2013 IL App (2d) 121178WC-U
No. 2-12-1178WC
Order filed November 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

WEST CHICAGO SCHOOL DISTRICT NO. 33,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 12-MR-297
THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al*.,	)	
(Edmund Garcia, Defendant-Appellee).	)	Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

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

ORDER

¶ 1 *Held:* (1) Evidence supported Commission's finding that claimant's industrial accident resulted in a partial incapacity that prevented claimant from pursuing his usual and customary line of employment; therefore, Commission's award of a wage-differential benefit is not against the manifest weight of the evidence; and (2) Commission could reasonably conclude based on evidence of record that claimant's part-time jobs constituted the average amount claimant is earning or is able to earn in some suitable employment; therefore, Commission did not err in using claimant's earnings at part-time positions to calculate wage-differential benefit.

¶ 2 Respondent, West Chicago School District No. 33, appeals an order of the circuit court of Du Page County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) that awarded claimant, Edmund Garcia, a wage-differential benefit pursuant to section 8(d)1 of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)1 (West 2000)). On appeal, respondent argues that the Commission's award of a wage-differential benefit is against the manifest weight of the evidence because claimant failed to prove that the permanent effects of his injuries prevented him from pursuing his usual and customary line of employment as a custodian. Alternatively, respondent contends that the Commission improperly determined that he is only capable of part-time work and therefore improperly calculated the rate of such benefit. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 5, 2001, claimant filed an application for adjustment of claim alleging an injury to his low back on November 27, 2000, while employed for respondent (No. 01 WC 61384). Claimant filed a second application for adjustment of claim on December 14, 2004, alleging he sustained a right-side inguinal hernia on September 22, 2004, also while in respondent's employ (No. 04 WC 59366). Prior to arbitration, the claims were consolidated for review. An arbitration hearing on claimant's applications for adjustment of claim was held on January 8, 2010. As the present appeal concerns only the claim for benefits related to the events of November 27, 2000, we confine our discussion of the facts to the circumstances concerning that injury.

¶ 5 Claimant began working for respondent in April 1984 and eventually became head custodian. On November 27, 2000, while lifting a lunch table at a school cafeteria, claimant felt a "muscle pull" in his back. Claimant took pain medication, but the pain worsened, so he sought treatment at the Glen Ellyn Clinic. On December 1, 2000, claimant saw Dr. Marilyn Mistry, to whom he complained

of low back pain with radiation into the left leg. Dr. Mistry diagnosed a possible L5 radiculopathy and took claimant off work pending evaluation by an orthopaedic surgeon. An MRI of the lumbar spine ordered by the orthopaedic surgeon, Dr. Osep Armagan, revealed herniated discs at L3-L4, L4-L5, and L5-S1. Dr. Armagan initially ordered conservative treatment, including anti-inflammatory medication and physical therapy. He later prescribed epidural steroid injections. Dr. Armagan authorized claimant to return to light-duty work, if available.

¶ 6 Claimant continued to have pain despite physical therapy and three epidural injections, so Dr. Armagan referred him to Dr. John Brayton, a neurosurgeon. On February 9, 2001, Dr. Brayton examined claimant and reviewed the MRI ordered by Dr. Armagan. Dr. Brayton concluded that claimant's complaints suggested left L5 and S1 radiculopathies, but noted that the MRI did not suggest any significant compression lesion to explain claimant's symptoms. Dr. Brayton ordered an EMG/NCV study and a flexion/extension lumbar X ray. The X ray revealed anterolateral spurs in the lower lumbar spine, but no spondylosis or subluxation. The EMG/NCV study was consistent with left-sided sciatica at the L5 and S1 levels. Dr. Brayton also ordered a repeat lumbar MRI with and without gadolinium. The repeat MRI showed no significant changes compared to the initial MRI.

¶ 7 Following claimant's consultation with Dr. Brayton, Dr. Armagan released claimant to two hours of work a day with limited lifting. Claimant testified that after the accident, he could not perform the functions of a head custodian, so he requested a transfer to the position of a utility custodian. According to claimant, the utility custodian position was "less physical" than that of head custodian. In an undated letter, respondent approved claimant's request and informed claimant that he would receive a permanent assignment once he is able to work longer hours.

