2013 IL App (4th) 120991WC-U
No. 4-12-0991WC
Order filed June 28, 2013

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JESSE PEÑA,	)	Appeal from the Circuit Court
	)	of McLean County.
Appellant,	)	
	)	
v.	)	No. 11-MR-334
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION, *et al*.,	)	Honorable
	)	Scott Drazewski,
(Otto Baum, Inc., Appellee).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Turner and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Commission's finding that claimant's current condition of ill-being is not causally related to his industrial accident is not against the manifest weight of the evidence given conflicting medical evidence; (2) Commission's finding that claimant was entitled to temporary total disability benefits only through November 3, 2009, is not against the manifest weight of the evidence in light of his release to light-duty work and his refusal of position within his restrictions; and (3) Commission's finding that penalties were not appropriate in this case is not against the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Jesse Peña, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)) alleging that he sustained a contusion to his left elbow while working as a laborer for respondent, Otto Baum, Inc. The arbitrator found that while claimant sustained an accidental injury arising out of and in the course of his employment with respondent, his current condition of ill-being is not causally related to his industrial accident. The arbitrator awarded claimant 10-3/7 weeks of temporary total disability (TTD) benefits (see 820 ILCS 305/8(b) (West 2008)), but denied claimant's request for penalties and attorney fees (see 820 ILCS 305/16, 19(k), and 19(l) (West 2008)). The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. The circuit court of McLean County confirmed the decision of the Commission. On appeal, claimant argues that the Commission erred in finding that his current condition of ill-being is not causally related to his industrial accident. In addition, claimant challenges the period of TTD awarded by the Commission as well as its denial of penalties and attorney fees. We affirm and remand.

¶ 4 II. BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing held on August 9, 2010, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)). On August 20, 2009, claimant was employed by respondent as a laborer and was assigned to a job site in Normal, Illinois. Claimant was tasked with providing materials to Matt Byrd and Max Getz, two bricklayers working at the job site. Claimant testified that Byrd and Getz were working on a wall located above him. Shortly before 9:30 a.m., both Byrd and Getz advised claimant to step back from the wall due to falling debris. As claimant backed away, his foot stepped

on a tool known as a "come-along" that was located on the ground behind him. Claimant described the come-along as having a wooden handle with a curved metal piece approximately six-inches in width at the bottom end. Claimant testified that, as a result of stepping on the come-along, the tool's wooden handle struck his left elbow. Claimant stated that the contact resulted in a bruise, but did not cause any lacerations or bleeding. Claimant noted that, upon being struck by the come-along, both Byrd and Getz stopped working to check on his condition.

¶ 6 Claimant continued working, but testified that prior to lunch he began experiencing a sharp, painful sensation in his left elbow and took Tylenol for relief. The medication relieved the pain, and claimant worked the rest of the day. Claimant testified that after returning home and falling asleep, he was awoken at approximately 3 a.m. by pain in his left elbow. On the morning of August 21, 2009, claimant took some over-the-counter pain medication and reported to the job site in Normal. Claimant worked that day, but testified that by the middle of the day he was only able to work with his right hand because of left elbow pain. Claimant testified that prior to leaving the job site for the day, Byrd, the supervisor on the project, informed him that his services would no longer be required due to a delay in the receipt of materials. Byrd wrote claimant a check and advised him to return to the labor hall to find a new position until the materials arrived at the Normal job site. Claimant also testified that Byrd advised claimant to have his left elbow examined.

