2016 IL App (1st) 152150WC-U
No. 1-15-2150WC
Order filed: November 10, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JOHN ORTIZ, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION and HARD ROCK CONCRETE CUTTERS, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 14-L-50975 Honorable Carl Anthony Walker, Judge, Presiding.

JOHN ORTIZ, Appellant/Cross-Appellee, v. HARD ROCK CONCRETE CUTTERS, Appellee/Cross-Appellant, (The Illinois Workers' Compensation Commission, Appellee).	))))))))))	Appeal from the Circuit Court of Cook County. No. 14-L-50975 Honorable Carl Anthony Walker, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's decision to allow respondent to amend its stipulation to accident was, at most, harmless error; claimant failed to show that the Commission's decisions regarding causation were against the manifest weight of the evidence; Commission's decision regarding period of temporary total disability found adequate support in the record; claimant's request for ongoing medical expenses was moot; claimant was not entitled to penalties of fees where respondent's conduct was taken in reliance upon reasonable medical opinion; and respondent's cross-appeal was dismissed as it was not properly taken.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, John Ortiz, appeals an order of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) awarding certain benefits to claimant pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)), while denying certain other benefits requested by claimant. Respondent, Hard Rock Concrete Cutters, has filed a cross-appeal. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 It is undisputed that, on April 23, 2012, claimant suffered a work-related accident while in the employ of respondent. He was employed as a concrete cutter. On that date, he was drilling holes in concrete with a core drill. He bent over to vacuum some concrete and water slurry. When he stood up, he struck his back and neck on a pipe that was protruding from a nearby wall, which caused him to fall. He remained on the ground for 5 to 10 minutes and then crawled to a cart, where he sat for another 5 to 10 minutes. He attempted to resume drilling, but his shoulder stiffened up and he could barely lift his arm above his head. He reported the accident and sought medical treatment.

¶ 6 At the arbitration hearing, which was held on June 21, 2013, the arbitrator outlined the issues that were in dispute, one of which was causation. Claimant testified first. He stated that he had been employed by respondent for about seven and one-half years at the time of the accident on April 23, 2012. He was a concrete cutter and a member of the Laborers' Union. His job involved heavy lifting, which claimant estimated to be up to 50 pounds at a time. Claimant testified that he was 42 years old, six-foot, two-inches tall, and weighed 211 pounds. Prior to this accident, claimant had never injured his left shoulder, left arm, or neck. He had never filed a workers' compensation claim, though he had injured himself once while working for respondent when he fell off a ladder.

¶ 7 Following the accident, claimant was transported to St. Catherine's Hospital in East Chicago, Indiana. They took X rays and discharged him, instructing claimant to see his personal physician. After being discharged, claimant drove himself to get a drug test, and then he went home.

¶ 8 Claimant attempted to follow up with Dr. Plunkett, his personal physician, on April 27; however, Plunkett was not available, so he saw Dr. Johansson instead. Johansson conducted an examination, gave claimant a shot of Toradol, and took claimant off work until claimant could see Dr. Gireesan.

¶ 9 Claimant testified that he first saw Gireesan on April 20, 2012. Gireesan reviewed the X rays from St. Catherine's and conducted an examination. Gireesan ordered physical therapy, which claimant underwent from May 2, 2012, to October 4, 2012. Claimant's pain increased during physical therapy, but his physical therapist told him that "[y]ou have to feel more pain in order to get better." On May 24, 2012, Gireesan recommended a cervical MRI, which was performed on May 29. Claimant reviewed the MRI with Gireesan on June 12. On June 16,

2012, claimant reported to Gireesan that he was experiencing low-back pain as a result of physical therapy. Gireesan diagnosed lumbar-back spasms and prescribed some medication. On July 10, 2012, claimant told Gireesan his pain was getting worse, and Gireesan prescribed trigger-point injections. The injections provided relief for "a couple days," but the pain returned. Gireesan repeated the injections, and they again worked for a short time only. On August 20, claimant reported he was doing better in physical therapy. Gireesan recommended cervical epidural injections, but claimant has yet to have had them.

