COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1043 **Cir. Ct. No. 2008CV13357**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TOWER AUTOMOTIVE MILWAUKEE, LLC AND FIDELITY & GUARANTY INSURANCE CO.,

PLAINTIFFS-APPELLANTS,

V.

TERRY SAMPHERE AND LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Tower Automotive Milwaukee, LLC and its insurer Fidelity & Guaranty Insurance Co. (collectively "Tower") appeal a circuit court judgment, affirming in part and reversing in part the Labor and Industry Review

Commission's decision to award temporary total disability ("TTD") benefits to Terry Samphere.[1] Tower raises six claims on appeal, four of which we find forfeited, and two of which we will address: (1) whether the Commission's findings of fact were based on credible and substantial evidence; and (2) whether the Commission misapplied those facts to the law addressing whether an applicant is attached to the labor market. We affirm.

BACKGROUND[2]

¶2 Terry Samphere worked for Tower for thirty-one years before retiring on June 30, 2003. During the course of his employment with Tower, Samphere held various positions, including: light press operator, welder handyman, and maintenance worker. These positions included various physically

[1] The circuit court reversed the Commission's award of benefits to Samphere for TTD benefits beyond the May 22, 2007 hearing date. The Commission admitted before the circuit court that its award of benefits beyond the hearing date was an error. Samphere did not appeal the circuit court's decision in this regard. Tower appeals the circuit court's decision to uphold the remainder of the Commission's decision.

[2] The background facts are gleaned from the parties' briefs (as confirmed by the record), the record, and the opinions of both the hearing examiner and the Commission. We note those facts the parties dispute.

In addition, we note that Tower's brief, while extensively referencing facts purportedly in the record, fails to comply with WIS. STAT. RULE 809.19(1)(d) (2007-08), which requires that the statement of the case include "appropriate references to the record." While Tower did include a general citation for each fact set forth, its citations were to exhibits generally and did not provide a pinpoint citation for each fact presented. Some of these exhibits were hundreds of pages long, containing unrelated medical records. Attempting to find some of the facts asserted by Tower in the record was at times akin to looking for a needle in a haystack. Indeed, the court was not able to locate all of the facts cited by Tower, and as we have previously noted, assertions of fact not found in the record are prohibited and will not be considered by the court. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). Tower is advised to include pinpoint citations in the future.

All references to the Wisconsin Statutes are to the 2007-08 version.

demanding responsibilities, summarized by the hearing examiner, and adopted by the Commission in its written decision, as follows:

> [Samphere's] … work activities involved significant amounts of standing, and fast repetitive pivoting at the knee while holding a piece of metal weighing 24 to 37 pounds. [Samphere] … sometimes banged his knees on the front of machines he was working with, and on metal stock which was stacked in the work area, or other obstructions. [Samphere] … spent a significant amount of time working in maintenance, where he was required to move 300 pound containers up and down stairs, using his knees to help guide the container. His job activities at times involved crawling on concrete underneath catwalks to lay down and remove rubber mats. He climbed 25 foot ladders, and at times had to walk while in a squatting position, and had to engage in a lot of bending and twisting at the knees. [Samphere's] … work over the years also required a significant amount of kneeling on concrete.

¶3 Samphere asserts that his work at Tower was a cause of his current knee injuries, resulting in a work-related disability. He claims his knee injuries require bilateral knee replacement surgeries; although only the left knee had undergone replacement at the time of the hearing before the hearing examiner. Samphere seeks TTD benefits from May 24, 2006, the date of his left knee replacement, and expenses related to his prospective right knee replacement.

¶4 Samphere began to seek medical treatment for pain in his left knee in November 1998. At that time, Samphere presented to Aurora Health Center-West Allis and complained that his left knee was "bothering him."[3] He was diagnosed with a left knee sprain.

[3] The medical report indicates that Samphere told doctors at that time that his knee began bothering him after he had begun jogging a week earlier. At the hearing before the hearing examiner, Samphere denied telling the doctor that he hurt his knee jogging or that he had ever jogged. The hearing examiner noted this discrepancy in his decision.

