Circuit Court for Calvert County
Case No. C-04-CV-19-000207

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 348

September Term, 2020

N & J EXCAVATING, ET AL.

v.

DUSTIN SHELOR

Berger,
Leahy,
Eyler, James, R.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, James, R., J.

Filed: July 12, 2021

This case arises out of a workers' compensation claim filed by Dustin Shelor, appellee, against his employer, N&J Excavating, appellant. N&J Excavating's workers' compensation insurance carrier, NGM Insurance Company, is also an appellant.[1] On December 27, 2013, Shelor suffered an accidental injury to his back while working for N&J Excavating. He filed issues with the Maryland Workers' Compensation Commission ("Commission") to determine, among other things, the nature and extent of his permanent total disability. The parties have stipulated that after a hearing on April 29, 2019, the Commission determined that Shelor had a permanent partial disability of 40 percent, 35 percent of which was attributable to the accidental injury and 5 percent of which was due to pre-existing conditions. The Commission found that Shelor was not permanently totally disabled.

Shelor appealed to the Circuit Court for Calvert County. A jury trial was held on March 5 and 6, 2020. The jury determined that Shelor was permanently totally disabled as a result of the December 27, 2013 accidental injury. N&J Excavating and NGM Insurance Company filed timely motions for judgment notwithstanding the verdict and new trial, both of which were denied. This timely appeal followed.

QUESTIONS PRESENTED

Appellants present four questions for our consideration, all of which involve the issue of whether Shelor failed to provide legally sufficient evidence to overturn the order issued by the Commission: The four questions presented by appellants are:

[1] The Subsequent Injury Fund had been named as a party, but was dismissed from the case by agreement of the parties and the circuit court. It is not a party to this appeal.

1. Did the circuit court err in denying the Employer and Insurer's motions for judgment during the trial?

2. Did the circuit court err in denying the Employer and Insurer's objections to giving the jury an instruction on permanent total disability?

3. Did the circuit court err in denying the Employer and Insurer's motion for new trial?

4. Did the circuit court err in denying the Employer and Insurer's motion for judgment notwithstanding the verdict?

For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Shelor, who was born on January 27, 1988, grew up in Calvert County. After making it "through 11th grade of high school," he earned a "GED."[2] Initially, he worked as a laborer with Chesapeake Utilities and then learned to operate heavy equipment including excavators, bulldozers, bobcats, and backhoes. When he was 18 years old, Shelor "tweaked" his back at work while unloading a truck. He missed three days of work as a result of that injury. He saw a chiropractor for "give or take a month," and, according to Shelor, the injury to his back was resolved and he "never had any other issues."

In about 2011, Shelor began working for N&J Excavating as a heavy equipment operator. He married his wife, Anna Shelor, in 2013 and they had three children who, at the time of trial, were 3, 5, and 8 years old. On December 27, 2013, while working for N&J Excavating, Shelor injured his lower back in an accidental injury when the pickup

[2] GED is an acronym that stands for either General Educational Diploma or Graduate Equivalency Degree.

truck he was operating was struck in the rear by another vehicle. After the accident, Shelor experienced low back pain that worsened over time. On January 9, 2014, Shelor went to the emergency room at Calvert Memorial Hospital, where he complained of increasing low back pain.

Shelor was referred to Paul Griffith, M.D., whom he saw on January 14, 2014. Dr. Griffith ordered a Magnetic Resonance Imaging (MRI) test. The MRI confirmed an "annular tear . . . of the disc" at L5/S1, the last disc in the low back, and mild disc desiccation. Shelor was treated initially with therapy, home exercises, and medicines. At some time in 2015, Shelor and his family moved to Loris, South Carolina.

In March 2015, Shelor had a "provocative lumbar discogram," a procedure in which, "under x-ray control" a needle is put into the last three discs in the low back and, under pressure a fluid is injected. Thereafter, on October 14, 2015, Shelor had a surgical procedure known as an anterior lumbar interbody fusion. That procedure involved entering the body through his belly, removing a disc, and placing a cage between the two bones. Following the surgery, Shelor completed post-operative rehabilitation. On August 25, 2016, he had a functional capacity evaluation, a test designed to determine what a patient can and cannot do physically. The test showed Shelor could perform work at a "light physical demand level."

