2024 IL App (2d) 230576WC-U
No. 2-23-0576WC
Order filed October 23, 2024.
Modified upon denial of rehearing November 21, 2024.

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

LYNNE SPENCER, Petitioner-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Illinois Central School Bus, LLC, Respondent-Appellee).	)	Appeal from the Circuit Court of Kane County. No. 23-MR-228 Honorable Kevin T. Busch, Judge, Presiding.

JUSTICE BARBERIS delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Mullen concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred when it set aside the Commission's decision. The Commission's findings on accident, causal connection, average weekly wage, reasonable and necessary medical expenses, and TTD benefits were not against the manifest weight of the evidence. The Commission's award of PPD benefits and its denial of PTD benefits and penalties and attorney fees were against the manifest weight of the evidence. Thus, we vacate the Commission's award of PPD and reverse the Commission's denial of PTD benefits and penalties and attorney fees.

¶ 2 I. BACKGROUND

¶ 3 Claimant, Lynne Spencer, filed a claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)) against employer, Illinois Central School Bus, seeking benefits for injuries she sustained to her head and for resulting psychiatric problems (posttraumatic stress disorder (PTSD), anxiety, and depression) while working as a bus driver for employer.

¶ 4 The following factual recitation was taken from the evidence adduced at the arbitration hearings on July 10, 2020, October 21, 2021, and March 30, 2022,[1] the evidentiary depositions of numerous medical professionals, vocational rehabilitation experts, and Warren Markham, an individual present on the bus lot following claimant's injury on February 20, 2015, as well as a police report, dated February 20, 2015, of Officer Chris Groves of the St. Charles Police Department. We recite only those facts necessary for our disposition of this appeal.

¶ 5 Officer Groves's police report indicated that he responded to employer's bus lot for a report of a battery on February 20, 2015, at 5:38 a.m. Officer Groves met with claimant, who reported the following:

> "Spencer reported that she went to her bus *** to start it up. After starting the bus[,] Spencer looked down to turn the lights on and advised that she was hit in the back of the head by an unknown subject. Spencer advised that she thought that she was knocked unconscious briefly because she advised that she saw stars and then woke up at the bottom of the steps next to the bus door. Spencer stated that she did not hear or see anything[,] and she didn't know what she was hit with. Spencer had a raised bump on the back of her head from the incident."

[1]Arbitrator Robert Harris held claimant's first arbitration hearing on July 10, 2020, before the court reassigned claimant's case to Arbitrator Gerald Granada, who held arbitration hearings on October 21, 2021, and March 30, 2022.

Officer Groves personally inspected claimant's bus but did not see anything "out of the ordinary." He did see a "smear mark on the door which [he] believed to be from when Spencer was knocked down into the stairs by the door."

¶ 6 Officer Groves's police report also stated that "[o]ther employees were on the bus prior to [his] arrival and there was nothing to process for evidence." Officer Groves spoke with Jefferey Jurs, a mechanic for employer, who informed him that a video camera on claimant's bus recorded footage several minutes after the bus turned on. Jurs also informed Officer Groves that the cold start process[2] started at 3:30 a.m. on February 20, 2015, and the cold starters turned off the engines approximately 20 minutes later. Officer Groves personally viewed the video footage, which showed two cold starters enter claimant's bus to turn off the engines. Next, the video showed Jurs and then Officer Groves enter claimant's bus following the alleged accident. The video did not show footage of the alleged attack, an unknown assailant, or footage showing claimant falling. Officer Groves believed that "the Spencer incident took place prior to the video activating after she started the bus." Moreover, the report stated that "Garcia [the bus lot manager for employer] also advised that employees have seen a M[ale]/W[hite] subject collecting aluminum cans from the bus[] after they return for the day and are being refueled *** between 1700 and 1900 [hours]." Officer Groves requested a copy of the video, and Garcia informed him that "he would secure a copy of the video when it was completed." A February 21, 2015, supplement to the police report indicated that Garcia did not provide police with the requested video footage.

¶ 7 Following the accident, claimant was transported via ambulance to Delnor Hospital, where doctors diagnosed claimant with a hematoma and concussion on the back of her head. A nurse's

[2]The cold start process entails an individual starting a bus to warm up the diesel engine. The heater in the cabin of the bus is not turned on during this process.

note from 6:08 a.m. indicated that patient arrived at the emergency room for a head injury, stating "that she was getting her bus ready for the day—patient allegedly struck by unknown object or possibly person—patient then remembers being awake at the bottom of the stairs ***." A nurse's note from 8:50 a.m. on February 20, 2015, stated: "Pt remains w/ steady gait, clear speech. Continues to report pain to back of head, pt also reports that she does not remember events that occurred this am."

¶ 8 On July 10, 2020, Jerald Marshall, a bus driver for employer and union steward, testified to the following at the first arbitration hearing. As union steward, Marshall investigated work-related accidents. Specific to February 20, 2015, Marshall testified that the weather was below freezing, and the bus lot lacked security cameras, a perimeter fence, and lighting. Marshall testified that he and John Blatchford, a retired police officer and employee of employer, saw a "huge goose egg on the back of [claimant's] head" in the front office immediately following the accident. After observing claimant's injury, Marshall and Randy Brown, a fueler and bus driver for employer, searched claimant's bus.

¶ 9 Two days later, Marshall and Garcia met to discuss claimant's accident. The following colloquy took place:

"Q. [COUNSEL FOR CLAIMANT]: And what do you recall Luis Garcia telling you about [claimant] or her injury or accident?

***

A. He stated as far as he was concerned [claimant] fell down the stairs and we are not discussing this any further. Anybody asks, that's what happened.

