2024 IL App (2d) 230124WC-U
No. 2-23-0124WC
Order filed May 17, 2024

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

BRIAN BORST,	)	Appeal from the Circuit Court
	)	of McHenry County.
Appellant,	)	
	)	
v.	)	No. 22-MR-122
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION, *et al*.,	)	Honorable
	)	Kevin G. Costello,
(Dow Chemical, Appellee).	)	Judge, Presiding.

JUSTICE MULLEN delivered the judgment of the court.

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

ORDER

¶ 1 *Held*: (1) The Commission did not abuse its discretion in admitting testimony of independent medical examiner; (2) the Commission did not require claimant to prove repetition of his job duties as a prerequisite to awarding benefits; (3) the Commission's finding that claimant failed to prove a causal relationship between his job and his lumbar condition was not against the manifest weight of the evidence; (4) the Commission's decision not to set a manifestation date was not improper where claimant failed to sustain his burden of proving a compensable injury; and (5) the Commission's decision not to impose penalties against respondent for unreasonable or vexatious conduct was not against the manifest weight of the evidence.

¶ 2 Claimant, Brian Borst, sought benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)) for injuries he allegedly sustained while working for respondent, Dow Chemical. Following a hearing, the arbitrator determined that claimant sustained an accident that arose out of and occurred in the course of his employment and that claimant's current condition of ill-being was causally related to his employment. The arbitrator awarded claimant medical expenses, temporary total disability (TTD) benefits, maintenance benefits, and permanent total disability (PTD) benefits, but denied claimant's request for penalties against respondent. A majority of the Illinois Workers' Compensation Commission (Commission) reversed, concluding that claimant failed to sustain his burden of proving accident and causation. On judicial review, the circuit court of McHenry County confirmed the decision of the Commission. Claimant now appeals, arguing that the Commission erroneously determined that he failed to establish accident and causation. Claimant also raises issues regarding the admissibility of certain evidence, the manifestation date of his alleged injury, and penalties. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 26, 2012, claimant filed an application for adjustment of claim (12 WC 025629) alleging that he sustained a "repetitive trauma" injury to his low back on June 7, 2012, while working for respondent. Thereafter, claimant filed two additional applications for adjustment of claim, alleging a "repetitive trauma" injury to his low back on July 10, 2012 (15 WC 018637), and on April 27, 2012 (15 WC 018638). The matter proceeded to a hearing before Arbitrator Robert Falcioni on October 14, 2016. The issues in dispute included accident, date of accident, causation, TTD benefits, maintenance benefits, medical expenses, and penalties. At the hearing, the parties stipulated that plaintiff dismissed the second and third applications for adjustment of claim and added the two accident dates alleged in those applications to the first application for adjustment of

claim. The parties again appeared before Arbitrator Falcioni to submit exhibits on July 12, 2007. Before rendering a decision, Arbitrator Falcioni passed away and the trial exhibits went missing. Thereafter, proofs were reopened and the record was supplemented before Arbitrator Charles Watts on April 18, 2018, and January 16, 2020. The following factual recitation is taken from the evidence adduced at the hearings before Arbitrators Falcioni and Watts.

¶ 5 Between 1996 and 2012, claimant was employed as a maintenance technician at respondent's campus in Ringwood. Claimant testified that each workday he would attend a morning meeting where he would receive his job assignments for the day. After the meeting, claimant would collect the tools, equipment, and personnel he needed to perform the necessary work. Claimant testified that the job assignments varied each day. If claimant was working a "small job," he would bring the tools and equipment to and from the work site using a two-wheel cart. Twice a month, claimant would have "bigger jobs" requiring the use of a four-wheel cart that weighed between 400 and 500 pounds loaded. Sometimes claimant needed help with the heavier cart and sometimes he used a forklift to transport it. Claimant stated that the average weight of a cart that he would push was 100 pounds.

¶ 6 Claimant testified that some of the job assignments involved light duty. For instance, he would repair small pumps weighing less than 15 to 20 pounds. He would also process work orders, sweep, and clean. Other assignments involved heavier duties, such as repairing or replacing the agitator blades, pumps, and shafts of 10,000-gallon steel reactor kettles. Some of this work required claimant to work outside the kettles and some of it required claimant to work inside the kettles. If claimant had to work inside the kettles he would have to hunch over, use a breathing apparatus with air tanks weighing about 60 pounds, or an air hose without tanks. Claimant testified that the weight of the agitator blades varied between 10 and 200 pounds, while the pumps weighed

between 50 and 250 pounds. The procedure for fixing the shafts required torquing bolts of various sizes. Claimant used hand tools to tighten the bolts because pneumatic or electronic tools presented explosion hazards. The frequency of these tasks varied from one or two times a year to once a week. In addition to the foregoing tasks, claimant performed preventive maintenance, replaced seals on the reactors, and welded. Claimant testified that about 75% of his job required him to bend at the waist and 70% of the time his job required lifting. In claimant's lay opinion, his job was in the heavy physical-demand level.

¶ 7 Claimant testified that at some point, he developed a problem with his low back and, in 2005, he came under the care of Dr. Arvind Ahuja for his lumbar spine. Dr. Ahuja performed a posterior lumbar interbody fusion at L4-L5 on February 1, 2005, and released claimant to work for respondent without restrictions in July 2005. Until 2012, claimant did not have any trouble performing his job duties after being released to return to work by Dr. Ahuja.

¶ 8 At the suggestion of Dr. Michael Fehling, his primary care physician, claimant returned to Dr. Ahuja on January 20, 2012, because his low back pain had been increasing over the prior six to nine months and he was having trouble doing his job. At that time, Dr. Ahuja was concerned about adjacent segment disease. Dr. Ahuja prescribed conservative treatment and pain medication, but claimant testified that his symptoms worsened. Dr. Ahuja took claimant off work after April 26, 2012. He has not worked for respondent since that date. On June 11, 2012, Dr. Ahuja performed a posterior decompression and transforaminal interbody fusion at L3-L4 and L5-S1 and an evaluation of the prior fusion at L4-L5. Claimant testified that on June 7, 2012, he asked Dr. Ahuja if his condition was related to his work. According to claimant, Dr. Ahuja responded affirmatively.

¶ 9 On September 21, 2012, claimant was in a car accident. Following the accident, claimant followed up with Dr. Ahuja, who reviewed some X rays and told claimant that "everything

look[ed] good." Shortly after the car accident, Dr. Ahuja released claimant to work with restrictions, but respondent was unable to accommodate them.

¶ 10 Thereafter, claimant continued to treat with Dr. Ahuja. Claimant told Dr. Ahuja that his lumbar condition was worsening. Dr. Ahuja was concerned that claimant was experiencing additional adjacent segment disease. Claimant underwent some tests and a series of epidural steroid injections in the summer of 2013. Claimant testified that he felt worse after the injections. Dr. Ahuja also changed claimant's medication, but claimant's condition still did not improve. Dr. Ahuja sent claimant for a functional capacity evaluation (FCE) at ATI Physical Therapy (ATI). The work restrictions recommended in the October 23, 2013, FCE, prevented claimant from returning to his position with respondent. In August 2014, Dr. Ahuja performed a lumbar fusion at L2-L3 with evaluation of the prior fusion. Following the third operation, claimant experienced some improvement, but continued to have lumbar pain, bilateral leg weakness, and trouble sleeping. Claimant testified that he continues to treat with Dr. Ahuja and that Dr. Ahuja sent claimant for another FCE which showed that he was completely disabled.

