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2015 IL App (1st) 142176WC-U

FILED: December 23, 2015

NO. 1-14-2176WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

C&B STEEL, CORP.,)	Appeal from
Appellant,)	Circuit Court of
Cross-Appellee,)	Cook County
v.)	No. 13L50997
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Robert Bounds, Appellee,)	Edward S. Harmening,
Cross-Appellant).)	Judge Presiding.
)	

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

ORDER

- ¶ 1 *Held:* (1) The Commission did not abuse its discretion in sustaining the employer's *Ghere* objection and striking a portion of a treating physician's deposition testimony.
- (2) The Commission did not abuse its discretion in finding the employer forfeited its argument that claimant exceeded his two physician choices allowed by section 8(a) of the Act.
- (3) The Commission abused its discretion by denying section 19(l) penalties for the withholding of TTD benefits for the period of February 22, 2011, to May 10, 2011, but it did not abuse its discretion in denying section 16 attorney fees and 19(k) penalties for the same period of time.

(4) The Commission did not abuse its discretion in denying penalties and fees for the withholding of TTD benefits after May 10, 2011.

¶ 2 On July 28, 2010, claimant, Robert Bounds, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer, C&B Steel, Corp. Following a hearing, the arbitrator found claimant's "current symptoms and complaints" were causally connected to the July 19, 2010, work accident which the parties had stipulated to. He awarded claimant 118 4/7 weeks' temporary total disability (TTD) benefits, expenses for all medical services rendered, and prospective medical care in the form of physical therapy, lumbar magnetic resonance imaging (MRI), and any further care recommended by his treating physician for claimant's "causally related neck and back conditions." The arbitrator denied prospective medical care for claimant's right ankle as well as penalties and attorney fees. Last, the arbitrator struck a portion of claimant's treating physician's testimony after finding a *Ghere* violation. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 663 N.E.2d 1046 (1996).

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's decision by vacating the portion of the arbitrator's award related to claimant's lumbar spine condition, including any prospective medical treatment related to that condition. It otherwise affirmed and adopted the arbitrator's decision. In addition, the Commission remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980). On judicial review, the circuit court of Cook County affirmed the Commission's decision.

¶ 4 On appeal, the employer argues the Commission erred in striking only a portion of claimant's treating physician's causation opinion for violating section 12 of the Act rather than his entire deposition testimony and (2) finding the employer waived its argument that claimant

exceeded his two physician choices. Claimant cross-appeals, arguing the Commission erred in (1) striking any of his treating physician's deposition testimony and (2) denying penalties and attorney fees. We reverse the portion of the circuit court's judgment which affirmed the denial of section 19(l) penalties for the period of February 22, 2011, to May 10, 2011. We otherwise affirm the circuit court's judgment confirming the Commission's decision. We remand to the Commission so that it may, consistent with this decision, impose section 19(l) penalties for the stated period and for further proceedings pursuant to *Thomas*, 78 Ill.2d 327, 399 N.E.2d 1322.

¶ 5 I. BACKGROUND

¶ 6 The following facts are taken from the evidence presented at the arbitration hearing on October 9, 2012, and November 2, 2012.

¶ 7 Claimant testified that on July 19, 2010, he worked for the employer as a journeyman ironworker and had worked for the employer for approximately 10 years. On that date, claimant was conducting an inventory when his foot got caught in a cable and he "cartwheeled down, somersaulted down" 15 stairs. The parties stipulated to this accident. According to claimant, he hit his head and landed on his back when he fell. He immediately felt "bad pain" in his neck, his "arms were completely numb," his right knee hurt, and his right ankle was "throbbing."

¶ 8 Claimant testified he had previously undergone a three-level cervical fusion procedure in October 2009 and returned to full-duty work a few weeks later. He attributed his fast recovery to being in good shape. Claimant testified between his return to work in November 2009 and the work accident at issue here, he did not experience any pain, tingling, or numbness in his arms and was able to perform all aspects of his job.

¶ 9 Claimant acknowledged that he saw his family physician, Dr. Brett Brechner, four

days prior to the work accident. According to claimant, the reason for this visit was to have his blood pressure checked. He explained that a few days prior to this appointment, he checked his blood pressure at a Walgreens and it was high. Claimant agreed he had complained of neck pain at this visit, but he stated it was "just your normal aches and pains, nothing I had to take any kind of medication for or anything."

