ELITE STAFFING, INC., Respondent-Appellant, v. RENE AVILA and ILLINOIS WORKERS' COMPENSATION COMMISSION, Petitioners-Appellees.

No. 1-11-3253WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, WORKERS' COMPENSATION COMMISSION DIVISION

2012 Ill. App. Unpub. LEXIS 3214; *2012 IL App (1st) 113253WC-U*

December 28, 2012, Order Filed

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PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. No. 11-L-50354. Honorable Robert L. Cepero, Judge, Presiding.

DISPOSITION: Affirmed; Cause remanded.

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

OPINION BY: HUDSON

OPINION

ORDER

Held: (1) Commission's award of $44,401.81 in medical expenses is not against the manifest weight of the evidence; (2) Commission's decision that claimant's condition of ill-being is causally related to his employment is not against the manifest weight of the evidence; (3) Commission's award of temporary total disability benefits for the period from February 19, 2010, through March 17, 2010, is not against the manifest weight of the evidence; and (4) claimant's request for sanctions pursuant to *Illinois Supreme Court Rule 375(b)* would be denied.

Claimant, Rene Avila, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2008)) seeking benefits for injuries he allegedly sustained to his back on November 23, 2009, while employed by respondent, Elite Staffing, Inc. Following a hearing pursuant to *section 19(b)* of the Act (*820 ILCS 305/19(b)* [*2] (West 2008)), the arbitrator determined that claimant's current condition of ill-being is causally related to his employment. The arbitrator awarded claimant temporary total disability (TTD) benefits for the period from November 30, 2009, through March 17, 2010, a period of 15-3/7 weeks. See *820 ILCS 305/8(b)* (West 2008). In addition, the arbitrator awarded certain medical expenses. See *820 ILCS 305/8(a), 8.2* (West 2008). A majority of the Illinois Workers' Compensation Commission (Commission) modified the award of medical expenses, but otherwise 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, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980)*. On judicial review, the circuit court of Cook County confirmed the decision of the Commission. In this appeal, respondent challenges the Commission's findings with respect to medical expenses, causation, and TTD benefits. For the reasons set forth below, we affirm the decision of the Commission and remand the matter for further proceedings.

I. BACKGROUND

The following factual recitation is taken from the evidence presented at the arbitration hearing held on March 17, 2010, as well [*3] as the record on appeal.

Claimant testified through an interpreter that he began working for respondent, a temporary staffing agency, in September 2009. On November 23, 2009, while assigned to a maintenance position at a plastics company, claimant slipped and fell as he picked up a sheet of plastic. Claimant testified that he landed such that his back collided directly with the floor, resulting in immediate pain to his low back and right leg.

Shortly after the accident, claimant presented to the Clearing Clinic, where he was examined by Dr. Anita Carani. Claimant reported low back pain at level eight on a ten-point scale. Upon examination, Dr. Carani noted no signs of trauma to the lumbar spine. Tenderness to palpation was present, but straight leg raising was negative bilaterally and strength testing in the lower extremities was within normal limits. An X ray of the lumbar spine revealed degenerative changes, but no fractures. Dr. Carani diagnosed a contusion of the lumbar spine and prescribed Naproxen. She attributed the injury to claimant's work activities. Dr. Carani authorized claimant off of work the remainder of the day, but allowed him to return to full duty for his next scheduled [*4] work shift. Dr. Carani also instructed claimant to follow up in eight days and to call or return to the clinic if new or worsening symptoms develop. Claimant never sought additional treatment at the Clearing Clinic.

When claimant returned to work on November 24, 2009, he was assigned to a position on the packing line. According to claimant, this position was a standing position and required him to work a 12-hour shift. Claimant performed these duties on the two days immediately following the accident, but was then informed by a supervisor that no more work was available to him. Subsequently, the pain in his lower back and right leg worsened, and claimant presented to Dr. Fernando Perez at Marque Medicos.

Dr. Perez examined claimant on November 30, 2009. At that time, claimant rated his pain at level eight on a ten-point scale. Dr. Perez's notes indicate that claimant demonstrated "significant difficulty" when rising in and out of a chair and getting on and off the examination table. Dr. Perez noted tenderness to palpation over the paraspinal musculature of the bilateral lumbar spine and at the L4-L5 and L5-S1 levels. The lumbar spine active range of motion was severely decreased and [*5] painful in all ranges of motion. Straight-leg raising was positive bilaterally at 10 degrees, and muscle strength testing of the bilateral lower extremities was 4/5. X rays of the lumbar spine were negative. Dr. Perez diagnosed a lumbar sprain/strain, which he attributed to the work-related accident of November 23, 2009. Dr. Perez prescribed electrical muscle stimulation (EMS) and cryotherapy over the bilateral lumbar spine for pain control and muscle relaxation. In addition, he recommended physical therapy three times a week and authorized claimant completely off work.

On December 1, 2009, claimant underwent an initial evaluation for physical therapy. At that time, claimant complained of "constant 8-9/10 low back pain" which worsened with movement. The therapist developed a plan consisting of modalities for analgesic effect, gentle flexibility/mobility exercises, and progressive strengthening as tolerated. Thereafter, claimant underwent three sessions of physical therapy. Claimant testified that the physical therapy included walking on a treadmill and doing exercises with a stability ball and a rope. On December 7, 2009, Dr. Perez released claimant to return to work light duty effective [*6] December 9, 2009. The restrictions imposed included no lifting or carrying over 20 pounds, no pushing or pulling over 30 pounds, no overheard work, no bending or squatting, and no climbing. Claimant testified that respondent had no work available within these limitations.

Claimant continued to attend physical therapy, and on December 14, 2009, Dr. Perez re-examined claimant. At that time, claimant reported "significant improvement" in his condition, including a decrease in back pain, since beginning physical therapy. However, he still noted intermittent discomfort and mild pain in the lower back, especially after walking for a prolonged period of time. As a result of the progress claimant made, Dr. Perez opined that ongoing physical therapy was medically warranted, so he prescribed an additional two-week regimen consisting of active therapeutic exercises and physical medicine modalities for the promotion of functional abilities. Dr. Perez continued to impose work restrictions upon claimant, although he noted that respondent was unable to accommodate light-duty work. Dr. Perez concluded that claimant had yet to reach maximum medical improvement (MMI), but he anticipated releasing claimant [*7] to full-duty work within two weeks.

On December 22, 2009, claimant underwent a physical therapy reevaluation. At that time, claimant reported low back pain which he rated at level four on a ten-point scale. The therapist concluded that claimant had improved with physical therapy, but noted that overall conditioning and mechanics for functional activity was very poor. The therapist recommended that claimant continue a regimen of physical therapy three times a week as ordered by Dr. Perez "to improve overall condition and mechanics and in hopes of improving the patient's overall function."

Claimant returned to Dr. Perez's office on December 30, 2009. Although claimant acknowledged that, overall, he had experienced improvement in his condition since beginning treatment, he indicated that he had been feel-

ing "slightly worse" recently. In particular, claimant complained of continued lower back pain and discomfort on a frequent basis, made worse with general bending movements and prolonged sitting and standing. After examining claimant, Dr. Perez noted that while claimant had progressed overall, he had not progressed as anticipated. As such, Dr. Perez prescribed an MRI of the lumbar spine [*8] to rule out lumbar disc derangement. Dr. Perez also ordered an additional three weeks of physical therapy, consisting of "passive physical medicine modalities and active therapeutic exercises." Claimant's work restrictions remained unchanged. Dr. Perez also opined that claimant had yet to reach MMI.

Claimant underwent the MRI on January 5, 2010. The MRI showed evidence of mild degenerative disc disease from L2-3 through L5-S1; mild posterior disc bulges at L2-3, L4-5, and L5-S1; and a right paracentral disc herniation at L3-L4. Based on the MRI and claimant's subjective complaints, Dr. Perez's assessment was a lumbar intervertebral disc derangement. Dr. Perez referred claimant for an electrodiagnostic study to rule out lumbosacral radiculopathy.

On January 12, 2010, claimant underwent another physical therapy reevaluation. At that time, claimant reported minimal low back pain. In addition, the therapist reported that claimant had been feeling better since starting therapy. The therapist also noted in relevant part that claimant had been "tolerating activities here in physical therapy including Swiss ball squats and repetitive step-ups with 12-pound weight 20 times. He is doing squat [*9] overhead lifting with 5-kilogram weight 15 times. He is walking on a treadmill at 2.5 mph for 10 minutes." Noting that claimant has shown improvement since starting therapy, the therapist recommended that the treatment continue.

On January 21, 2010, claimant underwent an independent medical examination by Dr. Avi Bernstein pursuant to *section 12* of the Act (*820 ILCS 305/12* (West 2008)). Claimant reported that he was involved in a work-related injury on November 23, 2009, when he slipped on a piece of plastic and landed on his low back. At the time of the examination, claimant complained of pain in the mid-lumbar spine which was worsened by prolonged sitting and bending. Claimant denied radicular symptoms to the lower extremities. Claimant reported that he had been treating at Marque Medicos and had been prescribed "physical therapy where he was told to do walking activities and special exercises." Physical examination revealed that claimant was able to stand without difficulty. The straight-leg test in a seated position caused complaints of low back pain or a withdrawal response. Claimant indicated tenderness at about the L3 level and lower with palpation. Claimant's neurologic examination [*10] was unremarkable. In addition to examining claimant, Dr. Bernstein reviewed the January 5, 2010, MRI. Dr. Bernstein concluded that claimant suffered a lumbar strain or mild discogenic injury as the result of a work-related incident. Noting that claimant still had persistent pain complaints three months after the accident, Dr. Bernstein recommended a "formal physical therapy program" with conditioning and strengthening as well as anti-inflammatory medications. Dr. Bernstein did not support "further chiropractic care or passive modalities in physical therapy as [claimant] has been describing." Dr. Bernstein authorized claimant to perform light-duty work with a 25-pound lifting restriction. He opined that after an additional four weeks of physical therapy, claimant would be at MMI and capable of returning to his prior work without restriction. Dr. Bernstein did not believe that any further therapeutic modalities or diagnostic workups were indicated.

Meanwhile, on January 22, 2010, claimant underwent the electrodiagnostic study ordered by Dr. Perez. The study suggested an acute denervation of the right L4 nerve root. Based on the new study, Dr. Perez modified his diagnosis to a lumbar intervertebral [*11] disc derangement and a lumbar radiculopathy. Dr. Perez opined that both of these conditions were the result of the injury claimant sustained at work on November 23, 2009. Dr. Perez's treatment plan involved physical therapy "consisting of passive physical medicine modalities and active therapeutic exercises" at a frequency of three times per week. Dr. Perez continued to authorize light-duty work, and he referred claimant to a pain-management specialist.

