NOTICE
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NOTICE
Decision filed 04/30/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (4th) 110454WC-U

NOS. 4-11-0454WC & 4-11-0474WC (cons.)

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RICHARD MESSERLY, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Thomas Industrial Coatings, Appellee).	) Appeal from the) Circuit Court of) Macoupin County.))) No. 09-MR-36)))) Honorable) Kenneth R. Diehl) Judge, presiding.

THOMAS INDUSTRIAL COATINGS, Appellant, v.	) Appeal from the) Circuit Court of) Macoupin County.)) No. 09-MR-36

	)	
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Richard Messerly,	)	Honorable
	)	Kenneth R. Diehl
Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice McCullough, and Justices Hoffman, Hudson, and Holdridge concurred in the judgment.

O R D E R

Held: The Commission's award of vocational rehabilitation benefits and maintenance benefits is not against the manifest weight of the evidence. The Commission's denial of an award for incurred vocational rehabilitation services is not against the manifest weight of the evidence. The Commission's denial of penalties and attorney fees is not against the manifest weight of the evidence

¶ 1 This matter is before the court on review of the Commission's decision concerning a second 19(b) petition filed in this proceeding pursuant to section 19(b) of the Workers' Compensation Act (the Act) (820 ILCS 305/19(b) (West 2008)). The claimant, Richard Messerly, was employed as an industrial painter for the employer, Thomas Industrial Coatings, when he suffered a work-related accident. Specifically, the claimant sustained heat exhaustion that lead to the claimant suffering from a physical intolerance to any activities that cause his body temperature to rise above a certain level. On the first 19(b) petition, the arbitrator found that the claimant suffered from a condition of ill-being as a result of a work-related accident and awarded the claimant vocational rehabilitation services and maintenance.

Neither party appealed this first 19(b) decision. However, after the decision, the parties disagreed with respect to which vocational rehabilitation service provider would be used, and the employer eventually discontinued maintenance benefits. The claimant filed a second 19(b) petition and a motion for penalties and attorney fees, and the Commission's decision with respect to those pleadings is the subject matter of the present appeal. Both parties appeal from the circuit court's judgment that confirmed the Commission's decision with respect to the second 19(b) petition and motion for sanctions.

¶ 2 BACKGROUND

¶ 3 The claimant was employed as a union/journeyman painter for the employer when he suffered a work-related accident on June 25, 2003, involving heat exhaustion while working at a job site in Oklahoma in temperatures in excess of 100 degrees. The claimant was later diagnosed as suffering from a physical intolerance to heat, i.e., a physical intolerance to activities that cause his body temperature to rise above a certain level. The claimant's physician imposed work restrictions concerning the temperatures at which he could safely perform work activities.

¶ 4 The claimant attempted to return to work for the employer to perform indoor work activities, but the employer told him that it did not have any positions with those work restrictions. The employer offered the claimant a job painting a bridge in an outside environment, but the work was not within his temperature restrictions.

¶ 5 Dr. David Volarich is a specialist in occupational preventive medicine. He conducted

an independent medical examination (IME) of the claimant on January 20, 2005. At the time of his examination, the claimant was complaining of ongoing difficulties with heat exposure. The claimant told Dr. Volarich that he became nauseous if he was outside in heat over 100 degrees or if he performed yard work in 85 to 90 degree temperatures. In addition to nausea, he also suffered dizziness, cramping, and shaking. At that time, the claimant reported that he had experienced at least seven heat-related episodes over the past year. He also told Dr. Volarich that he had to be careful to avoid heat when pursuing leisure activities and that if he breaks out into a sweat, he knows he is going to become ill, so he has to stop the activity. The claimant told Dr. Volarich that he had changed jobs five times because he was unable to work in hot conditions.

¶ 6 As a result of his January 2005 IME, Dr. Volarich concluded as follows: "It is my opinion the exposure to prolonged working in excessive temperatures in and around 6/25/03 is the substantial contributing factor causing the heat exhaustion with associated heat intolerance ***. It is noted that [the claimant] continues to experience symptoms of thermoregulatory dysfunction and heat intolerance." He believed that the claimant had achieved maximum medical improvement (MMI) and suffered from "continuing heat intolerance preventing him from working in hot environments." He wrote: "In order for [the claimant] to continue working, he will be restricted to working in a controlled environment with a temperature between approximately 60 and 75 degrees to prevent recurrent symptoms of heat exhaustion."

¶ 7 After the work accident, the claimant attempted to work as a painter for three entities, but he was able to work only briefly before the work activities caused his body to over-heat and he became physically ill. The claimant last worked as a painter on July 12, 2005, when he was terminated from a company called Aetna Coatings due to problems surrounding his heat intolerance. The claimant was offered a job as a project manager in Florida, but he testified that the position did not work out because the company required him to pay for building expenses out of his pocket and required him to hang dry wall in spite of his heat intolerance.

¶ 8 When the claimant was terminated from Aetna, the claimant made a demand with the employer for vocational assistance, and the employer subsequently authorized services with a vocational rehabilitation specialist, Frank Trares. The employer also agreed to pay the claimant $949.80 per week in maintenance benefits as well as pay the claimant's prior outstanding medical bills.

¶ 9 The claimant first met with Trares in August 2005. Trares helped the claimant obtain his G.E.D. and assisted the claimant in obtaining various job leads. In September 2005, the claimant had a lead for another job as a project manager in Missouri, but when the claimant requested a written description of his job duties, the employer did not make him a job offer.

¶ 10 In March 2006, the employer terminated maintenance benefits and Trares's services and wanted to switch the claimant's vocational rehabilitation services to Aegis Rehabilitation. The claimant, however, wanted to continue services with Trares.

