2021 IL App (2d) 200413WC-U
Nos. 2-20-0413WC, 2-20-0415WC (cons.)
Order filed June 28, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

PRAIRIE MATERIAL,	)	Appeal from the Circuit Court
	)	Circuit Court of Kane County.
Appellant,	)	
	)	
v.	)	Nos. 20-MR-54,
	)	20-MR-58
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*	)	Honorable
	)	Kevin Busch,
(Jeff Schultz, Appellee).	)	Judge, Presiding

JUSTICE BARBERIS delivered the judgment of the court.

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

ORDER

¶ 1 *Held*: (1) The Commission's finding that claimant's conditions of ill-being were causally related to his initial work accident was not against the manifest weight of the evidence; (2) the Commission's finding that claimant's medical treatment and expenses were reasonable and necessary was not against the manifest weight of the evidence; (3) the Commission's calculation of claimant's AWW was not against the manifest weight of the evidence; (4) the Commission's award of TTD benefits was not against the manifest weight of the evidence; (5) the Commission's award of TPD benefits was not against the manifest weight of the evidence; and (6) the Commission's award of penalties and attorney fees was not against the manifest weight of the evidence.

¶ 2 This case involves two separate claims for workers' compensation benefits brought contemporaneously by claimant, Jeff Schultz, against his employer, Prairie Material (Prairie), pursuant to the Illinois Workers' Compensation Commission Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)). In the first claim (No. 2-20-0413WC), claimant alleged that he sustained a left elbow contusion when his left elbow struck the steering wheel of a ready-mix truck that he was driving while working for Prairie on August 6, 2014.[1] In the second claim (No. 2-20-0415WC), he alleged repetitive trauma injuries—bilateral elbow epicondylitis and right shoulder internal derangement—with a manifestation date of December 5, 2014, from "overcompensating" as a result of the August 6, 2014, left elbow injury.

¶ 3 Both claims were consolidated for a hearing, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2016)), before the arbitrator on January 17, 2017. The disputed issues were causation, average weekly wage (AWW), medical and penalties/fees in the first claim, and accident, notice, causation, AWW, temporary total disability (TTD), temporary partial disability (TPD) and penalties/fees in the second claim.

¶ 4 On April 28, 2017, the arbitrator issued a decision with respect to claimant's first claim. The arbitrator found that claimant sustained an undisputed work accident on August 6, 2014, that caused a left elbow contusion. Pursuant to section 10 of the Act (820 ILCS 305/10 (West 2016)),

[1] Claimant, through his former attorney, previously filed an application of claim for the same left elbow injury sustained on August 6, 2014. Claimant's former attorney refused to dismiss the claim based on a fee petition dispute. The arbitrator made no findings with respect to this previous claim.

the arbitrator determined that claimant's AWW, from Prairie and American Linehaul (American), his second employer, was $1983.02 prior to the August 6, 2014, accident.

¶ 5 On May 1, 2017, the arbitrator issued a decision with respect to claimant's second claim. The arbitrator found that claimant's conditions of ill-being regarding his left and right arms and elbows, were causally related to his employment, including an "overuse injury to his right arm." The arbitrator determined that the repetitive trauma injuries had a manifestation date of December 5, 2014, and that proper notice was given to Prairie. In addition, the arbitrator found that "[t]here is an accurate calculation of AWW contained as a summary within [exhibit 9]." As shown in exhibit 9, the parties agreed that claimant's AWW from Prairie was $1277.38. Exhibit 9 also showed an AWW from American of $705.64, which was calculated by taking the total number of hours claimant worked for American from August 9, 2013, through August 1, 2014, ($2096.75), multiplied by claimant's regular rate of pay ($17.50) and then divided by 52 weeks. Based on these figures, the arbitrator calculated claimant's total AWW at $1983.02 ($1277.38 from Prairie plus $705.64 from American).

¶ 6 The arbitrator awarded claimant $153,298.21 in medical expenses; $1322.01 in weekly TTD benefits from March 11, 2015, through September 13, 2015; and a total of $69,977.89 in TPD benefits from December 5, 2014, through March 10, 2015, and September 14, 2015, through January 1, 2017. The arbitrator also awarded claimant penalties under section 19(k) of the Act (820 ILCS 305/19(k) (West 2016)) and attorney fees under section 16(a) of the Act (820 ILCS 305/16(a) (West 2016)), finding Prairie's refusal to pay TTD and TPD benefits, and its delay in reimbursing claimant for medical expenses, vexatious and unreasonable.

¶ 7 Prairie filed a petition for review of both decisions before the Illinois Workers' Compensation Commission (Commission). On December 19, 2019, the Commission issued a

unanimous decision affirming and adopting the arbitrator's decisions. The Commission remanded the matter to the arbitrator for further determination of temporary total compensation or compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 8 On January 9, 2020, Prairie filed a petition for judicial review in the circuit court of Kane County. The court subsequently entered an order confirming the Commission's decisions on June 22, 2020. Prairie appealed.

