ELSIE GHERE, Widow of Jim Ghere, Deceased, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Howell Asphalt, Appellee).

NO. 4-95-0476WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INDUSTRIAL COMMISSION DIVISION

278 Ill. App. 3d 840; *663 N.E.2d 1046*; *1996 Ill. App. LEXIS 171*; *215 Ill. Dec. 532*

January 11, 1996, ORAL ARGUMENT HELD
March 27, 1996, FILED

SUBSEQUENT HISTORY: [***1] Released for Publication May 6, 1996. As Corrected August 26, 1996.

PRIOR HISTORY: Appeal from Circuit Court of Douglas County. No. 94MR11. Honorable Frank W. Lincoln, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant widow of employee challenged the decision of the Circuit Court of Douglas County (Illinois), which confirmed the Industrial Commission's decision in favor of appellee employer finding that appellant failed to prove that the decedent sustained an accidental injury which arose out of and in the course of his employment.

OVERVIEW: Appellant widow filed an action to recover worker's compensation benefits after her husband suffered a fatal heart attack while working as a flagman for appellee employer on a highway paving project. The trial court confirmed the decision of the Industrial Commission, which adopted the arbitrator's finding that the decedent did not sustain an industrial accident, which arose out of and in the course of his employment. On appeal, the court affirmed and held that the arbitrator did not err in excluding the testimony of the decedent's treating physician on the causation issue because his opinions were not provided to appellee within 48 hours of the arbitration hearing as required by *820 Ill. Comp. Stat. 305/12* (1994). The court conclude that § 12 applied to treating physicians as well as examining physicians because the purpose of the rule was to prevent surprise. The court also found that the arbitrator properly excluded a letter from the Illinois State Water Survey because it was not certified and thus did not come within the exception to the hearsay rule. The court further determined that there was sufficient factual evidence to support the commission's determination.

OUTCOME: The court affirmed the decision in favor of appellee employer and against appellant widow because the Industrial Commission's decision that decedent's death did not arise out of and in the course of his employment was not against the manifest weight of the evidence.

LexisNexis(R) Headnotes

Evidence > Testimony > Experts > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN1] See *820 Ill. Comp. Stat. 305/12* (1994).

Evidence > Hearsay > Exceptions > Public Records > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

[HN2] A certified copy of a weather report is admissible if it was prepared by an individual who had a duty to record truly the facts contained therein.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview
[HN3] The claimant has the burden of proving by a preponderance of the credible evidence all the elements of his claim, including that the injury arose out of and in the course of his employment. The determination of whether an injury arose out of and in the course of the claimant's employment is generally a question of fact for the Industrial Commission, and the commission's determination thereof will not be set aside unless it is contrary to the manifest weight of the evidence. 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.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
[HN4] It is only when the decision of the Industrial Commission is against the manifest weight of the evidence that the decision of the commission should be set aside. The commission's decision is against the manifest weight of the evidence only where an opposite conclusion is clearly evident. 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 decision.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN5] Determining which of two medical witnesses is more worthy of belief and whose evidence is entitled to the greater weight is the function of the Industrial Commission. 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.

COUNSEL: For ELSIE GHERE, Widow of Jim Ghere, Deceased, Appellant: Richard G. Leiser, Warren E. Danz, P.C., Peoria, IL. ARGUER: For Appellant: Richard G. Leiser.

For THE INDUSTRIAL COMMISSION et al. (Howell Asphalt, Appellee): Robert N. Hendershot, Evans & Dixon, St. Louis, MO. ARGUER: For Appellee: David J. Reynolds, Jr.

JUDGES: HONORABLE MICHAEL J. COLWELL, J., HONORABLE JOHN T. McCULLOUGH, P.J., HONORABLE THOMAS R. RAKOWSKI, J., HONORABLE WILLIAM E. HOLDRIDGE, J., HONORABLE PHILIP J. RARICK, J. McCULLOUGH, P.J., and RAKOWSKI, HOLDRIDGE, and RARICK, JJ., concur.

OPINION BY: MICHAEL J. COLWELL

OPINION

[*841] [**1047] JUSTICE COLWELL delivered the opinion of the court:

Claimant, Elsie Ghere, widow of Jim Ghere, appeals the trial court's confirmation of the Industrial Commission's (Commission) decision which affirmed and adopted the arbitrator's decision. The claimant argues on appeal that (1) [***2] the arbitrator erred in not allowing Dr. Climaco to testify at the arbitration hearing; (2) the arbitrator erred in not admitting into evidence a letter from the Illinois State Water Survey; and (3) the Commission's finding that her deceased husband did not sustain an injury on August 22, 1990, which arose out of and in the course of [**1048] his employment, is against the manifest weight of the evidence. We affirm.

Jim Ghere (decedent) collapsed at 10:30 a.m. on August 22, 1990, while working for appellee, Howell Asphalt. The decedent later died when emergency personnel were unable to revive him. The death certificate indicates that the decedent died as a result of a heart attack. The decedent was 63 years old when he died.

The decedent was working as a flagman for Howell Asphalt at the time he collapsed. He got to work at 6:30 a.m. on August 22, 1990. His job responsibility as a flagman on August 22, 1990, was to walk approximately 150 feet ahead of the paving machine to keep traffic out of the way. The decedent collapsed when Howell Asphalt was in the process of paving a highway.

Roger Carter testified on behalf of the appellant. He testified that he was working with the decedent on August [***3] 20, 21, and 22, 1990. He stated that the decedent worked 10 to 11 hours on August 20 and 21, 1990. Carter stated that it was very hot, humid and muggy on August 22, 1990, and that the decedent was

sweating. He testified that the [*842] temperature was 80 to 85 degrees at 6:30 a.m. on August 22, 1990. He testified that the heat of the asphalt adds 80 to 100 degrees to the air temperature. Carter stated that the decedent was at least 150 feet in front of the paver when he worked as a flagman on August 22, 1990. He testified that they had laid about 1 1/2 to 2 miles of asphalt before the decedent collapsed. Carter testified that the decedent never complained to him about chest pains and he did not see the decedent being struck by any type of vehicle while he was flagging. Carter stated that he did not see the decedent take a break to get water or go to the bathroom between 7 a.m. and 10:30 a.m. on August 22, 1990.

Tim Murphy also testified on behalf of the claimant. Murphy worked with the decedent on August 22, 1990. He estimated the temperature on August 22, 1990, at 10:30 a.m. to be in the mid-eighties. He stated that the decedent was standing an average of 150 feet away from the paver. Murphy [***4] testified that the decedent did not complain to him about chest pains and that he did not see the decedent being struck by any type of vehicle while he was flagging on August 22, 1990. He testified that at 10:30 a.m. he told the decedent that he could get a drink of water and use the bathroom. He stated he observed the decedent get a drink of water and that the decedent collapsed when he returned to his position.

The claimant, the widow of the decedent, testified that the decedent had prostate surgery in April 1990. She stated that the decedent was off work for approximately three months and that he returned to work for the appellee on August 20, 1990. The appellant also stated that the decedent had no heart problems or complaints prior to August 1990.

Dr. Raymon Climaco testified on behalf of the appellant. Dr. Climaco's field of specialty is emergency room medicine. He testified that he treated the decedent on several occasions beginning in December 1979. The last time decedent saw Dr. Climaco was in early part of 1990. Dr. Climaco testified that he never treated decedent for heart problems. The employer objected to Dr. Climaco giving any opinions regarding the cause of the decedent's [***5] death and regarding whether the decedent's work activities or the work environment was causally related to his death because his opinions on these matters were not furnished to the employer 48 hours before the arbitration hearing. The arbitrator sustained that objection.

The claimant presented the deposition testimony of Dr. Stuart Frank, a cardiologist. Dr. Frank testified that the decedent's medical records did not provide sufficient information for him to make a definite determination regarding the cause of the decedent's death and [*843] causal connection between the decedent's death and the environmental circumstances surrounding his sudden death. Dr. Frank stated that the cause of decedent's death was most likely a myocardial infarction and/or a fatal ventricular arrhythmia. Dr. Frank explained that a myocardial infarction is, in lay terms, a heart attack, and a fatal ventricular arrhythmia refers to an irregular heartbeat where the heart is beating in such [**1049] a way that it is not able to pump any blood out into circulation, which results in the patient's death.

Claimant's attorney asked Dr. Frank a series of hypothetical questions. The attorney asked Dr. Frank to assume that the decedent [***6] had returned to work as a flagman after prostate surgery; that he began work at 7 a.m.; that the temperature was 85 to 90 degrees; that traffic was heavy when he was flagging; and that he suffered a heart attack at 10:30 a.m. Appellant's attorney asked Dr. Frank if the decedent's heart attack could have been precipitated or accelerated by excessive amounts of gas or carbon monoxide at work, and Dr. Frank replied: "If he had been exposed to excessive amounts of gas or carbon monoxide, it's possible it could have or might have precipitated or accelerated the development of the fatal arrhythmia or a myocardial infarction."

Dr. Frank was also asked whether the employment environment, which was incorporated in the hypothetical question, could have aggravated or precipitated any preexisting or underlying heart condition wherein the decedent eventually developed the arrhythmia or myocardial infarction. Dr. Frank replied: "I cannot, with any medical confidence, address the question of the nature of his work and its relationship to his death. Of course, I'm not familiar with the activities of a flagman."

However, Dr. Frank later testified that the decedent's work activities could have or [***7] might have provoked a possible myocardial infarction or ventricular arrhythmia.

James Campbell testified for the employer. Campbell was the paving superintendent for Howell Asphalt on the day that the decedent collapsed. He testified that he assigned the decedent to the job of lead flagman on August 22, 1990. Campbell stated that 15 minutes prior to the time when the decedent collapsed, he asked the decedent if he needed relief for a drink of water or to go to the bathroom and the decedent indicated that he was fine. Campbell testified that when he asked the decedent if he wanted a break he made no complaints about his chest or arms and he looked absolutely normal. He stated that the decedent was not unusually sweaty or red-faced. Campbell testified that the air temperature was 70 to 75 degrees on August 22, 1990.

[*844] Campbell stated that the decedent was 150 to 200 feet in front of the paver when he was working as a flagman on August 22, 1990. Campbell was asked

whether there is any difference between the temperature standing next to the paver as opposed to a flagman who would be standing 150 feet away from the paver, and Campbell replied:

> "Yes, there would naturally be some heat [***8] difference. Like I said, the asphalt itself is 275 or 300 degrees coming out the back of the machine, so there's going to be some reflective heat from it, but when you're that far -- when you're that far ahead, you're not going to feel anything from the asphalt."

Dr. Stephen Schuman, an internist and cardiologist, testified on behalf of the employer in an evidence deposition. Dr. Schuman testified that the decedent's death was caused by cardiac arrest precipitated by either primary ventriculation or a spontaneous blood clot formed in the natural history of coronary disease. Dr. Schuman indicated that in either case the decedent had suffered a ventricular fibrillation, which is a chaotic ventricle rhythm causing the heart to beat too rapidly. Dr. Schuman testified that the timing of the ventricular fibrillation was entirely coincidental. He also testified that coronary disease is very common in men over the age of 60. He indicated that it was not uncommon for there to be no warning that a heart attack will occur. Dr. Schuman testified that there was no connection between the decedent's work activities or the work environment and his death. Dr. Schuman stated that his opinion would [***9] not change even assuming the temperature on August 22, 1990, was in the mid- to upper-eighties.

The employer introduced into evidence a certified copy of the United States Department of Commerce records from the National Climatic Data Center. This showed that the maximum temperature in Mattoon, Illinois, on August 22, 1990, was 78 degrees and the minimum temperature was 67 degrees. The claimant attempted to introduce a letter [**1050] from the Illinois State Water Survey as evidence of air temperature. The arbitrator, however, refused to admit the letter on hearsay grounds.

The arbitrator found that the claimant failed to prove that the decedent sustained an accidental injury on August 22, 1990, which arose out of and in the course of his employment. The Commission affirmed and adopted the arbitrator's decision. The circuit court of Douglas County confirmed the Commission's decision.

The claimant first contends that the arbitrator erred in not allowing Dr. Climaco to testify at the arbitration hearing concerning whether the decedent's work activities or the work environment [*845] could or might have precipitated the decedent's heart attack. The arbitrator ruled that Dr. Climaco could not testify [***10] as to causal connection because his opinions on causation were not furnished to the appellee 48 hours before the arbitration hearing, pursuant to section 12 of the Illinois Workers' Compensation Act (Act) ([HN1] *820 ILCS 305/12* (West 1994)). The pertinent part of section 12 states:

> "In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, 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 employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, or his representative, as soon as practicable but not later than 48 hours before the time the case is set for hearing. Such delivery shall be made in person either to the employer, or his representative, or by registered mail to either, and the receipt of either shall be proof of such delivery. If such surgeon refuses to furnish the employer with such statement to the same extent as that [***11] furnished the employee, said surgeon shall not be permitted to testify at the hearing next following said examination." *820 ILCS 305/12* (West 1994).

