2021 IL App (3d) 190754WC-U
No. 3-19-0754WC
Order filed February 8, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MONTEREY MUSHROOMS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Bureau County.
	)	
v.	)	No. 18-MR-23
	)	
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	C.J. Hollerich,
(Sylvia Mendez, Defendant-Appellee).	)	Judge, Presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the judgment of the circuit court, vacate the decision of the Commission, and remand the cause for further proceedings where the Commission relied, in part, on the vocational opinion of a medical expert in finding claimant permanently and totally disabled.

¶ 2 Claimant, Sylvia Mendez, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2010)), seeking benefits for

injuries she allegedly sustained on October 11, 2009, while in the employ of respondent, Monterey Mushrooms, Inc. Following a hearing held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)),[1] the arbitrator found claimant's injuries compensable and awarded her temporary total disability (TTD) benefits under section 8(b) of the Act, reasonable and necessary medical expenses, and prospective medical care. The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision and remanded the matter for further proceedings pursuant to *Thomas v. Industrial Comm'n,* 78 Ill. 2d 327 (1980). On judicial review, the circuit court of Bureau County confirmed the Commission's decision.[2]

¶ 3 Thereafter, the parties filed a "Request for Hearing" form, seeking a determination on the issues of causal connection and claimant's entitlement to permanent total disability (PTD) benefits, additional amounts of TTD benefits and medical expenses, and penalties and attorney fees. Following a hearing, the arbitrator found that claimant's current condition of ill-being was causally related to the October 11, 2009, work accident and awarded her PTD benefits, along with additional amounts of TTD benefits and medical expenses. The arbitrator also found that respondent's failure to pay TTD benefits was unjustified, unreasonable, and vexatious and ordered respondent to pay penalties and attorney fees. The Commission affirmed and adopted the arbitrator's decision. On judicial review, the circuit court confirmed the Commission's decision.

[1] Our ability to recite the full procedural history and background of this case has been hindered by an incomplete record. Neither the transcripts of the witness testimony from the section 19(b) hearing nor any of the exhibits that were admitted at that hearing have been included in the record on appeal. Moreover, the record does not include copies of the decisions issued by the arbitrator, Commission and circuit court following the section 19(b) hearing. While the separate appendix filed with respondent's brief includes copies of these decisions, it does not appear that the parties have filed a stipulation pursuant to Illinois Supreme Court Rule 329 (eff. July 1, 2017) to supplement the record with the decisions or otherwise moved to supplement the record on appeal with the decisions.

[2] The circuit court's November 14, 2019, order indicates that an appeal followed this decision, but no additional information regarding a subsequent appeal appears in the record.

Respondent appeals, arguing that the Commission erred by (1) considering the vocational opinions of a medical expert, (2) awarding claimant PTD benefits, (3) finding that claimant's current condition of ill-being was causally related to the October 11, 2009, work accident, (4) awarding claimant additional TTD benefits, and (5) imposing penalties and attorney fees.

¶ 4 I. Background

¶ 5 A. Section 19(b) Proceedings

¶ 6 On January 11, 2011, claimant filed an application for adjustment of claim, seeking benefits for injuries she allegedly sustained to her "entire" body when she fell from a mushroom rack on October 11, 2009, while working for respondent as a mushroom harvesting picker. Along with her application, claimant filed a "Petition for an Immediate Hearing Under Section 19(b) of the Act." The matter proceeded to a section 19(b) arbitration hearing on March 28, 2012. Neither the transcripts of the witness testimony from the section 19(b) hearing nor any of the exhibits that were admitted at that hearing have been included in the record on appeal.

¶ 7 Following the section 19(b) hearing, the arbitrator issued a written decision on April 26, 2012, finding that claimant's current condition of ill-being was causally related to the October 11, 2009, work accident. The arbitrator awarded claimant TTD benefits in the amount of $357.37 per week for 61-2/7 weeks (from January 24, 2011, to March 28, 2012) under section 8(b) of the Act (820 ILCS 305/8(b) (West 2012)). Respondent was given a credit of $9,299.74 for TTD benefits previously paid to claimant. The arbitrator also awarded claimant reasonable and necessary medical expenses, which totaled $27,818.98, and prospective medical treatment, including a lumbar fusion surgery, under section 8(a) of the Act (820 ILCS 305/8(a) (West 2012)). The arbitrator denied claimant's request for attorney fees and penalties under sections 16, 19(k), and 19(*l*) of the Act (820 ILCS 305/16, 19(k), (*l*) (West 2012)).

¶ 8 Respondent filed a petition for review of the arbitrator's decision before the Commission. On November 7, 2012, the Commission issued a unanimous decision affirming and adopting the arbitrator's decision. The Commission also remanded the matter to the arbitrator for further proceedings regarding additional amounts of TTD benefits or compensation for permanent disability, if any, pursuant to *Thomas*, 78 Ill. 2d 327. Respondent sought judicial review of the Commission's decision in the circuit court of Bureau County. On December 31, 2013, the court confirmed the Commission's decision.

¶ 9 B. Permanency Proceedings

¶ 10 In the more than two years that followed, claimant sought further medical treatment and additional disputes arose between the parties. The parties filed a "Request for Hearing" form, listing six disputed issues: (1) whether claimant's current condition of ill-being was causally connected to the October 11, 2009, work accident; (2) whether respondent was liable for unpaid medical bills; (3) whether claimant was entitled to additional TTD benefits; (4) whether claimant was entitled to attorney fees and penalties; (5) whether claimant was entitled to PTD benefits; and (6) the amount of credit due to respondent. The matter proceeded to a second arbitration hearing on May 10, 2016.

