

NOTICE

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2013 IL App (5th) 120102WC-U
NO. 5-12-0102WC
IN THE
APPELLATE COURT OF ILLINOIS

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ST. ELIZABETH'S HOSPITAL,)	Appeal from the
)	Circuit Court of
Appellee and Cross-Appellant,)	St. Clair County.
)	
v.)	No. 10-MR-297
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Sherri Roth, Appellant-Cross-)	Stephen P. McGlynn,
Appellee).)	Judge, presiding.

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

ORDER

- ¶ 1 *Held:* The Commission's finding that the claimant's conditions of ill-being are causally related to her workplace accident is not against the manifest weight of the evidence. The Commission's awards for TTD benefits and prospective medical care are not against the manifest weight of the evidence. The Commission's awards of attorney fees and penalties pursuant to sections 16, 19(k) and 19(l) of the Workers' Compensation Act (820 ILCS 305/16, 19(k), 19(l) (West 2010)) are contrary to the manifest weight of the evidence.
- ¶ 2 The claimant, Sherri Roth, worked for the employer, St. Elizabeth's Hospital, as a certified nursing assistant (CNA). On August 25, 2007, the claimant was involved in a workplace accident that resulted in injuries to her low back. Thereafter, she began a course of treatments for conditions of ill-being in her low back, and she filed a claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 to 30 (West 2010)). During the course of her treatment, a dispute arose between the parties concerning whether she had

achieved maximum medical improvement (MMI) and whether the claimant's current conditions of ill-being were causally connected to the workplace accident. The matter proceeded to an expedited arbitration hearing under section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)). At the conclusion of the hearing, the arbitrator found in favor of the claimant on the issue of causation, finding that the claimant's current conditions of ill-being in her low back were causally related to the workplace accident. The arbitrator also awarded the claimant two intervals of temporary total disability (TTD) benefits, totaling 43 6/7 weeks of TTD benefits, and medical expenses, including prospective medical care. In addition, the arbitrator awarded the claimant penalties pursuant to sections 19(l) and 19(k) of the Act and attorney fees pursuant to section 16 of the Act.

¶3 The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission modified the arbitrator's decision with respect to the duration of the two time intervals in which the claimant qualified for TTD benefits. The Commission awarded the claimant a total of 27 2/7 weeks of TTD benefits. The Commission also modified the arbitrator's decision by reducing the awards for penalties and attorney fees, but otherwise affirmed and adopted the arbitrator's decision. One commissioner dissented with respect to the Commission's award of section 19(l) penalties. The dissenter believed that the evidence did not establish that the employer "failed, neglected, or refused to make payment of TTD benefits without good and just cause."

¶4 The employer appealed to the circuit court. The circuit court affirmed the Commission's finding with respect to causation. The court, however, reversed the Commission's awards for sections 19(k) and 19(l) penalties and section 16 attorney fees, holding that the record failed to support the Commission's awards for penalties and attorney fees. In addition, without explanation, the circuit court also held that the Commission's awards for TTD benefits and prospective medical treatment were against the manifest weight

of the evidence. The claimant now appeals the circuit court's judgment, and the employer cross-appeals.

¶ 5 The claimant argues that the circuit court erred in reversing the Commission's awards for prospective medical treatment, TTD benefits, penalties, and attorney fees. The employer argues that the circuit court erred in upholding the Commission's finding with respect to causation.

¶ 6 BACKGROUND

¶ 7 The claimant's job duties as a CNA for the employer included lifting patients, bathing patients, assisting patients with dressing, feeding patients, assisting patients with the restroom, and helping patients get into and out of wheelchairs and beds. On August 25, 2007, the claimant attempted to transfer a patient from a wheelchair using a slide board with help from a coworker. The claimant and her coworker did not lift at the same time, and the claimant felt an immediate and sharp pain in her low back. The claimant completed the transfer and continued to work. She reported the incident to her supervisor and requested medical attention. Two days later, on August 27, 2007, the employer sent the claimant to its occupational medicine facility.

¶ 8 Dr. Bryon Gorton examined the claimant and diagnosed her with a back strain and prescribed physical therapy. The claimant then underwent a course of physical therapy that helped alleviate some of her back pain. Dr. Gorton referred the claimant to Dr. Khan.