On January 28, 2010, claimant attended a pain-management consultation with Dr. Andrew Engel of Medicos Pain and Surgical Specialists. At that time, claimant reported bilateral low back pain and occasional bilateral leg numbness and tingling. Claimant rated the pain at level four on a ten-point scale. Dr. Engel conducted a physical examination of claimant and reviewed the January 5, 2010, MRI and the January 22, 2010, EMG. Dr. Engel's diagnosis was threefold: (1) lumbar radiculopathy; (2) lumbar herniated disc; and (3) low back pain syndrome. Dr. Engel recommended continued conservative care, including additional physical therapy because "[t]his treatment has helped to decrease his pain." In addition, Dr. Engel prescribed a regimen of [*12] medication management, consisting of a nonsteroidal anti-inflammatory, a gastroprotective, and a muscle relaxant. Dr. Engel authorized claimant off work. Dr. Engel opined that the work-related accident of November 23, 2009, was the direct cause of claimant's symptoms.

On January 29, 2010, claimant underwent another physical therapy evaluation. At that time, claimant reported that his pain was down to level four on a ten-point

scale. Claimant associated the pain with certain movements and activities, including exercise. Claimant denied pain in his lower extremities. The therapist concluded that there is subjective and objective improvement compared with claimant's prior evaluation. As such, he recommended that claimant continue physical therapy while awaiting further medical intervention.

On February 11, 2010, claimant was examined by Stacy Pond, a physician's assistant at Medicos Pain and Surgical Specialists. Claimant reported that since being placed on medication, he experiences temporary symptomatic relief of his pain. Claimant stated that the pain occasionally increases with activity. Claimant also described bilateral lower extremity burning, which worsened particularly when lying [*13] down. Although claimant rated his pain at level four on a ten-point scale, overall, he felt that the pain was of the same severity since the injury. Following a physical examination, Pond diagnosed persistent severe lumbago with bilateral lumbar radiculopathy, right worse than left, and intractable pain despite conservative treatment with medications, physical therapy, and chiropractic treatment. Pond recommended proceeding to the "next level" of pain management. As such, she prescribed a right L3 and L4 transforaminal epidural steroid injection to address claimant's discogenic pain. Claimant was also instructed to continue physical therapy as tolerated and to remain off work. On February 17, 2010, Dr. Engel administered a right L3 and L4 transforaminal epidural injection pursuant to Pond's recommendation.

Meanwhile, a utilization review report was prepared by chiropractor Edwin Rabin on February 16, 2010. The issue before Rabin was whether the 29 sessions of physical therapy claimant had undergone as of February 1, 2010, were medically necessary and appropriate. Rabin certified 16 physical therapy sessions from November 30, 2009, through December 30, 2009, but declined to certify 13 [*14] sessions between January 1, 2010, and February 1, 2010. Rabin explained his finding as follows:

> "ODG [Official Disability Guidelines] supports a maximum of 10 physical therapy sessions for this condition noting that patients should be formally assessed after a 'six-visit clinical trial' to see if the patient is moving in a positive direction, no direction, or a negative direction (prior to continuing with the physical therapy). In this case, the claimant was assessed approximately two weeks after initiating care and was found to be making good progress in objective and functional testing. Therefore, continuation of physical therapy would have been warranted. However, at the next reexamination, this claimant's condition was found to be regressing and an MRI was recommended. Evidence-based guidelines for this condition would have been expected to be exhausted at this point, given the frequency of 3 visits per week. More importantly, the claimant had made not [*sic*] significant progress in objective or functional measures over the prior two weeks of frequent care. Providing more of the same treatment that has been shown to be ineffective is not supported by guidelines. The claimant would [*15] be expected to have begun a transition toward a self-directed home exercise program from a point earlier in care, and by this time should have been independent in a home exercise program."

Dr. Perez appealed this decision, claiming that the review did not comply with *section 8.7* of the Act (*820 ILCS 305/8.7* (West 2006)) and other regulatory requirements. On appeal, chiropractor David Cox certified 12 physical therapy sessions to the lumbar spine beginning November 30, 2009, but denied certification as to the remaining 17 physical therapy sessions.

A physical therapy reevaluation dated February 23, 2010, notes that claimant reported temporary improvement following the epidural injection. However, there was an exacerbation of pain after claimant climbed stairs in his apartment building. Claimant rated the pain at level five on a ten-point scale. The therapist noted that claimant was able to achieve full active range of motion with moderate pain on flexion more than extension. Claimant reported moderate tenderness with palpation at the right lower lumbar and upper sacral areas with mild pain on the left side. Claimant was unable to adequately lift his bilateral lower extremities secondary [*16] to pain. Noting that claimant complains of moderate pain depending on the intensity and nature of the activity, the therapist recommended continued physical therapy and encouraged claimant to participate in a home-exercise program on a regular basis.

Pond saw claimant again on February 25, 2010. Claimant presented with a pain score of 5-6/10 after undergoing a right L3 and L4 transforaminal epidural steroid injection on February 17, 2010. Claimant reported that the injection decreased the level of pain to 2/10 for about three days. However, it subsequently increased to about 9-10/10 after claimant lifted a bag of garbage. The pain diminished somewhat after that incident, but it still

remained constant and severe. Claimant indicated that the pain is located in the right low back and right leg. Following an examination, Pond recommended a Medrol Dosepak to calm the current exacerbation of pain. Pond wanted to reassess claimant's condition in one week before deciding whether to authorize a second injection. She authorized claimant to remain off work "in an effort to not further aggravate his condition."

Claimant returned to see Pond on March 4, 2010, requesting authorization to undergo [*17] the second injection. Claimant noted that he experienced a 30-40% improvement with the first injection, although there was some regression of pain after increased activity. Pond agreed that it was appropriate to proceed with the second injection. Further, given the fact that no light-duty work was available to claimant and so as not to exacerbate his condition, Pond continued to authorize claimant off work. Dr. Engel performed the second injection on March 8, 2010, consisting of a right L3 and L4 transforaminal epidural steroid injection. Claimant stated that the second injection only provided temporary relief.

At the arbitration hearing, claimant testified that he continues to experience pain in his lower back and right leg. Claimant testified that although he takes painkillers, they provide little relief. Claimant denied any injuries to his lower back prior to the accident on November 23, 2009. Claimant stated that he is still authorized to be off work.

Relying on the opinions of the treating and examining physicians, the arbitrator concluded that claimant's current condition of ill-being as it relates to his back is causally related to his industrial accident of November 23, 2009. [*18] In addition, the arbitrator found that respondent was responsible for $18,869.31 in medical expenses. See *820 ILCS 305/8(a)*, *8.2* (West 2008)). The arbitrator disallowed certain medical expenses on the basis that they were not reasonable or necessary to cure or relieve claimant from the effects of the injury he sustained on November 23, 2009. In particular, the arbitrator found that none of the therapy claimant received at Marque Medicos after December 30, 2009, "resulted in any lasting improvement in [claimant's] condition, and in fact, as a result of this treatment [claimant's] condition worsened." The arbitrator also found that respondent was not required to pay for follow-up visits with Dr. Perez on four dates in January and February 2010 because the certified records from Marque Medicos did not include reports regarding any examination and findings on those dates. Finally, based on the opinions of Drs. Perez, Engel, and Bernstein, the arbitrator determined that claimant was temporarily totally disabled for the period from November 30, 2010, through March 17, 2010, a period of 15-3/7 weeks. See *820 ILCS 305/8(b)* (West 2008).

A divided Commission modified the decision of the arbitrator [*19] to reflect an award of medical expenses in the amount of $44,401.81, of which $32,100.57 is subject to the medical fee schedule (see *820 ILCS 305/8.2* (West 2008)) and $12,301.21 is awarded with the medical fee schedule applied. This modified award included, *inter alia*, charges of $29,979 from Marques Medicos for care and treatment from November 30, 2009, through February 19, 2010, subject to the medical fee schedule. In all other respects, the Commission affirmed and adopted the decision of the arbitrator. The Commission remanded the matter for further proceedings in accordance with *Thomas, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794*. Commissioner Nancy Lindsay concurred in part and dissented in part. She would have disallowed physical therapy expenses from Marques Medicos after December 30, 2009, on the basis that there was no evidence that such expenses were reasonable or necessary. In addition, she opined that the majority's award included charges for office visits with Dr. Perez for which there were no corroborating medical records in evidence. On judicial review, the circuit court of Cook County confirmed the decision of the Commission. This appeal ensued.

II. ANALYSIS

A. Medical Expenses

On appeal, respondent [*20] initially challenges several aspects of the Commission's medical expense award. Medical expenses are governed by *section 8(a)* of the Act (*820 ILCS 305/8(a)* (West 2008)). That provision states in relevant part:

> "The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to *Section 8.2*, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2008).

The claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under *section 8(a)*. *Westin Hotel v. Industrial Comm'n, 372 Ill. App. 3d 527, 546, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007)*. "Questions as to the reasonableness of medical charges or their causal rela-

tionship to a work-related injury are questions of fact to be resolved by the Commission." *Max Shepard, Inc. v. Industrial Comm'n, 348 Ill. App. 3d 893, 903, 810 N.E.2d 54, 284 Ill. Dec. 401 (2004)*. The Commission's [*21] decision on a factual matters will not be disturbed on appeal unless it is against the manifest weight of the evidence. *F & B Manufacturing Co. v. Industrial Comm'n, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill. Dec. 173 (2001)*. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n, 970 N.E.2d 16, 361 Ill. Dec. 16, 2012 IL App (3d) 110077WC, ¶ 15.*

With respect to the award of medical expenses, respondent first contends that there is no evidence in the record establishing that claimant's physical therapy and treatment between December 31, 2009, and January 20, 2010 (the day before claimant underwent the independent medical examination by Dr. Bernstein), was reasonable and necessary to cure or relieve him from the effects of the injury sustained at work on November 23, 2009. Respondent notes that on December 30, 2009, despite weeks of therapy, claimant reported that his condition had worsened. Nevertheless, physical therapy continued to be prescribed, all of which, respondent asserts, did nothing to improve claimant's condition.