¶ 10 Immediately following the work accident, claimant sought treatment at the St. James Hospital emergency department where he underwent a computerized tomography (CT) scan of his neck and head, an MRI of his neck, and x-rays of his right knee and right ankle. Claimant was discharged to the care of Dr. Brechner.

¶ 11 On July 20, 2010, claimant saw Dr. Brechner, complaining of "severe and constant" neck pain radiating to his arms following a fall. Upon examination, Dr. Brechner noted claimant had decreased range of motion in his neck. Dr. Brechner referred him to a neurosurgeon.

¶ 12 On July 23, 2010, claimant saw Dr. Giri Gireesan, a spine surgeon, complaining of neck pain and weakness in his upper extremities, including numbness and tingling in his hands. Dr. Gireesan diagnosed claimant with a cervical cord contusion with weakness in both upper extremities. He prescribed physical therapy and authorized claimant off work. Although claimant underwent physical therapy, he stated the pain in his neck increased and his arms got weaker. Dr. Gireesan recommended claimant see a neurologist. Claimant testified he asked Dr. Brechner for a referral to a neurologist and Dr. Brechner recommended Dr. Michael Spence.

¶ 13 On September 29, 2010, claimant saw Dr. Spence who diagnosed him with cervical myelopathy with chronic neck pain and bilateral upper extremity numbness and weakness as well as a right ankle strain. The record reflects that Dr. Spence was not a

neurologist but was board certified in physical medicine and rehabilitation. Dr. Spence recommended an MRI of claimant's cervical spine, an electromyogram and nerve conduction study of his bilateral upper extremities, and an MRI of his right ankle. According to claimant, these procedures were not authorized by the employer. Claimant saw Dr. Spence again on October 13, 2010, at which time Dr. Spence prescribed a transcutaneous electrical nerve stimulation (TENS) unit. Claimant testified the TENS unit also was not authorized by the employer.

¶ 14 On January 10, 2011, claimant saw Dr. Gireesan again. Dr. Gireesan continued to authorize claimant off work and again recommended he see a neurologist. Claimant testified he had not been authorized to see a neurologist. In February 2011, claimant moved to Florida.

¶ 15 The parties stipulated that claimant received weekly TTD benefits through February 21, 2011, at which time they terminated. Claimant testified he received no notice explaining why his TTD benefits ceased.

¶ 16 On May 6, 2011, claimant saw Dr. Nasier Khalidi, a neurologist in Florida. Dr. Khalidi diagnosed claimant with cervical myelopathy and recommended a cervical MRI. Dr. Khalidi also suggested claimant see a neurosurgeon. According to claimant, his neck pain was "still bad" and his arms were "still numb." Claimant identified a May 2011 fax sent to counsel for the employer that requested (1) authorization for certain tests recommended by Dr. Khalidi and (2) that the employer bring claimant current on TTD benefits. Claimant testified the employer did not authorize the requested tests or bring him current on TTD benefits.

¶ 17 On September 3, 2011, claimant saw Dr. Eusebio Gonzales, a physician at a free clinic. At that time, claimant was suffering from migraines which began when he "was trying to space [his] Vicodins out as long as [he] could because [he] was running out of them."

¶ 18 On January 5, 2012, claimant saw Dr. Douglas Hershkowitz, a neurosurgeon, also through the free clinic. Dr. Hershkowitz diagnosed claimant with cervical myelopathy and recommended a cervical MRI and cervical x-rays. Claimant identified a January 2012 fax sent to counsel for the employer that requested (1) authorization for certain tests recommended by Dr. Hershkowitz and (2) that the employer bring claimant current on TTD benefits. According to claimant, the employer did not authorize the requested tests or bring him current on TTD benefits. Nonetheless, claimant underwent a cervical MRI on February 4, 2012. The MRI revealed a "relative thinning of the cord and impingement on the cord at the C3-C4 level with some high signal myelomalacia suggestions. There is also a small focus of myelomalacia suggested within the cord and the approximate level of C5."

¶ 19 Claimant saw Dr. Hershkowitz again on February 7, 2012, at which time claimant expressed his desire to engage in physical therapy rather than injections or surgical intervention. Claimant identified a February 2012 fax sent to counsel for the employer requesting (1) authorization for the treatment outlined in certain attached medical records and (2) that the employer bring claimant current on TTD benefits.. Claimant testified the employer did not authorize the treatment or bring him current on TTD benefits.