¶ 11 1. Claimant's Testimony

¶ 12 Claimant, who converses primarily in Spanish, testified to the following details with the assistance of a certified interpreter, who was approved by both parties. Claimant continued to experience back pain after the March 28, 2012, hearing, but she did not seek further treatment until 2014. Claimant later clarified that, during the two-year treatment gap, she had been prescribed pain medication and advised to remain off work.

¶ 13 In 2014, claimant sought further treatment after she experienced worsening lower back

pain that radiated down her legs. Claimant first contacted Dr. George E. DePhillips, a neurosurgeon, who had previously examined her and recommended lumbar fusion surgery. At Dr. DePhillips' direction, claimant reported to Illinois Valley Community Hospital for a magnetic resonance imaging (MRI) scan. Dr. DePhillips reviewed the MRI scan and initially recommended surgery but, upon further discussion with claimant, recommended against it, finding that the risks of surgery outweighed any potential benefit.

¶ 14 In September 2014, Dr. DePhillips advised claimant that she was permanently and totally disabled from work. Claimant did not return to Dr. DePhillips for further treatment after September 2014. Claimant, instead, sought further treatment with Dr. Alejandro Bernal, her primary care physician. Dr. Bernal initially prescribed claimant medication for pain and depression, but after claimant began experiencing digestive issues, Dr. Bernal stopped claimant's pain medication. Claimant explained that she did not currently take prescription pain medication. She, instead, took the highest recommended dose of Tylenol or Advil.

¶ 15 On November 4, 2014, claimant presented to Dr. Sean A. Salehi for an independent medical evaluation (IME) at respondent's request. According to claimant, Dr. Salehi's evaluation was short and consisted of a brief interview with no physical examination. Claimant recounted that Dr. Salehi asked her a series of questions, asked her to signal where she was feeling pain and had her "lay down any which way [she] could and that was it." Claimant cooperated during the evaluation but was unable to "lay flat," as Dr. Salehi had requested. She disagreed with Dr. Salehi's opinion that she was "fine." On cross-examination, claimant adamantly denied undergoing a physical examination, despite acknowledging Dr. Salehi's deposition testimony that he conducted a complete neurological and physical examination of claimant on November 4, 2014.

¶ 16 In August 2015, claimant presented to Dr. Robert E. Eilers for further evaluation at her

attorney's request. Unlike Dr. Salehi, Dr. Eilers performed a physical examination of claimant. On cross-examination, respondent's attorney asked claimant if Dr. Eilers had testified during his deposition that she may be able to obtain a sedentary position on a part-time basis. Claimant's attorney objected, arguing that claimant was not present during the deposition and, thus, did not know the substance of Dr. Eilers' testimony. The arbitrator overruled the objection, but claimant was unable to confirm Dr. Eilers' testimony in that regard. Claimant admitted, however, that she had not attempted to find part-time sedentary work. She also admitted that no doctor currently recommended surgery.

¶ 17 On redirect, claimant's attorney posed the following question to claimant: "Ma'am, Dr. Eilers indicated he felt you could not be competitively employed in the work force, would you agree with that?" Respondent's attorney objected, arguing that the question called for a vocational opinion. The arbitrator overruled the objection, stating "I think she can answer that." Claimant then affirmed that she would agree with Dr. Eilers that she could not be competitively employed in the work force.

¶ 18 Claimant testified that, prior to the October 11, 2009, work accident, she performed a number of daily tasks at home, including cooking, cleaning and laundry. She also enjoyed activities with her children. Following the work accident, however, she was unable to perform these daily tasks and activities. Claimant did not return to work for respondent following the October 11, 2009, accident, and respondent never asked her to return. She denied performing any type of work after the March 28, 2012, hearing. She had filed for social security benefits, but her application remained pending. Claimant disagreed with Dr. Salehi's opinion that she could return to work, including work as a mushroom picker. Claimant estimated that her previous job required her to climb up and down stacked mushroom beds 50 times per day. Claimant asked that the arbitrator

find her permanently and totally disabled from all work.

¶ 19 2. Carolyn Fettik's Testimony

¶ 20 Fettik, respondent's harvesting supervisor, testified to the following details on respondent's behalf. Fettik was employed by respondent and had been so employed for the last 30 years. Fettik was employed as a picker for 12 years before she was promoted to her current position, harvesting supervisor. While working as harvesting supervisor for the last eight years, Fettik supervised and trained respondent's harvesting pickers. Fettik explained that pickers carry specific equipment and tools to perform their job duties, including a "lug," which holds up to four baskets of mushrooms, and a stump bucket, which holds the discarded product. Fettik clarified that the lug connects to the stump bucket to form one unit, and that the unit hangs from hooks on the side of the mushroom beds. Fettik initially estimated that a full lug weighed 20 pounds, but she later testified that a lug with four full baskets weighed "about 12 pounds." According to Fettik, pickers usually carried less than 20 pounds and never climbed down the stacks with a full lug of product. Fettik agreed that pickers could carry less weight by filling only one basket at a time.

¶ 21 On cross-examination, Fettik admitted that a harvesting picker's earnings depended on the amount of product they harvested. She explained that a full lug and stump bucket could weigh up to 28 pounds. She also agreed that the job was "pretty physical" and required a fair amount of agility.

