position (which involves pushing buttons on a control panel with either hand), each of these positions required either the use of both hands or the use of the dominant hand to write. Moreover, although Harris testified that he was aware that the claimant was restricted to sedentary duty, he was not aware that the claimant was under any other work restrictions. He testified that it was his understanding that "as long as [the claimant] can sit down, he's capable of returning to work."

¶ 30 Harris also testified that, in his former position as a forklift operator, the claimant was required to operate a device similar to a personal computer that mounted on the forklift. The claimant was also responsible for routing and matching products that were shipped to and from the distribution facility where he worked. Harris stated that the claimant performed the job well

without making too many mistakes and that he did not exhibit a lack of education or understanding in performing his job.

¶ 31 Although Harris could not recall personally offering the claimant a modified position after his injuries, he testified that the employer offered the claimant a sedentary position in September 2006, which the claimant declined.

¶ 32 The arbitrator found that the claimant was totally and permanently disabled from employment pursuant to section 8(f) of the Act. The arbitrator based this finding on the work restrictions prescribed by Drs. Saleem, Marciniak and Goodman, the claimant's age, and his limited skills in the English language which were "evident as he testified."[8] In addition, the arbitrator concluded that, "[w]hatever Petitioner's level of formal education, it was done in Macedonia and is of little use in the labor market." The arbitrator noted that "[t]he doctors agree [the claimant] can no longer work as a forklift operator", and he relied upon Pagella's testimony that "there was no stable labor market for someone with [the claimant's] restrictions, lack of transferable skills and lack of language skills." The arbitrator noted that the employer "did not rebut that testimony." Moreover, the arbitrator found that only one of the sedentary jobs identified as available by the employer—the wood sorter control panel operator position—"was conceivably within [the claimant's] restrictions or skills," and that there was "no evidence [that the employer] had, or would create, a vacancy for [the claimant] in that position or that the

[8] The arbitrator also found credible the claimant's testimony that he cannot write in English and that his daughter filled out his pre-employment questionnaire and his Social Security Disability Report.

position had been offered to him." Accordingly, the arbitrator awarded permanent total disability benefits.

¶ 33 The employer appealed the arbitrator's decision to the Commission, which rejected the arbitrator's finding of permanent total disability. The Commission noted that "[the claimant's] Section 12 medical examiner did opine that Petitioner was capable of sedentary work and Respondent did produce evidence that it had an extensive light duty work program." In addition, the Commission noted that the claimant was "adamant about refusing to even attempt any work despite [the employer's] offers." From this, the Commission concluded that the claimant had failed to prove that he was permanently totally disabled. Accordingly, the Commission modified the arbitrator's decision to find that the claimant was partially permanently disabled to the extent of 75% of the person as a whole and ordered the employer to pay partial permanent disability benefits of $272.40 per week for 375 weeks. The Commission otherwise affirmed and adopted the arbitrator's decision.

¶ 34 The claimant sought judicial review of the Commission's decision in the circuit court of Kendall County. Under the jurisdictional time limit prescribed by section 19(f) of the Act, the claimant had 20 days from the time he received the Commission's decision to commence a proceeding for review of the decision in the circuit court by filing a request for summons and proof of payment of the probable cost of the record. The claimant received the Commission's decision on April 14, 2009. Thus, the claimant had until May 4, 2009, to file the required documents. The claimant's request for summons and petition for review were file-stamped by the Kendall County Circuit Clerk's office on May 5, 2009. Although the claimant claimed to have filed its petition for review on May 4, 2009, he had no documentary proof of that claim.

Arguing that the claimant's petition for review was untimely under section 19(f) of the Act, the employer filed a motion to dismiss the claimant's petition for lack of subject matter jurisdiction.

¶ 35 Shirley Krause, the Deputy Circuit Clerk of Kendall County, provided an affidavit and was deposed. In her affidavit, Krause stated that she filed the claimant's petition and summons, and that May 5, 2009, represented the date that she filed the documents, not the date that the documents were received by the clerk's office. During her deposition, Krause testified that she recalled receiving the documents from the claimant's attorney. Although she could not recall the exact date when the documents arrived in the clerk's office, she testified that she was "certain" they arrived before May 5, 2009.