¶ 8 Claimant's care was later transferred from Dr. Armagan to Dr. Kevin Walsh. On April 10, 2001, claimant told Dr. Walsh that his symptoms had improved and that he was working four hours a day, but that he experiences pins and needles involving the plantar aspect of his left foot which radiates up to his back. Dr. Walsh noted no abnormalities on physical examination, but recommended a myelogram. Dr. Walsh released claimant to work three days a week, six hours a day with an increase to eight hours a day on April 30, 2001.

¶ 9 Claimant did not see Dr. Walsh again until November 9, 2001. At that time, Dr. Walsh noted that an EMG and MRI taken since April 2001 revealed lumbar radiculopathy and disc dehydration with mild bulging. Dr. Walsh opined that claimant's symptoms "appear to be out of proportion to what the MRI demonstrated." He diagnosed a left-sided herniated disc and opined that claimant could be a candidate for lumbar epidural steroid injections or surgical intervention. He also recommended a repeat MRI or a myelogram. During the visit, claimant requested work restrictions, so Dr. Walsh advised claimant to avoid prolonged vacuuming and lifting greater than 50 pounds while awaiting the outcome of the new tests. Claimant underwent a myelogram and a post-myelogram CT scan on November 20, 2001. The tests revealed mild to moderate diffuse bulging at L3-4, L4-5, and L5-S1 with central and bilateral foraminal stenosis at L4-5.

¶ 10 On November 26, 2001, claimant sought treatment with Dr. Robert Goldberg, an orthopaedic surgeon. Claimant gave Dr. Goldberg a history of the November 2000 work accident and subsequent treatment. Dr. Goldberg also reviewed claimant's medical records, including the diagnostic films, and he conducted a physical examination. Among other things, Dr. Goldberg noted a "pertinent past musculoskelatal history," including two separate work injuries in 1998 and 1999 which resulted in back pain but no sciatic symptoms or paresthesia. Dr. Goldberg opined that claimant's

musculoskelatal history and the MRIs indicate a preexisting lumbar disc pathology. However, noting that claimant never had symptoms of paresthesia or sciatica prior to November 27, 2000, Dr. Goldberg believed that the event on that date aggravated claimant's preexisting lumbar degenerative disc disease, resulting in sciatica. Dr. Goldberg recommended conservative treatment with medication and placed claimant on a 50-pound lifting restriction. On January 7, 2002, claimant returned to Dr. Goldberg's office. While still symptomatic, Dr. Goldberg found claimant to be at maximum medical improvement (MMI) and made permanent the 50-pound lifting restriction.

¶ 11 Claimant next saw Dr. Goldberg on January 13, 2003. At that time, claimant complained of ongoing low back pain with sciatic radiation to the left lower extremity. Dr. Goldberg diagnosed persistent low back pain and ordered another MRI of the lumbar spine. The radiologist noted a left paracentral protrusion of the L5-S1 disc, which was more prominent than on previous MRIs. The radiologist indicated that while the protrusion is relatively small, it is immediately adjacent to the left S1 nerve root. On February 24, 2003, Dr. Goldberg referred claimant to a pain clinic for lumbar epidural steroid injections. Claimant reported some relief of his back pain from the injections, but no improvement in his left leg paresthesia. On July 21, 2003, Dr. Goldberg again found claimant to be at MMI and imposed permanent restrictions of no lifting, pushing, or pulling more than 50 pounds.

¶ 12 On May 17, 2004, claimant returned to Dr. Goldberg's office with complaints of low back pain with sciatic radiation to the left lower extremity. Dr. Goldberg prescribed medication and instructed claimant to return as needed. Claimant next saw Dr. Goldberg in August 2005, with complaints of increased low back pain and sciatic symptoms in his left lower extremity. Dr. Goldberg found a positive left straight leg raise test. He ordered another lumbar spine MRI which

was significant for moderate to marked central canal and bilateral, symmetric lateral recess stenosis at the L3-4 level, but no other significant changes. Dr. Goldberg prescribed epidural steroid injections and changed claimant's restrictions to no lifting, pushing, or pulling more than 30 pounds. On September 12, 2005, Dr. Goldberg noted that claimant had reported only minimal relief from the injections, so he referred claimant to Dr. Harel Deutsch for a neurosurgical consultation.

