

NOTICE

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2013 IL App (5th) 120470WC-U

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).

NO. 5-12-0470WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

ILLINOIS WORKERS' COMPENSATION COMMISSION DIVISION

GILSTER MARY LEE CORPORATION,)	Appeal from the
Appellant,)	Circuit Court of
v.)	Jefferson County.
THE ILLINOIS WORKERS' COMPENSATION)	No. 12-MR-20
COMMISSION <i>et al.</i> (Larry Harnden, Appellee).)	
)	Honorable
)	Mark R. Stanley,
)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* (1) The Commission's finding of a causal link between claimant's work accident and his cervical spine condition of ill-being was not against the manifest weight of the evidence.
- (2) The Commission's award of temporary total disability benefits was not against the manifest weight of the evidence.
- (3) The Commission's medical expenses award is modified where (a) the Commission inconsistently ordered both that its medical expenses award be subject to the fee schedule and that specific medical bills would not be reduced by the fee schedule, (b) the parties agreed the fee schedule applied, and (c) the parties agreed about the amount by which the Commission's award should be reduced.
- (4) The Commission's award of prospective medical expenses was not against the manifest weight of the evidence.

(5) The Commission's imposition of penalties and attorney fees based on the employer's failure to pay medical expenses was against the manifest weight of the evidence as the record failed to show the employer was late in paying; however, the Commission committed no error in awarding penalties and attorney fees based on the employer's delay in paying claimant temporary total disability benefits.

¶ 2 On October 4, 2010, claimant, Larry Harnden, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, Gilster Mary Lee Corporation. Following a hearing, the arbitrator determined claimant sustained accidental injuries that arose out of and in the course of his employment on September 16, 2010, and awarded him 15-2/7 weeks' temporary total disability (TTD) benefits and \$12,522.38 for reasonable and necessary medical expenses. The arbitrator also ordered the employer to authorize and pay for medical treatment recommended by one of claimant's medical providers and ordered the employer to pay claimant (1) attorney fees in the amount of \$3,411.46 pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)), (2) penalties in the amount of \$6,261.06 pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2010)), and (3) penalties in the amount of \$3,210.06 pursuant to section 19(l) of the Act (820 ILCS 305/19(l) (West 2010)).

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) reduced arbitrator's award of medical expenses to \$7,653.54, section 19(k) penalties to \$3,826.77, and section 16 attorney fees to \$2,437.93. It otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Jefferson County confirmed the Commission's decision.

¶ 4 The employer appeals, arguing (1) the Commission's finding that claimant's current condition of ill-being was causally connected to his September 2010, work-related accident was against the manifest weight of the evidence, (2) the Commission's award of 15-2/7 weeks' TTD

benefits from September 20, 2010, to January 5, 2011, was against the manifest weight of the evidence, (3) the Commission's awards of medical expenses and prospective medical treatment were against the manifest weight of the evidence, and (4) the Commission's awards of penalties and attorney fees were against the manifest weight of the evidence. We modify the Commission's award of past medical expenses by reducing the total amount awarded to \$6,422.08; vacate the Commission's award of section 19(k) penalties; modify the Commission's award of section 16 attorney fees to \$906.96; and otherwise affirm the circuit court's judgment, confirming the Commission.

¶ 5

I. BACKGROUND

¶ 6 At arbitration, claimant testified he worked for the employer as a forklift driver. He alleged accidental injuries arising out of and in the course of his employment on September 16, 2010. On that date, claimant stated he was using a forklift to put a pallet of 44-pound bags of soy whey or cellulose on to the second floor. The bags were shrink wrapped on the pallet to hold them in place. Claimant testified he started to back up but the shrink wrap split and seven to eight bags fell down on the top of the forklift. He stated he looked up and jerked his head forward in an attempt to hide his head. Claimant was covered in six to eight inches of cellulose. He testified he was also struck by a partially full bag but was unsure how much was in the bag at the time. Following the incident, claimant's neck, arm, and shoulder hurt.

¶ 7 Claimant testified he worked for the employer for 11 years. Prior to September 2010, he had low back problems and sought medical treatment for that condition from Dr. Michael Templer and Dr. Glen Feather. He acknowledged having a spinal cord stimulator implanted due to his lower back condition and being under a 20-pound lifting restriction at the time of his

September 2010, work accident. He stated his lower back problems were unrelated to his employment and the employer was always able to accommodate his work restrictions. Claimant denied undergoing medical treatment for his neck prior to September 16, 2010.