The record shows that while claimant reported that he felt "slightly worse" when he saw [*22] Dr. Perez on December 30, 2009, Dr. Perez also noted that, overall, claimant's condition had improved since beginning treatment. Nevertheless, Dr. Perez concluded that claimant had not progressed as anticipated. As a result, he ordered an MRI of the lumbar spine to rule out lumbar disc derangement. He also prescribed an additional three weeks of physical therapy. Based on the result of the MRI, which demonstrated a lumbar intervertebral derangement, Dr. Perez ordered an EMG to rule out lumbosacral radiculopathy. In the meantime, claimant underwent a physical therapy re-evaluation on January 12, 2010. At that time, the therapist noted that while claimant continued to have complaints of back pain, he had shown improvement since starting therapy, and he therefore recommended that the treatment continue. Based on this evidence, the Commission could have reasonably concluded that while claimant continued to have complaints of back pain despite several weeks of physical therapy, his overall condition improved during this time and thus continued therapy was appropriate while additional diagnostic tests were conducted to pinpoint the source of claimant's complaints. As such, we cannot say [*23] that the Commission's award of medical expenses from December 31, 2009, through January 20, 2010, is against the manifest weight of the evidence.

Respondent also points out that on January 21, 2010, claimant saw Dr. Bernstein for an independent medical examination. Noting that claimant still had persistent pain complaints months after the accident, Dr. Bernstein recommended a "formal" physical therapy program with conditioning and strengthening. In addition, Dr. Bernstein stated that he did not support "further chiropractic care or passive modalities in physical therapy as [claimant] has been describing." Dr. Bernstein anticipated that claimant would be at MMI after four additional weeks of physical therapy. Based on Dr. Bernstein's report, respondent claims that the physical therapy claimant underwent after December 30, 2009, and through January 20, 2010, "was not in line with the active physical therapy recommended by Dr. Bernstein." Respondent further contends that "[i]t can also be presumed the physical therapy [claimant] underwent after the January 21, 2010 evaluation was not the type recommended by Dr. Bernstein because [claimant] did not achieve MMI within four weeks as opined [*24] by Dr. Bernstein."

Respondent does not explain how it would be possible for claimant's physical therapy regimen to be "in line" with Dr. Bernstein's recommendation prior to the date claimant actually saw Dr. Bernstein for an examination. Moreover, respondent does not direct us to any treatment program developed by Dr. Bernstein that he would accept as appropriate. We point out that, in concluding that claimant's therapy consisted solely of chiropractic care and passive modalities, Dr. Bernstein relied on claimant's description of his therapy. However, there is no evidence that Dr. Bernstein actually reviewed claimant's physical therapy treatment records. The Commission did review these records and determined that, contrary to Dr. Bernstein's finding that claimant's therapy consisted of only passive modalities, claimant's care involved "active modalities/therapy." In support of this finding, the Commission relied on claimant's testimony that during therapy he walked and underwent a series of exercises involving a stability ball and a rope. In addition, the Commission cited the January 12, 2010, physical therapy re-evaluation, which indicated that claimant was performing Swiss ball squats, [*25] doing repetitive step-ups with a 12-pound weight, performing squat overhead lifting with a 5-kilogram weight, and walking on a treadmill for 10 minutes. We also note that Dr. Perez repeatedly prescribed "active" therapeutic exercises for claimant. Accordingly, respondent's reliance on Dr. Bernstein's report is not well taken.

Respondent also argues that the Commission erred in finding that expenses associated with four of claimant's follow-up visits with Dr. Perez in January and February 2010 were reasonable and necessary. According to respondent, the certified records from Marque Medicos for the dates in question did not include any reports re-

garding any examination or findings on these dates. We disagree. The dates of service in question are January 13, 18, and 25, 2010, and February 4, 2010. The record contains a "daily progress note" from each of those four dates indicating that claimant presented to Marque Medicos for therapy on said dates and was examined by Dr. Perez. Furthermore, the note from each date lists claimant's subjective complaints, Dr. Perez's objective findings, his assessment of claimant's condition, and the treatment plan. Accordingly, we conclude that the Commission's [*26] award of medical expenses for these visits is not against the manifest weight of the evidence.

Finally, respondent argues that the following medical care was not reasonable or necessary to cure or relieve claimant from the effects of his work injury: (1) claimant's visits with Medicos Pain and Surgical Specialists; (2) claimant's two epidural steroid injections; and (3) claimant's treatment on December 5, 2009, from a biller known as Specialized Radiology Consultants. According to respondent, the Commission's approval of expenses for this treatment "is in direct conflict with the credible IME report of Dr. Bernstein where he opined [claimant] required no further treatment other than a formal four week regimen of physical therapy."

Dr. Bernstein did not examine claimant until January 21, 2010. Respondent does not explain why Dr. Bernstein's report that no further treatment was required is relevant to assessing the propriety of a medical charge occurring before the date of Dr. Bernstein's examination. Moreover, Dr. Bernstein's report does not reference whether the charge from Specialized Radiology Consultants, which apparently was for the interpretation of a diagnostic film, is appropriate. [*27] Because respondent does not explain why the treatment from Specialized Radiology Consultants was not necessary or reasonable to cure or relieve the effects of claimant's accidental injury, we are compelled to conclude that the Commission's award of this expense is not against the manifest weight of the evidence. With respect to the other two categories of medical expenses outlined in the previous paragraph, the Commission was presented with conflicting medical evidence regarding the necessity of such treatment. As respondent correctly notes, Dr. Bernstein was of the opinion that, other than four additional weeks of physical therapy, claimant required no further treatment. However, claimant's treating physicians thought otherwise. In particular, we note that on January 28, 2010, claimant consulted Dr. Engle of Medicos Pain and Surgical Specialists for pain management. At that time, claimant was prescribed various medications. Claimant returned to Medicos Pain and Surgical Specialists on February 11, 2010. Claimant reported that although he experienced temporary symptomatic relief of his pain with the medications, the pain increased with activity. As a result, Pond recommended proceeding [*28] to the "next level" of pain management, which consisted of the epidural injections, which were administered in February and March 2010. It is the function of the Commission to judge the credibility of the witnesses, determine the weight to be given to their testimony, and resolve conflicting medical evidence. *Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 435-36, 943 N.E.2d 153, 347 Ill. Dec. 863 (2011)*. Here, the Commission attributed more weight to the opinions of claimant's treating physicians than it did to the independent medical examiner. Given the Commission's role in resolving conflicts in the evidence, we cannot say that its finding that the foregoing medical expenses were necessary and reasonable to cure or relieve the effects of claimant's accidental injury is against the manifest weight of the evidence.

B. Causation

Next, respondent asserts that the Commission's finding that claimant's current condition of ill-being is causally related to his employment is against the manifest weight of the evidence. Respondent does not develop this argument in its opening brief or cite any authority in support of this argument, resulting in forfeiture of this issue on appeal. See *Illinois Supreme Court Rule 341(h)(7)* [*29] (eff. July 1, 2008) (requiring the appellant's brief to include the contentions of the appellant and the reasons therefor); *People v. Brown, 363 Ill. App. 3d 838, 840 n.1, 842 N.E.2d 1141, 299 Ill. Dec. 789 (2005)*. Respondent attempts to clarify its position regarding causation in its reply brief, arguing that the basis for this argument is that claimant's complaints "were a product of unnecessary, unreasonable and ineffective overtreatment." This argument is also subject to forfeiture. See *Illinois Supreme Court Rule 341(h)(7)* (eff. July 1, 2008) (noting that arguments raised for the first time in a reply brief are considered waived); *Illinois Health Maintenance Organization Guaranty Ass'n v. Department of Insurance, 372 Ill. App. 3d 24, 45, 864 N.E.2d 798, 309 Ill. Dec. 557 (2007)*. Even absent forfeiture, we would reject respondent's position as it is premised on the propriety of the Commission's award of medical care, which we have already determined was not erroneous.

C. TTD Benefits

Respondent next challenges the Commission's award of TTD benefits. Respondent does not dispute that claimant is entitled to TTD benefits from November 30, 2009, through February 18, 2010. However, respondent maintains that TTD benefits for the period from February 19, 2010, [*30] through March 17, 2010, should not have been awarded.

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, 372 Ill. App. 3d at 542.* The fact that the employee has the ability to do light work does not necessarily preclude a finding of temporary total disability. *Whitney Productions, Inc. v. Industrial Comm'n, 274 Ill. App. 3d 28, 31, 653 N.E.2d 965, 210 Ill. Dec. 770 (1995).* 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, 834 N.E.2d 583, 296 Ill. Dec. 26 (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, 741 N.E.2d 1144, 251 Ill. Dec. 966 (2000).* Once the injured employee has reached MMI, he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 289 Ill. Dec. 794 (2004).* The period during which an injured employee [*31] is entitled to TTD benefits is a factual inquiry subject to the manifest weight standard of review. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n, 387 Ill. App. 3d 244, 256-57, 899 N.E.2d 365, 326 Ill. Dec. 148 (2008).*

Respondent insists that the Commission's award of TTD benefits for the period from February 19, 2010, through March 17, 2010, is premised on "the dubious opinions of Dr. Perez and Dr. Engel finding [claimant] continued to be temporarily and totally disabled." Respondent argues that the Commission made this determination in error. Respondent relies on the opinion of Dr. Bernstein, who, on January 21, 2010, opined that after four weeks of formal physical therapy, claimant would be at MMI and able to return to full duty work without restrictions. Respondent reasons that had defendant followed Dr. Bernstein's treatment regimen, he would have been at MMI by February 19, 2010.

We cannot say that the Commission's finding that claimant remained temporarily totally disabled through March 17, 2010, is against the manifest weight of the evidence. The record demonstrates that, as of the date of the arbitration hearing, claimant had not been released to full-duty work. Notably, when claimant was seen at [*32] Medicos Pain and Surgical Specialists on February 25, 2010, Pond authorized claimant to remain off work "in an effort to not further aggravate his condition." Similarly, following an examination on March 4, 2010, Pond reiterated this finding, noting additionally that no light-duty work was available for claimant. Indeed, none of claimant's treating medical providers indicated that claimant had reached MMI. To the contrary, the medical evidence establishes that through March 2010, claimant continued to experience various symptoms connected with the work-related accident for which he was still being treated. While Dr. Bernstein, on January 21, 2010, anticipated claimant would reach MMI following four weeks of "formal" physical therapy, he did not develop a treatment plan that he viewed as appropriate. As such, the Commission concluded that the therapy claimant was receiving fell within the parameters of what Dr. Bernstein recommended. At best, this case presents a situation of conflicting medical evidence regarding the issue of whether claimant is entitled to TTD benefits after February 18, 2010. As noted elsewhere, it is the function of the Commission to judge the credibility of the [*33] witnesses, determine the weight to be given to their testimony, and resolve conflicting medical evidence. *Tower Automotive, 407 Ill. App. 3d at 435-36.* Based on the record before us, we are unable to conclude that the Commission's decision that claimant had yet to reach MMI and therefore was entitled to TTD benefits up to the date of the arbitration hearing is against the manifest weight of the evidence.

