

No. 4-13-0569WC

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

IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

UNIQUE DELIVERY SYSTEMS, INC.,	)	Appeal from the Circuit Court
	)	of McLean County.
	)	
Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 12-MR-350
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, <i>et al.</i> ,	)	
	)	Honorable
(James Gadison, Appellee and	)	Rebecca Simmons Foley,
Cross-Appellant).	)	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:* The Illinois Workers' Compensation Commission's findings, that the claimant's cervical spine injury was causally connected to his workplace accident and that he was not entitled to fees and penalties, were not against the manifest weight of the evidence.
- ¶ 2 The employer, Unique Delivery Systems, Inc. (Unique Delivery), appeals the decision of the circuit court confirming the determination of the Illinois Workers' Compensation Commission (Commission) that the cervical spine injury of the claimant, James Gadison, was

causally connected to his workplace accident. The claimant appeals that portion of the circuit court's order confirming the Commission's decision denying him an award for attorney fees and penalties under sections 16, 19(k) and 19(l) of the Worker's Compensation Act (Act) (820 ILCS 305/16, 19(k), 19(l) (West 2008)). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 We first note that, on October 7, 2009, the claimant was awarded temporary total disability (TTD) benefits for his injuries stemming from the April 10, 2008, workplace accident. At the conclusion of the August 10, 2009, hearing, the arbitrator concluded that: the claimant's injuries were causally connected to his employment; that he was unable to return to full-duty as of November 17, 2008; the claimant was entitled to TTD benefits from April 11, 2008, through August 10, 2009.

¶ 4 Unique Delivery sought review of this determination before the Commission, and on April 28, 2010, the Commission affirmed and adopted the arbitrator's decision and remanded the cause for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 5 Upon remand, a second arbitration hearing was conducted on October 13, 2011, and the following factual recitation is taken from the evidence presented at that hearing, which included the deposition and medical evidence submitted at the first arbitration hearing.

¶ 6 The claimant's 2009 deposition was admitted into evidence in which he testified that he worked as a delivery truck driver for Unique Delivery and was involved in a vehicle collision on April 10, 2008. Immediately after the accident, he experienced extreme pain from the lower back to the upper back and a headache, and he sought emergency room treatment. On May 1,

2008, he sought follow-up treatment with Dr. Lisa Snyder, who restricted him to light-duty work. The claimant testified that, after the accident, he had low back problems, which affected his legs, and neck pain with headaches. He stated that he had headaches "all the time" and whenever he has been standing for 20 minutes or more. He also stated that the numbness and tingling in his hands and feet made it difficult for him to sleep or sit for any period of time. The condition of both his lower back and his neck interfered with his normal activities, including jogging, walking for any distance, and playing ball with his children. He denied having any problems with his neck or lower back before the April 10, 2008, accident.

¶ 7 On June 26, 2008, Dr. Lisa Snyder noted that the claimant's "whiplash" injury had resolved, but further treatment of the lumbar spine was necessary. The claimant had a lumbar spine MRI exam, which showed disc bulging at the L3-4, L4-5, and L5-S1 levels. On September 11, 2008, Dr. Snyder released the claimant to full-duty work, stating his pain would subside with over-the-counter analgesic medications.

¶ 8 After returning to work on September 16, 2008, the claimant returned to the emergency room complaining of low back and neck pain. On September 26, he saw Dr. George DePhillips, a neurosurgeon, and complained of low back and neck pain. During that visit, the claimant stated that his low back pain was worse than the neck pain. Dr. DePhillips concluded that his lumbar pain was either discogenic from annular tears or myofascial and that he required further testing and possible pain management treatment. Dr. DePhillips testified that he and the claimant agreed to first treat his lower back pain before addressing his neck pain, explaining that was the reason some of his treatment notes did not mention the claimant's ongoing neck pain.

According to Dr. DePhillips, he did not begin to treat the claimant's neck pain until they decided that he should not pursue lumbar spine surgery.

¶ 9 On October 17, 2008, the claimant first saw Dr. Udit Patel for pain management treatment of his lumbar spine pain. Dr. Patel did not note any cervical spine pain complaints in his notes from the visit.