The claimant contends that section 12 of the Act does not apply to treating physicians, but rather only applies to examining physicians. Therefore, claimant argues, because Dr. Climaco was the decedent's treating physician, section 12 of the Act is inapplicable. The supreme court in *Nollau Nurseries, Inc. v. Industrial Comm'n, 32 Ill. 2d 190, 204 N.E.2d 745 (1965)*, refused to decide this issue. Our research has not found an appellate court decision that addresses this issue.

We believe the purpose of section 12 would be frustrated if we read section 12 to only apply to examining physicians. It seems to us from the language of section 12 that the purpose of having the employee's physician send a copy of his records to the employer no later than 48 hours prior to the arbitration hearing is to prevent the

employee from springing surprise medical testimony on the employer. *Cf., Cook v. Optimum/Ideal Managers, Inc., 130 Ill. App. 3d 180, 188, 473 N.E.2d 334, 340, 84 Ill. Dec. 933 (1984)*. With this purpose in mind, we see no justification [***12] in limiting section 12 of the Act to examining doctors and we now so hold.

The claimant also argues that under *Nollau,* the arbitrator should have allowed Dr. Climaco's testimony. In *Nollau,* over the employer's objection, the arbitrator allowed the claimant's treating [*846] physician to testify concerning the claimant's condition even though the physician's medical report was not furnished to the employer 48 hours before the hearing. The *Nollau* court held that the arbitrator did not err in allowing the treating physician to testify at the hearing. The court stated that the statute requires a refusal by the physician to furnish his records before his testimony is excluded. *Nollau, 32 Ill. 2d at 193, 204 N.E.2d at 747*. The court refused to render the physician's testimony inadmissible because there was nothing in the case to indicate that a request had been made for the physician's records.

The present case is distinguishable from *Nollau.* It appears from the record that the employer in the present case had Dr. Climaco's medical reports more than 48 hours before the arbitration hearing. However, the [**1051] portion of Dr. Climaco's testimony to which the employer objected was Dr. [***13] Climaco's opinion regarding whether the decedent's work activities and the work environment could or might have precipitated the decedent's heart attack. Dr. Climaco's opinion on whether the decedent's work activities and the work environment could have precipitated the decedent's heart attack goes well beyond what is in his records. There is absolutely no mention in Dr. Climaco's records of his opinion regarding whether the decedent's activities or the work environment could have precipitated the decedent's heart attack. Dr. Climaco's records do not mention that he ever treated the decedent for a heart condition. There was nothing in Dr. Climaco's records to put the employer on notice that Dr. Climaco had an opinion regarding causal connection which the employer could have requested. Therefore, the arbitrator was correct in sustaining the employer's objection to Dr. Climaco's testimony regarding the above matters. See *Vera v. Industrial Comm'n, 150 Ill. App. 3d 1033, 1036, 502 N.E.2d 337, 339, 104 Ill. Dec. 74 (1986)*.

The claimant also contends that the arbitrator erred in not admitting into evidence the letter from the Illinois State Water Survey. She argues that the letter [***14] falls within a hearsay exception. Our research of the case law on this issue does not support the claimant's argument. The court in *Chicago & Northwestern Ry. Co. v. Trayes, 17 Ill. App. 136, 139-40 (1885)*, held that [HN2] a certified copy of a weather report is admissible if it was prepared by an individual who had a duty to record truly the facts contained therein. In the present case, the letter from the Illinois State Water Survey was not certified and, therefore, it does not fall under the hearsay exception set out in *Trayes.*

The claimant's final contention on appeal is that the Commission's finding that the decedent did not sustain an accidental injury [*847] on August 22, 1990, which arose out of and in the course of his employment, is against the manifest weight of the evidence. [HN3] The claimant has the burden of proving by a preponderance of the credible evidence all the elements of his claim, including that the injury arose out of and in the course of his employment. *Parro v. Industrial Comm'n, 260 Ill. App. 3d 551, 553, 630 N.E.2d 860, 862, 196 Ill. Dec. 695 (1993), aff'd, 167 Ill. 2d 385, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995)*. The determination of whether an injury arose [***15] out of and in the course of the claimant's employment is generally a question of fact for the Commission, and the Commission's determination thereof will not be set aside unless it is contrary to the manifest weight of the evidence. *Hansel & Gretel Day Care Center v. Industrial Comm'n, 215 Ill. App. 3d 284, 292-93, 574 N.E.2d 1244, 1250, 158 Ill. Dec. 851 (1991)*. 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. *Kirkwood v. Industrial Comm'n, 84 Ill. 2d 14, 20, 416 N.E.2d 1078, 1080, 48 Ill. Dec. 556 (1981)*. [HN4] It is only when the decision of the Commission is against the manifest weight of the evidence that the decision of the Commission should be set aside. *Dexheimer v. Industrial Comm'n, 202 Ill. App. 3d 437, 442-43, 559 N.E.2d 1034, 1037, 147 Ill. Dec. 694 (1990)*. The Commission's decision is against the manifest weight of the evidence only where an opposite conclusion is clearly evident. *Caterpillar, Inc. v. Industrial Comm'n, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896,* [***16] *169 Ill. Dec. 390 (1992)*. 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 decision. *Boatman v. Industrial Comm'n, 256 Ill. App. 3d 1070, 1072, 628 N.E.2d 829, 830-31, 195 Ill. Dec. 365 (1993)*.

The claimant argues that the decedent's work activities and the work environment precipitated the decedent's heart attack. There was conflicting medical testimony on this issue. The claimant points to Dr. Frank's testimony to support her argument. Dr. Frank testified that the decedent's work activities could or might have provoked the decedent's death. However, Dr. Schuman testified that there was no connection between the decedent's

work activities or the work environment and his death. Dr. Schuman further stated that his opinion would not change even assuming the temperature on August 22, 1990, [**1052] was in the mid- to upper-eighties. [HN5] Determining which of two medical witnesses is more worthy of belief and whose evidence is entitled to the greater weight is the function of the Commission. *Olin Industries, Inc. v. Industrial Comm'n, 394 Ill. 593, 69 N.E.2d 305* [***17] *(1946)*.

The other evidence that the claimant presented to support her [*848] argument was the testimony of Carter and Murphy. They both testified that the temperature was 80 to 85 degrees on August 22, 1990. However, Campbell testified that the temperature was 70 to 75. Further, according to the National Climatic Data Center, the temperature in Mattoon on August 22, 1990, never got above 78 degrees and the low temperature was 67 degrees.

The claimant also argues that the decedent was exposed to severe heat because of the heat coming from the asphalt. Carter testified that the heat of the asphalt adds 80 to 100 degrees to the air temperature. However, Campbell testified that the decedent was 150 to 200 feet in front of the paver when he was working as a flagman on August 22, 1990, and that at that distance the decedent would not be able to feel the added heat from the pavement. 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. *Kirkwood, 84 Ill. 2d at 20, 416 N.E.2d at 1080*. Viewing the record as a whole, there was sufficient [***18] factual evidence to support the Commission's decision. Therefore, the Commission's determination that the decedent's death on August 22, 1990, did not arise out of and in the course of his employment is not against the manifest weight of the evidence.

For the foregoing reasons, we affirm the decision of the circuit court of Douglas County.

Affirmed.

McCULLOUGH, P.J., and RAKOWSKI, HOLDRIDGE, and RARICK, JJ., concur.

HOMEBRITE ACE HARDWARE, Clair Appellant, v. THE INDUSTRIAL COMMISSION et al. (Kevin Schnoeker, Appellee).

No. 5-03-0650WC

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

351 Ill. App. 3d 333; *814 N.E.2d 126*; *2004 Ill. App. LEXIS 661*; *286 Ill. Dec. 477*

June 8, 2004, Decided
June 8, 2004, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of St County. No. 02--MR--262. Honorable Walter Brandon, Judge, Presiding.

DISPOSITION: Judgment of the Circuit Court affirmed; cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employer sought review of a decision of the Circuit Court of St. Clair County (Illinois), which confirmed a decision of the appellee Illinois Industrial Commission. The Commission's decision affirmed and adopted an arbitrator's decision, which awarded appellee claimant 54 weeks of temporary total disability and directed the employer to authorize the claimant's prescribed cervical spine surgery.

OVERVIEW: The claimant injured his lower back. He began receiving treatment for herniated and bulging discs and about six weeks later began having pain in his neck and upper back. His treating physician diagnosed degenerative changes in the cervical spine with some posterior disc bulging and opined that the neck problems were related to the claimant's work injury. The employer refused to authorize cervical surgery. The employer's physician stated that there was no relationship between the claimant's neck condition and the work injury. The court affirmed the circuit court's judgment, holding that (1) the treating physician's records contained details about his treatment of the claimant's neck injury and the employer's claim of surprise at the physician's testimony was not well taken; (2) the treating physician's causation testimony was neither speculative or equivocal and the Commission's adoption of that testimony was reasonable; (3) *820 Ill. Comp. Stat. Ann. 305/8(a)* (2002) entitled the claimant to necessary surgical services and inclusion of the expense of the cervical surgery in the medical expense award was proper as was the order directing the employer to approve the surgery.

OUTCOME: The circuit court's judgment was affirmed and the cause was remanded to the Commission for further proceedings.

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN1] Evidentiary rulings made during the course of a workers' compensation case will not be disturbed on review absent an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

[HN2] An abuse of discretion occurs where no reasonable person would take the view adopted by a lower tribunal.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN3] The Illinois Industrial Commission is charged with determining the question of causation in a workers' compensation case, and an appellate court will not disturb its finding unless it is against the manifest weight of the evidence.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN4] The workers' compensation claimant has the burden of proving that medical services are necessary and expenses were reasonable. What is reasonable and necessary is a question of fact for the Illinois Industrial Commission, and its determination will not be overturned unless it is against the manifest weight of the evidence.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN5] The test for determining whether a factual finding in a workers' compensation case is against the manifest weight of the evidence is if there was sufficient evidence in the record to support an Illinois Industrial Commission determination.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
[HN6] See *820 Ill. Comp. Stat. Ann. 305/12* (2002).

Evidence > Procedural Considerations > Burdens of Proof > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN7] To obtain compensation under the Illinois Workers' Compensation Act, *820 Ill. Comp. Stat. Ann. 305/1 et seq.* (2002), a claimant must show, by a preponderance of the evidence, that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. In analyzing the "arising out of" component, courts are primarily concerned with a causal connection.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
[HN8] It is the Illinois Industrial Commission's function to weigh the testimony on causation in a workers' compensation action.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
[HN9] Even if one medical witness is equivocal on the question of causation, it is for the Illinois Industrial Commission to determine which medical opinion is to be accepted in a workers' compensation proceeding, and it may attach greater weight to a treating physician's opinion.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
[HN10] It is the Illinois Industrial Commission's function to judge the credibility of the witnesses in a workers' compensation proceeding, to draw reasonable inferences from their testimony, and to resolve any conflicts in claimant's favor.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
[HN11] *820 Ill. Comp. Stat. Ann. 305/8(a)* (2002) entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
[HN12] A workers' compensation claimant is entitled to recover only reasonable medical expenses that are causally related to his work accident and that are determined to be required to diagnose, relieve, or cure the effects of his injury. *820 Ill. Comp. Stat. Ann. 305/8(a)* (2002).

JUDGES: JUSTICE CALLUM delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

OPINION BY: CALLUM

OPINION

[*334] [**128] JUSTICE CALLUM delivered the opinion of the court:

Claimant, Kevin Schnoeker, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2002)) while working for employer, Homebrite Ace Hardware. Following a hearing on claimant's section 19(b) petition (*820 ILCS 305/19(b)* (West 2002)), the arbitrator awarded claimant 54 weeks of temporary total disability (TTD) benefits and directed employer to authorize claimant's prescribed cervical spine surgery. The Industrial Commission (Commission) affirmed and adopted the [*335] arbitrator's decision, and it remanded the case for further proceedings pursuant to *Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 332-35, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980)*. The circuit court confirmed the Commission's [***2] decision, and employer timely appealed. We affirm and remand pursuant to *Thomas, 78 Ill. 2d at 332-35*.

I. BACKGROUND

Claimant worked for employer as paint department manager. In 2000, claimant had worked for employer for 10 years and had managed the paint department for about 5 years. On November 6, 2000, claimant heard a pop in his back while he unloaded five-gallon buckets of driveway sealer from a pallet. He continued working, but felt back pain about four hours later. Claimant reported his injury to employer and did not return to work.

[**129] On November 9, 2000, claimant saw a doctor who worked with his family physician, Dr. Garces. Claimant related the popping episode and complained of low back pain. The associate diagnosed a possible disc herniation or bulging and prescribed pain medication and light work duty. The associate also referred claimant to Dr. Charisse Barta, a neurologist. Claimant returned to Dr. Garces's office for followup visits on November 14, and 28, 2000, and complained of continued lumbar pain. Dr. Garces prescribed physical therapy and suggested light duty work for four hours per day for two weeks.

