Workers' Compensation
Commission Division
Order Filed: June 24, 2016

No. 1-15-1549WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SHEREE MEYER,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 2013 L 051052
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*,	)	
	)	Honorable
(First Student Inc. and Gallacher Bassett Services, Inc., Appellees).	)	Carl A. Walker, Judge, Presiding.

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

ORDER

¶ 1 *Held:* We found that the decision of the Illinois Workers' Compensation Commission awarding the claimant benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)), but concluding that she failed to prove that she is totally and permanently disabled is not against the manifest weight of the evidence. We also found that the Commission's denial if the claimant's petition for an award of section 19(*l*) (820 ILCS 305/19(*l*) (West 2010)) penalties is not against the manifest weight of the evidence and its denial of an award of attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)) was not an abuse of discretion.

¶ 2 The claimant, Sheree Meyer, appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) that: awarded her benefits pursuant to the Workers Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)), following its finding that she failed to prove that she was permanently and totally disabled (PTD); and denied her petition for an award of penalties pursuant to section 19(*l*) of the Act (820 ILCS 305/19(*l*) (West 2010)) and attorney pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)). For the reasons which follow, we affirm.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearings held on July 21, 2009, September 17, 2009, and January 31, 2012.

¶ 4 The claimant was employed by Fist Student Inc. (First) as a part-time school bus driver. While working on February 19, 2009, the claimant slipped and fell on ice while walking in First's bus terminal. The claimant reported the fall to First's safety manager and completed her morning shift, but she did not return to work in the afternoon.

¶ 5 On February 20, 2009, the claimant presented at Alexian Brothers Corporate Health Center, complaining of pain in her low back and right leg. On February 25, 2009, she sought follow-up care with her family physician, Dr. Daniel O'Malley, who recommended that she have an MRI scan of her lumbar spine. The claimant had the MRI scan on February 26, 2009. The MRI revealed that the claimant had bulging discs at L3-L4 and L4-L5 and a broad based protrusion at L5-S1.

¶ 6 The claimant continued under the care of Dr. O'Malley who prescribed a course of physical therapy which the claimant completed. On March 5, 2009, Dr. O'Malley referred the claimant to Dr. Ronjon Paul. Following his examination of the claimant on March 18, 2009, Dr.

Paul restricted the claimant to light-duty office work and referred her to Dr. Sayeed for epidural steroid injections.

¶ 7 Dr. Sayeed administered an epidural injection to the claimant on March 30, 2009. The injection failed to relieve the claimant's low back and right leg pain, and she returned to see Dr. Paul who recommended that she have a second lumbar MRI.

¶ 8 The claimant had the second lumbar MRI which revealed disc degeneration with mild bulging at L3-L4, disc degeneration at L4-L5 with mild bilateral foraminal narrowing, and marked disc degeneration at L5-S1 with diffuse bulging of the intervertebral disc and moderate foraminal stenosis.

¶ 9 Dr. Sayeed administered a second epidural injection to the claimant. Again, the injection failed to relieve the claimant's low back and right leg pain, and she returned to see Dr. Paul on May 5, 2009. Dr. Paul continued to restrict the claimant to light-duty desk work and recommended that she have a lumbar discogram. First declined approval for the discogram and refused to accommodate the claimant's work restrictions.

¶ 10 The claimant filed a petition for an emergency hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)). Following a hearing on July 21, 2009, the arbitrator issued a written decision on August 7, 2009. However, the matter again came on for hearing before the arbitrator on September 17, 2009, and a corrected decision was issued on October 1, 2009. In the corrected decision, the arbitrator found that the claimant sustained injuries to her low back on February 19, 2009, which arose out of and in the course of her employment with First. The arbitrator awarded the claimant 3 3/7 weeks of temporary total disability (TTD) benefits for the period from June 1, 2009, through June 24, 2009. However, he denied the claimant TTD benefits subsequent to June 24, 2009, by reason of her failure to provide certain

requested information to First's section 12 (820 ILCS 305/12 (West 2008)) examiner. The arbitrator also ordered First to pay $9,853 for reasonable and necessary medical services rendered to the claimant and ordered First to pay the claimant's medical expenses in accordance with the Act and the medical fee schedule. In addition, the arbitrator denied the claimant's petition for an award of fees and penalties, finding that the claimant had been "obstreperous, demanding and obstructive in violation of Section 12 of the Act."