¶ 10 The claimant testified that, on November 17, 2008, he saw Dr. Steven Delheimer at the request of Unique Delivery. At his June 2009 deposition, Dr. Delheimer testified that, after examining the claimant, he concluded that the claimant had a normal neurologic exam and was "most likely exaggerating the amount of pain that he was experiencing." He stated the basis for his opinion was the lack of any secondary evidence supporting his level 10 pain complaints, such as elevated blood pressure, elevated pulse, sweating or pale complexion. Dr. Delheimer believed the claimant suffered from a myofascial pain syndrome, which is a soft tissue injury of his cervical and lumbar area.

¶ 11 On December 30, 2008, the claimant underwent a functional capacity evaluation (FCE) which determined that he could work at the light-medium demand level, meaning occasional lifting of 35 lbs. or frequent lifting of 20 lbs. This demand level fell below the medium-level job demand required for his delivery truck driving position. In the "Cervical Mobility" section of the FCE, it was noted that the claimant had a restricted range-of-motion on the right flexion tests.

¶ 12 On January 19, 2009, at the request of Unique Delivery, the claimant was examined by Dr. Robert Eilers, who diagnosed him with "myofascial pain syndrome secondary to strain-sprain injury due to the motor vehicle collision," affecting his cervical and lumbar spinal regions. Dr. Eilers further reported that the claimant "probably has aggravated his lumbar disk bulges at

L3-L4, L4-L5, and it appears that he may have an early disruption at L5-S1." He stated that diagnostic discogenic studies and electrodiagnostic studies were needed, but that the claimant's current condition was caused by his work-related vehicle collision and that medical care to date was reasonable and necessary. Dr. Eilers testified that the claimant's neck showed improvement as of August 2008, and he was released to work light-duty on September 12, 2008. However, after three days of working, the claimant relapsed and reported low back and neck pain, including headaches, numbness, ringing in the ear, and pain in his arms, back and neck. Regarding his examination of the claimant's cervical spine, Dr. Eilers testified that he showed myofascial trigger points, which are basically areas of muscle pain upon palpation of the cervical paraspinals, the trapezius and rhomboid muscles and which indicated the upper neck was strained or sprained. The claimant had tightness in the neck but was able to demonstrate a full range-of-motion. Dr. Eilers testified that, considering the claimant's total condition, he believed he would be permanently restricted to light-medium duty because heavier lifting could herniate the already bulging discs in his lumbar spine.

¶ 13 The claimant returned for a follow-up visit with Dr. DePhillips on February 20, 2009, at which time he was ordered to return to work with restrictions on his lifting, sitting, and duration of workday and to have a lumbar discogram procedure. On March 11, 2009, the claimant saw Dr. Gary Koehn, who stated that the claimant reported low back pain following the work accident, and "chronic neck pain following same accident, improved." On March 18, the claimant had a CT scan of his lumbar spine and Dr. Koehn performed the lumbar discogram, which revealed pain concordant with the L3 through S1 levels and a grade III annular tear at L5-S1 level. The CT results were consistent with the discogram findings.

¶ 14 The claimant returned to Dr. DePhillips on March 27, 2009, at which time it was recommended that he receive lumbar steroid injections. The claimant received lumbar steroid injections from Dr. Koehn on April 23 and May 20, 2009.

¶ 15 On May 11, 2009, the claimant returned to Dr. DePhillips, reporting that the April 23 lumbar steroid injection did not provide him with any relief. On examination, Dr. DePhillips found tenderness in the right paraspinal muscle region and increased pain with forward flexion. He recommended that the claimant receive a second epidural steroid injection, remain on light duty with lifting restrictions, and treat with a chiropractor for 3-4 times per week for 4 weeks. The claimant returned to Dr. DePhillips on May 27, stating the May 20 lumbar steroid injection provided no relief and his pain felt worse after the shot. The claimant also reported that he had "occasional neck pain and migraine headaches." Dr. DePhillips advised the claimant to continue with chiropractic care. The claimant complied and treated at the Judge Chiropractic Center.

¶ 16 On July 6, 2009, Dr. DePhillips's office visit report states that the claimant did not respond to the chiropractic treatments and continued to have low back pain. He ordered a follow-up MRI scan as his last study was performed in August 2008.