¶ 13 Claimant presented to Dr. Deutsch on September 12, 2005. During that visit, Dr. Deutsch noted that claimant had a "long standing history of back pain" which had only minimally responded to epidurals and physical therapy. He found the earlier MRIs to be of poor quality and recommended continuing the conservative treatment ordered by Dr. Goldberg. Dr. Deutsch stated that if the conservative treatment failed to resolve claimant's condition, he would consider a lumbar fusion at L4-5 and L5-S1.

¶ 14 On November 7, 2005, Dr. Deutsch ordered a closed lumbar spine MRI. The MRI revealed: (1) mild central spinal stenosis and left foraminal stenosis at L2-3; (2) severe central spinal stenosis and left foraminal stenosis at L3-4; (3) moderate central spinal stenosis and bilateral foraminal stenosis at L4-5; and (4) a left lateral disc herniation at L5-S1 with left foraminal stenosis. Dr. Deutsch noted claimant's symptoms made it difficult for him to work and perform daily activities. He advised claimant that surgery was not needed from a functional standpoint but might relieve his pain. Claimant decided to have the surgery, and on December 28, 2005, Dr. Deutsch performed a two-level lumbar fusion at L4-5 and L5-S1. Claimant continued to treat with Dr. Deutsch postoperatively. On June 12, 2006, claimant reported the elimination of his radicular symptoms. He also noted a decrease in back pain from level nine on a ten-point scale before surgery to level five after surgery. At that time, Dr. Deutsch found claimant to be at MMI and released him to work with

permanent restrictions of no twisting, no lifting more than 35 pounds, and "must squat, bend at knees to reach floor–no bending at waist." At the arbitration hearing, claimant described his back as "70 percent pain free."

¶ 15 Claimant testified that he did not work between December 28, 2005, and June 1, 2007. During this time, claimant took computer classes and began a self-directed job search. Moreover, after Dr. Deutsch released claimant to work in June 2006, claimant met with Sue Caddy, respondent's director of business and operations, and Barbara Clark, respondent's assistant superintendent, to review the physical restrictions imposed by Dr. Deutsch. In a letter dated June 27, 2006, Clark noted that the essential functions of a utility custodian include: (1) inspecting and cleaning lavatory fixtures; (2) sweeping, scrubbing, mopping, waxing, and polishing floors; (3) assisting in the unloading and delivery of supplies; (4) moving boxes and other deliveries within the school building; and (5) setting up the cafeteria tables and chairs for evening use of the building. Clark determined that based upon a review of the permanent restrictions outlined by Dr. Deutsch and given the job responsibilities of a utility custodian, claimant would be unable to perform the essential functions of the position with or without accommodations. As a result, respondent terminated claimant's employment effective June 30, 2006. Clark authored a second letter on September 6, 2006, denying claimant's request to be reinstated to his previous job.

¶ 16 Claimant noted that although the "market was bad," he eventually found a part-time position with Saleslink. Claimant testified that this position requires him to travel to home improvement retailers and assist store personnel with appliance sales. Claimant started the Saleslink position on June 1, 2007. He works 10 hours a week and earns $15 per hour. Claimant started a second part-time job with Impact Resource Group on August 9, 2007. This position involves setting up store

displays, counting inventory, and reviewing plan-o-grams. Claimant works 12 hours a week for Impact Resource Group. When claimant started the position, he earned $12 per hour. On April 1, 2009, claimant's hourly wage at Impact Resource Group was increased to $12.66 per hour. Claimant testified that if he were still employed as head custodian, he would be working 40 hours per week and, based on the union contract, he would be earning $22.33 per hour.

¶ 17 On cross-examination, claimant testified that he applied for several full-time jobs online, but received no response. Claimant also applied for a full-time position as a mailroom clerk for the corporate office of a liquor distributor. He interviewed twice for the position, but was not hired. Claimant also noted that when he initially applied to Saleslink, it was for a full-time position. Claimant testified that since being hired by Saleslink, he has asked for additional hours, but his requests have not been successful. He stated that the last time he asked Saleslink for full-time work was about seven months prior to the arbitration hearing. At that time, there was an open position, but it was awarded to an individual with more experience in outside sales. Claimant offered into evidence job search logs from February 2007 through September 2009, listing his employment contacts.