***

Q. Okay. What were you addressing with him during the meeting?

A. I stated to him about the bump on the head. Explained if she fell down the stairs the bump could not be in that position on her head and it would not have any scrap[e]s or anything on her body, knees or anything else. Secondly, there was urine on the bus, on the back seats of the bus. And I tried to tell him th[ere] had to be someone on the bus. His statement was well, it's cold out. And I said yeah? Because he was trying to say it happened last night. I said no, it was below zero. If it happened last night[,] it would be frozen[,] and it certainly wouldn't have a smell. And Randy, who was a fueler, we both went on the bus after the fact and checked it out.

***

Q. In response to that presentation you made to Mr. Garcia what was his response?

A. He says as far as the company is concerned[,] we are stating that she fell down the stairs.

***

A. What [Garcia] told me was [claimant] got hurt on the bus, we do not want to discuss it anymore, do not bring it up with anybody in the building, we don't want any more nervous people, period.

Q. [THE ARBITRATOR]: What did Garcia tell you regarding this alleged accident?

A. Luis Garcia told me that the company's stance is[,] and he is telling everyone that she fell down the stairs on the bus."

¶ 10 Marshall also testified that homeless individuals "[f]rom time to time" slept on buses, because "the buses are not locked at night. And there is a homeless village *** in the neighborhood. And in cold weather what happens is they come across the street and get into the bus." For support, Marshall stated that drivers had discovered empty food packages and urine on

buses in the morning in the past. The following conversation took place between the arbitrator and Marshall:

"THE ARBITRATOR: Do you have personal knowledge that you saw urine on the bus immediately after you spoke with [claimant] and you saw the bump on her head?

THE WITNESS: What do you mean by immediately?

THE ARBITRATOR: Okay. When did you first personally, with your own eyes, see urine on the bus after you saw the bump on her head?

THE WITNESS: About five to ten minutes.

THE ARBITRATOR: Well, that's immediately. So[,] five to ten minutes after you saw the bump on her head you walked on the bus[,] and you saw the urine?

THE WITNESS: Correct.

THE ARBITRATOR: Was that documented in any way?

THE WITNESS: Yes, made a police report.

THE ARBITRATOR: Okay. Thank you.

Q. MR. NIERMANN [COUNSEL FOR CLAIMANT]: So[,] after you saw—did anyone accompany you out to examine the bus?

A. Randy Brown."

Marshall stated that the urine was not frozen and had a strong odor. On cross-examination, Marshall testified that he did not observe anything, including salt, on claimant's back or legs that led him to believe she fell down the stairs.

¶ 11 On October 21, 2021, Jefferey Jurs, a mechanic for employer, testified to the following at the second arbitration hearing. Jurs explained that the buses were equipped with an internal camera system that recorded footage approximately five minutes after the ignition turned on. The camera then recorded for approximately 45 minutes after the ignition turned off. Specific to February 20,

2015, Randy Brown informed Jurs that someone hit claimant. At approximately 5:30 a.m., Jurs searched the bus lot by foot and vehicle and also searched claimant's bus. Jurs did not see urine or other evidence that someone had been on the bus. Once police arrived, Jurs showed Officer Groves the recorded video footage captured that morning after the cold crew turned on the ignition to claimant's bus. Jurs testified that "[t]he video showed when the cold starters had gone onto the vehicle to shut it off, and then again it showed [he and Officer Groves] on the bus *** searching the vehicle." The video did not show claimant or an unknown assailant on the bus.

¶ 12 On cross-examination, Jurs confirmed that the video footage would not "catch anything happening [for] five minutes" because the video recording did not start until the ignition turned on. Jurs did not know the location of the video and had not seen the video since February 20, 2015. Jurs confirmed that he "wasn't looking for anything," such as urine, between the seats. Instead, when he entered the bus, he "look[ed] to see if somebody was there. Whether or not they were coming at me or not." Jurs denied that people slept on the bus.

¶ 13 Next, Jose Cortez, a veteran dispatcher for employer, testified to the following at the October 21, 2021, arbitration hearing. On February 20, 2015, claimant called Cortez at 5:32 a.m. informing him that someone hit her in the head. Cortez immediately found claimant sitting in her personal vehicle outside the front office.

¶ 14 Next, claimant testified to the following at the October 21, 2021, arbitration hearing. Claimant, who was 77 years old at the time of the hearing, worked for employer as a bus driver for five years prior to the accident. Specific to February 20, 2015, claimant arrived at the bus lot sometime between 5:00 a.m. and 5:30 a.m. At that time, a colleague informed her that her keys were on the bus because a "cold start [took place] during the night." The doors to claimant's bus were closed but unlocked. She reiterated that the doors were "[n]ever" locked overnight. She entered the dark bus, explaining that there were no exterior lights in the area near the bus. When

she entered the bus, she "thought it was kind of strange because it was warm on the bus, and the buses are always cold even if they [cold] start [them] because the heaters are not allowed to be turned on."

¶ 15 After claimant entered the bus, she started to complete the Department of Transportation (DOT) safety checklist. While facing the driver's side window and standing near the driver's seat, she "turned to turn the bus on" when "[s]omething hit [her] from behind really hard" on the left side of the back of her head. At that time, "everything was black, and [she] saw flashes of actual stars and flashes like you would on the 4th of July." According to claimant, she was struck before she completely turned on the ignition and interior lights. When claimant stopped seeing stars, claimant found herself standing next to the driver's seat "holding onto the steering wheel with both hands." Claimant, who experienced "a lot of pain" in her neck and head and felt dizzy, attempted to turn on the bus to activate the interior lights. After many attempts, claimant turned on the bus and the interior lights, but she "didn't see anyone." Claimant turned off the lights and started to descend the stairs, at which point, she passed out for "maybe two or three minutes." Claimant then found herself at the bottom of the stairs. She testified, "I didn't trip on the stairs. I didn't slip on the stairs. I was the one that went down the stairs, and then I got up." Claimant walked to her car and drove to the front office. At that time, she saw "saw someone [she] knew" and "told him that [she] got hit in the head." Shortly thereafter, police arrived, and an ambulance transported claimant to Delnor Hospital. According to claimant, Garcia was not present when claimant left for the hospital.