¶ 11 The claimant then filed his first 19(b) petition, and the parties first appeared in front of the arbitrator on September 12, 2006, for the 19(b) hearing. This first petition and hearing are not the subject matter of the present appeal. On November 20, 2006, the arbitrator filed a decision finding that the claimant suffered from heat intolerance and finding that it was causally connected to his work-related accident. The arbitrator found that the claimant was motivated to find employment and awarded him maintenance and vocational rehabilitation. Neither party appealed this decision, and no record of the proceeding was prepared. Accordingly, the only record we have of this first 19(b) proceeding is the arbitrator's decision.

¶ 12 In this first decision, the arbitrator noted that the claimant had been examined by Dr. Volarich and Dr. Schuman and that they both diagnosed the claimant as having a physical intolerance to heat. The arbitrator noted that there was no dispute from the employer "as to causation regarding heat intolerance" and found that his heat intolerance continued at the time of the hearing. The arbitrator awarded the claimant temporary total disability/maintenance benefits. In addition, the arbitrator concluded that "[v]ocational services should continue to such time as [the claimant] secures suitable employment."

¶ 13 After the arbitrator's November 20, 2006, decision, the employer did not authorize additional vocational rehabilitation services by Trares. Instead, the employer referred the claimant for a section 12 exam by Dr. James Doll and referred the claimant to a new vocational rehabilitation specialist, Daniel Minnich, for a vocational assessment. The

claimant, nonetheless, continued his job searches with the assistance of Trares even though the employer would not authorize further services by Trares. The employer did resume its payment of maintenance benefits.

¶ 14 Minnich contacted the claimant's attorney to arrange a vocational assessment, but the claimant's attorney told Minnich that the claimant was not interested in his services. Minnich also contacted the claimant's attorney with a recommendation that the claimant attend a four- to six-week CDL training program that would qualify the claimant to drive commercial trucks. The claimant's attorney told Minnich that the claimant was not interested in pursuing that training. The claimant felt that he could not perform many of the outdoor tasks required of a commercial truck driver, including hooking and unhooking the trailer and roadside maintenance. In addition, the claimant's wife is disabled, and he felt that he was unable to remain away from home for extended periods.

¶ 15 The claimant finally met with Minnich on February 15, 2007, along with Trares and his attorney. The claimant described the two hour meeting as confrontational. Minnich told the claimant that he should have a job within 90 days. The claimant testified that he was so upset after the two hour meeting that he threw up in the parking lot.

¶ 16 On April 4, 2007, the claimant submitted to a medical examination by Dr. Doll. Dr. Doll noted the claimant's subjective complaints of heat and activity intolerance. Dr. Doll believed that the claimant was at MMI and did not require any further medical treatment. He felt that the claimant needed to avoid extreme heat environments, "anything above the ninety

degree mark." The work restrictions he recommended for the claimant included working within a temperature controlled environment and frequent temperature breaks with plenty of fluids to keep hydrated. He believed that these restrictions were likely to be permanent. He also believed that Dr. Volarich's limitation to a controlled environment of 60 to 75 degrees was "lower than typically necessary." He concluded that "in general I would advise [the claimant], or another patient with this condition, to stay at ninety degrees or below." He did not believe that the claimant required a more severe temperature limitation than 90 degrees.

¶ 17 The employer also hired an investigator who conducted video surveillance and recorded the claimant playing golf in hot temperatures on July 18, 2007, July 25, 2007, July 28, 2007, and July 29, 2007. On September 19, 2007, based on the surveillance videotapes and Minnich's opinion that the claimant should have a job within 90 days, the employer terminated the claimant's maintenance benefits. The claimant then filed a second 19(b) petition and a request for penalties and attorneys fees pursuant to sections 19(*l*), 19(k), and 16 of the Act for the employer's refusal to pay for the vocational services furnished by Trares and for its unilateral termination of maintenance benefits. This second 19(b) petition and motion for sanctions are the subject matter of the present appeal.

¶ 18 The parties appeared before the arbitrator on December 11, 2007, for a second 19(b) hearing. At the hearing, the claimant submitted the deposition testimony of Dr. Volarich. Dr. Volarich testified that he reevaluated the claimant on May 1, 2007, to determine if there had been any changes in the claimant's condition. At that time, the claimant reported that he

continued to have difficulties and was susceptible to heat syndrome at lower temperatures. He complained of difficulties in hammering 12 nails, moving a piece of furniture, and completing a plumbing repair at his home. The claimant complained of severe fatigue with a lessor amount of physical function. The claimant reported that he did some household chores and yard work and tried to stay busy, but he got fatigued quickly and had to sit down and rest frequently. Dr. Volarich testified that it was not unusual for some patients to become susceptible to heat exhaustion at lower temperatures. When Dr. Volarich saw the claimant on May 1, 2007, his heat intolerance diagnosis was the same as his previous diagnosis.

¶ 19 Dr. Volarich described the claimant as "firmly in the middle of the heat exhaustion syndrome." He did not believe that the claimant was physically capable of returning to his employment as a painter because he has recurrence of symptoms. Dr. Volarich was concerned with the claimant suffering from a heat stroke which could result in permanent damage to his brain, kidneys, heart, eyes, or some other permanent damage. He testified that the claimant's internal heat thermostat was not working properly to adjust his body temperature, *i.e.*, thermoregulatory dysfunction.

¶ 20 Dr. Volarich testified that when the claimant is placed in a work environment where there are temperatures above 80 degrees, there is a danger that the claimant would suffer from a recurrence of heat exhaustion symptoms that would have to be treated in an emergency room. The claimant was at a high risk of heat exhaustion or heat stroke if he is

forced to work in a very hot environment. He believed that the claimant needed to remain in an ambient temperature of 65 degrees to 75 degrees.