D. Sanctions

Claimant asks us to impose sanctions against respondent pursuant to *Illinois Supreme Court Rule 375(b)* (eff. Feb. 1, 1994) for bringing a frivolous appeal. Claimant contends that the instant appeal was not undertaken in good faith and was only intended to cause unnecessary delay, needlessly increasing the cost of litigation of this case. However, given the conflicting medical evidence of record, as well as the utilization review report, we decline claimant's request for sanctions.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission. This cause is remanded pursuant to *Thomas, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794.*

Affirmed; Cause remanded.

WILFREDO REYES, Appellant and Cross-Appellee v. THE WORKERS' COMPENSATION COMMISSION et al. (Millard Refrigerated Services, Appellees and Cross-Appellants).

No. 2-11-0715WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, WORKERS' COMPENSATION COMMISSION DIVISION

2012 Ill. App. Unpub. LEXIS 1478; 2012 IL App (2d) 110715WC-U

June 25, 2012, Order Filed

NOTICE: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

PRIOR HISTORY: [*1]
Appeal from Circuit Court of Kane County. No. 10MR606. Honorable Thomas E. Mueller, Judge Presiding.

DISPOSITION: Affirmed in part and reversed in part; award reinstated.

JUDGES: JUSTICE McCULLOUGH delivered the judgment of the court. Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

OPINION BY: McCULLOUGH

OPINION

ORDER

Held: The Commission's award of prospective medical expenses was not against the manifest weight of the evidence and the circuit court erred by reversing that portion of the Commission's decision. Also, the Commission's awards of temporary total disability benefits and medical expenses for claimant's cervical condition of ill-being were supported by sufficient evidence and not against the manifest weight of the evidence.

On May 7, 2009, claimant, Wilfredo Reyes, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2008)), seeking benefits from employer, Millard Refrigerated Services. Following a hearing, the arbitrator determined claimant sustained accidental injuries that arose out of and in the course of his employment on March 28, 2009, and awarded him (1) 43-2/7 weeks' temporary total disability (TTD) benefits and [*2] (2) reasonable and necessary medical expenses of $45,256.37. The arbitrator also ordered employer to pay the reasonable costs associated with the cervical surgery prescribed by one of claimant's doctors.

On review, the Workers' Compensation Commission (Commission) modified portions of the arbitrator's decision by correcting specific factual findings and reducing her award of medical expenses. The Commission's modified medical award totaled $42,953.41, with one commissioner dissenting as to the award of expenses relating to the epidural and trigger point injections claimant received. The Commission otherwise affirmed and adopted the arbitrator's decision. It also remanded the case to the arbitrator for a determination of a further amount of compensation for temporary or permanent disability. See *Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980)*. On judicial review, the circuit court of Kane County reversed the Commission's prospective medical award as being against the manifest weight of the evidence but otherwise confirmed the Commission's decision.

Claimant appeals, arguing the Commission's award of prospective medical expenses for cervical spine sur-

gery was not against [*3] the manifest weight of the evidence and the circuit court erred by reversing that award. Employer cross-appeals, arguing (1) claimant failed to properly allege a cervical injury and (2) the Commission's awards of medical expenses and TTD benefits were against the manifest weight of the evidence. We affirm in part and reverse in part the circuit court's decision, and reinstate the Commission's original prospective medical award.

The parties are familiar with the evidence presented and we discuss it only to the extent necessary to put their arguments in context. On appeal, claimant argues the circuit court erred by reversing the Commission's prospective medical award. He contends the Commission's award of expenses for the cervical spine surgery recommended by Dr. Martin Herman was appropriate and not against the manifest weight of the evidence. Claimant argues the Commission's finding of a causal connection between his work accident and his cervical condition of ill-being and its finding that he was in need of the cervical surgery were supported by sufficient evidence.

Whether a causal connection exists between a claimant's work accident and his condition of ill-being "is a question of [*4] fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence." *City of Springfield v. Illinois Workers' Compensation Comm'n, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081, 327 Ill. Dec. 333 (2009)*. It is the Commission's function to judge witness credibility and resolve conflicts in the medical evidence. *City of Springfield, 388 Ill. App. 3d at 315, 901 N.E.2d at 1081*. Where the record contains sufficient factual evidence to support the Commission's decision, it will not be set aside on appeal. *City of Springfield, 388 Ill. App. 3d at 315, 901 N.E.2d at 1081*.

Additionally, "[m]edical testimony is not essential to support the conclusion that an accident caused a claimant's condition of ill-being." *University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906, 912, 851 N.E.2d 72, 78, 303 Ill. Dec. 174 (2006)*. "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 causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982)*.

Here, [*5] the Commission found a causal connection between claimant's work accident and his cervical condition of ill-being. To support its causation finding, it relied, in part, on the chain of events following claimant's work accident. Evidence in the record supports that finding, showing claimant began experiencing neck and upper back pain on March 28, 2009, after spending an entire day at work lifting boxes. Clamant testified he began having neck pain at work on that date. The following morning, he was unable to move his neck due to intense pain. The record fails to show claimant was symptomatic prior March 28, 2009. Instead, it reveals consistent reports to his medical providers that he experienced neck pain after working on March 28, as well as constant complaints to each of his providers about continuing neck and upper back pain after that date.

To support its causation finding, the Commission also relied upon Dr. Herman's medical records, concluding that although Dr. Herman's records did not "contain a specific causation opinion," it was "reasonable to infer that Dr. Herman found causation" based on Dr. Herman's recorded history, findings, and recommendations. The Commission is entitled [*6] to draw reasonable inferences from the evidence presented and committed no error.

Evidence showed, on August 14, 2009, Dr. Herman authored a letter addressed to Dr. Barry Ring, another of claimant's medical providers. In that letter, Dr. Herman noted as follows:

> "[Claimant] works as a forklift driver at [employer]. He was injured at work lifting boxes. He was carrying two at a time and they weighed 30 pounds a piece. Picking up boxes is not a part of his routine but he was required by his supervisor to do it on this particular day, which was March 28, 2009. He began to develop pain in his neck radiating towards his rhomboid region and even up towards the back of his head."

Dr. Herman went on to describe claimant's medial treatment and noted that claimant "had continued pain into his neck, shoulder[,] and back of his shoulder." He found claimant's cervical magnetic resonance imaging (MRI) scan demonstrated "that he ha[d] an L3-4 disc herniation towards the left with some bony spurs." Dr. Herman's impression was that claimant had "a left C3-4 disc herniation with osteophytes, foraminal stenosis and nerve root compression." He noted conservative treatment for claimant had failed and recommended [*7] a cervical discectomy and fusion at C3-4.

Although neither Dr. Herman nor claimant's other medical providers gave an express opinion regarding causation, the evidence presented was sufficient for the Commission to conclude that claimant's cervical condition of ill-being was causally connected to his March 2009, work accident. The Commission drew reasonable

inferences from the record and its causation decision was not against the manifest weight of the evidence.

The Commission also found the cervical surgery recommended by Dr. Herman to be reasonable and necessary. Under the Act, a claimant is entitled to benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2008). "Prescribed services not yet performed or paid for are considered to have been 'incurred' within the meaning of the statute." *City of Springfield, 388 Ill. App. 3d at 317, 901 N.E.2d at 1082.* "Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, [*8] and its determination will not be overturned on review unless it is against the manifest weight of the evidence." *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011).*

Here, Dr. Herman recommended claimant undergo "an anterior cervical discectomy and fusion at C3-4." He noted claimant underwent conservative treatment that was unsuccessful and he felt surgical intervention was appropriate. The Commission affirmed and adopted the arbitrator's decision, finding claimant was entitled to undergo the surgery recommended by Dr. Herman. The arbitrator based her finding on the failure of conservative measures, the cervical MRI, Dr. Herman's opinions, and the utilization review report that employer submitted which certified the surgery as medically necessary.

The decisions of both the arbitrator and the Commission were supported by sufficient factual evidence. The Commission's award of prospective medical expenses was not against the manifest weight of the evidence. The circuit court reversed the Commission's prospective medical award, stating only that it was against the manifest weight of the evidence. We disagree and find [*9] the court erred in reversing that portion of the Commission's decision. The Commission's award is reinstated.

On cross-appeal, employer argues claimant was not entitled to benefits under the Act for his cervical condition of ill-being because, in his application for adjustment of claim, he alleged only a lifting injury to his "low back" and never amended his application to claim a cervical injury. As claimant points out, employer has forfeited this claim by failing to support his contention with citations to legal authority. See *Ill. S. Ct. R. 341(h)(7)* (eff. July 1, 2008); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n, 389 Ill. App. 3d 191, 208, 904 N.E.2d 1122, 1137, 328 Ill. Dec. 612 (2009)* (Arguments on appeal are forfeited when a party fails to support them with citation to authority). Moreover, employer's claim is without merit as the record shows it fully participated in the arbitration hearing, made no objection to the presentation of evidence related to claimant's neck injury, and was prepared to address and refute claimant's claim for benefits as it related to his cervical injury.

Also on cross-appeal, employer also argues the Commission's awards of medical expenses and TTD [*10] benefits were not supported by the evidence. We first address employer's challenge to the Commission's award of medical expenses. Specifically, employer argues the Commission erred by finding claimant entitled to (1) reimbursement for chiropractic expenses beyond 12 chiropractic sessions and (2) expenses related to every epidural and trigger point injection claimant received.

As stated, the Act entitles a claimant to receive benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2008). Again, the award of medical expenses is a question of fact for the Commission and its decision will not be set aside unless it is against the manifest weight of the evidence. *Absolute Cleaning, 409 Ill. App. 3d at 470, 949 N.E.2d at 1165.* "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Otto Baum Co., Inc. v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100959WC, P13, 960 N.E.2d 583, 586, 355 Ill. Dec. 701 (2011).*

Here, [*11] the record shows claimant received chiropractic care from April 6 to August 5, 2009, totaling expenses in the amount of $9,058.30. Employer argues claimant is entitled to receive expenses for only the first 12 chiropractic treatment sessions. It relies on the May 2009 recommendations of Dr. Sean Salehi, who evaluated claimant at employer's request, that claimant complete 12 sessions of chiropractic or physical therapy and the utilization review which certified only claimant's chiropractic treatment from April 8 to 29, 2009, (totaling 12 visits) as medically necessary. The arbitrator found claimant entitled to reimbursement for the full amount of claimed chiropractic expenses ($9,058.30). However, the Commission reduced that award to $6,755.34, finding claimant entitled to reimbursement for only three months of chiropractic care. It based its decision on Dr. Salehi's opinion in October 2009, that "physical therapy for up to three months post-injury" was "medically appropriate."