¶ 8 Claimant testified, following his accident, the first accident report he completed disappeared and his supervisor came to him with a new one. At arbitration, he submitted an accident report, dated September 16, 2010, showing he suffered a "strain or sprain" to his neck and upper back after being "struck." The report further states as follows:

"[Claimant] [w]as putting raw material through the 2nd floor window when the plastic wrap came loose on the way to the 2nd floor. 8 bags fell from the skid and hit the forklift from above. He then moved his head forward to evade being struck and strained his neck."

Claimant also submitted an "Employer's First Report of Injury" form, dated September 22, 2010, and containing a similar accident description.

¶ 9 Additionally, claimant presented the signed statement of Loren Donoho, a coworker who witnessed claimant's accident. Donoho reported he observed claimant on his forklift and saw several bags roll off of the pallet and onto the top of the forklift cage. He stated that "[w]hen the bags hit the cage they broke open and spilled onto the driver." Donoho observed claimant look up to see the bags falling and then "put his head down and put his arms over his head."

¶ 10 The employer presented a handwritten statement from claimant, dated September 16, 2010, wherein he reported putting "soy whey *** on the second floor when the stretch wrap broke" and eight bags fell on his forklift. He also reported noticing that his neck was sore after

the accident because he wrenched his neck trying to cover his face. The employer further submitted an employee's-report-of-claim form, dated September 23, 2010, and signed by claimant on September 30, 2010. That report states claimant was "struck on neck by partial bag of raw material" after "8 bags fell from 2nd floor stock window and fell on forklift, [claimant's] neck and shoulder [and] floor."

¶ 11 Claimant testified he finished work on the day of his accident and reported to work the following day. On September 20, 2010, he sought treatment with Dr. Aziz Rahman, his family doctor. His chief complaint was neck pain and Dr. Rahman noted claimant "had an accident at work." Claimant reported "he had four bags of 50 pounds each falling down from the truck and they told him to duck" and "[w]hen he ducked, he developed pain in the neck area." Dr. Rahman assessed claimant as having an injury to the neck, recommended an x-ray of his cervical spine, and gave claimant a slip stating he was unable to work on September 20 and 21, 2010. The report from claimant's x-rays show an impression of "[m]ultilevel degenerative change with neural foramen stenosis" and "[n]o superimposed acute abnormality *** in the cervical spine." Claimant testified he gave Dr. Rahman's off-work slip to the employer and was given a "write-up" for going to see his own doctor. At arbitration, he submitted a verbal warning form he received for "not following proper medical procedure."

¶ 12 Claimant testified, on September 21, 2010, he saw the employer's company doctor. His medical records reflect he was seen at Midwest Occupational Medicine on that date by Lynn Brown, a nurse practitioner. Records show claimant reported a history of driving a forklift on September 16, 2010, "when bags of flour that were on a pallet he was lifting were not properly wrapped and fell onto him, hitting him in the back of the neck." Claimant asserted his neck

continued to hurt and he experienced daily headaches. He also reported numbness at the neck but denied having numbness, tingling, or weakness in his hands or upper extremities. Claimant was assessed as having a cervical strain with underlying degenerative changes. Brown recommended no overhead work, no lifting of greater than 10 pounds, and physical therapy.

¶ 13 Claimant testified he returned to work and spoke with the employer's superintendent, Dan Liken, who told him to go home and use his vacation time to get better. He also stated he underwent physical therapy twice but it did not help. Physical therapy records dated September 23, 2010, state claimant was "currently not working due to need of turning head to drive tow motor." On September 27, 2010, he had a second physical therapy appointment and records show he reported increased lower back pain with "his light duty assignment." Additionally, the employee's-report-of-claim claimant signed on September 30, 2010, contains handwritten statements that claimant "continued [to work] except for doctor and therapy" and was "now working in production line 12 hr shifts, standing [and] bending causes a lot of pain."

¶ 14 On September 29, 2010, claimant sought medical treatment from Dr. Matthew Gornet. His chief complaints were neck pain, headaches, and "pain into his right shoulder, down his right arm to his wrist with tingling in his right hand." Dr. Gornet noted claimant's symptoms began on September 16, 2010, while he was working for the employer, and recorded the following history:

"[Claimant] was using a forklift apparently placing material onto the second floor. Apparently some of the straps that hold the material gave way and a bag fell approximately 20 feet and struck him in the back of the head."

Dr. Gornet stated he believed claimant's symptoms were causally connected to his work accident.

He recommended a CT myelogram and that, until Dr. Gornet knew what he was dealing with, claimant should "continue working as before."