¶ 21 Dr. Volarich testified that he would limit the claimant's work duties to a light to medium duty as opposed to the heavy or very heavy work that was required of a painter. According to Dr. Volarich, the claimant can perform some heavy work, but his work environment is critical. He has to be in a cool temperature. The claimant's risk is a combination of physical activity and the environment that he is in. Dr. Volarich believed that the claimant might be able to drive a truck if it was fairly well climate controlled and included an automatic transmission, cruise control, and power steering. The doctor had concerns, however, if the job required the claimant to perform any strenuous physical tasks in hot temperatures.

¶ 22 At the second 19(b) hearing, the claimant testified that he was 46 years old and that nothing had changed with his condition since the last hearing in September 2006. He testified that following the September 2006, hearing, he continued searching for employment. He looked for jobs in various areas, including Chicago, Orlando, and St. Louis. He searched on the internet, in newspapers, and with Trares's help. Trares went with the claimant to job fairs and had given him job leads. He testified that he had been to over twenty job interviews in 2007, but had not received any job offers as a result of those interviews. He testified that his job search was more difficult after the employer cut off his maintenance benefits in September 2007.

¶ 23 The claimant did not believe that he could return to work as a union/journeyman painter because the job duties involved more outdoor work than indoor work, and the indoor work often involved non-air-conditioned environments. He believed that his lack of an education prevented him from obtaining employment as a construction manager, and he was interested in obtaining an Associate's degree to make himself more marketable.

¶ 24 He testified that there were times that he tried to play golf but had to quit because he became sick, that he had not been able to play as much golf since his injury, and that he would not golf on days when the temperature was above 85 degrees. He stated that he had reduced his golf to 3 to 4 times per month and that he tries to begin golfing early in the morning so he is off of the course before the heat increases mid-day. He stays cool by keeping a damp towel in his cooler and using the towel to cool down. Likewise, Dr. Volarich testified that playing a round of golf in 85-degree weather would cause the claimant significant difficulties with heat intolerance because, according to Dr. Volarich, in that kind of weather, any activity would raise the claimant's core temperature.

¶ 25 The employer admitted into evidence the surveillance videotapes of the claimant playing golf in July 2007 on four different occassions. In addition, the employer presented evidence that the temperature was as high as 96 degrees at times when the claimant was videotaped playing golf.

¶ 26 Minnich testified at the second arbitration hearing by way of an evidence deposition. Minnich testified that he worked with disabled workers in assisting them in evaluating their

transferable job skills and assisting their medical treatment and returning to gainful employment. He was asked to provide services to the claimant in January 2006 by the employer's insurance carrier. Minnich contacted the claimant's attorney to arrange for a vocational evaluation, but he was told that the claimant was already receiving services from Trares. He contacted the claimant's attorney again in May and June 2006 for possible CDL training for the claimant. Minnich testified that he was again told that the claimant was not interested in his services.

¶ 27 Minnich finally met with the claimant at his attorney's office in February 2007 for an initial vocational assessment. Minnich's impression of the claimant during the assessment was that he was "pleasant and forthcoming during the evaluation."

¶ 28 Minnich testified that he believed that there were jobs available for commercial painters where the painter could work in an environment where the temperature was under 75 degrees. He believed that the majority of jobs in the painting field involved indoor work and finishing work in climate-controlled environments. In addition, Minnich felt that the claimant had transferrable skills of project management and that jobs for journeyman painters and project mangers were expected to grow "in almost double-digit numbers."

¶ 29 Minnich believed that the claimant is employable and placeable and has sufficient skills to obtain employment without further training or education. He did not believe that it was appropriate for the claimant to seek retraining in another field because the claimant had directly transferrable skills and could start working at any time.

¶ 30 Minnich identified three potential areas: construction project manager, supervisor of construction worker, and construction superintendent. Minnich was aware that the claimant had applied for positions in these areas and had interviews but had not obtained employment. Minnich testified that the claimant had received a job offer as a construction manager in Boston during the wintertime. He testified that this job opportunity demonstrated the claimant's ability to obtain a job, interview successfully, and earn a substantial salary. Minnich believed that the claimant should have a job within 90 days.

¶ 31 Trares testified at the second 19(b) hearing that he believed that the claimant was restricted to working in a controlled environment between 60 and 75 degrees. In addition, he believed that there were no major differences from a vocational standpoint between the work restrictions imposed by Dr. Doll and Dr. Volarich.

¶ 32 He testified that he looked for a wide variety of jobs for the claimant, including project management, painting, maintenance, and sales positions. According to Trares, the claimant has not imposed any restrictions on the type of employment he would accept or his salary requirements or location. The claimant was willing to go wherever he could get employment. Trares said that, at job fairs, the claimant interacted well with employers and showed sincerity in his effort to find a job.

¶ 33 Trares disagreed with Minnich's opinion that the claimant could return to work as a union painter. Because of the claimant's restrictions, Trares opined, the claimant's chances of getting a job as a painter were limited. Trares described the meeting between the claimant

and Minnich as confrontational. He did not believe that a vocational rehabilitation specialist should have a confrontational relationship with his client because the specialist has to be able to work with the client.

¶ 34 Trares believed that the claimant was employable and had cooperated in searching for a job. He continued to help the claimant even though the employer would not authorize his services because he believed that the claimant wants to work and needs to go back to work. Trares suggested that the claimant attend Sanford Brown Business College to get into the medical field or to get a business degree.

¶ 35 The business manager for Painters' District Council Number 2, Kevin Kenny, testified on behalf of the employer. He testified that, in the last five years, 80 percent of union painting work was interior work and only 20 percent was exterior. He testified that "quite a bit" of the interior work was climate controlled. He explained that the painters usually work "on the bottom end of the job where the HVAC people are turning on the air ***." He estimated that the temperatures for interior work environments could vary between 30 degrees and 85 degrees. He testified that the job market for union painters was good and that "the hours the last five to six years have been record hours." He stated that the painters in his Locals averaged 1750 to 1800 hours which he described as "almost unheard of." He testified that with those kind of hours, if a painter was looking, he was "able to find a spot." He testified that the union did not dictate where a painter worked, and it was the employee's right to work where he wanted.