¶ 16 Claimant saw footprints near the entrance of the bus, but she did not see snow on the stairs. After the accident, claimant never returned to work for employer or another job. Claimant treated with Dr. Mardjan Foroutan, claimant's treating psychiatrist, and Ms. Margaret Couch, her therapist. Neither professional released claimant to return to driving or nighttime activity following

the accident. Claimant took medication for panic attacks and anxiety, and she feared the dark, which impeded her ability to drive at night and enter dark rooms. Claimant avoided buses. Claimant denied that she experienced panic attacks prior to the accident. Fearful she would suffer from a panic attack, claimant did not return to work, stating that it "would be not only embarrassing but hard to explain, and I find talking about this outside of my therapist and Dr. Foroutan that it's hard to talk about."

On cross-examination, claimant stated that she spoke with Cortez following the accident. Claimant claimed that she looked for remote work but could not remember where she applied. Claimant confirmed that she worked as an adminstrative assistant for several companies prior to driving a bus for employer. Claimant denied stating to Dr. Foroutan on September 14, 2015, that she was unconscious after being struck on February 20, 2015. Claimant confirmed that she did not see or hear the person strike her, because the "person was behind [her]." Claimant also denied that she told a nurse at Delnor Hospital on February 20, 2015, that she did not recall what happened to her that morning.

¶ 17 On redirect examination, claimant believed, due to her mental health issues, that she could not return to her prior work as an adminstrative assistant. She believed this work would be "very complex and very stressful" for her. On recross-examination, claimant testified that she worked in employer's front office before driving a bus, where she distributed keys and scheduled bus routes. On further redirect, claimant confirmed that, even though she talked to her union leader, employer never offered her a position in the front office after the accident. On recross examination, claimant clarified that she attempted to gain employment in employer's office through her union leader, based on her belief that her union leader "was the go-between."

¶ 18 On October 28, 2021, the evidentiary deposition of Laura Belmonte, a rehabilitation counselor testifying on behalf of claimant, was taken. Belmonte met with claimant on August 20,

2021, via Zoom, and then prepared a vocational and rehabilitation assessment report. Belmonte testified consistent with her report. Claimant was almost 77 years old at the time Belmonte submitted her report, testifying that "individuals over 60 years of age have difficulty adjusting to vocational reorientation." According to Belmonte, claimant's advanced age was the most important factor in her analysis, noting that she had never placed an individual over 70 years old in a job.

¶ 19 Belmonte documented claimant's educational and employment histories. Belmonte noted that claimant graduated from high school 50 years prior and completed some college-level coursework. Belmonte also considered that claimant was unemployed for six years following the February 20, 2015, accident and had been separated from her career performing high-level adminstrative assistant duties for almost 14 years. Belmonte found this significant, given the many advancements in computer software programs and technology. As such, Belmonte did not believe claimant's adminstrative assistant skills were relevant in the current labor market. Belmonte continued to state:

> "On paper it may look like [there is a labor market for claimant], but when you actually dive into the details of the impact of, you know, the skills that she does not have anymore, the computer programs she's never been exposed to, the fact that she hasn't used Excel or Outlook in 10 to 15 years, that she only uses Word for like hobby activities at home, and that she just wouldn't be a viable candidate in a market that would require computer skills."

Although Belmonte acknowledged that claimant had a number of transferable job skills from her pre-injury occupations, there was no way of accounting for claimant's age or the significant time she had spent out of the workforce.

¶ 20 Belmonte opined, within a reasonable degree of professional certainty, that claimant was unable to obtain gainful employment as a bus driver, based on Dr. Foroutan's July 15, 2021, medical notes—the only medical record Belmonte reviewed—restricting claimant from driving a bus and avoiding dark spaces due to claimant's PTSD diagnosis. Belmonte opined that claimant was not employable and had no access to a stable labor market. Belmonte did not perform a labor market survey or search the internet to find possible job placements for claimant, noting that, based on her experience, it was unlikely she could identify a viable labor market for claimant. Belmonte did not recommend claimant for vocational assistance. For support, Belmonte reasoned that claimant had been removed from clerical work for almost 14 years, she was nearing her 80s, she had not applied for a job in almost 11 years, and she worked on a part-time basis for six years in an unskilled or low skilled job as a bus driver prior to her injury. Belmonte also concluded that claimant lacked necessary computer and technology skills, which made claimant an undesirable candidate for remote work. On cross-examination, Belmonte admitted that claimant had access to three laptops and an iPad, which claimant used for the Zoom interview.