¶ 7 After completing his work day, claimant went to the emergency room at OSF St. Joseph Hospital. There, X rays were taken and claimant was referred to Dr. Jack Spaniol for follow-up. Claimant saw Dr. Spaniol on August 24, 2009. Claimant told Dr. Spaniol that he began experiencing pain in the lateral (outside) aspect of his left elbow after being struck by a tool at work. Claimant

reported difficulty using his left arm, but denied any tingling, weakness, or numbness of the left upper extremity. Dr. Spaniol noted that claimant's X rays were negative for fracture. Upon examination, Dr. Spaniol noted that claimant had full range of motion of the left elbow as well as good strength and sensation on provocational testing. However, there was tenderness over the left lateral humeral condyle and on stretch and active contraction of the forearm muscles. Dr. Spaniol diagnosed a contusion to the left elbow. He prescribed pain medication and restricted claimant from lifting more than five pounds with his left arm. Claimant testified that after seeing Dr. Spaniol, he returned to the job site to provide Byrd with copies of his medical information and Byrd completed an accident report at that time.

¶ 8 Claimant returned to Dr. Spaniol's office on August 31, 2009, reporting little improvement. Dr. Spaniol noted continued tenderness over the left lateral epicondyle and weakness in the left arm secondary to pain. Dr. Spaniol continued claimant's lifting restriction, instructed claimant to wear a sling, and increased the dosage of his pain medication. Dr. Spaniol examined claimant again on September 9, 2009. At that time, Dr. Spaniol noted that claimant's condition had not improved. He recommended an MRI and referred claimant to Dr. Brett Keller, an orthopaedic surgeon.

¶ 9 On September 22, 2009, at respondent's request, claimant was evaluated by Dr. Prasant Atluri, a board-certified orthopaedic surgeon specializing in problems involving the upper extremity. At that time, claimant described pain at the lateral aspect of his left elbow radiating proximally into the lateral arm and distally into the forearm. Claimant also reported pain with any motion of his elbow as well as with any gripping or lifting activities. He denied any numbness or tingling in his fingers. Upon examination, Dr. Atluri noted tenderness around the lateral aspect of the left elbow,

including the epicondyle, hypersensitivity at the lateral aspect of the elbow near the lateral epicondyle joint line, tenderness along the radial nerve proximally in the lateral and posterior aspect of the arm, and a mildly positive wrist extension test. Dr. Atluri reviewed claimant's MRI, but found that it was of poor quality and therefore "essentially non-diagnostic." Dr. Atluri interpreted X rays taken in his office as showing "a possible small fracture." Dr. Atluri diagnosed a left elbow bone contusion with a possible fracture. Dr. Atluri recommended a CT scan of the left elbow to clarify the nature of the fracture, if any. He concluded that the mechanism of injury is consistent with claimant's clinical presentation. As such, Dr. Atluri concluded that claimant's left elbow condition would be considered related to his work injury. Dr. Atluri found that claimant was capable of working, but should avoid any lifting, pushing, pulling, or forceful gripping with his left upper extremity.

¶ 10 On October 1, 2009, claimant was again examined by Dr. Spaniol. During this visit, Dr. Spaniol noted that the MRI of claimant's left elbow showed minimal fluid in the elbow joint and a partial tear of the common extensor tendon. Dr. Spaniol's assessment was contusion to the left elbow with partial tear of the common extensor tendon over lateral epicondyle, "consistent with his mechanism of injury and his history." Dr. Spaniol advised claimant to undergo the CT scan recommended by Dr. Atluri. Dr. Spaniol stated that if claimant's condition did not improve, orthopaedic surgery would be considered.

¶ 11 Claimant saw Dr. Keller on October 22, 2009. At that time, claimant complained of pain and swelling in the posterior and lateral region of the left elbow, which is worsened by activity and palpation. Claimant denied any numbness or tingling. Upon examination, Dr. Keller noted

significant tenderness to palpation just posterior to the lateral epicondyle. Dr. Keller confirmed the pathology noted by Dr. Spaniol on the MRI scan, but noted that claimant demonstrated no tenderness or weakness in the common extensor origin. Dr. Keller diagnosed a contusion of the left elbow. He ordered physical therapy and gave claimant a release to return to light-duty work with restrictions of "no pushing, pulling or lifting with the left upper extremity." After claimant completed his physical therapy, he was referred by Dr. Keller to Dr. Jerome Oakey, a specialist in hand and upper extremity surgery.