¶ 9 I. Background

¶ 10 The following factual recitation is taken from the transcript of the consolidated arbitration hearing held on January 17, 2017, the evidence adduced at that hearing, and the decisions of the arbitrator and Commission that followed. We have limited the recitation to facts pertinent to a resolution of this appeal.

¶ 11 Claimant testified to the following. Beginning in September 2005, claimant worked as a ready-mix truck driver for Prairie, regularly driving a concrete mixer truck to various job locations, unloading the concrete, and returning to the terminal to refill the mixer. His duties included mixing the particular load of concrete for each job, which required him to climb up and down a ladder on the truck to add different ingredients into the load. In addition, after arriving at the designated job site, claimant would connect "chutes," each measuring three to four feet in length and weighing approximately 50 pounds, to transfer concrete to the desired location of the pour. The chutes were stored in various areas of the truck—some on the side at waist height and others overhead—which had to be pulled out and then lifted into place prior to the pour.

¶ 12 On August 6, 2014, claimant was driving approximately 55 miles per hour to a job site when he encountered an incline at the time the road transitioned from concrete to dirt. During the

encounter, he had his left hand on the steering wheel and his right hand on the gear shifter. As he traversed the uneven road surface, the truck jerked, causing his left elbow to strike the steering wheel. He immediately felt pain and numbness in his elbow after he "whacked [his] funny bone." He continued to the job site and finished pouring the concrete. He then informed the dispatcher of his left elbow injury and, upon returning to the terminal, applied ice to his injured elbow.

¶ 13 On Friday, August 8, 2014, two days after the accident, claimant sought medical attention for the first time. Prairie referred him to Alexian Brothers Medical Group, where he was examined by Dr. Grzegorz Blecharz, a primary care physician. Claimant was diagnosed with a contusion to his left elbow and provided with an "elbow sleeve." Dr. Blecharz advised claimant to apply ice to the area three to four times a day and take ibuprofen for pain. Dr. Blecharz released claimant to work on a modified basis, with instructions to "limit strong grip/grasp/pinch" with his left arm, until his follow-up appointment three days later.

¶ 14 Claimant testified that he wore the elbow sleeve when he returned to work the following Monday, August 11, 2014, but the sleeve did not provide relief. Later that same day, claimant reported, as instructed, for a follow-up visit with Dr. Blecharz. The August 11, 2014, medical record revealed that claimant complained of constant stabbing pain with numbness and tingling in his left elbow that radiated into his left hand. Although Dr. Blecharz noted tenderness to claimant's left elbow and crepitation on range of movement, he returned claimant to full-duty work and discharged him from care.

¶ 15 Claimant further testified that between August 6, 2014, the date of the accident, and December 5, 2014, he continued to work, despite continued numbness, tingling and the feeling that his left elbow was falling asleep. As a result, claimant relied on his right hand to perform routine tasks. For instance, claimant testified that he was unable to use his left hand to operate the

fuel tank pump, and he favored his right arm, instead of his left, when approaching and climbing the truck's ladder. Claimant also testified that he had difficulty carrying items up the ladder, lifting and connecting the chutes, and hammering concrete off the truck's drum and rear under-ride bar. Claimant testified that he had no medical issues with either elbow before the August 6, 2014, accident. It was after the accident that he began experiencing pain in his right elbow while performing his job duties, which he attributed to overuse. Because his left arm condition was not improving and his right arm pain had worsened, claimant spoke to Jeff Lesniak, Prairie's operations director, on December 5, 2014. Lesniak referred him to "the company doctor" at Alexian Brothers Medical Group.

¶ 16 On December 5, 2014, claimant presented to Dr. Blecharz's office. Dr. Blecharz's records reflected that claimant complained of constant bilateral elbow and right shoulder pain "due to over usage compensating for [left] arm." Claimant was examined by Heather Venamore, Dr. Blecharz's physician assistant, who observed bilateral elbow tenderness, effusion and crepitation. Claimant was diagnosed with medial and lateral epicondylitis in both elbows. Claimant was released to light-duty work with restrictions not to lift, carry, push, or pull more than 10 pounds, no repetitive motion, no reaching and no lifting above his shoulders. Claimant was also directed to complete physical therapy.

¶ 17 Claimant testified that Prairie did not offer him light-duty work at his regular terminal yard, initially placing him in a desk job at a terminal yard in Chicago and, later, as a part-time security guard at the Batavia yard. Claimant's employment lasted from December 5, 2014, to March 10, 2015, when Prairie notified him that it would no longer accommodate his restrictions due to his prescribed use of narcotic pain medication. Claimant further testified that after March 10, 2015, he regularly contacted Prairie but was always informed that Prairie had no work available for him

within the restrictions. In addition, claimant was off work from American from December 5, 2014, through September 13, 2015, due to restrictions imposed by the various medical providers, including time off following his July 17, 2015, and August 21, 2015, surgeries, as detailed below.