¶ 15 On October 1, 2010, claimant returned to Dr. Rahman and reported back and neck pain. Dr. Rahman noted claimant had "been having a lot of pain in the neck as well as in the lumbosacral area" and that he had been to see Dr. Gornet. Claimant reported "there was no way he [could] work." Dr. Rahman restricted claimant from working until November 16, 2010, when he would have had the diagnostic testing recommended by Dr. Gornet. On November 1, 2010, claimant followed up with Dr. Rahman and complained of back pain.

¶ 16 On November 15, 2010, claimant returned to see Dr. Gornet. Dr. Gornet noted claimant underwent recommended testing and stated as follows:

"[Claimant's] CT-Myelogram to my viewing shows bilateral foraminal stenosis left greater than right at C4-5, as well as what appears to be a right sided filling defect consistent with a disc herniation C6-7 with some foraminal stenosis there. Our general belief is the C6-7 lesion is the main source of his pain but he understands 4-5 may also play a role. Because the 4-5 level would require spinal fusion, my tentative plan would be to treat C6-7 alone and perform this first. Only if his symptoms are fairly refractory would I consider C4-5 treatment. He is also having back problems. He is off all of his narcotics, only occasional Tylenol #3. He made a lot of progress. We will tentatively give him the surgery date for early January but he will seek approval for this.

He also must obtain medical clearance. He can continue working light duty as before."

Dr. Gornet gave claimant a note stating he was able to return to light-duty work as of November 16, 2010, with restrictions of no lifting greater than 10 pounds, alternating between sitting and standing as needed, no repetitive bending, no repetitive lifting, and no overhead work.

¶ 17 Claimant testified, on November 17, 2010, he asked Dr. Templer to write him a note stating he could work without restrictions. He noted Dr. Templer was treating him for his low back and the release he was given was for that injury. Claimant stated the employer put him on its production line but he experienced problems in his neck from standing, bending, and reaching and only worked for about 15 minutes. He testified he reported what he was experiencing but the employer had no other work for him.

¶ 18 The employer submitted the deposition of Dr. James Doll, a specialist in physical medicine and rehabilitation, who examined claimant on October 19, 2010. Dr. Doll testified claimant provided a history of injuring his neck while operating a forklift and putting pallets up into a window. Claimant reported "the wrapping broke loose and bags of soy powder toppled down towards him" and "the bags hit him on the back of the neck and the powder filled his cab until he was buried up to his neck." Dr. Doll stated claimant complained of neck pain and occasional paresthesias in his right arm. In addition to his examination of claimant, Dr. Doll reviewed claimant's medical records and had x-rays performed on his cervical spine. He noted x-rays showed no acute bony abnormality or significant instability but he did observe "degenerative changes, including osteophyte formation and neural foraminal stenosis, at multiple levels."

¶ 19 Later, Dr. Doll was provided with additional medical records, including the myelogram

and CT scan performed on claimant in November 2010. Dr. Doll found claimant's myelogram "revealed left lateral recess stenosis and a small ventral extradural defect at C4-5 with left worse than right facet arthropathy." Although claimant's CT suggested the presence of a disc herniation, the same "was not described on the myelogram." Dr. Doll explained the discrepancy, stating "while there may be some disc material such as a bulge, protrusion, or herniation at this level that the radiologist saw, it is not having a compressive effect on the nerve root at that level as described in th[e] myelogram study." He attributed the changes found in claimant's November 2010 diagnostic testing to "a natural degenerative process." Dr. Doll opined claimant sustained only a cervical strain as the result of his September 2010 work accident. He described a cervical strain as "a soft tissue injury *** where by the muscles are stretched suddenly" and would expect a mild strain injury to "be two to four weeks in duration."

¶ 20 Dr. Doll noted variances in the accident histories claimant reported to his medical providers but testified his conclusions remained the same whether claimant was struck on the back of the neck by bags or only moved his head or neck to avoid being struck. Further, he stated that, at the time of his October 2010 examination of claimant, he found no objective evidence of a cervical strain, concluded claimant required no further testing or treatment for that injury, and found claimant had reached maximum medical improvement (MMI). Dr. Doll believed the neck pain claimant continued to experience was attributable to multilevel degeneration of his cervical spine. Further, he testified the degeneration was the result of the natural aging process and not claimant's work accident.

¶ 21 On cross-examination, Dr. Doll testified it was possible for claimant to "experience an aggravation of an underlying degenerative condition" as a result of his work accident "whether he

was struck by the bags or simply jerked his head to the side." However, he noted the absence of radiculopathy in the symptoms claimant reported to his medical providers immediately following his accident and found "it did not appear that a radicular process was taking place." Additionally, Dr. Doll testified that, following a neck injury, symptoms could be immediate or could appear within 24 to 48 hours or to two to three days later.