¶ 20 On May 10, 2011, claimant saw Dr. Gunnar Andersson, an orthopedic surgeon, at the request of the employer. Dr. Andersson reviewed medical reports and records prior to and after the work accident, including records from Dr. Spence, Dr. Brechner, and Dr. Gireesan. He also reviewed the July 2010 x-rays and MRI taken at St. James Hospital. Dr. Andersson testified the MRI showed a fusion from C4 to C7, but no evidence of any significant abnormalities of the neck and no evidence of spinal cord changes. According to Dr. Andersson, claimant exhibited "nonorganic physical signs" upon physical examination which he stated were complaints that

could not be explained based on an underlying musculoskeletal disorder. Dr. Andersson further testified he observed claimant on a surveillance video working on a generator and pushing on the blades of a forklift. Dr. Andersson found claimant's behavior exhibited on the video "surprising in the sense that [claimant's] presentation in the office was completely different from the presentation on the video." In a May 10, 2011, letter, Dr. Andersson noted claimant's "presentation does not fit with the surveillance tape which indicates that the patient is highly capable and moves around fairly freely." He further noted, "I cannot exclude that he aggravated his pre-existing neck condition for which he had been operated on, but there is no evidence on any of the imaging studies that there was permanent damage to [claimant's] spine and essentially no change from his pre-injury state." Dr. Andersson opined that claimant's current condition of ill-being was related to his underlying neck condition and not to the work accident.

¶ 21 Claimant saw Dr. Hershkowitz again on May 15, June 19, and July 31, 2012. On these visits, Dr. Hershkowitz recommended claimant undergo a lumbar MRI. Claimant identified an August 2012 fax sent to counsel for the employer requesting authorization for the lumbar MRI. Claimant testified the employer did not authorize the MRI.

¶ 22 On November 3, 2011, Dr. Brechner authored a letter which stated in pertinent part, that he had treated claimant for a neck condition in 2009 which resulted in claimant undergoing surgery. Dr. Brechner attributed claimant's July 15, 2010, neck complaints to the prior surgery. The letter further noted that on July 19, 2010, claimant complained of "worsened neck pain" following a work accident. In Dr. Brechner's opinion, the work accident exacerbated claimant's chronic neck pain. Finally, the letter noted Dr. Brechner could not form an opinion regarding whether the work accident caused continued issues for claimant beyond September 3, 2010, the date he had last seen claimant.

¶ 23 Dr. Brechner's evidence deposition was taken on April 24, 2012. Dr. Brechner testified he had been treating claimant for a number of ailments since August 2009. In October 2009, he assisted in a three-level cervical fusion on claimant. In November 2009, Dr. Brechner saw claimant for a blood pressure check. He saw claimant again on July 15, 2010, for a blood pressure check. Dr. Brechner noted claimant also complained of some neck discomfort on July 15, 2010, but upon examination, Dr. Brechner documented no problems with range of motion, strength, or tone.

¶ 24 Dr. Brechner next saw claimant on July 20, 2010, at which time claimant told him he fell at work and reinjured his neck. According to Dr. Brechner, claimant described severe and constant pain following the accident with radiating pain, numbness, and weakness to both arms. Upon examination, Dr. Brechner noted claimant had decreased range of motion in his neck in all directions and decreased strength in both upper extremities and hands. Dr. Brechner testified to a "definite change in [claimant's] status" between July 15 and July 20, 2010. Dr. Brechner recommended claimant see a neurosurgeon. Dr. Brechner next saw claimant on September 3, 2010, at which time claimant still had neck pain. Upon examination, Dr. Brechner noted claimant's neck was swollen and he had limited range of motion. In Dr. Brechner's medical opinion, the work accident "did reaggravate and cause further harm to [claimant's] neck." Specifically, he testified the "constant and severe pain" in claimant's neck, and the pain radiating to both of claimant's arms, were the result of the work accident.

¶ 25 In addition, Dr. Brechner testified he last saw claimant on April 20, 2012—four days prior to his deposition. At this visit, Dr. Brechner observed claimant was still suffering from neck pain with decreased range of motion, and he noted an increase in the numbness and weakness to claimant's upper extremities since their last visit. When asked about his treatment

recommendation, the employer objected, asserting it was not aware of this recent visit or that Dr. Brechner was going to render an opinion regarding treatment. According to the employer, "[t]he indication until thirty seconds ago was that the last time he saw [claimant] was on September 3rd of 2010. So I'm going to object to any further testimony or opinions he has regarding recent medical records which were not disclosed."