¶ 17 On July 27, 2009, Dr. DePhillips noted that the claimant's July 15 MRI exam revealed no interval change from the 2008 study which showed bulging discs at the L3 through S1 levels. Dr. DePhillips reported that the "risks of surgery at this point outweigh[ed] the benefits given his age and the fact that the disc [has] not collapsed and [was] not significantly degenerated." He advised the claimant to wait until his pain became unbearable before pursuing surgery and told him that he would likely require treatment over the next decade, including a discectomy and fusion at the L5-S1 level. Also at this visit, the claimant complained of "worsening neck pain

and headaches which began following the injury." Dr. DePhillips ordered an MRI of the cervical spine and recommended that the claimant remain off duty until they received the results of that exam.

¶ 18 On August 17, 2009, Dr. DePhillips noted that the claimant's August 4, 2009, MRI, revealed mild disc degeneration from the C4 through C7 level and a high intensity zone at the C5-C6 level that may be the result of an annular tear. The MRI report stated there was "straightening of [the] cervical lordosis suggesting spasm," "disc desiccation [at] C2-3 through C5-6," and disc bulges at C3-4, C4-5, and C5-6 "each of which contact the ventral cord and cause slight flattening but show no myelomalacic change and have no associated narrowing of neural foramina." Dr. DePhillips stated that the injury could have aggravated degenerative disc disease by virtue of causing annular disruption. He recommended the claimant receive epidural injections to treat the pain.

¶ 19 The claimant received a cervical epidural steroid injection on September 20 and returned to Dr. DePhillips on September 28, reporting that the injection did not provide relief and that he continued to suffer neck and shoulder pain with headaches. His neck pain sometimes radiated into the right arm to the elbow with intermittent numbness in the third, fourth, and fifth digits of his hand. Dr. DePhillips advised the claimant to proceed with a second epidural injection, remain off work until his next appointment, and follow-up after the injection.

¶ 20 The claimant returned to Dr. DePhillips on October 22, 2009, following his second epidural injection, which he reported provided no relief. He also reported that his neck pain was now worse than his low back pain. Dr. DePhillips ordered the claimant to undergo a cervical discogram procedure given his MRI results and the ineffectiveness of the epidural injections.

¶ 21 On November 5, 2009, the claimant underwent a cervical discogram study with Dr. Koehn. The study revealed concordant pain at the C3 through C6 level along with high-grade annular tears at each of those levels. A CT scan performed the same day revealed the same annular tears and noted mild spinal stenosis at the C3-4 and C4-5 levels.

¶ 22 On November 16, 2009, the claimant saw Dr. DePhillips, who discussed with him the pros and cons of cervical fusion surgery and referred him to Dr. Patrick Sweeney for a second opinion.

¶ 23 On December 15, 2009, the claimant saw Dr. Patrick Sweeney, who stated that, because of the claimant's young age, he did not recommend cervical fusion surgery. However, he wrote that if the claimant was unable to manage the pain, an anterior cervical fusion would not be unreasonable.

¶ 24 On December 21, 2009, Dr. DePhillips recommended that the claimant continue treating with Dr. Sharma and Dr. Patel for pain management. He also reviewed the second opinion the claimant received from Dr. Sweeney, who thought the claimant could benefit from an artificial disc replacement. However, a multi-level disc replacement procedure had not been approved by the FDA. Dr. DePhillips agreed with Dr. Sweeney that the claimant should continue with pain management treatment to avoid surgery. From a neurosurgical standpoint, Dr. DePhillips opined that the claimant had reached maximum medical improvement (MMI).

¶ 25 On February 8, March 8, May 3, June 14, July 13, and August 10, 2010, the claimant saw Dr. Patel, who noted the claimant's complaints of neck pain, headaches, and bilateral arm numbness and pain. Dr. Patel treated the claimant's symptoms with pain medications.

¶ 26 On August 30, 2010, the claimant saw Dr. DePhillips, who recommended a follow-up MRI exam because the claimant continued to report pain in his neck. On September 3, 2010, the claimant underwent a cervical MRI exam, which showed mild degenerative disc disease with slight disc bulging at multiple levels (C3 through C6) but no evidence of spinal stenosis or nerve impingement. Cervical spine x-rays performed on the same day indicated muscle spasm and mild degenerative disc disease.

¶ 27 On September 8, 2010, Dr. Patel administered an injection known as a cervical diagnostic medial branch block of the third occipital nerve to treat the claimant's ongoing pain.

¶ 28 On September 20, 2010, Dr. DePhillips saw the claimant and reviewed his previous November 2009, cervical discogram, cervical MRI, and cervical CT results. He advised the claimant that he thought he could benefit from a three-level anterior cervical discectomy with fusion surgery.