Dr. Barta examined claimant on November 30, 2000, and [***3] diagnosed low back pain and ordered an MRI of claimant's lumbosacral spine. She next examined claimant on December 28, 2000. In her notes, she wrote that claimant's lumbar MRI revealed a herniated disc at L3-L4 and a disc bulge at L4-L5. She also stated that claimant could return to work with a restriction of no lifting over 10 pounds. Dr. Garces subsequently referred claimant to Dr. Christopher Heffner, a neurosurgeon.

According to claimant, about six weeks to two months after the accident, he began feeling pain in his neck and upper back. Claimant testified that he had never experienced any neck problems before his injury, but he did experience back problems on several occasions.

At his deposition, Dr. Heffner, a board-certified neurosurgeon, testified that he first examined claimant on January 30, 2001. Claimant explained that he continued to experience back pain that radiated to his right posterior hip. He also had difficulty sleeping and with sexual function. Dr. Heffner reviewed claimant's MRI films and diagnosed herniated lumbar disc disease with back pain and hip pain. Dr. Heffner prescribed steroid medication and a TENS unit. Claimant was already off of work and Dr. Heffner [***4] agreed with that recommendation. [*336] Over employer's counsel's objection, he opined that claimant's condition was causally related to his work accident.

Dr. Heffner next saw claimant on February 13, 2001. At this time, claimant complained of pain to his neck that radiated to his arm. Dr. Heffner opined, over counsel's objection, that claimant's condition at this time was causally related to his work accident. Following two lumbar epidural injections, claimant complained at a March 6, 2001, visit, of neck and low back pain, but no pain radiating to his legs. Dr. Heffner ordered another injection and continued physical therapy. During a March 29, 2001, visit, claimant complained of neck pain that radiated to his right arm and to the back of his head. The MRI films revealed degenerative changes of the C5-C6 disc with some posterior disc bulging. Dr. Heffner recommended cervical traction. Again, over counsel's objection, he opined that claimant's condition at this time was causally related to his work accident. Dr. Heffner continued to keep claimant off of work and recommended continued physical therapy and home cervical traction.

Dr. Heffner next saw claimant on April 20, 2001. He felt [***5] that claimant's neck was a more significant problem at this time and discussed with claimant surgical intervention. During a May 17, 2001, visit, claimant complained of neck and lower back pain and posterior headaches. He also complained of pain radiating from his neck to his right upper shoulder and arm. Dr. Heffner's continuing diagnosis was a herniated lumbar disc and cervical degenerative disc disease. He again discussed with claimant surgical intervention with respect to his cervical spine. Claimant again saw Dr. Heffner on June 21, and July 31, 2001. [**130] His condition had not significantly changed.

Claimant agreed to undergo the cervical surgery, and it was scheduled for September 10, 2001. However, he did not undergo the procedure because employer did not authorize it. Dr. Heffner did not see claimant again after July 31, 2001, and never released him to return to work. According to Dr. Heffner, as of July 31, 2001, claimant's lower back condition had improved, and claimant did not complain of radicular pain to his leg. Dr. Heffner advised claimant to treat the condition on an as-needed basis. He testified that he would have released claimant to return to work if the cervical condition [***6] had not developed. Dr. Heffner further stated that he did not issue a report about causation with respect to claimant's cervical spine.

On July 16, 2001, Dr. R. Peter Mirkin examined claimant on employer's behalf and reviewed his MRI films. In his evaluation, Dr. Mirkin stated that there was no relationship between claimant's neck condition and his work injury. He noted that claimant's neck pain did not develop for several months after the injury. Dr. Mirkin also stated [*337] that claimant had a very small disc bulge in his neck and that he would not recommend surgery for it because it would not be beneficial. He recommended that claimant return to work.

On February 5, 2002, the arbitrator awarded claimant 54 weeks' TTD benefits for the period November 7, 2000, through November 21, 2001, and directed employer to authorize the treatment prescribed by Dr. Heffner, including the cervical spine surgery. Finding Dr. Heffner's causation opinion credible, the arbitrator found that claimant's condition of ill-being, including his cervical condition, was causally related to his work accident.

On November 18, 2002, the Commission, with one commissioner dissenting, affirmed and adopted the arbitrator's [***7] decision. In addition, it found that employer could not reasonably claim surprise by Dr. Heffner's causation opinion and thus overruled employer's objections to his testimony. The Commission remanded the case for further proceedings pursuant to *Thomas, 78 Ill. 2d at 332-35.*

On September 17, 2003, the circuit court confirmed the Commission's decision. Employer timely appealed.

II. STANDARDS OF REVIEW

The first issue on appeal involves an evidentiary ruling. [HN1] Evidentiary rulings made during the course of a workers' compensation case will not be disturbed on review absent an abuse of discretion. *Mobil Oil Corp. v. Industrial Comm'n, 327 Ill. App. 3d 778, 788, 764 N.E.2d 539, 261 Ill. Dec. 924 (2002).* [HN2] An abuse of discretion occurs where no reasonable person would take the view adopted by the lower tribunal. *Trettenero v. Police Pension Fund of the City of Aurora, 333 Ill. App. 3d 792, 801, 776 N.E.2d 840, 267 Ill. Dec. 468 (2002).*

The second and third issues on appeal involve causation and the medical expenses award. [HN3] The Commission is charged with determining the question of causation, and we will not disturb its finding unless it is against the manifest weight [***8] of the evidence. *Horath v. Industrial Comm'n, 96 Ill. 2d 349, 356, 449 N.E.2d 1345, 70 Ill. Dec. 741 (1983).* [HN4] The claimant has the burden of proving that the medical services were necessary and the expenses were reasonable. *Gallentine v. Industrial Comm'n, 201 Ill. App. 3d 880, 888, 559 N.E.2d 526, 147 Ill. Dec. 353 (1990).* What is reasonable and necessary is a question of fact for the Commission, and its determination will not be overturned unless it is against the manifest weight of the evidence. [**131] *F&B Manufacturing Co. v. Industrial Comm'n, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill. Dec. 173 (2001).* [HN5] The test for determining whether a factual finding is against the manifest weight of the evidence is if there was sufficient evidence in the record to support the Commission's determination. *Beattie v. Industrial Comm'n, 276 Ill. App. 3d 446, 450, 657 N.E.2d 1196, 212 Ill. Dec. 851 (1995).*

[*338] III. ANALYSIS

A. Evidentiary Ruling

Employer first argues that the Commission erred in overruling employer's objections to Dr. Heffner's causation testimony, which were based on *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*, because no report was tendered [***9] to employer in advance of the testimony notifying employer that Dr. Heffner would testify about the issue.

Section 12 of the Act [HN6] provides, in relevant part:

> "In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, 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 employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, 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 employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the hearing next following said examination." *820 ILCS 305/12* (West 2002).

The purpose of having the claimant's physician send a copy of his or her records to the employer no later than [***10] 48 hours prior to the arbitration hearing is to prevent the claimant from springing surprise medical testimony on the employer. *Ghere, 278 Ill. App. 3d at 845.*

In *Ghere*, the employee died of a heart attack while working as a flagman for employer. The employee's doctor testified that he treated the employee on several occasions, but never treated him for heart problems. The arbitrator sustained the employer's objection to the physician's testimony concerning whether the employee's work activities or environment could or might have precipitated his heart attack because the opinions were not furnished to the employer 48 hours before the hearing. On appeal, this court found that the physician's causation opinion would have gone beyond the contents of his medical records because there was no mention of causation in the records or that the physician ever treated the employee for a heart condition. Accordingly, we held that there was nothing in the records to put the employer on notice that the physician had an opinion regarding causation that the employer could have requested, and we upheld the arbitrator's exclusion of the testimony. *Ghere, 278 Ill. App. 3d at 846.* [***11]

Here, employer contends that the Commission cannot arbitrarily [*339] determine when an opinion constitutes surprise testimony. It suggests that the Commission must strictly adhere to *Ghere* and thus any undisclosed opinion testimony must be deemed as surprise and be barred. Employer argues that it would be unduly burdensome for a court to have to regularly [**132] inquire as to what parties expect an opposing witness to testify to in order to guarantee no surprise. We disagree.

We find no indication in *Ghere* that its holding must be so strictly interpreted. The *Ghere* court examined the physician's records and treatment history to determine whether the employer was put on notice regarding the possibility that the physician might provide causation testimony. The court did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise. Furthermore, *Ghere* is factually distinguishable because the physician in *Ghere* had never treated the employee's heart condition, whereas Dr. Heffner did treat claimant for his neck problems. Dr. Heffner's records contain details about his treatment of claimant's neck complaints and therefore the records put [***12] employer on notice that Dr. Heffner might testify as to a causal relationship between the neck condition and claimant's work accident. Indeed, the only contested issue at arbitration was claimant's cervical injury. Employer's suggestion that Dr. Heffner's testimony should have been excluded is not well taken under these facts.

In sum, we conclude that the Commission did not abuse its discretion in admitting Dr. Heffner's causation testimony.

B. Causation

Next, employer argues that the Commission's causation determination is against the manifest weight of the evidence. [HN7] To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. *Baggett v. Industrial Comm'n, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 266 Ill. Dec. 836 (2002).* In analyzing the "arising out of" component, we are primarily concerned with a causal connection. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).*

Employer contends that, notwithstanding the *Ghere* objections discussed above, Dr. Heffner's causation opinion was fundamentally [***13] flawed. It asserts that Dr. Heffner opined only that there was a "possibility" of a causal relationship between claimant's neck condition and his work accident and did not explain how the cervical complaints related to the lumbar complaints and arose out of the occurrence. According to employer, at no time during the 98 days following claimant's accident did his physical examinations or recitations of his medical [*340] history indicate that claimant had any cervical complaints. Moreover, Dr. Heffner did not explain

how a patient complaining of lumbar pain could develop radiating symptoms upwards into the cervical region that could be causally related to the same injury.

[HN8] It is the Commission's function to weigh the testimony on causation (*Pollard v. Industrial Comm'n, 91 Ill. 2d 266, 277, 437 N.E.2d 612, 62 Ill. Dec. 924 (1982))*, and we cannot conclude here that its reliance on Dr. Heffner's testimony was unreasonable. During his deposition, Dr. Heffner testified on four occasions regarding the causal relationship between claimant's neck condition and his work accident. In his response to the first question, which related to claimant's condition as of February 13, 2001, Dr. Heffner stated [***14] that it was reasonable to assume that there was a causal relationship. When asked to clarify this response with respect to claimant's complains of pain radiating upward to his neck, Dr. Heffner testified, "Yes, I think that's all part of the same problem." Next, addressing claimant's condition as of a March 6, 2001, office visit, Dr. Heffner opined, in relevant part, "I think his situation does seem to be causally related to the [**133] events of November." During the third interchange, which addressed causation as of claimant's March 29, 2001, visit, Dr. Heffner opined, in relevant part, "it is possible that the neck problem, in particular the pain problem relating to his neck, may be related to that, yes." Finally, when asked to opine on causation as of claimant's last office visit on July 31, 2001, Dr. Heffner replied, "Yes, I do think that there is certainly the possibility of causal relationship, yes."

Reading the foregoing responses as a whole, we conclude that Dr. Heffner's causation testimony was not speculative or equivocal. *Cf. McRae v. Industrial Comm'n, 285 Ill. App. 3d 448, 452-53, 674 N.E.2d 512, 220 Ill. Dec. 969 (1996)* (physician's opinion that claimant's work "may well [***15] have caused" claimant's condition of ill-being was equivocal and ambiguous). Nevertheless, [HN9] even if one medical witness is equivocal on the question of causation, it is for the Commission to determine which medical opinion is to be accepted, and it may attach greater weight to the treating physician's opinion. *Williams v. Industrial Comm'n, 244 Ill. App. 3d 204, 210, 614 N.E.2d 177, 185 Ill. Dec. 43 (1993)*; see also *Caterpillar Tractor Co. v. Industrial Comm'n, 97 Ill. 2d 35, 43, 454 N.E.2d 252, 73 Ill. Dec. 392 (1983)*. We cannot conclude here that the Commission's adoption of Dr. Heffner's testimony was unreasonable.

We also reject employer's contention that Dr. Heffner's failure to explain the link between claimant's lumbar complaints and his cervical complaints renders the Commission's reliance on his causation testimony unreasonable. It was sufficient that Dr. Heffner testified as to a causal connection. He was not necessarily required to link claimant's various complaints.