¶ 11 On cross-examination, claimant testified that he has had back problems for many years and underwent a microdiscectomy in 1995. Claimant admitted that his back continued to get worse even after he stopped working for respondent. In addition, claimant acknowledged that when he saw Dr. Ahuja in January 2012, there was no discussion relating his back problems to work. Claimant testified that he would dispute Dr. Ahuja's treatment note of June 7, 2012, if it did not mention a discussion regarding whether his back problems were work related. Claimant would disagree if, instead, Dr. Ahuja indicated that he spoke to claimant about the relationship between his back problems and work on July 10, 2012 (as opposed to June 7, 2012).

¶ 12 Claimant further testified on cross-examination that that he prepared a document entitled "My Day-to-Day Work Activity" sometime between June 2012 and August 2014. Claimant acknowledged that the document does not include all his job duties. Claimant also agreed that a job description prepared by respondent was generally accurate. Claimant could not recall why June 7, 2012, was chosen as the accident date on the first application for adjustment of claim. Asked how the accident occurred as "repetitive trauma," claimant responded "[r]epetitive motions *** [b]y doing my job at work, heavy lifting, pushing, stooping, bending." Asked why the second application for adjustment of claim listed an accident date of July 10, 2012, claimant responded he had "no idea," noting he was off work that date. Similarly, claimant could not say why the third application for adjustment of claim listed an accident date of April 27, 2012.

¶ 13 Gerard Burns testified he worked for respondent for 23 years, including as an electrician apprentice from 2009 to 2011, and then as the maintenance activity coordinator beginning in June 2012. In 2011 and 2012, Burns's duties involved performing maintenance work on all equipment. Burns worked with claimant about 25% to 30% of the time. After 2012, Burns's work as maintenance activity coordinator included distributing work orders, like the ones identified by claimant. Burns identified the job description prepared by claimant as accurate, but incomplete. In addition to heavy work, claimant's position included light work such as "round inspections," which involved checking oil and seal fluid levels, and medium work, such as small pump rebuilds. Burns described work as a maintenance technician as "constantly changing" and "varied." There was no job or physical activity that a maintenance technician would perform repeatedly except sitting at a desk closing work orders and using a computer.

¶ 14 Burns estimated that 15% of a maintenance technician's work is at the heavy physical-demand level and 30% is at the light physical-demand level. He also estimated that about 65% of

the work required the technician to torque a pipe or bolt. Prior to 2011, a technician would work approximately 45% of the time while kneeling or crouching. Burns also testified that about 10% of the time, the weight of tools and equipment on a lift cart would be in the 300- to 500-pound range. He said that about 50% of the time, the tools and equipment on a lift cart would be in the 100- to 200-pound range. He estimated the average weight of tools and equipment on a lift cart was 100 pounds.

¶ 15 Burns identified a video depicting maintenance work activity at respondent's facility. The video shows a mechanic replacing a pipe. Burns filmed the video in 2012. He described the mechanic putting on a face shield and other safety equipment and getting ready to break open a line because it was plugged with glue. He indicated there is usually a plugged pipe once per week. He classified the work shown on the video at the medium physical-demand level and testified the work was representative of the type of work orders a maintenance technician would receive.

¶ 16 Richard Oldland testified by evidence deposition that he worked for respondent from 2005 to 2014 and was an operations leader from 2010 until 2014. His duties included training and assisting maintenance technicians. Oldland transferred to the Ringwood plant in March 2012, and claimant worked under Oldland for approximately one month. Oldland reviewed respondent's description of claimant's duties and agreed it was representative of the work a maintenance technician does at the Ringwood facility. He also reviewed the job description prepared by claimant, opining the weights and durations were not reasonable. Specifically, he disagreed that a cart weighing 400 to 500 pounds would be able to be pushed around the plant by a single person, due to the presence of steep inclines. Oldland estimated that the weight of the cart after being loaded with tools and parts would range from 20 pounds to 150 pounds, with an average weight of 100 pounds. Oldland also noted that while the shift for a maintenance technician was 7 a.m. to

3 p.m., a technician would stop working prior to 3 p.m. to return tools. Further, due to morning meetings, the safety permit process, and work preparation activities, a maintenance technician would not typically begin actual maintenance work until 8:15 or 8:30 a.m. In an average day, a technician would perform maintenance work about six hours out of the eight-hour shift. Oldland also disagreed with the frequency that respondent stated a technician would have to load a cart. He testified that, on average, a technician would load a cart two to four times per day, not up to six times as claimant represented. The actual job orders varied in nature between light, medium, and heavy levels of work. The nature and types of jobs were different and changed daily. Oldland did not believe claimant's job as a maintenance technician was repetitive.

¶ 17 Oldland testified that on April 27, 2012, claimant reported to him that his back was bothering him. Claimant stated that the condition was similar to a surgery he had 8 to 12 years before and that he was going to have another surgery immediately. Claimant did not report any work injury or accident. Claimant stated that he always knew he would need another back surgery, that this was a "natural progression," and that it was time for him to have it fixed. Oldland completed a supervisor report on July 17, 2012, shortly after being informed claimant had made a workers' compensation claim. In the report, Oldland recounted his conversation with claimant. Oldland testified that he did not consider claimant's low-back condition to be work related, due to the conversation he had with claimant in April 2012. Oldland added that respondent had a policy whereby an employee would face discipline if he or she failed to immediately report a work injury.

¶ 18 Lisa Cashbaugh-Sanchez testified by evidence deposition that she worked for respondent as operations leader in Ringwood from November 2009 until February 2012. Cashbaugh-Sanchez oversaw the maintenance department and worked closely with maintenance technicians, including claimant. In her capacity as operations leader, Cashbaugh-Sanchez was familiar with the job duties

of workers in the maintenance department and observed claimant perform his job duties once a week. Cashbaugh-Sanchez agreed that the position of maintenance technician involves work at the light, medium, and heavy physical-demand levels. Cashbaugh-Sanchez reviewed the job description prepared by respondent and testified it was accurate for an annual description but unlikely for a worker to perform all job duties in one day. She also took exception to two items in the job description. Cashbaugh-Sanchez testified that there were no drums at the plant weighing 500 pounds and, she noted, for the drums respondent had, the workers were required to use lifting devices. Also, any job requiring the technician to manually torque would have been done with a torque wrench requiring a maximum of 10 pounds of manual force. Cashbaugh-Sanchez reviewed the job description claimant prepared and noted it excluded lighter duties, including pulling release valves weighing 10 pounds, lubrication of machines, re-gasketing heat exchangers, line labeling, and one to two hours of daily paperwork, all of which claimant did. Cashbaugh-Sanchez stated that respondent had safety requirements, including that no individual was to lift over 50 pounds without assistance. Cashbaugh-Sanchez stated maintenance technicians would have different tasks each day. Cashbaugh-Sanchez noted that respondent's injury-reporting policy applied whether a worker was claiming a specific accident or an aggravation caused by work. Claimant never reported a work injury to Cashbaugh-Sanchez.