¶ 18 Claimant further testified on cross-examination that after he stopped working for respondent, he began collecting disability benefits through the Illinois Municipal Retirement Fund until November 2007, when he turned 55 and qualified for an early retirement pension. Claimant agreed that he only sought part-time work while receiving disability because whatever he earned would create a set-off against those benefits. Claimant testified that he could earn as much as he wanted after he started to receive his full pension benefits in November 2007.

¶ 19 Dr. Goldberg testified by evidence deposition that based on his review of claimant's medical records, the history that claimant provided, and the physical examination he conducted, claimant had left-sided lumbar radiculopathy as a result of his work injury in November 2000, which was probably in part related to cumulative trauma because of the type of heavy repetitive lifting he was required to perform. Dr. Goldberg added that the surgery performed by Dr. Deutsch was related to the November 27, 2000, accident. Dr. Goldberg testified that he maintained the original 50-pound lift, push, pull restriction until August 15, 2005, when claimant was dropped to a 30-pound maximum limit for these activities. Dr. Goldberg testified that the change was made because claimant's physical symptoms and findings were worsening.

¶ 20 Dr. Deutsch also testified by evidence deposition. Dr. Deutsch deemed claimant at MMI as of June 12, 2006, at which time he released claimant to work with restrictions. Dr. Deutsch testified that the restrictions he imposed were "more or less permanent subject to possibly a functional capacity evaluation which may, you know, kind of tweak it up and down a bit." Dr. Deutsch stated that when he discussed these restrictions, claimant was eager to return to his job as a custodian. At that time, claimant indicated that it would be difficult for him to perform certain aspects of his job, such as moving school chairs around, which involves twisting, but claimant felt that he could do some of the other tasks such as mopping. Dr. Deutsch opined that the November 2000 lifting incident that claimant described contributed to his back problem. He further testified that the restrictions imposed are related to the back surgery and claimant's sequelae therefrom.

¶ 21 On cross-examination, Dr. Deutsch was asked the following sequence of questions, and provided the following answers, regarding the 35-pound lifting restriction:

"Q. Okay. Now, you testified that [claimant's] currently an [*sic*] MMI and that you've imposed the 35-pound lifting restriction, correct?

A. Yes.

Q. Since there wasn't an FCE performed, what do you base that lifting restriction on?

A. I think that [claimant] could get a functional capacity evaluation and that could be revised upwards or downwards some. Basically once someone [claimant's] age, you know, almost 55, has surgery and–lumbar surgery, even if they're better, they're usually not able to necessarily perform heavy lifting construction type work, and, you know, I would anticipate that [claimant] could do some lifting, you know, maybe 45 pounds possibly, but he's not necessarily going to be moving hundred pound objects, you know, having had back surgery.

Q. Well, he previously had 50-pound lifting restrictions imposed by Dr. Goldberg, and now after the surgery it's only 35 pounds, so we're trying to determine just what basis you use to come up with a 35-pound restriction?

A. That's a very arbitrary number that I came up with. Again, you know, to get a more sort of substantial number, they can do a functional capacity evaluation. Again, a lot of this is going to be dependent on asking him to lift X amount and ask him if he has pain, so that's an approximate number. Obviously, in the context of someone's work, they don't really measure how much things weigh. The point is is [*sic*] that he probably can't do very heavy lifting but can do most daily activities.

Q. Would you expect him to be able to physically perform better currently than he could before the surgery?

A. Yes."

On redirect examination, Dr. Deutsch stated that while claimant may be able to lift more than 35 pounds, he "will have a lot of pain doing it."

¶ 22 Respondent submitted an independent medical examination report prepared by Dr. Robert Levy. See 820 ILCS 305/12 (West 2000). Dr. Levy examined claimant on September 13, 2007. In his report of that visit, Dr. Levy outlined the history of claimant's back pain as well as his review of claimant's medical records and diagnostic films. With respect to work restrictions, Dr. Levy stated that the recommendations of Dr. Deutsch that claimant "avoid pushing and pulling and limit his lifting to 50 pounds are reasonable restrictions following fusion surgery." Dr. Levy noted, however, that "at present, [claimant] has no complaints of back or leg pain and no demonstrable neurologic or musculoskelatal deficits save for limited back flexion due to his fusion surgery." Noting that claimant was nearly two years post fusion surgery from which claimant had "healed fully," Dr. Levy opined that "with appropriate work hardening and back education, [claimant] could well return on his prior line of work without restrictions."

