2023 IL App (3d) 220524WC-U
No. 3-22-0524WC
Order filed December 27, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JACQUELINE MOORE,	)	Appeal from the Circuit Court
	)	of Will County.
Appellant,	)	
	)	
v.	)	Nos. 21-MR-2959
	)	21-MR-2998
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION, *et al*.,	)	Honorable
	)	John C. Anderson,
(City of Crest Hill, 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's finding that employee failed to prove a work accident involving his back on February 19, 2001, was not against the manifest weight of the evidence; (2) the Commission's award of temporary total disability benefits related to employee's work accident involving his left knee was not against the manifest weight of the evidence; (3) the Commission's permanent partial disability award of 60% loss of use of the left leg was not against the manifest weight of the evidence; and (4) the Commission's denial of attorney fees pursuant to section 16 of the Workers' Compensation Act (820 ILCS 305/16 (West 2016)) and penalties pursuant to sections 19(k) and 19(l) of the of the Workers' Compensation Act (820

ILCS 305/19(k), 19(l) (West 2016)) was not against the manifest weight of the evidence. Affirmed.

¶ 2 Claimant, Jacqueline Moore, the surviving spouse of Charles Moore (employee), appeals from orders of the circuit court of Will County confirming two decisions of the Illinois Workers' Compensation Commission (Commission). Claimant argues that: (1) the Commission's finding that employee failed to prove a work accident involving his back on February 19, 2001, was against the manifest weight of the evidence; (2) the Commission's award of temporary total disability (TTD) benefits related to an injury to employee's left leg on November 14, 2001, was against the manifest weight of the evidence; (3) the Commission's permanent partial disability (PPD) award of 60% loss of use of employee's left leg was against the manifest weight of the evidence; and (4) the Commission's denial of penalties and attorney fees was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Employee filed two applications for adjustment of claim seeking benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2000)) for injuries he allegedly sustained while in the employ of respondent, the City of Crest Hill.[1] The first application for adjustment of claim (No. 02 WC 48868) alleged an injury to employee's back occurring on February 19, 2001. The second application for adjustment of claim (No. 02 WC 48869) alleged injuries to multiple body parts occurring on November 14, 2001.[2] The cases were subsequently

[1] At some point following his testimony at the arbitration hearing, employee passed away. The applications for adjustment of claim were subsequently amended to substitute employee's surviving spouse as claimant.

[2] The initial application for adjustment of claim in No. 2 WC 48869 alleged an injury date

consolidated and proceeded to an arbitration hearing before Arbitrator Christine Ory over multiple dates beginning on September 25, 2017. The following evidence relevant to the issues raised on appeal was presented at the arbitration hearing.

¶ 5 A. Employee's Testimony

¶ 6 At the time of the arbitration hearing, employee was 70 years of age. Employee testified that he was hired by respondent in 1986. In February 2001, employee was working for respondent as a senior sewage operator. This position involved the maintenance and operation of the sewage treatment plant. Among employee's duties were lifting bags of chemicals weighing 40 to 60 pounds, raising pumps out of pits when the pits needed to be cleared, walking a minimum of one mile a day, and climbing four-story towers.

¶ 7 1. Back Injury

¶ 8 Employee testified that on February 19, 2001, he and a co-worker, Joe Kaczmarski, were directed by John Roberts, respondent's superintendent and employee's supervisor, to lift a broken garage door high enough to remove a dumpster. At the time he and Kaczmarski lifted the garage door, the garbage truck had not yet arrived. After lifting the garage door, employee noticed "some discomfort" in his lower back. Nevertheless, employee continued working. To this end, employee went to check on the "contact tank" to make sure there were no blockages. Employee testified that while leaving the contact tank, he "misstepped" as he was descending a grassy slope at a 45-degree angle. Employee stated that he experienced "an extreme sharp pain in [his] lower back." Employee immediately reported the incident to Roberts.

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of November 20, 2001. The date was changed to November 14, 2001, when it was amended.

¶ 9 Employee identified a form entitled "Employee's Report of Injury." The form provides that employee was injured on February 19, 2001, while "[t]raversing uneven surface on slope." The nature and location of the injury is described as "[right] side hip." The form asks whether employee "ever had any other condition or injury involving this part of [his] body." This inquiry was answered in the affirmative and indicated that employee's "hip went out" on an unspecified date while at work. Employee acknowledged signing the form, stating that he had to do so to see a doctor. However, he denied completing any parts of the form except the signature line and stated that the other writing on the form was not his. As discussed below, between the date of the alleged incidents and November 2001, employee saw various medical providers. During this time, employee was treated conservatively and his work status varied. Employee denied having had any injury to or medical treatment for his low back or right hip prior to February 19, 2001.

¶ 10 2. Left Leg Injury

¶ 11 In November 2001, employee was working for respondent in his position as a senior sewage operator. Employee testified that on November 14, 2001, he was cleaning a building when he fell approximately three feet through a grate that had not been placed properly. Employee stated that his chest landed on a valve stem and his left knee landed on a valve flange. Following the accident, employee felt discomfort in his chest and knee. Employee sought medical care for his left knee and continued to treat his back as described below. Employee denied having had any injury to or medical treatment for his left knee prior to November 14, 2001.

¶ 12 B. Deposition Testimony of John Roberts

¶ 13 Roberts appeared for an evidence deposition on February 23, 2012. At that time, Roberts had worked for respondent for 21 years and had been a superintendent for respondent since 1996. Roberts testified that on February 19, 2001, employee came into his office to report that he had

hurt himself. Employee told Roberts that the injury occurred as he was lifting a door to get a dumpster out. Roberts provided employee with forms to complete so he could be medically checked. Employee went to the lavatory to fill out the forms. While employee was in the lavatory, Kaczmarski came into Roberts's office and told Roberts that employee had not hurt himself lifting the door. According to Kaczmarski, employee did not assist in lifting the door. Rather, it was the driver of a garbage truck. Following his conversation with Kaczmarski, Roberts spoke to employee in the lavatory. Employee then told Roberts that he thought he hurt himself walking down the hill by the contact tank where he was "taking sludge blankets." Roberts noted that the ground slopes down three feet from the tank in that area.

¶ 14 Roberts reviewed the "Employee's Report of Injury" form. According to Roberts, the report is in employee's handwriting. Roberts further testified that he completed a separate document titled "Supervisor's Investigation Report" based on information provided to him by employee. The supervisor's report provides that employee "hurt hip someway" while "checking sludge blankets in final tanks." The supervisor's report identified as "unsafe" the condition of the ground because it "slopes about 3' from south side of tank" and as "unsafe" the act of employee "stepp[ing] back to [*sic*] far."

¶ 15 C. Deposition Testimony of Joseph Kaczmarski

¶ 16 Kaczmarski presented for an evidence deposition on February 21, 2018. Kaczmarski testified that he had worked for respondent for 19 years, but had retired by the time of his testimony. When asked whether he was familiar with any incident that occurred on February 19, 2001, involving employee, Kaczmarski responded, "Not off the top of my head." Kaczmarski later testified that on February 19, 2001, he went to Roberts's office after running an errand. At that

time, Roberts asked Kaczmarski if he knew that employee got hurt. Kaczmarski responded in the negative, noting that he and employee often worked alone.

¶ 17 D. Employee's Medical Care

¶ 18 Employee was initially examined by Dr. Luis Munoz on February 19, 2001. Employee reported that he was injured while "coming down from an area in which he was checking certain operational activities and misstepped and twisted his right hip." Upon examination, Dr. Munoz noted tenderness of the right hip on external and internal rotation and on abduction. Dr. Munoz also noted tenderness over the right sacroiliac joint and right sacral notch with spasm in the L5-S1 region. Dr. Munoz diagnosed right hip sprain, right sacroiliac joint dysfunction, and mild lumbosacral strain. Dr. Munoz prescribed an anti-inflammatory medication, a muscle relaxer, physical therapy, and a neurostimulator unit. He authorized employee off work until February 21.