¶ 11 Both parties sought a review of the arbitrator's October 1, 2009, decision before the Commission. The Commission issued a decision on January 31, 2011, with one commissioner dissenting. The Commission found that the arbitrator erred in suspending the claimant's TTD benefits for violating section 12 of the Act, and as a consequence, modified the arbitrator's decision by awarding the claimant 15 5/7 weeks of TTD benefits for the period from June 1, 2009, through September 17, 2009. In addition, the Commission denied the claimant's petition for an award of penalties and fees as a "legitimate dispute existed concerning [First's] *** obligation to pay temporary total disability benefits during periods when [First] *** believed [the claimant] *** was out of compliance with Section 12." No judicial review was sought by either party from that decision.

¶ 12 On September 2, 2009, Dr. Sayeed administered the discogram recommended by Dr. Paul. The report of that study noted non-concordant pain at L3-L4 and L4-L5, along with concordant pain at L5-S1, partially reproducing low back pain and suggesting right leg radiculopathy. After reviewing the discogram, Dr. Paul diagnosed L4-L5 spinal stenosis, spondylolisthesis, and L4-S1 spondylosis with degenerative disc disease. Dr. Paul recommended that the claimant undergo an L4-S1 decompression procedure and fusion surgery. He restricted the claimant from all work activity.

¶ 13 At the request of First, the claimant was examined by Dr. Avi Bernstein on October 16, 2009. Dr. Bernstein testified that he reviewed both of the claimant's MRI scans and her discogram. According to Dr. Bernstein, the discogram did not reveal concordant pain at L3-L4 and L4-L5 and showed only partial concordant pain at L5-S1. Dr. Bernstein stated that he would not recommend that the claimant have surgery because the source of her pain was unclear. He stated that surgery is not a reasonable treatment option in the absence of identification of the particular disc which is responsible for the claimant's pain. Dr. Bernstein was of the opinion that the claimant had reached maximum medical improvement (MMI) and was capable of full-duty work.

¶ 14 The claimant continued to see Dr. Paul, complaining of low back and right leg pain. Dr. Paul continued to restrict the claimant from all work activity.

¶ 15 On March 29, 2010, the claimant had a third MRI of her lumbar spine on orders of Dr. Paul. The report of that scan notes mild left foraminal stenosis secondary to facet arthropathy and disc bulging at L3-L4, moderate bilateral facet arthropathy with mild left foraminal and central canal stenosis at L4-L5, and moderate diffuse disc bulging with mild to moderate bilateral facet arthropathy and bilateral foraminal stenosis, right greater than left, at L5-S1.

¶ 16 On April 5, 2010, the claimant was admitted to Edwards Hospital where Dr. Paul performed an L4-S1 lumbar decompression and transforaminal lumbar interbody fusion. Following surgery, the claimant experienced left foot drop and numbness down her left leg. The pain in her right leg subsided, but she had no relief from the pain in her low back. The claimant was discharged from the hospital on April 9, 2010, with a left leg brace and a walker.

¶ 17 The claimant continued to treat with Dr. Paul post-operatively. His records reflect that the claimant continued to complain of pain in her low back, left leg and left foot along with pain

and numbness in her right leg. Dr. Paul restricted the claimant from all work activity and prescribed physical therapy and medication for her pain.

¶ 18 The claimant was referred to Dr. Leonard Cerullo, a neurosurgeon, who examined her on June 4, 2010. On examination, Dr. Cerullo found significant weakness in the claimant's left foot. Suspicious of a scratch injury to the claimant's L5 and S1 nerve roots, Dr. Cerullo ordered an EMG/NCV study and restricted her from all work.

¶ 19 The claimant had the EMG/NCV testing on June 8, 2010, which revealed active lumbar radiculopathies involving the left L5 and S1 nerve roots. The claimant complained of worsening left leg pain and swelling of her left foot. Dr. Cerullo referred the claimant to Dr. Geoffrey Dixon for a surgical consultation.