¶ 12 Claimant saw Dr. Oakey on November 12, 2009. Claimant provided a history of the accident. Dr. Oakey noted that claimant had failed conservative treatment and that his MRI was suggestive of "irritation of the common extensor tendon." Upon examination of the left upper extremity, Dr. Oakey noted some limitation in motion of the elbow, principally in full flexion, tenderness at the lateral epicondyle, and weakness with resisted wrist extension. Dr. Oakey diagnosed irritation of the lateral epicondylar tendon (tennis elbow). Dr. Oakey administered a steroid injection to the left elbow and instructed claimant to return in four weeks.

¶ 13 When claimant saw Dr. Oakey on December 14, 2009, he reported that the injection provided only transient relief. At that time, claimant also noted numbness in the middle, ring, and small fingers on the left side, at night. Upon physical examination, Dr. Oakey noted tenderness to palpation at the left lateral epicondyle, weakness with resisted wrist extension when the left elbow is extended, and Tinel's phenomenon on palpation of the left cubital tunnel. Dr. Oakey's diagnosis was twofold: (1) left tennis elbow and (2) left cubital-tunnel syndrome. Dr. Oakey opined that the former diagnosis would ultimately require surgical intervention. He recommended that claimant

have an EMG prior to surgery for further evaluation of his left cubital tunnel. In addition, Dr. Oakey issued claimant a slip providing that he may return to work as of December 15, 2009, with "no use of the left arm until after the EMG and reevaluation." Claimant subsequently informed Dr. Oakey that his request for an EMG was denied by the workers' compensation carrier.

¶ 14 At the arbitration hearing, claimant testified that on November 2, 2009, a representative of respondent contacted him by telephone to inquire whether he could work a six-hour shift as a "flagger." Claimant stated that this position requires an individual to hold a post with a stop sign. According to claimant, the post has to be held with two hands, especially when working on a highway in windy conditions. Claimant advised the caller that he had a physician's slip keeping him off work until he saw Dr. Oakey. Claimant testified that after that telephone conversation, respondent made no further attempts to offer him employment and it ceased paying TTD benefits effective November 3, 2009. Claimant also related at the arbitration hearing that he still experiences left elbow pain and would like to undergo surgery.

¶ 15 Donald Mackey testified that in November 2009, he was employed as respondent's safety manager. Mackey was contacted by Mark Collins, respondent's claims manager, to find a light-duty position for claimant. Collins told Mackey that claimant was capable of doing one-handed work. In response, Mackey found an opening for a flagger in Peoria. According to Mackey, the flagger position could be done with one hand. Mackey was not sure how long the flagger position would last, but noted that the flagger position could have led to other light-duty work. Mackey testified that on November 2, 2009, he called claimant and told him that the flagger position was available the following day. Claimant told Mackey that he "wasn't refusing the job," but that "he had a doctor's

excuse stating that he couldn't work until after surgery." Mackey testified that thereafter there was no further contact between himself and claimant.

¶ 16 Dr. Oakey testified by evidence deposition that when he saw claimant in November 2009, he diagnosed tennis elbow. Dr. Oakey testified that tennis elbow is the type of injury that could, over time, develop additional clinical symptoms that a patient would present at a later visit. Dr. Oakey further testified that when claimant presented on December 14, 2009, he described numbness in the middle, ring, and small fingers on the left side, which was not mentioned in the previous visit. Prior to performing the surgery for claimant's tennis elbow, Dr. Oakey wanted to explore these symptoms, which were indicative of cubital-tunnel syndrome. As a result, Dr. Oakey ordered an EMG. Dr. Oakey testified that the tennis-elbow condition is causally related to the August 20, 2009, work injury. Dr. Oakey was asked whether there was a causal relationship between the event of August 20, 2009, and the cubital-tunnel condition that he described as requiring additional diagnostic evaluation. Dr. Oakey responded:

> "That's a much harder question to answer. In looking through prior records, there was no previous mention of numbness or tingling in those three fingers. Therefore, it would not so much be the injury caused these, but the ultra mechanics of this elbow with which [claimant] performed the duties that he needed to perform would have contributed to the ulnar neuritis or irritation of the ulnar nerve."