¶ 19 Employee saw Dr. Munoz on February 21, 2001. He reported that the physical therapy was helping and the medication was calming his spasms. Dr. Munoz's examination documented stiffness and soreness in the lower back and tenderness over the right sacroiliac joint. Dr. Munoz diagnosed lumbosacral strain and right hip/sacroiliac joint dysfunction, resolving with therapy and medications. Dr. Munoz authorized employee to return to work with limitations and advised him to continue taking the prescribed medications and attend physical therapy.

¶ 20 Employee continued to treat with Dr. Munoz in March and April 2001. Some improvement was noted during an examination on March 1, 2001. By May 8, 2001, employee reported resolution of his right leg and hip pain, but complained of occasional numbness in his right toes. Dr. Munoz's examination of employee revealed no tenderness in the right hip or right sacroiliac joint. Dr. Munoz concluded that employee had reached maximum medical improvement (MMI) as to his

right hip strain/sprain and his right sacroiliac joint dysfunction. Dr. Munoz discharged employee from his care and released him to return to work without limitations.

¶ 21 On May 29, 2001, employee consulted his family physician, Dr. Joseph Karcavich. Employee told Dr. Karcavich that he was helping lift a heavy garage door at work when he felt a pulling sensation in his hip. Employee did not experience any pain at that time. Shortly afterwards, however, he was walking down an incline and began feeling pain in the hip. Employee reported that he continued to experience some pain in the hip area, but it was slowly improving and not interfering with his work activities. Upon examination, Dr. Karcavich noted no pain to percussion of the lower lumbar area. Rather, the pain started in the right buttock area, where employee kept his wallet. Dr. Karcavich opined that employee had possible nerve compression from the placement of his wallet. He advised employee to shift the wallet to the opposite side. Because of ongoing symptoms, Dr. Karcavich ordered an MRI of the lumbar spine, which was taken on June 18, 2001. The MRI was interpreted as showing: (1) moderately severe central stenosis at L3-L4 due to disc bulging (right side greater than left); (2) mild stenosis at L4-L5; and (3) grade I spondylolisthesis at L5-S1 with neuroforaminal narrowing.

¶ 22 Employee consulted Dr. Thomas Hurley on August 7, 2001. Employee reported that he strained his back while lifting a door at work and then, as he was walking down an uneven grade of a hill, he twisted his back resulting in pain predominantly in his back and hip with radiation down his right lower extremity. Employee also described paresthesias and numbness in his right lower extremity and a one-month history of localized knee pain. Following a physical examination and review of diagnostic studies, Dr. Hurley diagnosed grade I spondylolisthesis at L5-S1 and focal right knee arthropathy. Dr. Hurley discussed various treatment options, including a trial of epidural steroid injections and a lumbar fusion. Dr. Hurley prescribed pain medication and home

exercises and kept employee at full-duty work status. Dr. Heather Nath administered a series of epidural injections, but employee reported no relief. Dr. Nath referred employee to Health South for a functional capacity evaluation (FCE).

¶ 23 On January 11, 2002, employee was examined by Dr. Edward Goldberg at respondent's request. Dr. Goldberg reviewed employee's medical records and obtained a history from employee of the events of February 19, 2001. Employee reported that his right lower extremity radicular pain resolved after receiving the epidural injections, but he still experienced some numbness in his right foot and toes as well as significant mechanical back pain. Upon examination, Dr. Goldberg noted lower lumbar tenderness. Dr. Goldberg opined that employee aggravated his degenerative disc disease at L3-L4 through L5-S1, his spinal stenosis at L4-L5, and his spondylolisthesis at L5-S1. Dr. Goldberg attributed employee's complaints to the incidents of February 19, 2001. Dr. Goldberg did not believe that employee was a good surgical candidate due to the multilevel nature of his symptoms. He stated, however, that surgery could be considered if employee's quality of life deteriorates such that he cannot live with the pain. Dr. Goldberg recommended an FCE to determine whether employee required permanent work restrictions. Upon completion of the FCE, Dr. Goldberg would consider employee at MMI. Dr. Goldberg declined to comment upon a return to full duty until employee completed the FCE. However, he opined that employee "can continue to work in his present position as long as his co-workers help with jobs which may potentially cause increased back pain."

¶ 24 Meanwhile, employee sought treatment with Dr. Karcavich for his left knee. Dr. Karcavich ordered an MRI and referred employee to Dr. Bradley Dworsky, an orthopedic specialist. Following an examination and a review of the MRI, Dr. Dworsky diagnosed a tear of the medial meniscus and recommended surgery. On February 21, 2002, Dr. Dworsky performed an

arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee. Postoperatively, Dr. Dworsky prescribed a course of physical therapy and kept employee off work for three weeks. On March 18, 2002, Dr. Dworsky released employee to light-duty work. By April 8, 2002, Dr. Dworsky noted that employee had "almost no symptomatology." At that time, Dr. Dworsky released employee to work without restrictions.

¶ 25 On April 22, 2002, claimant called Dr. Dworksy's office to report that employee fell on his left knee and was complaining of limping, pain, and mild swelling. Employee was advised to elevate and ice the knee and take anti-inflammatory medication. If there was no improvement, employee was to present for an office visit. On May 1, 2002, employee saw Dr. Dworsky. Dr. Dworsky diagnosed a contusion and did not feel that additional treatment was necessary.

¶ 26 On June 17, 2002, employee consulted Dr. Richard Fessler for low back pain and numbness in the leg. Employee told Dr. Fessler that he injured his back the previous year while lifting a garage door at work and walking down a slope. Upon examination, Dr. Fessler noted tenderness to palpation bilaterally in employee's low back and painful range of motion with bending and twisting to the right. Dr. Fessler reviewed various diagnostic studies, including an MRI. He interpreted the MRI as showing moderate central stenosis at L3-L4 with a similar bulge at L4-L5, but noted that the quality of the film, which was taken in an open unit MRI, was extremely poor. Dr. Fessler diagnosed low back pain and right lumbosacral radiculitis. He ordered X rays of the lumbar spine and an MRI in a closed unit.

¶ 27 On July 15, 2002, employee underwent an FCE at Health South. The FCE found that employee was able to perform work at the light to medium physical demand level. Based on a job description respondent provided, this was below the level customarily required of employee's position. The evaluator determined that employee was unable to return to full duty at that time and

recommended additional therapy. The evaluator further noted that employee's primary limiting factor was discomfort in the low back.

¶ 28 The MRI ordered by Dr. Fessler was taken on August 23, 2002, and was interpreted as showing bilateral spondylolysis at L5, mild disc bulging and facet hypertrophy at L5-S1 with grade I spondylolisthesis, and disc bulging and facet degeneration at L3-L4 and L4-L5. On September 4, 2002, employee returned to Dr. Fessler's office. At that time, employee complained of persistent pain in his right leg and numbness in his right foot. Dr. Fessler diagnosed lumbar radiculopathy and a herniated nucleus pulposus. He recommended surgery.

¶ 29 On October 14, 2002, employee saw Dr. Dworsky with complaints of discomfort and swelling of his left knee. Dr. Dworsky attributed the complaints to degenerative joint disease and administered a corticosteroid injection.

¶ 30 On October 31, 2002, Dr. Gary Skaletsky examined employee at respondent's request. Employee told Dr. Skaletsky that he was at work on February 19, 2001, and, while lifting a garage door, he noted a pulling sensation in his lower back on the right side. Employee further reported that subsequently, while walking down an embankment, he felt that pain radiate into the right lower extremity through the hip and buttock to the ankle. Dr. Skaletsky's physical examination documented right-sided lumbar tenderness and decreased range of motion. Dr. Skaletsky also reviewed various medical records and diagnostic studies. Dr. Skaletsky diagnosed chronic low back pain secondary to degenerative disc and joint disease of the lumbar spine. He opined that employee sustained a lumbar strain with mild radiculopathy on February 19, 2001, and that the condition resolved with conservative treatment. Dr. Skaletsky further opined that employee's ongoing condition was the result of the progression of degenerative changes in the lumbar spine, which would occur in the absence of trauma. Dr. Skaletsky determined that employee had reached

MMI from the February 19, 2001, accident (although he did not specify the date when this occurred), and that there is no permanency or physical restriction arising from the injury. Further, he noted that employee was working without limitations and should continue to do so. He did not believe any further treatment was required for the injury of February 19, 2001, and he expressly agreed with Dr. Goldberg that a spinal fusion was not necessary.