¶ 20 The claimant was examined by Dr. Dixon on July 21, 2010. Dr. Dixon ordered a myelogram of the claimant's lumbar spine which revealed mild stenosis at L3-L4 with mild ventral extradural mass effect that was consistent with a diffusely bulging disc. The post-myelogram CT scan of the claimant's spine indicated relatively decreased filling of the left L5 and S1 nerve root sleeves as compared to the right side and asymmetric prominence of the left L5 dorsal root ganglion, suggesting edema and correlating with the clinical finding of left foot drop. Dr. Dixon diagnosed lumbar radiculopathy at L5-S1 after fusion and authorized the claimant to remain off of work.

¶ 21 On October 4, 2010, Dr. Dixon operated on the claimant's back. The surgery consisted of a laminectomy, facetectomy, bilateral foraminotomy and fusion of the L5-S1 level with decompression of the nerve roots and posterior interbody arthrodesis with device, and exploration of spinal fusion. The claimant was released from the hospital on October 10, 2010.

¶ 22 The claimant continued to treat with Dr. Dixon post-operatively. He continued to restrict the claimant from all work and prescribed pain medication. Initially, the claimant reported improvement of her symptoms. However on December 7, 2010, the claimant reported to Dr. Dixon that her "pre-operative complaints are unchanged." Dr. Dixon referred the claimant to Dr. Couri, a pain management specialist, for consultation.

¶ 23 The claimant saw Dr. Couri on January 10, 2011, complaining of pain in her left leg, left foot, right leg and low back. Following his examination of the claimant and review of her medical records, Dr. Couri diagnosed the claimant's condition as low back pain, L3-L4 bulging disc, left L4-L5 radiculopathy, and complex regional pain syndrome type II of the left leg. Dr. Couri recommended that the claimant have epidural steroid injections, which he administered on February 15, 2011.

¶ 24 The claimant reported that the epidural injections which she received on February 15, 2011, gave her 75% relief on her right side for about 3 hours, and no relief on her left side. On March 11, 2011, the claimant received a left L5 sympathetic nerve block which was administered by Dr. Couri. The claimant reported that the block failed to relieve the pain in her left leg. Dr. Couri continued to restrict the claimant from work, prescribed pain medication, and referred her back to Dr. Dixon to consider a spinal cord stimulator.

¶ 25 On April 12, 2011, the claimant was seen by Dr. Dixon. He recommended a trial spinal cord stimulator and referred the claimant to Dr. Clark for evaluation.

¶ 26 On May 10, 2011, the claimant was seen by Dr. Clark. He provided the claimant with a temporary spinal cord stimulator and scheduled her for a follow-up appointment.

¶ 27 On May 11, 2011, the claimant was again examined by Dr. Bernstein at the request of First. The claimant complained of severe pain and numbness down her left leg and into her left

foot. On examination, Dr. Bernstein found that the claimant was not giving her full effort even with muscles which were not impacted by her injury. Dr. Bernstein diagnosed the claimant with chronic radiculopathy of the left lower extremity which is related to her prior surgery.

¶ 28 The claimant returned to see Dr. Clark on May 13, 2011, and reported that her "pain is at least 50% better." Dr. Clark removed the temporary stimulator and recommended the permanent placement of a spinal cord stimulator.

¶ 29 On May 31, 2011, the claimant underwent a thoracic laminectomy with the insertion of a dorsal spinal cord stimulator that was performed by Dr. Dixon at Skokie Hospital. The claimant was discharged from the hospital on June 2, 2011.

¶ 30 The claimant continued to treat with Dr. Dixon post-operatively. Initially she reported 25-30% improvement in her symptoms but continued to complain of numbness in her left leg and pain in her low back and right leg. However, on October 14, 2011, the claimant reported that the stimulator did not appear to be working and may be making her symptoms worse, and she requested that Dr. Dixon remove the device. As of that visit, Dr. Dixon found that the claimant was "totally disabled from work."