While both employer and the Commission relied upon Dr. Salehi's opinions, the Commission based its

decision upon Dr. Salehi's most recent opinion and evaluation. Employer points to the utilization review which [*12] certified only 12 chiropractic sessions as medically necessary; however, a utilization review is not definitive and, instead, must be considered "along with all other evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical bills or treatment." *820 ILCS 305/8.7(i)* (West 2008).

The Commission's award of medical expenses for three months of chiropractic treatment was supported by Dr. Salehi's opinions. Although other evidence was conflicting, it was within the province of the Commission to resolve those conflicts. We find no error in the Commission's award of chiropractic expenses.

Employer also challenges the Commission's award of expenses for most of the epidural and trigger point injections claimant received. The record shows, on May 15, June 5, July 10, and August 7, 2009, claimant received injections from Dr. Ring. Claimant testified he felt relief from his pain when he received the injections but they failed to provide him with any lasting relief from his symptoms. Employer argues claimant is only entitled to expenses related to his initial lumbar and cervical epidural injections. It points to claimant's testimony [*13] that the injections provided no lasting relief; the utilization review which certified only claimant's May 15, 2009, epidural steroid injection and his June 5, 2009, cervical epidural steroid injection as medically necessary; and the failure of claimant's medical record to document any objective or subjective improvement following the initial injections.

In its decision, the Commission specifically affirmed the arbitrator's award of "expenses relating to the epidural and trigger point injections [claimant] underwent during the spring and summer of 2009." The Commission noted Dr. Salehi "made no adverse comments concerning the injections" even though he "specifically commented on the propriety of [claimant's] chiropractic care." Further, the Commission found "it was reasonable for [claimant] and his physicians to explore conservative measures, such as injections, before giving consideration to surgery." The Commission appropriately weighed the conflicting evidence and an opposite conclusion is not clearly apparent. Its award of expenses related to claimant's injections is not against the manifest weight of the evidence.

Finally, we address employer's challenge to the Commission's TTD [*14] award. "An employee is temporarily totally disabled from the time that an injury incapacitates her from work until such time as she is as far recovered or restored as the permanent character of her injury will permit." *Absolute Cleaning, 409 Ill. App. 3d at 471, 949 N.E.2d at 1166.* An injured employee's eligibility for TTD benefits ends once his physical condition stabilizes or he reaches maximum medical improvement. *Absolute Cleaning, 409 Ill. App. 3d at 471, 949 N.E.2d at 1166.* "The determination of the period of time during which a claimant is temporarily and totally disabled is a question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Absolute Cleaning, 409 Ill. App. 3d at 471, 949 N.E.2d at 1166.*

Here, the Commission affirmed the arbitrator's award of 43-2/7 weeks' TTD benefits for intermittent periods from April 21, 2009, through the date of trial on April 8, 2010. The arbitrator based her award on claimant's testimony regarding the dates he worked following his March 28, 2009, accident. Employer argues the evidence presented fails to support the Commission's award [*15] and it should be reversed or modified. It contends claimant testified regarding the days he returned to work but did not offer any evidence of pain complaints on those specific days. Employer also points to an off-work slip Dr. Ring gave claimant, stating he could return to work on July 20, 2009. Finally, it notes Dr. Salehi's opinion on October 27, 2009, that claimant could return to full-duty work.

In awarding TTD benefits through the date of the arbitration hearing, the Commission determined claimant had not reached maximum medical improvement and his condition had not stabilized. Evidence in the record supports the Commission's decision. Evidence showed claimant began experiencing neck and upper back pain after his work accident on March 28, 2009. Thereafter he consistently reported pain to his medical providers. In April and May 2009, both Dr. George Pappas and Dr. Salehi recommended claimant perform only light or modified-duty work. Dr. Ring also provided claimant with off-work slips, the last one stating he could return to work on July 20, 2009. However, on that date, claimant saw Dr. Hamid Kahn who diagnosed claimant with cervical and low back strains and recommended light-duty [*16] work with no lifting over 10 pounds. Evidence further showed claimant experienced no relief from his symptoms with conservative care and, ultimately, Dr. Herman recommended surgical intervention which claimant had not yet undergone at the time of arbitration.

Again, although the record contains conflicting medical evidence, namely Dr. Salehi's October 2009 opinion that claimant could return to full-duty work, it was within the province of the Commission to weigh the evidence. The record shows support for the Commission's decision regarding TTD benefits and its TTD award was not against the manifest weight of the evidence.

For the reasons stated, we reverse the circuit court's reversal of the Commission's prospective medical award and reinstate that award. We otherwise affirm the court's decision to confirm the remainder of the Commission's decision.

Affirmed in part and reversed in part; award reinstated.

EDMAR HEATING AND COOLING, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Charles Szymczak, Appellee).

2-10-1250WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, WORKERS' COMPENSATION COMMISSION DIVISION

2011 IL App (2d) 101250WC-U; 2011 Ill. App. Unpub. LEXIS 3219

December 21, 2011, Order Filed

NOTICE: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

PRIOR HISTORY: [*1]

Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois. Circuit No. 10-MR-1080. Honorable Christopher C. Starck, Judge, Presiding.

JUDGES: JUSTICE HOLDRIDGE delivered the judgment of the court. Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

OPINION BY: HOLDRIDGE

OPINION

ORDER

Held: (1) The Commission's finding that the claimant proved that his lower back injury was causally related to a work-related accident was not against the manifest weight of the evidence; (2) the Commission's findings that certain medical treatments provided after August 21, 2007, were reasonable and necessary and that the employer must pay for those treatments and for certain prospective medical treatments were not against the manifest weight of the evidence; (3) the exclusion of a Utilization Review Report offered by the employer was not an abuse of discretion; and (4) portions of the appellee's brief would be stricken for failure to file a cross appeal.

The claimant, Charles Szymczak, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (*820 ILCS 305/1 et seq.* (West 2006)) seeking benefits for a lower back injury he claimed to [*2] have sustained while working for Edmar Heating and Cooling (employer). Following a hearing, an arbitrator found that the claimant had failed to prove that his current condition of ill-being was causally related to a work-related accident and denied benefits. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission reversed the arbitrator's decision, with one Commissioner dissenting. The claimant sought judicial review of the Commission's decision in the circuit court of Lake County, which confirmed the Commission's decision. This appeal followed.

FACTS

The claimant worked in the heating and air conditioning business since June 1986 as the owner, president, and employee of the employer. He filed a workers' compensation claim against the employer for injuries he claimed to have sustained in an unwitnessed, work-related accident on June 20, 2006. On that date, the claimant was setting an air conditioner in place on two rails attached to a building when the unit shifted, requiring him to catch it before it fell. The claimant estimated that the air conditioner weighed between 250 and 300 pounds. As he caught the air [*3] conditioner, the claimant felt pain in his lower back. The claimant completed an accident report and returned it to his insurance broker on June 26, 2006.

The claimant had been treated for chronic low back pain several times prior to his June 20, 2006, work accident. From 1994 to 2003, the claimant was treated sporadically by Dr. Marshall Dickholtz, a chiropractor. For example, in December 1994, the claimant experienced pain in his lower back for three days and was assessed with chronic lower back pain. On August 3, 1995, Dr. Dickholtz questioned whether the claimant had a pinched nerve because he was experiencing numbness in his left leg and thigh for four days.

The claimant treated with Dr. Dickholtz for chronic low back pain and other problems every year from 1997 through 2003. For example, on January 8, 1998, the claimant returned to Dr. Dickholtz complaining of "pain in low back." In 1999, the claimant was involved in a car accident for which he sought treatment. He reported feeling numbness in his left leg which he continued to experience for many years thereafter. On March 21, 2000, the claimant complained of headaches, numbness in his right hand and left leg, and pain in his "right [*4] low back." Three weeks later, he complained of pain in his "left lower dorsal." He reported continued lower and middle back pain in September and October of 2000. Several times in 2001, the claimant complained of lower back pain which he alternately described as "strong," "shooting," and as radiating into his leg. He also complained of sciatica, nerve pain in hands, and intermittent leg pain. On July 2, 2001, a therapist cautioned the claimant to take "care with golfing." On September 25, 2001, the therapist noted "occasional low back pain-leg pain greatly diminished (2 weeks) *** low back and left leg pain." Three weeks later, the claimant returned with "intermittent pain, low back, sore back/lats and calves from golfing," which diminished somewhat by December 2001. On February 15, 2002, Dr. Dickholtz's notes reflected that the claimant's low back pain had improved. However, on January 5, 2003, the claimant suffered a lower back injury after lifting 80 pounds and returned for treatment. The chiropractic records that were introduced into evidence do not include any records of chiropractic treatment after 2003.

Following the June 20, 2006, work accident, the claimant returned to Dr. [*5] Dickholtz. Dr. Dickholtz gave the claimant chiropractic treatment until October 2006, when the claimant underwent treatment for a kidney stone. The claimant resumed chiropractic treatment resumed in December 2006 and continued through March 2007 when the claimant's workers' compensation carrier denied further treatment. The claimant continued working throughout this period.

At the employer's request, Dr. Julie Wehner, an assistant professor of spine surgery at Loyola University Medical Center in Chicago, performed a Section 12 evaluation of the claimant. Dr. Wehner recommended that the claimant undergo a lumbar MRI, which was performed on April 5, 2007. After reviewing the MRI results, Dr. Wehner opined that the claimant had a disc protrusion at L4-L5 on the right side, resulting in a moderate amount of spinal stenosis. She recommended that the claimant receive an epidural steroid injection to treat this condition. Thereafter, Dr. Dickholtz referred the claimant to Dr. Daniel Di Iorio, the claimant's family physician. After reviewing the MRI scan, Dr. Di Iorio also recommended an epidural steroid injection, and referred the claimant to Dr. Gary Magee.

On August 21, 2007, Dr. Magee administered [*6] an epidural steroid injection and prescribed physical therapy. The physical therapist's notes of September 19, 2007, reflect that the claimant reported that the chiropractic treatments he received after his June 20, 2006, work accident improved his symptoms "for a while" but that his symptoms "never completely went away." The therapist's notes also indicate that the claimant reported he was "pain free for almost a month" after the August 21, 2007, steroid injection, but his symptoms "began to return" "this weekend." The claimant reported experiencing pain when getting in and out of his vehicle and after prolonged sitting. However, he was able to lift groceries without pain and to golf without increased discomfort. The therapist noted that one of the goals of the claimant's physical therapy was to "remove pain." The therapy notes of October 8, 2007, indicate that the claimant reported that he was "very sore since work on Friday," that he had been "sore for the past 3 days," and that the pain rendered him unable to perform the stretching exercises prescribed by his doctor as "consistently" as he had done in the past.