¶ 31 On November 4, 2002, Dr. Fessler performed a right-sided L4-L5 microendoscopic foraminotomy. Dr. Fessler's postoperative diagnosis was right L4-L5 foraminal stenosis.

¶ 32 On January 8, 2003, employee underwent an MRI of the left knee at the direction of Dr. Dworsky. The MRI showed a medial femoral bone bruise, suprapatellar effusion, joint effusion, and edema or hemorrhage surrounding the semimembranosus muscle. There was no evidence of a meniscal injury.

¶ 33 Dr. Fessler examined employee on January 29, 2003. At that time, Dr. Fessler recorded that employee reported decreased back pain, but complained that the toes on his right foot were "[as] numb as they were pre-operatively." Dr. Fessler noted that employee's physical therapy was on hold due to "left knee issues" and that employee may need left knee reconstruction. Dr. Fessler also noted that employee was due to have an FCE, "but [was] unable to do it at this time." Dr. Fessler wrote that employee was to obtain an evaluation of his left knee and have it treated. Dr. Fessler stated that when employee was able to resume physical therapy and undergo the FCE, "he will return to the clinic for a release to work if possible."

¶ 34 On February 14, 2003, employee, upon a referral from Dr. Dworsky, presented to Dr. Charles Bush-Joseph for an examination of his left knee. Dr. Bush-Joseph noted that employee walked with a moderate limp and had a left knee effusion with stiffness and tenderness along the entire medial femoral condyle. Dr. Bush-Joseph also reviewed the January 2003 MRI, which he

interpreted as showing evidence of subchondral sclerosis and bone edema of the medial femoral condyle with complete loss of the articular surface. Dr. Bush-Joseph diagnosed progressive medial compartment arthrosis of the left knee and recommended a total knee replacement.

¶ 35 On February 27, 2003, employee saw Dr. Aaron Rosenberg for left knee pain. Dr. Rosenberg obtained a history from employee and, following an examination and a review of an MRI, diagnosed a pes anserine bursa of the left knee. Dr. Rosenberg administered a steroid injection, which provided mild improvement of employee's symptoms. Dr. Rosenberg prescribed physical therapy and recommended that he return in six weeks for a repeat evaluation. Dr. Rosenberg next saw employee on April 10, 2003. At that time, X rays showed moderate medial compartment degenerative arthritis. Dr. Rosenberg recommended another injection, but employee declined. Dr. Rosenberg prescribed a bone scan to rule out arthritis of the patellofemoral joint or lateral compartment. Dr. Rosenberg opined that if the scan is normal, employee would be a candidate for total knee replacement surgery.

¶ 36 On April 11, 2003, employee's knee was examined by Dr. John Nikoleit, an orthopedic surgeon. Dr. Nikoleit diagnosed left knee medial compartment arthritis and recommended surgery. On April 24, 2003, Dr. Nikoleit performed a left total knee arthroplasty. Dr. Nikoleit anticipated that employee would be off work for approximately two to three months. Postoperatively, employee continued to treat with Dr. Nikoleit, who prescribed physical therapy. By July 2003, Dr. Nikoleit noted that employee's recovery was going "quite well," and he prescribed additional therapy, home exercises, and an FCE. On July 30, 2003, Dr. Nikoleit completed a "Physician's Statement—Disability Claim" form in which he indicated that employee was temporarily disabled, but he expected employee to resume work on September 23, 2003. On the same form, Dr. Nikoleit stated that employee was ambulatory and that he was not totally disabled.

¶ 37 Employee underwent an FCE at Performance Physical Therapy on August 6 and 7, 2003. According to the FCE, employee gave maximum effort and was capable of returning to work at the light-to-medium physical demand level.

¶ 38 Employee consulted Dr. Kevin Koutsky on August 18, 2003. Employee's chief complaint was chronic low back pain with radiation down the right leg. Employee also described some numbness, tingling, and weakness. Employee reported that his symptoms began in February 2001 when he sustained an injury at work. Employee explained that he was lifting an oversized garage door and felt a sharp pain in his low back with radiation down the leg. Following an examination and review of radiographic studies, Dr. Koutsky's assessment was L5-S1 degenerative spondylolisthesis with lumbar spondylosis. Dr. Koutsky recommended that employee undergo an MRI of the lumbar spine and a discogram. Employee also saw Dr. Nikoleit on August 18, 2003, Dr. Nikoleit indicated that he would keep employee off work until mid-October, pending the return of a back specialist employee was to see.

¶ 39 Employee followed up with Dr. Koutsky on October 9, 2003, after undergoing the MRI and discogram. The discogram showed evidence of concordant pain after injection at L5-S1, but not at L4-L5 or L3-L4. The MRI showed evidence of an L5-S1 spondylolisthesis with severe degenerative disc disease at L5-S1 greater than L4-L5. Dr. Koutsky recommended surgery, consisting of decompression and stabilization. He estimated that employee's recuperation period would last six to eight months. Dr. Koutsky referred employee to Dr. Kenneth Heiferman for a neurosurgical evaluation. Dr. Heiferman documented that employee began experiencing low back pain and right foot pain after lifting a garage door at work. Following an examination and a review of some diagnostic studies, Dr. Heiferman determined that employee "appears to have a

mechanical component to his pain." Dr. Heiferman reviewed various treatment options with employee, including lumbar decompression and fusion.

¶ 40 On December 16, 2003, Dr. Koutsky performed a decompression and fusion at the L3 through S1 levels. Employee's post-operative recovery went well, and Dr. Koutsky ordered physical therapy and work hardening. Also on December 16, 2003, employee underwent a left knee manipulation by Dr. Nikoleit due to complaints of persistent restriction of motion of the left knee after surgery.

¶ 41 In a letter to employee's attorney, Dr. Koutsky opined that the condition of employee's ill-being was directly related to the accident of February 19, 2001. Dr. Koutsky acknowledged that employee had degenerative changes prior to that date, but concluded that it was the accident which caused the degenerative changes to become symptomatic and ultimately warranted surgery. As of the date of the letter (April 5, 2004), Dr. Koutsky stated that employee was not at MMI and that he was temporarily totally disabled from performing work activities.

¶ 42 In mid-September 2004, employee underwent an FCE at Brightmore Physical Therapy. The FCE summary notes that employee gave maximum, consistent effort. Employee was determined to be functioning in the light physical demand category of work and was advised to avoid all squatting, crouching, and kneeling tasks. Thereafter, employee continued to treat with Dr. Koutsky through September 2006. Dr. Koutsky recommended that employee continue with pain management, including analgesic medications, which employee, a veteran, received through the Veterans Administration.

¶ 43 Dr. Jeffrey Coe examined employee on July 10, 2012, reviewed medical records, and authored a report of his findings. His deposition testimony is discussed below.

¶ 44 Dr. Avi Bernstein, a cervical and lumbar reconstructive spine surgeon, performed a review of employee's medical records and authored a report of his findings dated July 19, 2017. Employee alleged a work injury on February 19, 2001, after "lift[ing] a garage door while walking down on [*sic*] uneven slope." This resulted in complaints of lower back pain. Employee alleged a second injury on November 14, 2001, when "he fell on a grate on a large valve" and injured his left knee and the right side of his chest. Based on employee's medical records, Dr. Bernstein opined that employee suffered a lumbar strain or a temporary aggravation of a preexisting degenerative and congenital condition of the lumbar spine (L5-S1 grade I spondylolisthesis) as a result of his work-related incident on February 19, 2001. Dr. Bernstein further opined that employee was at MMI as of May 8, 2001, when he was released to full duty by Dr. Munoz. Any further care or treatment was unrelated to the incident of February 19, 2001.