¶ 31 The claimant was again examined by Dr. Bernstein on November 3, 2011. Dr. Bernstein noted that the claimant walked with an antalgic gait and demonstrated a diminished reflex at the left ankle only. X-rays of the claimant's spine showed that her fusion was stable. Dr. Bernstein diagnosed the claimant as suffering from chronic pain syndrome and opined that she had sustained a permanent aggravation of a pre-existing degenerative condition. Dr. Bernstein restated his opinion that neither the claimant's surgery nor her subsequent care were necessitated by her work-related accident. According to Dr. Bernstein, the claimant's examination and the

results of her diagnostic testing were benign. Dr. Bernstein found the claimant to have reached MMI and that she was capable of working in a sedentary capacity.

¶ 32 On November 22, 2011, the claimant was seen by Dr. Richard Noren, a pain management specialist, at the request of First. Dr. Noren took a history from the claimant, reviewed her medical records, and conducted a physical examination. He concluded that the claimant was suffering from some degree of weakness in the distal motor group and post-laminectomy pain syndrome. Dr. Noren found the claimant to be at MMI, requiring only palliative care through medication. Dr. Noren noted that he had never seen a case where a patient experienced good results with a temporary spinal cord stimulator, but experienced poor results when a stimulator was surgically implanted, leading him to opine that a stimulator should not have been permanently implanted in the claimant. Additionally, Dr. Noren found the claimant capable of functioning at the sedentary level for light duty.

¶ 33 The claimant was examined by Dr. Couri on December 12, 2011. She complained of low back and bilateral leg pain. Dr. Couri diagnosed low back pain, radiculopathy, and complex regional pain syndrome, and opined that the claimant's disability "related to her back problem is permanent." In his notes of that visit, Dr. Couri wrote that "she will get another letter stating that she is unable to work."

¶ 34 When Dr. Dixon examined the claimant on January 12, 2012, he found her muscle strength good in all four extremities.

¶ 35 Susan Entenberg, a vocational rehabilitation counselor, interviewed the claimant on October 4, 2011, and gave her deposition on November 7, 2011. Entenberg reviewed medical records of the claimant consisting of two surgical reports and letters from Dr. Dixon and Dr. Couri. Entenberg testified that the claimant is not a candidate for vocational rehabilitation

because her physicians had not released her to perform any type of work and had determined that she is totally disabled. According to Entenberg, the claimant sustained a permanent reduction in her earning capacity as a result of her work injury. She testified that, based upon her lack of transferable skills, age, education and constant pain, the claimant is not capable of obtaining gainful employment. Entenberg admitted that she never performed any vocational testing of the claimant and never asked the claimant any questions relating to her computer skills or her prior experience as an office manager.

¶ 36 Deanna Bailye, a vocational rehabilitation counselor, prepared a labor market survey at the request of First. Bailye admitted that she never interviewed the claimant. She reviewed the reports of Drs. Bernstein and Noren, but not the records of the claimant's treating physicians. Bailye testified that she also reviewed a job description of the claimant's position with First and her job application which contained the claimant's prior work history, including her prior office management experience. According to Bailye the claimant possesses transferable skills. She reviewed the claimant's Facebook account and described the computer skills necessary to create and maintain such an account. She testified that those computer skills are transferable to basic office work such as data entry, file organization, and records management. Bailye concluded that the claimant's transferable skills and Dr. Bernstein's sedentary work restrictions qualified the claimant for employment as an office clerk or a dispatcher. As the result of the labor market survey which she performed, Bailye identified four potential employers who had opportunities for employment of the claimant, although none of the available positions were for a dispatcher. Bailye opined that a stable labor market exists for the claimant.

¶ 37 The claimant testified that prior to her employment with First, she worked in a photo studio where she supervised employees and managed the office, including payroll. According to

the claimant, the photo studio where she worked did not use computer equipment. She also testified that she has no experience with Word programs or spreadsheets.