In mid-October 2007, the claimant traveled to Texas to attend a golf [*7] tournament where he played 36 holes of golf in a 3-day period. When he got home, he was sore. He returned to Dr. Magee for a second epidural steroid injection on October 22, 2007. Dr. Magee's records of that visit indicate that, although the claimant "felt significantly improved" following the first steroid injection, he noticed a "recurrence of his back symptoms"--including "pain in his back with some radiation to the left leg"--when he traveled through the airport and during physical therapy. The claimant reported that the second injection did not help as much as the first injection. He continued physical therapy through October 31, 2007.

At the employer's request, Dr. Wehner reviewed additional medical records (including the physical therapist's notes) on December 11, 2007, and issued an additional report. Dr. Wehner concluded that the first epidural steroid injection had resolved the claimant's pain complaints. In support of this conclusion, Dr. Wehner cited the September 19, 2007, physical therapist record which

indicated that the claimant reported being pain free for one month after the injection and the facts that the claimant was able to work and to golf without increased discomfort [*8] after the injection. Although she acknowledged that the claimant had made "some increased complaints of pain" after the first injection, she opined that these complaints were "the result of golfing" and were "no longer related" to the claimant's work injury. Dr. Wehner opined that the claimant had reached MMI after the first steroid injection and the first course of physical therapy and that there was no need for any further treatments.

On January 22, 2008, Dr. Di Iorio prescribed an electromyography (EMG), which was performed on March 13, 2008. The test was abnormal, showing right L5 and left L4 radiculopathy. Dr. Di Iorio subsequently referred the claimant to Dr. Jack Perlmutter, an orthopedic surgeon. The claimant saw Dr. Perlmutter on April 16, 2008. After examining the claimant and reviewing his MRI and EMG results, Dr. Perlmutter diagnosed the claimant with symptomatic degenerative disc disease in the lower back and ordered a repeat MRI. Dr. Perlmutter noted that the claimant would probably have to have a discography performed at L4/L5 and possibly elsewhere in the lumbar spine depending on the results of further testing.

At the request of his attorney, Dr. Avi Bernstein, a spinal [*9] surgeon, evaluated the claimant on October 28, 2008. Two days later, Dr. Bernstein sent a report of his examination and his opinions to the claimant's counsel. The report noted that the claimant reported the history of his June 20, 2006, work accident to Dr. Bernstein and "denie[d] any prior history of lower back pain." The claimant reported that he had constant pain in his low back, ranging in intensity from approximately 6 through 9 on a scale of 10. Dr. Bernstein noted that the claimant's April 5, 2007, MRI showed degenerative changes in the claimant's lumbar spine at L4-L5 and a "small central protrusion consistent with an annular tear." [1] Dr. Bernstein opined that the claimant suffered a work-related injury on June 20, 2006, which "aggravated a pre-existing degenerative condition of the lumbar spine which appears to have resulted in an annular tear." He noted the claimant could either live with the condition or consider "further workup with surgical intervention." Dr. Bernstein recommended an updated MRI and a lumbar discogram. He opined that, if the discogram was positive, the claimant would be a candidate for either a spinal fusion or a disc replacement.

1 An annular tear occurs [*10] when the tough exterior on an intervertebral disc rips or tears.

On December 8, 2008, Dr. Wehner reevaluated the claimant. She opined that the claimant had a preexisting degenerative condition in his spine (as shown by the MRI scans). Although she conceded that the claimant's June 20, 2006, work accident had aggravated this preexisting condition, she described such aggravation as "temporary," and she reiterated her conclusion that the claimant reached MMI after receiving the "physical therapy and the epidural [injection]." She stressed that the June 20, 2006, work accident did not cause the degenerative changes in the claimant's spine. Accordingly, although Dr. Wehner agreed that a repeat MRI and a spinal fusion would be reasonable based on the "chronicity" of the claimant's pain, she suggested that the claimant's current symptoms were caused by his preexisting degenerative condition and his reaggravation of that condition while golfing in October 2007, not by his June 2006 work injury.

The MRI recommended by Dr. Bernstein was performed on December 17, 2008. After reviewing the MRI results, Dr. Perlmutter concluded that the claimant needed to undergo an interbody fusion. He agreed with [*11] Dr. Bernstein that the claimant should also undergo a discography to determine how extensive his surgery would be.

Dr. Bernstein testified by evidence deposition on April 21, 2009. Although he testified that the claimant probably had some preexisting degenerative changes at L4-L5 (which Dr. Bernstein described as normal for a man his age), he opined that there was a causal connection between the claimant's June 20, 2006, work accident and the chronic lower back pain that the claimant had suffered ever since that accident. Dr. Bernstein disagreed with Dr. Wehner's opinions that the claimant reached MMI after the first steroid injection on August 21, 2007, and that his golfing in October 2007 caused an new injury. Dr. Bernstein stated that he might agree with Dr. Wehner's conclusions if the claimant was "completely relieved of his symptoms for months" after the first steroid injection. However, Dr. Bernstein found that a period of two months without pain was too short to support Dr. Wehner's opinion.

During his cross-examination, Dr. Bernstein reviewed Dr. Dickholtz's records which outlined the chiropractic treatment that the claimant had received from 1994 through 2003. Dr. Bernstein [*12] was asked whether the claimant's history of back pain and chiropractic treatment from 1997 through 2003 and the fact that the claimant had suffered a lifting accident in 2003 would lead him to conclude that the claimant's current condition of ill-being might be related to the claimant's preexisting back condition. Dr. Bernstein responded that it depended on whether the claimant was symptomatic between 2003 and 2006. Because Dr. Dickholtz's records

did not reflect that the claimant sought any treatment for back pain between June 2003 and June 2006, Dr. Bernstein concluded that the claimant was asymptomatic during that period and, therefore, that his June 20, 2006, work injury caused a new aggravation of his preexisting back condition. Dr. Bernstein testified that he "didn't find any evidence that [the claimant] had a temporary aggravation" of his preexisting condition. Rather, he opined that the claimant's June 20, 2006, work accident had caused a "permanent" aggravation of that condition. Dr. Bernstein also noted that the back problems that the claimant suffered from 1994 through 2006 could have been "lumbar strains" which are "muscular causes of pain" that, unlike his current injury, [*13] are merely "temporary aggravations of degenerative conditions" which may be successfully treated by chiropractic care. For these reasons, Dr. Bernstein concluded that his review of the records of the claimant's chiropractic treatment did not change his causation opinion "in any way."

Dr. Wehner testified by evidence deposition on May 20, 2009. Dr. Wehner testified that the radiographic images of the claimant's lower back revealed a preexisting degenerative process. She read the claimant's physical therapy records as showing that the claimant's pain had resolved completely after his first steroid injection on August 21, 2007, and that his symptoms returned only after he played golf in October 2007. Thus, Dr. Wehner opined that the claimant's June 20, 2006, work accident caused a temporary aggravation of his preexisting condition which had resolved completely before a new injury (which occurred when the claimant played golf) reaggravated that condition and caused his current symptoms. However, during her cross-examination, Dr. Wehner admitted that lifting can cause an annular tear or aggravate a preexisting degenerative disc disease or a preexisting lumbar spinal stenosis.

During the arbitration [*14] hearing, the claimant admitted that he had experienced episodes of low back pain from 1995 through 2003 for which he sought treatment from Dr. Dickholtz. According to the claimant, Dr. Dickholtz's treatment of the claimant's back problems during this period consisted entirely of chiropractic manipulation and ultrasound therapy. The claimant testified that his complaints during this period consisted of minor, muscle-related low back pain which was always resolved by chiropractic care. For example, when the claimant experienced low back pain while lifting in June 2003, the pain was resolved after only one visit to Dr. Dickholtz.

However, the claimant testified that, after his June 20, 2006, work injury, the pain that he experienced was more intense and it did not go away with chiropractic care. Moreover, although he conceded that he felt better temporarily after the first steroid injection on August 21, 2007, the claimant testified that he continued to have lower back pain thereafter, even before he played golf in October 2007. He claimed that he called the employer's workers' compensation insurer on September 24, 2007, and told an insurance adjuster that he needed to schedule another [*15] steroid injection. He also stated that he had back pain while traveling to Texas and walking through the airport before he golfed.

Although the claimant admitted that he told his treating doctors that he did not have a prior back problem before the June 20, 2006, accident, he suggested that this statement was not untrue or inaccurate because his prior chiropractic treatments had merely "helped [his] muscle[s]."

The arbitrator found that the claimant had sustained an accident arising out of and in the course of his employment but denied benefits because he found that the claimant had failed to prove that his current condition of ill-being was causally related to the accident. The arbitrator found that the claimant had a preexisting condition of lower back pain and a substantial history of treatment for that condition prior to the accident. The arbitrator also found that the claimant had fully recovered from his June 20, 2006, injury after the first steroid injection and then reaggravated his preexisting back condition while golfing in October 2007. Thus, the arbitrator concluded that the June 20, 2006, injury was merely a temporary aggravation of the claimant's chronic preexisting lower [*16] back condition that had fully resolved by August 2007, and it was the subsequent golf outing, not the June 20, 2006, accident, that caused the claimant's current condition of ill-being. In reaching these conclusions, the arbitrator credited Dr. Wehner's medical opinions over those of Dr. Bernstein, in part because it found that Dr. Bernstein's causation opinion was based on false information (specifically, the claimant's misrepresentation that he had no prior back pain or back treatments). The arbitrator found the claimant's testimony to be "of limited credibility and not persuasive."

Based on these findings, the arbitrator ordered the employer to pay for claimant's back treatments only through the date of the first steroid injection (August 21, 2007), including two months of chiropractic treatments by Dr. Dickholtz. [2] It ruled that any subsequent medical treatments were "unreasonable and unnecessary due to the break in the causal connection." Further, the arbitrator noted that the employer had paid all medical bills through April 16, 2008, and was entitled to a credit for the amounts it had paid. The arbitrator also ruled that the employer was entitled to a credit for a $7,500 advance [*17] it made to the claimant on December 8, 2008. In addition, the arbitrator declined to bar the testimony and expert report of the employer's medical expert and declined to award the claimant other penalties and fees as a

sanction for the employer's alleged misuse of the Commission's subpoena power.