¶ 10 On September 24, 2012, claimant was examined by Dr. Zelby on respondent's behalf. Claimant testified that the appointment with Zelby lasted only about 10 minutes. On October 30, claimant saw Gireesan. Gireesan had a copy of Zelby's report and indicated that he "would go along with" it. Zelby's recommendation was that claimant undergo work hardening therapy and a functional-capacity examination (FCE). Claimant participated in work hardening from November 18 to December 5, 2012. When he began the program, he was at the light-duty level of physical activity. Work hardening got more difficult as it progressed, and claimant's pain level increased. Claimant underwent the FCE on December 6 (the FCE placed claimant at the sedentary level of physical activity). The FCE included a measure indicating it was "valid."

¶ 11 Claimant testified that he again saw Gireesan on December 10, 2012. Gireesan recommended another MRI, which was performed on December 17. Gireesan again recommended cervical epidurals and ordered claimant to remain off work.

¶ 12 Respondent terminated claimant's temporary-total disability (TTD) payments on January 9, 2013. Claimant saw Gireesan on March 15, 2013, and Gireesan continued to recommend cervical epidural injections. On April 13, 2013, Zelby again examined claimant on respondent's behalf. Zelby spent about 5 minutes with claimant. On April 19, 2013, he received a letter from

respondent, dated April 6, directing claimant to return to work on April 12. The letter was addressed to a post office box that claimant was not using, and he did not receive it until after the date he was told to report for work. Claimant testified that he still was experiencing a stinging sensation in his neck, numbness in his arms, back spasms, sharp pains between his shoulder blades, and lower-back pain. He takes Flexeril and Norco. Claimant also has headaches. He would like respondent to authorize the cervical epidural shots.

¶ 13 On cross-examination, claimant stated that on the day of second examination with Zelby, his pain remained at a level of 8 out of 10 for most of the day. He explained that this was because he was driving, so he did not take his medication. Claimant testified that he has good days and bad days. The day claimant underwent his FCE was a bad day. He has not worked since his last day with respondent. He had no prior history of low-back pain. At this point in the proceedings, respondent asked to amend the "stip[ulations] sheet to dispute accident and dispute notice because it was [respondent's] understanding that [claimant] had a history of low back pain."

¶ 14 Respondent then called Brad Bacon. Bacon testified that he is a project manager for respondent. He had worked for respondent for eight years at the time of the hearing, and, prior to that, he was a pastor. On the day of claimant's accident, Bacon met claimant at St. Catherine's Hospital emergency room. Claimant told Bacon that he was hit in the "back area," while gesturing toward his right shoulder and neck area. Claimant stated that he was wearing his hard hat. After leaving the emergency room, claimant drove himself to get a drug test and then home.

¶ 15 Respondent's next witness was Dvoratchek, the owner and president of respondent. Claimant spoke with Dvoratchek on the day of the accident and reported that his shoulder and

back were sore. He also spoke with claimant the next day. Claimant told Dvoratchek that he would be seeing his own doctor. Later that same week, claimant told him that he would be off work for four weeks. He sent claimant a letter on July 17, 2012, asking for an update on claimant's work restrictions, as respondent was trying to accommodate claimant. Claimant did not respond. Dvoratchek also called and left messages. Dvoratchek detailed the efforts he made to try to reach claimant. It is respondent's policy to attempt to accommodate light-duty restrictions when possible.

¶ 16 On cross-examination, Dvoratchek did not know whether there was any light-duty work available at the time of the arbitration hearing. However, he testified that there was no sedentary desk work available at that time. Dvoratchek was aware that claimant hired a lawyer within a week of the accident. Dvoratchek was aware claimant was represented by counsel at the times he tried to contact claimant. It never occurred to Dvoratchek to have respondent's workers' compensation representative contact claimant's attorney. When he offered claimant a position in April 2013, it was based on Zelby's opinion. However, he agreed that though Zelby opined claimant could work full duty, respondent did not offer claimant his regular job. He was not aware the Gireesan had continued claimant's off-work status.

¶ 17 Dvoratchek testified that claimant was a good employee. He did not recall claimant ever calling in sick. He testified that he prepared the letter dated April 6, 2013, offering claimant work with the help of the company's workers' compensation representative.

¶ 18 On redirect-examination, Dvoratchek testified that there was sedentary work available on April 6, 2013. He added, "I was going to have to make up something where he would have been at the desk taking care of some paperwork." Because claimant was a good employee, Dvoratchek wanted him to return to his former position.