¶ 36 The circuit court denied the employer's motion to dismiss. The court relied upon Krause's testimony that the required documents were received in the clerk's office before May 5, 2009. The court ruled that "[t]he act of tendering a document to the Clerk of Court, along with the required fee due, if any, is the final act required of a party attempting to file documents with the Clerk of Court." Moreover, the court noted that the claimant "ha[d] no ability to compel the Clerk of Court" to file stamp the documents. The court later denied the employer's motion to reconsider its ruling.

¶ 37 Addressing the merits of the claimant's appeal, the circuit court found that the Commission's decision was not against the manifest weight of the evidence and confirmed the decision.

¶ 38 In this appeal, the claimant appeals the Commission's finding that he was not totally, permanently disabled. In its cross appeal, the employer appeals the circuit court's denial of its motion to dismiss the claimant's petition for review of the Commission's decision as untimely.

¶ 39 ANALYSIS

¶ 40 A. The Employer's Cross-Appeal

¶ 41 Because the employer's cross-appeal raises a threshold jurisdictional issue, we will address it first. Section 19(f) of the Act provides that a proceeding for review of a Commission decision "shall be commenced" within 20 days of the receipt of notice of the decision of the Commission. 820 ILCS 305/19(f) (West 2008). It is undisputed that the claimant received the Commission's decision on April 14, 2009. Therefore, the claimant was required to "commence" a proceeding to review that decision by filing a request for summons and proof of payment for the probable cost of the record no more than 20 days later, *i.e.*, by May 4, 2009. *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 320 (1999). This time limit is "mandatory and jurisdictional." *Id.* at 321. Thus, it "must be strictly adhered to in order to vest the circuit court with jurisdiction over an appeal from the Commission." *Id.* at 320.

¶ 42 The employer argues that the claimant's request for summons and petition for review were untimely filed—and, therefore, the circuit court lacked jurisdiction over the petition—because these documents were not file-stamped until one day after the jurisdictional deadline and because there is "no evidence" suggesting they were timely filed. We disagree. Shirley Krause, the Deputy Circuit Clerk of Kendall County who file-stamped the documents on May 5, 2009, testified she was certain that the claimant's request for summons and petition for

review arrived in the clerk's office before May 5, 2009.[9] In addition, Krause stated in her affidavit that "I did not file stamp the documents when they arrived but I swear and affirm that they arrived in the Kendall County Circuit Clerk's office before May 4, 2009." This testimony is competent evidence establishing that the required documents were "filed" with the Clerk's office either on or before the May 4, 2009, statutory deadline. See *Newman, Raiz and Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 607 (2009) (a document is "filed" when it is "delivered to the proper officer with the intent of having such document kept on file by such officer in the proper place") (citation and internal quotation marks omitted). The fact that the circuit clerk file-stamped the documents after the deadline is immaterial. The claimant clearly "commenced" his proceeding for review in a timely fashion under section 19(f).

¶ 43 The employer argues that Krause's testimony that the documents arrived before May 5, 2009, is "not credible" because she also testified that her affidavit did not reflect a date on which the claimant's petition for review was received because she was not sure when it arrived. However, the fact that Krause could not identify the exact date that the petition arrived does not contradict her consistent, sworn testimony that it arrived some time before May 5, 2009. In any event, credibility determinations are "within the special competence of the trial courts," and we "accord deference to those trial court decisions." *Pekin Insurance Co. v. Hallmark Homes,*

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[9] Krause also swore that an "affidavit" arrived from the claimant's counsel's office with these documents. She does not describe the content of the affidavit or state whether it established that the probable cost of copying the record had been paid. However, the employer has not argued that the proof of payment was untimely filed. The record is therefore undeveloped as to this issue, and we will not address it.

L.L.C., 392 Ill. App. 3d 589, 593 (2009) (quoting *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1058–59 (2007)).

¶ 44 The employer argues that a party cannot satisfy the requirements of section 19(f) merely by "placing the appropriate documents in the United States mail" within the 20-day deadline. It also argues that the jurisdictional deadline prescribed by section 19(f) cannot be satisfied by "substantial compliance." This is a red herring. According to Krause's unrebutted testimony, the appropriate documents *arrived in the clerk's office* (and were therefore "filed") within the deadline; they were not merely "placed in the mail" within the deadline. Therefore, the claimant *actually complied* with section 19(f)'s requirements. As the claimant notes, "substantial compliance" is not at issue here.