¶ 45 E. Medical History Prior to February 2001

¶ 46 Employee denied having any injuries or accidents involving his low back or right hip prior to February 19, 2001, or undergoing any medical treatment to his low back or right hip prior to that date. Employee also denied having any injuries or accidents involving his left knee prior to November 14, 2001, or undergoing any medical treatment for his left knee prior to that date. During cross-examination at the arbitration hearing, respondent questioned employee regarding past treatment he received for the lumbar spine and left knee. For the most part, employee was unable to recall this treatment. In response, respondent submitted medical records for employee prior to February 2001. Those records showed in part that Dr. Hiroshi Eguro treated employee in 1990 for complaints of cervical spine and low back pain and Dr. Munoz treated employee in 1997 for a work-related injury to his low back after employee reported that he "mis-stepped" on uneven ground while carrying a four-gallon container of gasoline.

¶ 47 F. Evidence Deposition of Dr. Jeffrey Coe

¶ 48 Dr. Coe testified by evidence deposition on August 8, 2014. Dr. Coe is board certified in occupational medicine. He examined employee on July 10, 2012, reviewed medical records, and authored a report of his findings. Dr. Coe documented that employee worked as a sewage treatment plant operator for respondent. Employee described two incidents at work on February 19, 2001. Initially, employee developed pain in his low back as he was opening a garage door. Later that same day, as he was descending a hill, employee missed a step and twisted his right leg and hip. Following the second incident, employee developed pain in the right hip and buttock region in addition to the pain he was already experiencing in his back. Dr. Coe summarized the medical treatment employee received following the events of February 19, 2001. Employee also described an incident at work on November 14, 2001, in which he stepped through a floor grate and struck his left knee on a valve stem.

¶ 49 Dr. Coe testified that when he examined employee in July 2012, employee was still experiencing some back pain and stiffness with occasional radiation into his right buttock. Employee denied any right leg numbness, tingling, or burning. Employee also reported lingering pain and stiffness in his left knee, mostly with kneeling or squatting. Dr. Coe summarized the findings of his physical examination of employee. He noted tenderness bilaterally over the lower lumbar facet joints, but no generalized tenderness or muscle spasms in employee's back. Employee exhibited mild to moderate stiffness in extension and bilateral bending, which Dr. Coe stated was a common finding in someone with a three-level spinal fusion. Dr. Coe also noted mild to moderate stiffness in flexion and extension of employee's left knee and some residual swelling of the left knee.

¶ 50 Regarding the lumbar spine, Dr. Coe's diagnoses were degenerative disc disease and degenerative arthritis at the L3 through S1 levels. Regarding the left knee, Dr. Coe's diagnoses were degenerative arthritis, medial meniscal tearing, and chondromalacia. Based on his examination of employee and a review of employee's medical records, Dr. Coe opined that there was a causal relationship between the accidents on February 19, 2001, and November 14, 2001, as described to him by employee, and the conditions of ill-being of employee's lumbar spine and left knee. Dr. Coe explained that the two incidents on February 19, 2001, resulted in mechanical strains to employee's lumbar spine and aggravated preexisting degenerative arthritis and degenerative disc disease by activating a preexistent but asymptomatic spondylolysis and spondylolisthesis at L5-S1 causing pain. The incident on November 14, 2001, resulted in a direct contusion to employee's left knee. Dr. Coe stated that the November 2001 accident was a factor in aggravating degenerative arthritis in employee's left knee, thereby causing a breakdown of the knee, meniscal tearing, and chondromalacia. Dr. Coe believed that the medical treatment provided to employee for his lumbar spine and left knee conditions was reasonable and necessary for the complaints that employee described. Dr. Coe further opined that, based on employee's treatment history, the conditions of ill-being in employee's lumbar spine and left knee are permanent. Finally, Dr. Coe opined that, based on the totality of employee's orthopedic problems, employee was not capable of gainful employment.

¶ 51 Noting that some of employee's diagnoses were conditions of degeneration or arthritic change, Dr. Coe asked employee whether, prior to the work incidents, he had consulted a doctor for low back pain, right leg nerve-related symptoms, or left knee pain. Dr. Coe testified that employee responded in the negative.

¶ 52 On cross-examination, Dr. Coe testified that he did not review any of employee's medical records from September 2004 through the date of his report in 2012. Dr. Coe acknowledged that, depending on what is contained in those medical records, he might change his opinion as to the cause of employee's conditions of ill-being. Dr. Coe also admitted that the 2004 FCE, which was the last assessment made of employee's abilities and restrictions, found him capable of light physical duty level jobs. Dr. Coe was unaware whether employee sought work within those restrictions. Regarding the "misstep" that employee reported resulted in his back injury, Dr. Coe admitted that any misstep, whether at work or not, could have produced the same result. Finally, Dr. Coe stated that, in formulating his opinion as to the cause of employee's injuries, he relied on the facts related to him by employee. He acknowledged that if he were told different facts, his opinion might change.

¶ 53 On redirect-examination, Dr. Coe testified that employee told him about the medical treatment he received between 2004 through 2012. Assuming, hypothetically, that the medical records from 2004 through 2012 did not indicate any further injuries to the lumbar spine or left knee or extensive medical care, Dr. Coe testified that those records would not change his opinion.

¶ 54 G. TTD Benefits

¶ 55 Employee testified at the arbitration hearing that he did not receive any TTD benefits from February 20, 2001, through May 8, 2001. Employee testified that he performed modified work duties after his November 14, 2001, accident until his left knee surgery on February 21, 2002. Employee was off work from February 21, 2002, through April 8, 2002, but was not paid TTD benefits during that period of time. Employee testified that he went back off work on October 28, 2002, because of his back condition. For the period of October 28, 2002, through March 3, 2003, employee did not receive TTD benefits. Rather, respondent required employee to use his accrued

sick pay and vacation pay during that time. In November 2003, employee applied for social security disability benefits and was subsequently awarded them.

¶ 56 Employee testified that he has not received any type of disability benefit from respondent since October 28, 2002. Further, respondent has not offered him any type of employment since his last day of work on October 28, 2002.

¶ 57 Respondent presented evidence that it paid employee TTD benefits relative to his left knee injury for the period from February 21, 2002, through March 18, 2002.

¶ 58 H. Arbitrator's Decisions

¶ 59 The arbitrator issued two decisions, one related to employee's claimed back injury (case No. 02 WC 48868) and one related to the alleged knee injury (case No. 02 WC 48869). In both decisions, the arbitrator initially found employee not to be credible because "[h]e hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam."

¶ 60 In case No. 02 WC 48868, the arbitrator concluded that employee failed to establish by a preponderance of the evidence that he sustained an injury to his back on February 19, 2001, that arose out of and in the course of his employment. The arbitrator then noted that employee claimed to have injured his back due to two incidents that occurred on February 19, 2001—lifting a broken garage door and traversing an uneven surface while descending a slope. The arbitrator determined that employee failed to prove that he lifted the garage door on February 19, 2001. The arbitrator cited (1) Roberts's testimony that employee changed his story after he confronted him with Kaczmarski's claim that employee did not assist in lifting the garage door and (2) Dr. Munoz's medical record from the alleged date of the injury which does not mention the garage door incident. The arbitrator also determined that employee failed to prove that traversing the slope "was an

increase [*sic*] risk, or that he injured his *back* as a result of this activity." (Emphasis in original.) In support of this latter finding, the arbitrator cited employee's lack of credibility, the fact that employee's early complaints of pain were centered on his right hip and not his back, and employee's denial of a prior history of treatment for his right hip or back despite evidence to the contrary.

¶ 61 In case No. 02 WC 48869, the arbitrator first addressed whether the condition of ill-being of employee's left knee was causally related to the work accident of November 14, 2001. The arbitrator pointed out that employee's treating physicians attributed employee's need for a total knee replacement to degenerative arthritis, not to the work accident. She noted, however, that Dr. Coe did relate employee's ongoing left knee condition, which resulted in a total knee replacement, to the work accident of November 14, 2001, and that respondent offered no evidence to refute Dr. Coe's causation opinion. Accordingly, the arbitrator concluded that the accident employee sustained on November 14, 2001 (which was undisputed), "caused [employee's] ongoing left knee condition, for which he underwent a total knee replacement."