At the time of trial, Shelor experienced "constant pain," "aching all of the time," and "numbness" in his legs. He explained that the pain starts in his back and radiates "from the sacrum area outward." The pain "makes everything miserable . . . as far as sitting, sleeping, eating, [and] using the bathroom." The pain keeps him up "tossing and turning"

at night. Shelor testified that he could no longer enjoy fishing, woodworking, and playing with his children. Mrs. Shelor testified that it was hard for her husband "to do everyday chores" such as switching the laundry over, changing diapers, and bathing their children, and that he could not hold the children for long periods of time. She stated that he could cut the grass, but that he had to do it a little bit at a time and that it took about a week to complete that task. Shelor was, however, able to operate a car and he drove from South Caroline to the trial in Calvert County. Shelor, who lives near Myrtle Beach, testified that he left South Carolina at about 8 a.m., that he made five or six stops, each lasting 30 to 45 minutes, and arrived in Calvert County at "around six o'clock."

During the day, Shelor stays at home with his children, who are home-schooled. Mrs. Shelor works three to four days a week at a hair salon and spa and also assists the children with their home-schooling. The children use a self-directed, online curriculum and Shelor helps to get them set up on their computers each morning. Shelor does not actually teach any of the lessons. According to Shelor, the children do their school work from about 8 or 9 a.m. to about 3 p.m. Mrs. Shelor testified that the home-schooling "only requires two to four hours a day." Shelor goes to a gym about once a week, where he uses a "hydro-massage bed" and some machines and does "some light upper-body stretches" and exercises.

Shelor stated that if he was offered a job within his limitations, he would take it, but that he had not been offered such a job since his injury. He had received weekly vocational services through which he received help with his resume, and "different techniques, search engines and stuff [about] where to find different jobs."

Shelor testified that he applied for hundreds of jobs consisting mainly of "clerk or supervisor positions" and "light-duty work." On one occasion, he had "a good interview with a roofing company," but the job was not within his ability based on his limitations, so the job "fell through." Shelor continued to search for jobs online but did not find any job that met his limitations. He never physically went out to look for a job and, since June 2017, has not applied for any job.

At trial, Michael Franchetti, M.D. testified as an expert in orthopedic surgery on Shelor's behalf. Dr. Franchetti did not treat Shelor, but performed an independent medical examination of him on April 10, 2018. At that time, Shelor was "under no active care" but "was taking Tylenol and/or ibuprofen every day due to the back injury." After conducting a physical examination and taking x-rays, Dr. Franchetti concluded that as a result of his work injury on December 27, 2013, Shelor had a "total of 41 percent whole person impairment." Dr. Franchetti explained his impairment finding as follows:

> I, with an injured worker in the State of Maryland we are required to use what is called the Fourth Edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment. Out of the tables out of that guide, Chapter 3, Tables 81 and 82, due to loss of motion right from that table he has a 9 percent whole person impairment directly from that table. In accordance with the same table, I mean same chapter, I mean, Table 75, in Chapter 3 due to his single level lumbar decompression and fusion, right from that table he gets an additional 12 percent impairment. So we're up to 21 percent impairment right from the Guides.
>
> Then I took into consideration what we are obliged to do in the state of Maryland. We have to take into consideration what are called the five factors, pain, atrophy, weakness, loss of endurance, los[s] of function. Of those five factors four I thought were appropriate, pain, weakness, loss of endurance, loss of function, for an additional 20 percent impairment for a total of 41 percent whole person impairment due to his back injury of December 27 of '13.