¶ 22 The employer also submitted photographs of a forklift and a video. The arbitrator described the video as follows:

"[The employer] introduced a video of an individual dropping a single bag of the material from the second story landing and onto an unoccupied forklift. The recording shows the bag striking the protective, overhead bars of the forklift with the majority of the bag's contents entering the cab."

¶ 23 At arbitration, claimant testified he experienced soreness in his neck all the time and had a big knot that throbbed. His right arm would go to sleep and he experienced numbness in his fingers. Claimant also stated his head constantly hurt.

¶ 24 On March 17, 2011, the arbitrator determined claimant sustained accidental injuries that arose out of and in the course of his employment on September 16, 2010, and awarded him 15-2/7 weeks' TTD benefits and \$12,522.38 for reasonable and necessary medical expenses. The arbitrator also ordered the employer to authorize and pay for the treatment recommended by Dr. Gornet. Finally it ordered the employer to pay claimant (1) attorney fees in the amount of \$3,411.46 pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)), (2) penalties in the amount of \$6,261.06 pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2010)), and

(3) penalties in the amount of \$3,210.06 pursuant to section 19(l) of the Act (820 ILCS 305/19(l) (West 2010)). In reaching her decision, the arbitrator found the opinions of Dr. Gornet, a spine surgeon, more persuasive than those of Dr. Doll, whom she noted was not a surgeon. The arbitrator also noted Dr. Doll acknowledged claimant's accident could have caused his underlying degenerative condition to become symptomatic.

¶ 25 On January 13, 2012, the Commission reduced the arbitrator's award of medical expenses to \$7,653.54, section 19(k) penalties to \$3,826.77, and section 16 attorney fees to \$2,437.93, but otherwise affirmed and adopted the arbitrator's decision. On October 10, 2012, the circuit court of Jefferson County confirmed the Commission's decision.

¶ 26 This appeal followed.

¶ 27

II. ANALYSIS

¶ 28 On appeal, the employer first challenge the Commission's causal connection decision. It argues the Commission's finding of a causal link between claimant's work accident and his current, cervical condition of ill-being was against the manifest weight of the evidence.

¶ 29 "To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1. "An accidental injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Shafer*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1.

¶ 30 "In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from

the evidence, determine what weight to give testimony, and resolve conflicts in the evidence."

Shafer, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1. On review, the Commission's causal-connection finding will not be overturned unless it is against the manifest weight of the evidence.

Shafer, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1. "A factual finding is against the manifest weight of the evidence if the opposite conclusion is 'clearly apparent.'" *Shafer*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1 (quoting *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086, 837 N.E.2d 937, 940 (2005)). The appropriate test on review "is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1.

¶ 31 Here, the Commission affirmed and adopted the arbitrator's finding that claimant's cervical spine condition of ill-being was causally related to his work accident. The record contains sufficient evidence to support the Commission's decision.

¶ 32 Claimant alleged neck-related injuries as the result of a work accident on September 16, 2010. He testified that, while operating a forklift at work, seven to eight 44-pound bags of soy whey fell down onto the top of his forklift. Claimant stated he jerked his head forward in an attempt to hide his head and he was struck by a partially full bag. He testified that, following the accident, he experienced pain in his neck, arm, and shoulder. Although claimant had a preexisting low back condition of ill-being, the record fails to reflect any preexisting neck-related complaints or treatment.

¶ 33 After his work-related accident, claimant consistently reported neck pain to his medical providers and related his symptoms to his work accident. While the accident histories claimant

reported vary in some respects, they are substantially consistent with one another and claimant's arbitration testimony. Each history shows claimant was injured after several bags fell on top of his forklift and he either moved his head forward to cover himself, was hit or struck on his neck by a bag, or both moved his head and was struck.

¶ 34 Additionally, the record contains medical opinion evidence which supports causation. On September 19, 2010, claimant saw Dr. Gornet and made neck-related complaints. Dr. Gornet opined claimant's symptoms were causally connected to his work accident. Although Dr. Doll, who saw claimant at the employer's request, offered conflicting medical opinion, it was within the province of the Commission to resolve conflicting medical evidence. The Commission found Dr. Gornet, a spine surgeon, more persuasive than Dr. Doll, who was not a surgeon. Additionally, although Dr. Doll ultimately determined no causal connection existed, he did acknowledge that claimant's work accident could have aggravated his underlying degenerative condition.