¶ 62 The arbitrator awarded medical expenses related to the left knee injury. She also awarded TTD benefits for the periods from February 21, 2002 (the date of the left knee arthroscopic surgery), through April 8, 2002 (the date employee was released to return to work), and from April 24, 2003 (the date employee underwent total left knee replacement surgery), through September 23, 2003 (the date Dr. Nikoleit indicated on a disability form that employee would be able to return to work as it relates to his left knee condition). Regarding the nature and extent of the injury, the arbitrator awarded employee 120 weeks of PPD benefits, representing a 60% loss of use of the left leg. See 820 ILCS 305/8(e)(12) (West 2000). Finally, the arbitrator denied employee's request for attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2016)) and penalties pursuant

to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), 19(l) (West 2016)). The arbitrator explained that the delay in payment of TTD benefits was justified because it was not clear whether employee was offered or actually worked within any restrictions prior to being released to return to work full duty on April 8, 2002. The arbitrator further explained that until the opinion of Dr. Coe in July 2012, 10 years after the injury and 9 years after the total knee replacement, the medical records were silent as to the causal connection between the total knee replacement and the work accident of November 14, 2001.

¶ 63 I. Commission's Decisions

¶ 64 Employee filed a petition for review of the arbitrator's decisions with the Commission. On October 18, 2021, the Commission issued two decisions, one with respect to employee's back injury (21 IWCC 0518) and one with respect to employee's knee injury (21 IWCC 0519).

¶ 65 In case No. 21 IWCC 0518, a majority of the Commission corrected the decision of the arbitrator in part, but otherwise affirmed and adopted the arbitrator's decision. The Commission noted that the arbitrator concluded that employee failed to prove that his alleged back injury of February 19, 2001, arose out of and in the course of his employment with respondent. In so finding, the arbitrator found employee not to be credible and concluded that (1) employee failed to prove that he lifted the garage door on the date in question, (2) employee's early complaints of pain were centered on his right hip and not his back, and (3) employee "failed to prove that traversing the slope was an increased risk, or that he injured his back as a result of this activity." The Commission "corrected the [arbitrator's] analysis to bring it in line with the supreme court's subsequent decision in *McAllister v. Workers' Compensation Comm'n*, 2020 IL 124848." In this regard, the Commission struck the arbitrator's finding that "traversing the slope is not an increased risk," but

otherwise affirmed and adopted the arbitrator's conclusion that employee failed to prove a work accident involving his back occurred on February 19, 2001.

¶ 66 In case No. 21 IWCC 0519, the Commission affirmed and adopted the decision of the arbitrator in its entirety.

¶ 67 Commissioner Deborah Baker dissented from the Commission's decisions affirming the arbitrator's findings that employee failed to prove a compensable work accident on February 19, 2001, or that he sustained a 60% loss of use of the left leg as a result of the November 14, 2001, work accident. Commissioner Baker disagreed with the arbitrator's finding that employee lacked credibility given the facts of the case, the age of the case, the types of questions asked on cross-examination, and employee's age at the time of his arbitration testimony. She also found the arbitrator's increased-risk analysis misplaced in light of the supreme court's decision in *McAllister*. In Commissioner Baker's opinion, employee established by a preponderance of the evidence that he sustained a compensable work accident on February 19, 2001, that his lumbar spine injury is causally related to the February 19, 2001, injury, and that he is entitled to associated medical and TTD benefits. Commissioner Baker explained that employee's testimony regarding the two incidents on February 19, 2001, was unrebutted by any of respondent's witnesses, the initial medical records show that employee sustained an injury to his right hip *and* lower back on February 19, 2001, and several physicians, including Dr. Goldberg, Dr. Coe, and employee's treating physicians, opined that employee's lumbar spine condition was causally related to the events of February 19, 2001. Moreover, Commissioner Baker would have found employee permanently and totally disabled as a result of both his lumbar spine and left knee injuries. Finally, Commissioner Baker would find that employee is entitled to an award of penalties pursuant to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), 19(l) (West 2016)) and attorney fees

pursuant to section 16 of the Act (820 ICLS 305/16 (West 2016)) because there was no expert opinion or evidence to contradict employee's claim that his left knee injury is causally related to the undisputed November 14, 2001, accident.

¶ 68 J. Circuit Court Decision

¶ 69 Claimant sought judicial review of the Commission's decisions. Pursuant to orders entered on November 21, 2022, and December 16, 2022, the circuit court of Will County confirmed the Commission's decisions. Claimant then filed the present appeal.

¶ 70 II. ANALYSIS

¶ 71 On appeal, claimant raises four assignments of error. First, she argues that the Commission's finding that employee failed to prove a work accident involving his back on February 19, 2001, was against the manifest weight of the evidence. Second, she claims that the Commission's award of TTD benefits related to the injury to employee's left leg on November 14, 2001, was against the manifest weight of the evidence. Third, she contends that the Commission's PPD award of 60% loss of use of employee's left leg was against the manifest weight of the evidence. Finally, she contests the Commission's denial of penalties and attorney fees.

¶ 72 A. Back Injury

¶ 73 Claimant first argues that the Commission's finding that employee failed to prove a work accident involving his back on February 19, 2001, was contrary to law and against the manifest weight of the evidence. According to claimant, employee's testimony regarding the two incidents on February 19, 2001, was unrebutted and the initial treatment records document an injury to employee's lumbar spine. Claimant further asserts that Dr. Coe and all of respondent's medical experts opined that employee sustained a work-related injury to his back on February 19, 2001. Thus, claimant reasons, the overwhelming evidence supports a finding that employee sustained a

work-related injury to his back on February 19, 2001, and it was error for the Commission to find otherwise.

¶ 74 To be compensable under the Act an injury must "arise out of" and occur "in the course of" one's employment. 820 ILCS 305/1(d) (West 2012); *McAllister*, 2020 IL 124848, ¶ 32; *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006). Both elements must be present at the time of the injury to justify compensation. *McAllister*, 2020 IL 124848, ¶ 32; *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). The employee bears the burden of proving by a preponderance of the evidence that his or her injury arose out of and occurred in the course of the employment. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477 (2011); *First Cash Financial Services*, 367 Ill. App. 3d at 105.

¶ 75 The "arising out of" component is primarily concerned with causal connection. *McAllister*, 2020 IL 124848, ¶ 36. An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *McAllister*, 2020 IL 124848, ¶ 36; *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989); *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366 (1977). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *McAllister*, 2020 IL 124848, ¶ 36; *Purcell v. Illinois Workers' Compensation Comm'n*, 2021 IL App (4th) 200359WC, ¶ 18. The "in the course of" component refers to the time, place, and circumstances of the accident. *Caterpillar Tractor Co.*, 129 Ill. 2d at 57. Injuries sustained by an individual while at work or while in the performance of reasonable activities in conjunction with his or her employment are deemed to occur "in the course of" the employment. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 24.

¶ 76 Typically, the question of whether an employee's injury arose out of and occurred in the course of his or her employment is one of fact. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). As a court of review, we cannot reject or disregard permissible inferences drawn by the Commission simply because different or conflicting inferences may also reasonably be drawn from the same facts, nor may we substitute our judgment for that of the Commission on such matters unless the Commission's findings are against the manifest weight of the evidence. *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 113 (1993). 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' Compensation Comm'n*, 2013 IL App (5th) 120564WC, ¶ 21.

¶ 77 Employee alleged two distinct accidents on February 19, 2001, resulting in injuries to his back. First, he testified that he felt some discomfort in his lower back after he and a coworker lifted a broken garage door. Second, he claimed that he experienced a sharp pain in his low back after he "misstepped" while descending a grassy slope after performing a work-related task. The Commission found that employee failed to carry his burden of proving an injury to his back resulting from either lifting the broken garage door or descending the grassy slope. Applying the deferential standard applicable to this issue, we cannot conclude that the Commission's finding on accident was against the manifest weight of the evidence.