Dr. Franchetti did not find any reason to apportion Shelor's impairment between his prior injury and the injury on December 27, 2013, because "he was only 30 years old," the most recent injury "occurred five years before that when he was only 25," and the prior injury was "a short-lasting episode" that "completely resolved without residuals." Defense counsel asked Dr. Franchetti if his "41 percent was an impairment rating and not a disability rating," and he replied, "[a]bsolutely. I rated impairment. Doctors rate impairment which is once again loss of bodily function or loss of function of a body part." Dr. Franchetti acknowledged that he had not seen Shelor after the independent medical examination on April 10, 2018. When asked if he had any idea about Shelor's current condition, Dr. Franchetti stated that "within a reasonable degree of medical certainty and probability his condition I would expect would be essentially unchanged from when I saw him." Dr. Franchetti opined that when he examined Shelor, he was at "maximum medical improvement," meaning that "further treatment [was] not likely to improve[ ] the condition or injury."

Stuart Gordon, M.D. testified on behalf of N&J Excavating as an expert in orthopedic surgery and certified evaluations. Dr. Gordon saw Shelor on August 21, 2014, about eight months after his accident. At that time, Dr. Gordon concluded that Shelor could work light duty with certain restrictions, including not exceeding ten pounds of lifting, changing positions as needed, avoiding ladders and heights, and avoiding repetitive bending or squatting. At that time, Dr. Gordon stated that, in light of Shelor's decision not to pursue anything beyond pain management, the light duty work would last an indefinite period of time and that he anticipated that Shelor would be at maximum medical

improvement, meaning that he was at the point where everything that could be done had been done, in about three months.

Dr. Gordon saw Shelor again on June 21, 2018, when he conducted an independent medical examination of him. In formulating his opinion, Dr. Gordon, like Dr. Franchetti, used the Fourth Edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment and the five factors of pain, weakness, loss of function, atrophy, and loss of endurance. Dr. Gordon opined, within a reasonable degree of medical certainty, that Shelor had an overall impairment of 28 percent. Dr. Gordon explained:

> So for people who have a lumbar fusion, which is a significant thing, I gave him a Level 5, which is significate [sic] because the next level up is a Level 6 where you have no bowel or bladder control. That's called cauda equina syndrome.
>
> So – so that's called Level 5. And Level 5 gives 25 percent impairment to the whole – to the lumbar spine, whole person.
>
> That – that—let me explain that. The – the – the parts of the spine are considered whole person. And I'll leave it up to the nice attorneys to explain that more, but – but – but that's – that's how I got to the AMA part.
>
> And then I added some five factor values. I added 1 percent for pain, 1 percent for loss of function, 1 percent for endurance because I thought that the AMA Guide was not high – would – it was not as high as it should be for what I thought. So that took me up to a total of 28 percent.

Dr. Gordon apportioned the impairment half to Shelor's prior injury and half to his December 27, 2013 accidental injury. Dr. Gordon acknowledged that he was asked to provide an impairment rating, not a disability rating.

At the conclusion of Shelor's case and again at the close of evidence, appellants moved for judgment on the ground that Shelor had failed to provide sufficient evidence to

establish permanent total disability. Both motions were denied. Over appellants' objections, the circuit court instructed the jury using Maryland Pattern Jury Instruction – Civil 30:28, as follows:

> Permanent total disability means the incapacity to do work of any kind and not merely the incapacity to perform the work which the employee was accustomed and qualified to perform before the injury. Permanent total disability is not literal helplessness.
>
> Evidence that the employee has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a ruling[3] of permanent total disability. An employee whose injury prevents him from being employed in the labor market may be classified as permanently and totally disabled.

The Jury returned a verdict in favor of Shelor, finding that the decision of the Workers' Compensation Commission was not correct and that Shelor was permanently totally disabled due solely to the accidental injury of December 27, 2013.

STANDARD OF REVIEW

Appellants argue that, in light of the presumption of correctness of the Commission's decision and award, Shelor failed to produce sufficient evidence that he was permanently and totally disabled. The parties agree, and so do we, that the appropriate standard of review for sufficiency of the evidence following a *de novo* appeal from a decision of the Commission was set forth in *Giant Food, Inc. v. Booker*, 152 Md. App. 166 (2003). In that case, we recognized that the decision of the Commission is presumed to be *prima facie* correct and the party challenging the decision has the burden of proof. *Giant*

[3] Maryland Pattern Jury Instruction – Civil 30:28 uses the word "finding," but in instructing the jury, the court used the word "ruling."