¶ 22 3. Harvesting Picker Job Description

¶ 23 Respondent prepared a document, titled "Job Description/Analysis," which described the job duties of a harvesting picker as follows. The primary job duties of a picker include harvesting, or picking, mushrooms from beds of stacked trays ranging from one to eight feet in height. Harvesting pickers often squat or kneel on the concrete floor to pick mushrooms at the lower levels

and climb the stacks of trays, spaced 24 inches apart, to pick mushrooms from the higher levels. The position requires frequent lifting and carrying of a picking lug (mushroom basket hanger), stump cans, shelf and baskets weighing up to 20 pounds.

¶ 24 4. Medical Records

¶ 25 On May 22, 2012, and June 12, 2012, claimant presented for follow-up evaluations with Dr. DePhillips. At the May 22, 2012, visit, Dr. DePhillips noted that claimant had experienced worsening lower back pain and difficulty carrying out normal daily activities. Dr. DePhillips ordered an MRI of claimant's lumbar spine, noting that the most recent MRI scan, which revealed disc degeneration and protrusion at both the L3-L4 and L4-L5 levels, was from October 2011. Dr. DePhillips discussed lumbar fusion surgery with claimant but indicated that he would make a final decision after reviewing the updated MRI scan. Dr. DePhillips refilled claimant's prescription medications and recommended that she remain off of work until her next appointment.

¶ 26 Dr. DePhillips' notes from the June 12, 2012, visit indicated that claimant underwent an MRI scan on May 29, 2012, which revealed disc desiccation and bulging at the L3-L4 and L4-L5 levels. Dr. DePhillips also noted that Dr. Michel Malek had performed a discogram on claimant, which provoked concordant pain at the same levels. Based on the testing results, Dr. DePhillips opined that it was "reasonable to consider a lateral retroperitoneal transpsoas approach for interbody discectomy and fusion L3-L4 and L4-L5 levels with percutaneous pedicle screw fixation." Dr. DePhillips recommended, however, that claimant obtain a second opinion prior to proceeding with surgery, as Dr. Salehi had previously "disagreed with the need for surgery and felt that [claimant's] pain was not discogenic in origin or related to any structural abnormalities and quoted no evidence of neurologic impingement." Dr. DePhillips also noted that Dr. Malek had not provided a final opinion regarding claimant's need for surgery.

¶ 27 On May 20, 2014, nearly two years later, Dr. DePhillips ordered another MRI scan of claimant's lumbar spine. On June 2, 2014, claimant reported to Illinois Valley Community Hospital for the MRI scan, which revealed mild to moderate neural foraminal encroachment at L5-L6.

¶ 28 At a follow-up appointment on July 24, 2014, claimant discussed the results of the MRI scan with Dr. DePhillips. According to Dr. DePhillips' notes, claimant had chronic low back pain, which was "positive during provocative discography at the L3-L4 and L4-L5 levels." Dr. DePhillips was reluctant to proceed with surgery without a confirmation discogram, as the previous study had been performed three years earlier. He would consider surgery if a follow-up discogram was consistent with the initial discogram showing L3-L4 as the primary pain generator. Dr. DePhillips recommended that claimant remain off of work until her next appointment.

¶ 29 Shortly after his appointment with claimant on July 24, 2014, Dr. DePhillips wrote a letter to Dr. Bernal regarding claimant's history and condition. Dr. DePhillips noted that claimant had presented to his office to discuss surgical options for chronic low back pain after four years of unsuccessful conservative treatment. Dr. DePhillips noted that two other physicians, Drs. Salehi and Malek, had not recommended surgery based on their previous evaluations of claimant's condition. Dr. DePhillips explained that the most recent MRI scan of claimant's lumbar spine, dated June 2, 2014, revealed disc dehydration at the L3-L4 and L4-L5 levels. Dr. DePhillips also noted that claimant had a sixth-grade education and had not been able to work since her October 11, 2009, work injury.

¶ 30 On August 6, 2014, claimant underwent a lumbar discography and postprovocation discography computerized tomography (CT) scan. The reviewing physician noted an internal disc disruption but that claimant's pain "was not concordant."

¶ 31 On August 7, 2014, claimant presented for a follow-up appointment with Dr. DePhillips. Dr. DePhillips noted that claimant's previous discogram had provoked concordant pain at the L2-L3 and L3-L4 levels, but the August 6, 2014, discogram provoked concordant pain only at the L5-S1 or L6-S1 injection, or "the lowest-most disc." Claimant reported constant lower back pain with intermittent pain radiating down her legs, which Dr. DePhillips found was consistent with the results of the discogram. He discussed surgical treatment options with claimant, including a lumbar fusion surgery, and recommended that claimant remain off of work pending authorization for surgery.

¶ 32 On September 6, 2014, claimant underwent another lumbar discogram. The reviewing physician diagnosed claimant with lumbar spondylosis and stenosis.

¶ 33 On September 22, 2014, Dr. DePhillips prepared a letter to claimant setting forth his most recent findings and opinions regarding her back condition. Dr. DePhillips opined that the risks of surgery outweighed the benefits and, thus, his current recommendation was "against surgical intervention." He recognized that he had previously recommended lumbar fusion surgery but, upon further consideration, concluded that surgery was no longer reasonable, given "the passage of time" and "continued deterioration in [claimant's] lumbar spine." While Dr. DePhillips noted that surgery may be appropriate in the future, he would not proceed with the operation at that time. Dr. DePhillips' letter also included the following paragraph:

> "Taking into account your age as well as the effects of the injury and the condition of your lumbar spine as it exists today and the symptoms provoked by those injuries, it is my opinion that you are currently permanently and totally disabled from meaningful or gainful employment due to the work injury of 10/11/09. You will likely need ongoing medical care, specifically pain management, and as I said potentially surgical intervention in the

future."