[*341] Finally, we also reject employer's argument that the passage of 98 days between claimant's work accident and his first complaints of cervical pain necessarily renders Dr. Heffner's causation testimony suspect. [***16] Dr. Heffner testified that claimant did not relate any neck problems prior to his work accident and that there was a causal relationship between claimant's work accident and his neck condition. [HN10] It is the Commission's function to judge the credibility of the witnesses, to draw reasonable inferences from their testimony, and to resolve any conflicts in claimant's favor. *Sisbro, Inc., 207 Ill. 2d at 207*. We cannot conclude that the Commission's resolution of the causation issue was against the manifest weight of the evidence.

C. Medical Expenses

Employer's final argument is that the Commission erred in awarding claimant prospective medical benefits when it directed employer to authorize claimant's cervical surgery. According to employer, a prospective medical benefits award is an extraordinary form of relief that is available only when it is the only available option. We disagree.

Section 8(a) of the Act [HN11] entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. *820 ILCS 305/8(a)* (West 2002). Specific procedures [***17] or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for. *Plantation Manufacturing Co. v. Industrial Comm'n, 294 Ill. App. 3d 705, 710, 691 N.E.2d 13, 229 Ill. Dec. 77 (1997)*.

In *Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill. App. 3d 650, 655-56, 714 N.E.2d 1064, 239* [**134] *Ill. Dec. 767 (1999)*, this court held that the Commission's order directing the employer to provide written authorization for a prescribed surgery was proper. In that case, which involved a *section 19(b)* petition, one of the claimant's physician's prescribed a lumbar microdiscectomy. The employer refused to authorize the surgery, and the claimant had not been released to return to work. The Commission found the surgical procedure reasonable and necessary and ordered the employer to provide written authorization for the claimant to undergo the procedure. On appeal, the employer argued that the Commission's future medical expense award was against the manifest weight of the evidence because only one physician had opined that the surgery was necessary. This court disagreed and upheld the Commission's

award. We [***18] held that it was within the Commission's province to adopt the medical opinion that recommended the surgery. *Bennett, 306 Ill. App. 3d at 655.* Additionally, as the case involved a *section 19(b)* petition, [*342] we upheld the Commission's directive to the employer to provide written authorization because the opportunity to challenge the cost of the surgery in subsequent proceedings remained available to it. *Bennett, 306 Ill. App. 3d at 656.*

Here, employer attempts to distinguish *Bennett* by arguing that all of claimant's symptomology in that case pertained to the same part of the body, whereas, here, claimant is claiming injury to a different part of the body than that for which he was initially treated. Given that we have upheld the Commission's causation finding with respect to claimant's cervical condition, we find this distinction irrelevant as it pertains to the medical expenses award, and conclude that *Bennett* controls.

We emphasize that [HN12] claimant is entitled to recover only reasonable medical expenses that are causally related to his work accident and that are determined to be required to diagnose, relieve, or cure the effects of his injury. [***19] *820 ILCS 305/8(a)* (West 2002). Therefore, as we noted in *Bennett, 306 Ill. App. 3d at 656*, because issues regarding entitlement to additional TTD benefits and permanency remain open for determination in further proceedings, employer may challenge the reasonableness of the cost of claimant's cervical surgery in subsequent hearings.

In sum, we conclude that the Commission's award of prospective medical benefits was not against the manifest weight of the evidence.

IV. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed, and the cause is remanded to the Commission for further proceedings pursuant to *Thomas, 78 Ill. 2d at 332-35.*

Affirmed; cause remanded.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

KISHWAUKEE COMMUNITY HOSPITAL, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Lesley Bonney, Appellee).

No. 2-04-0512WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

356 Ill. App. 3d 915; *828 N.E.2d 283*; *2005 Ill. App. LEXIS 234*; *293 Ill. Dec. 313*

March 14, 2005, Decided

SUBSEQUENT HISTORY: [***1] Released for Publication May 23, 2005.
Rehearing denied by *Kishwaukee Cmty. Hosp. v. Indus. Comm'n, 2005 Ill. App. LEXIS 547 (Ill. App. Ct., May 23, 2005)*

PRIOR HISTORY: Appeal from the Circuit Court of De Kalb County. No. 03-MR-202. Honorable Kurt Klein, Judge, Presiding.

DISPOSITION: Judgment of the Circuit Court affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employer sought review in the Circuit Court of De Kalb County (Illinois) of the Illinois Industrial Commission's decision awarding temporary total disability (TTD) and other benefits to appellee workers' compensation claimant. The trial court affirmed the Commission's decision. The employer appealed.

OVERVIEW: The claimant worked for the employer as a nursing assistant. She testified that she was required to lift patients who normally weighed between 150 and 200 pounds and who were often immobile or combative. On January 24, 2001, the claimant sought treatment for stiffness, tingling, and soreness in both hands. She was diagnosed with bilateral carpal tunnel syndrome and degenerative joint disease in her left thumb; basilar joint arthritis was later found in her right thumb. The claimant underwent carpal tunnel release surgeries; she subsequently underwent elbow surgery that was found to be unrelated to employment. The appellate court found that the claimant's accident report to the employer on February 10, 2001, provided sufficient notice of the claimant's injuries, including the thumb injuries. The employer also was on sufficient notice with respect to the causation opinion given by one of the claimant's experts. There was sufficient evidence that the claimant's injuries arose out of and in the course of her employment; even the employer's expert admitted that prolonged use of the hands to manipulate patients could cause carpal tunnel syndrome. The evidence supported the TTD award.

OUTCOME: The trial court's judgment was affirmed.

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN1] It is the function of the Illinois Industrial Commission (currently the Illinois Workers' Compensation Commission) to resolve disputed questions of fact, including those of causal connection, to decide which of the conflicting medical views is to be accepted, and to judge the credibility of the witnesses and draw permissible inferences from the evidence. A reviewing court is not to discard the findings of the Commission merely because different inferences could be drawn from the same evidence. The Commission's decision should be set aside only if it is against the manifest weight of the evi-

dence. For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent.

Workers' Compensation & SSDI > Compensability > Injuries > General Overview
[HN2] A workers' compensation claimant should not be denied compensation because physicians did not immediately recognize the extent of her injuries. It is common for physicians to formulate ongoing and more definitive diagnoses and recommendations after subsequent examinations and treatment.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > General Overview
[HN3] The purpose of the notice requirement of the Illinois Workers' Compensation Act is to enable an employer to investigate an alleged accident. The notice requirement is met if the employer possesses known facts related to the accident within 45 days, and a claim is barred only if no notice whatsoever is given. The Illinois General Assembly has mandated a liberal construction of the notice requirement, and, therefore, if some notice has been given, even if inaccurate or defective, the employer must show that it has been unduly prejudiced.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN4] Whether an injury arises out of and in the course of a claimant's employment is a question of fact for the Illinois Industrial Commission (currently the Illinois Workers' Compensation Commission).

Workers' Compensation & SSDI > Compensability > Injuries > Cumulative Injuries
[HN5] The fact that a work-related accident may aggravate or accelerate a preexisting condition does not mean that the employee is not entitled to workers' compensation benefits, so long as the work-related accident was a factor contributing to the disability.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities
[HN6] The issues of whether an employee is temporarily totally disabled, as well as the period of such disability, are questions of fact for the Illinois Industrial Commission (currently the Illinois Workers' Compensation Commission), and its decision will not be disturbed on review unless it is against the manifest weight of the evidence.

COUNSEL: For Kishwaukee Community Hospital, Appellant: Kevin J. Reid, Garofalo, Schreiber, Hart & Storm, Chtd., Attorneys at Law, Chicago, IL.

For Illinois Industrial Commission, Appellee: Industrial Commission of Illinois, Dennis R. Ruth, Chairman, Chicago, IL.

For Lesley Bonney, Appellee: Richard L. Turner, Jr., Law Office of Richard L. Turner, Jr., Sycamore, IL.

JUDGES: JUSTICE GOLDENHERSH delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, CALLUM, and HOLDRIDGE, JJ., concur.

OPINION BY: GOLDENHERSH

OPINION

[**286] [*916] JUSTICE GOLDENHERSH delivered the opinion of the court:

Claimant, Lesley Bonney, sought benefits pursuant to the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.*(West 2000)) for [*917] repetitive trauma injuries she allegedly sustained while employed as a nursing assistant by Kishwaukee Community Hospital, the employer. The arbitrator concluded that claimant sustained accidental injuries arising out of and in the course of her employment and that timely notice was given. The arbitrator awarded temporary total disability (TTD) from January 25, 2001, through October 31, 2002, for a total of 91 6/7 weeks at a rate of $ 250.99 per week, and $ 4,461 in outstanding medical bills, which included all outstanding medical bills except for a bill in the amount of $ 153.80 due Dr. Thomas Adkins for services related [***2] to treatment for claimant's left cubital tunnel syndrome. On review, the Illinois Industrial Commission (Commission) [1] affirmed the decision of the arbitrator with modifications. The Commission found that claimant sustained an accidental injury on January 24, 2001, and that a causal connection exists between the accident and claimant's bilateral carpal tunnel syndrome and bilateral basilar joint arthritis, but that no causal connection exists between the accident and claimant's left cubital tunnel condition. The Commission agreed with the arbitrator that the employer was not responsible for the $ 153.80 bill from Dr. Adkins, and further found that the employer was not responsible for another bill in the amount of $ 184 for an EMG, as it, too, related to

claimant's left cubital tunnel condition. The Commission denied claimant's request for penalties and attorney fees. The circuit court of De Kalb County confirmed the Commission in its entirety. The issues raised by the employer on appeal are: (1) whether claimant sustained repetitive trauma injuries to her right thumb and left thumb arising out of and in the course of her employment; (2) whether the Commission erred in overruling [***3] the employer's objection to Dr. Steven Glasgow's causation testimony, which was based on *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*; [**287] (3) whether the Commission's decision finding that claimant's bilateral carpal tunnel condition arose out of and in the course of her employment is against the manifest weight of the evidence or error as a matter of law; and (4) whether the Commission's award of TTD is in error. We affirm.

1 Effective January 1, 2005, the name of the Industrial Commission was changed to the "Illinois Workers' Compensation Commission." However, because the Industrial Commission was named as such when the instant cause was originally filed, we will use this name for purposes of consistency.

FACTS

Claimant, age 55 at the time of the hearing, began working for the employer as a nursing assistant in 1969 and worked continuously in that capacity until January 24, 2001. Claimant testified she is 5 feet 2 [*918] inches tall and weighs 112 pounds. [***4] While working for the employer, claimant was often assigned elderly patients who had suffered strokes and were without use of their limbs or were alcoholics. Many of her patients were combative. They normally weighed between 150 and 250 pounds. Claimant's duties included changing sheets, bathing patients, moving patients from beds to chairs and commodes, and pushing patients on gurneys. She was assigned approximately six patients per shift.

Shelly Johnson, who is employed by the employer as an employee health nurse and occupational coordinator, corroborated claimant's testimony that claimant's job required her to lift patients in excess of 200 pounds, many of whom were stroke victims or combative.

On January 24, 2001, claimant reported to the employer's emergency room after discovering she could no longer button patients' gowns and experiencing stiffness, tingling, and soreness in both her hands. According to claimant, she began experiencing symptoms in her left hand six or seven months prior to January 24, 2001. The symptoms in her right hand started later. At the emergency room, claimant was diagnosed with chronic bilateral wrist pain with probable bilateral carpal tunnel syndrome. [***5] Claimant was ordered not to lift over five pounds, making her unable to work.

An accident report was admitted into evidence. It was signed by claimant on February 10, 2001. In the report, claimant set forth that her injuries occurred while lifting, pulling, and pushing patients, and her symptoms existed for approximately one year, with the symptoms getting progressively worse. She indicated that the pain in her hands kept her up at night and described the area of injury as both wrists.

After claimant's emergency room visit, she followed up with Dr. Glasgow and his partner, Dr. Taizoon Baxamusa. Dr. Glasgow is an orthopedic surgeon who is "fellowship trained in sports medicine." Dr. Baxamusa is an orthopedic surgeon who is a fellowship-trained hand specialist.

Dr. Glasgow first examined claimant on February 8, 2001, at which time he diagnosed claimant as suffering from bilateral carpal tunnel syndrome. Dr. Glasgow next saw claimant on February 22, 2001, after which he added to his diagnosis that claimant was also suffering from mild carpometacarpal degenerative joint disease in the left thumb based on a positive grind test to the left thumb. Dr. Glasgow determined that claimant had [***6] a compressive neuropathy of the ulnar nerve at the right elbow, which is commonly referred to as cubital tunnel syndrome. Ultimately, Dr. Glasgow recommended carpal tunnel release surgeries to claimant's right and left hands. Claimant underwent a left carpal tunnel release on March 21, 2001, and a right carpal tunnel release on June 13, 2001.