¶ 9 Dr. Khan examined the claimant on September 24, 2007, and recommended an MRI of the claimant's lumbar spine and electrodiagnostic studies of her lower extremities. He took the claimant completely off work. In a letter to Dr. Gorton dated September 24, 2007, Dr. Khan noted that the claimant "complained of low back pain and discomfort across the lower back area with radiation of pain posterior aspect of the left thigh calf with tingling and numbness left foot and big toe area by history." He wrote that the claimant was in

"moderately severe distress" and advised her to stay off work "until I see her next time in 2 weeks time."

¶ 10 The MRI ordered by Dr. Khan was taken on October 1, 2007, and it revealed a disc bulge at L4-L5. An EMG/nerve conduction study revealed a prolonged F-wave latency of the left peroneal nerve and a possible right S1 root dysfunction. The claimant returned to Dr. Khan on October 8, 2007, and he released her to light-duty work with a 10-pound lifting restriction and ordered her to avoid bending and twisting type activities. He prescribed lumbar epidural injections and ordered that she stay off work the day she has the injections.

¶ 11 On October 11, 2007, the claimant returned to Dr. Khan after she attempted to return to work. She reported that she experienced severe pain and discomfort when she attempted to go back to work. The pain was mainly in her low back, but radiated into her left lower extremity. He noted that the claimant was "ambulating very slowly has a very guarded walking." He advised the claimant to stay off work and prescribed Flexeril and Vicodin.

¶ 12 On October 15, 2007, Dr. Anderson administered an epidural steroid injection that provided the claimant with some relief. The claimant followed up with Dr. Khan on October 22, 2007, and he advised the claimant to continue with physical therapy, obtain a second epidural block, and stay off work until he saw her in two weeks.

¶ 13 On October 23, 2007, at the request of the employer, the claimant submitted to an independent medical examination (IME) conducted by Dr. Patricia Hurford. Dr. Hurford diagnosed the claimant as having a muscle strain-type of injury. She recommended two to three weeks of additional physical therapy along with a return to work. She did not feel that additional epidural steroid injections would be helpful. Although Dr. Hurford recommended that she go back to work, the claimant remained off work pursuant to Dr. Khan's work restriction.

¶ 14 The claimant returned to Dr. Anderson on November 5, 2007, and reported an overall

improvement of her symptoms. Dr. Anderson administered the second epidural injection at L4-L5.

¶ 15 The claimant saw Dr. Khan on November 8, 2007, and reported that her symptoms had improved but that she continued to have some low back pain with radiation into the posterior aspect of her left thigh to the level of the knee. Dr. Khan continued to keep the claimant off work, continued her physical therapy program, and advised her to receive a third lumbar epidural block. Dr. Anderson subsequently administered a third epidural injection at L4-L5.

¶ 16 The claimant returned to work, light duty, on November 28, 2007, and she saw Dr. Khan the next day. The claimant was still complaining of pain and discomfort. Dr. Khan allowed her to continue working light duty with a 20-pound lifting restriction and ordered her to avoid bending or twisting type activities. She returned to Dr. Khan on December 14, 2007, and complained of soreness and pain in her back area. Dr. Khan increased her lifting restriction to 30 pounds, along with avoiding frequent bending or twisting. He referred the claimant to Dr. Schultz. On January 7, 2008, Dr. Khan increased the claimant's lifting restriction to 40 pounds and ordered an MRI of the claimant's thoracic spine due to complaints of a pinprick sensation in her lower extremity.

¶ 17 At the request of the employer, the claimant returned for a second IME conducted by Dr. Hurford, and she suggested a CT myelogram to identify functional instability. She believed that the claimant's restrictions should continue until diagnostic studies were completed. The MRI of the claimant's thoracic spine ordered by Dr. Khan was taken on January 10, 2008, and the MRI was negative.