¶ 35 The employer challenges the Commission's decision as internally inconsistent, arguing it determined claimant sustained accidental injuries based upon one set of facts but then based its causation finding on medical opinion which relied on a different accident history. Specifically, the employer maintains "[t]he Commission found claimant was injured when 'he jerked his head forward and bent forward' just as the bags struck the top of his forklift" but then found the existence of a causal connection based upon the opinions of Dr. Gornet who noted claimant was injured when "a bag fell approximately 20 feet and struck him in the back of the head." We disagree and find the employer mischaracterizes the Commission's findings.

¶ 36 Here, aside from its modification of medical expenses, penalties, and attorney fees, the

Commission affirmed and adopted the arbitrator's decision. Nowhere in that decision did the arbitrator attribute claimant's injuries solely to jerking his head forward. Rather, she summarized evidence presented at arbitration, including medical records which showed claimant reported to a nurse practitioner on September 21, 2010, that he was "struck in the back of the neck with falling bags of flour." Moreover, the history recorded by Dr. Gornet stated "a bag fell approximately 20 feet and struck [claimant] in the back of the head." The Commission found he "recorded a consistent accident history," indicating it actually determined the mechanism of claimant's injury included being struck by a bag. As discussed, although the recorded accident histories vary, they are nevertheless substantially similar to one another and claimant's arbitration testimony, and several histories contain a description of claimant being struck or hit in the neck or head by a bag. The Commission's decision is not internally inconsistent.

¶ 37 The employer next argues claimant's failure to report radicular symptoms until 13 days after his work accident supports a finding of no causal connection between claimant's work accident and his condition of ill-being. However, although claimant did not immediately report radicular symptoms, he did consistently and continuously make neck-related complaints following his accident. His persistent neck-related complaints support the Commission's finding that claimant's cervical spine condition of ill-being was causally connected to his work accident.

¶ 38 Finally, the employer challenges the Commission's causal connection decision on the basis that it misrepresented Dr. Doll's medical opinion testimony. It contends the Commission took Dr. Doll's statements out of context to give the impression that Dr. Doll provided a causation opinion that was favorable to claimant. Dr. Doll opined claimant suffered a cervical strain as the result of his September 2010 work accident but his condition had resolved by the

time of Dr. Doll's October 2010 examination of claimant. Dr. Doll believed the cervical symptoms claimant continued to experience were the result of multilevel degeneration of the cervical spine and not claimant's work accident. However, he also acknowledged that claimant's work accident, whether he was struck by bags or simply jerked his head, could cause "an aggravation of an underlying degenerative condition." His testimony further indicated that he did not believe claimant's radicular symptoms were the result of his work accident because claimant did not report such symptoms immediately following his accident.

¶ 39 In her decision, the arbitrator summarized Dr. Doll's opinion testimony, including his belief that claimant suffered only a cervical strain as the result of his work accident and that the "degenerative changes in [claimant's] cervical spine were the cause of his present symptoms." The arbitrator then noted that Dr. Doll testified the type of accident claimant sustained while working for the employer "could" have aggravated claimant's preexisting degenerative condition of ill-being. A complete review of the arbitrator's decision shows she accurately set forth Dr. Doll's opinions and testimony and neither the arbitrator nor the Commission, in affirming and adopting the arbitrator's decision, mischaracterized or misrepresented that evidence.

¶ 40 Here, the timing of claimant's neck-related symptoms coupled with Dr. Gornet's causation opinion and Dr. Doll's acknowledgment that the mechanism of his injury could have aggravated a preexisting degenerative condition provided sufficient evidence to support the Commission's causal connection decision. An opposite conclusion from that of the Commission is not clearly apparent, and its decision was not against the manifest weight of the evidence.

¶ 41 On appeal, the employer next argues the Commission's award of TTD benefits from September 20, 2010, through January 5, 2011, was against the manifest weight of the evidence.

It contends claimant was not entitled to TTD benefits from September 22 to 30, 2010, because the evidence presented at arbitration actually showed he was working for the employer during that time. The employer also argues the Commission erred in awarding TTD after October 19, 2010, the date Dr. Doll examined claimant and determined his symptoms were unrelated to his employment.

¶ 42 "A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of her injury will permit." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. A claimant must "prove not only that he did not work, but also that he was unable to work. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. "[T]he period during which a claimant is temporarily totally disabled is a question of fact to be resolved by the Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 272 (2010).

¶ 43 "In resolving questions of fact, it is the function of the Commission to judge the credibility of the witnesses and resolve conflicting medical evidence." *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 257, 899 N.E.2d 365, 378 (2008). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Ming*, 387 Ill. App. 3d at 257, 899 N.E.2d at 378. Again, the appropriate test on review is whether the record contains sufficient factual evidence to support the Commission's determination. *Ming*, 387 Ill. App. 3d at 257, 899 N.E.2d at 378.