¶5 In August 2000, Samphere was again treated for left knee pain. He said at that time that his knee had begun swelling several days earlier. Clicking and popping of the left knee were noted, and Samphere walked with a limp. He was diagnosed with early degenerative joint disease of the left knee.

¶6 Samphere presented to the emergency room at St. Luke's Medical Center in January 2003, complaining of right knee pain.[4] He followed up with Dr. David Haskell that same month. Dr. Haskell assessed Samphere with a lateral collateral and capsular ligament sprain, and placed him in a cylinder cast. An MRI of Samphere's right knee revealed in part, medial and lateral meniscal tears, large joint effusion, bursitis, and a possible partial tear to the medial collateral ligament. Samphere underwent surgery on his right knee later that month. In March 2003, Samphere returned to Tower where he worked until his retirement in June 2003, three months later.

¶7 Following his retirement, Samphere presented to Dr. William Potos in February 2004 with right knee pain. An MRI revealed cartilaginous irregularity and tendonopathy. Samphere continued to see Dr. Potos for pain throughout 2005 and 2006.

[4] Tower contends that the medical report from St. Luke's indicates that Samphere told doctors that his knee began bothering him after he tripped on a shoelace; however, we cannot find a copy of that report in the record and Tower does not provide the court with a pinpoint citation. At the hearing before the hearing examiner, Samphere denied telling the doctors at St. Luke's that he tripped over a shoelace, and instead, testified that he woke up with swelling and did not know why. The parties do not appear to disagree that the St. Luke's report states that Samphere tripped on a shoelace. The hearing examiner noted the discrepancy between the report and Samphere's testimony in his decision.

¶8 In April 2006, Samphere saw Dr. James Stone with complaints of bilateral knee pain. A note from that visit states the following:

> [Samphere] has multiple joint complaints and feels that this is related to his work related duties in the past. He even asked Dr. Stone if his knees could be a work related injury. Dr. Stone, does not feel that this is work related, but degenerative in nature.[5]

¶9 Samphere also consulted with Dr. Donald Zoltan in April 2006, complaining of bilateral knee pain. Dr. Zoltan diagnosed Samphere with severe bilateral medial compartment osteoarthritis of the knees and significant bilateral patellofemoral osteoarthritis of the knees. On May 24, 2006, Dr. Zoltan performed a total arthroplasty on Samphere's left knee.

¶10 In November 2006, Dr. Zoltan completed a return to work form for Samphere, stating that Samphere was "permanent[ly]" unable to work from July 1, 2003 forward because of "knee pain" and "disability." The diagnosis on the return to work form was "severe arthritis both knees."

¶11 Dr. Richard Karr performed an independent medical examination of Samphere in January 2007. Dr. Karr opined that Samphere's knee condition was a

[5] The hearing examiner disregarded Dr. Stone's opinion in this regard, finding that the evidence did not indicate that Dr. Stone presented this conclusion to a reasonable degree of medical certainty and further that the evidence did not show what Dr. Stone knew with respect to Samphere's work activities.

result of degenerative osteoarthritis secondary to the normal progression of degenerative factors, and unrelated to Samphere's work activities at Tower.[6]

¶12 In April 2007, Dr. Zoltan completed a WKC-16-B form in which he affirmatively stated that Samphere's duties at Tower were a material cause of Samphere's knee condition. Dr. Zoltan had filled out another WKC-16-B form several months earlier in which he specifically found that while work was "a factor" of Samphere's knee problem, it was not "a material factor."

¶13 In May 2007, a hearing examiner conducted a hearing on Samphere's claim for worker's compensation benefits. The hearing examiner concluded that Samphere's years of strenuous work activity at Tower were a cause of Samphere's knee conditions and awarded Samphere TTD benefits.

¶14 Tower petitioned the Commission for review of the hearing examiner's decision. After review, the Commission adopted the hearing examiner's opinion in its entirety. Tower sought review of the Commission's decision in the circuit court. In a thorough and well-reasoned written opinion, the circuit court affirmed. This appeal follows.