Dr. DePhillips concluded the letter by advising claimant to contact him if her condition worsened or she wanted to return for an additional consultation.

¶ 34 On March 15, 2015, claimant presented to Dr. Bernal with complaints of stress and anxiety, as well as back and neck pain. Dr. Bernal noted that claimant injured her back in a work accident in 2009 and was prescribed Norco for her pain until 2014. Dr. Bernal renewed claimant's prescriptions for Norco and anxiety medication.

¶ 35 5. Opinion of Dr. Eilers

¶ 36 On August 10, 2015, Dr. Eilers, a board-certified physician of physical medicine and rehabilitation, examined claimant and prepared a report setting forth his findings and opinions. In his report, Dr. Eilers noted that claimant, who was then 44 years old, had sustained injuries when she fell approximately five feet onto her buttocks, back and head. X-rays taken the day after her injury revealed degenerative arthritis and changes, and further testing was delayed once claimant discovered she was pregnant. X-rays and MRI scans taken in September 2010 revealed an L1-L2 wedge compression fracture, along with disc degeneration with bulging at L3-L4, L4-L5 and L5-S1. Conservative treatment, including physical therapy and pain medication, had provided temporary relief but did not cure claimant's pain. She reported difficulty sleeping due to constant low back pain that radiated down her legs. Her pain worsened with prolonged walking, sitting, standing and daily activities. Although claimant was taking "Norco 10/325" at that time, she had indicated that "she would prefer to avoid the medications, as she may exceed her limits and then she has more pain."

¶ 37 Claimant reported difficulties with numerous activities of daily living that required bending, including bathing, dressing, cooking, cleaning, laundry and yard work. She used a single-point cane and could walk short distances but had difficulty walking long distances. Claimant also

had difficulty with activities that required overhead lifting, and she reported that "she can lift less than about a gallon of milk (7 pounds)." As a result, she was unable to "pick up, bath[e], clothe, or play with her youngest child." Claimant indicated that, because "turning or moving her legs" in a car was "uncomfortable," she felt unsafe driving. She preferred not to drive but was under no driving restrictions.

¶ 38 Regarding claimant's education, work and social history, Dr. Eilers noted that claimant had completed a fifth-grade education in Mexico and had worked for respondent as a picker for 12 to 13 years. Her job duties as a picker required extensive climbing, bending, twisting, turning, and continuous lifting of 35 to 40 pounds.

¶ 39 Dr. Eilers' physical examination of claimant's back revealed "significant myofascial trigger points over the lumbosacral paraspinals and over the piriformis muscle, as well as some tenderness over the tensor fascia lata." Dr. Eilers noted that claimant had significant reduction in her lumbar lordosis and pain on palpation. While claimant could rotate left and right, she experienced pain. Dr. Eilers also noted limited forward flexion and limitations with extension.

¶ 40 Dr. Eilers listed three impressions regarding claimant's back condition in his report. He first noted findings consistent with multiple lumbar compression fractures at L1-L2. Dr. Eilers opined that claimant "has had aggravation of underlying degenerative disk disease and changes in her lumbar spine secondary to her fall occurring at work on 10/11/2009 and aggravating degenerative disks at L3-L4, L4-L5, L5-L6." Second, Dr. Eilers noted severe myofascial pain involving the lumbosacral paraspinals, piriformis and the SI joint secondary to claimant's fall. Third, Dr. Eilers noted "[c]hronic pain secondary to the myofascial pain and lumbar degenerative disk disease with limitation in mobility and dependency on narcotic analgesics."

¶ 41 Dr. Eilers opined that claimant's injuries were related to her work accident and that the medical care she had received prior to his examination was reasonable and appropriate. Dr. Eilers also offered the following opinions in his report:

> "She is not able and will never be able to return to her competitive employment or her position at Monterey Mushrooms, and in light of her language limitations and her cognitive educational experience, she is probably permanently and totally disabled from any competitive employment, as it would have to be sedentary work or desk-based work, and she does not have the skills to carry that out. She is certainly going to require lifetime management for pain and modification of pain medications, and she may still be considered a candidate for surgical intervention in light of an address towards managing pain, particularly as she ages. I do not feel that surgery would be unreasonable, but I do agree with her surgeon in that doing surgery would not improve her overall functional status."

Dr. Eilers also opined that avoiding surgery would not be unreasonable for claimant, given the significant risks. Dr. Eilers concluded that neither pain medication nor surgery would cure claimant's condition, and that claimant "would not be able to return to her prior competitive employment even if she undergoes the surgery." Consequently, in Dr. Eilers' opinion, claimant "continues to remain permanently and totally disabled for competitive employment, and at this point in time her maintenance therapy and management would be most indicated."

¶ 42 In addition to Dr. Eilers' report, which was admitted without objection, claimant sought to admit the evidence deposition of Dr. Eilers, taken on October 21, 2015. When the arbitrator asked respondent's attorney if there was "[a]ny objection to the actual introduction of the deposition" into evidence, respondent's attorney responded, "[n]o, subject to the objections I may have made during the depositions." The arbitrator admitted the evidence deposition into evidence and stated that she would "make a ruling on each objection raised during that deposition."