¶ 18 Dr. Schultz examined the claimant on January 25, 2008, and he diagnosed the claimant as having low back pain, SI joint dysfunction on the left, left sciatica possibly originating at L5 root, and S1 nerve dysfunction on the right. He recommended Vicodin ES

at bedtime and sent her for additional x-rays and iontophoresis to her left SI joint. The claimant saw Dr. Khan on January 28, 2008, and reported that she still felt pain and discomfort in her low back with radiation of pain in her left lower extremity. Dr. Khan advised her to continue working with his previous restrictions.

¶ 19 On January 29, 2008, Dr. Hurford reviewed the results of the CT myelogram with the claimant and suggested that no surgical lesions were identified. Dr. Hurford released the claimant to regular work duties.

¶ 20 On March 25, 2008, Dr. Schultz reviewed the myelogram and also determined that there were no operable lesions which he could address. He recommended a soft brace, continued light duty, possible manipulation by Dr. Khan, and a TENS unit. He also ordered a functional capacity evaluation (FCE). He continued the claimant's light-duty work restriction with a maximum weight lifting limit of 40 pounds.

¶ 21 The claimant underwent the FCE on April 8, 2008, and the therapist conducting the evaluation believed that the claimant provided near full, though not entirely full, effort throughout the testing. The test results indicated that the claimant was capable of working at the sedentary to light level. On May 7, 2008, Dr. Schultz restricted the claimant from lifting more than 20 pounds and from carrying more than 10 pounds along with no repetitive bending from the waist. The claimant was to be afforded breaks as necessary.

¶ 22 The claimant saw Dr. Schultz again on June 3, 2008, and he recommended a consultation with vocational rehabilitation. He believed that the claimant's FCE results eliminated the possibility of her returning to work full duty as a CNA.

¶ 23 On July 9, 2008, the claimant reported to Dr. Schultz that she went "to the Division of Vocational Rehabilitation, but they had nothing for her." In addition, she reported that she was seen by a company doctor who told her that there was nothing wrong with her and that she should go back to work. She told Dr. Schultz that she wanted to go back to work, and

despite the results of the FCE he released her to work without any restrictions. At that time, she was still wearing a brace, using the TENS unit, and had a limp favoring her left lower extremity. Dr. Schultz wanted to see her in a month to see if she was able to make "the transition back to work."

¶ 24 At the request of the employer, on August 8, 2008, the claimant submitted to an IME conducted by Dr. Michael Polinsky. He opined that the August 2007 workplace accident exacerbated her underlying low back problems. He believed that the claimant had reached maximum medical improvement (MMI) and that her work capacities were limited only by her pain, and he opined that the FCE "defines her work restrictions the best." In his IME report, he wrote: "I would recommend following the guidelines outlined in her [FCE]." The claimant, however, testified that she continued to work at full duty.

¶ 25 On October 30, 2008, the claimant returned to Dr. Schultz and complained that her pain was getting increasingly worse. In his notes of the office visit, Dr. Schultz wrote that the results of the claimant's FCE indicated that she could not work in her previous capacities, that she continued to struggle at work, and that she had been written up for missing work. The claimant, however, wanted "to try to continue to work."

¶ 26 On December 9, 2008, Dr. Schultz noted that the claimant continued to work but was having a difficult time. On January 20, 2009, he noted that the claimant had increased back pain and left sciatica and that her return to work "has not worked out."

¶ 27 On March 26, 2009, the claimant called Dr. Schultz and asked to be taken off work because her pain was so severe that she could no longer continue to work. The claimant testified that she was experiencing severe pain in the morning that made her collapse to the floor and made it difficult to walk. Dr. Schultz took her off work. In August 2009, Dr. Schultz noted that the claimant had completed additional physical therapy and was not improved. He last saw the claimant in September 2009 and at that time noted that pain

medications and the TENS unit were no longer effective. He increased the claimant's pain medications. Dr. Schultz testified at the arbitration hearing by way of an evidence deposition. He opined that the claimant should be retrained for another position as her work as a CNA will aggravate her low back condition.

¶ 28 The employer presented the evidence deposition testimony of Dr. Hurford. She testified that she did not find evidence of radiculopathy and that the claimant suffered only a lumbar strain as a result of the workplace accident. She believed that the claimant had reached MMI and could return to work full duty as a CNA. She did not believe that the claimant needed any further medical treatment.