[6] The hearing examiner disregarded Dr. Karr's opinion in this regard, finding that his report:

> contains little if any actual discussion of specific job activities … [and] does not adequately explain why or how the conclusion was reached that 31 years of strenuous activities involving the knees would not be expected to have at least some [e]ffect on the development and progression of degenerative joint disease.

STANDARD OF REVIEW

¶15 On appeal, we review the Commission's decision, rather than the circuit court's decision. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). Whether Samphere is entitled to TTD benefits through the Worker's Compensation Act presents a mixed question of fact and law. *See* ***Michels Pipeline Constr. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995).

¶16 The Commission's "'findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence.'" ***Id.*** (citation omitted). Credible evidence is that which excludes speculation or conjecture. *See* ***Bumpas v. DILHR***, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See* ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). "'The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding.'" ***Michels***, 197 Wis. 2d at 931 (citation omitted).

¶17 When reviewing the Commission's conclusions of law, we apply a sliding scale of deference that is contingent upon the level of the Commission's experience, technical competence, and specialized knowledge. ***Bretl v. LIRC***, 204 Wis. 2d 93, 104, 553 N.W.2d 550 (Ct. App. 1996). The greatest level of deference requires that we give great weight to the Commission's legal conclusions if: (1) the Commission was charged by the legislature with the duty of administering the statute; (2) the interpretation of the Commission is one of long-standing; (3) the Commission employed its specialized knowledge or expertise in forming the interpretation; and (4) the Commission's interpretation will provide

consistency and uniformity in the application of the statute. ***Tannler v. DHSS***, 211 Wis. 2d 179, 184, 564 N.W.2d 735 (1997). The next level of deference provides that if the Commission's decision is very nearly one of first impression, we must give due weight to that decision. ***Bretl***, 204 Wis. 2d at 104-05. Finally, we owe no deference to the Commission and will conduct a *de novo* review if it is clear that the case is one of first impression and the Commission's special expertise and experience are no greater than ours. ***Id.*** at 105.

¶18 The parties disagree on the level of deference applicable here. Tower argues that we should give the Commission's conclusions of law no deference because: (1) the Commission has been inconsistent in its application of the law as to the meaning of "current wage loss"; and (2) the Commission has admitted that it improperly granted Samphere benefits beyond the May 22, 2007 hearing date. In the alternative, Tower argues that due deference review is appropriate for the same reasons.

¶19 Both of Tower's arguments for *de novo* or due deference review are unpersuasive. First, Tower does not assert that the Commission lacks competence, knowledge, or expertise with respect to TTD benefits issues. Rather, Tower argues that the Commission's decision should be afforded little, if any, deference because the Commission's legal interpretations have been inconsistent and provide no real guidance. *See* ***County of Dane v. LIRC***, 2009 WI 9, ¶18, 315 Wis. 2d 293, 759 N.W.2d 571 (holding that no deference is to be given to the Commission's decision when the Commission's "'position on an issue has been so inconsistent as to provide no real guidance'") (citation omitted). The only inconsistent interpretation cited by Tower is ***Keys v. Tower Automotive***, No. 2002-043158, 2007 WL 3334836 (LIRC Oct. 29, 2007). Tower argues that the Commission's decision here fails to apply the precedent it previously set in ***Keys***. We disagree

because ***Keys*** is distinguishable and because one case does not demonstrate that the Commission's "'position on an issue has been so inconsistent as to provide no real guidance.'" *See* ***County of Dane***, 315 Wis. 2d 293, ¶18 (citation omitted).

¶20 The Commission's decision is not at odds with ***Keys***—the facts are different. In ***Keys***, the Commission held that "the point of temporary disability is to allow recovery for current wage loss." ***Id.***, 2007 WL 3334836, at *5. Applying that standard, the Commission denied the applicant TTD benefits because it found that "due to his retirement and not due to the work injury, the applicant was not earning wages and [was] no longer attached to the labor market … when the applicant's claim … began," and, therefore, the applicant was not suffering a current wage loss. ***Id.*** Thus, in determining whether the applicant in ***Keys*** had sustained a "current wage loss" as a matter of law, the Commission relied on its factual finding that the applicant had detached himself from the labor market years before his renewed disability claim began and that the applicant's decision to detach himself from the labor market was unrelated to his claim.