¶ 18 On December 15, 2014, claimant presented to Rand Medical Center for an examination by Dr. Sajjad Murtaza, a pain management specialist. Dr. Murtaza observed tenderness to palpation over the medial and lateral epicondyles, bilaterally, with decreased range of motion in the right shoulder accompanied by positive Neer's and Hawkin's testing. Dr. Murtaza diagnosed claimant with bilateral epicondylitis, medial and lateral, and also right rotator cuff pain. Claimant was referred to attend physical therapy and for "medication management." A subsequent right shoulder computerized tomography (CT) scan appeared unremarkable.

¶ 19 On December 29, 2014, claimant returned to Rand Medical Center "for evaluation of a work-related injury," where he presented to Dr. Irvin Wiesman, a hand and microvascular surgeon. Dr. Wiesman's records reflected that claimant complained of bilateral elbow and forearm pain with bilateral hand numbness, tingling and weakness; forearm pain, numbness and tingling, worse in the fourth and fifth digits of both hands; and right shoulder pain secondary to repetitive, heavy lifting. Dr. Wiesman noted the right elbow pain "is worse after he suffered a forceful contusion of the right elbow." Claimant's physical examination revealed tenderness to palpation along the radial tunnel bilaterally, more so on the right, along with positive bilateral tinels at the cubital tunnel. Dr. Wiesman diagnosed claimant with medial and lateral epicondylitis, bilateral cubital tunnel syndrome, and bilateral radial tunnel syndrome. Dr. Wiesman discussed surgical intervention, which would start with right medial and lateral epicondylectomies with debridement of extensor and flexor "wad," and then possible decompression of the ulnar nerve at the cubital tunnel pending results of bilateral, upper extremity electromyography (EMG) studies. Claimant was instructed to

continue therapy and follow up in one month. Records from New Life Medical Center showed that claimant attended physical therapy and occupational therapy sessions from January 2, 2015, through May 13, 2016.

¶ 20 On March 11, 2015, claimant presented to Dr. Robert Fink, an orthopedic surgeon. Dr. Fink testified on December 9, 2015, in an evidence deposition. The deposition transcript and Dr. Fink's initial narrative report of May 11, 2015, and supplemental report of May 13, 2015, revealed the following. Dr. Fink opined that claimant injured his left elbow through direct trauma by striking the steering wheel of his work truck on August 6, 2014. This direct trauma caused the cubital tunnel to tighten resulting in the symptoms and the later diagnosis in the left arm. With respect to claimant's right arm condition, Dr. Fink opined that claimant put pressure on the right cubital tunnel by carrying 50-to-55-pound chutes in his right hand with his elbow bent at a 90 degree angle and his wrist dorsiflexed. Dr. Fink opined that the direct trauma claimant experienced to his left elbow combined with increased pressure on the cubital tunnel in the right elbow, due to job-related overuse, could be the cause of claimant's cubital tunnel syndrome in both arms. Dr. Fink expressed in his May 13, 2015, report that claimant required surgery to avoid a worsening condition. Additionally, medical records revealed that Dr. Fink performed two surgeries on claimant at Methodist Hospital of Chicago. On July 17, 2015, claimant underwent a right cubital tunnel release and partial right medial epicondylectomy, and then on August 21, 2015, claimant underwent a left cubital tunnel release with a debridement of the extensor carpi brevis tendon of the left elbow.

¶ 21 On September 9, 2015, Dr. Fink released claimant to light-duty work with restrictions not to lift more than 20 pounds and no ladder climbing. Claimant testified that he returned to light-duty work at American on September 14, 2015. As of the date of the arbitration hearing, claimant's

treatment was ongoing through Dr. Fink, and claimant currently used pain medication as prescribed.

¶ 22 Claimant next testified to the following concerning his concurrent employment. In addition to working for Prairie, claimant worked for American as a "full-time" warehouse leadman and driver since 2007, and he owned a commercial cleaning service franchise called "Complete Care For You," where he mainly supervised employees. In 2014, claimant typically worked 30 to 50 hours per week for American and 30 to 60 hours per week for Prairie. Claimant's American job duties included operating a forklift and sometimes driving trucks when one of the full-time drivers was unavailable. Compared to Prairie, American required claimant to drive far less often, and some of American's trucks had automatic transmissions. As American's warehouse leadman, claimant was not required to lift, although he occasionally lifted a 20-to-30-pound container onto a trailer. Claimant performed virtually no physical labor running his commercial cleaning service.