¶ 43 During the deposition, Dr. Eilers testified that he performed two medical evaluations of claimant's condition following her injury on October 11, 2009. He first evaluated claimant on July 19, 2011, and he had testified regarding the details of the first evaluation in a prior deposition. Dr. Eilers explained that claimant sought treatment for back pain and "musculoskeletal pain" shortly

after the October 11, 2009, work accident, but claimant was pregnant so "some of the tests were delayed." Plane x-rays subsequently revealed "an L1-L2 wedge compression fracture of the back," and "some degenerative disk changes at L3-L4, L4-L5 and L5-S1." When Dr. Eilers conducted the first evaluation in 2011, claimant had received only conservative treatment and still "needed a discogram to determine the problems" with her low back.

¶ 44 Dr. Eilers next evaluated claimant on August 10, 2015, at her attorney's request. During the second evaluation, Dr. Eilers obtained an updated history from claimant. Claimant was cooperative and reported continued difficulties sleeping, as well as constant low back pain that radiated down her legs. At that time, claimant was managing her pain with narcotic analgesics. Dr. Eilers conducted a physical examination of claimant on August 10, 2015. His testimony regarding the details of the physical examination was consistent with the findings set forth in his report. Dr. Eilers reviewed the most recent imaging of claimant's back and the results from the discogram procedure that was performed after his initial evaluation of claimant. In Dr. Eilers' opinion, the discogram revealed abnormalities at certain levels in claimant's low back. Dr. Eilers also reviewed the records from Dr. DePhillips' office. Dr. DePhillips had initially recommended a lumbar fusion surgery but later concluded that surgery would not improve claimant's level of function. It was Dr. Eilers' understanding that "Dr. DePhillips felt that a fusion would not cure her problems, and that basically she has a permanent total disability and wouldn't be a candidate for surgery, since it wouldn't improve her level of function and that pain management was a more appropriate approach." While Dr. DePhillips did not rule out the possibility of surgery in the future, Dr. DePhillips had expressed a preference that claimant avoid surgery at that time.

¶ 45 Based on his examination and review of the records, Dr. Eilers formed impressions, or opinions, regarding claimant's condition to a reasonable degree of medical certainty. Dr. Eilers opined that claimant had findings consistent with multiple lumbar compression fractures at L1-L2 and that claimant's October 11, 2009, work accident aggravated her underlying degenerative disc

disease, specifically, at L3-L4, L-4-L5 and L5-L6. Dr. Eilers also opined that claimant "has severe myofascial pain in the lumbosacral paraspinals, and she has SI joint involvement due to the fall, and she has chronic pain due to the myofascial pain, her degenerative dis[c] disease, which results in limited mobility and dependency on narcotic analgesics." Dr. Eilers further opined to a reasonable degree of medical certainty that claimant's current condition was caused by the October 11, 2009, work accident, and that her treatment for that condition was reasonable and necessary.

¶ 46 Dr. Eilers testified that claimant could not return to her previous job with respondent due to her current condition and that claimant's other employment options would be very limited, given that "she's not fluent in English, et cetera." According to Dr. Eilers, claimant was totally disabled from competitive employment as a mushroom picker and, "[a]t best, she might be able to do something sedentary on a part-time basis." Dr. Eilers noted that claimant could "work an hour or so, and other days she won't." As a result, Dr. Eilers opined that claimant was not "going to be competitively employed."

¶ 47 Respondent's attorney then objected on the grounds that Dr. Eilers was not a vocational expert. Dr. Eilers then attempted to clarify his opinion regarding claimant's employability, stating that she could not work an eight-hour day due to her chronic pain and ingestion of narcotics for pain management. While Dr. Eilers believed that claimant could possibly perform light, sedentary work, he noted that the number of hours claimant could work would "vary day-to-day." Dr. Eilers could not predict the number of hours claimant could work on a daily basis, noting that it would "depend on whether she's taking medications or not."

¶ 48 Dr. Eilers further opined that claimant would require long-term treatment for pain management and her condition could possibly require surgical intervention in the future. Respondent's attorney objected on the grounds that Dr. Eilers' opinion called for speculation. Respondent's attorney objected on the same grounds when claimant's attorney asked Dr. Eilers if claimant could return to competitive employment if she had surgery in the future. Over the

objection, Dr. Eilers clarified that claimant would not return to competitive employment even if she had the previously recommended surgery.

¶ 49 On cross-examination, Dr. Eilers agreed that he had referenced a functional capacity assessment (FCA)[3] in his report, but he could not recall the date of the FCA. The FCA revealed that claimant had low back pain and "[t]here were some inconsistencies in terms of what she could and couldn't do." Dr. Eilers believed the FCA showed that claimant could perform sedentary, light work "at the very best." Dr. Eilers did not find the FCA helpful or definitive in his consideration of claimant's employability, given that claimant's pain level varied on a daily basis. When asked if his opinion that claimant was permanently and totally disabled was predicated by his conclusion that there would be no competitive employment opportunities for her, Dr. Eilers responded as follows:

> "Essentially. Clearly she's not going to go back to [respondent], doing what she did. And I don't see her really being able to compete in the, you know, sedentary type position, because some days she might do an hour or two, other days she can't do it. She's on narcotic analgesics, and she's still having chronic pain.
>
> So, I don't see her being competitively employed. So, some days will be better, some are going to be worse, some days she can work, some days she can't. For an employer, he wants somebody to be there say whatever it is, if it's 40 hours a week that she be here. She's not going to necessarily achieve that. That's the problem."

