2014 IL App (2nd) 130150WC-U

Order filed April 4, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DUNDEE TOWNSHIP PARK DISTRICT,	)	Appeal from the Circuit Court
	)	of the Sixteenth Judicial Circuit,
	)	Kane County, Illinois
Appellant,	)	
	)	
v.	)	Appeal No. 2-13-0150WC
	)	Circuit No. 12-MR-246
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Jessica Boston-Gale,	)	Honorable
Appellee).	)	David R. Akemann,
	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
JUSTICES HOFFMAN, HUDSON, HARRIS, AND STEWART concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's decision to award penalties under sections 19(k) and 19(l) of the Workers' Compensation Act and attorney's fees under section 16 of that Act was not against the manifest weight of the evidence.

¶ 2 The claimant, Jessica Boston-Gale, filed two applications for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for back injuries which she allegedly sustained while working for Dundee Township Park District

(employer) on March 4, 2008, and May 11, 2009. After conducting a hearing, an arbitrator found that the claimant's current condition of ill-being was causally connected to her work-related accidents and awarded the claimant temporary total disability (TTD) benefits, medical expenses, and prospective medical care. The arbitrator also awarded penalties against the employer under sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2008)) and attorney's fees under section 16 of the Act. 820 ILCS 305/16 (West 2008)).

¶ 3 Both parties appealed aspects of the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously affirmed and adopted the arbitrator's decision.

¶ 4 The employer then sought judicial review of the Commission's decision in the circuit court of Kane County, which confirmed the Commission's ruling in all respects. This appeal followed.

¶ 5 **FACTS**

¶ 6 The claimant worked for the employer as a horticulturist. On March 4, 2008, she felt pain in her back while attempting to move a log. She was unable to work from March 8 through March 16, 2008, and she received medical attention for her back at Sherman Health Services in March 2008. She returned to work in April 2008 and continued working until she reinjured her back while doing landscaping work for the employer on May 11, 2009. Thereafter, she returned to Sherman Health Services for further treatment and returned to work with restrictions.

¶ 7 On July 13, 2009, the claimant came under the care of Dr. David Levin. She told Dr. Levin that, although she had had gradual improvement of her back pain with conservative treatment after her initial work accident, she continued to have low back pain with prolonged

standing and sitting and had recurrent flare ups. After examining the claimant and reviewing her x-rays, Dr. Levin diagnosed the claimant as having "low back pain secondary to isthmic spondylolistheses"[1] of L5-S1, and recommended that she undergo a surgical fusion at L5-S1. Dr. Levin released the claimant to continue to work full duty "as she tolerates" and recommended that the claimant undergo further diagnostic testing should she decide to proceed with surgery, including a CAT scan of her pars region and an MRI "to better evaluate the neighboring discs."[2]

¶ 8 On July 30, 2009, the claimant was evaluated by Dr. Martin Lanoff, the employer's section 12 medical examiner. After examining the claimant and reviewing her medical records, Dr. Lanoff agreed with Dr. Levin's diagnosis of preexisting spondylolisthesis made symptomatic by the claimant's work accidents in 2008 and 2009. Dr. Lanoff also concurred with Dr. Levin that back surgery might be necessary and, if so, that a CT scan and an MRI would be indicated. He noted that "Dr. Levin's assessment is right on target with just about everything that he said," and that "I cannot blame him for recommending surgical intervention at this point because [the claimant] failed physical therapy twice." However, Dr. Lanoff recommended that the claimant complete an additional round of physical therapy before considering surgery. He believed that the claimant could return to work full time without restrictions. Dr. Lanoff's report was provided to Dr. Levin**.** However, the claimant testified that she was not given a copy of Dr.

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[1] An "isthmic spondylolisthesis" is the forward displacement, or slippage, of a vertebra from its normal position due to fibrous or bony defects between the upper and lower facet joints of the vertebra. This is a frequent cause of low back and leg pain.

[2] Dr. Levin also opined that the claimant's back pain was caused by her work injury and that she had been asymptomatic before her work injuries.

Lanoff's report. She also testified that neither the employer nor the employer's insurance adjuster informed her that Dr. Lanoff had concluded that her back injury was work-related and had recommended fusion surgery.

¶ 9 The claimant returned to Dr. Levin on August 10, 2009. Dr. Levin's medical record of that visit indicates that the claimant "remain[ed] in mild-to-moderate pain-related distress." Dr. Levin agreed with Dr. Lanoff that the claimant should undergo a repeat trial of physical therapy. However, given the duration and severity of the claimant's pain, Dr. Levin noted that, if the claimant did not substantially improve over the ensuing four weeks, he would recommend proceeding with a surgical fusion at L5-S1 with preoperative CT and MRI scans. He noted that the claimant would "continue to work as tolerated."