¶ 38 Following the arbitration hearing held on January 31, 2012, the arbitrator issued a decision on March 9, 2012, awarding the claimant: 113 5/7 weeks of additional TTD benefits for the period from September 18, 2009, through November 22, 2011; and 300 weeks of PPD benefits for 60% loss of the person as a whole. The arbitrator specifically found that the claimant "failed to prove that she is obviously incapable of employment or that she cannot perform any services except those which are so limited in quantity, dependability or quality that there is no reasonably stable market for them." In addition, the arbitrator denied the claimant's petition for an award of penalties and attorney fees, finding that "[t]here was a genuine dispute regarding the need for medical care and the continuation of TTD, and it was not unreasonable for [First] *** to rely on their [*sic*] Section 12 examiner."

¶ 39 Both parties filed timely petitions for review of the arbitrator's March 9, 2012, decision before the Commission. The Commission issued a unanimous decision on October 16, 2013, modifying the arbitrator's decision to provide for the additional award of 9 6/7 weeks of maintenance benefits to the claimant for the period from November 23, 2011, through January 31, 2012; in all other respects, the Commission affirmed and adopted the arbitrator's decision.

¶ 40 Thereafter, the claimant sought judicial review of the Commission's October 16, 2013, decision in the circuit court of Cook County. On April 29, 2015, the circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 41 For her first assignment of error, the claimant argues that the Commission's finding that she failed to prove that she is totally and permanently disabled is against the manifest weight of the evidence. She asserts that the Commission ignored the opinion of Dr. Dixon that she is

"totally disabled from work." According to the claimant, the evidence of record supports the conclusion that she is totally disabled and cannot perform any services except those for which no reasonable stable labor market exists, and therefore, she falls in the "odd-lot" category of total and permanent disability. We disagree.

¶ 42 In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87 (1983), the supreme court held that:

> "[A]n employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations]. The claimant need not, however, be reduced to total physical incapacity before a total permanent disability award may be granted. [Citations]. Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. [Citation]. Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. [Citation]. In determining a claimant's employment potential, his age, training, education, and experience should be taken into account. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 489 (1979); *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 362 (1978).
>
> In considering the propriety of a permanent and total disability award, this court has recently stated:
>
> > 'Under *A.M.T.C.*, if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to

> establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market ([citation]), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant ([citation]). [Citations].' " (Emphasis omitted.)

¶ 43 The nature and extent of a claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980). In deciding issues of fact, it is the function of the Commission to judge the credibility of the witnesses, determine the weight to be accorded their testimony, and to resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). The Commission's finding on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009). Whether this court might reach the same conclusions is not the test of whether the Commission's determinations are against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 44 The Commission found that the claimant is capable of performing sedentary employment duties without endangering her health. Its determination in this regard is amply supported by the

opinions of Drs. Bernstein and Noren, both of whom reported that she is capable of sedentary employment. In addition, Bailye testified that the claimant possesses transferable skills for which a stable labor market exists. Although the claimant's treating physicians and Entenberg offered contrary opinions, it was the function of the Commission to judge the credibility of the witnesses, determine the weight to be accorded their testimony, and to resolve conflicting medical evidence. Based upon the record before us, we are unable to find that a determination of the nature and extent of the claimant's disability opposite to the conclusion reached by the Commission is clearly apparent. Consequently, we hold that the Commission's finding that the claimant failed to prove that she is totally and permanently disabled is not against the manifest weight of the evidence.

¶ 45 Next, the claimant argues that the Commission erred in denying her petition for an award of penalties pursuant to sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2012)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2012)). She argues that First unreasonably and vexatiously failed to pay TTD, maintenance benefits, and medical expenses. According to the claimant, First's own section 12 examiner, Dr. Butler, issued a report in August of 2009 in which he concluded that the claimant's work accident aggravated a pre-existing condition. Nevertheless, First continued to dispute liability and declined to pay her benefits. Aside from the fact that the claimant's brief fails to identify the specific benefits or expenses which she claims that First unreasonably failed to pay, we find no error in the Commission's decision to deny her petition for penalties and fees.