Food Inc., 152 Md. App. at 176-77. *See also* Md. Code Ann., Labor & Employment Article, § 9-745(b). To survive a motion for judgment and a motion for judgment notwithstanding the verdict, "a plaintiff has the burden of producing sufficient evidence to send the case to a jury for a resolution of fact." *Giant Food, Inc.*, 152 Md. App. at 176. In *Giant Food, Inc.*, we wrote:

> In *Jacobs v. Flynn*, 131 Md. App. 342, 353-54, 749 A.2d 174 (2000), *cert. denied*, 359 Md. 669, 755 A.2d 1140 (2000), this Court wrote the following about the standard of review for such motions[:]
>
> > A party is entitled to a judgment not withstanding the verdict (JNOV) [and judgment] when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense. In reviewing the denial of a JNOV, we must resolve all conflicts in the evidence in favor of the plaintiff and must assume the truth of all evidence and inferences as may naturally and legitimately be deduced therefrom which tend to support the plaintiff's right to recover[.] If the record discloses any legally relevant and competent evidence, however slight, from which the jury could rationally find as it did, we must affirm the denial of the motion. If the evidence, however, does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty, then the denial of the JNOV was error. Nevertheless, only where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury.

Id. at 177 (internal citations and quotation marks omitted).

With this standard in mind, we shall consider whether there was sufficient evidence to support the jury's finding that Shelor was permanently and totally disabled.

DISCUSSION

I. Expert Testimony on Permanent and Total Disability

Appellants argue that permanent total disability is "statutorily different than any other degree of permanent disability in the Maryland workers' compensation statute." They contend that Shelor failed to offer any evidence that he was so injured that he could "'perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" *Bullis School v. Justus*, 37 Md. App. 423, 426 (1977)(quoting *Lee v. Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433, 436 (1950)). According to appellants, Shelor's permanent and total disability was a complicated medical and vocational issue that required expert testimony.

In support of their contentions, appellants rely on *Jewel Tea Co., Inc. v. Bramble*, 227 Md. 1 (1961). In that case, as here, we considered whether the plaintiff presented sufficient evidence to prove that her injuries constituted a "total disability," meaning an "incapacity to do work of *any* kind, and not mere incapacity to perform that work which the employee was accustomed and qualified to perform before the injury." *Id.* at 3 (emphasis in original). The plaintiff, Josephine Blamble, was injured when she fell down some steps while working as a door-to-door salesperson for the Jewel Tea Company. *Id.* at 2. As a result of her fall, Blamble suffered a broken left ankle and a sprained right ankle. *Id.* She was taken to a hospital where her left ankle was set and a cast applied. *Id.* After a few days of bedrest, Blamble was taken to the physical therapy department for instruction in crutch ambulation and, while being fitted for crutches, she suffered a heart attack. *Id.*

At a hearing before the Commission to determine the extent of her disability, Blamble's personal doctor, a general practitioner, testified that she "had suffered a myocardial infarction as a result of the crutch-training episode." *Id.* at 3. The doctor

opined that she was "disabled a hundred percent" and that her ability to engage in any kind of employment was "[l]imited[.]" *Id*. The doctor stated that "if she could sit down at something maybe [she could work] three or four hours a day, yes, maybe with a rest period in between." *Id*. The Commission determined, among other things, that Blamble "had become permanently totally disabled, 60 per cent being reasonably attributable to the accidental injury and 40 per cent being attributable to a pre-existing condition." *Id.* Both parties appealed to the circuit court where the case was tried before a jury. *Id.*

At trial, Blamble testified "that she did not feel she could go back to work, that she could not climb steps and had certain feelings of heaviness in her heart and down her arm." *Id.* at 4. Her testimony was based not on any attempt she made to work, but on her own personal feelings and experiences she had at her house and in a department store. *Id.* at 5. Blamble presented the testimony of her landlady, who testified that that Blamble was "in very delicate health and unable to do her own housework or cooking." *Id.* Blamble's personal doctor testified and his testimony from the hearing before the Commission was also read into evidence. *Id.* at 3. Blamble also called as a witness her cardiologist. *Id.* In addition to the opinion expressed before the Commission, Blamble's doctor opined that she "could do sedentary work as long as it wasn't too strenuous" and that "her condition at that time 'shows evidence of healing and she shows much improvement.'" *Id.* at 5. When asked about his testimony before the Commission that Blamble was one hundred percent disabled, the doctor stated that that was his opinion "then." *Id.*