> 2 Based on the deposition testimony of Drs. Wehner and Bernstein, the arbitrator concluded that chiropractic treatment of more than two months is not effective and is therefore excessive.

The claimant appealed the arbitrator's decision to the Commission. The Commission reversed, with Commissioner Basurto dissenting. The Commission found Dr. Bernstein's testimony to be "more credible and more persuasive" than Dr. Wehner's testimony. First, the Commission noted that there was "no evidence" to indicate that the claimant had received any treatment to his lower back from 2003 until the June 20, 2006, work accident. The Commission agreed with Dr. Bernstein that this "indicates that the lower back was not an active problem and [the claimant] did not feel the need to seek care" during that period. The Commission credited Dr. Bernstein's opinion that the claimant's June 20, 2006, work accident "permanently [*18] aggravated [his] pre-existing lumbar condition." Moreover, the Commission rejected Dr. Wehner's opinion that the claimant reached MMI after the first steroid injection because it found that the physical therapy records and the claimant's testimony indicated that the claimant had suffered back pain after the injection and before the October 2007 golf outing (*e.g.*, during physical therapy and while walking through the airport).

Accordingly, the Commission ordered the employer to pay all of the claimant's medical bills that were incurred after August 21, 2007, subject to the medical fee schedule. In addition, the Commission ordered the employer to pay for discography and fusion surgery recommended by Dr. Perlmutter, all subsequent treatment and physical therapy, and two months' worth of Dr. Dickholtz's chiropractic treatments. [3]

> 3 The Commission did not require the employer to pay for the entire regimen of chiropractic treatments performed by Dr. Dickholtz (which continued for approximately nine months after the June 20, 2006, accident) because "[e]ven Dr. Bernstein testified that a chiropractor's treatment lasting more than 2 months is not effective and therefore may not be reasonable."

Commissioner [*19] Basurto dissented. He noted that the arbitrator did not find the claimant to be credible, and there was "no basis to reverse the decision of the arbitrator" because "the record is replete with instances of the [claimant] not telling the truth to his treating physicians[.]" Commissioner Basurto stated that "the arbitrator is in the best position to judge credibility" because he observed the claimant's demeanor firsthand. Moreover, he found that the "manifest weight of the evidence" supported the arbitrator's credibility finding. Thus, Commissioner Basurto concluded that the arbitrator's "well reasoned" decision should be affirmed.

The employer sought judicial review of the Commission's decision in the circuit court of Lake County. In the claimant's brief to the circuit court, the claimant defended the Commission's decision regarding causation and benefits but challenged another ruling contained in the Commission's order. Specifically, the claimant argued that the Commission's denial of the claimant's request for attorney fees and penalties was against the manifest weight of the evidence. The circuit court held that the Commission's decision was neither contrary to law nor against the [*20] manifest weight of the evidence, and it confirmed the Commission's decision "on all issues raised by the appellant and on cross-appeal by the cross-appellant." This appeal followed.

ANALYSIS

1. Causal Connection Between Work Injury and the Claimant's Present Condition

The employer argues that the Commission's finding that the claimant's June 20, 2006, work accident was causally related to his current lower back condition and need for surgery is against the manifest weight of the evidence. We disagree.

To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial Comm'n, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 296 Ill. Dec. 26 (2005)*. However, a work-related injury "need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003)*. Thus, even if an employee has a preexisting condition which makes him more vulnerable to injury, recovery will not be denied as long as it can be shown that his employment was also a causative factor. *Id.* Accordingly, an employee [*21] may recover under the Act if he shows that he suffered a work-related accident that aggravated or accelerated a preexisting condition. *Id.*

Whether a causal connection exists between a claimant's condition of ill-being and his employment is an issue of fact to be decided by the Commission. *Id.*; see also *Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 347 Ill. Dec. 863 (2011)*. In determining causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence,

determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984)*; *Hosteny v. Illinois Workers' Compensation Comm'n, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009)*; *Fickas v. Industrial Comm'n, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999)*. A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences from the evidence may be drawn. *Berry, 99 Ill.2d at 407*. The Commission's findings will not be overturned unless they are against the manifest weight of the evidence (*Tower Automotive, 407 Ill. App. 3d at 434*), [*22] *i.e.*, unless the record discloses that an opposite conclusion is "clearly apparent." *Caterpillar, Inc. v. Industrial Comm'n, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992)*; see also *Gallianetti v. Industrial Comm'n, 315 Ill. App. 3d 721, 729-30, 734 N.E.2d 482, 248 Ill. Dec. 554 (2000)*. When the evidence is sufficient to support the Commission's causation finding, we must affirm. *Pietrzak v. Industrial Comm'n, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002)*.

Applying these standards, we cannot conclude that the Commission's causation finding was against the manifest weight of the evidence. Dr. Bernstein opined that the claimant's June 20, 2006, work injury permanently aggravated his preexisting lower back condition. He disagreed with Dr. Wehner's conclusion that the claimant had reached MMI after the first steroid injection on August 21, 2007, because the claimant was pain free for too short a time after that injection to support a finding of MMI. Dr. Bernstein also disagreed with Dr. Wehner's finding that the claimant suffered a new, entirely independent aggravation of his preexisting back problem while golfing in October 2007. The record evidence supports Dr. Bernstein's conclusions. For example, the physical therapy records show that the claimant [*23] complained of lower back pain after the first steroid injection but before the claimant's October 2007 golf outing. In addition, the claimant testified that he called the employer's workers' compensation insurance carrier to schedule a second injection on September 24, 2007, three weeks before the golf outing.

These facts strongly suggest that the aggravation of the claimant's lower back which was caused by the June 20, 2006, work injury had not resolved prior to the golf outing. Thus, the golf incident was at most a "contributing cause" of the claimant's current condition, not an "intervening cause" that broke the causal chain between the June 20, 2006, aggravation and the claimant's current condition of ill-being. See, *e.g.*, *International Harvester Co. v. Industrial Comm'n, 46 Ill. 2d 238, 247, 263 N.E.2d 49 (1970)*; *Teska v. Industrial Comm'n, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1, 203 Ill. Dec. 574 (1994)*. The fact that the claimant reported that he felt better for a while before the October 2007 golf outing and worse afterwards does not change this analysis. *See Vogel v. Industrial Comm'n, 354 Ill. App. 3d 780, 788, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005)* (holding that the fact that the claimant testified that he was "doing fine" and experiencing no pain until [*24] after he was involved in a subsequent, non-work-related accident "d[id] nothing to change the fact" that the claimant was in a weakened condition as a result of the initial work-related accident and was therefore susceptible to the injury he suffered after the subsequent accident); *Teska, 266 Ill. App. 3d at 742-43* (reversing the Commission's finding that claimant suffered an intervening accident when he experienced pain while bowling approximately a year after he sustained a cervical injury at work, and holding that "[m]erely because claimant experienced an upsurge of neck pains while bowling *** does not mean that the causal connection was broken"); see also *Lasley Construction Co., Inc. v. Industrial Comm'n, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5, 211 Ill. Dec. 345 (1995)*; *Mendota Township High School v. Industrial Comm'n, 243 Ill. App. 3d 834, 836, 612 N.E.2d 77, 183 Ill. Dec. 820 (1993)*.

Moreover, although the claimant received chiropractic treatments for back problems from 1994 through 2003, the evidence suggests that the June 20, 2006, accident significantly aggravated his lower back condition. Dr. Dickholtz's records show that, in the nine years that Dr. Dickholtz treated the claimant, Dr. Dickholtz never recommended that the claimant undergo [*25] an MRI or an EMG or suggested that the claimant should consider surgery to repair his lower back. The claimant's intermittent back pain was treated successfully by chiropractic care during this period, and the claimant never filed a workers' compensation claim relating to his lower back condition at that time. By contrast, after the June 20, 2006, accident, chiropractic care was no longer effective, and the claimant was forced to seek other remedies, including steroid injections and surgery. It was only after the work accident that the claimant's doctors ordered him to undergo an MRI and an EMG, and only then that the claimant filed a workers' compensation claim. Moreover, Dr. Dickholtz's records suggest that the claimant received no chiropractic treatment from June 2003 until after the June 20, 2006, accident. Dr. Bernstein took this to mean that the claimant was asymptomatic during that period. Further, the claimant testified that his back pain was both more intense and more resistant to treatment after the work accident.

Accordingly, there was ample evidence to support the Commission's causation finding. Although Dr.

Wehner reached a different conclusion, it is the Commission's province [*26] to weigh the evidence and to resolve conflicts in medical opinion testimony. The Commission chose to resolve the conflict between the expert's opinions in favor of the claimant. On this record, we cannot say that the opposite conclusion was clearly apparent.

The employer argues that we should "give deference" to the arbitrator's finding that the claimant was not a credible witness because "only [the arbitrator] had the opportunity to observe the claimant's character and demeanor while testifying." We have repeatedly rejected this argument, and we do so again here. The Commission "exercises original jurisdiction and is not bound by an arbitrator's findings." *R & D Thiel v. Illinois Workers' Compensation Comm'n, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 338 Ill. Dec. 10 (2010)*; see also *Franklin v. Industrial Comm'n, 211 Ill. 2d 272, 279, 285, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004)*; *Paganelis v. Industrial Comm'n, 132 Ill. 2d 468, 483, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989)*. Thus, when the Commission makes credibility findings which are contrary to those of the arbitrator and gives sufficient reasons to permit judicial review, the only question is whether the Commission's findings are against the manifest weight of the evidence. *R & D Thiel, 398 Ill. App. 3d at 866*. We will not employ [*27] an extra degree of scrutiny to the Commission's credibility findings merely because they contradict those of the arbitrator. *Id.*; see also *Hosteny, 397 Ill. App. 3d at 676*. [4]

> 4 In *S & H Floor Covering, Inc. v. Illinois Workers' Compensation Comm'n, 373 Ill. App. 3d 259, 267, 870 N.E.2d 821, 312 Ill. Dec. 377 (2007)*, we stated in *dicta* that "it may very well be time to reconsider the Commission's prerogative to determine credibility regardless of the arbitrator's decision," and that we "will consider" employing an "extra degree of scrutiny" to the record in determining whether there is sufficient support for the Commission's decision when the Commission "makes credibility determinations regardless of the arbitrator's findings." However, in several subsequent decisions, we reaffirmed the traditional standard of review and declined to employ extra scrutiny when reviewing a Commission decision that was based on credibility findings which contradicted the credibility findings made by the arbitrator. See, *e.g., R & D Thiel, 398 Ill. App. 3d at 866*; *Hosteny, 397 Ill. App. 3d at 676*.