¶ 26 Dr. Brechner testified that based on his April 20, 2012, examination, he did not believe claimant would be able to function as an ironworker. While recognizing that approximately 1 1/2 years had passed between visits with claimant, Dr. Brechner noted claimant's symptoms were consistent with those he exhibited in 2010 and opined that claimant's condition of ill-being on April 20, 2012, was causally connected to the work accident.

¶ 27 Claimant saw Dr. Andersson again on June 12, 2012. In addition to conducting a second physical examination, Dr. Andersson reviewed medical records pertaining to claimant's treatment since his last visit, including records from Dr. Hershkowitz and Dr. Brechner, a report from a February 2012 MRI of claimant's cervical spine, and a January 2012 functional capacity evaluation. Dr. Andersson testified that claimant continued to display nonorganic physical signs upon examination. He further stated the MRI report suggested changes in the spinal cord at the C3-4 level indicating a myelopathy or myelomalacia, which he testified were not present on the MRI taken immediately after the work accident. According to Dr. Andersson, this meant the noted changes were not caused by the accident. While Dr. Andersson did not rule out the need for further treatment due to an underlying condition related to his prior neck injury, in his opinion, "none of the symptoms [claimant] presented with had anything to do with the [work] accident." In a June 12, 2012, letter authored by Dr. Andersson, he continued to be of the opinion that claimant's symptoms were not related to the work injury.

¶ 28 Rosario Cibella, the employer's attorney during the depositions of Dr. Brechner and Dr. Andersson, testified at the arbitration hearing. According to Cibella, she agreed to take Dr. Brechner's deposition on the basis of the opinions contained in his November 30, 2011, letter. In particular, Cibella testified Dr. Brechner's letter indicated he had no opinion regarding whether claimant suffered a continuing aggravation beyond September 3, 2010. Cibella explained that she objected to Dr. Brechner's testimony regarding his April 20, 2012, examination of claimant because she had not been provided with the records which formed the basis for that testimony.

¶ 29 At the time of claimant's testimony in this case, he stated he had zero mobility in his neck, his arms were "[c]ompletely numb, weak," and his right leg was "getting weaker, and it will fall asleep, and I just fall over or it just goes out on me" approximately three to four times per week. Since the work accident, he has been able to sleep approximately four hours at a time before the Vicodin wears off. Claimant requested that the employer pay his medical bills and authorize physical therapy, a cervical MRI, care by Dr. Hershkowitz, and surgery by Dr. Gireesan if necessary.

¶ 30 The arbitrator found claimant's "current symptoms and complaints" were causally connected to the July 19, 2010, work accident. He awarded claimant 118 4/7 weeks' TTD benefits, medical expenses for all medical services rendered, and prospective medical care in the form of physical therapy, a lumbar MRI, and any further care recommended by his treating physician for claimant's "causally related neck and back conditions." The arbitrator denied prospective medical care for claimant's right ankle as well as penalties and attorney fees. Last, the arbitrator struck a portion of Dr. Brechner's testimony after finding a *Ghere* violation. *Id.* 278 Ill. App. 3d 840, 663 N.E.2d 1046. Specifically, the arbitrator excluded Dr. Brechner's

opinion regarding a causal relationship between the work accident and claimant's complaints after September 3, 2010.

¶ 31 On review, the Commission modified the arbitrator's decision by vacating the portion of the arbitrator's award related to claimant's lumbar spine condition including any prospective medical treatment related to that condition. It otherwise affirmed and adopted the arbitrator's decision. In addition, the Commission remanded the matter to the arbitrator for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322. On judicial review, the circuit court of Cook County confirmed the Commission's decision. This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, the employer asserts the Commission erred in (1) striking only that portion of Dr. Brechner's testimony establishing a causal link between claimant's complaints after September 3, 2010, and the work accident pursuant to section 12 of the Act (820 ILCS 305/12 (West 2012)) and *Ghere*, 278 Ill. App. 3d 840, 663 N.E.2d 1046, rather than Dr. Brechner's entire deposition testimony and (2) finding the employer waived its argument claimant exceeded his two physician choices under section 8(a) of the Act (820 ILCS 305/8(a) (West 2012)).