¶ 19 At the request of respondent, Dr. Arthur Itkin testified by way of evidence deposition on October 29, 2015. Dr. Itkin is a board-certified neurologist, a fellow of the Academy of Electrodiagnostic Medicine, and a clinical assistant professor at the University of Illinois. He has practiced for 23 years and has about 5000 patients. He does medical-legal consulting and independent medical examinations (IMEs). He spends less than 5% of his practice on medical-

legal issues. Dr. Itkin examined claimant twice and prepared six reports dated March 27, 2013, November 18, 2013, April 10, 2014, September 2, 2014, May 2, 2015, and July 7, 2015.

¶ 20 When Dr. Itkin first examined claimant on March 27, 2013, he obtained a history from claimant of chronic lower back problems beginning in the mid-1990s. Claimant recalled undergoing "some procedures" as early as 1997. Claimant reported that from 2000 to 2002, he was treated conservatively for low-back pain that radiated into the right leg. In 2005, claimant underwent fusion surgery at L4-L5. Claimant's back was relatively stable until about 2008. In or about 2010, without provocation or injuries, claimant's right leg started giving out and the pain worsened in his back and radiated to his leg. Claimant reported to Dr. Itkin that in 2011, his leg started tingling with any flexion of his body, which he was required to do at work. Claimant began receiving more aggressive treatment at that time, including epidural steroid injections. In June 2012, claimant underwent fusion surgery. Claimant's symptoms improved after the surgery, but he still complained of significant low back pain which was exacerbated by movement.

¶ 21 At the March 27, 2013, examination, claimant told Dr. Itkin that he cannot sit for more than five minutes. Claimant complained of bilateral leg pain at night and said his legs needed to move or they hurt. Claimant reported significant pain of the back, buttocks, and tailbone. Dr. Itkin testified that claimant described his job duties for respondent in general terms and what his daily work routine involved. Claimant did not describe specifically how he was injured. Dr. Itkin reviewed claimant's medical records, documenting in his report a summary of what he reviewed. Those records included Dr. Ahuja's notes from procedures performed in 2005 and prior procedures. Dr. Itkin did not see any evidence that Dr. Ahuja had any information regarding the work claimant was doing. Dr. Itkin testified that other than a letter to claimant's attorney dated December 4, 2012, he found no specific causal opinion in Dr. Ahuja's treatment records.

¶ 22 Dr. Itkin performed a sensory examination which revealed some changes which were not substantiated by objective anatomical analysis. He opined claimant had significant symptom amplification. It was inconsistent with his exam and exams by Dr. Ahuja as recorded in his medical records. Dr. Itkin concluded claimant was an unreliable historian for his sensory exam. Dr. Itkin opined claimant had a very extensive degenerative lumbosacral disease spanning almost half his life. He diagnosed claimant's condition as failed-back syndrome and discogenic pain.

¶ 23 As to causation, Dr. Itkin testified that in 2013, he could not "completely answer" if claimant's work as a laborer exacerbated his lower back condition. He noted claimant started having symptoms in his late twenties by his history. He could not offer an opinion if extensive physical labor exacerbated the pre-existing degenerative condition over time. He noted in his report that the evidence was inconclusive and it could not be quantified whether claimant's work duties over time worsened or aggravated his pre-existing degenerative condition. For instance, Dr. Itkin did not know how often claimant performed each work task, the repetitiveness of each work task, the duration or length of each work task, or the force used. He stated it was clear claimant's job was not sedentary or light duty in nature and the job "possibly could have" worsened or aggravated claimant's preexisting condition, but he could not offer an opinion conclusively or to a reasonable degree of medical certainty at that time. Moreover, Dr. Itkin questioned how Dr. Ahuja could opine on causal connection without having additional information.

¶ 24 Following the March 27, 2013, examination, Dr. Itkin reviewed additional medical records and generated his November 18, 2013, report. Dr. Itkin described the report as a "technical opinion" following the ATI FCE dated October 23, 2013. Dr. Itkin testified that he had hoped the FCE report would allow him to see what claimant's work was like, but it failed in that regard.

¶ 25 Dr. Itkin examined claimant for a second time on April 10, 2014, and generated a four-page report. Claimant reported that his symptoms had not changed. On neurologic exam, Dr. Itkin noted symptom magnification but otherwise the exam was unchanged. As part of the examination, Dr. Itkin also reviewed additional medical records, including a note from Dr. Ahuja dated December 4, 2013. Dr. Itkin noted claimant was progressively getting worse, even after he stopped working. Dr. Itkin opined that claimant's work as described could not be implicated in any way that he could explain.

¶ 26 Dr. Itkin subsequently reviewed additional records and authored another addendum report dated September 2, 2014. He reviewed an employee occupational injury/illness report from respondent dated July 11, 2012, medical records from Aurora Healthcare, a patient statement of injury dated September 5, 2012, Dr. Ahuja's records of August 25, 2005, Centegra Health System records, and Dr. Ahuja's records from 2012. He stated these records further substantiated and confirmed his opinion regarding causality between claimant's progressive lumbosacral disease and his work duties. Based on his review of the records, he concluded that there was no particular accident and he did not find any work activity that was related to claimant's injury. He testified, "[t]he cause is progressive degenerative lumbosacral disease, which is a biological cause."

¶ 27 Dr. Itkin was directed to his September 2, 2014, report where he noted a record from Dr. Fehling dated May 10, 2011. Dr. Itkin testified that under the musculoskeletal review of symptoms of Dr. Fehling's report, there was a "very unusual entry." Claimant reported both legs wanting to give out at work. Yet, the same report indicated that, at home, claimant was able to dig 10 post holes, shovel mulch for hours on end, bend, stretch, and move around without any problems. Dr. Itkin remarked that if a person has spinal disease, "you will have it at home, at work and probably even on the moon." Dr. Itkin testified that, in terms of causality, he was "more certain than ever

before that [claimant] suffers with [*sic*] accelerated degenerative lumbosacral disease that had started more than a decade ago at least. He has failed back syndrome partially related to his underlying degenerative pathology and partially because of multiple surgeries." Dr. Itkin reiterated that the cause of claimant's back injury was "degenerative lumbosacral disease and not his work."

¶ 28 Dr. Itkin testified that as part of his review, he read job descriptions, including one written by claimant, and reviewed videos.[1] Based on his review of this evidence, Dr. Itkin opined that claimant does not perform repetitive jobs. He further stated as a basis of his opinion, "I read the report, I read his job duties. He wrote it down, he told me what he does, he wrote down what he does, how much he does of that. These are very objective facts here. We know what he did as a maintenance tech for [respondent]." When asked what excludes claimant's position from being classified as a repetitive job, Dr. Itkin answered, "[h]e does different things on different days. He does different jobs on different days. They're not repetitive."

¶ 29 After reviewing additional records, Dr. Itkin authored a report dated May 2, 2015. Dr. Itkin noted Dr. Ahuja had performed a multi-level fusion surgery as well as other procedures, including discectomies on August 27, 2014. Despite surgery, claimant was getting progressively worse. Dr. Itkin testified this course of events "further confirm[ed the] underlying process that was going on."