¶ 23 Based on the foregoing evidence, the arbitrator concluded that claimant's low-back condition was related to the work accident of November 27, 2000. Relevant to this appeal, the arbitrator awarded claimant a wage differential from January 8, 2010, through the remainder of claimant's disability. See 820 ILCS 305/8(d)(1) (West 2000). Thereafter, respondent filed a petition for review before the Commission. The Commission affirmed in part, modified it in part, and vacated in part. With respect to the wage-differential award, the Commission concluded that after claimant began collecting his pension in November 2007, he looked for full-time work within his restrictions, but received no job offers. Accordingly, the Commission determined that claimant's work injuries

resulted in his inability to return to his usual and customary work as head custodian for respondent. The Commission also concluded that a comparison of the "average amount" claimant would be able to earn in the full performance of his duties as head custodian and the "average amount" that claimant is earning or is able to earn in his two part-time positions established an impairment of earnings. See 820 ILCS 305/8(d)1 (West 2000). Thus, the Commission awarded claimant a wage differential for the period from November 25, 2007 (the date claimant turned 55 and qualified for an early retirement pension) and January 8, 2010 (the date of the arbitration hearing), and from January 8, 2010, through the remainder of his disability. Based on wage statements submitted into evidence, the Commission determined that claimant earned an average of $288.14 per week from his part-time jobs for the period from December 1, 2007, through December 31, 2009. The Commission noted that under the union contract, claimant would have earned $22.33 per hour as a head custodian during the same period, or $893.20 for a 40 hour workweek. Thus, the Commission calculated a wage differential of $403.17 per week (($893.20 minus $288.44) times 66-2/3% equals $403.17). On judicial review, the circuit court of Du Page County confirmed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, respondent argues that the Commission erred in awarding claimant a wage-differential award. In this regard, respondent raises two principal contentions. Initially, respondent claims that the Commission's award of a wage differential is against the manifest weight of the evidence because claimant failed to prove that the permanent effects of his injuries prevent him from returning to his usual and customary employment as a custodian. Alternatively, respondent contends that the Commission improperly determined that claimant is only capable of part-time work and therefore improperly calculated the rate of the wage-differential benefit.

¶ 26 The purpose of a wage-differential award is to compensate an injured worker for his reduced earning capacity. *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 759 (1995). The Act provides for a wage-differential benefit in section 8(d)1 (820 ILCS 305/8(d)1 (West 2000)). At the time of the injury in question, the statute provided:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitation as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)1 (West 2000).

The employee bears the burden of proving all elements of his claim by a preponderance of the evidence. *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886, 890 (1990). Based on the language of section 8(d)1, this court has stated that to qualify for a wage-differential award, an employee must prove (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1014 (2005); *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 730 (2000); *Albrecht*, 271 Ill. App. 3d at 759. Whether an employee has presented sufficient evidence to establish his entitlement to a wage-differential award is a question of fact to be resolved by the Commission. *Durfee*, 195 Ill. App. 3d at 890. We will not disturb the Commission's finding on a factual matter

unless it is against the manifest weight of the evidence. *Copperweld Tubing Products Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633 (2010). For a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061 (2006).

¶ 27 In the present case, respondent focuses its argument on whether claimant established that his back injury prevents him from returning to his former occupation as a custodian. According to respondent, the Commission erred in awarding a wage-differential benefit because claimant did not establish that the permanent effects of his injuries prevent him from returning to his usual and customary employment. The evidence presented at trial shows that Dr. Deutsch found claimant at MMI on June 12, 2006, six months following surgery. At the same time, Dr. Deutsch released claimant to work with permanent restrictions of no twisting, no lifting more than 35 pounds, and no bending at the waist. Subsequently, claimant met with respondent to discuss these restrictions as they relate to the utility custodian position. After reviewing the permanent restrictions outlined by Dr. Deutsch in light of the job responsibilities of a utility custodian, respondent determined that claimant would be unable to perform the essential functions of the position. Respondent reaffirmed its decision in correspondence to claimant dated September 6, 2006. Based on the restrictions imposed by Dr. Deutsch and respondent's determination that claimant could not perform the essential functions of a utility custodian with such restrictions in place, the Commission could have reasonably concluded that following his industrial accident, claimant was unable to pursue his usual and customary line of employment. As such, we find that that a conclusion opposite to the one reached by the Commission is not clearly apparent and thus the Commission's decision that claimant is entitled to a wage-differential award is not against the manifest weight of the evidence.