¶ 46 Penalties under section 19(*l*) of the Act are in the nature of a fee for late payment. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20. Assessment of a penalty under section 19(*l*) is mandatory if the payment is late and the employer

is unable to show adequate justification for the delay. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The employer has the burden of justifying the delay, and the standard to be applied is reasonableness. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20. That is to say, whether a reasonable person in the employer's position would have believed that the delay is justified. *Id.* Whether an employer's justification for the delay was reasonable is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 47 In denying the claimant's petition for penalties, the arbitrator found that "there was a genuine dispute regarding the need for medical care and the continuation of TTD, and it was not unreasonable for [First] *** to rely on their [*sic*] Section 12 Examiner." The Commission adopted that portion of the arbitrator's decision.

¶ 48 Dr. Bernstein opined as early as October of 2009 that the back surgery contemplated by Dr. Paul was not reasonable treatment. He was also of the opinion that the claimant was capable of full-time work. Following his examination of the claimant on November 13, 2011, Dr. Bernstein again opined that neither the claimant's surgery nor her subsequent medical care were necessitated by her work-related accident. He found that, as of that examination, the claimant was capable of working in a sedentary capacity. Dr. Noren was of the opinion that a stimulator should not have been implanted in the claimant. Clearly, the claimant's treating physicians held contrary opinions, but a resolution of the conflict in opinions was a factual question for the Commission to decide. The Commission decided the conflict in favor of the claimant and awarded her TTD benefits and medical expenses. However, the fact that the Commission decided the issue in claimant's favor does not mean that First was not justified in delaying payment of benefits.

¶ 49 An employer's good faith challenge to liability will not subject it to penalties under the Act. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 20, 25 (1982). When the employer acts in reliance upon responsible medical opinions or where there are conflicting medical opinions, penalties are not ordinarily imposed. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 302 (1980). Whether the employer's actions were justified under the circumstances is a question of fact for the Commission to decide. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20.

¶ 50 In this case, the Commission determined that First did not act unreasonably in failing to pay TTD benefits or medical expenses, and we cannot say, in light of the opinions of Drs. Bernstein and Noren, that an opposite conclusion is clearly apparent. Consequently, we hold that the Commission's denial of section 19(*l*) penalties is not against the manifest weight of the evidence.

¶ 51 Section 19(k) of the Act provides that, when there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, the Commission may award additional compensation equal to 50% of the amount payable at the time of such an award. 820 ILCS 305/19(k) (West 2012). Section 16 of the Act provides that the Commission may assess attorney fees against an employer where penalties under section 19(k) are appropriate. 820 ILCS 305/16 (West 2012). The standard for awarding penalties under section 19(k) and fees under section 16 is higher than the standard for awarding penalties under section 19(*l*). See *Jacobo*, 2011 IL App (3d) 100807WC, ¶¶ 21-24. For section 19(k) penalties and section 16 fees to be imposed, it must be established that the employer's delay or non-payment was deliberate or the result of bad-faith or an improper purpose. *McMahan*, 183 Ill. 2d at 515. Even when the facts support an award of penalties under section 19(k) and fees under section 16, the decision to

award the penalties or fees is left to the discretion of the Commission. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 44. Our review of the Commission's denial of section 19(k) penalties and fees under section 16 involves a two-step inquiry. *Id.* ¶ 25. First, we determine whether the Commission's factual findings are against the manifest weight of the evidence, and then we determine whether the Commission's refusal to award penalties was an abuse of discretion. *Id.*

¶ 52 For the same reasons which we gave in our analysis of the Commission's denial of section 19(*l*) penalties, we also find that the reasons given for the Commission's denial of section 19(k) penalties and section 16 fees are not against the manifest weight of the evidence. We conclude, therefore, that the Commission did not abuse its discretion in the denial of penalties or fees.

¶ 53 In summary, we conclude that: the Commission's finding that the claimant failed to prove her entitlement to PTD benefits is not against the manifest weight of the evidence; that the Commission's denial of section 19(*l*) penalties is not against the manifest weight of the evidence; and the Commission did not abuse its discretion in denying the claimant's petition for an award of section 19(l) penalties and section 16 attorney fees. Consequently, we affirm the judgment of the circuit court which confirmed the decision of the Commission.

¶ 54 Affirmed.