¶ 36 Kenny testified that "[t]he District Counsel #2 has one of the finest apprenticeships in the country" and has "roughly four different training centers, and they offer upgrading classes from blueprint reading to CPR, to wood graining, everything that a painter or taper would need." If a painter did not want to paint, he could take a class to hang wall paper. In describing the classes, he added: "There is a lot of options." The classes were available to union members with a $25 deposit that was refunded upon completion of the class. Kenny testified, however, that the claimant had not been a member of the union since 2005, but could easily rejoin with a letter of intent from a contractor.

¶ 37 On February 6, 2008, the arbitrator filed his decision. In his decision, the arbitrator wrote that he had previously heard the matter in 2006 on a 19(b) petition and had found that the claimant's work-related injury caused the placement of permanent job restrictions that prevented him from returning to his former job as a union painter. The arbitrator also noted that he had previously awarded the claimant maintenance benefits and had ordered that "[v]ocational services with Frank Trares were to continue until the [claimant] secured suitable employment." The arbitrator noted, however, that the employer "did not authorize vocational services as ordered in the [November 20, 2006] decision but did continue to pay maintenance benefits until cutting them off on September 19, 2007." Instead of authorizing Trares's services, the arbitrator noted, the employer sent the claimant to Dr. Doll for a section 12 examination. In addition, the employer sent the claimant to Minnich for a vocational assessment.

¶ 38 The arbitrator found that the claimant's condition had not changed since the last hearing and that he continued to have the same work restrictions. Also, the arbitrator concluded that the claimant had previously proven that he had a condition of heat intolerance that was causally connected to his work for the employer and that the employer was collaterally estopped from re-litigating that issue. The arbitrator ordered the employer to pay for the vocational rehabilitation services that Trares provided after the September 2006 hearing in the amount of $18,686.64.

¶ 39 The arbitrator also concluded that the claimant was entitled to future vocational rehabilitation services with Trares until such time as he secures suitable employment or exhausts reasonable possibilities of employment. The arbitrator directed the employer to pay for Trares' services and to pay for "retraining/schooling of [the claimant] at Sanford Brown Business College for no more than a two year business or medical assistant degree if it is still the recommendation of Trares."

¶ 40 The arbitrator concluded that the claimant was not required to continue with any vocational services with Minnich because his "combative attitude is contrary to the ultimate goal of returning [the claimant] to the work force" and because Minnich's "efforts were not in good faith and were not *bona fide*." The arbitrator stated that Minnich's "recommendation for truck driving and a CDL is not reasonable under [the claimant]'s circumstances after careful consideration of the evidence and testimony presented."

¶ 41 The arbitrator ordered the employer to pay for past due maintenance benefits and to

continue to pay such benefits until the claimant "has been suitably re-employed or exhausts reasonable possibilities for employment."

¶ 42 The arbitrator found that the employer's "failure to follow the prior order" and its termination of maintenance benefits was "unreasonable, vexatious, and not in good faith." The arbitrator awarded the claimant $4,860 in section 19(*l*) penalties, $16,804.71 for section 19(k) penalties, and $11,054.83 in attorney fees pursuant to section 16 of the Act.

¶ 43 The employer appealed the arbitrator's award to the Commission, arguing that the arbitrator erred in awarding vocational rehabilitation services, the payment of vocational rehabilitation services rendered by Trares after the September 2006 hearing, and penalties under sections 19(k) and 19(*l*) and attorney fees under section 16.

¶ 44 On July 23, 2009, the Commission entered its decision and opinion on review. The Commission noted that neither party sought review of the arbitrator's decision after the first 19(b) hearing and that there was no transcript of those proceedings included in the record. Therefore, the Commission noted, the only evidence before it with respect to the first hearing was the arbitrator's first November 20, 2006, 19(b) decision.

¶ 45 With respect to the arbitrator's second 19(b) decision, the Commission affirmed the arbitrator's finding of a causal connection between the claimant's work-related injury and his condition of ill-being, as there was no evidence in the record of any change in the claimant's physical condition. The Commission stated: "Given the fact the issue of causal connection was previously determined by the Arbitrator in the November 20, 2006, 19(b) Decision, the

[employer] is barred from raising the issue of causation again."

¶ 46 The Commission, however, concluded that other findings in the arbitrator's second 19(b) decision were unsupported. For example, the arbitrator stated in the second 19(b) decision that he had previously found that the claimant "had permanent restrictions in place that prevented him from returning to his former job as a union painter." The Commission, however, disagreed as follows: "[T]he Commission finds nothing within the November 20, 2006, 19(b) Decision which indicates [the claimant] had permanent restrictions preventing him from returning to work as a union painter. Instead the November 20, 2006, 19(b) Decision indicates [the claimant] was unable to return to work for the [employer], but not that [the claimant] was unable to return to work as a union painter."

¶ 47 With respect to the claimant's ability to return to work as a union painter, the Commission noted that Dr. Doll and Dr. Volarich agreed that the claimant is restricted to working in a controlled temperature environment, but they disagreed concerning the maximum temperature. Dr. Doll's maximum was 90 degrees, and Dr. Volarich's maximum was 75 degrees. The Commission found Dr. Volarich's opinion to be questionable "due to credibility issues surrounding [the claimant's] reporting of heat tolerance symptoms." The Commission further stated as follows:

> "In light of the surveillance videos, there is some significant indication that the temperature restrictions imposed may be exaggerated. Videotape surveillance evidence from July 18, 2007, July 25, 2007, July 28, 2007, and July 29, 2007, depicts

[the claimant] playing golf, seemingly without difficulty, in southern Illinois, during which time temperatures reached as high as 96 degrees. On May 1, 2007, [the claimant] was seen in follow up by Dr. Volarich, at which time [the claimant] reported severe fatigue after hammering 12 nails. The Commission finds [the claimant]'s reported severe fatigue after hammering 12 nails hard to reconcile with the numerous rounds of golf he was observed playing during a 12 day period in July of 2007."