¶ 23 Additionally, claimant testified that, before August 6, 2014, he had discussed his concurrent employment at American with Buddy Horn, Prairie's terminal yard supervisor, "on almost a daily basis." Claimant explained that Horn instructed drivers which truck to drive during a shift and provided directions with respect to the location of the job site and materials needed to correctly mix the concrete. Horn also assigned other tasks to drivers, such as shoveling gravel, using wheel barrels and cleaning trucks. Horn was also responsible for opening the office in the morning and for issuing job tickets for each delivery. Claimant explained that the drivers, upon returning to the terminal after a delivery, would send the job tickets to the office through pneumatic tubes. Claimant believed that it was Horn's responsibility to collect the completed tickets. Claimant acknowledged that Horn belonged to the same union, but claimant believed that Horn was an "empowered employee" with more rights than other employees.

¶ 24 Claimant verified his income records from Prairie and American, as depicted in claimant's exhibit 9, which included claimant's pay stubs while working part-time for Prairie from December 5, 2014, to March 10, 2015, and from September 14, 2015, through the most recent pay period in late 2016. Claimant also verified the unpaid medical bills incurred for treatment, as depicted in claimant's exhibit 8, totaling $137,491.00 and unreimbursed medical bills paid by his union group health and welfare insurance plan, as depicted in claimant's exhibit 10, totaling $11,971.21.

¶ 25 On November 17, 2016, claimant presented to Dr. Prasant Atluri, a board-certified microvascular hand surgeon, at Prairie's request, for a section 12 examination. Dr. Atluri's section 12 report reflected that Dr. Atluri had reviewed claimant's job description and some of the treatment records, but Dr. Atluri did not have the EMG results and Dr. Fink's surgical records. As a result, Dr. Atluri noted that he was unable to determine "the specific diagnoses in more detail." Dr Atluri expressed that "the clinical documentation suggests that the patient had chronic bilateral elbow cubital tunnel syndrome, medial epicondylitis and lateral epicondylitis and possible radial tunnel syndrome." Dr. Atluri, after reviewing claimant's work activities as a ready-mix truck driver, opined that claimant's conditions were not work-related.

¶ 26 On April 28, 2017, the arbitrator issued a decision with respect to claimant's first claim. The arbitrator found that claimant had sustained an undisputed work injury on August 6, 2014, that caused a left elbow contusion. Pursuant to section 10 of the Act, the arbitrator determined that claimant's AWW prior to the August 6, 2014, accident was $1983.02 from both Prairie and American.

¶ 27 On May 1, 2017, the arbitrator issued her decision with respect to claimant's second claim. The arbitrator found that claimant's conditions of ill-being regarding his left and right arms and elbows were causally related to his employment, including an "overuse injury to his right arm."

The arbitrator determined that the repetitive trauma injuries had a manifestation date of December 5, 2014, and that proper notice had been given to Prairie. In addition, the arbitrator found that "[t]here is an accurate calculation of AWW contained as a summary within [exhibit 9]." As shown in exhibit 9, the parties agreed that claimant's AWW from Prairie was $1277.38. Exhibit 9 also showed an AWW from American of $705.64, which was calculated by taking the total number of hours claimant had worked for American from August 9, 2013, through August 1, 2014, ($2096.75), multiplied by claimant's regular rate of pay ($17.50) and then divided by 52 weeks. Based on these figures, the arbitrator calculated that claimant had a total AWW of $1983.02 ($1277. 38 from Prairie plus $705.64 from American).

¶ 28 The arbitrator awarded claimant $153,298.21 in medical expenses; $1322.01 in weekly TTD benefits from March 11, 2015, through September 13, 2015; and a total of $69,977.89 in TPD benefits from March 11, 2015, through September 13, 2015, and September 14, 2015, through January 1, 2017. The arbitrator also awarded claimant penalties under section 19(k) of the Act and attorney fees under section 16(a) of the Act, finding Prairie's refusal to pay TTD and TPD benefits, and its delay in reimbursing claimant for medical expenses, vexatious and unreasonable.

¶ 29 Prairie filed a petition for review before the Commission. On December 19, 2019, the Commission issued a unanimous decision affirming and adopting the arbitrator's decisions. The Commission remanded the matter to the arbitrator for further proceedings for a determination of temporary total compensation or compensation for permanent disability, if any, pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 30 On January 9, 2020, Prairie filed a petition for judicial review in the circuit court of Kane County. The court subsequently entered an order confirming the Commission's decision on June 22, 2020. This appeal followed.

¶ 31 II. Analysis

¶ 32 On appeal, Prairie asserts the following six assignments of error: (1) the Commission's finding that claimant's conditions of ill-being were causally related to his initial work accident of August 6, 2014, was against the manifest weight of the evidence; (2) the Commission's finding that claimant's medical treatment and expenses were reasonable and necessary was against the manifest weight of the evidence; (3) the Commission erred in calculating claimant's AWW; (4) the Commission's award of TTD benefits was against the manifest weight of the evidence; (5) the Commission's award of TPD benefits was against the manifest weight of the evidence ; and (6) the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. We will address Prairie's challenges in turn.