¶ 28 Respondent concedes that it did not authorize claimant to return to its employment as either head custodian or utility custodian. Respondent asserts, however, that its failure to do so was premised on work restrictions imposed by Dr. Deutsch, restrictions which respondent categorizes as "speculative." Noting that Dr. Deutsch testified on cross-examination that the 35-pound lifting restriction was "arbitrary" and that claimant could possibly lift up to 45 pounds, respondent suggests that the permanent restrictions imposed by Dr. Deutsch "do not conclusively establish [claimant's] inability to return to his pre-injury employment." Respondent claims that the only physician upon whom reasonable reliance may be placed is the section 12 examiner, Dr. Levy, who would have imposed a 50-pound lifting restriction, which would not have hindered claimant from a return to the utility custodian position.

¶ 29 Contrary to respondent's position, we find that the Commission could have reasonably determined that Dr. Deutsch had a medical basis for imposing a 35-pound lifting limitation and that this limitation was not premised on speculation. At the time Dr. Deutsch imposed the lifting limitation, he had been claimant's treating physician for nearly a year and was therefore familiar with claimant and his condition. Dr. Deutsch testified that he imposed claimant's restrictions based on the spinal fusion surgery he performed and the sequelae from that surgery. As of June 12, 2006, when the permanent restrictions were put in place, claimant reported that he still experienced lower back pain at level five on a ten-point scale. Dr. Deutsch stated that claimant might be able to lift more than 35 pounds and that an FCE might "tweak" the amount of the limitation, but opined that claimant could have a lot of pain lifting more than 35 pounds. Thus, Dr. Deutsch based his restrictions on the surgery that he performed, his examinations of claimant, and his knowledge of how claimant's condition progressed.

¶ 30 Respondent also notes that there is no empirical evidence, such as an FCE, to support the validity of the restrictions imposed by Dr. Deutsch. We agree that an FCE can be helpful in assessing an injured employee's capacity to perform the duties of a particular job. That said, respondent does not direct us to any legal requirement that an employee is required to undergo an FCE to qualify for a wage-differential award under section 8(d)1 of the Act. Indeed, on numerous occasions, we have upheld wage-differential awards in the absence of an FCE. See, *e.g.*, *Albrecht*, 271 Ill. App. 3d at 759-62; *Rutledge v. Industrial Comm'n*, 242 Ill. App. 3d 329, 331-32 (1993); *Old Ben Coal Co.*, 198 Ill. App. 3d 485, 491-93 (1990).

¶ 31 Moreover, respondent's argument ignores that the lifting limitation was only one of three permanent restrictions imposed by Dr. Deutsch. Dr. Deutsch also prohibited claimant from twisting and from bending at the waist. Respondent insists that nothing in the record suggests that the bending and twisting restrictions imposed by Dr. Deutsch, rather than the lifting limitation, precluded a resumption of custodial work. As explained below, however, the evidence of record suggests otherwise.

¶ 32 In its letter of June 27, 2006, respondent outlined several essential functions of a utility custodian, including (1) inspecting and cleaning lavatory fixtures, (2) sweeping, scrubbing, mopping, waxing, and polishing floors, and (3) setting up cafeteria tables and chairs for evening use of the building. The Commission could have reasonably found that any one of these duties involved movements that would violate the work restrictions imposed by Dr. Deutsch. Indeed, claimant voiced concern to Dr. Deutsch about certain aspects of his job which involve twisting. Claimant cited moving school chairs as one such task. Furthermore, the evidence suggests that it was principally the twisting and bending restrictions, rather than the lifting limitation, which prevented