¶21 In Samphere's case, the Commission found that Samphere's injury was a *cause* of his retirement. Samphere testified that he would have continued working at Tower but for his knee problems, and the Commission found him credible, concluding that Samphere had not withdrawn from the labor market and was eligible for TTD benefits. The Commission applied the same definition of current wage loss as it did in ***Keys***, namely that an applicant who has detached himself or herself from the labor market for reasons unrelated to the injury suffered is not suffering a current wage loss. The only difference between ***Keys*** and Samphere's case is the facts.

¶22 Second, we find Tower's argument—that the Commission's decision should be afforded no deference or due deference because the Commission admitted before the circuit court that it erred in awarding TTD benefits to Samphere beyond the May 22, 2007 hearing date—to be without merit. The Commission submits that affirming that part of the hearing examiner's order granting TTD benefits beyond the hearing date was "the result of simple oversight and not an erroneous view of the law." We agree, and Tower provides us with no evidence that such a clerical oversight warrants disregarding the substance of the Commission's decision in its entirety.

¶23 Because all four of the factors for great weight deference have been met, we will apply that standard of review to the Commission's legal conclusions. The legislature, through WIS. STAT. § 102.14(1), charged the Commission (together with the Department of Workforce Development) with administering the Worker's Compensation Act. *See* ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 573, 579 N.W.2d 668 (1998). The Commission has been resolving issues regarding the payment of benefits to an injured worker during a period of temporary disability, a foundational issue under the Act, since the Worker's Compensation Act was passed. Because of this wealth of experience, we are satisfied that the Commission has gained a great deal of technical competence and specialized knowledge in ascertaining whether an injured worker qualifies for TTD benefits. Further, we note that the Commission's interpretations and decisions in this area will "provide consistency and uniformity in the application of the statute." *See* ***Tannler***, 211 Wis. 2d at 184. Therefore, because all four criteria are satisfied, we conclude that the Commission's decision is entitled to great weight deference, and we must affirm its conclusions if they are reasonable, even if another conclusion would be equally reasonable. *See* ***CBS***, 219 Wis. 2d at 573.

DISCUSSION

¶24 On appeal, Tower claims that the Commission: (1) exceeded its authority when finding Samphere sustained a bilateral knee injury; (2) exceeded its authority when finding Samphere was entitled to TTD benefits following his voluntary retirement; (3) exceeded its authority when finding Samphere was entitled to prospective medical treatment consisting of a total right knee replacement; (4) misapplied the law when awarding TTD benefits after Samphere voluntarily retired; (5) misapplied the law when awarding TTD benefits after Samphere failed to properly notify Tower of his claim, pursuant to WIS. STAT. § 102.12; and (6) misapplied the law when awarding TTD benefits after Samphere exceeded the allowable number of choices for physicians, pursuant to WIS. STAT. § 102.42(2). We will address each claim in turn.

A. Forfeiture

¶25 As an initial matter, the Commission asserts that Tower has forfeited[7] four of its six claims for failing to raise them before the Commission, the circuit court, or both. More specifically, the Commission contends that Tower did not argue before the Commission or the circuit court that: (1) the Commission misapplied the law when awarding TTD benefits after Samphere failed to properly notify Tower of his claim; and (2) the Commission misapplied the law when awarding TTD benefits after Samphere exceeded the allowable number of choices

[7] While the parties and relevant case law use the word "waiver," we use the word "forfeiture" consistent with the terminology adopted by ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and quoted source omitted).

for physicians. And the Commission contends that Tower did not argue before the circuit court (but did argue before the Commission) that: (1) the Commission exceeded its authority when finding Samphere sustained a bilateral knee injury; and (2) the Commission exceeded its authority when finding Samphere was entitled to prospective medical treatment consisting of a total right knee replacement. Our review of the record confirms the Commission's recitation of the claims raised and not raised before the circuit court and the Commission.