¶ 19 Finally, respondent called Nebojsa Gilgorevic, a private investigator. Gilgorevic testified that he surveilled claimant on April 3, 2013, following the medical appointment claimant had that day. He made a video recording of claimant leaving the appointment and getting into a car, which was played for the arbitrator.

¶ 20 Claimant submitted the evidence deposition of Dr. Giri T. Gireesan into evidence. Gireesan testified that he had been treating claimant since April 30, 2012. During his first visit, Gireesan's records indicate, claimant did not state that he hit his head. They also state "negative for ear pain, eye pain, headache, [and] sore throat." Claimant had no significant past medical history. He initially diagnosed myofascial syndrome. He placed a restriction on claimant regarding driving. It was Gireesan's understanding that claimant was struck on the left side of the neck and upper back. A radiologist reviewed claimant's initial MRI and noted degenerative changes of the cervical spine *** most pronounced at [the] [C]5-6 level where there is shallow right paracentral/foraminal disk protrusion associated with mild right neuroforaminal stenosis." The radiologist "reported herniation at the [C]5-6 level." After claimant's June 12, 2012, Gireesan diagnosed a displacement of [the] intervertebral disk with pain in the neck and both upper extremities." Gireesan agreed with Zelby's recommendation of a work-hardening program. As of April 10, 2013, Gireesan opined, claimant could work in a sedentary-to-light capacity.

¶ 21 On cross-examination, Gireesan testified that when he saw claimant on May 24, 2013, claimant complained of headaches on the left side of his head. The pathology at the C5-6 level would manifest as pain in the shoulder and extremities. Gireesan believed that there was likely some pre-existing degeneration of the disk, and "the injury kind of made it worse for him." He opined claimant's at-work accident aggravated the disk. On June 26, 2012, claimant first

reported low-back pain. Gireesan told claimant that it was most likely unrelated to the accident, as the accident affected the top part of claimant's body. However, he later concluded that the low-back pain was secondary to physical therapy. In July, claimant reported a 40% improvement in physical therapy; however, he also experienced increased pain as the weights he was working with increased. Gireesan decided to administer trigger point injections. The injections had only a temporary effect.

¶ 22 On August 20, 2013, Gireesan recommended cervical epidural injections. He noted Zelby's disagreement regarding the propriety of such injections, and he attributed it to the fact that Zelby had only seen claimant on a limited basis and did not have a "good grasp of the whole situation." Gireesan explained that he went along with Zelby's recommendation for work hardening because cervical epidural injections were not being approved. As of October 30, 2013, claimant still complained of headaches. The MRI taken in December 2013 indicated claimant was in about the same condition as he was when the first MRI was performed. He disagreed with Zelby's opinion that injections were not warranted in part because injections are a minor, not-particularly-invasive procedure. Moreover, the only way to see if they would be helpful is to administer them. The FCE performed in December 2013 was valid and indicated claimant could work at the sedentary-light level.

¶ 23 Gireesan opined that claimant could not return to his regular job. Further, he suffered a work-related accident and it aggravated the degenerative condition of his spine. Currently, Gireesan believed claimant's condition was temporary. On cross-examination, Gireesan agreed that he did not address claimant's low-back condition over the course of his treatment of claimant.

¶ 24 Respondent introduced the deposition of Dr. Andrew Stephen Zelby, who testified that he is a board-certified neurosurgeon. He examined claimant on September 24, 2012. Claimant stated that he suffered a work-related accident on April 23, 2012. Claimant related the circumstances of the accident and the following course of care he received. Claimant told Zelby that he could tolerate sitting or standing for only an hour at a time. He reported a pain level of 9 on a 10-point scale; however, Zelby observed no pain behaviors during claimant's visit "to suggest that was an accurate representation of his pain." Claimant said nothing about low-back pain. Zelby reviewed claimant's MRI from May 29, 2012. He observed mild degenerate changes in claimant's spine that were consistent with his age. He noted "no acute or post-traumatic abnormalities." Zelby also reviewed claimant's medical records. He diagnosed cervical spondylosis and a trapezius strain. He opined that there was no relationship between the degenerative conditions and claimant's accident. Cervical epidural injections would be of no value to claimant.