claimant from returning to one of his custodial positions. In November 2001, Dr. Walsh imposed a 50-pound lifting limitation. When Dr. Goldberg took over claimant's care, he continued this restriction. In August 2005, however, Dr. Goldberg changed claimant's restriction to no lifting, pushing, or pulling more than *30 pounds*. Dr. Goldberg testified that he imposed the more restrictive lifting limitation because claimant's physical symptoms and findings were deteriorating. As respondent points out, claimant worked between November 2001 and December 28, 2005, when he underwent back surgery, so respondent obviously accommodated the 30-pound lifting limitation. Yet, when claimant was released to return to work in June 2006, respondent decided that it could not accommodate a less restrictive 35-pound lifting limitation. Since respondent was able to accommodate a 30-pound lifting limitation prior to claimant's surgery, its failure to accommodate a less restrictive weight limitation following claimant's operation strongly supports a finding that the twisting and bending restrictions imposed by Dr. Deutsch, rather than the lifting limitation, were determinative as to whether claimant could return to work in his previous position. Thus, we cannot agree with respondent's contention that nothing in the record suggests that the bending and twisting restrictions imposed by Dr. Deutsch precluded a resumption of custodial work.

¶ 33 Respondent also insists that the Commission should have given greater weight to the testimony of Dr. Levy than it did to the testimony of Dr. Deutsch. It is the province of the Commission to weigh conflicting evidence and draw reasonable inferences therefrom. *Old Ben Coal Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 494 (1990). In this case, the Commission could have reasonably rejected the opinion of Dr. Levy as the record suggests that it is premised on inaccurate information. Dr. Levy stated that the recommendations of Dr. Deutsch that claimant "avoid pushing and pulling and limit his lifting to 50 pounds are reasonable restrictions *following*

fusion surgery." (Emphasis added.) However, Dr. Deutsch did not impose a 50-pound lifting restriction following claimant's operation. He imposed a three-fold restriction of no lifting more than 35-pounds, no twisting, and no bending at the waist. Dr. Levy's opinion was also premised on his finding upon examination that claimant had no complaints of back or leg pain and that he had only minor neurologic and musculoskeletal deficits. However, six months following surgery, claimant reported to Dr. Deutsch that he still experienced back pain, although it had been reduced. Further, at the arbitration hearing, claimant testified that his back is "70 percent pain free." Given these inconsistencies, the Commission could have reasonably concluded that Dr. Levy's opinion was not credible.

¶ 34 Respondent contends that even if claimant is entitled to a wage-differential award under section 8(d)1, the Commission improperly calculated the rate of such benefits. Respondent asserts that this issue presents a question of law subject to *de novo* review. Claimant, on the other hand, argues that the issue presented to us is a question of fact subject to the manifest-weight standard. We agree with claimant and apply the manifest-weight standard. See *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 635 ("The Commission's calculation of an employee's wage-differential award is a factual finding which will not be set aside on review unless it is against the manifest weight of the evidence."); *Morton's of Chicago*, 366 Ill. App. 3d at 1061-62 (applying manifest-weight standard in reviewing whether the claimant sustained her burden on wage-differential issue).

¶ 35 Respondent initially argues that had claimant's true physical capabilities been assessed with an FCE, rather than by the restrictions imposed by Dr. Deutsch, claimant should have, in the very least, been able to return to work as a utility custodian, earning at least $17.22 per hour as provided for in the union contract. Thus, respondent reasons, if any wage-differential benefit were to be

contemplated, it should be measured by the difference between the wages applicable to the head custodian position and the utility custodian position. Having previously determined that the Commission's finding that claimant is not capable of returning to his usual and customary line of employment, we reject this contention without further comment.

¶ 36 Respondent also argues that the Commission improperly calculated claimant's earning potential based upon the part-time employment hours he worked. According to respondent, the Commission should have determined his true earning capacity based upon full-time work. As noted previously, however, section 8(d)1 instructs that a wage-differential award is "equal to 66-2/3% of the difference between the average amount which [the employee] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some *suitable employment* or business after the accident." (Emphasis added.) 820 ILCS 305/8(d)1 (West 2000). Nothing in the statute prohibits the use of part-time employment to calculate a wage-differential award so long as the part-time position constitutes suitable employment.