¶ 45 B. The Claimant's Appeal

¶ 46 The claimant argues that the Commission's finding that he failed to prove that he was permanently and totally disabled was contrary to law and against the manifest weight of the evidence. The question of whether a claimant is permanently and totally disabled is one of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203 (2009). For a finding of fact to be contrary to the manifest weight of the evidence, the opposite conclusion must be "clearly apparent." *Id.* Whether a reviewing court might reach the same conclusion is not the issue. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 47 An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). Our supreme court has stressed, however, that the employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286–87 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1089 (2007).

¶ 48 If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd-lot" status. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546–47(1981); *City of Chicago*, 373 Ill. App. 3d at 1089. An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1089. In determining whether a claimant falls within an "odd-lot" category for purposes of an award of PTD benefits, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities. *A.M.T.C. of Illinois, Inc.*, 77 Ill.2d at 489; *Ameritech Services, Inc.*, 389 Ill. App. 3d at 204.

¶ 49 An employee seeking to establish odd-lot status must "initially establish[ ]" by a preponderance of the evidence that he falls within the odd-lot category. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1091. Ordinarily, the employee satisfies this burden either by presenting evidence of a diligent but unsuccessful attempt to find work or by showing

that because of his age, skills, training, experience, and education, he will not be regularly employed in a well-known branch of the labor market. *City of Chicago*, 373 Ill. App. 3d at 1091. Whether the employee has successfully carried this burden presents a question of fact for the Commission to determine. *Id.* If the employee establishes by a preponderance of the evidence that he falls into the odd-lot category, the burden of production shifts to the employer to show that the employee is employable in a stable labor market and that such a market exists. See *Valley Mould*, 84 Ill.2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1091. The question whether the employer has satisfied its burden also presents a question of fact for the Commission. *City of Chicago*, 373 Ill. App. 3d at 1091.

¶ 50 Here, the claimant attempted to establish that he was permanently totally disabled by proving that he fell into the odd-lot category. He did not argue that he had performed a diligent but unsuccessful job search. Accordingly, in order to meet his initial burden, the defendant was required to prove by a preponderance of the evidence that, because of his age, skills, training, experience, education, and the extent of his injuries, he will not be regularly employed in a well-known branch of the labor market. *City of Chicago*, 373 Ill. App. 3d at 1091; *Ameritech Services, Inc.*, 389 Ill. App. 3d at 204. We cannot conclude that the Commission's finding that the claimant failed to meet this burden was against the manifest weight of the evidence.

¶ 51 In attempting to prove his "odd-lot" status, the claimant relied almost entirely on Pagella's testimony. Pagella testified that the claimant would be incapable of performing any sedentary positions available in the labor market because of his medical work restrictions, his limited education, and his limited ability to read, write, and understand English. However, in determining the claimant's educational limitations, Pagella relied entirely upon the claimant's

representations and did not independently test the claimant's abilities. The claimant told Pagella that he had attended school only through the eighth grade, even though he had actually received a twelfth-grade education in Macedonia, as he later admitted before the arbitrator. Thus, Pagella's conclusions regarding the claimant's limited education were based at least in part on false information.

¶ 52 Moreover, the testimony of the claimant's supervisor (Harris) suggested that the claimant could read and understand English well enough to successfully perform the tracking and routing functions of his prior forklift operator job, which required some reading in English. In order to qualify for that job, the claimant had to read a manual printed in English and pass a test demonstrating his understanding of what he had read. The fact that he passed the test[10] and was able to successfully perform the routing and tracking functions of the job countered Pagella's dim view of the claimant's intellectual abilities and undermined Pagella's claim that the claimant's ability to read and understand English was severely limited.

¶ 53 More importantly, as the arbitrator recognized, the employer identified at least one sedentary position that was potentially within the claimant's work restrictions. According to Harris, the wood sorter/control panel operator position merely required the employee to push

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[10] During cross-examination, Harris admitted that he was not present when the claimant took the test and, therefore, was not aware of whether someone may have helped him read the test. However, the claimant did not testify that he received any such help. Nor does he make such a claim on appeal. It is the Commission's province to resolve such factual issues, and we cannot say that a finding that the claimant passed the test on his own would be against the manifest weight of the evidence.