¶ 21 Also on October 28, 2021, the evidentiary deposition of Julie Bose, a vocational rehabilitation counselor testifying on behalf of employer, was taken. Bose did not meet with claimant but reviewed Belmonte's report when preparing her own vocational and rehabilitation assessment report of claimant. Bose testified, within a reasonable degree of professional certainty, that claimant was employable and could return to work utilizing her transferable skills as an adminstrative assistant. Bose opined that claimant could work in a clerical position as a receptionist, data entry clerk, or remotely in a customer service-related role and earn $11 to $16 per hour. For support, Bose testified that claimant worked into retirement age when she was injured, which showed claimant's ability to work as an older worker. She did not believe claimant's age precluded her from returning to work, especially since individuals worked later in life and

employers continued to hire older workers. For support, Bose testified that the United States Bureau of Labor Statistics in October 2019 demonstrated that "older people, particularly those 65 to 74 and those 75 and older, are increasingly participating in the labor force more than they have historically." Based on her experience placing older workers in job positions, her review of claimant's age, education, computer literacy, transferability of skills, and current trends in hiring remote workers, Bose believed claimant could reasonably work from home. On cross-examination, Bose admitted that she did not perform a labor market survey for claimant. Although Bose acknowledged that claimant's mental health issues could affect her work, she believed remote work offered claimant a viable option to reenter the work force.

¶ 22 On March 30, 2022, Jurs testified to the following at the last arbitration hearing. Jurs testified that the video recording system started to record information approximately five minutes after turning the ignition on. On cross-examination, Jurs confirmed that the video recording system did not activate until "you *** actually turn [the key in the ignition] to the opposite direction." Jurs stated that once "[you] turn the key off," the video recording stops roughly 45 minutes later. The following conversation took place:

"Q. [COUNSEL FOR CLAIMANT]: The police officer says you told him that the bus starters start the buses around 3:30. They run for 20 minutes, does that sound right?

A. Roughly, yes.

Q. Okay. So started at 3:30, lunch for 20 minutes. That takes us to 3:50 or 4, right?

A. Correct.

Q. 45 minutes later is 4:45, correct?

A. Correct.

Q. She gets hit 45 minutes later [at 5:30 a.m.] when the DVR is clearly not running, correct?

A. Yes.

Q. Okay. Makes sense, doesn't it?

A. Yes."

¶ 23 Randy Brown testified to the following at the March 30, 2022, arbitration hearing. On February 20, 2015, claimant informed Brown that she was hit in the back of the head. Brown subsequently entered claimant's bus but did not see an assailant or urine. According to Brown, the lighting around claimant's bus was "[v]ery well lit," and he was unfamiliar with a homeless camp located near the bus lot in 2015. On cross-examination, Brown testified that he was "almost positive that [he] went on [claimant's] bus, but I mean, there's a chance I didn't, you know, there is. I'll be honest with you." Brown did not recall snow on the ground but believed there could have been frost. On redirect, Brown testified that he "didn't go in it, deep into the bus, but I'm almost positive I looked in the bus" and around it. The following colloquy took place:

"Q. [THE ARBITRATOR]: Sir, so you don't remember if you actually entered the bus, right?

A. I just—yeah, you know, to be honest with you, I can't recall that.

Q. When you went looking at the bus, was this before the police came?

A. Yes. Way before that, yeah.

Q. Okay.

A. Yea.

Q. So if there was a video running, you would have been on that video?

A. Correct."

¶ 24 On May 22, 2019, the evidentiary deposition of Dr. Nicholas Schlageter, a board-certified neurologist, was taken. Dr. Schlageter conducted an independent medical examination (IME) of claimant, at employer's request, on May 4, 2015. Claimant told Dr. Schlageter that she arrived at

the bus lot at 5:30 a.m. on February 20, 2015, and was hit on the back of the head after she entered her bus. As a result, claimant saw stars and then fell down the stairs of her bus. Claimant thought she lost consciousness briefly. She experienced dizziness but drove her car to employer's front office. At the time Dr. Schlageter examined claimant, she experienced pain on the bridge of her nose and right jaw, as well as pressure-type pain involving her entire head. Claimant also complained of anxiety, necessitating her decision to seek therapy. Aside from elevated blood pressure, claimant's neurological exam was normal. As such, Dr. Schlageter opined that claimant could return to full-duty work. Dr. Schlageter believed that claimant's "complaints [of pain on the bridge of her nose and right jaw] were causally related to the accident/incident of February 20th, 2015," given her physical issues occurred after this date.

¶ 25 Next, Dr. Schlageter testified that claimant's February 20, 2015, medical records from Delnor Hospital revealed elevated high blood pressure. Dr. Schlageter noted that it "was possible" that claimant had a syncopal episode and "lost her balance and fell." Counsel for employer then asked Dr. Schlageter whether it implied, in his opinion, that claimant was mistaken about being struck by an assailant since at least four people could not find the person who allegedly struck her. Dr. Schlageter responded: "I mean, she fell and hit her head, and why that—I mean that might go to the question of why it occurred, but I think it did occur." On cross-examination, Dr. Schlageter confirmed that claimant's medical records revealed that she suffered a concussion, which is "practically any blow to the head."

¶ 26 On August 5, 2019, the evidentiary deposition of Dr. Foroutan, claimant's treating psychiatrist, was taken. Claimant first presented to Dr. Foroutan on September 14, 2015. At that time, claimant informed Dr. Foroutan that she was a bus driver for employer and had been "attacked by an unknown person who hit her on the head[,] and she lost conscious[ness]. Basically[,] she said [she] had struggled a little. She was dazed and she lost consciousness." In

addition, when claimant entered her bus, she smelled urine, and as soon as she tried to turn the bus lights on, she got hit on the head. Claimant presented to Dr. Foroutan with anxiety and panic attacks, and she developed a fear of buses, difficulty engaging in "any kind of sustained activity," and struggled to leave her house following the accident. According to Dr. Foroutan, claimant had PTSD prior to February 20, 2015; however, the attack exacerbated claimant's symptoms, requiring antianxiety, antidepressant, and antipsychotic medications. Dr. Foroutan believed claimant would "endanger herself and the lives of other people" if claimant drove a school bus.