¶26 In reply, Tower admits that none of the four issues were raised before the circuit court, arguing only that some of the claims were addressed in its answer to the application for benefits, and therefore, that the Commission was on notice of some of the claims. To the extent the claims were not properly raised, Tower argues that forfeiture rules do not apply in this case. We agree with the Commission that the claims have been forfeited and decline to address the claims on appeal.

¶27 "It is the often-repeated rule in this State that issues not raised or considered in the [circuit] court will not be considered for the first time on appeal." ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). This rule extends to appeals from administrative proceedings. ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980) ("On appeal, this court will not consider issues beyond those which were properly before the court below. This rule applies equally to determinations made by the [Commission]."). In other words, to preserve an issue for appeal, a party seeking an administrative review must raise its claims at each level of the proceedings—before the hearing examiner, the agency, and the circuit court.

¶28 However, "[t]his rule … is not absolute and exceptions are made." ***Wirth***, 93 Wis. 2d at 443. Assuming an issue has been forfeited, we may choose to address it on appeal if: (1) the issue is of statewide importance or interest; (2) the issue is one of law that is not dependent on the facts below; or (3) the parties have fully briefed the issue and there are no factual disputes. *See* ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶11-13, 249 Wis. 2d 142, 638 N.W.2d 355. Because we *may* choose to address a forfeited issue if one of the above conditions is met, does not mean, as Tower asserts, that we *must* address an issue. Whether to do so is entirely at our discretion.

¶29 We choose not to exercise that discretion here. First, the issues Tower now asks us to address are not of statewide importance or interest. Second, the issues have not been fully briefed and we do not have the benefit of the Commission's or circuit court's opinion on the issues. And third, there are factual disputes. Tower had ample opportunity to raise its claims before the Commission and the circuit court. It chose not to do so. Tower's failure to raise these issues divested the circuit court, and in some instances the Commission, of an opportunity to correct or explain its alleged errors. Consequently, we will not address Tower's forfeited claims.

¶30 We next address Tower's surviving claims: (1) that the Commission exceeded its authority when finding Samphere retired due to his knee condition; and (2) that the Commission misapplied the law regarding actual wage loss.

B. The Commission's Findings of Fact

¶31 Because Tower believes the evidence demonstrates that Samphere withdrew from the labor market when he retired, Tower asserts that the Commission exceeded its authority when awarding Samphere TTD benefits

because he was not suffering an actual wage loss. *See* WIS. STAT. § 102.43(5) (describing temporary disability as payment "for loss of earnings"). Tower argues that the Commission's findings of fact are unsupported by substantial and credible evidence because Samphere's testimony contradicts other facts in the record and, therefore, should be overturned. We disagree.

¶32 As previously stated, we are limited in our review of the facts on appeal. Under WIS. STAT. § 102.23(6), we may not set aside the Commission's order if it is "supported by credible and substantial evidence." We must find the Commission's findings of fact conclusive if there is *any credible evidence* in the record to support those findings. *See* ***Briggs & Stratton Corp. v. DILHR***, 43 Wis. 2d 398, 403, 168 N.W.2d 817 (1969); *see also* WIS. STAT. § 102.23(6) ("the court shall not substitute its judgment for that of the [C]ommission as to the weight or credibility of the evidence on any finding of fact"). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See* ***Bucyrus-Erie***, 90 Wis. 2d at 418. "'The question is not whether there is credible evidence in the record to sustain a finding the [C]ommission did not make, but whether there is any credible evidence to sustain the finding the [C]ommission did make.'" ***Briggs***, 43 Wis. 2d at 403 (quoting ***Unruh v. Industrial Comm'n***, 8 Wis. 2d 394, 398, 99 N.W.2d 182 (1959)). Therefore, we turn to the Commission's decision to review the basis for its finding.

¶33 With respect to Samphere's testimony on his reasons for retiring, the Commission found as follows:

> [Samphere] testified that he would have continued working for the employer had it not been for his knee problems. The [C]ommission found this testimony credible, and also inferred from the medical evidence that [Samphere's] knee problems have been an ongoing, major factor in his failure to obtain employment since his retirement …. The credible

> inference drawn from the evidence presented is that even though [Samphere] retired from his employment with the employer, he did not withdraw from the labor market.