¶ 34 Claimant cross-appeals, asserting the Commission erred in (1) striking any of Dr. Brechner's deposition testimony, relying on *Homebrite Ace Hardware v. Industrial Comm'n*, 351 Ill. App. 3d 333, 814 N.E.2d 126 (2004), and (2) denying attorney fees and penalties under sections 16, 19(l), and 19(k) of the Act (820 ILCS 305/16, 19(l), (k) (West 2012)).

¶ 35 A. Standard of Review

¶ 36 On review, this court will not disturb an evidentiary ruling made during a workers' compensation proceeding absent an abuse of discretion. *RG Construction Services v.*

Workers' Compensation Comm'n, 2014 IL App (1st) 132137WC, ¶ 35, 24 N.E.3d 923. An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602, 610 (2006).

¶ 37

B. Section 12 Analysis

¶ 38

The employer first asserts the Commission erred in striking only that portion of Dr. Brechner's testimony establishing a causal link between claimant's complaints after September 3, 2010, and the work accident, rather than his entire deposition testimony where the fact that Dr. Brechner examined claimant on April 20, 2012, was not disclosed to the employer at least 48 hours prior to the deposition. In his cross-appeal, claimant argues the Commission erred in striking any of Dr. Brechner's testimony because section 12 does not apply to treating physicians.

¶ 39

We first consider whether section 12 applies to treating physicians. Section 12 of the Act provides, in relevant part, as follows:

"In all cases where the examination [of a claimant] is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, or his representative, as soon as

practicable but not later than 48 hours before the time the case is set for hearing. *** If such surgeon refuses to furnish the employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the hearing next following said examination." 820 ILCS 305/12 (West 2012).

¶ 40 In *Ghere*, this court concluded that section 12 applies to both treating and examining physicians. *Id.* 278 Ill. App. 3d at 845, 663 N.E.2d at 1050. At issue in *Ghere* was whether section 12 applied to bar the opinions of the employee's treating physician which had not been disclosed to the employer at least 48 hours prior to arbitration, namely that the employee's work activities and environment were causally connected to his heart attack that resulted in his death. *Id.* at 841-42, 663 N.E.2d at 1048. The position of the employee's wife was that section 12 applied only to examining physicians. *Id.* at 845, 663 N.E.2d at 1050. This court disagreed, finding that:

"the purpose of section 12 would be frustrated if we read section 12 to only apply to examining physicians. It seems to us from the language of section 12 that the purpose of having the employee's physician send a copy of his records to the employer no later than 48 hours prior to the arbitration hearing is to prevent the employee from springing surprise medical testimony on the employer." *Id.*

In addition, this court noted that nothing in the treating physician's records—which had been timely disclosed to the employer prior to the arbitration hearing—put the employer on notice that

the physician had any opinion regarding causal connection, especially where the records did not disclose he ever treated the employee for a heart condition. *Id.* at 846, 663 N.E.2d at 1050-51.

¶ 41 Despite our holding in *Ghere*, claimant cites *Homebrite* for the proposition that section 12 does not apply to a treating physician's testimony. According to claimant, the *Homebrite* court "clearly held that undisclosed opinion testimony from a treating physician shall not be deemed a surprise and be barred under the *Ghere* decision." Claimant's interpretation of the holding in *Homebrite* is incorrect.

¶ 42 At issue in *Homebrite* was whether the Commission erred in overruling the employer's objection to the causation testimony of a treating physician because the employer had not been notified of the physician's causation opinion at least 48 hours prior to the arbitration hearing. *Id.* at 338, 814 N.E.2d at 130. According to the employer, the Commission was required to strictly adhere to *Ghere* and deem any undisclosed opinion testimony a surprise as "it would be unduly burdensome for a court to have to regularly inquire as to what parties expect an opposing witness to testify to in order to guarantee no surprise." *Id.* at 339, 814 N.E.2d at 131-32. This court disagreed.