¶ 29 During her testimony, the claimant admitted to a previous injury to her low back in 2005. She missed three months of work for that injury and received physical therapy, but no injections or any other treatments. She was subsequently released for full-duty work. She then had intermittent pain but continued to work in a full-duty capacity until her August 2007 workplace injury. She testified that she wanted to continue treating with Dr. Schultz.

¶ 30 At the conclusion of the hearing, the arbitrator found in favor of the claimant on the issue of whether her conditions of ill-being were causally related to the August 2007 workplace accident. The arbitrator based her decision on "the chain of events and the records of [the claimant]'s treating physicians." The arbitrator also based her decision on the claimant's testimony, which she found to be credible. The arbitrator found that the claimant was entitled to two intervals of TTD benefits: September 24, 2007, through November 27, 2007, and March 26, 2009, through November 25, 2009 (the date of the 19(b) hearing).

¶ 31 The claimant had filed a motion for penalties pursuant to sections 19(k) and 19(l) of the Act and attorney fees pursuant to section 16 of the Act. The arbitrator found that the employer had failed to accommodate the claimant's light-duty work restrictions or, in lieu of that, pay her TTD benefits. The arbitrator found the employer's conduct to be unreasonable

and vexatious "in light of their own examining physicians." The arbitrator wrote, "if [the employer] could not accommodate the restrictions, [the employer] had the duty to pay temporary total disability benefits, which they did not."

¶ 32 The arbitrator, therefore, awarded the following penalties: the maximum amount of \$10,000 in section 19(l) penalties; \$4,566.06 in section 19(k) penalties (50% of the outstanding TTD benefits award); and \$1,826.41 in section 16 attorney fees (20% of the outstanding TTD benefits award).

¶ 33 The employer appealed the arbitrator's decision to the Commission. The Commission adopted the arbitrator's findings with respect to causation, but modified her decision with respect to TTD benefits, penalties, and attorney fees. The Commission found that the employer made a binding stipulation that the first interval period of TTD benefits should be extended by one day to November 28, 2007. The Commission, therefore, awarded TTD benefits for the period of September 24, 2007, to November 28, 2007.

¶ 34 The Commission reduced the second interval of TTD benefits to March 26, 2009, through July 28, 2009. In cutting off the second interval of TTD benefits at July 28, 2009, the Commission noted that the claimant saw Dr. Schultz on that day, but he did not provide the claimant with an "off work" note as he had on several prior occasions. The claimant saw Dr. Schultz again in August and September 2009, but on neither visit did he comment on causation or the claimant's ability to work. The Commission, therefore, found that "the evidence does not support the Arbitrator's award of temporary total disability benefits from July 29, 2009, through November 25, 2009.

¶ 35 With respect to penalties, the Commission noted that the arbitrator awarded the section 19(k) penalties and section 16 fees on temporary disability benefits during a period of time in which the claimant was actually working (August 2008 until late January 2009). The Commission explained that the arbitrator did so because the arbitrator believed that the

employer had "vexatiously failed to either pay benefits or provide accommodated duty after August 8, 2008 consistent with the opinions of its Section 12 examiner, Dr. Polinsky." The Commission, however, found that the employer was not vexatious after August 8, 2008, because the claimant testified that the employer accommodated her restrictions at times. In addition, Dr. Schultz noted on October 30, 2008, that the claimant wanted to be released to work full duty without any restrictions.

¶ 36 The Commission awarded section 19(k) penalties and section 16 fees only for the period of unpaid TTD benefits from September 24, 2007, through October 10, 2007, a total of 2 3/7 weeks. It awarded section 19(k) penalties in the amount of 50% of the unpaid TTD benefits (50% of \$601.73), or \$300.86, and section 16 attorney fees in the amount of 20% of unpaid TTD benefits (20% of \$601.73), or \$120.35. The Commission awarded the maximum amount of section 19(l) penalties of \$10,000, due to the employer's failure to timely pay these same TTD benefits. The court affirmed all of the other aspects of the arbitrator's decision.