In other words, Dr. Oakey explained, it was not the acute trauma that claimant experienced on August 20, 2009, that caused the cubital-tunnel findings. Rather, the change in claimant's use of the left arm as a result of the tennis-elbow diagnosis might or could have irritated the ulnar nerve.

¶ 17 On cross-examination, Dr. Oakey testified that the first note addressing the return-to-work issue was dated December 14, 2009, and allowed claimant to return to work as of December 15, 2009, with no use of the left arm until after EMG and a reevaluation. Dr. Oakey stated that although he did not issue a work slip after claimant's initial visit in November 2009, he would have imposed the same work restrictions at that time.

¶ 18 Dr. Atluri testified by evidence deposition that when he evaluated claimant on September 22, 2009, claimant denied any numbness or tingling of the fingers at that time. Dr. Atluri explained that this was significant as it indicated the absence of any nerve problems.

¶ 19 Dr. Atluri further testified that although he found the quality of claimant's September 2009 MRI to be poor, the MRI report indicated the presence of a possible partial common extensor tendon origin tear. Dr. Atluri testified that claimant had no functional deficits suggestive of this condition other than some pain in the area. He added that this condition is typically a finding associated with tennis elbow, but that claimant's examination was not indicative of tennis elbow and that his mechanism of injury is not the type that would be expected to cause a common extensor tendon tear. As a result, Dr. Atluri concluded that that finding on the MRI "was just an incidental finding," which "had nothing to do with his symptoms or his injury" and did not require any specific restrictions.

¶ 20 Dr. Atluri further testified that X rays taken in August 2009 were "pretty normal." Nevertheless, he ordered another set of films as part of the examination. He stated that the X rays taken in his office revealed nothing different from what the outside X rays showed, other than a possible small fracture near the base of the coronoid (described by Dr. Atluri as a prominent part of the ulna in the front of the elbow joint) that was visible only on one of the oblique views. Dr. Atluri

ultimately diagnosed a left elbow bone contusion with a possible fracture. He recommended a CT scan of the left elbow to verify whether a fracture of the coronoid was actually present or whether there was just a blood vessel that resembled a fracture. Dr. Atluri testified that a review of the CT scan ruled out a fracture of the coronoid. As such, he modified his diagnosis to simply a left elbow contusion. Dr. Atluri opined that claimant's subjective complaints were consistent with his physical findings and the history he provided.

¶ 21 Dr. Atluri testified that at the time of his examination, there was no evidence that claimant had cubital-tunnel syndrome. Dr. Atluri noted, for instance, that at the time of the examination, claimant specifically denied numbness or tingling in his fingers. Further, when Dr. Atluri examined claimant, there was no tenderness over the medial aspect of his elbow, which is the location of the cubital tunnel, and no dysfunction of the ulnar nerve.

¶ 22 Dr. Atluri testified that, based on his findings, he recommended that claimant undergo supervised therapy for four to six weeks followed by transition to a home exercise program. He did not believe that surgical intervention was warranted. In addition, he opined that claimant should be assigned temporary work restrictions and that he should avoid "any lifting, pushing, or pulling as well as forceful gripping with his left upper extremity" for a period of six weeks from the date of his examination. Thereafter, claimant would be allowed to resume some light lifting, pushing, and pulling with the left upper extremity. Dr. Atluri expected claimant to be at full duty by eight to ten weeks after his evaluation of claimant. Dr. Atluri further testified that he would not expect any permanency from claimant's injury.