The cardiologist opined that Blamble had no disability "except emotional." *Id.* at 6. As part of his examination of Blamble, the cardiologist reviewed the results of an

electrocardiogram and could find no evidence of heart disease, although he could not rule out the possibility of such disease. *Id.* at 5. The cardiologist opined that Blamble "very likely did not suffer a coronary occlusion with a myocardial infarction, as diagnosed by" Blamble's personal doctor. *Id.* He felt that it was more probable that Blamble "had an episode of paroxysmal tachycardia[.]" *Id.* He testified that Blamble could be re-employed and "could do practically what she had done before . . . with certain limitations depending on her emotional self." *Id*. at 6. At the close of Blamble's case, the employer requested a jury instruction that based on the uncontradicted evidence, "it could not find that Mrs. Blamble was 100 per cent disabled[.]" *Id.* That request was denied. The jury found that Blamble "was permanently totally disabled, 100 per cent of which was due to the accident and none due to a pre-existing disease[.]" *Id.*

On appeal, the employer argued that the circuit court erred in failing to instruct the jury as it had requested. *Id.* In considering that issue, the Court of Appeals held that Blamble failed to present sufficient evidence to warrant submission to the jury of the question of permanent total disability. *Id.* at 8. The Court explained:

> It has been held that reliance on lay testimony alone is not justified when the medical question involved is a complicated one, involving fact-finding which properly falls within the province of medical experts. . . . What we have said should not be taken as indicating that we conclude that all awards in cases of injuries of a subjective nature can stand only if accompanied by definitive medical testimony, ...
>
> This Court has taken judicial notice of the fact that some persons with diseased hearts support themselves and lead useful lives for years. In the absence of more compelling proof than the opinion of the employee herself and that of her landlady that she is totally disabled within the intendment of the statute, and in the light of medical opinion to the contrary, we must hold that the trial court erred in refusing to grant the appellant's prayer. In our

> opinion there was insufficient evidence to warrant submission to the jury of the question as to permanent total disability.

Id. at 7-8 (citations omitted).

Appellants contend that the facts of the instant case are almost identical to those in *Jewel Tea Company*. They point out that neither physician in the instant case testified that Shelor was permanently and totally disabled and that the functional capacity evaluation performed on August 25, 2016 showed that he could perform light duty work. Appellants assert that Shelor was, in fact, performing light duty or sedentary work by providing elementary and pre-school education to his children. They also point to Shelor's failure to follow up on a job offer because "he subjectively felt he couldn't perform it," and the fact that he did not seek any employment after his vocational rehabilitation services ended. According to appellants, Shelor should have been required to provide vocational and medical expert testimony to meet his burden of showing that "he was, generally, permanently restricted from pursuing any meaningful employment opportunities" and that home-schooling his children was not "evidence of his ability to work in a job for which a stable market exists." We are not persuaded.

Contrary to appellants' assertion, *Blamble* did not hold that cases involving claims of permanent total disability always require expert testimony. Rather, the Court determined that in some cases, the impairments are so complex that a juror would not have common knowledge about them or how they would limit a claimant's ability to work. In *Blamble*, the contradictory testimony about Blamble's heart disease, that it was either a myocardial infarction or an episode of paroxysmal tachycardia, was beyond the common

knowledge of jurors and expert testimony was required in order for the jurors to determine how the heart condition would affect Blamble's ability to perform the duties of her job. In reaching that decision, the Court of Appeals recognized that there were certain "conditions which, while less obviously permanent in their nature, may still, according to common knowledge, be probably so, with such a degree of probability that an adjudication of permanency as a fact may be permissible without expert opinions." *Blamble*, 227 Md. at 6 (quoting *Cluster v. Upton*, 165 Md. 566, 569 (1933)). "'There must however, be a reliable basis for the adjudication of it as a fact, something beyond mere conjecture, or possibility; and the burden is upon the plaintiff to establish the fact by evidence sufficient to support the finding, if he intends to include permanent injury as an item in the ground of his recovery.'" *Id.*

In the instant case, Shelor's back injury did not involve a complicated medical issue. The expert testimony from Drs. Franchetti and Gordon provided the jurors with information about Shelor's physical impairment. That testimony, combined with the testimony of Shelor and his wife about how the injury affected Shelor's ability to do his job, and Shelor's inability to find a job, provided sufficient evidence from which the jurors could determine Shelor's disability.