¶ 25 Furthermore, claimant's reported loss of sensation in his entire left upper extremity had "no anatomic basis." Zelby added, "[Claimant's] persistent subjective complaints were out of proportion to his objective findings." Three to four weeks of work-hardening therapy would allow claimant to "easily" reach maximum medical improvement (MMI) with respect to "any infirmity arising as a consequence of his April 2012 work injury."

¶ 26 Zelby saw claimant for a second time on April 3, 2013. Claimant reported that his symptoms increased during work-hardening therapy. His pain was at a level of 8 out of 10, though Zelby observed no pain behaviors that would corroborate this. Zelby reviewed the MRI that was performed on December 17, 2012. It showed no changes from the earlier MRI. Claimant's neurologic examination was normal. Ongoing subjective complaints "could not be

explained by the objective medical evidence." Zelby opined that claimant was at (MMI) as of early December 2012. Zelby further opined that the fact that claimant's heart rate did not change during his FCE indicated he was not exerting himself. Additionally, one would typically see an increase in the heart rate of an individual experiencing pain.

¶ 27 On cross-examination, Zelby explained that his recommendation for work-hardening therapy was based on claimant's self-reported symptoms as well as findings during his examination of claimant. He would accept claimant's complaints and try to find an abnormality during an examination or study to explain the complaint. The term "objective medical evidence" encompasses a patient's complaints, according to Zelby. Zelby acknowledged that he documented a decrease in the range of motion of claimant's neck. When asked, "What's the difference between a trigger point injection and an epidural injection," Zelby answered, "One is a trigger point injection and one is an epidural injection." Zelby opined that claimant's accident did not aggravate claimant's underlying degenerative condition.

¶ 28 In addition to the depositions, the parties presented documentary evidence. The arbitrator began her written ruling by noting the issues in dispute, which included "accident regarding [claimant's] lower back [and] causal connection regarding all of [claimant's] current conditions." She then gave a detailed account of the evidence presented. She then turned to the issue of accident, first noting that it was undisputed that claimant sustained an "accident to the neck on April 23, 2012, but that [respondent] disputes whether [claimant] sustained a compensable injury to the low back." The arbitrator found claimant to lack credibility. She noted claimant's testimony about the mechanism of injury was not consistent with his medical records and that his complaints of low-back pain were inconsistent as well. Despite reporting that he had been struck in the neck and upper back, emergency room records noted no outward signs of injury. Outside

of having a "somewhat limited range of motion in the neck," claimant's physical examination by Gireesan was normal. The arbitrator noted that Gireesan admitted claimant's low-back pain was not related to his accident. Finally, she noted that the surveillance video, while not "shocking" in itself, "reinforces the demeanor of a claimant whose subjective complaints are either wholly unfounded by medical evidence or overstated, at best." The arbitrator then found claimant had not established that "he sustained a compensable injury to the low back on April 23, 2012." She found all other issues related to claimant's alleged back injury moot.

¶ 29 Regarding causation, the arbitrator first noted that she had already determined that claimant had not suffered "a compensable low back injury at work." She again found claimant to lack credibility and found that claimant had not established a causal connection between the "continued cervical spine condition" and his employment. She gave little weight to Gireesan's opinions, as they were based "almost exclusively" on claimant's subjective complaint, which the arbitrator noted were inconsistent with objective medical evidence. She rejected Gireesan's opinion on causation on this basis as well. Instead, she found Zelby persuasive. She noted Zelby's testimony that there was no anatomic condition that would cause claimant to lose sensation in his entire left arm. The arbitrator then found that claimant's "credibility [was] further brought into question by additional inconsistencies and contradictions." Specifically, she noted claimant's trial testimony added body parts, conditions, and pain complaint not corroborated by his medical records; his failure to reports a head injury to respondent, his physicians, or emergency room personnel; and the fact that the surveillance video undermines his claim that he was having a bad day on the day Zelby examined him. The arbitrator therefore found that there was "no credible evidence to support a causal connection finding between

[claimant's] continued symptomatology in the neck and his accident at work beyond Zelby's last Section 12 report" of April 3, 2013.