¶ 10 After completing the recommended course of physical therapy, the claimant returned to Dr. Levin on September 14, 2009. Dr. Levin's records reflect that the claimant continued to have persistent low back pain with no improvement in her pain after the physical therapy. The claimant expressed a desire to pursue "definitive surgical treatment." Dr. Levin ordered an MRI and a CT scan, which were performed on September 18, 2009, and September 24, 2009, respectively. He noted that the claimant could "continue to work as tolerated without restrictions." When the claimant returned to Dr. Levin on October 5, 2009, the doctor reviewed the results of the CT and MRI scans and recommended a discogram to better evaluate whether the L4-5 disc level was also symptomatic. Pending the outcome of the discogram, Dr. Levin planned to recommend either an isolated L5-S1 fusion or a two-level fusion including the L4-L5 level as well.

¶ 11 The employer sent the claimant back to Dr. Lanoff for a follow-up examination on November 3, 2009. After reviewing Dr. Levin's additional records, the claimant's physical therapy records, and the recent MRI and CT scans, Dr. Lanoff agreed with Dr. Levin that the

claimant had not improved and that her condition warranted fusion surgery. However, Dr. Lanoff opined that the claimant's condition warranted only a one-level fusion at the L5-S1 level. He did not believe that the claimant should undergo surgery at the L4-L5 level as well, and he did not believe that a discogram was indicated. Dr. Lanoff opined that the claimant was able to work full duty without restrictions.

¶ 12 On November 23, 2009, the employer terminated the claimant for violating the employer's sick pay policy.[3] When asked during her testimony whether she had been working full duty at the time of her termination, the claimant responded "not really." She explained that she had difficulty lifting shrubs and bags of fertilizer, digging holes, bending, and weeding for periods of time. Accordingly, her crew did that type of work for her. The claimant stated that, when she attempted to do this type of work herself, she would "pay for it with pain." The claimant testified that she would take longer breaks and that her boss "didn't make [her] do as much because he knew that [she] couldn't."

¶ 13 The employer's medical management nurse arranged for another section 12 examination by another physician, Dr. Kern Singh. The claimant was evaluated by Dr. Singh on November 30, 2009. Dr. Singh's records indicate that he saw the claimant for a "workers' compensation second opinion." After noting the claimant's accident history and reviewing the radiographic studies, Dr. Singh diagnosed degenerative disc disease at L4-L5 and spondylolisthesis at L5-S1. He recommended a minimally invasive lumbar fusion surgery at L5-S1 only and opined that there was no indication for discography. Dr. Singh took the claimant off

[3] The claimant testified that she attended a Cubs game and "put it in as a mental health day." When the employer saw photos of the claimant at the Cubs game which the claimant had posted to her Facebook page, the employer terminated her.

work. Dr. Singh's records indicate his report was sent to the employer's claim adjuster and to the employer's nurse case manager. However, the claimant testified that she was not provided with a copy of Dr. Singh's report or advised of his surgical recommendations at that time.

¶ 14 On December 31, 2009, the claimant filed applications for adjustment of claim relating to her work-related accidents of March 4, 2008, and May 11, 2009. On January 15, 2010, the claimant filed a petition seeking penalties under sections 19(k), and 19(l) of the Act and attorney's fees under section 16 of the Act based upon the employer's alleged failure to pay her TTD benefits. On January 27, 2010, the claimant's attorney wrote a letter to the employer's attorney noting that he had received Dr. Lanoff's records (which had not been provided to the claimant as required by section 12 of the Act) and demanding that the employer pay the claimant TTD benefits from the date of her termination. The following day, claimant's counsel sent another letter demanding that the employer authorize treatment by Dr. Singh so that the claimant could schedule a follow up appointment with Dr. Singh.

¶ 15 On February 3, 2010, the employer paid the claimant an advance against permanency in the amount of 2% person as a whole. On February 19, 2010, the employer agreed to pay Dr. Singh's surgical costs.

¶ 16 On March 5, 2010, Dr. Singh performed L5-S1 spinal fusion surgery on the claimant. That same day, the employer began paying the claimant TTD benefits. The claimant returned to Dr. Singh for a postoperative visit on March 31, 2010, at which time the doctor released the claimant to return to work with restrictions[4] and prescribed physical therapy. The employer did not offer the claimant light duty work while she was under restrictions imposed by Dr. Singh.

[4] Dr. Singh restricted the claimant from lifting, pushing or pulling more than 10 pounds and from bending, kneeling, stooping, squatting, or twisting.