¶ 43 In *Homebrite*, this court noted that *Ghere* "did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise." *Id.* at 339, 814 N.E.2d at 132. Rather, we pointed out that the *Ghere* court examined the treating physician's medical records to determine whether the employer was put on notice that the treating physician might provide causation testimony. *Id.* We distinguished the situation in *Homebrite* from *Ghere* based on the substance of the medical records which were timely provided to the respective employers. Specifically, the medical records in *Ghere* contained no evidence of the physician's treatment of the claimant for heart problems while the medical records in *Homebrite* contained details about

the treating physician's treatment of the claimant's neck complaints which were at issue. *Id.* at 132, 814 N.E.2d at 132. Accordingly, the medical records provided to the employer in *Homebrite* were sufficient to put the employer on notice that the physician might testify as to a causal relationship between the claimant's condition of ill-being in his neck and the work accident. *Id.*

¶ 44 In addition, claimant asserts his notice of deposition somehow avoided or cured a *Ghere* violation. The notice of deposition stated, in part, that claimant would "elicit testimony from [Dr. Brechner] concerning all disputed issues including, but not limited to, accident, history, causal connection, reasonableness and necessity for past, present and future medical care and treatment and expenses." Claimant contends that pursuant to *Homebrite*, the employer "had no reasonable expectation of any limit on Dr. Brechner's testimony as long as it related to the condition he treated." He also claims *Kishwaukee Community Hospital v. Industrial Comm'n* supports his position. 356 Ill. App. 3d 915, 923, 828 N.E.2d 283, 291 (2005) (finding the employer could not have been surprised by the treating physician's causation opinion because the medical records he provided to the employer contained details regarding his treatment of the conditions at issue and the employer knew claimant "intended to inquire into the issue of causal connection with regard to [those] conditions"). We disagree.

¶ 45 In this case, the medical records and deposition testimony demonstrate Dr. Brechner treated claimant for a prior neck condition that resulted in surgery, and treated him again following the work accident at issue. However, contrary to the circumstances in *Homebrite* and *Kishwaukee*, Dr. Brechner's November 30, 2011, letter—which was authored 13 months after he last saw claimant—clearly limited his causation opinion to a definite timeframe. In particular, Dr. Brechner noted, "I cannot form an opinion on whether [claimant's] fall on July

19, 2010, has caused ongoing pain or disability" beyond September 3, 2010. Despite the clear limits expressed in his letter, Dr. Brechner subsequently testified that claimant's condition of ill-being on April 24, 2012, was causally connected to the work accident based on his April 20, 2012, examination of claimant. Dr. Brechner's April 20, 2012, examination was not disclosed to the employer at least 48 hours prior to the deposition as required by section 12, but instead, was sprung on the employer during Dr. Brechner's testimony. Thus, the facts in this case more closely resemble those in *Ghere* where the testimony at issue went well beyond what was included in the medical records provided to the employer.

¶ 46 Nonetheless, claimant argues the employer waived any issue with Dr. Brechner's testimony because it failed to make a timely objection. Based on our review of the record, however, we conclude that counsel for the employer objected to Dr. Brechner's new opinion testimony as soon as she processed the fact that Dr. Brechner's opinion had changed. Thus, we find the employer did not waive this issue.

¶ 47 Based on the above, we find the Commission did not abuse its discretion in sustaining the employer's *Ghere* objection and striking Dr. Brechner's opinion on the causal relationship between claimant's complaints after September 3, 2010, and the work accident at issue.

¶ 48 We next address the employer's contention that the Commission erred by denying the employer's motion to strike Dr. Brechner's entire deposition testimony. The employer asserts that claimant's sole purpose for taking Dr. Brechner's deposition was to obtain his opinion regarding claimant's treatment after September 3, 2010, and that the act of striking only the post September 3, 2010, causation testimony did not eliminate the damage done. In particular, the employer contends a large portion of Dr. Brechner's testimony related "to progression of

treatment[,] and progression of [claimant's] condition, none of which [it] was prepared to question Dr. Brechner [about]." The employer cites *Mulligan v. Illinois Workers' Compensation Comm'n*, 408 Ill. App. 3d 205, 220, 946 N.E.2d 421, 434 (2011), for the proposition "when a party objects to the admission of medical testimony on section 12 grounds, the proponent of the medical testimony has the burden to prove compliance with the requirements of section 12 of the Act." The employer argues claimant failed to meet this burden and, thus, the entire deposition should have been excluded. We disagree.