¶ 44 Here, the Commission adopted the arbitrator's determination as to TTD. In her decision,

the arbitrator concluded as follows:

"[Claimant] is entitled to TTD benefits from 9/20/10 through 1/5/11, a period of 15 2/7 weeks. [Claimant] was either authorized off work or was released with light duty restrictions which [the employer] elected not to honor. [The employer's] own selected physician from [Midwest Occupational Medicine] placed work restrictions on [claimant]."

The employer argues that, although claimant testified he was off work from September 22 to 30, 2010, documents including the employee's-report-of-claim form it submitted and claimant's medical records indicate otherwise.

¶ 45 Here, claimant was injured on September 16, 2010, and continued to work immediately following his accident. The parties agree Dr. Rahman took claimant off work on September 20 and 21, 2010. On September 21, 2010, claimant was seen at Midwest Occupational Medicine by a nurse practitioner who recommended no overhead work and a 10-pound lifting restriction. Thereafter, the record contains conflicting evidence regarding whether claimant returned to work for the employer.

¶ 46 Claimant testified he returned to work and spoke with the employer's superintendent who told him to go home and use his vacation time to get better. The employer submitted an employee's-report-of-claim form, dated September 23, 2010, but signed by claimant on September 30, 2010, containing handwritten statements that claimant "continued [to work] except for doctor and therapy" and was "now working in production line 12 hr shifts, standing [and] bending causes a lot of pain." However, on September 23, 2010, claimant's physical

therapy records state claimant was "currently not working due to need of turning head to drive tow motor." On September 27, 2010, claimant had a second physical therapy appointment and records show he reported increased lower back pain with "his light duty assignment." We note claimant had been on light-duty work restrictions for his low back condition prior to, and at the time of, his September 2010 accident and it is unclear to what time frame this physical therapy record refers.

¶ 47 Further evidence showed claimant remained under light-duty work restrictions. On October 1, 2010, he reported to Dr. Rahman that "there was no way he [could] work" and Dr. Rahman restricted claimant from working until November 16, 2010. On November 15, 2010, Dr. Gornet recommended surgery and stated claimant could "continue working light duty as before" and placed claimant under various restrictions. On November 17, 2010, Dr. Templer, who treated claimant for his low back condition, released him to return to work without restriction. Claimant testified he returned to work and was placed on the employer's production line; however, due to neck problems, he worked only 15 minutes.

¶ 48 Although the record contained conflicting evidence regarding whether claimant returned to light-duty work for the employer between September 22 to 30, 2010, it was within the province of the Commission to resolve conflicts in the evidence. Given its ultimate award of TTD to claimant from September 20, 2010, through January 5, 2011, the Commission resolved those conflicts in favor of claimant. As the record contains support for the Commission's decision and an opposite conclusion is not clearly apparent, we find the Commission's award of TTD from September 22 to 30, 2010, was not against the manifest weight of the evidence.

¶ 49 Additionally, as discussed, the Commission's causal connection decision was also not

against the manifest weight of the evidence. Thus, for the reasons already stated, the employer's challenge to the Commission's TTD award on that basis is without merit.

¶ 50 On appeal, the employer next challenges the Commission's awards of past and prospective medical expenses, arguing its awards were against the manifest weight of the evidence and contrary to law. Under the Act, "a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVML v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165 (2011) (citing 820 ILCS 305/8(a) (West 2006)). "Prescribed services not yet performed or paid for are considered to have been 'incurred' within the meaning of the statute." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 317, 901 N.E.2d 1066, 1082 (2009). "Whether medical expenses are reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1.

¶ 51 Initially, the employer contends the Commission erred in awarding past medical expenses of \$7,653.54, arguing it failed to reduce its award pursuant to the medical fee schedule in section 8.2 of the Act (820 ILCS 305/8.2 (West 2010)). Claimant concedes the fee schedule applies and both parties agree the medical services at issue were performed in Missouri and the amount payable for such out-of-state expenses was "76% of actual charge." See 50 Ill. Adm. Code 7110.90(g) (2012). However, claimant contends "there is simply no dispute" because the Commission expressly stated the fee schedule applied to its award of medical expenses.