[*919] Dr. Glasgow testified that claimant's left and right carpal tunnel conditions both resolved following surgeries, but as of August 13, 2001, claimant continued to have [**288] problems with her left hand. Dr. Glasgow recommended surgery to the left carpometacarpal joint and referred claimant to Dr. Baxamusa. Dr. Glasgow opined that there was causal connection between the accident in question and claimant's bilateral carpal tunnel syndrome and her left thumb condition. With regard to the first carpometacarpal joint, Dr. Glasgow specifically stated that the condition was severe. He also stated that claimant's work as a nursing assistant for the number of years she did it at least aggravated the situation, if not caused it.

Dr. Baxamusa examined claimant on August 27, 2001, and found evidence of left thumb basilar joint arthritis, as well as basilar joint [***7] arthritis in the right thumb, but to a lesser extent. On December 10, 2001, Dr. Baxamusa performed left thumb basilar joint arthroplasty on claimant. On April 16, 2002, Dr. Baxamusa restricted claimant to lifting no more than 10

pounds and ordered work hardening. On August 2, 2002, Dr. Baxamusa noted that claimant was getting stronger but was now experiencing numbness and tingling in her ring and small fingers. Dr. Baxamusa last examined claimant on August 19, 2002. His examination showed weakness in claimant's ulnar nerve, which is indicative of cubital tunnel syndrome. Claimant later underwent left elbow surgery, which the Commission determined was unrelated to employment. Dr. Baxamusa did not offer an opinion on causal connection with regard to carpal tunnel, but focused on claimant's thumbs. He specifically opined that if claimant was doing a lot of pinching, loading, and gripping with her thumb, those activities would exacerbate basilar joint arthritis.

Dr. John Ruder testified for the employer. He is board certified in plastic surgery, reconstructive surgery, general surgery, and surgery for the hands and upper extremities. He has performed numerous carpal tunnel surgeries in [***8] his practice, as well as some surgeries involving the carpometacarpal joint of the thumb. Dr. Ruder examined claimant's medical records and her job duties. He found no causal connection between claimant's carpal tunnel syndrome and her job, and no causal connection between her job and her thumb condition. He agreed that no one knew exactly what caused claimant's thumb condition, and said that it could have been caused by something as simple as turning a doorknob or pinching a key. On cross-examination, Dr. Ruder admitted that if a person's job involved repetitive lifting of 200-pound patients, then such activities could lead to carpal tunnel syndrome and exacerbation of bilateral joint arthritis. He did not believe that claimant's duties required her to perform the type of repetitive, forceful [*920] activities necessary to cause carpal tunnel or bilateral joint arthritis.

ANALYSIS

I

The first issue raised by the employer is whether claimant sustained repetitive trauma injuries to her right and left thumbs arising out of and in the course of her employment. The employer argues that claimant failed to show that her right thumb condition manifested itself on January 24, 2001, the date the [***9] Commission found that all of claimant's conditions manifested themselves. Employer points out that no mention was made of an injury to claimant's right thumb until August 29, 2001, when Dr. Baxamusa set forth that there was evidence, to a milder extent, on the right thumb, which was less symptomatic. At that time, Dr. Baxamusa noted a one-year history of basilar thumb pain and crepitus on the left thumb, but made no mention of any complaints of right thumb pain. Employer argues that claimant [**289] did not start noticing symptoms in her right thumb until November 29, 2001, and, therefore, the right thumb condition cannot be connected back to claimant's employment, which ended on January 24, 2001.

Employer further argues that because the Commission found January 24, 2001, to be the manifestation date for all of claimant's various conditions, including the right thumb, it was impossible for claimant to provide notice of her right thumb condition, as she did not complain of the condition until August 29, 2001, or have symptoms until November 29, 2001. As to the left thumb, the employer maintains that claimant failed to prove causal connection. Employer insists that the Commission's finding [***10] of causal connection between claimant's work activities and her right thumb and her left thumb conditions was against the manifest weight of the evidence and erroneous as a matter of law.

[HN1] It is the function of the Commission to resolve disputed questions of fact, including those of causal connection, to decide which of the conflicting medical views is to be accepted, and to judge the credibility of the witnesses and draw permissible inferences from the evidence. *Dexheimer v. Industrial Comm'n, 202 Ill. App. 3d 437, 442, 559 N.E.2d 1034, 1037, 147 Ill. Dec. 694 (1990).* A reviewing court is not to discard the findings of the Commission merely because different inferences could be drawn from the same evidence. *Dexheimer, 202 Ill. App. 3d at 443, 559 N.E.2d at 1037.* The Commission's decision should be set aside only if it is against the manifest weight of the evidence. *Gust K. Newberg Construction v. Industrial Comm'n, 230 Ill. App. 3d 96, 111, 594* [*921] *N.E.2d 758, 768, 171 Ill. Dec. 614 (1992).* For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Dolce v. Industrial Comm'n, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175, 178, 221 Ill. Dec. 268 (1996).* [***11]

Here, claimant worked as a nursing assistant for the employer for over 30 years. She started experiencing pain in her hands and wrists long before she sought treatment at the employer's emergency room. On January 24, 2001, claimant was forced to go to the emergency room because she could no longer button patients' gowns. She gave a history of experiencing pain, numbness, and tingling in both her hands for six or seven months prior to the date in question. Claimant was diagnosed with bilateral carpal tunnel syndrome by Dr. Glasgow. After he started treating claimant, it became apparent to Dr. Glasgow that claimant's condition was more severe.

Dr. Glasgow noted arthritic changes in claimant's left first carpometacarpal joint after X rays were taken on February 8, 2001. On February 22, 2001, Dr. Glasgow performed a more detailed examination and noted a posi-

tive grind test at the right first carpometacarpal and carpal tunnel joints. He specifically noted that in addition to carpal tunnel syndrome, claimant was also suffering from mild carpometacarpal degenerative joint disease in the left thumb. Dr. Glasgow found it difficult to discern where all of claimant's pain and dysfunction was [***12] coming from. After treating her for bilateral carpal tunnel syndrome by performing releases on both her right and left wrists, Dr. Glasgow referred claimant to Dr. Baxamusa to deal with claimant's carpometacarpal degenerative joint disease.

Dr. Baxamusa first examined claimant on August 27, 2001, at which time he noted a prominent arthritic appearance and positive crepitus in grind testing in claimant's left thumb carpometacarpal metacarpal joint, and noted the same, but to a lesser extent, on the right thumb. We [**290] agree with claimant that [HN2] she should not be denied compensation because the physicians did not immediately recognize the extent of her injuries. It is common for physicians to formulate ongoing and more definitive diagnoses and recommendations after subsequent examinations and treatment. With regard to the issue of notice, we point out that [HN3] the purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident. *Gano Electric Contracting v. Industrial Comm'n, 260 Ill. App. 3d 92, 95, 631 N.E.2d 724, 727, 197 Ill. Dec. 502 (1994).* The notice requirement is met if the employer possesses known facts related to the accident [***13] within 45 days, and a claim is barred only if no notice whatsoever is given. *Gano, 260 Ill. App. 3d at 96, 631 N.E.2d at 727.* Our General Assembly has mandated a liberal construction of the [*922] notice requirement, and, therefore, if some notice has been given, even if inaccurate or defective, the employer must show that it has been unduly prejudiced. *Gano, 260 Ill. App. 3d at 96, 631 N.E.2d at 727.*

In the instant case, claimant went to the employer's emergency room on January 24, 2001, complaining of pain in both of her hands. She filled out an accident report on February 10, 2001, in which she notified the employer that she had been experiencing pain in both her wrists. The Commission determined that claimant gave timely notice. The fact that claimant did not specifically state she was experiencing pain in her thumbs does not mean that she did not give proper notice of her injuries. The employer was in no way prejudiced by claimant's lack of the term "thumb." Claimant was off work as of January 24, 2001, at which time the employer was made aware of the pain in claimant's hands.

As to whether claimant's injuries are the result of a work- related accident [***14] arising out of and in the course of her employment, claimant testified that her job required her to engage in heavy and repetitive lifting activities consisting of moving large and immobile patients. Shelly Johnson corroborated claimant's testimony in this regard. Even the employer's expert, Dr. Ruder, agreed that repetitive forceful activities can lead to the onset of basilar joint arthritis. Dr. Baxamusa opined that claimant's basilar joint arthritis may have been exacerbated by her activities as a nursing assistant. Claimant's activities required her to change sheets, assist patients with dressing, including buttoning and unbuttoning gowns, and similar activities that require the pinching and grasping motions that lead to basilar joint arthritis.

Weighing all the evidence, the Commission found a causal connection between claimant's employment and her right and left thumb conditions. [HN4] Whether an injury arises out of and in the course of a claimant's employment is a question of fact for the Commission. *Beattie v. Industrial Comm'n, 276 Ill. App. 3d 446, 449, 657 N.E.2d 1196, 1199, 212 Ill. Dec. 851 (1995).* [HN5] The fact that a work-related accident may aggravate or accelerate [***15] a preexisting condition does not mean that the employee is not entitled to benefits, so long as the work-related accident was a factor contributing to the disability. *Newberg Construction, 230 Ill. App. 3d at 111, 594 N.E.2d at 768.* The Commission's decisions with regard to the right and left thumbs cannot be said to be against the manifest weight of the evidence.

II

The second issue raised by the employer is whether the Commission erred in overruling its objection to Dr. Glasgow's [**291] causation [*923] testimony, which was based upon *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*, because no report was issued notifying the employer as to what Dr. Glasgow's opinions would be on the issue of causal connection. The employer contends that claimant's attorney's letter notifying the employer's attorney that Dr. Glasgow would render opinions regarding causal connection was too broad.

In *Ghere*, the employee died of a heart attack while working for the employer. The employee's doctor testified that while he treated the employee on several occasions, he never treated the employee for heart problems. The arbitrator sustained [***16] the employer's objection to the doctor's testimony regarding whether the employee's work activities or environment could or might have precipitated his heart attack, because the opinions were not furnished to the employer 48 hours prior to the hearing, in violation of section 12 of the Act (*820 ILCS 305/12* (West 1994)). On appeal, the *Ghere* court found that the doctor's causation opinion would have gone beyond the contents of his medical records, because there was no mention of causation in the records or that the doctor ever treated the employee for a heart condition.

Because there was nothing in the records to put the employer on notice that the doctor had an opinion regarding causation that the employer could have requested, the arbitrator's exclusion of such testimony was upheld. *Ghere, 278 Ill. App. 3d at 846, 663 N.E.2d at 1046.*

Contrary to *Ghere*, in the instant case, Dr. Glasgow's records contain details about his treatment of claimant's bilateral carpal tunnel syndrome and basilar joint arthritis, making the instant case more akin to *Homebrite Ace Hardware v. Industrial Comm'n, 351 Ill. App. 3d 333, 814 N.E.2d 126, 286 Ill. Dec. 477 (2004).* [***17] In *Homebrite*, this court found that the employee's doctor could testify as to causation of the employee's neck injury, even though no medical report was tendered to the employer notifying the employer that the doctor would testify about the issue. We pointed out that in *Ghere*, the doctor had never treated the employee's heart condition, whereas in *Homebrite*, the doctor did treat the employee for his neck problems, and the doctor's records contained details about such treatment and the employee's neck complaints. Accordingly, the records put the employer on notice that the doctor might testify as to a causal relationship between the neck condition and the employee's work accident. *Homebrite, 351 Ill. App. 3d at 339, 814 N.E.2d at 132.*

Likewise, in the instant case, the employer could not have been surprised by Dr. Glasgow's opinions regarding causation, especially in light of the fact that claimant's attorney even provided the employer's attorney with a letter indicating that he intended to inquire into the [*924] issue of causal connection with regard to both the bilateral carpal tunnel and basilar joint arthritis conditions. The fact that Dr. Glasgow did not [***18] render an opinion regarding claimant's right thumb condition, even though the letter stated he would, does not change our determination. Relying on *Homebrite*, we find there was no error in allowing Dr. Glasgow to offer opinion testimony regarding causation.

III

The third issue raised by the employer is whether the Commission's finding that claimant's bilateral carpal tunnel condition arose out of and in the course of her employment is against the manifest weight of the evidence or error as a matter of law. The employer argues that Dr. Glasgow's opinion regarding carpal tunnel was not well taken, because Dr. Glasgow did not [**292] know the details of claimant's job. The employer asserts that the opinion of Dr. Ruder is more convincing because Dr. Ruder obtained a detailed understanding of claimant's work activities and did not find that her activities were necessarily prolonged, forceful, or repetitive as to cause carpal tunnel syndrome.