Moreover, contrary to the employer's argument, the issue of the claimant's credibility was not dispositive in this case because there was other credible [*28] evidence to support the Commission's causation finding, including the physical therapy records, Dr. Dickholtz's records, and Dr. Bernstein's testimony. The employer erroneously maintains that Dr. Bernstein's opinion was "based on" the claimant's misrepresentation that he had never experienced or been treated for low back pain prior to the June 20, 2006, accident. Contrary to the claimant's assertion, however, Dr. Bernstein reviewed Dr. Dickholtz's records--which outlined the chiropractic treatment that the claimant had received for his lower back condition from 1994 through 2003--and concluded that these records did not change his causation opinion "in any way."

2. Whether the Claimant's Medical Treatments Were Reasonable and Necessary

The employer argues that all of the medical treatments the claimant received for his lower back after the August 21, 2007, epidural steroid injection were unreasonable and unnecessary and that only the first 12 chiropractic treatments he received were reasonable and necessary. Because we uphold the Commission's findings that the claimant did not reach MMI on August 21, 2007, and that his current condition of ill-being is causally related to his work accident, [*29] we agree with the Commission that the medical treatments provided after August 21, 2007, were reasonable and necessary and that the employer must pay all of the claimant's medical bills for those treatments subject to the medical fee schedule. We also agree that the employer must pay for the discography and fusion surgery recommended by Dr. Perlmutter and all subsequent treatment and physical therapy. The Commission's conclusions on these issues were not against the manifest weight of the evidence.

We also agree with the Commission's conclusion that the employer should be required to pay for only the first two months of Dr. Dickholtz's chiropractic treatments. The Commission's conclusion on this issue was based on Dr. Bernstein's testimony that chiropractic treatment for more than two months is not effective. The employer notes that Dr. Wehner testified that the usual course of chiropractic treatment is 12 to 15 visits and argues that only 12 visits were reasonable and necessary in this case. Dr. Wehner's testimony does not appear to conflict materially with Dr. Bernstein's testimony on this issue. However, assuming there was a conflict, it was the Commission's province to resolve it. [*30] The Commission's finding that the employer must pay for two months of chiropractic treatment was not against the manifest weight of the evidence.

3. The Exclusion of the Utilization Review Report

The employer argues that the Commission abused its discretion when it upheld the arbitrator's decision to ex-

clude the employer's Exhibit No. 10, which was a report that stemmed from the utilization review performed of the claimant's chiropractic treatment. During the June 15, 2009, arbitration hearing, the claimant's counsel objected to the report on hearsay grounds, and the arbitrator sustained the objection and excluded the report. Although the employer had sent the claimant a letter on February 16, 2009, communicating its intent to introduce the utilization review report into evidence during the hearing, the claimant did not indicate that he was objecting to the report until the employer's counsel moved to introduce it at the hearing four months later. The employer argues that the claimant waived any objection to the admission of the report by this dilatory conduct and that the report should have been admitted.

We disagree. As an initial matter, the employer raised this issue for the first [*31] time in its appeal of the Commission's decision to the circuit court. It did not raise the issue before the Commission. The issue is therefore waived. See, *e.g., R.D. Masonry, Inc. v. Industrial Comm'n, 215 Ill. 2d 397, 414, 830 N.E.2d 584, 294 Ill. Dec. 172 (2005)* ("Arguments not raised before the Commission are waived on appeal."); see also *U.S. Steel Corporation-South Works v. Industrial Comm'n, 147 Ill. App. 3d 402, 406, 499 N.E.2d 60, 101 Ill. Dec. 693 (1986)* (ruling that an issue raised for the first time in the circuit court "may be considered waived because the circuit court *** has no authority to consider evidence or arguments not presented before the Commission").

In any event, even if we were to consider the issue, we would reject the employer's argument. The employer has presented no authority for the proposition that a party to a workers' compensation proceeding waives an objection to the admission of evidence, even though the party objected at the time the opposing party moved for its admission, merely because the party failed to announce its intention to object to the evidence before the hearing. [5] Nor have we found any such authority. The claimant's objection to the admission of the utilization review report was timely and proper. Moreover, [*32] because the claimant had not stipulated to the admission of object to its admission on hearsay grounds and should have prepared to meet such an objection. At a minimum, the employer could have moved for a continuance so the author of the report could testify and be cross-examined at the hearing. The employer failed to do so. Its only argument in favor of admission was that the claimant had failed to object prior to the hearing. The employer does not argue that the report was not hearsay or that it fell within a hearsay exception. Accordingly, the Commission's decision to exclude the report was not an abuse of discretion.

5 The cases cited by the employer are distinguishable and inapposite. *City of Chicago v. Workers' Compensation Comm'n, 387 Ill. App. 3d 276, 899 N.E.2d 1247, 326 Ill. Dec. 596 (2008)*, addressed the Act's requirement that the parties exchange IME reports no later than 48 hours before a case is set for hearing. Although we reversed the arbitrator's decision excluding the employer's IME report in that case, we did so based upon our construction of the Act, not upon the claimant's failure to object to the admission of the report prior to the hearing. *Department of Transportation v. Bouy, 69 Ill. App. 3d 29, 40, 386 N.E.2d 1163, 25 Ill. Dec. 499 (1979)*, [*33] is also inapposite. That case held that a party's objection to the admission of expert witness testimony was timely, even though it was raised *after* the opposing party first moved to admit the testimony at trial, where the objection was raised "as soon as the character of the objectionable testimony [became] apparent." If anything, *Bouy* undermines the employer's argument that the claimant waived its objection by not raising it before the hearing.

4. Whether the Employer is Entitled to any Credits

After concluding that the claimant had reached MMI on August 21, 2007, and that the claimant had failed to prove a causal connection between his work accident and his current state of ill-being, the arbitrator ruled that the employer was entitled to a credit for any bills it paid for medical services rendered after August 21, 2007, and for a $7,500 advance it made to the claimant on December 8, 2008. However, as noted above, the Commissioner reversed the Commission's causation finding and ordered the employer to pay for medical services rendered after August 21, 2007, including prospective medical care. Therefore, although it did not address the issue of whether the employer was entitled to [*34] any credits, it implicitly rejected the arbitrator's ruling on that issue. The employer now argues that, if we reverse the Commission and reinstate the arbitrator's award, we should also reinstate the arbitrator's rulings on the issue of credits. Because we affirm the Commission's decision, we need not reach this issue. [6]

6 Although the claimant challenges the Commission's "[d]etermination" that the employer shall have credit for the $7,500 advance it paid to the claimant, we do not believe that the Commission ever made any such determination.

5. The Employer's Motion to Strike Portions of the Appellee's Brief for Failure to File a Cross-Appeal

The claimant argues in his appellee's brief that the Commission erred by refusing to bar the testimony and

expert report of the employer's medical expert and by refusing to award the claimant other penalties and fees as a sanction for the employer's alleged misuse of the Commission's subpoena power. Although the claimant raised this issue before the arbitrator, the Commission, and the circuit court, he did not file a cross-appeal raising the issue before this Court. The employer has filed a motion to strike the claimant's arguments because the claimant [*35] failed to file a cross-appeal.

We agree with the employer that this issue has not been properly presented to this court. Where a decision of the Commission "contains a specific finding adverse to an appellee," "the appellee must file a cross-appeal raising as an issue that adverse finding." *Ruff v. Industrial Comm'n of Illinois, 149 Ill. App. 3d 73, 78, 500 N.E.2d 553, 102 Ill. Dec. 660 (1986)*; see also *City of Wilmington v. Industrial Comm'n, 52 Ill. 2d 587, 591, 289 N.E.2d 418 (1972)*; *Nelson v. Industrial Comm'n, 194 Ill. App. 3d 10, 17-18, 550 N.E.2d 1047, 141 Ill. Dec. 1 (1990)*; *Burrgess v. Industrial Comm'n, 169 Ill. App. 3d 670, 677, 523 N.E.2d 1029, 120 Ill. Dec. 118 (1988)*. Here, the claimant's challenges to the Commission's decisions to admit the employer's medical expert's testimony and to deny the claimant's request for sanctions concern specific findings adverse to the claimant contained in a judgment which was otherwise favorable to him. Moreover, these findings are separate from and unrelated to the issues raised by the employer on appeal. Thus, the claimant could only challenge the Commission's findings on these issues in this court by filing a cross-appeal. See, *e.g., City of Wilmington, 52 Ill. 2d at 591*; *Ruff, 149 Ill. App. 3d at 78*; *Burrgess, 169 Ill. App. 3d at 677*.

The cases cited [*36] by the claimant do not affect this analysis. *Landmarks Preservation Council of Illinois v. City of Chicago, 125 Ill. 2d 164, 174-75, 531 N.E.2d 9, 125 Ill. Dec. 830 (1988)*, merely stands for the proposition that an appellee may "*sustain* the decision of the circuit court on any grounds called for by the record," and that, when urging an appellate court to *affirm* a judgment, the appellee may challenge findings of the circuit court that are adverse to him without filing a cross-appeal. (Emphasis added.) However, *Landmarks Preservation Council* has no application to the situation presented here, where the claimant is urging us to *reverse* certain rulings that the circuit court made against him. *Hurt v. Industrial Comm'n, 191 Ill. App. 3d 733, 738, 548 N.E.2d 122, 138 Ill. Dec. 892 (1989)*,*Harrawood v. Industrial Comm'n 66 Ill. 2d 230, 232-33, 362 N.E.2d 350, 5 Ill. Dec. 879 (1977)*, and *Murrelle v. IndustrialComm'n, 382 Ill. 128, 132-33, 46 N.E.2d 1007 (1943)*, also do not apply. Those cases merely hold that because a writ of *certiorari* to the circuit court brings the entire record before the circuit court, an appellee does not need to file a separate writ of *certiorari* in order to challenge aspects of the Commission's decision before that court. None of these cases stands for the proposition that an appellee may [*37] challenge adverse findings by the Commission in the *appellate court* without filing a cross-appeal. As noted above, all of the cases addressing this issue have reached the opposite conclusion.

Accordingly, the issues that the claimant attempts to raise have not been properly presented before this court and are therefore waived. See, *e.g., Ruff, 149 Ill. App. 3d at 78*. The employer's motion to strike the portions of the appellee's brief addressing these issues is granted.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Lake County, which confirmed the Commission's decision. In addition, we grant the employer's motion to strike portions of the appellee's brief for failure to file a cross-appeal.

Circuit court affirmed. Appellant's motion to strike granted. The matter is remanded to the Commission for further proceedings.