¶ 17 On April 2, 2010, Ann Traczek, the claims consultant for the employer's insurance adjuster, wrote a letter to the claimant's attorney informing him that, because Dr. Singh had returned the claimant to work, the employer would be terminating the claimant's TTD benefits. Traczek's letter stated that "[a]s [the claimant] was working full duty, with no restrictions at the time of her termination, we feel she is not entitled to TTD benefits as she has been returned to work." Traczek also stated that the claimant had been collecting unemployment compensation from the time of her termination until the day before her surgery, and noted that "we will notify the unemployment compensation vendor that [the claimant's] benefits should not be challenged after March 31, 2010." Further, Traczek stated that the employer would continue to pay all medical bills related to the claimant's injury until the claimant reached maximum medical improvement (MMI).

¶ 18 The claimant began a course of physical therapy on April 6, 2010. However, because the therapy was exacerbating the claimant's back pain, Dr. Singh took the claimant off work completely on April 27, 2010. The employer resumed paying TTD benefits at that time.

¶ 19 On June 9, 2010, the claimant told Dr. Singh that she noticed an increase in back pain after sitting on an airplane for three hours. X-rays taken at that time showed early bone consolidation in the L5-S1 space. However, when the claimant returned to Dr. Singh on July 14, 2010, she reported a further increase in her low back pain. Dr. Singh ordered a CT scan for further evaluation of the spinal fusion. The scan was performed on July 21, 2010. Although Dr. Singh initially reported that the CT scan showed evidence of a solid fusion, his medical record of September 15, 2010, indicates that the CT scan revealed only mild evidence of bone consolidation, which was suggestive of pseudoarthritis or nonunion at the L5-S1 level. The doctor therefore recommended another fusion surgery. He opined that this procedure was appropriate and reasonable given that the claimant had persistent pain and documented evidence

of a nonunion (which he testified was a natural risk of the first fusion surgery he had performed on the claimant).

¶ 20 On August 16, 2010, the claimant underwent a functional capacity evaluation (FCE) upon Dr. Singh's recommendation. Dr. Singh testified that the FCE report indicated that the claimant had given a full physical effort during her testing and that she was performing at the medium demand level. The FCE report also indicated that the claimant's documented physical abilities did not match the demands of her full-time, pre-injury job as a horticulturist for the employer. This was primarily due to her decreased tolerance for stooping and crouching, her inability to lift more than 25 pounds on an occasional basis, carry more than 40 pounds on an occasional basis, push more than 35 pounds on an occasional basis, and pull more than 50 pounds on an occasional basis.

¶ 21 The claimant then began a course of work hardening at Athletico. The Athletico records reflect that, on September 2, 2010, the claimant was able to perform floor-to-waist lifting, waist-to-shoulder lifting and carrying exercises of increasing weights without a significant increase in her lower back symptoms. However, the claimant continued to report underlying pain through the work conditioning sessions. The claimant testified that she took Oxycontin and Darvocet during her FCE and work conditioning sessions. The sessions consisted of squats, lunges, hip flexion and extension, swizzle ball crunches, resistive rotation and rowing, and lateral walks with a band on her ankles. Some of the claimant's therapy sessions were more than 90 minutes long.

¶ 22 On September 1 and 2, 2010, the employer conducted surveillance of the claimant and videotaped her lifting her niece from a sport utility vehicle (SUV) and doing yard work at her

parents' home.[5] The claimant testified that her niece weighed 29 pounds. She also stated that the yard work she had performed at her parents' house was as demanding as the exercises she had been performing during her work hardening sessions. She testified that, although she had taken her pain medication before she began working in the yard, she was in a lot of pain both during and after the yard work.

¶ 23 The employer arranged for the claimant to be evaluated by Dr. Jerome Kolavo, another section 12 examiner, on October 26, 2010. After examining the claimant and reviewing the radiographic findings and the surveillance video, Dr. Kolavo opined that the claimant "was not a candidate for any further surgical intervention" and that she could "return to work full duty without restrictions." Although Dr. Kolavo acknowledged that the claimant "may be symptomatic from the L4-L5 level [*sic*]," he concluded that the claimant's "clinical presentation today in the office *** is in dramatic contradiction to her levels of physical activity" depicted on the surveillance video. Specifically, Dr. Kolavo noted that, in the surveillance video, the claimant was shown "doing landscaping, gardening, weeding, etc.[,] easily flexing 90 degrees at the waist, repetitively bending, stooping, lifting and working hours at a time[,] *** bend[ing] easily in and out of a car *** to pick up a child[,] and get[ting] in and out of a relatively small vehicle without any obvious disability." The employer stopped paying the claimant TTD benefits as of November 23, 2010.