¶ 37 In this case, we conclude that the Commission could have reasonably concluded that part-time employment constituted "suitable employment" for purposes of determining claimant's earning potential after the accident. In this regard, we note that Dr. Deutsch released claimant to return to work with no twisting, no bending at the waist, and no lifting more than 35 pounds. Based on these restrictions, respondent determined that claimant would be unable to perform the essential functions of a utility custodian and terminated his employment. Claimant then commenced a self-directed job search. Claimant eventually found two part-time positions, one with Saleslink and the other with Impact Resource Group. Claimant testified that he earns $15 per hour with Saleslink and works 10

hours per week. Claimant works 12 hours a week for Impact Resource Group, where he initially earned $12 per hour before receiving a raise to $12.66 per hour. Thereafter, claimant continued to search for full-time work, but has been without success. Accordingly, we conclude that the Commission's decision is not against the manifest weight of the evidence.

¶ 38 Respondent nevertheless maintains that claimant made a "conscious decision to restrict his availability to work part time." According to respondent, this decision was not motivated by a physician's orders or any vocational limitations, but rather by "a calculated choice made by the Claimant to avoid a temporary set-off" to his disability benefits. In support of its position, respondent points to evidence that when claimant initially applied to Saleslink, it was for a full-time position. However, the Commission took this into consideration in deciding whether to award a wage differential. The Commission acknowledged that claimant voluntarily worked part time until from June 1, 2007 (when he began working for Saleslink), until November 25, 2007 (when he turned 55 and qualified for an early retirement pension without a set-off). As such, it did not award claimant a wage-differential for this period of time. Instead, the Commission only awarded claimant a wage differential commencing November 25, 2007, the period after which he turned 55 and sought out full-time work without success. Again, the evidence supports this finding. At the arbitration hearing, claimant testified that he applied for several full-time jobs online, but never received any response. Claimant noted, for instance, that he applied for a full-time position as a mailroom clerk. Although he interviewed twice for this position, he was not hired. The job log admitted into evidence supports claimant's testimony and reflects that after November 25, 2007, claimant contacted at least 20 employers regarding various positions. In addition, claimant testified that he requested additional hours from Saleslink, but was not given additional work hours. Further,

claimant applied for a full-time job with Saleslink, but that the position was given to an individual with more experience.

¶ 39 Finally, we note that respondent cites to *Durfee*, 195 Ill. App. 3d 886, for the principal that an employee who "elects to pursue a less lucrative employment than he is otherwise capable of attaining fails to prove a loss in earning capacity based purely on his less lucrative earnings." *Durfee*, however, did not establish any concrete rule regarding when a claimant may be held to have proved loss of earning capacity. More important, the facts of this case differ substantially from those in *Durfee*. In *Durfee*, the claimant was injured while working as a repairman. The claimant's treating physician placed no physical restrictions on him and suggested that he attempt to return to work. Instead, claimant obtained a job as a school administrator at a church, a job which the claimant enjoyed and which coincided with his clerical interests. We noted that while the claimant testified that the school-administrator position was "the best job he could find," there was no evidence that he attempted to obtain any other form of employment. *Durfee*, 195 Ill. App. 3d at 890. Based on these facts, we held that the Commission could reasonably conclude that the claimant had not shown a loss of earning capacity. *Durfee* was based in part on the fact that the claimant made a personal choice to accept a lower paying position and in part on his failure to prove that he could not obtain a higher-paying job. See *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 634 (discussing *Durfee*). Unlike the claimant in *Durfee*, claimant in this case does have permanent restrictions, restrictions that respondent admittedly cannot accommodate. Further, unlike the claimant in *Durfee*, claimant in this case tried to return to his usual and customary line of employment, but respondent refused his request. The claimant in *Durfee* deliberately stayed with lower-paying work because he enjoyed it and it coincided with his clerical interests. *Durfee*, 195 Ill.

App. 3d at 890. In contrast, claimant in this case only chose to work part time for a few months. He then began seeking full-time, higher paying work once he turned 55, but has been unsuccessful. Thus, for purposes of the period beginning on November 25, 2007, the period for which he was awarded a wage differential, claimant's failure to find a higher paying, full-time work is evidence of a loss in earning capacity. The Commission was entitled to rely upon that evidence in granting claimant a wage-differential award.

¶ 40 III. CONCLUSION

¶ 41 For the reasons set forth above, we affirm the judgment of the circuit court of Du Page County, which confirmed the decision of the Commission.

¶ 42 Affirmed.