¶ 48 The Commission also took issue with the arbitrator's finding in the second 19(b) decision that the employer was "previously ordered to continue to provide vocational rehabilitation through Frank Trares." Instead, the Commission found that "[a]n actual reading of the prior November 20, 2006, 19(b) Decision, indicates [the employer] was ordered to continue to provide vocational services, without mention that those efforts were necessarily to be provided through Frank Trares." The Commission affirmed the arbitrator's finding that the claimant was entitled to further vocational rehabilitation services but vacated the arbitrator's order that those services be provided by Trares. The Commission found that the claimant is "entitled to his own choice with regard to the provider of his vocational rehabilitation services" and that the claimant "has the right to continue to receive those services through Frank Trares." The Commission ordered the employer to pay for the reasonable costs of necessary vocational rehabilitation services.

¶ 49 The Commission, however, vacated the arbitrator's order that the employer pay for retraining/schooling of the claimant at Sanford Brown Business College. The Commission

found that there was no evidence that this retraining/schooling was necessary as of the date of the hearing. Instead, the Commission directed that the claimant was to "explore and pursue further possible re-employment as an indoor union painter in his future vocational efforts."

¶ 50 The Commission also modified the arbitrator's decision to reflect that the claimant was not entitled to penalties and attorney fees under sections 19(k), 19(*l*), and 16. The Commission found that the employer's reliance on Minnich's opinions and the surveillance videotapes in terminating the claimant's maintenance benefits did not rise to the level of being unreasonable, vexatious, or in bad faith.

¶ 51 Finally, the Commission vacated the arbitrator's award of $18,686.64 for vocational services rendered by Trares. The Commission found that the arbitrator improperly admitted Trares's billing statements over the employer's objection that a proper foundation had not been laid for the admission of the billing statements. The Commission noted that Trares testified that his billing statements came from a clerical department and that billing was not his department. The Commission concluded that Trares's testimony did not meet the foundational requirements for admitting the billing statements. The Commission stated: "Trares was not familiar with the providers' business practices, and was not able to testify about the reasonableness of the charges contained within the billing statement." Accordingly, the Commission vacated the arbitrator's order that the employer pay for past vocational services rendered by Trares.

¶ 52 Both parties appealed the Commission's decision to the circuit court. On May 5, 2011, the circuit court found that the Commission's decision "is not against the manifest weight of the evidence" and entered a judgment confirming the Commission's decision. Both parties timely filed separate notices of appeal from the circuit court's judgment. On this court's own motion, we consolidated the appeals.

¶ 53 ANALYSIS

¶ 54 Before proceeding to the merits of the appeal, we note that the employer filed a motion to strike the claimant's brief or portions of his brief for violating various provisions of Illinois Supreme Court Rule 341 (eff. July 1, 2008), including failure to cite authority. We ordered this motion taken with the case. It is well established that points not supported by authority may be deemed waived. *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 306, 574 N.E.2d 1316 (1991). However, this principle is "an admonition to the parties and not a limitation upon the power of a reviewing court to address issues of law as the case may require." *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 37, 629 N.E.2d 690 (1994). Accordingly, we deny the employer's motion to strike the claimant's brief. However, we remind counsel that they are required to follow Rule 341 and admonish counsel to comply with the supreme court rules in the future.

¶ 55 I.

¶ 56 The Commission's Award of Maintenance and Vocational Rehabilitation Services

¶ 57 The employer argues that the Commission erred in ordering the continuance of maintenance and vocational rehabilitation benefits. We disagree.

¶ 58 Section 8(a) of the Act requires an employer to pay for an employee's necessary physical, mental and vocational rehabilitation, including the costs and expenses of maintenance. 820 ILCS 305/8(a) (2008). "A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019, 832 N.E.2d 331, 347 (2005). The Commission's determination concerning whether a claimant is entitled to vocational rehabilitation is reviewed under the manifest weight of the evidence standard. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 430, 454 N.E.2d 672, 675 (1983) ("the Commission's finding that claimant could not obtain suitable employment, and is therefore eligible for rehabilitation, was not contrary to the manifest weight of the evidence").

¶ 59 A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent from the record on appeal. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). On review under the manifest weight of the evidence standard, we are not to decide whether we might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010). "In resolving questions of

fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App.3d 665, 674, 928 N.E.2d 474, 482 (2009). Choosing between two conflicting medical opinions is a matter particularly within the province and expertise of the Commission. *Jarrett v. Industrial Comm'n*, 156 Ill. App. 3d 898, 913, 511 N.E.2d 144, 153 (1987). In the present case, we cannot find that the Commission's determination that the claimant is entitled to additional vocational rehabilitation services and maintenance is against the manifest weight of the evidence.

¶ 60 The parties did not dispute that the claimant suffered a workplace injury in 2003 when he suffered from heat exhaustion as a result of working for the employer as a painter in hot temperatures. In addition, it was uncontroverted that the claimant was diagnosed with having an intolerance to physical work in a hot environment. All of the physicians that examined the claimant imposed temperature restrictions with respect to the claimant's workplace environment.

¶ 61 After the first 19(b) hearing, the arbitrator concluded that "[t]here was no issue as to heat intolerance causation" and concluded that the claimant proved that he was entitled to maintenance benefits. The arbitrator ordered that "[v]ocational services should continue to such time as [the claimant] secures suitable employment." Neither party appealed the arbitrator's November 20, 2006, decision, and the only record of that proceeding is the

arbitrator's decision. Therefore, the issue of causation was decided and cannot be relitigated. We agree with the claimant that the arbitrator's ruling with respect to causation was the "law of the case" with respect to that issue. *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606-07, 786 N.E.2d 218, 224-25 (2003) (the arbitrator's determination at a section 19(b) hearing that a causal connection existed between the claimant's work-related accident and his injuries was the law of the case).