¶ 24 During his subsequent evidence deposition, Dr. Kolavo reiterated his opinions that the claimant was not in need of further surgery and could return to work in a full capacity. He interpreted the claimant's most recent CT scan as showing a maturing interbody fusion at L5/S1

[5] The videotape, which was introduced into evidence, was recorded over a two-day period. It was 42 minutes long.

with pedicle screws intact. He did not think the claimant had a pseudoarthrosis. He opined that the claimant's fusion was healed or healing and there was no need for a revision fusion. He thought that the claimant's pain could be from her degenerating L4/5 disc or "just normal left-over surgical pain."

¶ 25 Dr. Kolavo also testified that the surveillance video showed the claimant functioning at a much higher level than she demonstrated during Dr. Kolavo's examination. During cross-examination, Dr. Kolavo stated that it appeared to him that the claimant was exerting a lot of pound force as she was gardening in the yard. However, he admitted that he was not aware of the soil conditions or how much force the claimant had to exert to pull the weeds. He also admitted that he did not know how long the surveillance video showed the claimant working. He acknowledged that several of the claimant's physical therapy sessions were more than 90 minutes long.

¶ 26 Further, Dr. Kolavo admitted that he knew nothing about Dr. Lanoff's evaluations of the claimant or his treatment recommendations. When asked if he had reviewed Dr. Levin's records, he answered "it's not ringing any bells." Dr. Kolavo conceded that, if the claimant has a pseudoarthrosis and was in a lot of pain, she would probably be a candidate for a fusion.

¶ 27 Dr. Singh also viewed the surveillance video. During his evidence deposition, Dr. Singh testified that the video did not change his opinion about the claimant's need for additional back surgery. He explained that the activities that the claimant performed on the video were consistent with her FCE constraints and her work conditioning status. The FCE and work conditioning sessions indicated that the claimant was capable of lifting 40 to 45 pounds with repetitive bending and stooping, and the activities depicted on the video were not inconsistent with those findings. Moreover, Dr. Singh noted that, at no time did either he, Dr. Levin, or the

claimant's FCE or work conditioning therapists ever find that the claimant had magnified or exaggerated her symptoms or given submaximal effort.

¶ 28 Dr. Singh testified that the claimant's most recent CT scan showed a lack of bone formation at the L5/S1 interspace which would confirm the existence of a nonunion, and the claimant's presentation of increasing pain over a three to four month period was also consistent with a nonunion. He opined that the initial surgery and subsequent treatment were a direct result of the claimant's work-related injury in 2008, and the need for the second surgical intervention was a direct result of the nonunion after the first procedure. On cross-examination, Dr. Singh agreed that the claimant was getting better before she flew to Arizona before her June 9, 2010, examination. However, although he conceded that sitting on an airplane for several hours and other activities might increase the claimant's pain symptoms, Dr. Singh opined that those activities did not cause or hasten the claimant's pseudoarthrosis or prevent the fusion of her spine. Dr. Singh opined that a solid fusion is essential in isthmic spondylolisthesis. He did not believe that the claimant's fusion could complete itself without a second surgery because, once a nonunion develops, bone will not consolidate across the resulting fibrous tissue and ingrowth.

¶ 29 Dr. Singh disagreed with Dr. Kolavo's opinion that the claimant was able to return to her normal job without restrictions. He recommended that the claimant be allowed to return to work according to the permanent restrictions identified at the conclusion of her valid FCE and her final work conditioning session. Dr. Singh did not believe that the claimant was capable of returning to work full duty because her job requirements were at a heavy demand level.

¶ 30 The claimant testified that her lower back pain has increased and she is not getting relief. Moving and sitting without adjusting for long periods aggravate her pain, and she has trouble sleeping more than four or five hours.

¶ 31 The claimant testified that, after her second work-related accident, she was returned to work full duty "as tolerated" without any specific bending, lifting, or sitting restrictions. She continued to work until she was terminated on Nov. 23, 2009. Thereafter, she applied for unemployment benefits. In so doing, she had to indicate she was ready, willing and able to work. The claimant testified that the employer paid her TTD benefits from the date of surgery until the end of March 2010 when Dr. Singh released her to light duty work. When Dr. Singh took her off work again, the employer resumed paying TTD benefits until November 23, 2010.

¶ 32 The claimant testified that she saw the surveillance video. According to the claimant, the video showed her working in her parents' yard, preparing it for her sister's upcoming wedding. The claimant stated that she had performed the activities depicted on the video voluntarily, including bending, squatting, pulling weeds, using both hands, using a rake, carrying landscape debris, and picking up a child from a car. The claimant testified that, at the time, she understood that the FCE showed she could work at the medium physical demand level, and she thought her work in the yard was at the same level as her physical therapy activities.