¶ 50 Dr. Eilers admitted that he was not a certified rehabilitation consultant, but he believed that such consultant would agree that claimant could perform sedentary work, at best. Dr. Eilers, again, reiterated that the number of hours claimant could work would vary on a daily basis. Dr. Eilers elaborated that claimant would not be able to work eight hours per day or 40 hours per week, but she may be able to work in the "cottage industry" doing "some piece things at home or work[.]"

[3] The FCA has not been included in the record on appeal.

Dr. Eilers agreed with Dr. DePhillips' opinion that, although surgery could be performed, surgery would not allow claimant to return to work. Dr. Eilers admitted that he was not a neurosurgeon or spine orthopedic surgeon.

¶ 51 6. Opinion of Dr. Salehi

¶ 52 On November 4, 2014, Dr. Salehi, a board-certified neurosurgeon, conducted an IME of claimant, who was accompanied by a Spanish interpreter, and prepared a report setting forth his findings and opinions. Dr. Salehi, who had previously conducted an IME of claimant, noted that claimant had since received additional treatment, including therapy and injections, and that surgery had been recommended following a discogram on August 7, 2014. Claimant reported no change in her condition since the last examination, aside from worsening, constant pain in her lower back that radiated into her legs. Claimant took a daily dose of Norco for the pain she experienced, which she rated at 10/10. While Dr. Salehi's neurological examination revealed bilateral sciatic notch tenderness, he noted that claimant exhibited abnormal superficial lumbosacral tenderness and inconsistent, overreacted behavioral responses for pain. Dr. Salehi further noted that claimant refused to lie flat and perform lumbar range of motion. Dr. Salehi concluded his report with the following impression and recommendation:

> "**Problem # 1:** LOW BACK PAIN SYNDROME (ICD-724.2)
> My opinions remain the same as my last IME report of 7/12/11 and have not changed following re-evaluation of the patient today. In response to the specific question posed in the cover letter of 11/4/14, she is currently at [maximum medical improvement]."

¶ 53 Dr. Salehi testified to the following details by evidence deposition on January 21, 2016. Dr. Salehi clarified that his neurosurgery practice is primarily focused on the entire spine, as opposed to the brain and peripheral nerves. In an average week, he sees approximately 60 to 70 patients and performs two or three IMEs. He performed his third IME of claimant on November

4, 2014, and prepared a report following the examination. Dr. Salehi had previously examined claimant in April 2011 and July 2011. He had testified regarding his findings and opinions from 2011 in a previous proceeding. During the examination on November 4, 2014, claimant indicated that surgery had been recommended but did not specify the type of surgery or who had recommended the surgery.

¶ 54 During the November 4, 2014, examination, Dr. Salehi conducted a neurological examination of claimant. Dr. Salehi's testimony regarding that examination was consistent with his report. Dr. Salehi's opinions remained unchanged from 2011 upon reexamination of claimant. In his opinion, claimant's spinal tenderness was "superficial." Based on his examination and the history provided by claimant, Dr. Salehi opined, within a reasonable degree of medical and surgical certainty, that claimant was suffering from "lower back pain syndrome" or "chronic lower back pain." After reviewing the available imaging, Dr. Salehi was unable to pinpoint the reason for claimant's pain and his diagnosis was based on claimant's complaints. Dr. Salehi believed there was a "non-organic" reason for claimant's pain. Dr. Salehi also opined, within a reasonable degree of medical and surgical certainty, that claimant, who was at MMI, could return to her pre-injury level of work. Dr. Salehi based his opinions on the length of time since claimant's injury, the nature of her treatment and the lack of efficacy of any further medical care. He did not believe that claimant required any additional medical treatment, but he advised her to "keep an active lifestyle" without formal medical care. Dr. Salehi indicated that he had previously recommended that claimant "be tapered off of her Norco." In his opinion, the long-term use of narcotic pain medications for chronic lower back pain could worsen a patient's condition and cause dependency issues.

¶ 55 On cross-examination, Dr. Salehi agreed that long-term use of pain medication alters a

patient's perception of pain and that claimant was only prescribed pain medication as treatment for her October 11, 2009, injury. Dr. Salehi did not recommend claimant undergo surgery in 2011, and, even though surgery was subsequently approved by the Commission in 2012, he did not currently recommend surgery. Dr. Salehi clarified that surgery would be warranted only if there was an anatomic, rather than a non-organic, reason for claimant's pain. Dr. Salehi agreed that claimant "appeared to have some desire to get better."

¶ 56 No further evidence was presented at the May 10, 2016, hearing. It appears that the arbitrator reopened, and closed, proofs on June 22, 2016, to address claimant's average weekly wage and TTD rates; however, the transcript from this proceeding has not been included in the record on appeal.

¶ 57 7. Arbitrator's Decision

¶ 58 On January 25, 2017, the arbitrator issued a written decision, finding that claimant's current low back condition was causally connected to the October 11, 2009, work accident. In so finding, the arbitrator noted that, following the section 19(b) hearing on March 28, 2012, the Commission determined that claimant's low back condition was caused by the work accident and that surgery was reasonable and necessary to cure claimant's work injury. However, claimant was unable to obtain further treatment until July 24, 2014, after the case was finalized. The arbitrator noted that claimant's condition remained unchanged, as there was no indication of an intervening accident. The arbitrator also noted that Dr. DePhillips had elected not to proceed with the surgery due to the delay in time. The arbitrator placed no weight on Dr. Salehi's opinion that claimant had no ongoing back problems because he offered the same opinion that the Commission had previously rejected.