¶ 29 On September 24, 2010, the claimant received another occipital nerve block injection from Dr. Patel.

¶ 30 On October 6, 2010, Dr. DePhillips injected the claimant with lidocaine to treat his cervical spine pain. While continuing to treat with Dr. DePhillips, the claimant continued seeing Dr. Patel, who administered occipital nerve block injections on October 22, November 12, December 10, and December 22, 2010.

¶ 31 In a November 15, 2010, office visit note, Dr. DePhillips stated that the claimant continued complaining of left-sided neck pain with headaches and low back pain. Regarding the neck pain, the claimant reported to Dr. DePhillips that the pain radiated into his left arm and

forearm and his fingers felt numb. He rated his pain as 10 on a scale of 1 to 10. Dr. DePhillips opined that a cervical fusion was reasonable at the C3-4, C4-5, and C5-6 levels.

¶ 32 During his March 23, 2011, deposition, Dr. DePhillips clarified that he had released the claimant to light-medium work duty in February 2009, which Unique Delivery was unable to accommodate. On July 27, 2009, he recommended that the claimant remain off work due to his worsening neck condition. As of November 15, 2010, Dr. DePhillips had not released the claimant to work, although he was unaware whether Dr. Patel had released him. Regarding causation, Dr. DePhillips testified that the claimant's low back and neck conditions were caused by the workplace accident of April 10, 2008. He stated that he based his causation opinion on the fact that the claimant had no previous history of low back or neck problems and that his symptoms were consistent with clinical findings. On cross-examination, he stated that it was insignificant that the claimant did not pursue treatment for his neck pain for several months and then reported pain of 7 out of 10, noting that the claimant was on Flexeril and Vicodin for his low back pain during that same time period. Dr. DePhillips testified that he did not believe that the claimant was exaggerating his symptoms.

¶ 33 On January 4, 2011, Dr. Patel treated the claimant's neck pain with a radiofrequency ablation of the third occipital nerve. On January 31, 2011, the claimant saw Dr. Patel and reported that his neck symptoms had initially improved following the radiofrequency ablation procedure but had since worsened. Dr. Patel noted that, if surgery was not indicated, the claimant was at MMI from an interventional pain standpoint.

¶ 34 On February 28, March 28, April 29, and May 27, 2011, the claimant continued treating with Dr. Patel for his low back and neck pain. Dr. Patel treated the claimant's symptoms with

medication, including Flexeril and Vicodin. On June 24, 2011, Dr. Patel discussed administering occipital nerve block injections if his pain did not improve with medications. On July 20, August 17 and September 19, 2011, the claimant received occipital nerve block injections from Dr. Patel. On September 19, Dr. Patel noted that the claimant reported about 60% pain relief from these injections.

¶ 35 At the second arbitration hearing, the claimant testified that he continued to treat with Dr. Patel while awaiting approval to undergo cervical spine surgery. He stated that he wanted to proceed with surgery because his headaches and neck pain, in addition to his lower back pain, have affected his ability to sleep and have become intolerable. He testified that he can lift only 10 lbs. and cannot traverse stairs or jog other than to cross a street.

¶ 36 Regarding employment, the claimant testified he began documenting his job search efforts as of January 2011 and had applied for 17 jobs since then. Beginning in 2009, he applied for positions through four temporary employment agencies, but he did not record those efforts. The claimant testified that, because he needed money for his family, he applied for jobs despite Dr. DePhillips' recommendation that he not work.

¶ 37 Dr. Howard Konowitz, testifying for Unique Delivery, stated that the claimant's March 18, 2009 discogram was performed at pressure levels which would lead to false positive results, meaning a normal disc would trigger pain symptoms. He also opined that the claimant became tolerant to the Vicodin and Flexeril medications and therefore perceived his pain worse than it actually was. Dr. Konowitz stated that the claimant's injuries were myofascial in origin and that he believed the claimant could return to his medium-demand level truck driver position. On

cross-examination, Dr. Konowitz admitted that he had not examined the claimant, but he only reviewed his medical records.