¶ 49 In *Mulligan*, this court found the Commission improperly allowed the live testimony of a physician retained by the employer to review records after arbitration had already begun and the deposition testimony of an examining physician who had not provided his medical report to the employer prior to arbitration. *Id.* Unlike the employer in *Mulligan*, the employer in this case had notice that Dr. Brechner would testify regarding his treatment of claimant and his medical opinions relating to his treatment up to September 3, 2010. Therefore, as we have previously discussed, the only portion of Dr. Brechner's testimony that can be deemed a surprise was the testimony concerning his examination of claimant on April 20, 2012, and any opinions formed therefrom. Accordingly, the Commission did not abuse its discretion in denying the employer's motion to strike Dr. Brechner's entire deposition testimony.

¶ 50 C. Two-Physician Choice Rule

¶ 51 The employer next asserts the Commission erred in finding it waived any issue with claimant exceeding the two-physician choice rule under section 8(a) of the Act. The two-physician choice rule limits an employer's liability to pay for medical services to (1) first aid and emergency services and (2) two additional physicians chosen by an employee and any provider and services recommended by those two physicians. 820 ILCS 305/8(a) (West 2010)).

¶ 52 Initially, we note that while the employer frames the issue as one involving the concept of waiver, it really means forfeiture. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 229, 874 N.E.2d 43, 56 (2007) (explaining that "waiver" involves an affirmative act and an intentional relinquishment of a known right whereas "forfeiture" involves the failure to timely assert a right). It has long been established that a party's failure to raise an issue before the arbitrator results in its forfeiture. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020, 832 N.E.2d 331, 348 (2005) (citing *Thomas*, 78 Ill.2d at 336, 399 N.E.2d at 1326).

¶ 53 The employer argues that it timely raised the two-physician choice issue by disputing causal connection and liability for unpaid medical bills on the request for hearing form presented to the arbitrator before the hearing commenced and arguing the issue in its proposed findings following arbitration. It further asserts that it raised the issue in its petition for review filed with the Commission by placing a checkmark next to all issues related to medical expenses, including causal connection, reasonableness of the charges, and the necessity of past and prospective medical treatment, and by arguing the issue in its statement of exceptions before the Commission. We note, however, that the Commission found the employer's issue concerning the two-physician choice rule was not properly before it because "it was not raised at trial before the [a]rbitrator and was raised for the first time in [the employer's] proposed decision." Thus, the issue before us is whether the employer's act of checking the boxes on the request for hearing form to indicate it disputed causal connection and liability for unpaid medical bills was sufficient to put the arbitrator and claimant on notice of a claim that claimant had exceeded the number of physicians allowed under section 8(a) of the Act. We find it was not.

¶ 54 As noted, the request for hearing form reveals the employer disputed liability for unpaid medical bills. However, the employer did not clearly indicate on the form, or otherwise

timely bring to the arbitrator's attention, that its dispute regarding liability for medical bills related to claimant's treatment by more than the allowed two physicians. Based on the information before it, it was reasonable for the arbitrator to assume that the employer's dispute regarding claimant's unpaid medical bills was related only to their causal connection.

Accordingly, we find the Commission did not abuse its discretion in finding the employer forfeited its argument that claimant exceeded his two physician choices allowed by section 8(a) of the Act.

¶ 55 D. Penalties and Attorney Fees

¶ 56 Finally, claimant argues the Commission erred in failing to award penalties and attorney fees under sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2012)). Claimant asserts he is entitled to penalties and attorney fees because (1) the employer failed to pay TTD benefits without explanation from February 22, 2011, to May 10, 2011, in violation of section 9910.70 of the Illinois Administrative Code (Code) (50 Ill. Admin. Code. § 9110.70(b) (eff. June 26, 2006)), and (2) the employer's reliance on Dr. Andersson's opinion to withhold TTD benefits after May 10, 2011, was unreasonable and vexatious.

¶ 57 "Penalties under section 19(l) are in the nature of a late fee" and are "mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show adequate justification for the delay.'" *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20, 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." *Id.* "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the

delay was justified." *Id.* When benefits are withheld for 14 days or more, a rebuttable presumption of unreasonable delay exists. 820 ILCS 305/19(l) (West 2012). In addition, pursuant to section 9910.70 of the Code, when an employer begins paying TTD benefits but terminates or suspends payment before the employee has returned to work, the employer is required to provide the employee with a written explanation regarding the basis for the termination or suspension of further TTD benefits no later than the date of the last TTD payment. 50 Ill. Admin. Code. § 9110.70(b) (eff. June 26, 2006). "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." *Id.*