Dr. Glasgow testified that claimant's bilateral carpal tunnel syndrome was a direct result of claimant's working as a nursing assistant for a prolonged number of years. He pointed out the repetitive nature of the tasks performed by a nursing assistant. [***19] He testified that a nursing assistant would be required to perform numerous pushing and pulling tasks. Dr. Ruder, the employer's own expert, admitted that prolonged use of the hands in a forceful manner, such as would be required to manipulate patients over the course of a 30-year career as a nursing assistant, could cause carpal tunnel syndrome, as evidenced by the following colloquy between Dr. Ruder and claimant's attorney:

> "Q. Prolonged, forceful use would include lifting patients, say, in excess of 200 pounds, rotating them, pulling them up out of wheelchairs, or in to beds, using weight belts or straps in order to assist getting patients in and out of bath tubs, those types of activities, couldn't it?
>
> A. It could, yes.
>
> Q. And so prolonged, forceful use of that type in manipulating patients over a course of 30 plus years, might, indeed, lead to the development of carpal-tunnel syndrome?
>
> A. Correct.
>
> Q. And if this particular patient, Lesley Bonney, was engaged in those activities over a period of 30-plus years, in terms of patient manipulation, then she might have been subject to the prolonged, forceful use that you describe in terms of the development of her carpal- tunnel [***20] syndrome bilaterally?
>
> A. Yes.
>
> [*925] Q. And, therefore, if that were the case, the need for surgery would relate to the prolonged forceful use that gave rise to the symptomatology of the carpal-tunnel syndrome, correct?
>
> A. Correct."

Under these circumstances, we cannot say the Commission's decision is not supported by the evidence.

As previously discussed, it is the Commission's function to resolve disputed questions of fact, including causal connection, and to decide which of the conflicting views should be accepted. Weighing the evidence here,

the Commission found a causal connection between claimant's bilateral carpal tunnel syndrome and claimant's employment as a nursing assistant over the course of the previous 30 years. The Commission obviously found claimant's testimony regarding the nature of her job and Shelly Johnson's corroboration of that testimony more credible than Dr. Ruder's testimony regarding the nature of claimant's duties. After reviewing all the evidence, we cannot say the Commission's decision is not supported by the evidence.

IV

The last issue raised by the employer is whether the Commission erred in its award of TTD. The employer argues that, at most, [***21] claimant is entitled to TTD benefits only up to August 19, 2002, as it can be inferred from Dr. Baxamusa's testimony that claimant's left thumb condition was resolved to the extent that the weight restriction would have been upgraded to at least 25 pounds, a weight restriction the employer could have accommodated. The employer insists that after that date, claimant was off work due to her left elbow condition, a condition for which the employer is not responsible.

[**293] [HN6] The issues of whether an employee is temporarily totally disabled, as well as the period of such disability, are questions of fact for the Commission, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence. *Sorenson v. Industrial Comm'n, 281 Ill. App. 3d 373, 384-85, 666 N.E.2d 713, 720-21, 217 Ill. Dec. 44 (1996).* Here, we cannot say the Commission's decision is against the manifest weight of the evidence.

Medical records reveal that claimant was authorized off work as of January 24, 2001, when she was told not to lift over five pounds. Claimant did not return to work after that date, because of increasing symptoms and the continued imposition of weight [***22] restrictions. Shelly Johnson, the employer's own employee health nurse, testified that the hospital could not accommodate a 10-pound restriction. Johnson testified that the minimum weight restriction that could be accommodated by the employer is 25 pounds. The employer's contention that as of August 19, 2002, claimant's left thumb condition resolved to the point [*926] that the weight restriction could have been upgraded to 25 pounds is speculative and not based on the record presented here. Accordingly, the Commission's findings with respect to the award of and the length of TTD benefits are not against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of De Kalb County is hereby affirmed.

Affirmed.

McCULLOUGH, P.J., and HOFFMAN, CALLUM, and HOLDRIDGE, JJ., concur.

CERTIFIED TESTING, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Michael Nixon, Appellee).

No. 4-06-0039WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

367 Ill. App. 3d 938; *856 N.E.2d 602*; *2006 Ill. App. LEXIS 1269*; *305 Ill. Dec. 797*

September 28, 2006, Filed

NOTICE:

[***1] THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: Appeal from the Circuit Court of Macon County. No. 05--MR--198. Honorable Thomas E. Little, Judge, Presiding.

DISPOSITION: Affirmed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employer appealed after the Circuit Court of Macon County (Illinois) affirmed and adopted a decision of appellee Illinois Industrial Commission. The Commission had affirmed and adopted an arbitrator's *820 Ill. Comp. Stat. Ann. 305/19(b)* (2002) hearing decision that a knee injury suffered by appellee claimant arose out of and in the course of his employment and awarded him temporary total disability benefits and medical expenses.

OVERVIEW: The claimant admitted to a preexisting problem with his right knee, but he argued that the acute pain he suffered while performing is work duties was a new issue that he had never suffered before. The new issue required surgery on the knee. The appellate court affirmed. While conflicting evidence had been presented, there was sufficient evidence from which the Commission could reasonably have found a causal connection between the claimant's work and the knee problem. The prior knee problems did not require orthopedic intervention and had never caused the claimant to miss work. Further, the treating physician opined that there had been an aggravation of a the preexisting knee problem. The employer's 850 Ill. Comp. Stat. Ann. 305/12 (2002) objection to testimony from the treating physician was properly overruled as testimony from the physician at deposition was a natural extension of the report he provided. Finally, the Commission's failure to resolve a prospective medical treatment issue was not erroneous because the employer's opportunity to challenge the necessity and cost of future surgeries remained available.

OUTCOME: The trial court's decision was affirmed and the cause was remanded to the Commission for further proceedings pursuant to the Thomas decision.

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

[HN1] To obtain compensation under the Illinois Workers' Compensation Act, *820 Ill. Comp. Stat. Ann. 305/1 et seq.* (2002), a claimant's injury must be one arising out of and in the course of the employment. Both elements must be present at the time of injury, and the claimant bears the burden of proving the elements of his or her claim. In analyzing the "arising out of" component, courts are primarily concerned with a causal connection. The accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being.

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN2] The question whether a claimant's injury arose out of and in the course of his employment is a question of fact for the Illinois Workers' Compensation Commission, and its determination will not be disturbed on review, unless it is against the manifest weight of the evidence. A finding is not against the manifest weight of the evidence if there was sufficient evidence in the record to support the Commission's determination.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Evidence > Procedural Considerations > Rulings on Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Abuse of Discretion
[HN3] Evidentiary rulings made during the course of a workers' compensation case will not be disturbed on review absent an abuse of discretion. An abuse of discretion occurs when no reasonable person would adopt the view taken by the lower tribunal.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
[HN4] See *820 Ill. Comp. Stat. Ann. 305/12* (2002).

Workers' Compensation & SSDI > Compensability > Injuries > General Overview
[HN5] Section 8(a) of the Illinois Workers' Compensation Act, *820 Ill. Comp. Stat. Ann. 305/8(a)* (2002), entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Prescribed services not yet performed or paid for are considered to have been "incurred" within the meaning of the statute. Where a matter involves a *820 Ill. Comp. Stat. Ann. 305/19(b)* (2002) petition, an employer may challenge the cost and necessity of a prospective surgery in subsequent proceedings.

JUDGES: JUSTICE CALLUM delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

OPINION BY: CALLUM

OPINION

[*939] [**604] JUSTICE CALLUM delivered the opinion of the court:

Claimant, Michael Nixon, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2002)) for injuries he sustained to his right knee on November 22, 2002, while working for employer, Certified Testing. Following a hearing on claimant's section 19(b) petition (*820 ILCS 305/19(b)* (West 2002)), the arbitrator determined that claimant's injuries arose out of and in the course of his employment and awarded him 13 1/2 weeks' temporary total disability (TTD) benefits and medical expenses. The Industrial Commission [1] (Commission) affirmed and adopted the arbitrator's decision and remanded the cause for further proceedings pursuant to *Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 332-35, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).* [***2] The trial court confirmed the Commission's decision, and employer appeals. We affirm.

1 Now known as the Illinois Workers' Compensation Commission. See Pub. Act 93-721, eff. January 1, 2005.

I. BACKGROUND

Claimant, age 51, has been a member of the Sheet Metal Workers, [*940] Local 218 (Local 218), for over 29 years. On November 22, 2002, employer hired claimant to work at Normal Community High School in Bloomington-Normal. Claimant walked up stairs to a lower roof of the building and then climbed an extension ladder from the lower roof to the penthouse. On his way back down the ladder, claimant carried approximately 75 to 80 pounds of gear on his shoulders and felt a burning sensation in his right knee. He "had a horrific time trying to get off the ladder. [He] had to really slowly come down the ladder." Claimant testified that when his partner, Chuck Helms, arrived, he told Helms that he had hurt his knee.

On November 21, 2002, the day before the alleged accident, claimant weighed approximately 380 pounds. He [***3] testified that he had a previous knee problem. A January 11, 2001, note from Dr. Michael Wall, claimant's primary care physician for 10 to [**605] 12 years, reflects that claimant complained of having right knee pain off and on for several weeks. At that time, claimant did not provide a history of trauma or injury to the knee and he indicated that he was taking over-the-counter medications without relief. Claimant

experienced grinding in his right knee, and Dr. Wall diagnosed him with crepitus and internal derangement. In February 2002, Dr. Wall prescribed claimant a knee brace for his right knee. Claimant testified that his prior knee problems did not cause him to miss work or prohibit him from performing his regular duties. Claimant's union employment records that were admitted into evidence confirm that his prior knee problems did not restrictor prohibit him from performing his job duties.

After discussing his injury with Helms, claimant telephoned Dr. Wall and scheduled an appointment to see him immediately. Dr. Wall's notes of his initial examination of claimant's injury indicate that claimant's chief complaint was "[r]ight knee pain/injured a long time ago but woke up this a.m. with [***4] terrible pain" and:

> "[Claimant] presents today with complaints of right knee pain which has been a chronic problem for 3 years. [Claimant] states he injured it 3 years ago, and since that time has had occasional flare ups of his knee pain. He states that over the past week he has been doing a lot of ladder climbing and over this week he has noticed increased swelling and pain to his right knee. He denies any specific new injury to the knee."

At arbitration, claimant disagreed with Dr. Wall's notations that he woke up with pain and that the injury had been a chronic problem for three years. When asked whether he had denied a new injury, claimant explained "Well, it's not like I fell off the ladder or anything like that. It's the burning sensation I felt when I was coming down the [*941] ladder with my equipment on my shoulder. That's -- I mean, I don't know how else to put it, except, that's when it happened. I was stretched out, and I had the burning sensation."

Dr. Wall recommended an MRI, which revealed an "anterior cruciate ligament tear of indeterminate age, with prominent narrowing of the patellorfemoral joint with regional osteophyte formation consistent with severe [***5] changes of chondromalacia of the patella." Dr. Wall referred claimant to Dr. Michael Trice, an orthopedic specialist. Dr. Trice examined claimant on November 27, 2002. His notes indicate that on November 22, 2002, claimant felt a sharp pain in his knee while going up the ladder and the pain was worse going down. Dr. Trice diagnosed possible internal derangement and anterior cruciate ligament strain and recommended arthroscopic surgery. Claimant underwent surgery on December 9, 2002, which confirmed internal derangement and revealed a torn medial meniscus, patellofemoral chondromalacia, medial femoral chondromalacia, and a 50% tear of his anterior cruciate ligament. One of Dr. Trice's records pertaining to claimant's surgery lists November 22, 2002, as the date that claimant's condition first appeared and states that claimant had not been treated for his condition within the past two years.

After surgery, claimant continued to treat with Dr. Trice. Due to ongoing right knee pain, claimant received Hylagen injections in an attempt to alleviate the symptoms. Claimant attended three sessions of work hardening and was advised to continue a rehabilitation program at the YMCA. On February 27, 2003, Dr. [***6] Trice released claimant to work, effective March 3, 2003. In his May 22, 2002, notes, Dr. Trice opined that there was a causal relationship between claimant's injury and the [**606] symptom she developed and, while the accident did not cause the arthritis found in claimant's knee, the injury resulted in damage to his ligament and cartilage.

After completing some physical therapy, claimant attempted to return to work for another company. He worked for two weeks, but stopped because the knee injections he had received did not work as hoped. Claimant did not work from July 2002 through the date of the hearing, December 5, 2003.

Dr. Michael Watson evaluated claimant on August 19, 2003, at the request of claimant's counsel. Dr. Watson's narrative report and deposition were admitted into evidence. Prior to his examination of claimant, Dr. Watson reviewed claimant's medical records from Drs. Wall and Trice. Dr. Watson explained that claimant told him that he injured himself on November 22, 2002, while climbing an extension ladder with equipment on his back and that, although claimant had experienced prior, intermittent problems with his right knee, none [*942] caused as much intense pain or trouble as [***7] the accident on November 22, 2002. Dr. Watson examined claimant's right knee, and the results were consistent with a partial thickness tearing of his anterior cruciate ligament. Also, X rays revealed moderately advanced osteoarthritis. In his narrative report, Dr. Watson opined that the November 2002 injury aggravated a preexisting condition and, because the condition was now more severe, claimant may have difficulty climbing when carrying heavy equipment, as is required by his job.