¶ 23 On cross-examination, Dr. Atluri reiterated that the bone contusion that he diagnosed was

related to the acute blunt force trauma that claimant described as occurring with the come-along hitting him in the left elbow. Dr. Atluri acknowledged that the early onset of numbness and tingling in a bone contusion such as the one experienced by claimant is plausible. However, he did not believe that there was a relationship between claimant's work injury and the development of numbness and tingling. He explained that blunt trauma sufficient to cause a bone contusion also results in some type of soft-tissue injury and resultant swelling. He stated that the swelling could place pressure on nerves and cause numbness and tingling which would be present almost immediately after the trauma. He added, however, that the late development of numbness and tingling as a result of such injuries would not be expected because the swelling shrinks rapidly. As such, Dr. Atluri opined that the development of numbness and tingling at a later time would have to be from some other cause. Dr. Atluri further testified that, other than a general projection, he could not state whether claimant had reached maximum medical improvement. He added that it would require either a clinical examination or a thorough review of additional medical records to determine maximum medical improvement. On redirect examination, Dr. Atluri reiterated that other than the bone contusion, he did not find any other condition related to the accident of August 20, 2009.

¶ 24 Based on the foregoing evidence, the arbitrator determined that although claimant sustained an accident arising out of and in the course of his employment with respondent, his current condition of ill-being is not causally related to his employment. The arbitrator further determined that claimant needs no additional diagnostic testing for the accident of August 20, 2009, and that claimant does not require any surgical intervention related to the work injury to the left elbow. The arbitrator

awarded claimant TTD benefits for the period from August 22, 2009, through November 3, 2009, a period of 10-3/7 weeks. The arbitrator denied TTD benefits beyond November 3, 2009, because respondent offered claimant a position within his medical restrictions beginning on that date, but claimant did not accept the job. Finally, the arbitrator, reasoning that respondent's actions throughout the course of this case had been " 'objectively' reasonable," denied claimant's request for penalties and attorney fees pursuant to sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), and 19(l) (West 2008)). The Commission affirmed and adopted the decision of the arbitrator and remanded the cause for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). On judicial review, the circuit court of McLean County confirmed the decision of the Commission. This appeal followed.

¶ 25 III. ANALYSIS

¶ 26 A. Causation

¶ 27 Claimant first argues that that the Commission's finding that his current condition of ill-being is not causally related to his work accident of August 20, 2009, is against the manifest weight of the evidence. Citing *Phillips v. Industrial Comm'n*, 187 Ill. App. 3d 704 (1989), and relying upon the testimony of Dr. Oakey, claimant asserts that he presented unrebutted expert medical testimony that sufficiently supports a finding of causal connection. Respondent, citing the testimony of Dr. Atluri, maintains that there is sufficient evidence in the record to support the Commission's finding that claimant's current condition of ill-being is not related to his work accident.

¶ 28 An employee seeking workers' compensation benefits has the burden of proving all elements of his claim. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 449 (1995). Among other things,

the employee must establish that there is a causal connection between the employment and the injury for which he seeks benefits. *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 860 (2005). Whether a causal connection exists between a claimant's condition of ill-being and his employment is a question of fact for the Commission. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597 (2005). It is the function of the Commission to decide questions of fact and causation, to judge the credibility of the witnesses, and to resolve conflicting medical evidence. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741 (1994). Although we might draw different inferences from the facts, a reviewing court will not overturn the Commission's decision on a factual matter unless it is against the manifest weight of the evidence. *P.I.&I. Motor Express, Inc./For U, LLC v. Industrial Comm'n*, 368 Ill. App. 3d 230, 240 (2006). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, ¶ 15.

¶ 29 Applying this standard, we are compelled to affirm the Commission's finding on causation. It is undisputed that claimant suffered a contusion to his left elbow when the come-along struck him at work on August 20, 2009. However, there was conflicting medical evidence regarding whether the other conditions of claimant's left elbow, in particular the diagnoses of lateral epicondylitis (tennis elbow) and cubital-tunnel syndrome, were related to the work accident. Claimant relies upon the opinion of Dr. Oakey. Dr. Oakey first examined claimant on November 12, 2009. At that time, he diagnosed an irritation of tennis elbow. Dr. Oakey related this condition to claimant's work accident. When claimant saw Dr. Oakey on December 14, 2009, he indicated, for the first time, that he was experiencing numbness in the middle, ring, and small fingers on the left side at night. After