¶ 33 1. Causal Connection

¶ 34 In the present case, Prairie does not dispute claimant's initial work-related injury to his left elbow and the reasonableness of the medical treatment and expenses that immediately followed. Instead, for its first assignment of error, Prairie contends that the Commission's finding that claimant's conditions of ill-being (*i.e.*, left and right cubital tunnel syndromes) were causally related to his employment is against the manifest weight of the evidence. We disagree.

¶ 35 To obtain compensation under the Act, a claimant must prove by a preponderance of the evidence that "some act or phase of his *** employment was a causative factor in his *** ensuing injuries." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Whether a causal relationship exists between a claimant's employment and his or her condition of ill-being is a question of fact. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984); *Bolingbrook Police Dept. v. Illinois Workers' Comp. Comm'n*, 2015 IL App (3d) 130869WC, ¶ 52. Whether a claimant has established the requisite causal connection between his current injuries

and an industrial accident is a question of fact for the Commission to determine, and that determination will not be overturned on appeal unless it is against the manifest weight of the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980); *R&D Thiel v. Illinois Workers' Comp. Comm'n*, 398 Ill. App. 3d 858, 866 (2010). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). The appropriate test is whether there is sufficient evidence in the record to support the Commission's determination, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 36 In resolving factual matters, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Comp. Comm'n*, 397 Ill. App. 3d 665, 674 (2009). This is especially true with respect to medical issues, where we owe heightened deference to the Commission due to the expertise it has long been recognized to possess in the medical arena. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979).

¶ 37 Nevertheless, Prairie first argues that Dr. Fink's causation opinion is less persuasive than Dr. Atluri's opinion, because, according to Prairie, Dr. Atluri is a board-certified "upper extremity specialist," while Dr. Fink has never been board certified for hand or upper extremity surgery.

¶ 38 We find Prairie's argument to be an invitation for this court to determine the weight to be accorded to the expert opinions. As earlier noted, that is the sole function of the Commission. Again, this is especially true with respect to medical issues, where heightened deference is owed to the Commission due to the expertise it has long been recognized to possess in the medical arena. *Long*, 76 Ill. 2d at 566. Additionally, there is no evidence to suggest that Dr. Fink was unqualified

to render an opinion. In fact, Dr. Fink testified that he was previously board certified and one-third of the surgeries he had performed in the previous three years involved elbow procedures. We further note that Dr. Fink performed both of claimant's surgical procedures, and the Commission emphasized that Dr. Atluri had limited information regarding claimant's past medical treatment. Given these facts, the Commission, in affirming and adopting the arbitrator's decision, had sufficient reason to afford greater weight to Dr. Fink's expert opinion, as compared to Dr. Atluri's opinion, irrespective of Dr. Atluri's board certification.

¶ 39 Prairie also argues that Dr. Atluri rendered a more well-informed causation opinion because he, unlike Dr. Fink, had obtained a job description from claimant and reviewed Prairie's written job description. Prairie argues that Dr. Fink, without knowledge of claimant's job duties, rendered an opinion based on speculation and conjecture. As such, Prairie argues that Dr. Fink's opinion, his testimony notwithstanding, was not within a reasonable degree of medical certainty. We disagree and find, based on the record before us, that the Commission's determination as to causation is not against the manifest weight of the evidence.

¶ 40 Here, the Commission considered claimant's testimony combined with Dr. Fink's deposition testimony and opinion to be more persuasive than Dr. Atluri's section 12 report and opinion. Claimant testified to the mechanism of injury to his left elbow and provided consistent history to his treatment providers. Claimant testified that he had no medical issues with either elbow before the August 6, 2014, accident. However, between the August 6, 2014, accident and December 5, 2014, despite experiencing continuing numbness, tingling and the feeling that his left elbow was falling asleep, claimant continued to work using his right hand to perform routine job duties. Because his left arm was not improving and the pain in his right arm had worsened, Prairie referred claimant to Alexian Brothers Medical Group, where he later complained of constant pain

in both of his elbows and right shoulder "due to over usage compensating for [left] arm." Again, we note that Prairie disputes the mechanism of injury, not the veracity of claimant's testimony.

¶ 41 Consistent with claimant's testimony, Dr. Fink opined that claimant's acute injury to his left elbow caused a narrowing of the tunnel, which lead to his left cubital tunnel syndrome. Dr. Fink further opined that claimant could have developed right cubital tunnel syndrome as a result of claimant compensating for his left elbow injury. Contrary to Prairie's argument, Dr. Fink testified that claimant's work-related activities, as a ready-mix truck driver, required "repeated lifting of heavy chutes with his right arm while his right elbow was at a 90[-]degree angle." Consequently, Dr. Fink, aware of the date of claimant's acute injury and the manifestation date of December 5, 2014, of the repetitive trauma injury, opined, within a reasonable degree of medical certainty, that claimant's medical conditions were employment related.