¶ 62 When the parties returned for a hearing on the second 19(b) petition, the arbitrator did not allow the employer to relitigate the issue of whether the claimant suffered from heat intolerance as a result of the work-related injury. The arbitrator, however, properly allowed the employer to present evidence concerning any changes to the claimant's condition since the first 19(b) hearing was not conclusive concerning the "nature and extent" of the claimant's disability. 820 ILCS 305/19(b) (West 2008). The evidence presented at the second hearing concerning the nature and extent of the claimant's disability supported the Commission's finding that the claimant continued to suffer from a condition of heat intolerance, that the heat intolerance has caused a reduction in his earning power, and that rehabilitation will increase his earning power.

¶ 63 In determining that the claimant was entitled to additional vocational rehabilitation services, the Commission considered conflicting testimony from two vocational rehabilitation experts, Trares and Minnich, and considered medical testimony from Dr. Doll and Dr. Volarich. In addition, the Commission considered the claimant's testimony concerning the

nature of his condition after the first 19(b) hearing as well as surveillance video tapes of the claimant playing golf.

¶ 64 The claimant testified that his condition of heat intolerance had not changed since the first hearing and that he continued to have the same work restrictions which prevented him from returning to work as a journeyman/union painter. Dr. Volarich also concluded that there was no change in the claimant's physical condition since his January 20, 2005, evaluation. Trares testified that continuing vocational rehabilitation services were the claimant's best opportunity to increase his earning capacity. Trares testified that the claimant was dedicated to finding a job, worked diligently toward that goal, and offered no restrictions concerning income level or the location where he would work. He had taken the claimant to job fairs where the claimant interacted well with potential employers and showed sincerity in finding work. The claimant also testified about his job search efforts since the previous hearing and presented an extensive list of job searches throughout Illinois and other states.

¶ 65 The employer's section 12 examiner, Dr. Doll, agreed that the claimant is restricted to working in a temperature-controlled environment. Dr. Doll, however, disagreed with Dr. Volarich concerning the maximum temperature in which the claimant could work. Dr. Doll's maximum temperature was 90 degrees, while Dr. Volarich's maximum temperature was 75 degrees. The Commission reviewed the surveillance videos of the claimant playing golf in temperatures as high as 96 degrees "seemingly without difficulty." Although the Commission weighed the conflicting evidence and found that the temperature restrictions

imposed by Dr. Volarich were exaggerated, it nonetheless found that the claimant's work restrictions include temperature restrictions and that the claimant would benefit from additional vocational rehabilitation services.

¶ 66 The Commission found that there was no evidence to support the arbitrator's order requiring the employer to pay for retraining/schooling. Apparently, the Commission agreed with Minnich's opinion that the claimant did not need retraining/schooling. Instead, the Commission noted the conflicting evidence in the record concerning the existence of a stable labor market for temperature-controlled indoor painting jobs, and the Commission found Kenny's testimony, that there were temperature-controlled indoor painting jobs available, to be credible. Therefore, the evidence supports the Commission's directive that the claimant "should explore and pursue further possible re-employment as an indoor union painter in his future vocational efforts." The Commission recognized that the claimant had work environment temperature restrictions but determined that his vocational rehabilitation services should continue and include pursuit of indoor painting jobs that can accommodate his restrictions. The Commission's finding with respect to continued vocational rehabilitation services was neither contrary to law or against the manifest weight of the evidence.

¶ 67 The claimant also challenges the Commission's decision with respect to vocational rehabilitation services, arguing that the Commission improperly allowed the employer to relitigate an issue which had been previously decided at the first 19(b) hearing. Specifically, the claimant maintains that the arbitrator determined in its first arbitration decision that the

claimant could not return to work as a union painter and that there was no evidence presented that the claimant's condition had changed in any material manner since the first 19(b) hearing. Accordingly, the claimant maintains that the Commission improperly directed him to consider union painting positions in future vocational efforts. We disagree.

¶ 68 The Commission reviewed the arbitrator's November 20, 2006, decision and determined that the arbitrator did not make a finding that the claimant could not return to work as a union painter. Instead, the arbitrator concluded, in the first 19(b) decision, that the claimant could not return to work as a painter for the employer. It made no finding with respect to the claimant's ability to work as a union painter for other employers in temperature-controlled environments. We agree with the Commission; our review of the arbitrator's November 20, 2006, decision does not reveal any evidence of any stipulation by the parties or a finding by the arbitrator that the employee could not return to work as a union painter.

¶ 69 The arbitrator's findings of fact in the November 20, 2006, decision discussed the claimant's inability to work for the employer due to his work restrictions. The arbitrator wrote that the claimant was treated by Dr. Volarich and Dr. Schuman and that the doctors diagnosed the claimant as having heat intolerance. The arbitrator further noted that the claimant attempted to return to work for the employer to perform "inside work activities," but he was told that there was "no position with those restrictions."

¶ 70 The arbitrator found that the claimant attempted to return to work as a painter with three other entities, but "was only able to work a short time with each one of these employers

since he would eventually reach a point where his body would overheat and he would then have to tell the employer of his heat intolerance." The arbitrator made no findings with respect to whether there is a stable labor market for temperature controlled indoor painting suitable for employment within the claimant's restrictions. By contrast, in the second 19(b) proceeding, the record includes testimony from Kenny indicating that there was a stable labor market for painting jobs in climate controlled environments that fit within Dr. Doll's temperature restrictions. Therefore, we agree with the Commission that there is nothing in the arbitrator's first 19(b) decision that indicates that the claimant had permanent restrictions that prevented him from returning to work as a union painter.