¶ 27 On cross-examination, Dr. Foroutan testified that claimant's lack of memory, as documented in the nurse's notes from Delnor Hospital on February 20, 2015, "actually speaks to the severity of the blow." Dr. Foroutan believed claimant likely had a "spotty memory" following her head injury, but claimant could recall the accident as time passed. Moreover, Dr. Foroutan stated that some people are unaware that they lose consciousness. Dr. Foroutan reiterated that claimant had a bump on her head, as evidenced by her medical records at Delnor Hospital, stating: "[Claimant] was hit on the head. There was a trauma to the occiput. So[,] *** there was a trauma. It was not something she invented. There was a trauma." Dr. Foroutan believed claimant had good judgment and insight, did not have impaired reality testing, and consistently reported the same version of events throughout her treatment. Dr. Foroutan specifically stated that claimant was "actually pretty consistent" in "her repetitious descriptions every time she came into my office," and did not present to her "for any gain" by lying and fabricating a story about the attack. Dr. Foroutan confirmed that it was not unusual for a head trauma victim experiencing pain to also present with high blood pressure.

¶ 28 On October 4, 2019, the evidentiary deposition of Warren Markham, a cold starter and bus driver for employer, was taken. Specific to February 20, 2015, Markham started the cold start process at 3:30 a.m. and finished at 4:45 a.m. After claimant reported the accident, Markham

checked claimant's bus with his flashlight for approximately 15 to 20 minutes. Markham did not see anyone on the bus or in the bus lot. Markham did not observe or smell urine on claimant's bus or see "footprints in th[e] bus" in the stairwell. On cross-examination, Markham testified that he wrote a statement about the accident on February 21, 2015. Markham, however, wrote that the accident took place on February 2, 2014. Markham testified that the bus doors were unlocked overnight, confirming that a vagrant "certainly could've pulled open the door and gone in the bus." Markham was not surprised to hear that someone not employed by employer was entering buses to collect cans before and after routes, as stated in Officer Grove's police report. Markham confirmed that the bus lot was not fenced in and lacked surveillance cameras and lights. Specific to February 20, 2015, Markham recalled that it snowed the night before the accident and the stairway to claimant's bus had "a little bit of snow" on it. Markham denied that he was present when Marshall located a puddle of urine near the last seat on the bus. On redirect examination, Markham confirmed that he primarily focused on locating an assailant when he checked claimant's bus, not whether the aisles were clean or free of debris.

¶ 29 Ms. Margaret Couch, claimant's therapist, provided treatment summaries following employer's request for therapeutic records. Couch, who worked with claimant since September 22, 2015, believed that claimant suffered from PTSD prior to February 20, 2015. As a result, the February 20, 2015, attack exacerbated claimant's symptoms, causing her to experience daily panic attacks, sleep disturbances, and difficulty getting out of bed. Although claimant's symptoms improved over time, Couch believed that claimant was "far from achieving ' 'normal' ' social and emotional functioning." Couch wrote in a June 19, 2016, treatment summary that claimant's PTSD symptoms, which included panic attacks, agoraphobia, flashbacks, hyposomnia, and weight gain, traced back to the violent February 20, 2015, work-place accident. In addition, Couch wrote in an October 19, 2018, treatment summary that she did not take or keep contemporaneous notes during

client sessions. Couch described that claimant feared the dark and slept with a night light, which was a direct result of the February 20, 2015, attack that occurred in the dark, in the early morning hours. Lastly, Couch noted in an October 17, 2021, treatment summary that claimant "has never wavered in her telling of the incident in 2015, nor does she benefit in any way from experiencing these chronic symptoms."

¶ 30 On June 30, 2021, the evidentiary deposition of Dr. Nancy Landre, a licensed psychologist, was taken. Dr. Landre performed an IME of claimant on March 12, 2020, at employer's request. At that time, claimant still cried and felt jumpy, experienced panic attacks, and did not like when people walked behind her or surprised her. Dr. Landre testified that claimant reported her version of the accident as follows:

> "[S]he went to the bus barn and noticed that they had not started the bus yet, although they were supposed to. And she got on her bus, and she saw that the keys were already in it. And at that point she thought that she got hit on the back of the head on the left side.
>
> She did not think that she'd passed out, but she reported that everything went black[,] and she saw stars. And then when everything came back into focus, she was standing up and hanging onto the steering wheel and noticed that it was very dark in her bus. And she turned around and tried to turn some lights on and was pushing buttons. And then the next thing she knew she was at the bottom of the stairs outside of the bus."

Dr. Landre concluded that claimant "did clearly have a head injury because *** there was an indication that she bonked her head." Dr. Landre testified that "it was not clear to [her] whether she was truly struck on the back of the head or fell out of the bus." The following colloquy took place:

"Q. [COUNSEL FOR EMPLOYER]: Do you have an opinion whether what she reported on February 20, 2015, could have been a flashback to an earlier episode of abuse?

***

A. Honestly, I don't even know what to say about that. I kind of don't think so, honestly.

***

Q. So then do you have an opinion to a reasonable degree of neuropsychological certainty whether [claimant] is impaired in her ability to observe, remember, and relate the specific events of February 20, 2015, the day of the alleged occurrence?

***

A. I have some concern about her ability to accurately recall the events of that day. I think there are reasons to be concerned about the validity of her recall regarding what transpired.

Q. Okay. And what would those be, ma'am?

A. Well, there are indications in the medical record that she told a nurse immediately afterwards that she didn't know what had happened. Her story evolved over time and shifted and changed quite a bit. Usually, when people have a head injury, their memory for events surrounding that event is sketchy and not reliable. So[,] I think, collectively, all of those.