¶ 42 In contrast, although Dr. Atluri admitted that claimant's job duties required heavy lifting up to 50 pounds, intermittent pushing and pulling up to 70 pounds and climbing ladders, he nevertheless concluded that claimant's conditions of ill-being were caused by a chronic condition not associated with claimant's employment. Dr. Atluri expressed that claimant's job duties varied and that his intermittent exposure to heavy forceful use of the upper extremities would not contribute to the diagnosed medical conditions.

¶ 43 As the recitation of the evidence illustrates, the Commission was faced with competing medical evidence concerning the causal connection of claimant's conditions of ill-being. The Commission, after considering the strengths and weaknesses of the claimant's testimony and experts' testimonies and opinions, weighed the evidence in favor of claimant. Again, it is not our task as a reviewing court to accord weight to the testimonies and resolve conflicting medical

evidence. Accordingly, we find the Commission's decision is supported by the evidence of record and, thus, is not against the manifest weight of the evidence.

¶ 44 2. Medical Expenses

¶ 45 Based on its causation argument, Prairie also assigns error to the Commission's award of medical expenses for claimant's medical treatment relating to his conditions of ill-being. However, because we affirm the Commission's findings with respect to causation, we need not address Prairie's arguments concerning associated medical expenses. Accordingly, we affirm the Commission's award of medical expenses.

¶ 46 3. AWW

¶ 47 Prairie next assigns error to the Commission's calculation of claimant's AWW and makes two arguments in support: (1) Prairie did not have knowledge that claimant had concurrent employment with American; and (2) the Commission, in calculating claimant's AWW, included overtime earnings at the time-and-a-half rate and not the regular rate of pay. Under either circumstance, Prairie requests that we recalculate the AWW and then reduce the benefits awarded to claimant.

¶ 48 Before addressing Prairie's arguments, we note that the parties dispute the standard of review that governs our analysis of this issue. Prairie asserts we should review *de novo* because the Commission's calculation of the AWW presents an application of law, pursuant to section 10 of the Act, to undisputed facts. Claimant, on the other hand, asserts the Commission's determination should be reviewed under the manifest-weight standard because a wage determination by the Commission is a factual finding. As set forth more thoroughly below, we will address the standard of review as to each of Prairie's arguments in turn.

¶ 49 It is well settled that a claimant has the burden of proving, by a preponderance of the evidence, the elements of his claim, including his AWW. *Bagwell v. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160407WC, ¶ 24; *Sylvester v. Industrial Comm'n*, 314 Ill. App. 3d 1100, 1103 (2000); *Zanger v. Industrial Comm'n*, 306 Ill. App. 3d 887, 890 (1999). Typically, "[t]he determination of an employee's AWW is a question of fact for the Commission, which will not be disturbed on review unless it is against the manifest weight of the evidence." *Kawa v. Illinois Workers' Comp. Comm'n*, 2013 IL App (1st) 120469WC, ¶ 134. When the sole issue before a reviewing court is a question of law, the proper standard of review is *de novo*. *Beelman Trucking v. Workers' Comp. Comm'n*, 233 Ill. 2d 364, 370 (2009). A reviewing court may also apply a *de novo* standard of review when the facts essential to its analysis are undisputed and the review only involves an application of the law to those undisputed facts. *Uphold v. Illinois Workers' Comp. Comm'n*, 385 Ill. App. 3d 567, 571-72 (2008). However, if more than one reasonable inference can be drawn from the undisputed facts, than the applicable standard of review is manifest weight of the evidence. *Bagwell*, 2017 IL App (4th) 160407WC, ¶ 31.

¶ 50 a. Prairie's Knowledge of Concurrent Employment

¶ 51 Prairie's first argues that the Commission erred as a matter of law in determining that Prairie had knowledge of claimant's concurrent employment with American. Specifically, Prairie argues that "[i]t cannot be reasonably inferred that Buddy Horn was an agent of [Prairie], to whom notice of concurrent employment would be sufficient under section 10 of the Act." According, Prairie argues that our analysis only involves an application of law to undisputed facts. We disagree and will apply a manifest-weight-of-the-evidence standard.

¶ 52 Section 10 defines the employee's AWW as:

> "the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement *excluding overtime*, and bonus divided by 52. *** When the employee is working concurrently with two or more employers *and the respondent employer has knowledge of such employment prior to the injury*, his wages from all such employers shall be considered as if earned from the employer liable for compensation." (Emphases added.) 820 ILCS 305/10 (West 2016)).

¶ 53 While it is undisputed that claimant and Horn each worked for Prairie, a factual dispute exists as to Horn's position with Prairie. Claimant testified that Horn was Prairie's terminal "yard supervisor." Claimant also testified that Horn (1) instructed the drivers which truck to use during a shift and provided directions with respect to the location of the job site and materials needed to correctly mix the concrete; (2) assigned other tasks to the drivers, such as shoveling gravel, using wheel barrels and cleaning trucks; (3) opened the office every morning; and (4) issued a job ticket for each delivery and then collected the ticket upon completion of the delivery. In contrast, Prairie stressed that claimant and Horn belonged to the same union, and disputed that Horn provided the job tickets that directed claimant's work activities. Given this factual dispute, the appropriate standard of review to apply is manifest weight of the evidence. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Freeman United Coal Mining Co. v. Illinois Workers' Comp. Comm'n*, 2013 IL App (5th) 120564WC, ¶ 21.