conducting a physical examination, Dr. Oakey modified his diagnosis to also include left cubital-tunnel syndrome. Dr. Oakey testified that tennis elbow is the type of injury that could, over time, develop additional clinical symptoms. He further testified that while the acute trauma claimant experienced on August 20, 2009, was not the cause of the cubital-tunnel symptoms, the change in the use of claimant's left arm as a result of the tennis-elbow diagnosis might or could have irritated the ulnar nerve resulting in such symptoms.

¶ 30 In contrast to the testimony of Dr. Oakey was that of Dr. Atluri. Dr. Atluri diagnosed a contusion to the left elbow and concluded that the contusion was related to the work injury. Dr. Atluri, however, did not believe that any other findings were causally related to his accident. Dr. Atluri noted that while the MRI report indicated the presence of a partial common extensor tendon tear, a condition typically associated with tennis elbow, his physical examination of claimant was not indicative of tennis elbow. Further, Dr. Atluri testified that the mechanism of injury claimant described is not the type that would be expected to cause a common extensor tendon tear. Dr. Keller concurred with the latter finding, noting that upon examination, claimant demonstrated no tenderness or weakness in the common extensor origin.

¶ 31 In addition, Dr. Atluri did not believe that claimant's symptoms of cubital-tunnel syndrome were causally related to his August 20, 2009, accident at work. Dr. Atluri noted that when he first examined claimant on September 22, 2009, claimant denied any symptoms related to cubital-tunnel syndrome, such as numbness or tingling in his fingers. Dr. Atluri further testified that when he examined claimant, there was no tenderness over the medial aspect of his elbow, the location of the cubital tunnel, and no dysfunction of the ulnar nerve. Dr. Atluri acknowledged that the early onset

of numbness and tingling in a bone contusion such as the one experienced by claimant is possible as a result of swelling placing pressure on nerves. He noted, however, that claimant initially denied such symptoms and that the late onset of such symptoms is unlikely because the swelling shrinks rapidly.

¶ 32 Given the conflicting medical evidence, and in light of the Commission's role in resolving factual disputes, we cannot say that the Commission's finding that claimant's current condition of ill-being is not causally related to his work accident is against the manifest weight of the evidence. In so holding, we find misplaced claimant's reliance on *Phillips*, 187 Ill. App. 3d 704. The *Phillips* court noted that where the claimant proves causation with unrebutted medical testimony which sufficiently supports a finding of causal connection, a reviewing court may set aside the Commission's finding of no causation. *Phillips*, 187 Ill. App. 3d at 707. In *Phillips*, only one physician offered a direct opinion on causal connection, and he opined that the claimant's current condition of ill-being was caused by her work accident. *Phillips*, 187 Ill. App. 3d at 707. The respondent in *Phillips* offered no direct evidence to rebut the causal connection of claimant's injury to her condition. In contrast, respondent in this case offered the testimony of Dr. Atluri. Dr. Atluri expressly testified that other than the bone contusion, he did not find any of claimant's other conditions causally related to the work accident of August 20, 2009.

¶ 33 Claimant also directs us to *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59 (1982), in support of his claim that the Commission's finding on causation is against the manifest weight of the evidence. According to claimant, that case stands for the proposition that "[a] chain of events which establishes a prior condition of good health, an accident, and a subsequent condition

of ill-being in disability may be sufficient to prove a causal connection between an accident and an individual's injury." The supreme court actually stated the following in *International Harvester*:

> "This court has held that medical evidence is not an essential ingredient to support the conclusion of the Industrial Commission that an industrial accident caused the disability. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient *circumstantial evidence* to prove a casual nexus between the accident and the employee's injury. [Citations.] * * * When the claimant's version of the accident is uncontradicted and his testimony unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award." (Emphasis added.) *International Harvester*, 93 Ill. 2d at 63-64.