¶ 30 Relying on her finding regarding causation, the arbitrator found Gireesan's bills from 2013 were not compensable and that an award of prospective medical care was not warranted, though respondent was ordered to pay for claimant's physical therapy. She awarded TTD through December 5, 2012, when claimant completed work hardening ($810.95 per week for 32 and 2/7 weeks), citing Zelby's opinion. She also found that no fees or penalties should be imposed against respondent. The Commission modified the amount of credit respondent was due for overpayment of TTD and otherwise affirmed. It remanded pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 277 (1980). The circuit court confirmed the Commission's decision. This appeal followed.

¶ 31 III. ANALYSIS

¶ 32 On appeal, claimant raises a number of issues. First, he argues that the Commission erred by allowing respondent to withdraw its stipulation to accident regarding claimant's low-back injury. Second, claimant contests the Commission's conclusion regarding causation. Third, he asserts he was entitled to receive TTD beyond December 5, 2012, and that respondent's offer to re-employ him in April 2013 was not a *bona fide* job offer. Fourth, he claims he is entitled to recover medical expenses for treatment by Gireesan. Fifth, he argues that he is entitled to fees and penalties under the Act. Respondent has filed a cross-appeal, arguing that Gireesan's opinions should be stricken as they were beyond the scope of direct examination; however, strictly speaking, this is not a proper cross-appeal, as respondent is not actually challenging a portion of the Commission's decision. See *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 108 (2000). We therefore dismiss respondent's cross-appeal.

¶ 33 Most of claimant's arguments, including causation, raise factual issues that we review using the manifest-weight standard. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). Under this standard of review, we will reverse only if an opposite conclusion to the Commission's is clearly apparent. *Id.* A court of review is not bound by the reasoning of a lower tribunal, for we review the result to which it came rather than its reasoning. See *Boaden v. Department of Law Enforcement*, 267 Ill. App. 3d 645, 652 (1994); *Department of Mental Health & Developmental Disabilities v. Illinois Civil Service Comm'n*, 103 Ill. App. 3d 954, 957 (1982). Moreover, we owe considerable deference to the Commission when it resolves a conflict in medical evidence, as its expertise in that sphere is well recognized. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). With these principles in mind, we turn to claimant's arguments.

¶ 34 A. AMENDING THE STIPULATION

¶ 35 Claimant first argues that it was error for the Commission (in affirming the arbitrator) to allow respondent to amend its stipulation and contest the issue of accident as it related to claimant's low-back condition. It is true that stipulations are typically binding upon the parties. See *Ingrassia Interior Elements v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110670WC, ¶ 15. However, in this case, assuming, *arguendo*, that the Commission erred, any purported error was harmless.

¶ 36 It was undisputed that claimant suffered an at-work accident on April 23, 2012. Respondent stipulated to this. Apparently, respondent believed claimant's injuries were limited to his cervical spine and neck. Claimant alleged that his lower back began hurting while he was in physical therapy, which he was undergoing as a result of the accident. On claimant's theory, there was no second accident. Rather, an undisputed accident occurred, and then the question

became what injuries resulted from that accident, *i.e.*, a question of causation. Perhaps respondent could have argued that some facet of physical therapy (like malpractice) broke the chain of causation between claimant's accident and the condition of his lower back; however, there simply was no second accident at issue.

¶ 37 Indeed, though the arbitrator framed the issue as one of whether claimant sustained an accident to his low back, the balance of that section of her order reads more like an analysis of causation. She notes that Gireesan's records show no initial complaints of low-back pain. She found claimant's testimony as to the existence of low-back pain incredible, which is a finding that addresses the result of claimant's accident rather than its occurrence. She then notes that "[e]ven Dr. Gireesan admitted that [claimant's] low back condition was not related to his injury at work on April 23, 2013—again, this finding concerns a causal relationship. She also observed that when claimant reported low-back pain, "it was related to activities outside of work"—an independent cause. Ultimately, the arbitrator concludes, "Based on all of the foregoing, the Arbitrator finds that [claimant] failed to establish by a preponderance of the evidence that he sustained a compensable injury to the low back at work on April 23, 2012." This finding makes plain that the arbitrator was not addressing the occurrence of the accident itself. She was addressing whether the undisputed accident caused an injury to claimant's lower back.