¶ 54 In rendering its decision, the Commission weighed the evidence and found that claimant had proven by a preponderance of the evidence that Prairie had the requisite knowledge. We note that the Commission, in addition to the above-referenced facts, weighed claimant's testimony that

before August 6, 2014, he had discussed his concurrent employment "on almost a daily basis" with Horn, against Prairie's assertions that claimant had failed to notify the dispatcher, business office or operations director, who had directed claimant to the company doctor in December 2014, about his concurrent employment.

¶ 55 Under these circumstances, we cannot say an opposite conclusion than that reached by the Commission is clearly apparent. We therefore find that the Commission's finding was not against the manifest weight of the evidence. We now turn to Prairie's second argument.

¶ 56 b. Overtime Earnings

¶ 57 Prairie next asserts that the Commission, in affirming and adopting the arbitrator's decision, erred in considering claimant's overtime earnings in its AWW calculation. In particular, Prairie argues that the Commission, under section 10 of the Act, calculated overtime earnings at time and a half and not the regular rate of pay. Prairie cites to *Airborne Exp., Inc. v. Illinois Workers' Comp. Comm'n*, 372 Ill. App. 3d 549, 554 (2007), where this court, in considering the overtime exclusion under section 10, defined overtime as including "those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." Prairie asserts that claimant failed to prove his overtime hours were mandatory or part of the regular work schedule, and "[t]he arbitrator did not provide an analysis of how the wages were calculated."

¶ 58 In turn, claimant asserts that Prairie "waived [*sic*] any argument as to the appropriateness of inclusion of overtime hours" by not raising it in a timely fashion. Prairie responds that it has challenged the calculation of claimant's AWW since the beginning of the case. We note, however, that Prairie does not cite to the record where it first raised this argument before the arbitrator. In

fact, the record reveals that Prairie failed to object when claimant verified his income records from American in exhibit 9 and had waived objection to the exhibit's admission at the arbitration hearing. Moreover, Prairie failed to include this argument in its statement of exceptions filed with the Commission. Thus, Prairie forfeited review of this issue on appeal. See *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 414 (2005) ("Arguments not raised before the Commission are waived [*sic*] on appeal.").

¶ 59 Here, in affirming and adopting the arbitrator's decision, the Commission calculated that claimant had earned $103,117.40 in the year preceding the August 6, 2014, injury, and that claimant's AWW was $1983.02. The Commission had claimant's income records, as contained in exhibit 9, and accepted claimant's figures of his AWW at Prairie of $1277.38 and at American of $705.64. As shown in exhibit 9, claimant's AWW from American was computed by taking the total number of hours claimant worked for American from August 9, 2013, through August 1, 2014, ($2096.75), multiplied by claimant's regular rate of pay ($17.50), and then divided by 52 weeks.

¶ 60 Additionally, contrary to Prairie's argument that "[t]he arbitrator did not provide an analysis of how the wages were calculated," the Commission, in adopting the arbitrator's decision, found that "[t]here is an accurate calculation of AWW contained as a summary within [exhibit 9]." Again, Prairie did not object at the arbitration hearing to the admission of exhibit 9 nor contest claimant's income figures as it related to either employer. As such, this court presumes the arbitrator considered only competent and proper evidence in reaching a decision. See *Thomas*, 78 Ill. 2d 327, 336. Accordingly, we affirm the Commission's calculation of the AWW in determining that the Commission's finding that Prairie had knowledge of claimant's concurrent employment

is not against the manifest weight of the evidence. We also rule that Prairie's secondary argument concerning overtime earnings is forfeited.

¶ 61 4. TTD and 5. TPD Benefits

¶ 62 For its fourth and fifth assignments of error, Prairie challenges the Commission's awards of TTD and TPD benefits. However, because we affirm the Commission's findings with respect to causation and AWW, we need not address Prairie's arguments, which are premised upon the success of those arguments. Accordingly, we affirm the Commission's awards of TTD and TPD benefits.

¶ 63 6. Penalties and Attorney Fees

¶ 64 For the final assignment of error, Prairie challenges the Commission's award of penalties under section 19(k) of the Act and attorney fees under section 16(a) of the Act as against the manifest weight of the evidence. Consistent with the Commission's decision, claimant maintains that Prairie failed to justify its deliberate delay in the payment of benefits.