buttons on a control panel. Harris testified that this could be done with a single hand. Moreover, unlike writing, which typically requires the use of the dominant hand, pressing buttons can be done with either hand, even by someone who is not ambidextrous. Thus, it is likely that the claimant could have performed this position with his left hand without using his right arm or hand at all. In addition, Harris's testimony suggested that the wood sorter /control panel operator position was a legitimate, existing light-duty position available at one of the employer's facilities, not a sham position that was created or modified specifically for the claimant in order to avoid a finding that he is totally permanently disabled. This suggests that there was at least one type of regular, gainful employment that the claimant could have pursued notwithstanding his limitations. The claimant did not show that he was unable to do the work that this position required. Accordingly, he failed to prove by a preponderance of the evidence that he could not be employed in any branch of the labor market. See, *e.g.*, *Hallenbeck v. Industrial Comm'n*, 232 Ill. App. 3d 562, 569 (1992) ("The ability to perform sedentary work has been considered as a factor militating against a finding that one is permanently and totally disabled."); see also *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 178-79 (1981) (holding that claimant "ha[d] not carried the burden necessary to demonstrate his inability to return to gainful employment" under the odd-lot standard where the evidence showed that he was capable of performing some of the duties of his former position and where, "[n]otwithstanding his age and ninth-grade education, [claimant] made no showing that the *** work he could perform was unavailable").

¶ 54 The claimant argues that, even if he were capable of performing one of the positions offered by the employer, "it would not bar the finding of odd lot total disability" because "the [employer] clearly has the burden of showing that [the claimant] will be 'regularly employed in a

well-known branch of the labor market'." We disagree. It is the *claimant's* burden to make the opposite showing, *i.e.*, to show by a preponderance of the evidence that "because of his age, skills, training, experience, education, and the extent of his injuries, he will *not* be regularly employed in a well-known branch of the labor market." (Emphasis added.) *City of Chicago*, 373 Ill. App. 3d at 1091; see also *Hallenbeck*, 232 Ill. App. 3d at 569 ("The employee bears the burden of proving each element of his case, including the extent and permanency of his injury.") The employer assumes the burden of showing that some such regular employment is available only if the claimant first makes this initial showing. As noted above, the claimant never made this showing. Thus, the burden never shifted to the employer, and the Commission properly rejected the claimant's assertion of total permanent disability without requiring a showing from the employer.

¶ 55 We acknowledge, however, that the Commission could have provided a clearer and more thorough analysis in support of its decision. Moreover, the Commission's reliance on Dr. Lazar's opinion that the claimant was "capable of performing sedentary work" was misplaced. First, Dr. Lazar's opinion was conditional. He opined that the claimant would be capable of performing sedentary work *only if* his neuropathic pain was treated more aggressively with certain drugs. There is no evidence that the claimant was ever given such "aggressive" drug treatment or that such treatment was effective. Moreover, Dr. Lazar expressly noted that he did not render *any* opinion on the state of the claimant's shoulder and knee injuries because he was "not an orthopedic surgeon." Thus, Dr. Lazar's opinion did not take into account the work restrictions relating to the claimant's shoulder and knee that were imposed by the claimant's orthopedic surgeons. Moreover, Dr. Lazar is not a vocational expert, and he did not perform any analysis of

the labor market in determining that the claimant could do sedentary work. For all these reasons, Dr. Lazar's opinion that the claimant might be able to do sedentary work if certain conditions were met is of little relevance. See, *e.g.*, *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 545 (2007) (rejecting doctor's opinion that claimant was unable to perform any type of work where, *inter alia*, the doctor had not conducted a labor market survey or prescribed a FCE). In addition, the Commission improperly relied on the claimant's refusal of a sedentary position that the employer offered him in September 2006 during a time that Dr. Goodman had held the claimant off work.

¶ 56 Nevertheless, although we do not agree with all aspects of the Commission's analysis, "a reviewing court can affirm the Commission's decision if there is any legal basis in the record to support its decision, regardless of the Commission's findings or reasoning." *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 803 (2005). As noted above, there is sufficient evidence in the record to support the Commission's decision that the claimant failed to prove that he was permanently and totally disabled under the "odd-lot" approach. Whether we would have reached the same conclusion if we were deciding the case in the first instance is immaterial. The Commission's decision was not against the manifest weight of the evidence. We therefore affirm.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, we affirm the judgment of the Kendall County circuit court, which confirmed the Commission’s decision.

¶ 59 Affirmed.