¶ 38 Dr. Sean Salehi testified that he examined the claimant on January 6, 2011, at the request of Unique Delivery, and he concluded the claimant's cervical condition was not causally related to the April 2008 accident. On physical examination, Dr. Salehi noted that the claimant had limited range-of-motion in his cervical and lumbar spines and tenderness upon touch, but his gait was normal and he had no significant and obvious abnormality in motor tests. He opined that the claimant had a cervical strain, lumbar back pain, and myofascial pain syndrome. Based on the fact that no cervical spine symptoms were documented in the claimant's June 2008 through March 2009 medical records and Dr. Snyder's June 2008 note indicating the "whiplash" had resolved, Dr. Salehi did not believe the claimant's current cervical spine condition was related to the April 2008 accident. He opined that the claimant had reached MMI for the work-related neck injury as of June 26, 2008. Dr. Salehi further opined that the claimant was not a good candidate for surgery and could return to work on a light-medium level of demand per the December 2008 FCE. He explained, however, that he did not believe the claimant's neck condition was the reason for the FCE's recommended work restrictions.

¶ 39 Zarko Gligorevic, a private investigator, testified that he filmed the claimant on January 14 and January 15, 2011, and recorded about 13 minutes of video. The video is not part of the record, but Gligorevic's written report stated that the claimant was seen leaving his residence, retrieving an empty garbage container, bending at his waist, picking up a half-full garbage bag, and carrying the bag and the container into his garage. The report further stated the claimant was seen entering a vehicle on the passenger side, exiting the vehicle at another location, jogging

across the street, and entering a building. Gligorevic testified that he saw the claimant jog across the street, but he did not recall any vehicle traveling in the claimant's path which would have necessitated his need to jog. The report also stated the claimant was filmed as he walked for six minutes down his street to a neighbor's home, entered a vehicle as a passenger, exited the vehicle, walked into a cigar store, and then returned to the vehicle.

¶ 40 Paula Massat, a vocational rehabilitation specialist, testified that she was hired by Unique Delivery to perform a Labor Market Survey in this case. She completed the survey in July 2010 and found 12 positions within 50 miles of the claimant's residence which were suitable for the claimant's skills, experience, and light-medium demand level restriction. Massat admitted that she never met the claimant and did not live near him. She stated that she spoke to employers over the phone in compiling data for her survey. The claimant testified that he applied to the positions Massat found for him except for three positions. He stated that he could not locate two listed employers and one position exceeded his light-medium demand level restriction as it was a truck driving position similar to his position with Unique Delivery.

¶ 41 Following a hearing, the arbitrator found that the claimant was entitled to TTD benefits and prospective medical expenses for cervical spine surgery pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)). However, the arbitrator denied the claimant's petition for attorney fees and penalties under sections 16, 19(k) and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2008)).

¶ 42 Unique Delivery sought review before the Commission, arguing that the claimant failed to prove that his current condition of ill-being was causally connected to his work accident. The claimant also sought review of the arbitrator's denial of his request for attorney fees and

penalties. On August 7, 2012, the Commission affirmed and adopted the decision of the arbitrator.

¶ 43 Unique Delivery then sought judicial review of the Commission's decision in the circuit court of McLean County. The claimant also sought review of the Commission's refusal to award him attorney fees and penalties. On June 3, 2013, the circuit court confirmed the decision of the Commission.

¶ 44 Unique Delivery now appeals, arguing that the Commission erred in finding that the claimant's cervical spine injury was causally connected to the April 2008 accident. It argues that the Commission improperly relied on the 2009 arbitration decision, which found the lumbar spine injury was causally connected to the accident, in its determination that the cervical spine injury was also caused by the workplace accident. We disagree.

¶ 45 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill.2d 249, 253, 403 N.E.2d 221 (1980). Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill.2d 236, 244, 461 N.E.2d 954 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill.2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill.App.3d 288, 291, 591 N.E.2d 894 (1992). Whether a reviewing court might reach the same

conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1982).