¶ 65 Section 19(k) of the Act allows penalties for "any unreasonable or vexatious delay of payment or intentional underpayment of compensation." 820 ILCS 305/19(k) (West 2016). Penalties under section 19(k) are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). Good faith is to be judged objectively, hence the issue is whether an employer's denial was objectively reasonable under the circumstances. *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436 (1993). While the claimant must show that a penalty under section 19(k) is warranted, once the claimant has shown that a payment has been delayed, the employer has the burden of showing that it had a reasonable belief that the delay was justified. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579 (1995).

Section 16(a) of the Act, in turn, provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16(a) (West 2016).

¶ 66 Before addressing Prairie's final assignment of error, we must again clarify the applicable standard of review. Initially, we note that Prairie submits that the issue of whether penalties and fees were appropriate is a question of fact and, thus, the appropriate standard of review is manifest weight of the evidence. Claimant, in turn, submits that the imposition of penalties and attorney fees is reviewed under an abuse-of-discretion standard.

¶ 67 To clarify, the Commission's finding that the facts justify section 19(k) penalties and section 16 attorney fees is reviewed under the manifest-weight-of-the-evidence standard. *Jacobo v. Illinois Workers' Comp. Comm'n*, 2011 IL App (3d) 100807WC, ¶ 25. Second, unlike the mandatory penalties provision under section 19(*l*) of the Act (820 ILCS 305/19(*l*) (West 2016)), the Commission's imposition of section 19(k) penalties and section 16(a) attorney fees is discretionary. *McMahan*, 183 Ill. 2d at 515. Therefore, we review the Commission's decision to award penalties and fees under an abuse-of-discretion standard. An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the Commission. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 44.

¶ 68 In the present case, it is undisputed that Prairie refused to pay, or delayed payment, of medical bills and disability benefits. Although Prairie referred claimant to Alexian Brothers Medical Center on August 8, 2014, for medical treatment concerning his left elbow injury sustained in the August 6, 2014, work-related accident, it refused to pay the outstanding bill until the arbitration hearing in January 2017. Prairie also referred claimant to Alexian Brothers Medical Center in December 2014, after claimant reported that his left arm was not improving, and his right arm had worsened. Again, Prairie refused to pay the bill until the arbitration hearing. The record

also shows that Dr. Fink's May 13, 2015, narrative report recommended claimant undergo two surgeries due to his "work injury" and overuse of his right arm. Dr. Fink also suggested claimant's condition would substantially worsen, resulting in the potential loss of hand function, without the two surgeries. Despite this, Prairie neither authorized the surgeries nor paid any of the medical expenses associated with the surgeries, which totaled $137,491. In addition, Prairie refused to reimburse a subrogation claim for $11,971.21 from claimant's group health insurance plan (union health and welfare plan).

¶ 69 Moreover, even though claimant worked light duty at a reduced hourly rate from December 5, 2014, through March 10, 2015, Prairie refused to pay TPD benefits. Likewise, after Prairie no longer accommodated claimant's restrictions, and claimant was placed on permanent restrictions, Prairie refused to pay TTD benefits. Thus, the burden shifted to Prairie to show that it had a reasonable belief that justified the withholding of payments. See *Roodhouse Envelope Co.*, 276 Ill. App. 3d at 579 ("When an employer chooses to delay payment of compensation, it has the burden of showing that it had a reasonable belief that the delay was justified."). In support of withholding payment, Prairie asserts that its refusal to pay for claimant's medical treatment was reasonable in light of Dr. Atluri's contrary causation opinion. In support, Prairie asserts:

> "Dr. Atluri, unlike Dr. Fink, being a more qualified expert in the field, having more experience in treatment of upper extremities, being board certified in this specialty and having access to more information regarding the Claimant's job duties, both for [Prairie] as well as [American], provided a reasonable basis for which [Prairie] denied further benefits."

¶ 70 We disagree. Instead, the record reveals that Dr. Fink's May 13, 2015, narrative report indicates that claimant's conditions of ill-being were work-related and required surgeries to avoid

a worsening of the conditions. In addition, Dr. Fink performed claimant's surgeries in July and August of 2015, and then testified at a deposition on December 9, 2015. In comparison, Prairie had no basis to dispute claimant's disability as not work-related until Dr. Atluri rendered his opinion on November 18, 2016. Given these facts, the Commission found Prairie's reliance on Dr. Atluri's opinion unfounded.

¶ 71 Under these circumstances, we cannot say that the Commission's determination that Prairie's reliance on Dr. Atluri's opinion in delaying payment as vexatious and unreasonable is contrary to the manifest weight of the evidence. Instead, we conclude the evidence supports section 19(k) penalties and section 16(a) attorney fees. Likewise, Prairie failed to show a reasonable purpose for delaying benefits prior to Dr. Atluri's report in November 2016. Thus, the Commission's decision to award such penalties and fees is within its discretion. For the foregoing reasons, we affirm the Commission's award of penalties and attorney fees.

¶ 72 III. Conclusion

¶ 73 We affirm the judgment of the circuit court, which confirmed the Commission's decision.

¶ 74 Affirmed.