¶ 59 The arbitrator awarded claimant unpaid medical bills totaling $1,176.84 and additional TTD benefits at a rate of $357.37 per week for 129-5/7 weeks for the time period of March 29,

2012, to September 22, 2014—the date Dr. DePhillips found claimant permanently and totally disabled. Respondent was credited $34,494.43 for amounts of TTD previously paid. The arbitrator also awarded claimant PTD benefits at a minimum rate of $461.78 per week for life commencing September 23, 2014. In support, the arbitrator relied on Dr. DePhillips' determination that claimant "was medically permanently and totally disabled[,]" and Dr. Eilers' opinion that claimant was permanently and totally disabled. While the arbitrator acknowledged Dr. Eilers' testimony that claimant could, at best, potentially perform sedentary work, the arbitrator noted that Dr. Eilers opined claimant was functionally, totally disabled because her ability to work may be limited to "one to two hours a day at best, and other days not at all." The arbitrator noted that, after claimant proved she was medically permanently and totally disabled, the burden shifted to respondent to prove claimant was employable. The arbitrator, again, rejected the medical opinion of Dr. Salehi, noting that it was the same opinion that had been previously rejected by the Commission. In addition, the arbitrator awarded claimant penalties at "50% of $42,289.07 [$76,783.50 TTD owed (from March 29, 2012, to May 10, 2016) less $34,494.43 paid], or $21,144.54" under section 19(k) of the Act (805 ILCS 305/19(k) (West 2016)). The arbitrator also ordered respondent to pay "20% of $42,289.07, or $8,457.81 in attorneys' fees" under section 16 of the Act (820 ILCS 305/16 (West 2016)). In support, the arbitrator found that respondent's failure to pay TTD based on Dr. Salehi's opinion, which had previously been rejected by the Commission, was unreasonable and vexatious.

¶ 60 8. Decisions on Review

¶ 61 Respondent filed a petition for review of the arbitrator's decision before the Commission. On March 12, 2018, the Commission issued a unanimous decision affirming and adopting the arbitrator's decision. Respondent sought judicial review of the Commission's March 12, 2018,

decision in the circuit court of Bureau County. On November 14, 2019, the court entered an order confirming the Commission's decision. Respondent now appeals.

II. Analysis

¶ 62 On appeal, respondent first argues that the Commission's award of PTD benefits is against the manifest weight of the evidence. In support, respondent maintains that the Commission misconstrued the opinions of Drs. DePhillips and Eilers as medical evidence of permanent total disability. Respondent also maintains that claimant failed to present any evidence showing that she was obviously unemployable or that she fell into the odd-lot category.

¶ 63 "In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury." *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 1007893WC, ¶ 33. This presents a question of fact to be resolved by the Commission, and a reviewing court will not disturb the Commission's determination in this regard unless it is against the manifest weight of the evidence. *Professional Transportation Inc.*, 2012 IL App (3d) 1007893WC, ¶ 33. A finding made by the Commission is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Id.* ¶ 33.

¶ 64 "An injured employee can establish his entitlement to PTD benefits under the [A]ct in one of three ways, namely: [(1)] by a preponderance of the medical evidence; [(2)] by showing a diligent but unsuccessful job search; or [(3)] by demonstrating that, because of age, training, education, experience, and condition, there are no available jobs for a person in his circumstance." *Id.* ¶ 34. In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 288-89 (1983), our supreme court explained that:

> "[A]n employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations.] The claimant need not, however, be reduced to total physical incapacity before a permanent

> total disability award may be granted. [Citations.] Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market. [Citation.]"

If, however, a claimant's disability is "not so limited in nature that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, to be entitled to PTD benefits under the Act, the claimant has the burden of establishing the unavailability of employment to a person in his circumstances; that is to say that he falls into the 'odd-lot' category." *Ameritech Servs., Inc. v. Illinois Workers' Comp. Comm'n*, 389 Ill. App. 3d 191, 203-04 (2009). A claimant may prove that he or she falls into the odd-lot category "by (1) showing diligent but unsuccessful attempts to find work or (2) by showing that he will not be regularly employed in a well[-]known branch of the labor market." *Levato v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶ 23 (citing *Ameritech Servs.*, 389 Ill. App. 3d at 203-04).

¶ 65 Here, the Commission, in affirming and adopting the arbitrator's decision, found that claimant proved she was permanently and totally disabled as of September 22, 2014. In so finding, the Commission relied on Dr. DePhillips' opinion that claimant was medically permanently and totally disabled, which was set forth in a letter, dated September 22, 2014.[4] The Commission also relied on Dr. Eilers' opinion that claimant was permanently and totally disabled. Dr. Eilers' opinion was set forth in his report and his deposition testimony. However, respondent maintains that the Commission abused its discretion by allowing "Dr. Eilers' vocational testimony" into evidence and committed reversible error by relying on Dr. Eilers' opinion in finding claimant permanently and totally disabled.