¶ 30 Dr. Itkin authored a final report on July 7, 2015, after reviewing additional records, including Dr. Ahuja's deposition, the second FCE report, and claimant's notes regarding day-to-day work activity where claimant explicitly described what he did at work. Dr. Itkin again noted claimant was getting worse. Dr. Itkin further stated that after reviewing Dr. Ahuja's deposition,

[1]During oral argument, claimant's attorney stated that the videos reviewed by Dr. Itkin were those taken by Burns.

his opinions remained the same. Dr. Itkin again stated he saw no evidence of repetitive trauma as there was not a specific repetitive job task. Ultimately, Dr. Itkin concluded that there was no evidence to suggest that claimant's work for respondent "materially affected his progressive degenerative lumbosacral pathology."

¶ 31 On cross-examination, Dr. Itkin testified that he is not a board-certified neurosurgeon. He acknowledged that claimant was alleging that his preexisting degenerative lumbar spine condition was aggravated over time by performing his regular job duties. He further acknowledged that in his first report he indicated that it was possible that claimant's work duties aggravated his condition. However, Dr. Itkin added that he could not offer an opinion about causation within a reasonable degree of medical certainty because, at the time of the first report, he needed more information regarding the nature of claimant's duties for respondent. Dr. Itkin testified that claimant provided him with more specific information about his work duties. Dr. Itkin later stated:

> "[W]hen I wrote the initial report, I tried to abstain from an opinion because I was really still thinking about this one way or the other. And it's not one of those nine to ten. It was one of those more closer to 49/51 kind of thing [*sic*]. And now I'm looking at this on April 10, 2014, and I say hold on a second. So I'm looking at this stuff. And you know what, he is a sick guy. I mean, he has bad back [*sic*]. I'm not arguing with the most important thing, at least to me, is his medical problems. But I don't know how his work *** had anything to do with this. And I cannot—And I say in the note there is not—I could not in any way—I could not find the significant pathology that could be related to his work ***.

> So basically maybe if you—If the Commission is following this, I would say this is when I exercised my option to make an opinion. I did not make an opinion before. And if I had to make an opinion, I would make this opinion, if that makes sort of legal sense."

¶ 32 On further cross-examination, claimant's attorney asked Dr. Itkin whether, over the course of claimant's fusion surgeries, his job duties "contribute[d] even a little bit" to his lumbar condition worsening over time. Dr. Itkin responded that claimant's job duties "did not materially contribute to his progressive degenerative lumbosacral disease." Dr. Itkin elaborated that by using the term "materially," he meant that "he does something at work and it changes the course of his lumbosacral disease." Dr. Itkin then added that "the answer to that is, no." Asked whether claimant's job duties made his back condition degenerate faster, Dr. Itkin responded in the negative. Dr. Itkin later reiterated that claimant's job for respondent "did not contribute to the natural course of his lumbosacral pathology, which is extensive, progressive." Dr. Itkin added that "even if [claimant] were a lawyer *** not a laborer, he would still be seeing Dr. Ahuja one time, second time and third."

¶ 33 On redirect examination, Dr. Itkin testified that claimant's job duties included tasks that were not heavy labor and that were, in fact, sedentary. Dr. Itkin added that claimant did not mention these lighter duties when he was interviewed. Dr. Itkin stated that at his second examination, he would have asked more specific questions about his job, such as what he does and the frequency with which he does tasks.

¶ 34 At the request of claimant, Dr. Ahuja testified by evidence deposition on May 12, 2015. Dr. Ahuja stated that he is a board-certified neurosurgeon. Dr. Ahuja estimated that he performs between 80 and 120 lumbar fusions each year. Dr. Ahuja testified extensively regarding his treatment of claimant between 2005 and 2015, as discussed above.

¶ 35 Dr. Ahuja further testified that based on a job description provided to him by Centegra, he understood that the essential physical functions of claimant's position included the ability to manually move 500-pound drums using the appropriate equipment, the ability to physically enter reactors for maintenance, the ability to manually lift 25-kilogram (55-pound) drums, and the ability to manually torque fasteners to 100 feet per pound. Dr. Ahuja testified that he prepared a narrative report in response to a letter from claimant's attorney dated September 26, 2012. In the letter, Dr. Ahuja indicated that ongoing stress while working for respondent likely increased claimant's lumbar disc disease beyond that which would be reasonably expected. Dr. Ahuja further testified that claimant's job condition "would be a component of the continued progression of the disease" and would be a contributing factor in claimant needing the three-level fusion. Dr. Ahuja agreed that in the middle of the report, he stated the date of claimant's "work situation" is related to June 6, 2012, as on that day, in his office, he and claimant discussed that he had the condition but had not formerly recognized that the ongoing stresses at respondent likely increased his lumbar disc disease beyond what would be reasonably expected. Dr. Ahuja testified later that there was no discussion of claimant's work duties on June 6, 2012. Rather, the conversation whether claimant's work contributed to his lumbar disc condition occurred on July 10, 2012.

¶ 36 Dr. Ahuja testified that at some point claimant gave him a self-written job description. He indicated claimant's job description was consistent with a job description previously provided by respondent. Asked if, after a review of claimant's medical history and the descriptions of claimant's job duties, he had an opinion to a reasonable degree of medical and surgical certainty whether, as of the last time he saw claimant, claimant's condition of ill-being was caused by his work duties, Dr. Ahuja responded:

> "The best of my medical ability and within a medical probability what I can say is he clearly had lumbar disk herniation that he needed surgery. I don't know at that time and I don't have enough details of that surgery that it was an acute event that made that happen. *** But what I can say is that looking at his work, the condition with the chronic exposure is a component—work condition are [*sic*] a component of his progression of disease at L4-5 that needed the surgery.
>
> Subsequently that leading to fusion at 4-5 [*sic*] leading to continued chronic exposure from work led to further degeneration at the level above and below the fusion and eventually leading to L2-3 disease.
>
> So in that way I can say that a chronic exposure and continued work has contributed and is a component of his progression of his lumbar disease leading to the three lumbar fusions."

Dr. Ahuja added that he had the same opinion with regard to claimant's inability to work.

¶ 37 Dr. Ahuja further testified that he reviewed Dr. Itkin's reports. In contrast to Dr. Itkin, it was Dr. Ahuja's opinion that claimant's activities at work were related to his condition of ill-being and they exacerbated claimant's underlying pathology. As a basis for his opinion, Dr. Ahuja cited the progression of the disease. He explained that claimant had a lumbar disc herniation, underwent a fusion, and did well for a while. Subsequently, the symptoms progressed "further and further faster." Based on the description of claimant's job, he opined that the stresses of the position "accelerate[d] his underlying pathology."

¶ 38 On cross-examination, Dr. Ahuja admitted that claimant suffered from a type of progressive degenerative lumbar spine disease that was present for many years. Dr. Ahuja had no idea what caused the need for the initial microdiscectomy in the 1990s. Also, Dr. Ahuja had not

reviewed any medical records to address the nature of that condition. Dr. Ahuja admitted that the natural progression of claimant's disease is something that gets worse with time, but noted that the question is whether claimant's work accelerated the condition. Dr. Ahuja conceded that when he saw claimant in January 2012, he did not have any details as to why claimant had recurrent pain within the few months prior to that visit. More specifically, there were no specific work activities that were mentioned causing a worsening of symptoms by claimant to Dr Ahuja. Dr. Ahuja admitted there was no causation opinion regarding work relatedness until December 4, 2012, in response to a letter (dated September 26, 2012) from claimant's attorney. He stated that claimant's job duties of repeatedly lifting 55 pounds and going into small areas were "causative factor [*sic*]" in this case. Dr. Ahuja agreed that even when claimant was off work, his condition worsened.