¶ 33 The arbitrator found that the claimant's current back condition was causally connected to her undisputed work accident of March 4, 2008, which she re-aggravated during her second work accident on May 11, 2009. The arbitrator further found that the claimant was temporarily totally disabled from March 8, 2008, through March 16, 2008, and again from November 30, 2009 (when Dr. Singh took her off work), through March 10, 2011, for a total TTD period of 67-6/7 weeks. The arbitrator noted that, at the time the claimant was terminated on November 23, 2009, she was working under Dr. Levin's release to full work "as tolerated." The arbitrator found that "this is not a full release, but there is no way to know [the claimant's] precise restrictions." Regardless, the arbitrator noted that Dr. Singh took the claimant off work from November 30, 2009, through March 31, 2010. Although the claimant was released with a 10-

pound restriction thereafter, the arbitrator stressed that "she was not at MMI and remained entitled to TTD." The arbitrator noted that the claimant was again taken off work entirely on April 28, 2010, and remained off work awaiting a second surgery at the time of the arbitration hearing. Accordingly, the arbitrator found that the claimant was entitled to TTD benefits throughout each of these periods.[6]

¶ 34 Moreover, the arbitrator found that the claimant was entitled to undergo the anterior fusion prescribed by Dr. Singh. The arbitrator based this finding on "the opinion of treating [doctor] Singh who viewed the video and opined claimant's activities were within her capabilities as documented in [physical therapy]" and "based his surgical recommendation on a CT scan he thought showed nonunion and [on the claimant's] physical exams, which for over a year and through different doctors had shown no sign of malingering or symptom magnification." Although the arbitrator acknowledged that Dr. Kolavo read the claimant's CT scan differently, she relied on Dr. Singh's interpretation as the treating doctor and "as one [the employer] initially thought suitable for a referral." With respect to the surveillance video, the arbitrator found that "Dr. Singh's opinion that [the claimant's] activities were consistent with her tested capabilities is more credible that [of] Dr. Kolavo, who did not know the length of time she was in the garden on Sept. 1, 2010 compared to the length of her [physical therapy] sessions, or the amount of force she was exerting and how it compared to her capabilities in [physical therapy]." The arbitrator also noted that Dr. Kolavo "was not familiar with the records or opinions of Dr. Levin or Dr. Lanoff."

[6] The arbitrator also found that the claimant was entitled to medical expenses of $1,773.74.

¶ 35 The arbitrator found that the claimant was entitled to $10,000.00 in penalties under section 19(l) of the Act "because [the employer's] failure to pay TTD for the period Nov. 30, 2009 through March 5, 2010 was unreasonable." Further, the arbitrator found that the claimant was also entitled to penalties under section 19(k) of the Act and to attorney's fees under section 16 of the Act because the employer's failure to pay TTD and medical bills was "unreasonable and vexatious." The arbitrator noted that the claimant "was taken off work by Dr. Singh, a doctor recommended by [the employer], on Nov. 30, 2009," and that "Dr. Singh, like the two doctors before him, recommended fusion surgery." Nevertheless, the employer "delay[ed] authorizing that surgery until after [the claimant] employed an attorney and incurred litigation costs *** [and] withheld Dr. Lanoff's reports in disregard of sec. 12 of the Act." The arbitrator found that the employer "had no reasonable basis for withholding TTD for this period." Accordingly, the arbitrator awarded the claimant half of the total unpaid TTD benefits and medical bills as a penalty under section 19(k). She also awarded attorney's fees under section 16 of the Act.

¶ 36 The employer appealed the arbitrator's decision to the Commission, which affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision in the circuit court of Kane County, which confirmed the Commission's ruling. This appeal followed.

¶ 37 **ANALYSIS**

¶ 38 The employer argues that the arbitrator's decision to award penalties under sections 19(l) of the Act (820 ILCS 305/19(l) (West 2008)) was against the manifest weight of the evidence and that the amount of penalties awarded under that section was contrary to law. It also argues that the arbitrator's award of penalties under section 19(k) of the Act (820 ILCS 305/19(k) (West 2008)) and attorney's fees under section 16 of the Act (820 ILCS 305/16 (West

2008)) were against the manifest weight of the evidence and an abuse of discretion. We address these issues in turn.

¶ 39 1. Penalties Under Section 19(l)

¶ 40 Section 19(l) provides, in pertinent part, that if an employer or its insurance carrier "fail, neglect, refuse, or unreasonably delay" the payment of benefits under Section 8(a) or Section 8(b) "without good and just cause," the arbitrator or the Commission shall allow the employee additional compensation in the sum of $30 per day "for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000." 820 ILCS 305/19(l) (West 2008)). "A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." *Id.* 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, ¶ 20; *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). Thus, "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay," the assessment of a penalty under section 19(l) is mandatory. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998); *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20.

¶ 41 The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20. 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.*; see also *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9–10 (1982). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the

manifest weight of the evidence. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20; *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121 (1991).