¶ 37 One commissioner dissented. The dissenting commissioner agreed with the majority's decision, except its award of 19(l) penalties. The dissenter noted that it was unclear from the record when the claimant filed her motion for penalties and fees and that the motion contains no factual allegations from which the employer could have known, prior to arbitration, that the claimant was seeking penalties and attorney fees for nonpayment of TTD benefits from September 24, 2007, through October 10, 2007. The dissenter concluded that under these circumstances, the employer has not "failed, neglected, or refused to make payment of TTD benefits without good and just cause" and, therefore, "an award of 19(l) penalties is improper."

¶ 38 The employer appealed the Commission's decision to the circuit court. The circuit court believed that the evidence of a causal connection between the claimant's conditions of

ill-being and a compensable work accident was very thin. However, it could not "say that the Commission's award is against the manifest weight of the evidence as to [the claimant]'s back condition in 2009."

¶ 39 With respect to all issues, the circuit court's judgment reads as follows:

"The Commission's decision finding that [the claimant]'s work related injury is causally connected to her current condition of ill-being is affirmed. The Commission's decision awarding certain TTD benefits, prospective medical treatment and Sections 19(k) and 19(l) penalties and Section 16 attorney's fees is against the manifest weight of the evidence. The decision of the Commission awarding penalties pursuant to Sections 19(k) and 19(l) and Section 16 attorney's fees is hereby reversed."

¶ 40 In reversing the Commission's penalties and fees awards, the court noted that the claimant's motion was filed on November 9, 2009, and is devoid of any notice or content with respect to the time period for which she sought penalties and fees. In addition, the court noted that the record is silent concerning any demand made in writing for TTD benefits from September 24, 2007, through October 10, 2007. The court, therefore, reversed the penalties and fees award "for both procedural and substantive reasons."

¶ 41 The circuit court's holding that the Commission's award of TTD benefits and prospective medical treatment is against the manifest weight of the evidence was made without any discussion or explanation.

¶ 42 The claimant appealed from the circuit court's decision, and the employer cross-appealed.

¶ 43

ANALYSIS

¶ 44

I.

¶ 45

Causation

¶ 46 The first issue we address on appeal is whether the Commission's finding in the claimant's favor on the issue of causation is against the manifest weight of the evidence.

¶ 47 To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005). It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Republic Steel Corp. v. Industrial Comm'n*, 26 Ill. 2d 32, 45, 185 N.E.2d 877, 884 (1962). Whether a causal connection exists between a claimant's condition of ill-being and his employment is an issue of fact to be decided by the Commission. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). The Commission's findings with respect to factual issues are reviewed under the manifest weight of the evidence standard. *Id.*

¶ 48 "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). The appropriate test is not whether this court might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R&D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010).

¶ 49 "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois*

Workers' Compensation Comm'n, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003). On review, a court "must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Id.*

¶ 50 Reviewing the record under these standards, we cannot conclude that the Commission's finding with respect to causation is against the manifest weight of the evidence.

¶ 51 The evidence presented at the trial established that the claimant was involved in a workplace accident that occurred when she and a coworker were attempting to lift a patient from a wheelchair. She felt pain in her low back and sought medical treatment. The employer referred her to its occupational medicine facility, and one of its physicians diagnosed her with a back sprain. She then underwent a course of physical therapy which provided some improvement in her symptoms. The claimant was taken off work on September 24, 2007, and a subsequent MRI revealed a disc bulge at L4-L5. The claimant also received a series of lumbar epidural injections. She was referred to Dr. Khan who took the claimant off work.

¶ 52 The claimant returned to light-duty work on November 28, 2007. Dr. Khan restricted her from lifting over 20 pounds and advised her to avoid bending and twisting types of activities. The claimant continued to experience low back pain and underwent an FCE in April 2008. The FCE indicated that the claimant was capable of working at the sedentary to light level.