¶ 39 Based on the foregoing, the arbitrator determined that claimant's regular, heavy-duty work over a number of years—notably lifting, bending, crouching, pulling carts, and torquing tools—aggravated his preexisting lumbar spine condition, causing it to become symptomatic and require additional surgery. In so concluding, the arbitrator found the testimony of Dr. Ahuja more credible than that of Dr. Itkin. The arbitrator concluded that there were two appropriate "manifestation dates" of the repetitive-trauma claim—April 27, 2012, the first day claimant was off work and July 7, 2012, the date claimant and Dr. Ahuja discussed whether his condition was work related. The arbitrator awarded claimant medical expenses, TTD benefits, maintenance benefits, and PTD benefits. The arbitrator denied claimant's request for penalties on the basis that respondent made good-faith arguments that repetitive-trauma was not present in this case and reasonable arguments that claimant failed to allege an accident date.

¶ 40 A majority of the Commission reversed the decision of the arbitrator and denied claimant's application for benefits. The Commission found that claimant failed to prove by a preponderance

of the evidence that he suffered accidental injuries arising out of and in the course of his employment on any of the three alleged manifestation dates and that claimant failed to sustain his burden of proving that his current condition of ill-being was casually related to his employment. Instead, the Commission concluded that claimant's condition "was the result of his pre-existing condition and degenerative aging process and that his varied job duties were not a causative factor." The Commission elaborated, "[m]ore to the point, the Commission is not convinced that [claimant's] job duties were sufficiently repetitive or performed in such a manner as to cause and/or aggravate his low back condition." In support of its conclusion, the Commission relied on the testimony of claimant, Burns, Oldland, and Cashbaugh-Sanchez "as to the variety of duties and changes in positions and rest breaks." The Commission also cited the job descriptions entered into evidence and prepared by the parties, which indicated "the various and varied activities [claimant] performed on a daily basis."

¶ 41 Regarding the medical opinion testimony, the Commission found Dr. Itkin's opinion more persuasive than that of Dr. Ahuja. The Commission concluded that Dr. Ahuja's causation opinion was not supported by the record. The Commission pointed to Dr. Ahuja's testimony that "multiple 55 pound lifting and going in small areas caused [claimant's] condition." The Commission found Dr. Ahuja's testimony refuted by evidence, both testimonial and documentary, which indicated that the nature of claimant's work varied and included light- and medium-duty tasks such as paperwork and data entry. The Commission also cited the fact that Dr. Ahuja's records are devoid of any reference to claimant's work activities as being a cause of his low-back complaints until December 2012, almost a year after Dr. Ahuja began treating claimant for his current condition, when claimant's attorney "solicited" a causation opinion. In contrast, the Commission found Dr. Itkin's opinion supported by the evidence. The Commission reasoned that Dr. Itkin had a better

forensic understanding as to the nature of claimant's variety of job duties, conducted a comprehensive review of claimant's medical records, and reviewed the job descriptions. Finally, the Commission cited Oldland's testimony, noting that claimant indicated to him that his condition was a natural progression of a prior injury.

¶ 42 Commissioner Tyrrell dissented. He concluded that claimant met his burden on the issues of accident and causation. In support, Commissioner Tyrell found that Dr. Ahuja credibly testified that claimant's work duties accelerated his underlying pathology beyond what would reasonably be expected, contributing to the need for the three-level fusion. Commissioner Tyrell found Dr. Itkin's testimony unconvincing because (1) despite having a detailed description of claimant's job duties, Dr. Itkin could not initially make a causal connection opinion and (2) when he did offer an opinion, it was predicated on a misunderstanding of the nature of repetitive-trauma injuries.

¶ 43 On judicial review, the circuit court of McHenry County confirmed the decision of the Commission. This appeal ensued.

¶ 44 II. ANALYSIS

¶ 45 On appeal, respondent challenges on various grounds the Commission's findings that he failed to sustain his burden of proving accident and causation. Claimant also argues that: (1) Dr. Itkin's testimony should have been excluded because his opinion was based in part on a review of videos of claimant's work duties and respondent failed to provide claimant with the videos reviewed by Dr. Itkin at least 48 hours prior to Dr. Itkin's deposition testimony; (2) the manifestation date of his injury should have been set by the Commission and any of the dates alleged by claimant are appropriate manifestation dates; and (3) penalties should have been assessed against respondent pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2012)) for unreasonable and vexatious delay.

¶ 46 Prior to discussing the issues raised by claimant, we note that respondent has filed a motion to dismiss claimant's appeal or, in the alternative, strike his brief for failure to comply with the Illinois Supreme Court Rules. We ordered the motion taken with the case. We deny respondent's motion to dismiss claimant's appeal or strike his brief, but find it appropriate to admonish claimant's attorney for failure to comply with the requirements for briefs filed with this court.

¶ 47 Illinois Supreme Court Rule 341(h)(9) (eff. Oct. 1, 2020) requires that an appellant's brief contain an appendix in accordance with Illinois Supreme Court Rule 342 (eff. Oct. 1, 2019). When, as in this case, an appeal involves proceedings to review a decision of the Commission, Rule 342 requires that the appendix contain, among other things: (1) a table of contents to the appendix; (2) the judgment appealed from; (3) any opinion, memorandum, or findings of fact filed or entered by the trial judge; (4) the notice of appeal; (5) a complete table of contents, with page references of the record on appeal; (6) the decision of the arbitrator; and (7) the decision of the Commission. Ill. S. Ct. R. 342 (eff. Oct. 1, 2019). In violation of Rules 341(h)(9) and 342, claimant's opening brief, filed on November 13, 2023, did not contain an appendix at all. On January 22, 2024, after respondent filed both the motion at issue and its brief in this case, claimant requested leave to file an amended brief on appeal to correct certain deficiencies in the original brief. Over respondent's objection, we granted claimant leave to file the amended brief. Although claimant's amended brief includes an appendix, the appendix fails to comply with the requirements of Rule 342. Notably, the appendix, which consists of only two pages, does not contain the judgment appealed from, the trial court order, the notice of appeal, the arbitrator's decision, or the Commission's decision.

¶ 48 In addition, Illinois Supreme Court Rule 341(h)(6) (eff. Oct. 1, 2020) requires the appellant's brief to contain a statement of facts "with appropriate reference to the pages of the record on appeal." Similarly, Illinois Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) mandates

that the argument section of the appellant's brief include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." We note that the record in this case is nearly 3000 pages and is not in chronological order. Yet, in his original opening brief, claimant's attorney failed to cite to the record for much of the evidence and testimony referenced in the statement of facts and he failed to cite to the record at all in the argument section. Claimant's attorney attempted to correct these deficiencies in the amended opening brief. We observe, however, that the statement of facts still lacks sufficient references to the pages of the record on appeal. Similarly, while the argument section in the amended brief does cite to some of the pages of the record relied on, there are still instances where citations are lacking.