And plus, there was such a discrepancy between what she was reporting and what, for example, the gentleman [Markham] who kind of check out the scene afterward was reporting that, you know, calls into question whether she was really a reliable reporter of what actually happened that morning."

Dr. Landre testified that she was unable to causally connect claimant's possible anxiety disorder and the accident because "the cause of her injury was unclear." Dr. Landre found claimant employable, given her normal cognitive test results.

¶ 31 On cross-examination, Dr. Landre testified that, although claimant's medical records indicated that an unknown assailant hit claimant on the bus, claimant told a nurse on February 20, 2015, "that she did not remember what happened." According to Dr. Landre, "that's the most reliable account *** is what happened *** immediately afterward." Dr. Landre acknowledged that counsel for employer provided her with Markham's trial testimony, which indicated that Markham did not find urine or footprints as he looked for an alleged assailant. She admitted, however, that counsel for employer never provided her with Marshall's trial testimony, which demonstrated that Marshall inspected claimant's bus within 5 to 10 minutes after he visually saw a large goose egg on the back side of claimant's head. Dr. Landre was also unaware that Marshall smelled urine and found liquid urine on claimant's bus immediately after claimant reported the attack. Dr. Landre was also unaware of the below freezing temperatures on February 20, 2015, that homeless people accessed the unlocked buses overnight before, and that employer did not have security cameras or lights around the perimeter of the facility.

¶ 32 On July 15, 2022, the arbitrator found claimant failed to prove that she sustained an accidental injury arising out of and in the course of her employment on February 20, 2015. The arbitrator denied claimant all benefits. The arbitrator also denied claimant's petition for penalties and attorney fees and found the remaining issues raised by claimant (accident date; current condition of ill-being causally related to injury; claimant's earnings; whether medical services provided were reasonable and necessary; temporary total disability (TTD); the nature and the extent of her injuries; and permanent total disability (PTD) benefits and continued treatment) moot.

¶ 33 Claimant filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). The Commission reversed the arbitrator's decision, finding that claimant proved she sustained an accidental injury arising out of and in the course of her employment on February 20, 2015, and that her current condition of ill-being was causally related to the work accident. The Commission, unlike the arbitrator, found claimant credible, where evidence demonstrated that claimant's coworkers observed a bump on her head shortly after the accident, and claimant was diagnosed with a hematoma at the emergency room at Delnor Hospital. Moreover, the Commission relied on Marshall's testimony that he found fresh urine on the bus floor, and that claimant consistently reported her description of the attack, which occurred while claimant was on her bus preparing to perform the DOT checklist. The Commission believed that the circumstances of claimant's employment "clearly contributed to the risk of an assault," provided employer required her to arrive early in the morning to a bus lot that did not have security cameras or lighting and enter a bus that remained unlocked overnight.

¶ 34 The Commission determined that, although claimant's psychological and unrelated physical conditions and her advanced age weighed against her return to work, claimant failed to prove she was entitled to PTD benefits, pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2020)), and a wage loss differential, pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2020)). The Commission awarded claimant permanent partial disability (PPD) benefits of $264.59 for 250 weeks, pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2020)), as the work attack caused the loss of use of 50% of the person-as-a-whole; reasonable and necessary medical expenses incurred for treatment by Dr. Foroutan and Ms. Couch, under sections 8(a) and 8.2 of the Act (820 ILCS 305/8(a); 8.2 (West 2020)); and temporary total disability (TTD) benefits of $293.99 per week for 232-4/7 weeks, from February 20, 2015, through August 5, 2019, pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2020)). The

Commission denied claimant penalties and fees, pursuant to sections 16, 19(k), and 19(*l*) of the Act (820 ILCS 305/16; 19(k); (*l*) (West 2020)). Employer sought judicial review of the Commission's decision in the circuit court of Kane County.

¶ 35 On December 14, 2023, the circuit court held a hearing. From the outset of the hearing, the court stated that it did not "require any additional input" from the parties. Instead, the court stated:

> "This is a pretty easy one for the Court. The alleged incident is that a bus driver is attacked on a bus, hit on the head, and suffered debilitating psychiatric problems.
>
> The arbitrator found claimant failed to prove her claim. He noted that she lacked credibility. She also failed to prove that the incident occurred or that it occurred in connection with her work. There is [*sic*] questions if she was even assaulted and, as I said, if it arose from her work. That's essentially what the arbitrator's decision concluded.
>
> The petitioner's testimony was inconsistent or contrary to other witnesses. She told the police officer she started the bus but no evidence of that exists. The video proves that did not happen. She both denies losing consciousness, falling down but also reports passing out, falling down. No one saw a potential assailant even though several opportunities to do so existed.
>
> In overruling the arbitrator, the Commission found the petitioner credible because she had a bump on her head and that it was a recent fresh injury and because one witness claimed to have seen urine on the bus, while three or four others found no such evidence. The one witness was plaintiff's union steward and motivated to back its members.
>
> Further, given the wintry conditions, it's more plausible that plaintiff fell or slipped and hit her head. Such a conclusion is based on the snowy condition. There's evidence snow was tracked into the bus, in fact, by the driver's area. Petitioner was not found on the

bus or in the area near the bus, nor does anyone place her there. There's no evidence she was on the bus that morning other than her own statement.

She is found in her car out in front of the offices outside the bus yard. And then she relates her account of being allegedly assaulted.

Like the arbitrator, no reasonable finder of fact would find that the petitioner was attacked while on the bus."

The court found the Commission's decision against the manifest weight of the evidence, noting that no competent evidence existed to support claimant's argument. The court proceeded to state:

"THE COURT: If this was a criminal trial, it would get directed out.

MR. NIERMANN [COUNSEL FOR CLAIMANT]: It's not a criminal trial.