¶34 The issue of Samphere's credibility was solely for the Commission to decide. *See* WIS. STAT. § 102.23(6) ("[T]he court shall not substitute its judgment for that of the [C]ommission as to the weight or credibility of the evidence."). When asked about the effect that thirty-one years of employment at Tower had on his knees, Samphere testified, "Well, they got worse at the end. That's why I retired." When asked if the pain in his knees played a factor in his decision to retire, Samphere replied, "Yes … [i]t factored in. I couldn't handle the work anymore. It was too hard, too strenuous."

¶35 The Commission reasonably found Samphere's testimony truthful and supported by the medical records, in that the medical records demonstrated that Samphere had suffered from knee problems before his retirement and that those problems continued on after his retirement. His knee problems began in 1998, continued in 2000 and 2003, and required surgery in March 2003 and again after he retired in June 2003. The Commission also noted that on "April 15, 2007, Dr. Zoltan unambiguously opined that the work exposure was a material contributory causative factor for both [Samphere's] knee problems,"[8] further

[8] Tower argues that Dr. Zoltan's opinion is not credible because several months prior to completing the WKC-16-B form in which he concluded that Samphere's duties at Tower were a material cause of Samphere's knee condition, he filled out another WKC-16-B form and explicitly found that while work was "a factor" of Samphere's knee problems, it was not a "material factor." The Commission noted this discrepancy, but determined that:

> [w]hen completing the earlier WKC-16-B, Dr. Zoltan may have been confused about the legal significance of the word "material," but it is clear from the two WKC-16-B's [sic] that from a medical standpoint, [Dr. Zoltan] did believe [Samphere's] work exposure was materially causative of the [Samphere's] bilateral knee problems.

supporting Samphere's testimony. Samphere's testimony, as supported by the medical records and Dr. Zoltan's opinion, constitutes credible and substantial evidence on which the Commission was entitled to rely, and we will not overturn its discretionary decision.

¶36 Tower is correct that there is evidence in the record that contradicts the Commission's findings. But in order to reverse the Commission's findings of fact, Tower must do more than simply demonstrate that other reasonable, equally plausible interpretations of the record exist. *See* ***Hamilton v. DILHR***, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Tower must show that there is no credible evidence in the record to support the Commission's decision, and it has not done so here.

C. The Commission's Conclusions of Law

¶37 Finally, Tower argues that the Commission misapplied the law when awarding Samphere benefits after his retirement. In support of its argument, Tower relies, again, on ***Keys***. In ***Keys***, the Commission denied an applicant TTD benefits because "due to his retirement and not due to the work injury, the applicant was not earning wages and [was] no longer attached to the labor market … when the applicant's claim … began." ***Id.***, 2007 WL 3334836, at *5. The applicant testified that he had filled out three job applications in the three years since his retirement, but the Commission did not find that to be enough evidence to establish that the applicant remained attached to the labor market. ***Id.*** Based on ***Keys***, Tower argues that here the Commission erred in awarding benefits because Samphere was similarly retired from his employment and provided no evidence of an effort to secure employment since his retirement. Accordingly,

Tower believes, as a matter of law, that Samphere is not sufficiently attached to the labor market and is not eligible for TTD benefits.

¶38 As we have already established, this case differs from ***Keys*** in that the Commission found that Samphere retired, in part, because his knee problems were getting worse. Because the Commission found Samphere's testimony credible in that regard, the Commission did not need to turn to other evidence to determine whether Samphere was attached to the labor market. Critical to the applicant's application in ***Keys***, the Commission found that the applicant's decision to retire was unrelated to his injury, and, therefore, the Commission needed to look elsewhere to determine whether the applicant was suffering from an actual wage loss. Here, the Commission concluded, based on Samphere's testimony and other supporting evidence, that Samphere's work injury contributed to his decision to retire, leaving him sufficiently attached to the job market. Consequently, the Commission's decision stands.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.