¶ 49 The purpose of the supreme court rules is to require parties to proceedings before a reviewing court to present clear and orderly arguments so that the court may properly ascertain and dispose of the issues involved. *47th & State Currency Exchange, Inc. v. Coleman Corp.*, 56 Ill. App. 3d 229, 232 (1977). In this case, the failure of claimant's attorney to comply with the rules of our supreme court has severely hampered our ability to address and resolve the issues raised on appeal. We remind claimant's counsel that the rules of our supreme court "are not suggestions;" rather, they are rules which have the force of law, and the presumption is that they will be followed as written. *Bright v. Dicke,* 166 Ill. 2d 204, 210 (1995). We trust claimant's attorney will comply with all applicable supreme court rules in future appeals. Having disposed of the motion taken with the case, we now turn to claimant's contentions of error.

¶ 50 A. Admissibility of Dr. Itkin's Testimony

¶ 51 We first address claimant's contention that Dr. Itkin's testimony should have been excluded because Dr. Itkin's opinion was based in part on a review of videos of claimant's work

duties and respondent failed to provide the videos reviewed by Dr. Itkin at least 48 hours prior to Dr. Itkin's deposition testimony.

¶ 52 At Dr. Itkin's evidence deposition, claimant's counsel objected to the doctor's testimony on multiple grounds. Relevant here, claimant argued that Dr. Itkin's testimony should have been excluded because Dr. Itkin's opinions were based in part on videos of claimant's work duties and respondent failed to provide copies of those videos to claimant's attorney. The arbitrator sustained claimant's objection. Citing *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996), the arbitrator determined that the videos should have been provided 48 hours prior to Dr. Itkin's deposition testimony. The Commission reversed the arbitrator's evidentiary ruling, noting that claimant's attorney had Dr. Itkin's reports more than 48 hours before Dr. Itkin's deposition.

¶ 53 A reviewing court will not disturb an evidentiary ruling made during a workers' compensation proceeding absent an abuse of discretion. *RG Construction Services v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 132137WC, ¶ 35. An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the Commission. *Centeno v. Illinois Workers' Compensation Comm'n*, 2020 IL App (2d) 180815WC, ¶ 34. To the extent we are required to construe a statute, we are presented with a question of law subject to *de novo* review. *Joiner v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161866WC, ¶ 26.

¶ 54 Section 12 of the Act requires the employee to submit to a medical examination by a qualified medical practitioner or surgeon selected by the employer for purposes of determining the nature, extent, and probable duration of the injury received by the employee. 820 ILCS 305/12 (West 2012). Section 12 of the Act further provides as follows:

> "In all cases where the examination is made by a surgeon engaged by the employer, and the injured employee has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employer to deliver to the injured employee, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employer and the same shall be an exact copy of that furnished to the employer, said copy to be furnished the employee, or his representative as soon as practicable but not later than 48 hours before the time the case is set for hearing. *** If such surgeon refuses to furnish the employee with such statement to the same extent as that furnished the employer said surgeon shall not be permitted to testify at the hearing next following said examination." 820 ILCS 305/12 (West 2012).

In *Ghere*, this court held that section 12 of the Act applies to bar the opinion of a treating or examining physician who had not been disclosed to the opposing party at least 48 hours before the case is set for hearing. *Ghere*, 278 Ill. App. 3d at 844-46. We reasoned that the purpose of providing the physician's records within this time frame is to prevent a party from springing surprise medical testimony on the other party. *Ghere*, 278 Ill. App. 3d at 845. Further, in *City of Chicago v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 276, 280 (2008), this court held that the term "hearing" in section 12 refers to the arbitration hearing, not the physician's deposition. See also *Mulligan v. Illinois Workers' Compensation Comm'n*, 408 Ill. App. 3d 205, 218-19 (2011) (holding that "section 12 of the Act dictates that the proponent of medical testimony provide the other party with the required medical reports 48 hours before evidence is presented on the first day of the arbitration hearing," but recognizing that "circumstances may occur where strict

compliance with the requirements of section 12 would result in substantial prejudice, and a showing of good cause would justify relaxing those requirements").

¶ 55 In this case, there was no surprise as to Dr. Itkin's testimony. The plain language of section 12 of the Act simply requires that the employee be provided from the independent medical examiner retained by the employer "a *statement in writing* of the condition and extent of the injury" and that the statement be furnished to the employee at least 48 hours before the time the case is set for hearing. 820 ILCS 305/12 (West 2014). Claimant does not assert that Dr. Itkin's reports were not timely provided to him. Claimant's objection rests solely on the fact that certain videos were not provided prior to Dr. Itkin's deposition. However, we do not find, and claimant does not direct us to, any language in section 12, *Ghere*, or any other authority that an examining or treating physician must produce every item he or she reviewed at least 48 hours prior to the physician's deposition testimony. See *Mulligan*, 408 Ill. App. 3d at 218 (referring to section 12's requirement that that the employee be sent a copy of the physician's "report" no later than 48 hours before the time a case is set for hearing); *People v. Mileris*, 103 Ill. App. 3d 589, 594 (1981) (noting that section 12 of the Act requires that an examining doctor provide to the employee "the single report mandated *** by section 12" and does not require "the making or keeping of any other records").

¶ 56 Claimant insists that he was prejudiced in cross-examining Dr. Itkin due to the failure to produce the videos at least 48 hours prior to Dr. Itkin's deposition hearing. According to claimant, work-duty videos introduced at the arbitration hearing corroborate his claim that he was required to perform heavy-duty labor. However, there was no dispute at the arbitration hearing that claimant's work tasks included heavy-duty labor. Regardless, the videos in question (taken by Burns) were submitted at the arbitration hearing without any objection by claimant and claimant did not include any videos in the record on appeal. Therefore, claimant has forfeited this argument.

See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1994) (noting that Illinois courts have long held that to support a claim or error on appeal, the appellant has the burden to present a sufficiently complete record); *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004) (noting that the failure to object before the arbitrator waives any challenge to evidence on appeal); *Redlin v. Village of Hanover Park*, 278 Ill. App. 3d 183, 193 (1996) (holding that it is the appellant's burden to affirmatively show error from the record on appeal, and where the appellant fails to include disputed exhibits in the record on appeal, the reviewing court will presume that the trial court did not commit error and that the appellant has waived the argument on appeal).

¶ 57 In short, since Dr. Itkin's reports were disclosed to claimant at least 48 hours prior to the time the case was set for hearing, we conclude that the Commission's decision that Dr. Itkin's testimony was properly admitted did not constitute an abuse of discretion.

¶ 58 B. Accident and Causation

¶ 59 Next, we address claimant's argument that the Commission erred in concluding that he failed to prove his repetitive-trauma claim. An employee who alleges a repetitive-trauma injury must meet the same standard of proof as an employee who alleges an injury arising from a single identifiable event. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). The employee must prove by a preponderance of the evidence all elements necessary to justify an award. *Quality Wood Products Corp. v. Industrial Comm'n*, 97 Ill. 2d 417, 423 (1983). This includes establishing an accident "arising out of" and occurring "in the course of" the employment. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). Where a repetitive-trauma injury is involved, the employee must identify a date within the limitations period on which the injury "manifest[ed]

itself." *Durand*, 224 Ill. 2d at 67; *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). A repetitive-trauma injury is said to manifest itself on "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 531. This is generally either the date on which the employee requires medical attention or the date on which the employee can no longer perform his or her work activities. *Durand*, 224 Ill. 2d at 72. For an injury to "arise out of" one's employment, it must have an origin in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the injury. *Navistar International Transportation Corp. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1203 (2000).