¶ 71 II.

¶ 72 Trares's Billing Statements for Vocational Services Rendered

¶ 73 The claimant argues that the Commission erred in vacating the arbitrator's award of $18,686.64 for vocational services rendered by Trares after the first 19(b) hearing. At the second 19(b) hearing, the claimant offered Trares's billing statements as Petitioner's Exhibit 6. When the claimant offered the billing statements, the employer's counsel stated that she would withhold her objection pending the testimony. With respect to the bills, the employer's counsel stated, "assuming that the foundational requirements are met by the testimony, I will not have an objection, but at this time, I don't want to commit myself one way or the other." The arbitrator then admitted the billing statements and stated that if the employer "should want to raise any foundational objections or otherwise after the testimony comes in, please

feel free to do so before we close the record after today's hearing." Trares's billing statements that were admitted into evidence were for a period beginning in July 2007 and continuing through November 11, 2007. His bills totaled $21,349.35.

¶ 74 During cross-examination, Trares testified that he charged $90 an hour and that he charged his actual time. He also testified that he charged for litigation expenses, including testimony preparation and correspondence and telephone calls with the claimant's attorney. His charges for testimony and depositions were at higher rates. He did not know the exact amount of the higher rate because he did not do the billing. When asked about a telephone call and a correspondence to the claimant's attorney billed in the statements, Trares again emphasized that he did not have anything to do with the billing and that the billing was "more than likely" done from an office in Springfield. He testified that the bills included not only his charges, but also charges from an office that handles clerical work. The employer's attorney asked Trares about other various billing items, including 7 hours that was billed for testimony preparation on October 5, 2007. Trares testified that the charge of 7 hours might be a clerical error because he did not know why he would have spent 7 hours preparing for testimony.

¶ 75 After the claimant completed his presentation of evidence, the arbitrator noted that "Petitioner's Exhibits marked 1 through 8 have all been admitted ***." The arbitrator asked if "[e]ither party want[ed] to add anything concerning that?" The employer's attorney did not voice any objection to Trares's billing statements (Petitioner's Exhibit 6) or voice any

concerns concerning the admission of the billing statements.

¶ 76 The arbitrator reviewed Trares's billing statements in light of Trares's testimony and deducted from his bills charges for testimony preparation and contacts with the claimant's attorney. The arbitrator found that his charges totaling $18,686.64 were reasonable for his services.

¶ 77 On appeal, the Commission concluded that Trares's billing statements were admitted "over [the employer]'s objection that a proper foundation had not been laid for the billing statement." The Commission noted that "Trares provided the only foundational testimony with regard to the vocational rehabilitation billing statement," but he testified that the billing statement came from a clerical department and that billing was not his department. The Commission further noted that the billing statements contained charges for litigation and report writing which should have been excluded from any award and that the billing statements did not "clearly identify what charges were incurred for vocational rehabilitation, versus what charges were incurred as litigation expenses and report writing."

¶ 78 The Commission, therefore, concluded that "Trares's testimony did not meet the foundational requirements for admitting the [billing statements]" because Trares was not familiar with the provider's billing practices and was "not able to testify about the reasonableness of the charges contained within the billing statement[s]."

¶ 79 In *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2005), the court addressed the foundational requirements for the admission of medical bills

in a workers compensation proceeding.[1] The employer argued that the arbitrator and the Commission erred in allowing the claimant to introduce medical bills over its objection that no proper foundation had been established for their admission.

¶ 80 The *Land and Lakes Co.* court stated that, except when the Act provides otherwise, the Illinois rules of evidence govern proceedings before an arbitrator and the Commission. *Land and Lakes Co.*, 359 Ill. App. 3d at 590, 843 N.E.2d at 590. The court then noted that Supreme Court Rule 236(a) "sets forth the foundational requirements for documents admissible pursuant to the business records exception to the hearsay rule." *Land and Lakes Co.*, 359 Ill. App. 3d at 590, 583 N.E.2d at 591. Pursuant to Rule 236(a), "[t]he party offering the evidence must demonstrate that the record was made in the regular course of business and at or near the time of the transaction." *Id.* "A proponent may lay an adequate foundation through the testimony of the custodian of the records or another person familiar with the business and its mode of operation." *Id.*

¶ 81 Courts have further held that the foundation for the admissibility of unpaid bills also includes a showing of reasonableness. "To introduce an unpaid bill into evidence, a party must establish that the bill is reasonable for the services of the nature provided." *Kunz v.*

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[1] Since *Land and Lakes Co.* was decided, section 16 of the Act was amended in 2005 to ease the foundational requirements for the admission of medical bills and records. 820 ILCS 305/16 (West 2008). The amended foundational requirements in section 16, however, apply only to the bills and records of "a treating hospital, treating physician, or other treating healthcare provider." Therefore, the bills and records of a vocational rehabilitation service do not fall under the purview of the foundational requirements contained in section 16 of the Act.

Little Co. of Mary Hospital and Health Care Centers, 373 Ill. App. 3d 615, 624, 869 N.E.2d 328, 337 (2007). "A party seeking admission of an unpaid bill into evidence 'can establish reasonableness by introducing testimony of a person having knowledge of the services rendered and the usual and customary charges for such services.' " *Id*., quoting *Arthur v. Catour*, 216 Ill. 2d 72, 82, 833 N.E.2d 847, 853-54 (2005).

¶ 82 In the present case, the employer did not offer an objection to the admission of Trares's billing statements. Instead, the employer's counsel stated that she was not going to commit one way or another with respect to the billing statements and was withholding any objection pending Trares's testimony. The arbitrator admitted the bills, but added that if the employer "should want to raise any foundational objections or otherwise after the testimony comes in, please feel free to do so before we close the record after today's hearing." The employer's counsel cross-examined Trares with respect to his billing statements. However, at the close of the claimant's presentation of evidence, the arbitrator again asked if the employer had any concerns with respect to any of the claimant's exhibits, and the employer offered no objections, comments, or statements with respect to Trares's billing statements, their foundation, or their admission into evidence.