¶ 42 In this case, the Commission awarded penalties under section 19(l) because it found that the employer's failure to pay TTD benefits for the period of November 30, 2009 through March 5, 2010, was unreasonable. The employer challenges this finding, arguing it was reasonable for the employer to conclude that no TTD benefits were due and owing during that period because Drs. Levin and Lanoff had released the claimant to work full duty without restrictions up to the time she was terminated on November 23, 2009. The employer contends "it was objectively reasonable for the [employer] to rely on both the opinions of Dr. Levin and Dr. Lanoff that the claimant was able to work full duty."

¶ 43 We disagree. Dr. Singh, the employer's own section 12 medical examiner, took the claimant off work completely as of November 30, 2009. Dr. Levin's and Dr. Lanoff's work releases were rendered prior to that date. No doctor opined that the claimant could work between November 30, 2009, and March 5, 2010, with or without restrictions. Thus, Dr. Singh's opinion that the claimant could not work from November 30, 2009, through March 5, 2010 was unrebutted. For that reason alone, the employer's failure to pay TTD benefits for that period was unreasonable, and the Commission's decision to award penalties under section 19(l) is not against the manifest weight of the evidence.

¶ 44 In any event, contrary to the employer's argument, the work releases provided by Drs. Levin and Lanoff do not establish that the claimant could work full duty up to the time she was terminated on November 23, 2009. At that time, Dr. Levin had released the claimant to work full duty "as tolerated." As the Commission correctly noted, this is not a "full release." Moreover, although the claimant was under no specific medical restrictions at the time of her termination, she testified that she was "not really" working full duty at that time. She explained

that: (1) she could not perform many of her usual work duties without pain; (2) that her boss "didn't make [her] do as much because he knew that [she] couldn't"; (3) her crew performed some of the more physically demanding duties of her job for her; and (4) she took longer breaks. The employer did not rebut this testimony.

¶ 45 The employer also argues that it reasonably relied upon a dispute between Dr. Levin and Drs. Lanoff and Singh regarding the surgery to be performed on the claimant.[7] However, while this dispute might be relevant to the employer's delay in authorizing a discogram or a particular surgical procedure, it has nothing to do with the claimant's entitlement to TTD benefits, which was triggered when Dr. Singh took her off work completely on November 30, 2009. Thus, the dispute among the claimant's doctors regarding surgical treatment cannot justify the employer's failure to pay TTD benefits from November 30, 2009, through March 5, 2010.

¶ 46 The employer argues in the alternative that, even if the Commission properly decided to award penalties under section 19(l), the amount of the award was not properly calculated and is therefore contrary to law. Section 19(l) of the Act allows a late fee of $30 per day up to a maximum of $10,000. The Commission awarded the statutory maximum penalty of $10,000. However, the employer notes that the period of November 30, 2009, through March 5, 2010, represents 96 days, and "[n]inety-six days times $30.00 per day equals a monetary penalty of

[7] As noted above, by November 30, 2009, all three doctors agreed that the claimant was a candidate for lumbar fusion surgery at L5-S1. However Dr. Levin wanted to perform a discogram to determine whether to perform a two-level fusion including the L4-L5 level as well. Drs. Lanoff and Singh each concluded that the claimant's condition warranted only a one-level fusion at the L5-S1 level and did not believe that a discogram was indicated.

$2880.00." Thus, the employer argues that the Commission's award of $10,000 "on its face is contrary to law."

¶ 47 We disagree. By its plain terms, section 19(l) allows a penalty of $30 per day "*for each day that the benefits under Section 8(a) or Section 8(b) have been* [unreasonably] *withheld or refused*." (Emphasis added.) 820 ILCS 305/19(l) (West 2008). Although the benefit period at issue spanned only 96 days, the employer unreasonably withheld the TTD benefits that were owed during that period for much longer than 96 days. In fact, the employer still had not paid these benefits at the time of the arbitration hearing in March 2011. Approximately 467 days passed between the date Dr. Singh took the claimant off work and the arbitration hearing. Thirty dollars per day times 467 days equals more than $14,000. Thus, the Commission's award of $10,000 in penalties under section 19(l) is neither contrary to law nor against the manifest weight of the evidence.[8]

¶ 48 2. Penalties Under Section 19(k) and Attorney's Fees Under Section 16

¶ 49 The standard for awarding penalties under section 19(k) is higher than the standard under 19(l). *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 21. Section 19(k) of the Act provides, in pertinent part, that "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." (Emphasis added). 820 ILCS 305/19(k) (West 2006). Section 16 of the

[8] The employer's argument that the calculation of the penalty amount under section 19(l) is limited to the period of time during which unreasonably withheld benefits *were accruing* has no support in the statutory language. The employer has cited no cases that support its novel interpretation of section 19(l). Nor have we found any.