II. Expert Vocational Testimony

Appellants assert that Shelor was required to produce expert testimony as to whether home-schooling his children constituted gainful employment. We disagree. That issue was addressed by the Court of Appeals in *Maldonado v. American Airlines*, 405 Md. 467 (2008). In that case, George Maldonado, a fleet service clerk for American Airlines, cut

his hand while loading luggage into an aircraft. *Maldonado*, 405 Md. at 470. Thereafter, he continued "to load baggage into the aircraft using one hand, at which time he felt a tear in his lower back." *Id.* at 471. The Commission determined that Maldonado "sustained a permanent partial disability of '50% under 'Other Cases' industrial loss of the body as a result of the injury to the back and psychiatric (serious disability).'" *Id.* at 470. On judicial review, Maldonado testified that the injury to his back "prohibited him from returning to work since the accident, but that after his injury he also obtained a bachelor's degree in theology . . . was able to drive a car, walk between 30 and 40 minutes without taking a break, and do 'light work' around the house." *Id.* at 471. Maldonado stated that "because he could only sit for a certain period of time before needing to lay down, 'no job is going to hire me.'" *Id.* American Airlines presented videotaped depositions from two medical experts, a psychiatrist and an orthopedic surgeon, both of whom evaluated Maldonado's permanent impairment. *Id.* The psychiatrist opined that Maldonado had "'a mild overall impairment of about 10 percent' and attributed 5% of the impairment to be directly related to the accident and 5% to other factors." *Id.* at 472-73. The orthopedic surgeon opined that Maldonado had a 10% impairment to his lower back. *Id.* at 473. He "believed half of the degenerative changes were preexisting and half were attributable to the accident[,]" that there were no findings consistent with radiculopathy, and no evidence of instability in Maldonado's spine. *Id.*

Maldonado filed a motion for directed verdict, which was denied. Thereafter, he presented videotaped depositions from a psychologist and an internist. *Id.* at 473. The psychologist testified that Maldonado suffered a 60% impairment due to psychological

problems arising from the injury. *Id.* The internist estimated that Maldonado had a 45% impairment due to a disk injury to his back and "an additional 15% impairment from other problems associated with the accident." *Id.* at 473. Ultimately, the jury "reduced the percentage of loss to 35%." *Id.* at 470, 474. The trial judge denied Maldonado's motion for judgment notwithstanding the verdict in which he had argued that his employer failed to produce testimony from a vocational expert. *Id.*

On appeal, Maldonado argued that any party who disputes a decision of the Commission involving "Other cases" industrial loss must present testimony from a vocational expert during the judicial review proceeding in order to rebut the presumption of correctness of the Commission's award. *Id.* at 474. The Court of Appeals rejected that argument and held that expert vocational testimony is not *per se* required to determine industrial loss. The Court explained:

> We, therefore, conclude that the testimony of a vocational expert is not a *sine qua non* requirement to rebut the presumption of correctness of a Workers' Compensation Commission award of permanent partial disability under "Other cases" industrial loss, nor is expert vocational testimony required in this case, where the jury was presented with sufficient evidence from which to determine industrial loss. Specifically, in terms of the statutory factors listed in Section 9-627(k)(ii)[4], the age, experience, occupation and

[4] Section 9-627(k) of the Labor and Employment Article addresses "Other cases" of permanent partial disability, as follows:

> (k)(1) In all cases of permanent partial disability not listed in subsections (a) through (j) of this section, the Commission shall determine the percentage by which the industrial use of the covered employee's body was impaired as a result of the accidental personal injury or occupational disease.
>
> (2) In making a determination under paragraph (1) of this subsection, the Commission shall consider factors including:
>
> (i) the nature of the physical disability; and