¶ 83 We agree with the claimant that by failing to object to the foundation of the admission of the billing statements, the employer relieved the claimant of his burden to prove the reasonableness of the billing statements for foundation purposes. *Wills v. Foster*, 229 Ill. 2d 393, 420, 892 N.E.2d 1018, 1034 (2008) ("By stipulating to the admission of the billed

amounts into evidence and failing to offer any objection, defendant relieved plaintiff of the burden of establishing reasonableness"). However, contrary to the claimant's argument, merely because Trares's statements were properly admitted into evidence before the arbitrator and the Commission does not establish that the Commission was required to adopt the arbitrator's findings with respect to the award amount for Trares's services.

¶ 84 The supreme court has stated that once bills are admitted into evidence, it is still up to the fact finder "to decide whether to award all, part, or none of the bill[s]." *Id.* In addition, Rule 236(a) provides: "All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility."

¶ 85 Under the Act, the Commission is the fact finder (*Biggerstaff v. Industrial Comm'n*, 171 Ill. App. 3d 845, 849, 525 N.E.2d 1000, 1002 (1988)), and is charged with the task of factually determining whether rehabilitation expenses are necessary (*Cole v. Byrd*, 167 Ill. 2d 128, 136-37, 656 N.E.2d 1068, 1072 (1995)). Therefore, in the present case, even if the employer waived foundation objections to the admissibility of Trares's billing statements, the Commission, nonetheless, was charged with the fact finding task of determining whether all, part, or none of the bills should be paid by the employer. We cannot reverse the Commission's factual findings concerning Trares's billing statements unless they are contrary to the manifest weight of the evidence. *Cole*, 167 Ill. 2d at 137, 656 N.E.2d at 1072.

¶ 86 The Commission reviewed the billing statements in light of Trares's testimony and

determined that the claimant failed to prove the reasonableness of the bills. The Commission noted that the billings contained charges not only for vocational rehabilitation, but also for litigation expenses and report writing, charges which the Commission found should not be included in the award. Additionally, the billing statements, the Commission found, did not adequately identify appropriate charges for vocational rehabilitation as opposed to improper litigation and report writing charges. Trares offered very little explanation concerning the basis for many of the charges when he was questioned about specific charges. In addition, although he stated that he charged his actual time and that there was no minimum billing increment, he could not explain why there were no charges that were less than .2 of an hour. The Commission, as the fact finder, determined not to award Trares's bills because he "was not familiar with the providers' business practices, and was not able to testify about the reasonableness of the charges contained within the billing statement." We cannot find that the Commission's findings with respect to Trares's bills are against the manifest weight of the evidence.

¶ 87 III.

¶ 88 Section 19(k) and 19(*l*) Penalties and Section 16 Attorneys' Fees

¶ 89 The claimant also argues that the Commission erred in vacating the arbitrator's award for penalties and attorney fees under sections 19(k), 19(*l*), and 16 of the Act. We disagree.

¶ 90 The issues surrounding awards of penalties and fees under sections 16, 19(k) and 19(*l*) of the Act involve two different standards.

¶ 91 Penalties under section 19(*l*) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late, and the employer cannot show an adequate justification for the delay. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id*. When the employer acts in reliance upon a reasonable medical opinion or when there are conflicting medical opinions, section 19(*l*) penalties ordinarily are not imposed. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 756 (2001). 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. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121-22, 578 N.E.2d 140, 143 (1991).

¶ 92 The standard for awarding penalties pursuant to section 19(k) is higher than the standard under section 19(*l*). Section 19(k) requires more than a showing that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). Section 19(k) penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 93 With respect to attorneys' fees, Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS

305/16 (West 2005). The imposition of penalties and attorney fees under sections 19(k) and section 16 fees is discretionary. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 94 A review of the Commission's decision concerning penalties and attorney 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 fees is "contrary to the manifest weight of the evidence." *McMahan*, 183 Ill. 2d at 516, 702 N.E.2d at 553. Second, we must determine whether "it would be an abuse of discretion to refuse to award such penalties and fees under the facts present here." *Id*.

¶ 95 In the present case, we believe that the Commission's denial of section 19(*l*) penalties was not against the manifest weight of the evidence. In addition, because the facts do not support the imposition of penalties under section 19(*l*)'s lower standard, the Commission's finding that the facts do not meet the higher standard of section 19(k) penalties and section 16 attorney fees was not contrary to the manifest weight of the evidence.

¶ 96 In denying the claimant's request for penalties and attorney fees, the Commission found that the employer's "reliance upon the opinions of Daniel Minnich, [the employer]'s vocational counselor, and the videotape surveillance, in terminating maintenance benefits after September 2007, did not rise to the level of being unreasonable, vexatious, or in bad faith." As noted above, Minnich testified that the claimant was employable and placeable and could have a job within 90 days. Minnich believed that the claimant could easily obtain a job similar to his previous employment as a project manager. In addition, the Commission

noted that the videotape surveillance showed the claimant playing golf on several occasions in July 2007 in warmer temperatures than what Dr. Volarich believed the claimant could tolerate. Although the Commission ultimately disagreed with the employer's decision to terminate maintenance and vocational rehabilitation services, we cannot conclude that the manifest weight of the evidence requires a finding that the employer had no basis for relying on Minnich's opinions and the videotape surveillance in terminating those benefits. Accordingly, we must affirm the Commission's findings with respect to penalties and attorney fees.

¶ 97 CONCLUSION

¶ 98 For the foregoing reasons, the judgment of the circuit court that confirmed the Commission's decision is hereby affirmed. We remand for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 99 Affirmed; cause remanded.