In his deposition, Dr. Watson opined that joint replacement surgery would be risky due to claimant's age and weight, although it was one option to be considered as a last resort. Dr. Watson stated, "I felt it was possible that he may not be able to go back and do such activities as climbing and carrying heavy equipment, so really his options were very limited." Dr. Watson further opined that, based on the history provided, claimant's preexisting

knee condition was aggravated by climbing the ladder while bearing additional weight. Also, the ladder climbing may have partially torn claimant's anterior cruciate ligament; however, Dr. Watson could make no definite conclusion in that regard. Moreover, he opined [***8] that the accident aggravated claimant's preexisting chondromalacia and osteoarthritis condition to the point where the surgery performed by Dr. Trice was necessary.

During Dr. Watson's deposition, claimant's counsel asked whether Dr. Watson would restrict claimant's employment as a sheet metal worker. Employer's counsel objected pursuant to "*Section 12*." The objection was overruled, and Dr. Watson testified:

> "I think, as I stated in my narrative, that it would be -- well, that he would not be able to do things like climb stairs, climb ladders, particularly with carrying heavy equipment, and even more particularly carrying equipment up ladders and stairs, so climbing I think is out. Heavy carrying would be out. He may even be limited in his ability to walk for long periods of time and squat and kneel and those sorts of things. *** [N]o, I don't think that he would be able to do all of his duties as a sheet metal worker the way I understand that a sheet metal worker works."
>
> On cross-examination, employer's counsel asked Dr. Watson:
>
> "Q. Now, he told you that as he ascended this ladder that he was having no problems with his knee and then noticed problems with his knee [***9] after he ascended the ladder?
>
> A. Well, I think it's an important point and that's why I described it in my narrative the way I did because he described [**607] specifically a sudden, sharp pain in his knee while he was going up the ladder as opposed to I went up the ladder and I came down and my knee got real sore, so I mean he attributed it to a specific point of climbing the ladder that he had a sudden, sharp pain.
>
> [*943] Q. And I think you testified on direct that he told you he was working fine prior and then had pain after. Is that correct?
>
> A. That's what he told me, yes.
>
> Q. Now that history is important to you, isn't it?
>
> A. It's very important."

At arbitration, employer submitted a one-page letter from Dr. James Strickland of the St. Louis Orthopedic Institute. Dr. Strickland did not examine claimant. However, after reviewing claimant's medical records, including those from Drs. Wall, Trice, and Watson, he opined that any future surgery that claimant might need on his knee would not be related to his work injury, but would instead be related to preexisting degenerative joint disease.

Robert Champion, Jr., testified that he is a business agent for Local 218 and is responsible for sending [***10] members to jobs within his jurisdiction. Champion has known claimant since November 1980 and worked with claimant as a sheet metal worker. In the 1990s, Champion sent claimant to work at different contracting jobs as a sheet metal worker and claimant was able to perform his usual and customary duties. After November 22, 2002, claimant could no longer perform his usual duties. Claimant is designated as injured, and Champion will not call him for jobs until he receives notification that claimant is physically ready to work.

Chuck Helms, Jr., testified that he works for employer and is a member of Local 218. Helms worked with claimant on a Danville project and on the November 2002 Bloomington-Normal school project. On the Danville job, which was in the fall but before the Bloomington job, Helms noticed that claimant walked with a limp. According to Helms, on the Bloomington job, claimant stated that he had some knee problems that he had neglected to have treated. Helms testified that claimant told him, at both the Danville and Bloomington jobs, that he had a hard time getting up and down ladders. Helms served as the lead man, similar to a foreman, on the Bloomington job. When a person [***11] is injured on the job, he or she is supposed to notify the lead man of the injury and the lead man, in turn, tells his or her boss. Helms testified that claimant did not report being injured on the Bloomington job. However, claimant and Helms were working on different sides of the roof, and Helms confirmed that claimant could have injured his knee and Helms would not have witnessed the injury.

Mark Moleski testified that he works for employer and is a member of Local 218. Moleski met claimant on the Danville job and noticed that claimant walked with a limp. Moleski testified that claimant told him that his leg had been bothering him and that he had been putting off having it treated. Claimant was not, however, under any kind of restricted duty on the Danville job.

[*944] On rebuttal, claimant testified that he walks with a limp because his big toe on his left foot was amputated in 1983. He admitted that he did tell Helms and Moleski that he needed to have his knee treated.

On January 30, 2004, the arbitrator found a causal relationship between the November 22, 2002, accident and claimant's injuries. The arbitrator awarded claimant 13 2 weeks' TTD benefits and [**608] medical expenses. The Commission [***12] affirmed and adopted the arbitrator's decision and remanded the cause for further proceedings pursuant to *Thomas, 78 Ill. 2d at 332-35*. The trial court confirmed the Commission's decision. In doing so, the trial court found no error in the Commission's decision not to rule on prospective medical care, holding that the Commission's decision not to rule may have been purposeful or the Commission may have determined that the issue was not yet ripe. Employer timely appealed.

II. ANALYSIS

A. Arising Out of and in the Course of Employment

Employer argues that the Commission's finding that claimant sustained an injury arising out of and in the course of his employment on November 22, 2002, was against the manifest weight of the evidence. [HN1] To obtain compensation under the Act, a claimant's injury must be one "arising out of and in the course of the employment." *Parro v. Industrial Comm'n, 167 Ill. 2d 385, 393, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995)*. Both elements must be present at the time of injury, and the claimant bears the burden of proving the elements of his or her claim. *Beattie v. Industrial Comm'n, 276 Ill. App. 3d 446, 449, 657 N.E.2d 1196, 212 Ill. Dec. 851 (1995)*. [***13] In analyzing the "arising out of" component, we are primarily concerned with a causal connection. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003)*. The accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being. *Sisbro, 207 Ill. 2d at 205*.

Employer contends that the Commission's determination was against the manifest weight of the evidence because claimant's testimony regarding his workplace injury is contradicted by his coworkers' testimonies and contemporaneous medical records. Specifically, it relies on Helms' testimony that claimant never reported a work injury and notes that Helms and Moleski both testified that they witnessed claimant limping prior to November 22, 2002.

[HN2] The question whether claimant's injury arose out of and in the course of his employment is a question of fact for the Commission, and its determination will not be disturbed on review, unless it is against the manifest weight of the evidence. *Joiner v. Industrial Comm'n, 337 Ill. App. 3d 812, 815, 786 N.E.2d 627, 272 Ill. Dec. 88 (2003)*. A finding is not against the [*945] manifest [***14] weight of the evidence if there was sufficient evidence in the record to support the Commission's determination. *Homebrite Ace Hardware v. Industrial Comm'n, 351 Ill. App. 3d 333, 337, 814 N.E.2d 126, 286 Ill. Dec. 477 (2004)*.

Regarding the coworkers' testimonies, we note first that Helms conceded that, on November 22, 2002, he and claimant worked on different sides of the roof and that claimant could have injured his knee without Helms knowing. Moreover, although Helms, who was still employed by employer at the time of his testimony, testified that claimant did not report the injury, claimant testified that he *did* report the injury to Helms. It is the Commission's function to judge the credibility of witnesses, and we cannot say that the Commission erred in crediting claimant's testimony. *Kishwaukee Community Hospital v. Industrial Comm'n, 356 Ill. App. 3d 915, 920, 828 N.E.2d 283, 293 Ill. Dec. 313 (2005)*. As to claimant's being seen limping prior to November 22, 2002, his explanation that he limped due to an amputated [**609] toe was unrebutted. In any event, employer's argument somewhat misses the mark. Claimant admitted having prior knee problems; however, he testified that his [***15] knee problems worsened significantly after he experienced a burning sensation in his knee while descending a ladder. Employer does not address the well-settled principle that aggravations of preexisting injuries are generally compensable. See, *e.g.*, *Riteway Plumbing v. Industrial Comm'n, 67 Ill. 2d 404, 412, 367 N.E.2d 1294, 10 Ill. Dec. 528 (1977)*; *Kishwaukee Community Hospital, 356 Ill. App. 3d at 922*.

Regarding the medical records, employer first contends that claimant's assertion of a workplace injury is belied by Dr. Wall's records, which reflect that claimant suffered an earlier knee injury, awoke the morning of November 22, 2002 with pain in his knee, and denied a new injury when examined. Claimant, however, testified that he disagreed with Dr. Wall's note that he awoke with pain. Moreover, claimant explained that he denied a new injury only in the sense that he did not, for example, fall off a ladder. We do not find the Commission's decision to credit claimant's explanation unreasonable.

Employer next argues that Dr. Trice's surgical record falsely states that claimant had not been treated for his condition within the past two years and, thus, Dr. Trice's [***16] causation opinion was based on an inaccurate history and must be disregarded. We believe that employer ignores the type of medical record at issue and the context in which it was prepared. The medical record appears to be a postoperative form, listing claimant's date

of surgery, dates of hospital admission, and type of surgery. The form indicates that claimant's injury occurred on November 22, 2002, and that he had not been treated for his condition within the past two years. Given that claimant did not have any prior knee surgeries and that the form was completed at a surgeon's request, [*946] we do not believe that this history is necessarily incorrect. In our view, this record does not reflect that Dr. Trice possessed an inaccurate understanding of claimant's condition, nor does it diminish his causation opinion.

Finally, employer notes that Dr. Watson found claimant's statement that he was going up the ladder when injured very important in formulating his opinion, yet claimant's testimony and medical records reflect that he felt pain while descending the ladder. Thus, employer argues, Dr. Watson's opinion must also be disregarded. Again, employer ignores the context of Dr. Watson's testimony. [***17] While Dr. Watson acknowledged that claimant's history was important, he did not indicate that claimant's direction on the ladder when he felt pain was critical to his opinion. Rather, Dr. Watson explained that he found claimant's description of a sudden, sharp pain, in contrast to a general soreness, important in formulating his opinion.

We conclude that there was sufficient evidence in the record from which the Commission could reasonably have found a causal connection between claimant's work accident and his condition of ill-being. It is undisputed that claimant experienced some knee problems prior to his November 22, 2002, accident. However, claimant's medical records that predate the accident confirm that, while claimant made prior complaints regarding his knee, Dr. Wall did not refer claimant to an orthopedic specialist prior to the accident. Claimant testified that his prior knee problems did not cause him to miss work or in any way prohibit him from performing his regular duties. Claimant's union employment records confirm that his prior knee problems did not restrict him or prohibit him from performing his job duties. Prior to [**610] November 22, 2002, claimant had not been diagnosed [***18] with or treated for a tear of his anterior cruciate ligament or considered for possible knee replacement surgery. Dr. Trice opined that claimant's accident resulted in damage to his ligament and cartilage. Dr. Watson opined that the accident aggravated claimant's preexisting chondromalacia and osteoarthritis condition to the point where the surgery performed by Dr. Trice was necessary. The Commission may attach great weight to the treating physician's opinion. *Homebrite Ace Hardware v. Industrial Comm'n, 351 Ill. App. 3d 333, 340, 814 N.E.2d 126, 286 Ill. Dec. 477 (2004)*. In sum, we conclude that the Commission's finding that claimant's injury arose out of and in the course of his employment was not against the manifest weight of the evidence.

B. Section 12 Objection

Employer argues that the Commission erred in overruling its objection, pursuant to *section 12* of the Act, made during Dr. Watson's [*947] deposition. [HN3] Evidentiary rulings made during the course of a workers' compensation case will not be disturbed on review absent an abuse of discretion. *Homebrite Ace Hardware, 351 Ill. App. 3d at 337*. An abuse of discretion occurs when no reasonable person would adopt the [***19] view taken by the lower tribunal. *Homebrite Ace Hardware, 351 Ill. App. 3d at 337*.

Section 12 of the Act provides, in pertinent part:

> [HN4] "In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, 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 employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, or his representative, as soon as practicable but not later that 48 hours before the time the case is set for hearing. *** If such surgeon refuses to furnish the employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the hearing next following said examination." *820 ILCS 305/12* (West 2002).

The purpose of requiring the claimant's physician to send a copy of the written statement to employer no later [***20] than 48 hours before the hearing is to prevent the claimant from springing surprise medical testimony on the employer. *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 845, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*; see also *Homebrite Ace Hardware, 351 Ill. App. 3d at 338*; *Kishwaukee Community Hospital, 356 Ill. App. 3d at 923-24*.