¶ 53 In August 2008, the claimant submitted to an IME conducted by the employer's

chosen expert, Dr. Polinsky. Dr. Polinsky opined that the workplace accident exacerbated the claimant's underlying low back problems, that she had reached MMI, and that the recommendations of the FCE should be followed. The claimant continued working, and records from her treating physicians indicate that she complained that her symptoms became worse as she attempted to work her full duties as a CNA. Dr. Schultz noted in October 2008 that the claimant reported that her pain was getting increasingly worse. In December 2008, he noted that the claimant continued to work but was having a difficult time. In January 2009, he noted that the claimant had increasing back pain and left sciatica. Finally, on March 29, 2009, he took the claimant off work when she called and said she could no longer continue work. At the arbitration hearing, Dr. Schultz opined that the claimant should be retrained for another position because her work will aggravate her condition. He also believed that the August 25, 2007, workplace accident caused her conditions.

¶ 54 Based on this record, we cannot find that the Commission's finding of causation is against the manifest weight of the evidence. The Commission adopted the arbitrator's finding of causation based on "the chain of events and the records of [the claimant]'s treating physicians." In addition, it adopted the arbitrator's finding that the claimant provided credible testimony concerning her symptoms.

¶ 55 Expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and her condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892 (1994). We agree with the Commission that causation in the present case is supported by both medical testimony *and* the chain of events.

¶ 56 Although the claimant had a previous low back injury in 2005, she successfully treated

that injury by being off work for three months and undergoing physical therapy. She was then released to full-duty work. She had intermittent low back pain since then, but was able to work full duty until the August 25, 2007, accident. As noted above, the results of the FCE after the workplace accident indicate that the claimant was capable of working only at the sedentary to light level. In addition, she testified that she continues to experience severe low back pain. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester*, 93 Ill. 2d at 63-4, 442 N.E.2d at 911.

¶ 57 The production of symptoms was a fact in the record that the Commission used to make its factual determination of causation. In both *Sisbro* and *Tower Automotive*, the courts considered that the employees were asymptomatic prior to working for the employer. *Sisbro*, 207 Ill. 2d at 207-08, 797 N.E.2d at 674; *Tower Automotive*, 407 Ill. App. 3d at 435, 943 N.E.2d at 160-61. Other cases have also noted the onset of symptoms in evaluating causation with respect to preexisting conditions. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000) ("Claimant was asymptomatic before these accidents and symptomatic afterward. The Commission could reasonably find that the accidents aggravated claimant's prior right knee condition. This finding was not against the manifest weight of the evidence."); *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 861, 826 N.E.2d 493, 502 (2005) (medical expert testified "that it was after the work injury that the claimant's [preexisting] condition was exacerbated; namely, he experienced pain while walking and his ability to work was limited").

¶ 58 Furthermore, the testimony at the trial included the opinion of Dr. Schultz that the workplace accident aggravated the claimant's low back condition. The employer's own IME doctor, Dr. Polinsky, also opined that the claimant's workplace accident exacerbated her

underlying low back problems. Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972); *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566, 394 N.E.2d 1192, 1194 (1979) ("Therefore, a finding of fact by the Commission on this issue, based on any medical testimony or on inferences to be drawn from medical testimony, should be given substantial deference because of the expertise acquired by the Commission in this area."). Considering the chain of events and the medical testimony, the record supports a finding that the employee's current condition of ill-being, low back pain, is causally related to the workplace accident.

¶ 59

II.

¶ 60

TTD Benefits

¶ 61 Because we affirm the Commission's finding with respect to causation, we also affirm the Commission's awards for TTD benefits and prospective medical treatments and reverse that portion of the circuit court's judgment that overturned those awards.

¶ 62 As noted above, the Commission awarded two intermittent periods of TTD benefits. The first period was from September 24, 2007, through November 28, 2007. In the request for hearing prepared by the parties prior to the arbitration hearing, the employer agreed that the claimant was totally disabled from October 11, 2007, through November 28, 2007, a period of seven weeks. Accordingly, the circuit court had no basis to reverse the TTD benefits award for this period of time. *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-88, 804 N.E.2d 135, 138 (2004) (statement by employer in its request for a hearing that employee was temporarily totally disabled for 84 weeks was binding on the employer).

¶ 63 Prior to the arbitration hearing, the parties stipulated that the employer had already paid a total of \$1,734.39 in TTD benefits. The parties also stipulated that the claimant's average weekly wage was \$371.66. The record does not show when the employer paid the

TTD benefits, but the payment is consistent with its stipulation that the claimant was temporary and totally disabled for seven weeks ($\$371.66 \times 7 \times 66 \frac{2}{3}\%$). 820 ILCS 305/8(b)(1) (West 2010).