¶ 58 Sections 16 and 19(k) authorize the Commission to award attorney fees and penalties to a claimant where the "delay is deliberate or the result of bad faith or improper purpose." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 44, 959 N.E.2d 772. Thus, the standard for awarding attorney fees and penalties under sections 16 and 19(k) is higher than the standard for awarding section 19(l) penalties. *Id.* Even when the facts support an award under section 19(l), the decision to award penalties or attorney fees under sections 16 and 19(k) is left to the discretion of the Commission. *Id.* Our review of the Commission's denial of penalties and attorney fees under sections 16 and 19(k) involves a two-step process. *Id.* ¶ 25, 959 N.E.2d 772. First, we must determine whether the Commission's factual findings were against the manifest weight of the evidence and then we must determine whether the Commission abused its discretion by refusing to award penalties and attorney fees. *Id.* ¶ 25, 959 N.E.2d 772.

¶ 59 Claimant first contends that he is entitled to penalties and attorney fees because the employer failed to pay TTD benefits without explanation from February 22, 2011, to May 10, 2011, in violation of section 9910.70 of the Code (50 Ill. Admin. Code. § 9110.70(b) (eff. June

26, 2006)). Our review of the record reveals that the employer ceased paying TTD benefits on February 21, 2011, and did not provide claimant with a written explanation explaining the basis for its cessation as required by § 9110.70(b) of the Code. Further, the employer offered no justification for its cessation of claimant's TTD benefits during this period at arbitration and has chosen not to respond to this issue on appeal. As the employer failed to show adequate justification for its cessation of claimant's TTD benefits, claimant is entitled to section 19(l) penalties for the period of February 22, 2011, to May 10, 2011. Thus, we find the Commission's decision denying section 19(l) penalties for this period of time was against the manifest weight of the evidence. However, we find the record fails to reflect the employer's cessation of claimant's TTD benefits for this period of time was the result of bad faith or improper purpose. In fact, the record is silent regarding the employer's reasons for ceasing TTD benefits on February 21, 2011. Accordingly, we find the Commission's decision denying section 16 attorney fees and section 19(k) penalties was not an abuse of its discretion.

¶ 60 Next, claimant asserts he is entitled to penalties and attorney fees because the employer's reliance on Dr. Andersson's opinion to withhold TTD benefits after May 10, 2011, was unreasonable and vexatious. Specifically, claimant contends the employer intentionally withheld from Dr. Andersson the medical records of Dr. Brechner which indicated an "essentially normal exam" of claimant four days prior to the work accident. Claimant's argument in his brief revolves around Dr. Brechner's testimony at his evidence deposition. We note, however, Dr. Andersson's initial evaluation of claimant, upon which the employer relied on in denying benefits under the Act, was conducted in May 2011, while Dr. Brechner's evidence deposition was taken nearly one year later. Thus, the issue is whether the employer's reliance on Dr. Andersson's May 2011 opinion, based on the information available at that time, was

reasonable.

¶ 61 At his deposition, Dr. Andersson testified that prior to his May 2011 examination of claimant, he reviewed medical records from before and after the work accident, including those of Dr. Brechner. Dr. Andersson's May 10, 2011, letter to the employer notes claimant's prior neck condition and fusion surgery and that he was seen by Dr. Brechner four days before the work accident at which time he complained of neck and back pain. Dr. Brechner's July 15, 2010, office note indicates that claimant complained of neck and back pain on that date. In addition, Dr. Andersson noted that he reviewed the July 2010 cervical MRI and x-rays which showed no significant abnormalities and the surveillance video of claimant which showed claimant to be "highly capable" and "mov[ing] around fairly freely." Based on these factors, Dr. Andersson opined that claimant's current condition was related to his underlying neck condition and not to the work accident. The record fails to reflect the employer's reliance on Dr. Andersson's May 2011 opinion was unreasonable or vexatious. Thus, we find the Commission's decision not to award penalties and fees after Dr. Andersson's May 2011 opinion was not an abuse of discretion.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we reverse the portion of the circuit court's judgment which affirmed the denial of section 19(l) penalties for the period of February 22, 2011, to May 10, 2011. We otherwise affirm the circuit court's judgment confirming the Commission's decision. We remand to the Commission so that it may, consistent with this decision, impose section 19(l) penalties for the stated period and for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 64 Affirmed in part, reversed in part, cause remanded.