> training of the employee when the accident occurred, Maldonado testified that he was forty-three years old, that at the time of the accident he had been working for American Airlines as a fleet service clerk for fourteen and a half years, that the position required loading, offloading and deicing the plane as well as "pushing the aircraft back when it was ready for departure, [and] giv[ing] hand signals to the aircraft when it was approaching the gate."
>
> There was also adequate evidence upon which the jury could gauge the nature of the physical disability pursuant to Section 9-627(k)(i). The jury heard conflicting testimony from the doctors for each party as to the extent of [ ] Maldonado's back injury as well as psychological functioning related to the accident. Maldonado himself also provided the jury with evidence relevant to this factor; he testified that after sustaining his injuries, he obtained a bachelor's degree in 2002 and that he was able to drive a car, walk between 30 to 40 minutes without taking a break and engage in "light work" around the house, but that because he could only sit for a certain period of time before needing to lay down "no job is going to hire me." Based on the testimony of the witnesses, including Maldonado, there was sufficient evidence provided on each statutory factor to allow the jury to "assess the extent of the loss of use by considering how the injury has affected the employee's ability to do his or her job." *Getson*, 346 Md. at 62, 694 A.2d at 968.

Id. at 482-83.

For the same reasons expressed in *Maldonado*, we conclude that there was no requirement for Shelor to provide expert vocational testimony.

III. Evidence of Home-schooling

> (ii) the age, experience, occupation, and training of the disabled covered employee when the accidental personal injury or occupations disease occurred.
>
> (3) The Commission shall award compensation to the covered employee in the proportion that the determined loss bears to 500 weeks.
>
> (4) Compensation shall be paid to the covered employee at the rates listed for the period in §§ 9-628 through 9-630 of this Part IV of this subtitle.

Appellants contend that the fact that Shelor home-schooled his children was "indicative of performing work for which a steady and stable market exists (the education of preschool and elementary school children) and, therefore, a finding of permanent total disability is improper." We disagree. There was a complete absence of evidence as to the duties, educational requirements, and physical requirements of a pre-school or elementary school teacher, nor was there any evidence that Shelor had ever been employed or earned wages as a teacher. The only evidence produced was that Shelor is at home during the day when his children utilize an online curriculum. Shelor testified that "it's already kind of predesigned, and so what I – mainly what I would do is just get them, my daughter especially, who's in kindergarten, get her set up. My son, he can just go – he takes care of his all by hisself [sic], and then they have – it's guided lessons on the computer." Shelor was clear that he did not actually teach the children.

Moreover, it is well established that evidence that a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial disability. *See Babcock & Wilcox, Inc. v. Steiner*, 258 Md. 468, 473 (1970)(quoting Larson, 2 Workman's Compensation Law, § 57.51)(stating same); *Bullis School*, 37 Md. App. at 430 (claimant, a bus driver and maintenance worker, came within legal definition of one who suffered permanent total disability even though after his accidental injury he was employed as a maintenance supervisor). In the instant case, there was no evidence that Shelor was employed and the fact that he supervised his children while they participated in online home-schooling did not preclude a finding of permanent total disability.

IV. Jury Instruction

Lastly, we reject appellants' argument that the circuit court erred in instructing the jury on permanent total disability. In deciding whether to grant a requested jury instruction, a trial court must consider "whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Malik v. Tommy's Auto Service, Inc.*, 199 Md. App. 610, 616 (2011)(citation omitted). We review the grant or denial of an instruction for an abuse of discretion. *Steamfitters Local Union No. 602 v. Erie Ins. Exchange*, 241 Md. App. 94, 125 (2019), *aff'd* 469 Md. 704 (2020).

In the case at hand, there is no dispute that the pattern jury instruction that was given correctly stated the law with regard to permanent total disability. There was sufficient evidence, including the testimony of Dr. Franchetti, Dr. Gordon, Shelor, and his wife, from which the circuit court could determine that the instruction was applicable. Accordingly, the circuit court did not err in giving the jury instruction.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.