¶ 60 Similarly, the employee must establish the existence of a causal relationship between the condition of ill-being and his or her employment. *Navistar International Transportation Corp.*, 315 Ill. App. 3d at 1202. An occupational accident need not be the sole or principal causative factor in the resulting condition of ill-being, as long as it was *a* causative factor. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Hence, a claimant need prove only that some act or phase of his or her employment was a causative factor in the resulting injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

¶ 61 Both the occurrence of a work-related accident and the existence of a causal relationship are questions of fact for the Commission. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786 (2005) (causation); *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1, 5 (1990) (accident). In resolving factual matters, it is within the province 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 from the evidence. *Hosteny v. Illinois Workers' Compensation*

Comm'n, 397 Ill. App. 3d 665, 674 (2009). This is especially true with respect to medical issues, an area in which we owe heightened deference to the Commission because of the expertise it possesses in the medical arena. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). We review the Commission's factual determinations under the manifest-weight-of-the-evidence standard. *Orsini*, 117 Ill. 2d at 44. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Bassgar, Inc. v. Illinois Workers' Compensation Comm'n*, 394 Ill. App. 3d 1079, 1085 (2009). "The test is not whether this or any other tribunal might reach the opposite conclusion, but whether there was sufficient factual evidence in the record to support the Commission's determination." *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450 (1995). With these principles in mind, we address claimant's arguments *seriatim*.

¶ 62 1. Repetitive Trauma

¶ 63 Claimant first argues that the Commission's decision that he failed to prove accidental injuries arising out of and occurring in the course of his employment was "contrary to law." In this regard, claimant asserts that the Commission's decision was premised on an argument advanced by respondent that, to establish a repetitive-trauma claim, an employee is required to show that his or her job duties were "repetitive in nature." According to claimant, however, an employee need only prove that the performance of his or her regular job duties, over time, caused the injury. See *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 529. Claimant argues that he never claimed to have sustained a "repetitive-use" injury, *i.e.*, performing the same task repeatedly. Rather, his theory of recovery was that the heavy-labor tasks he performed for respondent over the years aggravated his preexisting lumbar fusion. In other words, claimant's repetitive-trauma "is repeated physical insults over time from heavy labor."

¶ 64 Our supreme court has held that an injury is compensable under a repetitive-trauma theory when the injury occurs gradually through the performance of one's job duties rather than suddenly. See *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 529 ("We believe that the purpose behind the *** Act is best served by allowing compensation in a case like the instant one where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time.") Contrary to claimant's position, however, the Commission did not deny benefits on the ground that claimant's job duties were not "repetitive in nature."

¶ 65 As noted earlier, regardless of the theory of recovery, an employee must prove by a preponderance of the evidence all elements necessary to justify an award under the Act. *Quality Wood Products Corp.*, 97 Ill. 2d at 423. In the present case, the Commission concluded that claimant failed to carry this burden. The Commission found that claimant failed to sustain his burden of proving that he suffered accidental injuries arising out of and in the course of his employment on any of the three alleged manifestation dates. The Commission reasoned that claimant's condition "was the result of his pre-existing condition and degenerative aging process and that his varied job duties were *not* a causative factor." (Emphasis added.) The Commission added that it was "not convinced that [claimant's] job duties were sufficiently repetitive *or performed in such a manner as to cause and/or aggravate his low back condition*." (Emphasis added.) In support of its position, the Commission relied on the testimonial evidence (claimant, Burns, Oldland, and Sanchez), documentary evidence (the written job descriptions prepared and submitted by both claimant and respondent), and medical testimony from Dr. Ahuja and Dr. Itkin. Clearly, the Commission did not deny claimant benefits on the basis that he failed to establish that his job duties were "repetitive in nature." Rather, the Commission determined that claimant's injury was not compensable because his condition of ill-being was attributable to a preexisting,

degenerative condition, not his employment. Hence, claimant's argument finds no support in the record, and we reject it.

¶ 66 2. Causation

¶ 67 Claimant further contends that the Commission's finding that his low back condition is not causally related to his employment was against the manifest weight of the evidence. However, as claimant concedes in his brief, the Commission was presented with conflicting medical opinions. Dr. Ahuja opined that claimant's lumbar condition was aggravated by his job duties for respondent. In Dr. Itkin's view, claimant's condition was attributable solely to his preexisting, degenerative condition, not his employment. The Commission adopted the decision of Dr. Itkin over that of Dr. Ahuja, finding that Dr. Ahuja's causation opinion was not supported by the record because he did not have a complete understanding of the varied nature of claimant's work duties. In contrast, the Commission reasoned that Dr. Itkin had a better forensic understanding as to the nature of claimant's variety of job duties, conducted a comprehensive review of claimant's medical records, and reviewed the job descriptions. Determining which of two medical witnesses is more worthy of belief and whose evidence is entitled to greater weight is the function of the Commission. *Hosteny*, 397 Ill. App. 3d at 674; *Ghere*, 278 Ill. App. 3d at 847. Given the conflicting medical opinions, we cannot say that a conclusion opposite the Commission is clearly apparent.

¶ 68 Claimant argues that the Commission's reliance on Dr. Itkin's opinion was improper for several reasons. First, according to claimant, Dr. Itkin based his conclusion that claimant's current condition of ill-being is not work related solely on the ground that claimant's job duties were not sufficiently repetitive. Claimant reiterates, however, that he did not advance a "repetitive-use" theory of repetitive trauma. Rather, he asserted that cumulative trauma to his low back over time

from "heavy labor job duties" contributed to his condition. Claimant's characterization of Dr. Itkin's testimony is inaccurate.

¶ 69 It is true that, as part of his causation analysis, Dr. Itkin reviewed claimant's job duties. It is also true that Dr. Itkin concluded that claimant's work tasks were not repetitive in nature because of the variety of tasks performed. However, this was only one factor Dr. Itkin cited as the basis for his causation opinion. Dr. Itkin examined claimant on multiple occasions and reviewed years of medical records. Dr. Itkin cited claimant's "fluctuating" neurological examinations, which indicated that he was an unreliable historian. For instance, Dr. Itkin found it unusual that a May 10, 2011, note from claimant's primary-care physician indicated that claimant's legs only gave out at work and not at home. As Dr. Itkin explained, an individual with spinal disease will have it everywhere. Dr. Itkin also found that claimant had significant symptom magnification, another sign that he was an unreliable historian. In addition, Dr. Itkin observed that claimant's condition worsened even when he was under restrictions or not working and after Dr. Ahuja performed the third operation in August 2014. Dr. Itkin opined that this history confirmed that an underlying, degenerative process was occurring. Ultimately, Dr. Itkin concluded that the cause of claimant's condition was "progressive degenerative lumbosacral disease, which is a biological cause." Dr. Itkin testified that this condition was partially related to his underlying degenerative pathology and partially related to his multiple surgeries, but it was not related to his work for respondent. Thus, contrary to claimant's argument, Dr. Itkin did not base his conclusion that claimant's current condition of ill-being is not work related solely on the ground that claimant's job duties were not sufficiently repetitive. Rather, Dr. Itkin cited multiple grounds to support his position.