¶ 52 Here, the Commission modified the arbitrator's "award of medical from \$12,522.38 to \$7,653.54, subject to the medical fee schedule" but further broke down its award and ordered that medical bills from Dr. Gornet and CT Partners, totaling \$123 and \$5,008.08, respectively, were awarded "and not reduced by the fee schedule." The Commission then ordered the employer to pay claimant "the sum of \$7,653.54 for medical expenses *** subject to the Medical Fee Schedule." The employer argues the Commission's decision is internally inconsistent and the bills from Dr. Gornet and CT Partners, totaling \$5,131.08, should be reduced by 24%, resulting in a \$1,231.46 reduction in the amount of medical expenses awarded by the Commission for a new total of \$6,422.08 in medical expenses ($\$7,653.54 - \$1,231.46 = \$6,422.08$). We agree.

¶ 53 The Commission inconsistently ordered both that its medical expenses award be subject to the fee schedule and bills from Dr. Gornet and CT Partners would not be reduced by the fee schedule. On review, the parties agree that the fee schedule applies and by what amount the Commission's award should be reduced. To the extent the Commission held otherwise, it erred. We modify the Commission's award of medical expenses by reducing the amount awarded to \$6,422.08.

¶ 54 The employer also challenges the Commission's award of prospective medical expenses for "the surgery recommended by Dr. Gornet." It complains that Dr. Gornet never recommended any specific surgical procedure. The employer also contends Dr. Gornet's causation opinion was based on facts not in evidence.

¶ 55 Initially, to the extent the employer argues the prospective medical award is improper because the Commission erred in finding the existence of a causal connection, we disagree. For the reasons already stated, the Commission's finding that claimant's cervical condition of ill-

being was causally connected to his work accident was not against the manifest weight of the evidence. There was sufficient evidence in the record to support both the accident history recorded by Dr. Gornet and the Commission's ultimate finding as to causation.

¶ 56 Further, we find Dr. Gornet's recommendation for additional treatment of claimant's cervical spine was sufficiently specific to support the Commission's award of prospective medical care. Dr. Gornet's records stated as follows:

"[Claimant] returns today. His CT-Myelogram to my viewing shows bilateral foraminal stenosis left greater than right at C4-5, as well as what appears to be a right sided filling defect consistent with a disc herniation C6-7 with some foraminal stenosis there. Our general belief is the C6-7 lesion is the main source of his pain but he understands 4-5 may also play a role. Because the 4-5 level would require spinal fusion, my tentative plan would be to treat C6-7 alone and perform this first. Only if his symptoms are fairly refractory would I consider C4-5 treatment. He is also having back problems. He is off all of his narcotics, only occasional Tylenol #3. He made a lot of progress. We will tentatively give him the surgery date for early January but he will seek approval for this."

The record supports a finding that claimant sustained injury to his cervical spine as the result of his September 2010 work accident. After his accident, he consistently reported neck-related complaints and Dr. Gornet recommended surgery on claimant's cervical spine to further treat his condition. The Commission's award of prospective medical expenses was not against the

manifest weight of the evidence.

¶ 57 Finally, on appeal, the employer challenges the Commission's awards of penalties and attorney fees pursuant to sections 19(k), 19(l), and 16 of the Act. It contends the imposition of penalties and attorney fees was improper because it made a good-faith challenge to liability based on Dr. Doll's medical opinion. The employer also contends the record fails to show it delayed in paying claimant's medical expenses because it had 60 days from the receipt of any medical bill to make payment and the evidence presented failed to show that time period had expired.

¶ 58 Penalties under section 19(l) of the Act are "in the nature of a late fee" (*Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 15, 981 N.E.2d 1193) and may be ordered when the employer or its insurer "without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits" (820 ILCS 305/19(l) (West 2008)).

"[T]he assessment of a penalty under section 19(l) is mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay.'" *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 19, 959 N.E.2d 772 (quoting *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998)). "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 19, 959 N.E.2d 772. "The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 19, 959 N.E.2d 772.

¶ 59 Additionally, compensation may be awarded under sections 19(k) and 16, when there has been an unreasonable or vexatious delay of payment, intentional underpayment, or the instituting

or carrying on of proceedings that are frivolous or for the purpose of delay. 820 ILCS 305/19(k), 16 (West 2008). "[S]ection 19(k) penalties and section 16 fees 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.'" *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 23, 959 N.E.2d 772 (quoting *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553). "[T]he imposition of penalties and attorney fees under sections 19(k) and section 16 fees is discretionary." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 23, 959 N.E.2d 772. As a result, review involves a two step process, requiring a reviewing court to initially determine whether the Commission's factual findings were against the manifest weight of the evidence and then determine whether the Commission abused its discretion by awarding penalties and attorney fees. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 24, 959 N.E.2d 772.