¶ 64 The evidence presented at the trial also supports the Commission's finding that the claimant's initial period of temporary and total disability began on September 24, 2007, rather than October 11, 2007, as stipulated by the employer. An employee is totally disabled when she cannot perform any service except those for which no reasonably stable labor market exists. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 627 (1990). The time period of TTD is a question of fact for the Commission, and its decision should not be disturbed unless it is against the manifest weight of the evidence. *Id.* at 118-19, 561 N.E.2d at 627-28.

¶ 65 On September 24, 2007, the claimant saw Dr. Khan, who advised her to remain off work. The claimant attempted to return to work on October 10, 2007, but could only work half a day due to pain. When the claimant returned to Dr. Khan on October 11, 2007, he again took her off work. Accordingly, the record supports the Commission's award of TTD benefits for the period beginning September 24, 2007, through November 28, 2007. The employer, however, only paid TTD benefits from October 11, 2007, through November 28, 2007. There is no evidence that the employer paid any TTD benefits for the claimant's temporary and total disability for the period of September 24, 2007, through October 10, 2007. We reverse that portion of the circuit court's judgment that reversed the Commission's award of TTD benefits from September 24, 2007, through October 10, 2007, a total of $2 \frac{3}{7}$ weeks.

¶ 66 With respect to the second period of TTD benefits, the arbitrator awarded the claimant TTD benefits for the period from March 26, 2009, through November 25, 2009, which was the date of the 19(b) hearing. The Commission, however, modified the arbitrator's TTD

benefits award for the second intermittent period by reducing the TTD period to March 26, 2009, through July 28, 2009. The claimant did not appeal the Commission's decision to the circuit court. The employer appealed, and the circuit court, without explanation, held that the Commission's decision awarding TTD benefits is against the manifest weight of the evidence. Both the claimant and the employer now appeal from the circuit court's judgment.

¶ 67 The evidence supports the Commission's finding that the claimant was temporarily and totally disabled from March 26, 2009, until July 28, 2009. On March 26, 2009, the claimant's treating physician took the claimant off work because of the symptoms of the claimant's work-related injury. Because we affirm the Commission's finding that the claimant's conditions of ill-being in her low back are causally related to the workplace accident, we affirm the Commission's award of TTD for the second intermittent period of temporary total disability beginning on March 26, 2009, and we reverse that portion of the circuit court's judgment that finds that the Commission's awards for TTD benefits are against the manifest weight of the evidence.

¶ 68 As noted above, the arbitrator originally awarded the second period of TTD benefits from March 26, 2009, all the way through the date of the arbitration hearing, November 25, 2009, but the Commission reduced the award for this second period of TTD benefits to March 26, 2009, through July 28, 2009. In her brief before this court, the claimant "submits that temporary total disability benefits for *** March 26, 2009 through November 25, 2009 should be awarded." However, in her argument to the circuit court, the claimant requested the circuit court to "affirm the Commission's decision in its entirety." The claimant did not challenge the Commission's decision to reduce the second intermittent period of TTD benefits. Because this issue was not presented to the circuit court, "we find this issue has been waived and need not be considered by this court." *May v. Industrial Comm'n*, 195 Ill. App. 3d 468, 472, 552 N.E.2d 258, 260 (1990) (claimant waived her *res judicata* challenge

to the Commission's decision where she did not present the issue to the circuit court). We affirm the Commission's TTD benefits awards in their entirety and reverse that portion of the circuit court's judgment that finds the awards to be against the manifest weight of the evidence.

¶ 69

III.

¶ 70

Prospective Medical Care

¶ 71 We also reverse the circuit court's finding that the Commission's award of prospective medical care is against the manifest weight of the evidence. Section 8(a) of the Act requires employers to pay all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of the work-related injury. 820 ILCS 305/8(a) (West 2010). "Questions regarding entitlement to prospective medical care under section 8(a) are factual inquiries for the Commission to resolve." *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193.