¶ 66 Evidentiary rulings made during the course of a workers' compensation proceeding will be

[4] While Dr. DePhillips' letter was inadvertently dated, "September 22, 2104," it is clear that the intended date was September 22, 2014.

upheld on review absent an abuse of discretion. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010 (2005). Here, during the deposition of Dr. Eilers, respondent objected to Dr. Eilers' testimony that claimant could not be "competitively employed" on the grounds that he was not qualified to offer a vocational opinion. When claimant sought to admit Dr. Eilers' deposition testimony into evidence at the arbitration hearing, respondent renewed any objections made during the deposition. While the arbitrator indicated that she would rule on each objection, there is no indication in the record that the arbitrator expressly ruled on respondent's objection. It appears the arbitrator impliedly overruled respondent's objection by relying on Dr. Eilers' opinion that claimant was permanently and totally disabled in the written decision that was issued following the hearing, which was affirmed and adopted by the Commission.

¶ 67 Accordingly, we consider whether the Commission, in affirming and adopting the arbitrator's decision, abused its discretion in admitting, over respondent's objection, Dr. Eilers' testimony and opinion that claimant could not be "competitively employed." Respondent, relying on *People v. Hope*, 168 Ill. 2d 1, 23 (1995), argues that the Commission clearly abused its discretion by allowing into evidence the vocational opinions of a medical expert, who was not qualified to render such opinions.

¶ 68 While not cited by respondent, we find section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)) useful in our consideration of this issue. Section 8(a) provides that "[a]ny vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation." Vocational rehabilitation includes, but is not limited to, "counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution." 820 ILCS 305/8(a) (West 2014).

¶ 69 Here, Dr. Eilers testified that claimant could not return to her previous job as a mushroom picker due to her current condition, and that her other employment options would be very limited, given that "she's not fluent in English, et cetera." Dr. Eilers opined that, "[a]t best, she might be able to do something sedentary on a part-time basis." However, Dr. Eilers noted that claimant's ability to work would be inconsistent, and that some days she could "work an hour or so, and other days she won't." After reviewing claimant's limitations, Dr. Eilers opined that she was not "going to be competitively employed." However, Dr. Eilers readily admitted that he was not a certified vocational rehabilitation counselor, and there is no indication that he attempted to assist claimant in obtaining part-time sedentary work. As such, Dr. Eilers was not qualified to offer the opinion that claimant could not be competitively employed in the work force, including sedentary-type positions.

¶ 70 We also find it significant that, when asked on cross-examination if his opinion that claimant was permanently and totally disabled was predicated on his conclusion that there would be no competitive employment opportunities for her, Dr. Eilers responded, "[e]ssentially." Dr. Eilers elaborated that he could not "see [claimant] really being able to compete in the, you know, sedentary type position, because some days she might do an hour or two, other days she can't do it." Because Dr. Eilers' unqualified opinion that claimant could not obtain sedentary employment was the basis for his opinion that she was permanently and totally disabled, we agree with respondent that Dr. Eilers' opinion testimony was improperly admitted into evidence.

¶ 71 We recognize that "not every admission of incompetent evidence requires reversal." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 537 (2007) (citing *Greaney*, 358 Ill. App. 3d at 1013). "[W]hen an examination of the record as a whole demonstrates that the erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its

admission is harmless." *Westin Hotel*, 372 Ill. App. 3d at 537 (citing *Greaney*, 358 Ill. App. 3d at 1013). After carefully reviewing the record in this case, we are unable to conclude that the Commission's finding of permanent total disability was supported by other competent evidence so as to render the admission of Dr. Eilers' testimony harmless.

¶ 72 As noted, the Commission clearly relied on Dr. Eilers' opinion in finding that claimant proved she was permanently and totally disabled. The Commission also relied on Dr. DePhillips' opinion that claimant was medically permanently and totally disabled. However, Dr. DePhillips did not testify regarding his opinion by way of an evidence deposition. Instead, his opinion was set forth in the medical records, specifically, a one-page letter, dated September 22, 2014. The letter, which was addressed to claimant, provides in pertinent part:

> "Taking into account your age as well as the effects of the injury and the condition of your lumbar spine as it exists today and the symptoms provoked by those injuries, it is my opinion that you are currently permanently and totally disabled from meaningful or gainful employment due to the work injury of 10/11/09."

A close examination of the arbitrator's decision fails to reveal the weight placed on the opinion of Dr. DePhillips, as opposed to the opinion of Dr. Eilers. Consequently, it is unclear whether the Commission would have found claimant permanently and totally disabled based solely on the opinion of Dr. DePhillips without consideration of Dr. Eilers' opinion.

¶ 73 In light of the foregoing, we remand the matter to the Commission for a determination of whether claimant's disability is properly categorized as permanent total, without consideration of Dr. Eilers' opinion testimony. On remand, the Commission should evaluate the basis for Dr. DePhillips' opinion and determine whether his opinion, along with any other evidence in the record, establishes claimant's entitlement to PTD benefits under any of the three categories

specified above. If the Commission finds claimant has failed to prove entitlement to PTD benefits, it should consider whether claimant's disability is properly categorized as permanent partial. The Commission should make specific findings of fact and conclusions of law in support of its decision. We voice no opinion regarding the ultimate outcome of these issues, and we choose not to address respondent's remaining contentions on appeal until these issues are resolved by the Commission.

¶ 74 III. Conclusion

¶ 75 For the foregoing reasons, we reverse the judgment of the circuit court of Bureau County, which confirmed the decision of the Commission; vacate the decision of the Commission, which affirmed and adopted the decision of the arbitrator; and remand for further proceedings consistent with this order.

¶ 76 Reversed; vacated; cause remanded with directions.