Act provides for an award of attorney's fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2006). " 'The amount of [attorney's] fees to be assessed is a matter committed to the discretion of the Commission.' " *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 22 (quoting *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516 (2003)). An award of penalties and attorney's fees pursuant to sections 19(k) and 16 is "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *Id.* ¶ 23.

¶ 50 The standard for awarding penalties and attorney's fees under sections 19(k) and 16 of the Act is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan*, 183 Ill. 2d 499 at 514–15; *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 24. It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan*, 183 Ill. 2d at 515. Instead, the claimant must show that the employer's delay or refusal to pay is "deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515.

¶ 51 Moreover, while section 19(l) penalties are mandatory, the imposition of penalties and attorney's fees under sections 19(k) and section 16 fees is discretionary. *Id.* Accordingly, our review of the Commission's decision to award penalties and attorney's fees pursuant to sections 19(k) and 16 involves a two-part analysis. First, we must determine whether the Commission's finding that the facts justified section 19(k) penalties and section 16 attorney's fees is contrary to the manifest weight of the evidence. *Id.* at 516. Second, we must determine whether it was an abuse of discretion to award such penalties and fees. *Id.*

In this case, the Commission awarded penalties under section 19(k) and attorney's fees under section 16 because it found that "[the employer's] failure to pay TTD and medical bills was unreasonable and vexatious." That finding was not against the manifest weight of the evidence. As noted above, the employer refused to pay TTD benefits from November 30, 2009, through March 5, 2010, even though its own section 12 examiner (Dr. Singh) took the claimant completely off work during that time, and even though Dr. Singh's opinion that the claimant could not work after November 30, 2009, was not rebutted by any other doctor. The Commission could have reasonably found that the employer's refusal to pay TTD benefits during this period was unreasonable, vexatious, and undertaken deliberately or in bad faith.

¶ 52 Moreover, the Commission reasonably found that the employer's failure to pay TTD benefits during two subsequent periods was also unreasonable and vexatious. First, the employer stopped paying TTD benefits when Dr. Singh released the claimant to work with restrictions on March 31, 2010. Neither Dr. Singh nor any other doctor had found that the claimant had reached MMI at that time. Ann Traczek, the claims consultant for the employer's insurance adjuster, informed the claimant's counsel that the employer did not believe that the claimant was entitled to continuing TTD benefits because she had been "returned to work" and because she "was working full duty, with no restrictions at the time of her termination" on November 23, 2009. The employer resumed paying TTD benefits on April 27, 2010, when Dr. Singh again took the claimant off work completely. The employer argues that its decision not to pay TTD benefits from April 1, 2010, through April 27, 2010, "was not a result of bad faith or improper purpose but [was] based upon a legitimate dispute regarding the [c]laimant's ability to return to work."

¶ 53 We disagree. An employee is temporarily totally disabled, and therefore entitled to receive TTD benefits, "from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit," *i.e.*, until the

employee has reached MMI. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). The release to light duty "is but one factor to be considered in determining whether a claimant has reached [MMI]." *Beuse v. Industrial Comm'n*, 299 Ill. App. 3d 180, 183 (1998). "Equally important is the medical testimony concerning the claimant's injury, the extent thereof, the prognosis, and, *most importantly, whether the injury has stabilized*." (Emphasis added.) *Id.* See also *Mechanical Devices*, 344 Ill. App. 3d at 759 ("[t]he dispositive test is whether the claimant's condition has stabilized"). Here, at the time the employer stopped paying TTD benefits on April 1, 2010, no doctor had found that the claimant had reached MMI or that her condition had stabilized. The claimant was still under Dr. Singh's care at that time and was undergoing physical therapy, which further suggested that her condition had not yet stabilized. The fluidity of her condition became even more obvious when Dr. Singh took her off work completely only a few weeks later because her therapy was exacerbating her back pain. In short, the employer had no basis whatsoever for assuming that the claimant had reached MMI on April 1, 2010.

¶ 54 Moreover, the employer's reliance on the claimant's ability to work prior to her termination is unreasonable. The fact that the claimant was able to work before she was terminated in November 2009 says nothing about her ability to work or the stability of her condition after undergoing back surgery in March 2010. Accordingly, the Commission's finding that the employer's refusal to pay TTD benefits from April 1, 2010, through April 27, 2010, was unreasonable and vexatious was not against the manifest weight of the evidence.[9]

[9] The fact that the claimant was terminated in November 2009 does not affect her entitlement to receive TTD benefits for her work-related injury until she reached MMI. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010).