In this case, there was direct medical evidence to support the Commission's finding that his current condition of ill-being is not casually related to his industrial accident. As such, we find that *International Harvester* does not require a different result.

¶ 34 B. TTD Benefits

¶ 35 Claimant next challenges the period of TTD award by the Commission. Claimant argues that he is entitled to TTD benefits beyond November 3, 2009, and that the Commission erred in finding to the contrary based on the testimony of Dr. Atluri and respondent's decision to offer him a "one-day, six-hour position as a 'flagger.' " Respondent replies that where an injured employee refuses work falling within he restrictions set forth by his physician, the employee is not entitled to TTD benefits.

¶ 36 TTD benefits are available from the time an injury incapacitates an employee from work until

such time as the employee is as far recovered or restored as the permanent character of the injury will permit. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). A claimant seeking TTD benefits must prove not only that he did not work, but that he was unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832 (2002). The dispositive inquiry is whether the employee's condition has stabilized, that is, whether the employee has reached MMI. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005). The factors to consider in assessing whether an employee has reached MMI include a release to return to work, medical testimony or evidence concerning the employee's injury, and the extent of the injury. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 178 (2000). Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). The period during which a claimant is entitled to TTD benefits is a factual inquiry. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256-57 (2008). It is the function of the Commission to decide questions of fact (*Teska*, 266 Ill. App. 3d at 741), and those findings will not be disturbed on appeal unless they are against the manifest weight of the evidence (*Ming Auto Body/Ming of Decatur, Inc.*, 387 Ill. App. 3d at 257). As noted above, a finding is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Will County Forest Preserve District*, 2012 IL App (3d) 110077WC, ¶ 15.

¶ 37 Claimant argues that the Commission's "singular reliance" on Dr. Atluri's testimony in finding that he was not entitled to TTD benefits beyond November 3, 2009, was in error. According to claimant, all of the physicians that examined claimant recommended a course of treatment that

would extend beyond November 3, 2009. Thus, he insists, he had not fully recovered as the nature of his injury allowed by the time his TTD benefits were terminated. There is evidence of record that claimant had not reached maximum medical improvement with respect to the left bone contusion prior to November 3, 2009. Dr. Atluri, for instance, testified that, other than a general projection, he could not state whether claimant had reached maximum medical improvement. This, however, is but one factor to consider in assessing the period of TTD. Indeed, this court has upheld Commission decisions to deny TTD benefits despite the need for continued treatment where the employee voluntarily ceased working despite the availability of a position within the employee's medical restrictions. For instance, in *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880-81 (1990), we upheld the Commission's finding that the period of TTD ended when the claimant was offered a light-duty job within her restrictions, but she refused to even attempt to do the job. Similarly, in *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880 (1990), three doctors cleared the claimant to return to light-duty work and the employer provided a job within the restrictions. The claimant attempted the position, but began to experience excruciating pain and left work. We upheld the Commission's denial of TTD benefits following the claimant's refusal to work the light-duty position, noting that there was no medical testimony corroborating the claimant's testimony that she could not work at the light-duty position. *Gallentine*, 201 Ill. App. 3d at 886-88.

¶ 38 In the case at bar, respondent offered claimant work as a flagger. Claimant declined the position, purportedly relying on a slip from his physician to the effect that he was unable to work until further evaluation. However, the medical records in evidence do not support claimant's testimony. At the time the employment offer was made, claimant had been evaluated by Dr. Spaniol,

Dr. Atluri, and Dr. Keller. None of those physicians authorized claimant off work completely. In August 2009, Dr. Spaniol restricted claimant from lifting more than five pounds with his left arm. In September 2009, Dr. Atluri found claimant capable of working, but instructed him to avoid any lifting, pushing, pulling, or forceful gripping with his left upper extremity. Similarly, in October 2009, Dr. Keller released claimant to light-duty work with restrictions of no pushing, pulling, or lifting with the left arm. We also note that while claimant did not see Dr. Oakey until after respondent offered claimant the flagger job, even he would have permitted claimant to return to work as long as he refrained from using his left arm until further evaluation.