¶ 72 The circuit court in the present case held that the Commission's award of prospective medical care is against the manifest weight of the evidence, but it did not offer any explanation for this holding. We affirm the circuit court's finding that the claimant's conditions of ill-being in her low back are causally related to the workplace accident. Therefore, we affirm the Commission's award of prospective medical care and reverse that portion of the circuit court's judgment finding the Commission's award to be against the manifest weight of the evidence.

¶ 73

VI.

¶ 74

Sections 19(k) and 19(l) Penalties and Section 16 Attorney Fees

¶ 75 Finally, the claimant challenges the circuit court's reversal of penalties and fees. As noted above, the Commission awarded penalties and fees under sections 16, 19(k), and 19(l), but the circuit court held that the awards for penalties and fees were against the manifest

weight of the evidence and reversed these awards. The issues surrounding awards of penalties and fees under sections 16, 19(k), and 19(l) of the Act involve two different standards.

¶ 76 (a)

¶ 77 Section 19(l) Penalties

¶ 78 Penalties under section 19(l) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late and the employer cannot show an adequate justification for the delay. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id.* The question of whether the employer has unreasonably delayed payment is a fact question that will not be disturbed unless it is against the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121-22, 578 N.E.2d 140, 143 (1991).

¶ 79 In the present case, we agree with the circuit court that the Commission's findings with respect to 19(l) penalties are against the manifest weight of the evidence. The parties' penalties dispute centers around whether penalties should be awarded due to the employer's failure to pay TTD benefits for the period beginning September 24, 2007, through October 10, 2007, a period of 2 3/7 weeks. However, there are no facts in the record that indicate that the employer knew, prior to the arbitration hearing, that the claimant was seeking TTD benefits for this period of time. Therefore, the claimant has not established that the employer failed, neglected, or refused to make payment of TTD benefits. We affirm the circuit court's judgment to the extent that it reversed the Commission's award of section 19(l) penalties.

¶ 80 (b)

¶ 81 Section 19(k) Penalties and Section 16 Attorney Fees

¶ 82 Section 19(k) of the Act provides as follows:

"In the case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation ***, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2010).

¶ 83 The standard for awarding penalties pursuant to section 19(k) is higher than the standard under section 19(l). Section 19(k) requires more than a showing that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). Section 19(k) penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.* 702 N.E.2d at 553.

¶ 84 With respect to attorney fees, section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2010). The imposition of penalties and attorney fees under sections 19(k) and section 16 fees is discretionary. *McMahon*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 85 A review of the Commission's decision concerning penalties and attorney fees pursuant to sections 19(k) and 16 involves a two-part analysis. First, we must determine whether the Commission's finding that the facts justified section 19(k) penalties and section 16 attorney fees is "contrary to the manifest weight of the evidence." *Id.* at 516, 702 N.E.2d at 533. Second, we must determine whether it was an abuse of discretion to award such penalties and fees. *Id.*

¶ 86 Under the facts outlined above, we must also conclude that the Commission's awards for section 19(k) penalties and section 16 attorney fees are improper. Again, without evidence that the employer knew that the employee claimed TTD benefits for the period of September 24, 2007, through October 10, 2007, there can be no finding that the employer

acted in bad faith in failing to pay those benefits. Under the first prong of the analysis outlined above, the evidence presented at the arbitration hearing does not justify 19(k) penalties or attorney fees.

¶ 87 Accordingly, we affirm that portion of the circuit court's judgment that reverses the Commission's award of penalties and attorney fees pursuant to sections 19(l), 19(k), and 16 of the Act. We reverse the Commission's awards for penalties and fees.

¶ 88 **CONCLUSION**

¶ 89 For the foregoing reasons, we affirm that portion of the circuit court's judgment that confirmed the Commission's findings on causation, and we affirm that portion of the circuit court's judgment that reversed the Commission's awards for penalties and fees pursuant to sections 19(l), 19(k), and 16 of the Act. We reverse those portions of the circuit court's judgment that reversed the Commission's awards of TTD benefits and prospective medical care. We remand the case for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 90 Affirmed in part and reversed in part; cause remanded.