¶ 38 Accident clearly was in dispute; the request for hearing sheet indicates that respondent was disputing, generally, whether claimant's condition of ill being was related to his injury. Thus, claimant was on notice that causation was at issue. The arbitrator reasoning was certainly imprecise, and it would have been clearer had she discussed claimant's low-back condition in terms of whether a causal relationship existed between it and employment. Nevertheless, since claimant knew causation was at issue, he also knew he had the burden of putting forth evidence

to establish causation. Thus, any error in proceeding in this manner was harmless because claimant was already aware of the necessity of putting on the sort of evidence upon which the arbitrator relied. An error that prejudices no one is harmless. See *City National Bank of Murphysboro v. Reiman*, 236 Ill. App. 3d 1080, 1095 (1992).

¶ 39 Claimant attempts to show prejudice by arguing that the finding he was not credible regarding the issue of accident prejudiced the Commission against him and affected its analysis of the remaining issues. However, such evidence was properly before the Commission as it pertained to the issue of causation. Claimant states, "When the Commission allowed Respondent to place accident into dispute based on the low back, the Commissions [*sic*] fact-finding became skewed by looking for evidence that [claimant] complained of his low back at the time of accident." Claimant does not explain why such fact finding is "skewed." Indeed, it seems to us that "evidence that [claimant] complained of his low back at the time of accident" would have been highly relevant to the issue of a causal connection between claimant's low-back condition and the accident.

¶ 40 Thus, we conclude that the Commission's decision to allow respondent to amend its stipulation did not amount to reversible error. The question remains as to whether the Commission correctly determined that claimant failed to carry his burden of proving a causal relationship between his ongoing conditions of ill being and his at-work accident.

¶ 41 B. CAUSATION

¶ 42 We now turn to the question of whether the Commission's decision regarding causation is contrary to the manifest weight of the evidence. We will first address claimant's lower back, and then we will turn to claimant's neck.

¶ 43 1. Claimant's Lower Back

¶ 44 As noted above, the arbitrator's decision conflates the issues of accident and causation. However, we are not bound by that reasoning (*Boaden*, 267 Ill. App. 3d at 652), and we may affirm on any basis appearing in the record (*CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 31). Here, it is abundantly clear that the arbitrator's findings that she made in the course of discussing accident are pertinent to causation. Even claimant acknowledges that claimant's "low back condition was a causal connection issue, not an accident issue. The Commission's findings that are relevant to causation are not against the manifest weight of the evidence.

¶ 45 The Commission's decision regarding claimant's lower back rests primarily upon its rejection of claimant's testimony due to his lack of credibility. To this end, the Commission noted that medical records from the emergency room documented no outward sign of an injury to claimant's neck or upper back. It erroneously stated that this was corroborated by the records of Dr. Plunkett (claimant actually saw Gireesan); however, as these records were duplicative of emergency room records in this aspect, we find this mistake to be of little significance. The Commission noted that outside of the somewhat limited range of motion of claimant's neck, his examinations were "otherwise normal" except for his "inconsistent pain complaints." This is borne out by Gireesan's medical records. Gireesan told claimant his low-back pain was not related to his accident. Claimant never complained of low-back pain until about six weeks after the accident. The surveillance video provides additional support for the Commission's decision.

¶ 46 It is true, as claimant points out, that the FCE performed in December 2012 placed claimant at the sedentary level of work ability. This, however, merely created a conflict in the evidence (particularly with respect to Zelby's opinions), which was for the Commission to resolve. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655 (1999). We

cannot say that the FCE was so compelling that the Commission was required to give more weight to it than other evidence, such as Zelby's opinions, that favored respondent.

¶ 47 Attacking the Commission's findings, claimant asserts that the Commission found claimant to be at MMI as of December 5, 2012, even though the FCE performed at this time indicated he was at the sedentary duty level. However, the Commission discussed the FCE and found claimant to lack credibility with respect to his claims of experiencing low-back pain in connection with it. Moreover, Zelby further opined that the fact that claimant's heart rate did not change during his FCE indicated he was not exerting himself. Zelby opined the FCE was not consistent with claimant's objective medical condition. Thus, there were reasons in the record for the Commission to question the FCE.