¶ 46 In this case, we cannot find that the Commission's finding that the claimant's current cervical spine condition was causally connected to his workplace accident is against the manifest weight of the evidence. The Commission based its decision on the evidence that the claimant had continually reported neck and low back pain after his workplace accident. The Commission noted that it had previously determined a causal connection existed between the claimant's low back and neck pain after the first hearing and that, following that hearing, the claimant continued receiving treatment for his condition, which included steroid injections, chiropractic treatments, and pain medications. Additionally, the claimant's medical exams revealed cervical spine abnormalities consistent with his pain complaints, including his MRI exam which showed disc degeneration and disc bulging from C3 through C7 levels, his CT scan which showed annular tears at the same areas as the bulging discs, and his cervical discogram which showed pain concordant with C3 through C6 levels. The claimant testified that he never had pain in his neck or low back before the workplace accident and no evidence refutes his testimony. Further, Dr. DePhillips, the claimant's treating neurosurgeon, testified that he believed the claimant's current condition of ill-being, including his cervical spine condition, was causally connected to his workplace accident of April 2008.

¶ 47 For two reasons, we disagree with Unique Delivery's contention that the Commission improperly used its previous causation finding in its present decision. First, the record does not

support Unique Delivery's argument that the initial Commission decision determined that the claimant's neck injury resolved as of Dr. Snyder's June 26, 2008, note. Rather, the Commission's first decision noted that, after Dr. Snyder released the claimant to work in September 2008, he suffered an increase in pain in both his "low back and neck," and then sought treatment with Dr. DePhillips. The initial Commission decision did not restrict the claimant's TTD benefits to his lumbar spine injury, but rather broadly stated that the claimant's "present condition of ill-being [was] causally related to the 4/10/08 accident" and that Unique Delivery shall pay TTD benefits for the claimant's "injuries." Second, the record does not support Unique Delivery's contention that the Commission only made its present causation determination because it believed it was bound by its previous causation finding. The record shows that the Commission, adopting the arbitrator's ruling, noted that it was "bound by the previous arbitration finding that [the claimant's] condition of ill being as of 8/10/09 was causally related to the accident in question." This statement indicates only that the arbitrator knew he could not determine that the claimant's cervical spine condition had resolved in June 2008 as Unique Delivery argued because causation had already been established through August 10, 2009. The arbitrator further stated that "[s]ince that time, the records document consistent neck and back pain with radiation into the extremities," indicating that the Commission's present decision was based on the claimant's medical records, including the records after the August 10, 2009, hearing date. Reading the decision in its entirety, it is plain that the Commission did not simply adopt its previous causation determination. We, therefore, reject Unique Delivery's contention that the Commission improperly applied its previous causation finding in the second arbitration hearing.

¶ 48 We further reject Unique Delivery's argument that the evidence proved that the claimant's neck injury had resolved as of June 26, 2008, based on Dr. Snyder's note and the claimant's failure to seek treatment for his cervical spine condition until July 27, 2009, when he complained to Dr. DePhillips of neck pain. The record shows that the claimant reported both neck and low back pain to Dr. DePhillips during his initial September 26, 2008 visit, although at that time, he reported that his low back pain was worse than his neck pain. Dr. DePhillips confirmed that the claimant complained of both neck and low back pain at the initial consultation and that they agreed to first treat the lumbar spine injury; he explained that that was the reason for his notes failing to document the claimant's ongoing neck pain.

¶ 49 Unique Delivery contends that the opinion of Dr. Salehi established that the claimant's current neck condition was not caused by the workplace accident. However, the Commission noted that Dr. Salehi's opinion that the claimant's neck condition resolved as of June 26, 2008, contradicted the finding of the previous arbitration ruling finding a causal connection through August 10, 2009. The gap in treatment was also explained by the claimant and Dr. DePhillips's testimony that they had agreed to first treat the claimant's lumbar spine. Further, the Commission noted that Dr. DePhillips testified that he believed the claimant's neck condition was caused by the workplace accident. While Unique Delivery contends that Dr. DePhillips admitted that he did not have Dr. Snyder's June 2008 note, he testified that the claimant had provided his medical history, including the fact that he was released to work in September 2008, suffered a relapse or exacerbation in symptoms upon returning to work, and sought emergency room treatment thereafter. It is the function of the Commission, and not this court, to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence,

such as the opposing medical opinions of Drs. Salehi and DePhillips. Here, the Commission resolved the conflict in the medical evidence by placing more weight on the opinion of Dr. DePhillips, and we will not disturb this factual finding as it is not against the manifest weight of the evidence.