¶ 70 Second, claimant argues that the Commission's decision to credit the opinion of Dr. Itkin over Dr. Ahuja was improper because, in so doing, the Commission "ignored some crucial facts

and exalted some irrelevant facts." For instance, claimant contends that the Commission ignored that Dr. Itkin did not initially reach a conclusion as to causation "and then changed his opinion for no reason." Claimant also faults the Commission for relying on Dr. Itkin's decision because he is a neurologist, not a neurosurgeon. Additionally, claimant contends that the Commission improperly discounted Dr. Ahuja's opinion on the bases that Dr. Ahuja did not have sufficient knowledge of claimant's work duties and claimant "solicited" Dr. Ahuja's opinion. None of these contentions persuades us that the Commission's reliance on Dr. Itkin's opinion was against the manifest weight of the evidence.

¶ 71 We reject the notion that Dr. Itkin changed his opinion for no reason. Dr. Itkin performed two independent medical examinations of claimant and authored six narrative reports between March 2013 and July 2015. Dr. Itkin indicated that, as of the date of his first independent medical examination, he could not arrive at a precise conclusion regarding causation because he did not have enough evidence to conclusively determine whether claimant's job duties over time aggravated his preexisting lumbosacral condition. Following the second independent medical examination in April 2014, Dr. Itkin found that claimant was progressively getting worse even when he was not working, which supported a finding that there was no causal relation between his condition of ill-being and his employment. As Dr. Itkin continued to review additional information, his causation opinion became clearer. By the time of his fourth report in September 2014, Dr. Itkin conclusively stated that he could not find a causal link between claimant's condition of ill-being and his employment. As Dr. Itkin stated, "[t]he case is progressive degenerative lumbosacral disease, which is a biological cause." After reviewing more records, Dr. Itkin stated that he was "more certain than ever before" that claimant suffered from accelerated degenerative lumbosacral disease that started more than a decade earlier and that this failed-back syndrome was

related to his underlying degenerative pathology and resultant need for multiple surgeries. By July 2015, Dr. Itkin, noting that his opinions had not changed, stated, after reviewing Dr. Ahuja's evidence deposition, that there was no evidence to suggest claimant's work for respondent materially affected his progressive degenerative lumbosacral pathology. Dr. Itkin elaborated that by using the term "materially," he meant that "he does something at work and it changes the course of his lumbosacral disease." Dr. Itkin's opinion did not change. Rather, his opinion developed over time as he acquired more information and conducted a second examination of claimant.

¶ 72 Claimant also implies that Dr. Itkin was less qualified than Dr. Ahuja to render a causation opinion in this case because he is a neurologist, not a neurosurgeon. We disagree. The differences in each doctor's credentials were simply a factor for the Commission to consider when determining the weight to assign to each physician's opinion. Assigning weight to evidence is primarily a matter for the Commission. *Hosteny*, 397 Ill. App. 3d at 674; see also *Freeman United Coal Mining Co. v. Industrial Comm'n*, 286 Ill. App. 3d 1098, 1103-04 (1997) (rejecting argument that Commission erred in rejecting testimonies of doctors with "more impressive" credentials, noting that credibility determinations and the weight to be given the opinions of medical experts are particularly within the domain of the Commission). The difference in the two doctors' credentials does not provide a basis to overturn the Commission's decision.

¶ 73 Claimant also contends that Dr. Itkin's testimony lacked credibility because he provided no explanation why claimant's job duties could not have aggravated his fusion. We disagree. Dr. Itkin explained that claimant suffered from accelerated degenerative lumbosacral disease that started more than a decade earlier, that the rate of his deterioration from before and after working for respondent had not changed, and that this failed-back syndrome was related to his underlying degenerative pathology and resultant need for multiple surgeries.

¶ 74 Additionally, claimant contends that the Commission improperly discounted Dr. Ahuja's opinion on the bases that Dr. Ahuja did not have sufficient knowledge of claimant's work duties and claimant "solicited" Dr. Ahuja's opinion. However, this argument is essentially an invitation for us to reweigh the evidence and substitute our judgment for that of the Commission. This, of course, we may not do. *Setzkorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055 (2004). Moreover, the Commission succinctly and clearly laid out why it found Dr. Ahuja's causation opinion not supported by the record. Significantly, the Commission found that that the job duties documented by Dr. Ahuja were contradicted by claimant's own testimony and the job descriptions submitted at the arbitration hearing. Indeed, claimant acknowledged that his job description did not include every task he performed for his position with respondent. Additionally, claimant cites to no authority that holds that the Commission could not consider the fact that Dr. Ahuja did not offer a causation opinion until specifically requested to do so for purposes of litigation.

¶ 75 Third, claimant argues that, putting aside the medical opinion evidence, the Commission's decision is not supported by the record taken as a whole. According to claimant, the Commission did not explain how his job duties could not have contributed to his condition. Claimant argues that he regularly performed heavy duty tasks which involved significant use and strain of his lower back. But the Commission did explain why claimant's job duties did not contribute to his condition of ill-being. The Commission found that claimant's condition was the result of his preexisting condition and the degenerative aging process and not his varied duties. The Commission further explained that it was not convinced that claimant's job duties were sufficiently repetitive or performed in such a manner as to cause or aggravate his low back condition. The Commission relied on the testimony of claimant, Burns, Oldland and Sanchez, the job descriptions admitted into evidence, and the causation opinion of Dr. Itkin. As noted above, Dr. Itkin opined that

claimant's condition was not work related because claimant suffered from a long-standing degenerative spinal condition and the rate of his deterioration from before and after working for respondent had not changed. The Commission's finding that claimant failed to establish causation was not against the manifest weight of the evidence.

¶ 76 D. Manifestation Date

¶ 77 Next, claimant argues that the Commission erred by not setting a "manifestation date." Citing *Durand*, 224 Ill. 2d 53, and *Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920 (2000), claimant asserts that it is the duty of the Commission to determine the appropriate manifestation date for a repetitive-trauma claim. Claimant further contends that any of the dates alleged by him in his three applications for adjustment of claim are "appropriate manifestation dates." However, there must be a repetitive-trauma injury before the question of when the injury manifested itself becomes relevant. As we are affirming the Commission's decision that claimant failed to sustain his burden of establishing a repetitive-trauma injury, we find no error in the Commission's decision not to address which of the dates claimant alleged in his application for adjustment of claim constituted the manifestation date.

¶ 78 C. Section 19(k) Penalties

¶ 79 Finally, claimant argues that penalties pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2012)) should have been assessed against respondent for unreasonable and vexatious delay "because [respondent's] own independent medical examiner could not provide a basis for denying [claimant's] claim" and respondent "pursued a theory contrary to law." Having rejected the bases underlying claimant's request for section 19(k) penalties, we conclude that the Commission's denial of such penalties was not against the manifest weight of the evidence. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 80 III. CONCLUSION

¶ 81 For the reasons set forth above, we affirm the judgment of the circuit court of McHenry County, which confirmed the decision of the Commission.

¶ 82 Affirmed.