¶ 48 Claimant asserts that the surveillance video did not undermine his credibility. He explains that "[h]e is shown getting out of a car and walking without any type of emotion into a store, and coming back out of the store without any emotion and getting into the car." He continues that "[h]is complete lack of emotion supports a finding of severe pain." Perhaps, but the Commission did not interpret the recording in this manner. Instead, it viewed claimant's lack of emotion as evidence that he was not in pain, which seems a perfectly reasonable inference to us. Indeed, claimant's argument here is simply a request that we reject the Commission's interpretation of the recording and substitute our own. This, of course, we may not do. *Illinois Valley Irrigation, Inc. v. Industrial Comm'n*, 66 Ill. 2d 234, 239 (1977) ("On review, a court will not reject permissible inferences drawn by the Commission because different inferences might also have been reasonably drawn, nor will it substitute its judgment for that of the Commission unless the findings are contrary to the manifest weight of the evidence.").

¶ 49 In sum, the facts found by the Commission, though framed as a discussion of accident, clearly entail claimant failing to carry his burden of proof as to causation with respect to the condition of his low back. These factual findings are not contrary to the manifest weight of the evidence.

¶ 50 2. Claimant's Neck and Cervical Spine

¶ 51 The Commission also found that the ongoing condition of claimant's cervical spine was not causally related to his at-work accident. Again, the Commission found claimant testimony to lack credibility. It also found that Gireesan's opinion was entitled to little weight because it "relied almost exclusively on [claimant's] subjective complaints which are inconsistent with objective medical evidence." It noted Gireesan admitted that claimant's right-side disc protrusion should produce symptoms on the right side rather than the left, as reported by claimant. It questioned Gireesan's recommendation for cervical epidural injections given that claimant had no neurological deficits. On the other hand, it credited Zelby's opinions, relying on Zelby's testimony that claimant's subjective complaints were out of proportion to his objective findings. It noted Zelby's testimony that no neurological condition could produce a loss of sensation in one's entire left upper extremity, as claimant stated. It found Zelby's opinion consistent with objective medical evidence. The Commission further noted additional inconsistencies and contradictions in claimant's testimony, including "pain complaints not corroborated by the medical records" and claims of weight gain and increased blood pressure despite a lack of medical evidence tying these to the accident. The Commission also relied on the surveillance video. As such, the Commission found that claimant's continued symptomatology after Zelby's last examination of claimant was not causally related to claimant's

at-work accident. Again, the Commission tied its findings to evidence in the record, and we cannot say they are contrary to the manifest weight of the evidence.

¶ 52 Claimant, however, attempt to establish that they are. We initially note that claimant argues that no evidence supports the Commission's finding that his "condition of ill-being is not causally related to the accident." It is claimant's burden to establish the existence of a causal relationship. *Steiner V. Industrial Comm'n,* 101 Ill. 2d 257, 261 (1984). Thus, the absence of evidence as to the lack of a causal relationship provides no reason for us to disturb the Commission's decision.

¶ 53 Claimant relies heavily on the FCE, contending that the fact it showed him to be at a sedentary level (after previously having been found to be at a light duty level) should be given dispositive weight. However, Zelby disagreed with the FCE, and the Commission placed little weight upon it. It also found claimant's testimony about the FCE incredible. At most, this was a conflict in the record for the Commission to resolve. *Bennett Auto Rebuilders*, 306 Ill. App. 3d at 655. Claimant asks that we give little weight to Zelby's opinion; however, such matters are primarily for the Commission (*Id.*). Given the deference we owe it on medical issues (*Long*, 76 Ill. 2d at 566), we will not simply substitute our judgment for the Commission's here.

¶ 54 In short, while claimant has identified some conflicts in the evidence, none are so significant that we could say that an opposite conclusion to the Commission's is clearly apparent.

¶ 55 B. TTD

¶ 56 Claimant also argues that the Commission's decision finding it appropriate to terminate TTD at the conclusion of work hardening is contrary to the manifest weight of the evidence. He again points to the fact that the FCE placed him at a sedentary level of work ability. As noted

above, Zelby opined to the contrary. This is the same conflict in the evidence we have previously discussed, and we find it no more compelling in this context.