¶ 78 1. Garage Door

¶ 79 Claimant argues that the Commission erred in rejecting employee's claim that he injured his back at work on February 19, 2001, when he lifted the broken garage door. According to claimant, employee's testimony at the arbitration hearing clearly supports such a finding. Claimant further contends that Roberts's testimony should be rejected because there was never an issue or dispute whether employee lifted the garage door until Roberts's deposition testimony in 2012, 11 years after the incident. We disagree.

¶ 80 The Commission was presented with conflicting evidence regarding employee's involvement, if any, in lifting the broken garage door on February 19, 2001. As noted above, employee did testify that he felt some discomfort in the lower back after he and a coworker lifted a broken garage door. The Commission, however, did not believe employee. The Commission found employee not to be a credible witness, explaining that he hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct examination.

¶ 81 Moreover, employee's testimony was contradicted by documentary evidence, the testimony of Roberts, and the medical records of Dr. Munoz, the physician who initially treated employee. A form entitled "Employee's Report of Injury" was admitted into evidence. That form specifies that employee injured his right hip (not his back) on February 19, 2001, while "[t]raversing uneven surface on slope" (not while lifting the garage door). Although employee denied completing any part of the form except the signature line, Roberts testified that the form was in employee's handwriting. Roberts also testified that he completed a separate document entitled "Supervisor's Investigation Report." Like the "Employee's Report of Injury," Roberts's report does not reference employee sustaining an injury to his back while lifting a garage door. Rather, it provides that employee "hurt hip someway" while "checking sludge blankets in final

tanks." Roberts testified that he completed his report based on the information provided to him by employee. The Commission rejected employee's testimony that he did not complete the "Employee's Report of Injury" form, concluding that that form and the "Supervisor's Investigation Report" were completed by different people.

¶ 82 We further observe that employee provided Roberts with differing accounts of how his alleged injury occurred. Roberts acknowledged that employee initially told him that he experienced an injury on February 19, 2001, as he was lifting the garage door. Roberts testified, however, that as employee was completing paperwork so he could be medically checked, Kaczmarski approached him and disputed employee's story. Kaczmarski told Roberts that it was the garbage truck driver, not employee, who helped lift the garage door. Following his conversation with Kaczmarski, Roberts spoke to employee. According to Roberts, employee then changed his story and told him that he was hurt while walking down a hill. As noted above, the version of events in which employee was descending the hill is reflected on both the "Employee's Report of Injury" form and the "Supervisor's Investigation Report." Likewise, the notes of Dr. Munoz, the physician who treated employee on February 19, 2001, do not reflect that employee injured himself while lifting a garage door. The history contained in Dr. Munoz's treatment note of February 19, 2001, states that employee reported that he was injured while "coming down from an area in which he was checking certain operational activities and misstepped and twisted his right hip." It was not until employee treated with Dr. Karcavich on May 29, 2001, more than three months after the alleged accident, that the medical notes reference an injury while lifting a garage door. However, employee told Dr. Karcavich that he did *not* experience any pain while lifting the garage door.

¶ 83 In short, despite employee's testimony that he injured his back while lifting the garage door, there was other evidence contradicting this version of events. In particular, there was evidence that: (1) employee changed his story about where his alleged injury occurred from a witnessed location (the garage) to an unwitnessed location (the hill); (2) employee initially reported an injury to his right hip, not his back; (3) neither the "Employee's Report of Injury" form nor the "Supervisor's Investigative Report" document an injury as a result of lifting a garage door; and (4) the history of injury contained in the treatment records of Dr. Munoz, the initial treating physician, reference an injury to the right hip (not the back) while descending an area on respondent's premises (not while lifting the garage door). As we stated previously, in resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny*, 397 Ill. App. 3d at 674. In this case, the Commission, after considering the conflicting evidence, determined that employee was not credible and that he failed to sustain his burden of proving that he sustained in injury to his back arising out of and in the course of his employment while lifting a garage door at work. Based on the record before us, we cannot say that an opposite conclusion is clearly apparent. See *Hosteny*, 397 Ill. App. 3d at 676-679 (concluding that the Commission's finding that the claimant failed to prove that he sustained an accident was not against the manifest weight of the evidence where the Commission found that the claimant lacked credibility and his version of events was contradicted by other evidence).

¶ 84 2. Descending Hill

¶ 85 Claimant also argues that the Commission erred in rejecting employee's claim that he injured his back at work on February 19, 2001, when he "misstepped" while descending a hill. According to claimant, employee's testimony regarding the incident was unrebutted, the initial

treatment records document an injury to the lumbar spine and all of respondent's medical experts opined that employee sustained a work-related injury to his back on February 19, 2001. Again, we disagree.

¶ 86 It is well established that the Commission, as the trier of fact, is not bound to accept even "unrebutted" testimony, so long as it has a sound reason for doing so. *Sorenson v. Industrial Comm'n*, 281 Ill. App. 3d 373, 384 (1996); see also *U.S. Steel Corp v. Industrial Comm'n*, 8 Ill. 2d 407, 413 (1956) (noting that the mere existence of testimony by an interested party does not require its acceptance); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041-42 (1999) (stating that the Commission is not required to accept unrebutted testimony). Here, the Commission, in affirming and adopting the arbitrator's decision, did not believe employee's testimony that he "misstepped" while descending a hill. Moreover, it provided reasons for this finding. The Commission explained that employee hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct examination. We reiterate that, with respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. Based on our review of the record, we cannot say that the Commission's finding as to employee's credibility was against the manifest weight of the evidence. Quite simply, inconsistency creates unreliability. Therefore, we find unpersuasive claimant's assertion that the Commission was required to accept employee's testimony because it was unrebutted.

¶ 87 Moreover, claimant's contention that the initial medical records clearly reflect an injury to the back is not entirely accurate. According to Dr. Munoz's medical report dated February 19,

2001, employee expressly reported that he injured his right hip. He made no mention of back pain. This is consistent with the "Employee's Report of Injury" and the "Supervisor's Investigative Report," both of which describe the nature and location of the injury as the right hip and make no reference to the back at all.

¶ 88 Claimant nevertheless argues that Dr. Munoz's notes support the contention that employee injured his back at work because, in addition to diagnosing right hip pain, Dr. Munoz also diagnosed right sacroiliac joint dysfunction and mild lumbosacral strain. Claimant also contends that all of respondent's medical experts opined that employee sustained a work-related injury to his back on February 19, 2001. We reiterate, however, that the Commission did not find credible employee's description of the mechanism of injury. To the extent that respondent's medical experts accepted that employee injured his back while descending the hill, they did so based on the history provided by employee. But, as noted above, the Commission found employee not to be credible. Indeed, there are conflicting histories in the documentary evidence. As noted earlier, the record reflects that employee initially reported an injury to his right hip. However, he told Dr. Goldberg that he felt pain in his lower *back* on February 19, 2001, not his right hip. Employee provided a similar history to Dr. Skaletsky and Dr. Bernstein. Moreover, there is no evidence that these doctors were aware of employee's prior history of treatment to his lumbar spine. Employee expressly told Dr. Skaletsky that he did *not* have any prior problems with his low back, a story he repeated to Dr. Coe. This was simply not accurate as reflected by the treatment records admitted at the arbitration hearing.

¶ 89 In short, the Commission, after considering the evidence before it, determined that employee was not credible and that he failed to sustain his burden of proving that he sustained an injury to his back arising out of and in the course of his employment while descending a hill at

work on February 19, 2001. In light of the Commission's role in assessing witness credibility (*Hosteny*, 397 Ill. App. 3d at 674) and our review of the record as detailed above, we cannot say that this finding was against the manifest weight of the evidence.

¶ 90 B. Leg Injury

¶ 91 Next, claimant argues that the Commission's awards of TTD and PPD benefits as it relates to the work-related injury to employee's left lower extremity on November 14, 2001, are against the manifest weight of the evidence.