¶ 60 "An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act." *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 756 (2001). Generally, penalties are unwarranted when there are conflicting medical opinions, or when the employer acts in reliance upon responsible medical opinion. *Matlock*, 321 Ill. App. 3d at 173, 746 N.E.2d at 756.

¶ 61 Here, in awarding penalties and fees under the Act, the Commission adopted the arbitrator's findings and conclusions. The arbitrator determined as follows:

"[The employer] shall pay penalties of \$6,261.19 (50% of the outstanding medical bills) pursuant to Section 19(k), \$3,210.06 (107 days of unpaid TTD benefits at \$30 per day) pursuant to Section 19(l) of the Act, and attorney fees of \$3,411.46 (20% of the medical bills and unpaid temporary total disability benefits)

pursuant to Section 16 of the Act."

As a result of its modification of the arbitrator's medical expenses award, the Commission also modified the awards of section 19(k) penalties to \$3,826.77, and section 16 attorney fees to \$2,437.93.

¶ 62 Initially, the employer argues this case involved conflicting medical evidence and it reasonably relied on the opinions of Dr. Doll, who examined claimant at its request and determined his condition of ill-being at the time of the examination was not causally connected to his work accident. However, although Dr. Doll found no causation as of the date of his October 19, 2010, examination of claimant, he also determined claimant sustained a cervical strain as the result of his September 16, 2010, work accident for which he received treatment, including restricted activities and physical therapy.

¶ 63 This court has held "[a]ny portion of a claimant's benefits which are undisputed must be promptly paid or the employer will be subject to penalties and attorney fees under the Act." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 49, 959 N.E.2d 772. Here, the employer does not dispute that, at the very least, claimant suffered a cervical strain as a result of his work accident for which he was off work and required treatment. It asserts no good and just cause for its failure to pay claimant TTD benefits as a result of the undisputed injury he sustained on September 16, 2010. To the extent the Commission based its award of penalties and attorney fees on the employer's delay in paying claimant TTD benefits, its decision was not against the manifest weight of the evidence and it committed no error.

¶ 64 As stated, the employer also argues the record fails to reflect it delayed in paying claimant's medical expenses. It contends it had 60 days from the *receipt* of any medical bill to

make payment, the record does not establish when it received any of the claimed bills, several of the bills were not even past 60 days from the date of *service*, and claimant has conceded the employer may not have received copies of his medical bills until the date of arbitration.

¶ 65 At the time of the arbitration hearing, section 8.2(d) of the Act (820 ILCS 305/8.2(d) (West 2010)) provided "[a]ll payments to providers for treatment provided pursuant to this Act shall be made within 60 days of receipt of the bills as long as the claim contains substantially all the required data elements necessary to adjudicate the bills." Additionally, section 19(l) of the Act (820 ILCS 305/19(l) (West 2010)) provided as follows:

"If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 60 days specified under Section 8.2(d)."

¶ 66 Here, the record does not reflect when the employer received or became aware of any of the specific medical bills at issue. Claimant points out that, on November 19, 2010, he filed a petition for penalties and attorney fees, alleging the employer refused to pay TTD or reasonable and necessary medical expenses. However, his petition does not identify any specific bill and the record contains no other written demand for the payment of benefits. Moreover, in his brief, claimant asserts that "at the very LATEST, [the employer] had complete copies of the bills by the January 5, 2011 trial date." Assuming the employer received the bills on the date of the

arbitration hearing, it still had 60 days from that date within which to make timely payment under the Act. Given this record and the parties' arguments, we find the Commission's imposition of penalties and attorney fees based on the employer's failure to pay medical expenses was against the manifest weight of the evidence as the record fails to show it was late in paying.

¶ 67 For the reasons stated, we find the Commission's award of section 19(l) penalties, based on the employer's failure to pay claimant TTD benefits, was supported by the record and not against the manifest weight of the evidence. Its imposition of section 19(k) penalties, based solely on the employer's failure to pay medical expenses, was against the manifest weight of the evidence and is vacated on appeal. Finally, the Commission's award of section 16 attorney fees, based both on the employer's failure to pay TTD benefits and medical expenses, is modified to \$906.96 (20% of the Commission's TTD award), to reflect an award based solely on the employer's failure to pay TTD.

¶ 68

III. CONCLUSION

¶ 69 For the reasons stated, we modify the Commission's award of past medical expenses by reducing the total amount awarded to \$6,422.08; vacate the Commission's award of section 19(k) penalties; modify the Commission's award of section 16 attorney fees to \$906.96; and otherwise affirm the circuit court's judgment, confirming the Commission's decision.

¶ 70 Affirmed in part as modified and vacated in part.