¶ 57 Claimant contends that he was entitled to TTD through the date of the arbitrator hearing. Generally, a claimant is entitled to TTD from the time of the injury until he or she reaches MMI. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). The Commission found that TTD should terminate on December 5, 2012, when claimant completed work-hardening therapy. This determination finds support in Zelby's testimony. Claimant, however, argues that his condition deteriorated during work hardening, as demonstrated by the FCE. Again, there were reasons for which the Commission could discount the FCE. Most notably, Zelby opined though the FCE was described as "valid," it "made no sense in the context of objective medical evidence and [claimant's] underlying medical condition." Zelby explained that though claimant's performance may have been internally consistent—the criteria for assessing the validity of an FCE—it was not consistent with claimant's objective medical condition. Zelby opined, "There was no medical evidence to suggest that [claimant] could not safely return to all of his usual vocational and avocational activities without restrictions." He added that claimant reached MMI at about this time.

¶ 58 Thus, Zelby's opinion, which was tied to objective medical evidence such as claimant's MRI, provided not only a reason to question the FCE, but a reason to question its self-assessed conclusion regarding its validity. Given the Commission's decision finds a basis in Zelby's opinion, we cannot say that it is against the manifest weight of the evidence.

¶ 59 C. The Job Offer

¶ 60 Claimant also argues that an offer to re-employ him that respondent made to him in April 2013 was not a *bona fide* job offer. He cites *Reliance Elevator Co. v. Industrial Comm'n*, 309

Ill. App. 3d 987, 993 (1999), which holds that "[e]mployers must not be allowed to defeat an injured employee's entitlement to a disability award by making sham job offers." However, the Commission's decision regarding TTD does not mention the job offer. Instead, the Commission terminated TTD on December 5, 2012, "when [claimant] completed work conditioning in accordance with the opinions rendered by Dr. Zelby that [claimant] reached maximum medical improvement." That the job offer was not made until April 2013, four months after the date at which the Commission terminated TTD shows that the Commission was not relying on the job offer in making this decision. Moreover, Zelby's opinion provides an adequate basis for the Commission's decision such that it is not contrary to the manifest weight of the evidence. In short, even if the job offer was not *bona fide*, the Commission did not rely on it in determining TTD should terminate on December 5, 2012.

¶ 61 D. Medical Expenses

¶ 62 Claimant asks that "[i]n the event this court finds that [claimant's] current condition of ill-being are causally related to the accident, the court should award the ongoing medical expenses of Dr. Gireesan." We have not made such a finding regarding causation. This argument is moot.

¶ 63 E. Penalties and Fees

¶ 64 Finally, claimant asserts that penalties and fees should be imposed upon respondent in accordance with sections 19(k), 19(l), and 16 of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2012)). Sections 16 and 19(k) allow for the imposition of fees and penalties against an employer where the employer has been guilty of an unreasonable or vexatious delay, and the two statutes apply under similar circumstances. *USF Holland, Inc.*, 357 Ill. App. 3d 798, 805 (2005). A good-faith challenge to liability will not result in fees or penalties being imposed. *Matlock v.*

Industrial Comm'n, 321 Ill. App. 3d 167, 173 (2001). So long as the employer is acting reasonably, fees and penalties are not appropriate. *Electro-Motive Division v. Industrial Comm'n,* 250 Ill. App. 3d 432, 436 (1993). Section 19(l) is more in the nature of a late fee, pursuant to which penalties must be awarded where payment is late and the employer cannot provide an adequate justification for the delay. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807, ¶ 20 (quoting Mc*Mahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998)).

¶ 65 Here, respondent had a good-faith basis for disputing liability, namely, Zelby's opinion. In *Reynolds v. Illinois Workers' Compensation Commission*, 395 Ill. App. 3d 966, 971 (2009), we held that where an employer acts in reliance upon reasonable medical opinion, penalties are not appropriate. Zelby's opinion easily satisfies this standard.

¶ 66 IV. CONCLUSION

¶ 67 In light of the foregoing, the decision of the circuit court of Cook County confirming the decision of the Commission is affirmed. Respondent's cross-appeal is dismissed. This cause is remanded in accordance with *Thomas*, 78 Ill. 2d 277.

¶ 68 Affirmed.