¶ 92 1. TTD

¶ 93 An employee is temporarily totally disabled from the time an injury incapacitates him or her until such time as he or she is as far recovered as the permanent character of the injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990); *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). To be entitled to TTD benefits, the employee must establish not only that he did not work, but also that he or she is unable to work and the duration of that inability to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832 (2002); see also *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010) ("[W]hen determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force."). Once an injured employee has reached MMI, the disabling condition has become permanent and he or she is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). The factors to consider in determining whether an employee has reached MMI include a release to work, medical testimony or evidence concerning the employee's injury, and the extent of the injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005).

¶ 94 Whether an employee is entitled to TTD benefits and the period during which the employee is temporarily totally disabled are questions of fact for the Commission. *Archer Daniels Midland*, 138 Ill. 2d at 118-19. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. As a court of review, we will not set aside the Commission's decision on a factual matter unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 118-19. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Freeman United Coal Mining Co.*, 2013 IL App (5th) 120564WC, ¶ 21.

¶ 95 The Commission awarded TTD benefits for the periods from February 21, 2002 (the date of the left knee arthroscopic surgery), through April 8, 2002 (the date employee was released to return to work), and from April 24, 2003 (the date employee underwent total left knee replacement surgery), through September 23, 2003 (the date Dr. Nikoleit indicated on a disability form that employee would be able to return to work as it relates to his left knee condition). Claimant does not dispute the first period of TTD awarded. However, she claims that the second period of TTD benefits should have commenced on January 29, 2003, and continued through October 13, 2004. In support of her position, claimant asserts that employee was taken off work by Dr. Fessler on January 29, 2003, due to severe left knee issues. Claimant further asserts that employee underwent additional surgical procedures for the left knee after September 2003, none of employee's physicians ever released him to return to his pre-injury employment, and Dr. Coe opined that, as of October 2004, employee was medically unable to perform any type of gainful employment.

Claimant therefore reasons that the Commission should have awarded TTD benefits from January 29, 2003, through October 13, 2004.[3]

¶ 96 For three reasons, we find unpersuasive claimant's argument that employee was entitled to TTD benefits for the period from January 29, 2003, through April 23, 2003. First, Dr. Fessler's note regarding employee's work status is vague. The record reflects that Dr. Fessler examined employee on January 29, 2003, at which time employee's physical therapy was on hold secondary to left knee issues. At that time, Dr. Fessler instructed employee to "return to the clinic for a release to work if possible" once he resumed his physical therapy. However, there is nothing in Dr. Fessler's records that expressly authorized employee off work due to his left knee injury. In fact, and secondly, Dr. Fessler did *not* treat employee for his left knee injury. Dr. Fessler is a spine surgeon and was providing postoperative care following employee's back surgery on November 4, 2002. Third, claimant does not cite evidence from any physician who treated employee's left lower extremity and opined that employee was unable to work at any time between January 29, 2003, through April 23, 2003, due to the condition of his left knee. Indeed, following the initial left knee surgery, Dr. Dworsky released employee to return to work without restrictions on April 8, 2002. Despite new complaints following a fall on the surgically repaired knee, Dr. Dworsky did not prescribe any work restrictions. Dr. Bush-Joseph, who examined employee's left knee on February 13, 2003, recommended knee replacement surgery, but imposed no work restrictions. Dr. Rosenberg examined employee's left knee on February 27, 2003, and imposed no work

[3] The significance of the October 13, 2004, date is unclear, other than the fact that this is the end date that employee requested for TTD benefits in the request for hearing form submitted to the arbitrator.

restrictions. Employee followed up with Dr. Rosenberg on April 10, 2023. At that time, Dr. Rosenberg agreed that employee was a candidate for knee replacement surgery, but imposed no work restrictions. On April 11, 2023, Dr. Nikoleit examined employee's left knee. While agreeing with the proposed surgery, Dr. Nikoleit did not impose any work restrictions. Based on the totality of the evidence, the Commission could reasonably credit the physicians who treated employee's left knee and did not impose any work restrictions over an ambiguous note regarding employee's work status from his spine surgeon. As such, we conclude that the Commission's decision not to award employee TTD benefits for the period from January 29, 2003, through April 23, 2003, was not against the manifest weight of the evidence.

¶ 97 We also reject claimant's contention that employee was entitled to TTD benefits for the period from September 24, 2003, through October 13, 2004. On April 24, 2003, Dr. Nikoleit performed a left total knee replacement operation on employee. Employee continued to treat with Dr. Nikoleit postoperatively. On July 30, 2003, Dr. Nikoleit completed a disability form indicating that employee would be able to resume work without restrictions by September 23, 2003. The last of Dr. Nikoleit's office notes is dated August 18, 2003. At that time, Dr. Nikoleit stated that he would keep employee off work until mid-October pending the return of a back specialist employee needed to see. In other words, Dr. Nikoleit kept employee off work because of an issue related to his *back*, not his left knee. Consequently, the Commission could reasonably conclude that employee had reached MMI from his left knee by September 23, 2003, and was not entitled to TTD benefits after that date.

¶ 98 We are cognizant that, on December 16, 2003, Dr. Nikoleit performed a left knee manipulation on employee. However, claimant does not direct us to any medical records indicating that employee was taken off work because of this procedure. It was claimant's burden to present

such evidence to support her claim. See *Sysco Food Service of Chicago v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 170435WC, ¶ 41 (noting that a claimant has the burden of proving by a preponderance of the evidence all elements of his or her claim). Moreover, although Dr. Coe testified that employee was not capable of gainful employment, this opinion was premised on the totality of employee's orthopedic problems, not just his left knee. Considering the record before us, we cannot say that the Commission's decision that employee was entitled to TTD benefits for his left knee injury only through September 24, 2003, was against the manifest weight of the evidence.

¶ 99 2. PPD

¶ 100 Next, claimant disputes the PPD benefits awarded by the Commission. According to claimant, employee was entitled to an award of permanent total disability (PTD) benefits beginning on October 14, 2004.

¶ 101 The employee bears the burden of establishing by a preponderance of the evidence the extent and permanency of his or her injury or condition in a workers' compensation case. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843 (1994). An employee is considered permanently and totally disabled if he or she is obviously unemployable, *i.e.*, unable to make some contribution to industry sufficient to justify the payment of wages or there is medical evidence to establish a claim of permanent and total disability. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 53; *Lanter Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 10 (Rarick, J., concurring in part and dissenting in part). However, an employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87 (1983). If an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to

PTD by proving he or she fits within the "odd lot" category. *Westin Hotel,* 372 Ill. App. 3d at 544. The odd-lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n,* 84 Ill. 2d 538, 547 (1981) (citing 2 Arthur Larson *et al.,* Workmen's Compensation § 57.51, at 10-164.24 (1980)). An employee generally fulfills the burden of establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n,* 2012 IL App (3d) 100783WC, ¶ 34; *Alano v. Industrial Comm'n,* 282 Ill. App. 3d 531, 534-35 (1996). If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. *Westin Hotel,* 372 Ill. App. 3d at 544.

¶ 102 The issue of whether an employee is permanently and totally disabled presents a question of fact. *Professional Transportation, Inc.*, 2012 IL App (3d) 100783WC, ¶ 33. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny,* 397 Ill. App. 3d at 674. As a court of review, we cannot reject or disregard permissible inferences drawn by the Commission simply because different or conflicting inferences may also reasonably be drawn from the same facts, nor may we substitute our judgment for that of the Commission on such matters unless the Commission's findings are against the manifest weight of the evidence. *Zion-Benton Township High School District 126,* 242 Ill. App. 3d at 113. A decision is against the manifest weight of the evidence only if an opposite

conclusion is clearly apparent. *Freeman United Coal Mining Co.*, 2013 IL App (5th) 120564WC, ¶ 21.

¶ 103 In this case, the Commission awarded employee 120 weeks of PPD benefits, representing a 60% loss of use of the left leg. See 820 ILCS 305/8(e)(12) (West 2000). Claimant argues that employee was entitled to PTD benefits because there is medical evidence to establish a claim of permanent total disability. Claimant relies on the medical opinions and testimony of Dr. Bush-Joseph, Dr. Nikoleit, and Dr. Coe. We find claimant's argument unpersuasive.