¶ 55 Although the employer reinstated the claimant's TTD benefits on April 27, 2010, it again stopped paying such benefits on November 23, 2010. It did so in reliance upon Dr. Kolavo's opinion that the claimant was able to return to her job full duty without restrictions and that further medical treatment was not warranted. The employer argues that its reliance on Dr. Kolavo's opinion was reasonable, and contends that the Commission's decision to penalize the employer for withholding TTD benefits in reliance on Dr. Kolavo's opinion was against the manifest weight of the evidence.

¶ 56 We disagree. It is true that section 19(k) penalties will not be imposed "where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the withheld compensation." *Board of Education*, 93 Ill. 2d at 9. Thus, as the employer correctly notes, our supreme court has ruled that "[w]hen the employer acts in reliance upon responsible medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed." *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 302 (1980). However, our supreme court has made clear that "the test is not whether there is some conflict in medical opinion." *Continental Distributing Co. v. Industrial Comm'n*, 98 Ill. 2d 407, 415 (1983). Rather, the dispositive question is "whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented." *Id.* at 416; see also *Miller v. Industrial Comm'n*, 255 Ill. App. 3d 974, 979-80 (1994). This is a factual question for the Commission, and the Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. *Board of Education*, 93 Ill. 2d at 25. The burden of proof is on the employer. *Id.*

¶ 57 Considering all of the evidence presented, we cannot say that the employer's refusal to pay TTD benefits after November 23, 2010, in reliance upon Dr. Kolavo's opinion was reasonable. Dr. Kolavo based his opinion that the claimant could return to work without

restrictions almost exclusively on his review of the surveillance video. However, he admitted that he was not aware of how much force the claimant had to exert to perform the tasks depicted on the video. He also admitted that he did not know how long the video showed the claimant working, and he acknowledged that several of the claimant's physical therapy sessions were more than 90 minutes long (more than twice as long as the video). Further, Dr. Kolavo could not recall reviewing Dr. Levin's medical records, and he admitted that he knew nothing about Dr. Lanoff's evaluations of the claimant or his treatment recommendations. Dr. Singh, who was one of the employer's own independent medical examiners and the claimant's surgeon and treating physician, testified that the activities the claimant performed on the video were consistent with her FCE constraints and her work conditioning status. Dr. Singh's opinion that the claimant was unable to return to work without restrictions was consistent with the FCE report and the work conditioning therapy reports. Dr. Kolavo's opinion, by contrast, contradicted those reports. Accordingly, the Commission's finding that the employer's reliance on Dr. Kolavo's opinion was unreasonable was not against the manifest weight of the evidence.

¶ 58 The employer argues that, even if the facts supported and justified an award of penalties under section 19(k) and fees under section 16, the Commission abused its discretion in awarding such penalties and fees because the Commission's decision was based on two errors of law. The employer asserts that the Commission based its award of penalties and fees, in part, on the employer's alleged violation of section 12 of the Act, which requires the employer's section 12 examining physician to send a copy of his report to the claimant or her representative no later than 48 hours before the arbitration hearing. The employer argues that it did not improperly withhold Dr. Lanoff's or Dr. Singh's reports in violation of section 12, and, even assuming *arguendo* that it did violate section 12, such a violation would not "form the basis for an award of [s]ection 19 penalties or [s]ection 16 fees." Second, the employer maintains that the

Commission based its award of section 19(k) penalties, in part, on the employer's alleged delay in authorizing the fusion surgery recommended by Drs. Singh and Lanoff and notes that a majority of this court has held that section 19(k) penalties may not be based on an employer's unreasonable delay in authorizing medical treatment. See *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC.

¶ 59 These arguments are unavailing. First, contrary to the claimant's assertion, the Commission did not award section 19(k) penalties and section 16 fees based upon the employer's alleged violation of section 12 or its alleged delay in authorizing surgery. Rather, the Commission awarded such penalties and fees because it found that "[the employer's] *failure to pay TTD and medical bills* was unreasonable and vexatious." (Emphasis added.) Although the Commission noted in passing that the employer also delayed authorizing the surgery recommended by its own section 12 examiner (Dr. Singh) and "withheld Dr. Lanoff's reports a in disregard of sec[tion] 12 of the Act," the Commission did not award penalties and fees on that basis. Rather, it appears to have mentioned this additional misconduct merely to provide further examples of the employer's bad faith. Immediately after mentioning this additional improper conduct, the Commission closed its discussion of penalties and fees by reiterating that the employer "had no reasonable basis for withholding TTD for this period." This further confirms that the basis for the Commission's award of section 19(k) penalties and section 16 fees was the employer's failure to pay TTD benefits.

¶ 60 **CONCLUSION**

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County, which confirmed the Commission's decision.

¶ 62 Affirmed; cause remanded.