THE COURT: I understand that.

MR. NIERMANN: You've got three commissioners saying she got hurt on the bus.

THE COURT: No, you have three commissioners that said she was credible because she had a recent bump on her head and because one guy says he found urine, but completely ignored the more plausible story as to how she got hurt which is likely she slipped and fell and hit her head on a slippery, snowy day, and ignored all of the evidence that there were two guys walking around the yard starting buses. There's no video evidence. There's no one that can actually place her on the bus except herself. And we have several opportunities to see someone and know someone is seen.

Like I said, from my point of view, this isn't even close and it's a tortured decision that the Commission entered into to try to lend credibility to this woman's statements."

¶ 36 Accordingly, the circuit court set aside the Commission's decision, finding claimant failed to prove that she sustained an accidental injury arising out of and in the course of employment. The court ordered the arbitrator's decision reinstated. Claimant filed a timely notice of appeal.

¶ 37 After issuance of our disposition on October 23, 2024, claimant initially filed a motion to correct calculation errors, and employer filed a response. Shortly thereafter, both claimant and employer filed petitions for rehearing. We deny both claimant's and employer's petitions for rehearing, deny claimant's motion to correct calculations, deny both claimant's and employer's requests for certification, and issue our modified order upon the denial of rehearing.

¶ 38 II. ANALYSIS

¶ 39 Claimant raises multiple issues on appeal, however, the primary issue before this court is whether claimant sustained an accident which arose out of her employment. From the outset, we note that we are reviewing the Commission's decision finding that claimant sustained an accidental injury arising out of and in the course of her employment, not the circuit court's decision. When a party appeals to the appellate court following the entry of a judgment of the circuit court in a workers' compensation proceeding, it is the decision of the Commission, not the judgment of the circuit court, which is under consideration. *Travelers Ins. v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 33. Therefore, we afford deference to the Commission's decision, not the circuit court or the arbitrator's decision, and our review of the Commission's decision is "extremely deferential." *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 544 (2010).

¶ 40 A. Accident

¶ 41 To obtain compensation under the Act, a claimant bears the burden of proving, by a preponderance of the evidence, that he or she sustained an accidental injury arising out of and in the course of her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The "arising out of" component addresses the causal connection between a work-related injury and a claimant's condition of ill-being. *Sisbro*, 207 Ill. 2d at 203. An injury arises out of one's employment if the origin of the injury is in some risk connected with or incidental to the

employment so that there is a causal connection between the employment and the accidental injury. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, ¶ 36.

¶ 42 Whether a claimant's injury arose out of and in the course of her employment is a question of fact to be resolved by the Commission, and the Commission's determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 546 (2010). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Where the inferences drawn by the Commission are reasonable, such inferences cannot be disregarded because other inferences might have been drawn from the same facts. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07 (1984). A reviewing court can affirm the Commission's decision if there is any legal basis in the record to support its decision, regardless of the Commission's findings or reasoning. *General Motors Corp. v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695 (1989).

¶ 43 Here, the Commission's decision that claimant's injuries arose out of her employment was not against the manifest weight of the evidence. Dissimilar to the arbitrator and the circuit court, the Commission found claimant's testimony credible, where she testified that she was struck on the head by an unidentified assailant after she entered her unlocked bus that was parked in a lot without security cameras or lighting. The record supports a finding that claimant consistently reported that she was standing next to the driver's seat and facing the driver's side window while performing a DOT checklist at the time of the attack. In addition, the Commission found it important that claimant consistently reported the accident to her treating physicians and the section 12 examiners over the course of the litigation. We cannot disagree, where the record supports a finding that claimant consistently reported the details of the attack to Drs. Foroutan. Landre, and Schlageter, as well as Ms. Couch.

¶ 44 The Commission also reasoned that claimant's testimony was supported by Marshall's testimony that he found urine on claimant's bus 5 to 10 minutes after he observed a bump on her head, and the fact that claimant was diagnosed with a hematoma at the emergency room on February 20, 2015. The record supports the Commission's findings. Lastly, we note that, although claimant's medical notes at Delnor Hospital state that she could not remember what happened to her on the morning of the accident, there is evidence in the record to support claimant's contention that she was struck from behind while attempting to turn on the ignition and interior lights in her bus. Moreover, although Officer Groves's police report stated that an assailant hit claimant "[a]fter [she] start[ed] the bus," the Commission determined claimant's testimony credible that she was in the process of turning on the ignition when an assailant struck her from behind. While different inferences could be drawn from the evidence, we cannot say that the Commission's credibility determinations or its factual findings that a work-related accident occurred was against the manifest weight of the evidence. See *Hart Carter Co. v. Industrial Comm'n*, 89 Ill. 2d 487, 495 (1982). (A court will not set aside an award solely because we might have made a finding on the evidence different from the one made by the Commission or because we might have drawn inferences different form the ones drawn by the Commission.). Based on the record before us, we cannot say that an opposite conclusion is clearly apparent.

¶ 45 B. PTD Benefits

¶ 46 Next, claimant argues that the Commission's decision denying claimant PTD benefits is against the manifest weight of the evidence. We agree.

¶ 47 Here, the Commission found that claimant failed to prove either factor necessary to achieve odd-lot status. "Whether a claimant falls into the odd-lot category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544

(2007). A claimant generally satisfies the burden of establishing that she falls into the odd-lot category in one of the following ways: (1) by showing a diligent but unsuccessful job search, or (2) by demonstrating that she will not be regularly employed in a well-known branch of the labor market due to his age, skills, training, and work history. *Id.* at 544 (citing *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534-35 (1996)). A claimant may fall into the odd-lot category if she "is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *Id.* at 544 (citing *Alano*, 282 Ill. App. 3d at 534). If the claimant establishes that she falls into the odd-lot category, "the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists." *Id.* at 544 (citing *Waldorf Corp. v. Industrial Comm'n*, 303 Ill. App. 3d 477, 484 (1999)).