¶ 50 Finally, the undisputed evidence in the record does not support Unique Delivery's argument that the claimant was not entitled to TTD benefits because he made no credible attempt to secure employment. Massat testified that she found 12 positions in July 2010 for the claimant based on his skills and work restrictions. The claimant testified that he applied for those positions, except two positions for which he could not locate the listed employer and one position which exceeded his work restrictions. He further testified that, beginning in 2009, he applied for other jobs that he found through his own efforts working with several temporary employment agencies. He stated that he began documenting his personal efforts in January 2011 and had recorded applying to 17 positions since then. It was also undisputed that Unique Delivery did not have any light-medium demand level work available for the claimant and did not provide vocational assistance beyond that which Massat provided. Unique Delivery points out that the video surveillance refuted the claimant's testimony that he was unable to work without restrictions. However, the Commission determined that the video did not contradict the claimant's testimony regarding his physical capabilities, further noting that the video was taken shortly after he had received some pain relief following a radiofrequency ablation procedure. Again, it is within the Commission's to resolve conflicts in the evidence and, in this case, it did not find the video surveillance to be compelling evidence of the claimant's ability to work without restrictions, especially given the claimant had never been released to work without

restrictions by a physician or through an FCE. Thus, based on the facts of this case, we cannot say the Commission's finding that the claimant made a credible attempt to secure employment is against the manifest weight of the evidence.

¶ 51 In his cross-appeal, the claimant argues that the Commission erred in its refusal to award him penalties under sections 19(l) and 19(k) of the Act and attorney fees under section 16 of the Act. He contends that, from August 10, 2009 through January 13, 2011, Unique Delivery's failure to pay him TTD benefits and his medical bills was so unreasonable and egregious that penalties and attorney fees were warranted. The arbitrator denied penalties and attorney fees without comment, and the Commission, also without comment, affirmed and adopted the arbitrator's decision on this issue.

¶ 52 Section 19(l) of the Act provides:

"In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of \$30 per day for each day that the benefits \*\*\* have been so withheld or refused, not to exceed \$10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(l) (West 2012).

¶ 53 Penalties under section 19(l) are in the nature of a late fee. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC (2011), ¶ 20, 959 N.E.2d 772. The assessment of a penalty under section 19(l) is mandatory if the payment is late, and the employer or its insurer cannot show an adequate justification for the delay. *Id.* 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.* The question of 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.*

¶ 54 In this case, the claimant has submitted no evidence of an unreasonable delay or bad faith on the part of Unique Delivery, which was withholding payment while it was contesting causation and reasonableness of medical expenses in light of the opinions given by its independent medical examiners. See *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003) ("Generally, an employer's reasonable and good-faith challenge to liability does not warrant the imposition of penalties," including "when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions"). Thus, under the facts of this case, we cannot find the Commission's decision to not impose section 19(l) penalties is against the manifest weight of the evidence.

¶ 55 Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. 820 ILCS 305/16 (West 2012). Section 19(k) of the Act provides:

"In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation \*\*\* then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2012).

¶ 56 The standard for awarding penalties under section 19(k) and section 16 is higher than the standard for awarding penalties under section 19(l) because they require more than an "unreasonable delay" in payment of an award. *Jacobo v. Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 24. Rather, section 19(k) penalties and section 16 fees are intended to address situations where the delay is deliberate or the result of bad faith or improper purpose. *Id.* Additionally, while section 19(l) penalties are mandatory, the imposition of penalties under section 19(k) and fees under section 16 is discretionary. *Id.*

¶ 57 Our review of the Commission's denial of penalties and fees under sections 19(k) and 16 of the Act involves a two-part analysis. *Id.*, ¶ 25. First, we determine whether the Commission's findings that the facts do not justify section 19(k) penalties and section 16 fees are contrary to the manifest weight of the evidence. *Id.* Second, we determine whether it would be an abuse of discretion to refuse to award such penalties and fees under the facts presented. *Id.*

¶ 58 Regarding the first prong of the analysis, we already determined that the Commission's finding, that Unique Delivery's delay in paying the claimant's benefits was not unreasonable given it was contesting causation and relying upon its experts' opinions, is not contrary to the manifest weight of the evidence. In addition, there is no evidence in the record that Unique Delivery's delay was deliberate or the result of bad faith or an improper purpose. Therefore, under these facts, we do not find that the Commission abused its discretion when it determined that the facts do not justify section 19(k) penalties and section 16 fees.

¶ 59 Based upon the foregoing analyses, we affirm the circuit court judgment which confirmed the Commission's decision in its entirety.

¶ 60 Affirmed.