¶ 104 Employee saw Dr. Bush-Joseph on only one occasion. There is nothing in Dr. Bush-Joseph's treatment record to indicate that he found employee to be permanently and totally disabled. In fact, Dr. Bush-Joseph examined employee *prior* to his total knee replacement surgery. Dr. Nikoleit's involvement in employee's treatment was more extensive than that of Dr. Bush-Joseph. Dr. Nikoleit performed the total left knee replacement procedure. However, there is nothing in Dr. Nikoleit's treatment records to indicate that he found employee to be permanently and totally disabled because of his left knee injury. To the contrary, as noted in our discussion of the TTD issue, on July 30, 2003, Dr. Nikoleit completed a disability form indicating that employee would be able to resume work without restrictions by September 23, 2003. Dr. Nikoleit also checked a box on the same form stating that employee was ambulatory and that he was *not* totally disabled. Although Dr. Coe testified that employee was not capable of gainful employment, this opinion was premised on the totality of employee's orthopedic problems. However, as discussed earlier, claimant failed to sustain her burden of proving a compensable injury to employee's back. Importantly, Dr. Coe never opined that employee was unable to work *solely* because of his left knee condition. In light of this record, we conclude that the Commission's award of PPD benefits was not against the manifest weight of the evidence.

¶ 105 C. Penalties and Attorney Fees

¶ 106 Lastly, claimant asserts that the Commission's denial of penalties pursuant to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), 19(l) (West 2016)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2016)) was against the manifest weight of the evidence.

¶ 107 The intent of sections 16, 19(k), and 19(l) is to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301 (1980). Awards under section 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 504-05 (1998). That is, the refusal to pay must result from bad faith or improper purpose. *McMahan*, 183 Ill. 2d at 515. The imposition of attorney fees under section 16 and penalties under section 19(k) are discretionary. 820 ILCS 305/16 (West 2012) (providing that the Commission "may" assess attorney fees in certain circumstances); 820 ILCS 305/19(k) (West 2012) (noting that the Commission "may" award additional compensation); *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 25. Hence, our review of the Commission's award of attorney fees and penalties under these statutory provisions involves a two-part analysis. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 25. First, we must determine whether the Commission's finding that the facts do not justify section 19(k) penalties or section 16 attorney fees is against the manifest weight of the evidence. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 25. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Freeman United Coal Mining Co.*, 2013 IL App (5th) 120564WC, ¶ 21. Second, we determine whether it would be an abuse of discretion to refuse to award such penalties and fees

under the facts presented. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 25. 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. *Oliver v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 143836WC, ¶ 50.

¶ 108 An award under section 19(l) is more in the nature of a late fee, so an award under that section is appropriate if an employer neglects to make payment without good and just cause. *McMahan*, 183 Ill. 2d at 515; *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 15. If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory. *McMahan*, 183 Ill. 2d at 515. Whether there is an adequate justification for the delay is a question of fact to be resolved by the Commission, and its determination will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20.

¶ 109 Having found that employee failed to prove that he sustained an injury to his back arising out of and in the course of his employment with respondent on February 19, 2001, the Commission determined that any request for penalties and attorney fees in relation to that claim was moot. Because we affirm the Commission's finding on accident, we also affirm the Commission's denial of penalties and attorney fees relative to the claimed back injury.

¶ 110 Turning to the injury to employee's left knee, the Commission declined to assess penalties and attorney fees against respondent. Regarding the first period of TTD relative to the knee (February 21, 2002, through April 8, 2002), the Commission found that "[i]t was clear from the evidence" that employee was temporarily totally disabled from February 21, 2002 (the date of the left knee arthroscopic surgery), through March 18, 2002 (the date Dr. Dworsky released employee

to light-duty work). And, despite employee's testimony to the contrary, the Commission found that employee was paid TTD benefits during that period. The Commission further determined that "the record is silent as to whether [employee] was offered work, or actually worked within his restrictions" between March 18, 2002, and April 8, 2002 (when Dr. Dworsky released employee to work without restrictions). Regarding the second period of TTD relative to the knee (April 24, 2003, through September 23, 2003), the Commission found that until employee provided the opinion of Dr. Coe on July 10, 2012, 10 years after the injury and 9 years after the total knee replacement, "the records were silent as to the causal connection of the total knee replacement and the work accident of November 14, 2001." The Commission explained that employee's treating physicians failed to relate the need for the knee replacement to the work accident. Instead, they related it to degenerative arthritis. Finally, the Commission noted that employee was off work at the time of the total knee replacement due to a back injury, but his claim for workers' compensation benefits for the back condition was denied. As such, the Commission concluded that respondent's delay in payment of TTD benefits for the period after March 18, 2002, was justified.

¶ 111 Initially, we agree with claimant that whether employee was off work simultaneously for both his left knee and back conditions had no bearing on the issue of penalties and attorney fees related to the left knee condition. Nevertheless, we ultimately find claimant's position unpersuasive.

¶ 112 Regarding the first period of TTD relative to employee's left knee injury, claimant argues on appeal that the Commission's statement that the record is "silent" as to whether employee worked after March 18, 2002, is inaccurate. According to claimant, following a March 18, 2002, visit, Dr. Dworsky recommended three additional weeks of physical therapy and a return visit for a possible release to full duty. Claimant adds, "[employee] specifically testified that Dr. Dworsky

did not release him to return to work for his left knee condition until the April 8, 2002 appointment. This fact was not rebutted by Respondent." We disagree. In a workers' compensation report authored by Dr. Dworsky on March 18, 2002, he wrote: "In talking to [employee], he is doing quite well to the point where *I think he can be returned to at least a light duty position* and continue therapy for the next three weeks, after which, we'll see him back for a possible full release without restrictions." (Emphasis added.) Thus, Dr. Dworsky clearly released employee to return to light-duty work as of March 18, 2002. And although employee's restrictions prior to the February 21, 2002, surgical procedure had been accommodated, there was no clear evidence that employee sought light-duty work from respondent for the period from March 19, 2002, through April 8, 2002, or that respondent denied such a request. As such, we cannot say that the Commission's factual findings are against the manifest weight of the evidence or that it was an abuse of discretion to refuse to award section 19(k) penalties and section 16 attorney fees under the facts presented. Similarly, we are unable to conclude that the Commission's denial of section 19(l) penalties was against the manifest weight of the evidence.

¶ 113 Regarding the second period of TTD relative to the left knee injury, claimant disputes the Commission's finding that, until Dr. Coe's opinion of July 10, 2012, the medical records were silent as to the causal connection between the total knee replacement and the work accident of November 14, 2001. According to claimant, respondent was in possession of medical evidence establishing a causal connection as early as May 13, 2003, when Dr. Nikoleit completed a "Physician's Statement—Disability Claim" form in which he indicated that employee was receiving treatment due to an injury arising out of employee's employment. Again, we disagree with claimant's position. First, Dr. Dworsky, Dr. Bush-Joseph, and Dr. Rosenberg all attributed the left knee complaints employee reported following his initial knee surgery to degenerative joint

disease. None of the physicians linked this condition to employee's work injury of November 2001. Second, although Dr. Nikoleit checked a box on the May 13, 2003, form to indicate that employee's condition arose out of his employment, he neglected to do so on a subsequent copy of the same form he completed on July 30, 2003. Thus, the evidence on the causal relationship between employee's left knee condition and his employment was not as clear as claimant suggests. Consequently, we cannot say that the Commission's factual findings are against the manifest weight of the evidence or that it was an abuse of discretion to refuse to award section 19(k) penalties and section 16 attorney fees under the facts presented. Likewise, we cannot conclude that the Commission's denial of section 19(l) penalties was against the manifest weight of the evidence.

¶ 114 III. CONCLUSION

¶ 115 For the reasons set forth above, the judgment of the circuit court of Will County, which confirmed the decisions of the Commission, is affirmed.

¶ 116 Affirmed.