¶ 48 In rejecting claimant's argument that she fell into the "odd-lot" category, the Commission noted that claimant did not seek employment after the accident. This finding is supported by the record. The Commission further determined that claimant failed to prove that, due to her age, skills, training, and work history, she would not be regularly employable in a well-known branch of the labor market. We disagree. Belmonte testified that there was no stable labor market available to claimant, a 77-year-old woman, who was no longer employable. "Based on [claimant's] outdated clerical skills, age, and unrelated health conditions," Belmonte testified that claimant lost access to a stable labor market, including remote work, and thus, would not have any benefit from receiving vocational assistance. Accordingly, it is our view that claimant established that she fell into the "odd-lot" category, at which time the burden shifted to employer to show that some kind of suitable work was regularly and continuously available to claimant (*Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547 (1981)). Employer failed to do this. Employer offered the testimony of Bose, who believed claimant could work as a receptionist, a data entry clerk, or

remotely in a customer-related role, and earn $11 to $16 per hour. However, Bose did not identify any suitable work that would be regularly and continuously available to claimant. As such, we find the Commission's denial of PTD benefits under the "odd-lot" category was against the manifest weight of the evidence.

¶ 49 Accordingly, we reverse the portion of the Commission's decision that awarded claimant PPD benefits for the loss of use of 50% of the person-as-a-whole and vacate the PPD award. We reverse the Commission's decision to deny claimant PTD benefits and remand claimant's cause back to the Commission with directions to calculate claimant's PTD benefits and determine the date upon which claimant is entitled to such an award.

¶ 50 C. Penalties and Attorney Fees

¶ 51 Lastly, claimant argues that the Commission abused its discretion by failing to award penalties pursuant to sections 19(*l*) and 19(k) of the Act and attorney fees pursuant to section 16 of the Act against employer for "its breathtaking course of misconduct during this litigation." For support, claimant argues that employer destroyed the video recording footage from claimant's bus, misled Drs. Schlageter and Landre to manufacture false arguments, engaged in illegal parallel litigation, and abused motion practice before the Commission. We address claimant's contention in turn.

¶ 52 Penalties under section 19(*l*) are in the nature of a late fee. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The assessment of a penalty under section 19(*l*) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *Id.* at 499. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in

the employer's position would have believed that the delay was justified. *Bd. of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10 (1982). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121 (1991).

¶ 53 Section 19(k) penalties and section 16 attorney fees address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 849 (2002). A review of the Commission's decision to deny penalties and attorney fees pursuant to sections 19(k) and 16 of the Act involves a two-step analysis. First, we must determine whether the Commission's finding that the facts do not justify section 19(k) penalties and section 16 attorney fees is "contrary to the manifest weight of the evidence." *McMahan*, 183 Ill. 2d at 516. Second, we must determine whether "it would be an abuse of discretion to refuse to award such penalties and fees under the facts present here." *Id.*

¶ 54 We first address claimant's argument that employer unreasonably denied claimant benefits after Dr. Schlageter related claimant's complaints to the attack. According to the Commission, employer had a reasonable basis for disputing the claim, "[g]iven the disputed facts surrounding the unwitnessed assault by an unidentified assailant." The evidence demonstrated that employer acted in reliance on Dr. Schlageter's IME testimony and report, which noted that claimant's "complaints [of pain on the bridge of the noise and jaw pain] were causally related to the accident/incident of February 20th, 2015." Dr. Schlageter did not testify that claimant's complaints were related to the attack, as claimant incorrectly noted in her brief. However, Dr. Schlageter believed that claimant experienced injuries following February 20, 2015, although he did not opine as to the source of her injuries. Moreover, Dr. Landre testified that claimant "clearly" had a head injury, however, "it was not clear to [her] whether [claimant] was truly struck on the back of the

head or fell out of the bus." Regardless of whether claimant suffered injuries from a fall or an attack by an unknown assailant, claimant's injuries arose out of her employment. As such, we believe employer unreasonably withheld claimant benefits, especially where employer failed to provide justification for the delay.

¶ 55 Accordingly, we hold that the Commission's determination to deny penalties and attorney fees was against the manifest weight of the evidence and constituted an abuse of discretion. Accordingly, we reverse the Commission's denial of penalties under sections 19(*l*) and 19(k) and attorney fees under section 16 and remand this matter to the Commission for a determination of the amount of penalties and attorney fees to be assessed against employer for its intentional delay in payment. Because of our disposition of claimant's argument, we need not address the remaining issues claimant raised on appeal.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we reverse the circuit court's order setting aside the Commission's decision. We affirm the Commission's decision in part and reverse in part. Specifically, we affirm the Commission's findings on accident, causal connection, average weekly wage, reasonable and necessary medical expenses, and TTD benefits. We reverse the portion of the Commission's decision that awarded claimant PPD benefits for the loss of use of 50% of the person-as-a-whole and vacate the PPD award. We reverse the Commission's decision to deny claimant PTD benefits and remand claimant's cause back to the Commission with directions to calculate claimant's PTD benefits and determine the date upon which claimant is entitled to such an award. Lastly, we reverse the Commission's decision to deny claimant penalties and attorney fees and remand the matter back to the Commission with directions to determine the amount of penalties and attorney fees to be assessed against employer for its intentional delay in payment.

¶ 58 Reversed; Commission's decision affirmed in part, reversed in part; cause remanded with directions.