¶ 39 Although claimant testified that flagging requires the use of two hands, claimant did not attempt to perform the job offered by respondent and he offered no medical testimony that he could not perform the duties of a flagger. Moreover, Mackey testified that the flagger position involves the use of only one hand. Given this conflicting testimony, the determination whether the flagger position was within claimant's medical restrictions presented a question of fact for the Commission to resolve. The Commission resolved this conflict by finding that the flagger position was within his restrictions, and given the evidence of record, we do not find this conclusion contrary to the manifest weight of the evidence. In sum, the record establishes that claimant was released to return to light-duty work, he was offered a position within his medical restrictions, but he turned down the employment. As such, there was sufficient evidence to support the Commission's conclusion that claimant was not entitled to TTD benefits after November 3, 2009. Therefore, we conclude that a decision opposite to the one reached by the Commission is not clearly apparent.

¶ 40 Claimant nevertheless argues that an employee's ability to perform light-duty employment

or seek out such employment is not dispositive as to whether the individual is entitled to TTD benefits. See, *e.g.*, *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278, 286 (1982); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760-61 (2003). In this case, however, it was not claimant's *ability* to perform light-duty work that is significant. Rather, it was the fact that claimant was offered a light-duty position within his restrictions, but he nevertheless declined the offer of employment. Citing *Anders v. Industrial Comm'n*, 332 Ill. App. 3d 501, 507 (2002), claimant also maintains that an employer cannot unilaterally terminate an employee's TTD benefits based on the employee's ability to perform light-duty work when there is no work available within the employee's physician-imposed restrictions. However, as we note above, claimant was offered a position within the physician-imposed restrictions, but he declined the job.

¶ 41 C. Penalties and Attorney Fees

¶ 42 Finally, claimant challenges the Commission's denial of penalties under section 19(k) of the Act (820 ILCS 305/19(k) (West 2008)), additional compensation under section 19(l) of the Act (820 ILCS 305/19(l) (West 2008)), and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2008)). The intent of sections 16, 19(k), and 19(l) is to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301 (1980). Awards under section 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). An award under section 19(l) is more in the nature of a late fee, so an award under that section is appropriate if an employer neglects to make payment without good and just cause.

McMahan, 183 Ill. 2d at 515. The employer has the burden of showing that it had a reasonable belief that the delay was justified. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579 (1995). Thus, where the employer relies upon "responsible medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed." *Avon Products, Inc.*, 82 Ill. 2d at 302. Whether to impose penalties and attorney fees under the foregoing provisions is a question of fact for the Commission subject to the manifest-weight standard of review. *Residential Carpentry, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 975, 983 (2009).

¶ 43 In this case, the Commission, affirming and adopting the decision of the arbitrator, denied claimant's request for penalties and attorney fees, finding that respondent's actions throughout the course of the case had been " 'objectively' reasonable." Claimant urges that this finding is against the manifest weight of the evidence as respondent terminated claimant's TTD benefits "without *any evidence* that the [claimant] had recovered as fully as his injuries would allow." (Emphasis in original.) Claimant also emphasizes that he was " 'laid off' " shortly after the accident of August 20, 2009, and was offered only a "one-day, six-hour position as a 'flagger' at the behest of Respondent's claims manager." Claimant maintains that the fact that his TTD benefits were terminated after he did not accept the flagger position suggests that the offer was "a veiled attempt on the part of the Respondent to avoid paying benefits." Thus, he reasons, penalties are appropriate. Having found, however, that the Commission's decision on TTD is not against the manifest weight of the evidence, we reject claimant's request to reverse the denial of penalties and attorney fees.

¶ 44 IV. CONCLUSION

¶ 45 For the reasons set forth above, we affirm the judgment of the circuit court of McLean

County, which confirmed the decision of the Commission. This cause is remanded for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 46 Affirmed and remanded.