Employer admits that it received a written report from Dr. Watson, dated August 19, 2003, and it does not suggest that the report was furnished less than 48 hours prior to hearing. Rather, employer contends that Dr. Watson's opinion regarding whether he would restrict

claimant's employment as a sheet metal worker went beyond the opinions rendered in his August 19, 2003, report. Employer likens this case to *Ghere*, where an employer's *section 12* objection was sustained because the physician opined on factors contributing to the claimant's heart attack when he had never treated the claimant for heart problems. *Ghere, 278 Ill. App. 3d at 846.* There, the court determined that the employer was unfairly surprised by the medical testimony. [**611] *Ghere, 278 Ill. App. 3d at 846.* Here, Dr. Watson examined [***21] claimant's knee, opined on the severity of claimant's knee injury, and, in his report, expressed doubt as to whether claimant would be able to perform aspects of his job. Specifically, Dr. Watson's narrative report states that he found claimant's condition to be severe and that claimant [*948] may now have difficulty climbing stairs and ladders, particularly while carrying heavy equipment, "which is required by his job." In his deposition, Dr. Watson was asked whether, based on his assessment of claimant's knee, he would recommend that claimant's work be restricted. It was reasonable for the Commission to find that Dr. Watson's deposition testimony was a natural continuation of the opinion in his narrative report and that his opinion, that claimant's condition would restrict his ability to perform his job as a sheet metal worker, did not come as a surprise to employer. Thus, we conclude that the Commission did not abuse its discretion in overruling employer's *section 12* objection.

C. Prospective Medical Treatment

Employer's final argument is that the Commission erred in failing to address and deny prospective medical treatment. Employer notes that the parties identified prospective medical [***22] treatment as an issue in dispute; however, both the arbitrator and the Commission failed to address the issue. Employer relies, in part, on section 7030.80 of Title 50 of the Administrative Code, which provides that, after the closing of proofs, the arbitrator must issue a written decision that includes the arbitrator's findings of fact and conclusions of law on each contested issue. 50 Ill. Adm. Code '7030.80 (2002). Employer notes that Dr. Strickland's opinion, that any future need for surgery would be due to claimant's preexisting knee problems, is unrebutted. Thus, it contends that we should, in the first instance, determine the issue and conclude that claimant's need for future surgery is not causally related to his November 22, 2002, injury.

[HN5] *Section 8(a)* of the Act entitles claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. *820 ILCS 305/8(a)* (West2002). Prescribed services not yet performed or paid for are considered to have been "incurred" within the meaning of the statute. *Homebrite Ace Hardware, 351 Ill. App. 3d at 341*; [***23] *Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill. App. 3d 650, 655, 714 N.E.2d 1064, 239 Ill. Dec. 767 (1999).* Where, as here, a matter involves a section 19(b) petition, an employer may challenge the cost and necessity of a prospective surgery in subsequent proceedings. *Homebrite Ace Hardware, 351 Ill. App. 3d at 341-42*; *Bennett Auto Rebuilders, 306 Ill. App. 3d at 656.* Thus, we conclude that the Commission's failure to resolve the prospective medical treatment issue here was not erroneous because the opportunity for employer to challenge the necessity and cost of claimant's future surgeries remains available.

However, a note of caution is warranted. Employer's contention [*949] that the Commission should follow its own rules and address all issues before it is well-taken. Indeed, parties commit significant time and valuable resources to preparing contested issues for the Commission's review, and they deserve a resolution of those issues in return. And, while we conclude here that the Commission's failure to resolve the prospective medical treatment issue does not warrant reversal, our conclusion [**612] would very likely differ in another context.

III. [***24] CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Macon County is affirmed, and the cause is remanded to the Commission for further proceedings pursuant to *Thomas, 78 Ill. 2d at 332-35.*

Affirmed and remanded.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

CITY OF CHICAGO, Plaintiff-Appellant, v. THE WORKERS' COMPENSATION COMMISSION et al. (EZRA TOWNSEND Defendants-Appellees).

No. 1-07-2850WC

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

387 Ill. App. 3d 276; 899 N.E.2d 1247; 2008 Ill. App. LEXIS 1343; 326 Ill. Dec. 596

December 23, 2008, Filed

SUBSEQUENT HISTORY: Released for Publication January 29, 2009.

PRIOR HISTORY: [***1]

Appeal from the Circuit Court of Cook County. No. 07-L-50054. Honorable Sheldon Gardner Judge, Presiding.
City of Chicago v. Workers' Comp. Comm'n (Townsend), 2008 Ill. App. LEXIS 1312 (Ill. App. Ct. 1st Dist., Dec. 23, 2008)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employer sought review of a decision of the Circuit Court of Cook County (Illinois), which confirmed a decision of appellee, the Workers' Compensation Commission, that excluded an independent medical examiner (IME) report because it was not disclosed to appellee claimant prior to the commencement of his treating physician's deposition as allegedly required by *820 ILCS 305/12* (2002).

OVERVIEW: After the claimant had injured his lower back in 1998 and had been receiving temporary total disability benefits, the matter was heard by an arbitrator in 2005 on the nature and extent of the claimant's permanent partial disability under *820 ILCS 305/8(f)*. The arbitrator excluded the IME report proffered by the employer as it was not produced prior to the commencement of the hearing, which based on Commission precedent occurred when the treating physician was deposed. On appeal, the court reversed and remanded. Initially, the court determined that a de novo standard of review applied as the matter involved a question of statutory construction. The court noted that when the treating physician's deposition was taken and the IME was conducted, an arbitration hearing had not yet been set; the employer tendered the IME report to the claimant within a few days after the IME and well before the arbitration hearing. In prior case law, which was contrary to the Commission's precedent, the hearing referred to *820 ILCS 305/12* was the arbitration hearing; thus, the exclusion was an error as a matter of law.

OUTCOME: The court reversed the circuit court's decision and remanded for further proceedings before the Commission.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation
[HN1] When resolution of a matter involves a question of statutory construction, the appropriate standard of review is de novo.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
[HN2] See *820 ILCS 305/12* (2002).

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence

[HN3] The purpose of *820 ILCS 305/12* (2002) would frustrated if *820 ILCS 305/12* is read to only apply to examining physicians. The purpose in having the employee's physician send a copy of his records to the employer no later than 48 hours before the arbitration hearing is to prevent the employee from springing surprise medical testimony on the employer.

COUNSEL: For Appellant: Aukse R. Grigaliunas, Hennessy & Roach, Ltd., Chicago, Illinois.

For Appellee: Richard J. Barr, Jr., Lannon, Lannon & Barr, Ltd., Chicago, Illinois.

JUDGES: Honorable John T. McCullough, P.J., Honorable Robert E. Gordon, J., Honorable R. Peter Grometer, J., Honorable William E. Holdridge, J., and Hon. James K. Donovan, J., JUSTICE HOLDRIDGE delivered the Opinion of the Court. MCCULLOUGH, P.J., and GROMETER and DONOVAN, JJ., concur. JUSTICE ROBERT E. GORDON, specially concurs.

OPINION BY: William E. Holdridge

OPINION

[**1248] [*277] JUSTICE HOLDRIDGE delivered the Opinion of the Court:

Ezra Townsend filed an application for adjustment of claim against his employer, the City of Chicago, seeking workers' compensation benefits for an injury to his lower back incurred on April 17, 1998. The matter proceeded to an arbitration hearing under section 19(b) of the Workers' Compensation Act (Act) (*820 ILCS 305/19 (b)* (West 2006)). The arbitrator found the claim compensable and awarded temporary total disability (TTD) benefits, medical expenses and penalties. The employer appealed to the Illinois Workers' [***2] Compensation Commission (Commission), which unanimously affirmed the arbitrator's decision. The employer then sought review in the circuit court of Cook County, which subsequently confirmed the Commission's decision. The employer did not file an appeal from the order of the circuit court and began paying benefits.

On February 8, 2005, and May 11, 2005, the matter was heard by the arbitrator on the issue of the nature and extent of claimant's permanent partial disability. The Arbitrator found that the claimant was permanently and totally disabled pursuant to *section 8(f)* of the [*278] Act. In doing so, the arbitrator excluded from evidence an Independent Medical Examiner (IME) report issued on September 6, 2004, by Dr. Charles Slack and proffered by the employer. The report was excluded based upon the arbitrator's determination that the report had not been produced prior to the commencement of the hearing in the matter. Pursuant to Commission precedent (*Marks v. Acme Industries, Inc.*, 02 IIC 0892 (2002)) the arbitrator held that the commencement of the hearing began with the treating physician (Dr. Chemel) had been deposed on May 7, 2004.

The employer appealed to the Commission, which affirmed [***3] and adopted the decision of the arbitrator with one dissent (Commissioners Pigott and DeMunno in the majority, with Commissioner Lindsey dissenting). In her dissent, Commissioner Lindsey distinguished the instant matter from *Marks*, noting that, unlike *Marks*, in the instant case the IME had not issued a report until after the treating physician's deposition. Further, Commissioner Lindsey criticized *Marks* as being wrongly decided.

The employer then sought review in the circuit court of Cook County, which confirmed the decision of the Commission. We reverse.

At issue here is whether the Commission erred in excluding the IME report of Dr. Charles Slack, issued on September 6, 2004, because it was not disclosed to the claimant prior to the May 7, 2004 commencement of the treating physician's deposition. The parties dispute the appropriate standard of review. The claimant maintains that the issue involves an evidentiary ruling, which is to be upheld unless it is an abuse of discretion. *Homebrite Ace Hardware v. Industrial Comm'n., 351 Ill. App. 3d 333, 337, 814 N.E.2d 126, 286 Ill. Dec. 477 (2004)*. The employer maintains that the appropriate standard of review is *de novo*, as what is at issue is whether Dr. Slack's report is [***4] barred by *Section 12* of the Act. We note that [HN1] resolution of the matter involves a question of statutory construction, the appropriate standard of review is *de novo. King v. Industrial Comm'n., 189 Ill. 2d 167, 171, 724 N.E.2d 896, 244 Ill. Dec. 8 (2000)*; we therefore review *de novo*.

Our analysis begins with *Section 12* of the Act provides:

> [HN2] "In all cases where the examination is made by a surgeon engaged by the employer, and the injured employee has no [**1249] 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, said copy to by furnished to the employee, or

> his representative as soon as practicable but not later than 48 hours *before the time the case is set for hearing. 820 ILCS 305/12* (2002)(Emphasis added).

[*279] The facts in the instant matter are not in dispute. After an initial hearing to determine causation, the employer paid TTD and medical. The claimant continued to treat for his injuries. The parties began discussing a settlement regarding permanency, however these discussions [***5] were unsuccessful. The claimant scheduled an evidence deposition with his treating physician, Dr. Chmell, which took place by agreement of the parties on May 24, 2004. At the time of the deposition, a hearing before an arbitrator was anticipated, although a hearing date had yet to be set. The matter remained pending for several months following Dr. Chmell's deposition, without a hearing date being set.

Still with no date set for a hearing before an arbitrator, the employer scheduled an independent medical examination (IME) as provided in *section 12* of the Act, with Dr. Slack, which took place on August 26, 2004. We find no indication in the record that the claimant's attorney objected to the IME, and the claimant, in fact, appeared for the IME on August 26, 2004. At that time, Dr. Slack issued a report in conjunction with his examination, dated September 6, 2004. This report was tendered to the claimant's attorney on September 20, 2004. In a letter to claimant's counsel, the employer's counsel asked if claimant would stipulate to the admission of Dr. Slack's report, or whether claimant would wish to depose Dr. Slack. The employer received no response.

The matter was called for hearing [***6] before an arbitrator on February 8, 2005. After testimony and certain exhibits were admitted, the employer attempted to have admitted as evidence Dr. Slack's September 6, 2004, report. The claimant objected, citing the Commission decision *Marks v. ACME Industries*, which is a Commission decision standing for the proposition that the "hearing" referred to in *Section 12* of the Act ("48 hours before the case is set for the hearing) is the treating physician's deposition. The arbitrator rejected the Slack report as being in violation of *Section 12* of the Act, as interpreted in the *Marks* decision. The arbitrator then concluded that, since Dr. Chmell's opinions as to permanency was unrebutted (due to the exclusion of Dr. Slack's report) the claimant was permanently and totally disabled.

The matter was appealed to the Commission, which affirmed and adopted the arbitrator's decision, with one dissent. The circuit court confirmed, and the employer appealed.

On appeal, the employer maintains that Dr. Slack's report should have been admitted as it complied with *Section 12* of the Act, notwithstanding the *Marks* decision. At the outset, we note one important factual distinction between the instant [***7] matter and the facts in *Marks*. In *Marks*, the employer had the examining physician's [*280] report in hand prior to the treating physician's deposition, but failed to provide a copy of the report to the claimant until after the conclusion of the treating physician's deposition. Here, Dr. Slack's report did not even exist at the time of Dr. Chmell's deposition. In fact, the claimant participated without objection in Dr. Slack's examination, and Dr. Slack's report [**1250] was tendered only a few days after the examination and well before the arbitration hearing.

The employer urges this court to ignore the Commission's decision in *Marks*, and focus instead upon this court's decision in *Ghere v. Industrial Comm'n., 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*. In *Ghere*, the issue was whether the 48 hour prior to hearing disclosure required in *Section 12* applied to treating physician's reports as well as examining physicians. In holding that *Section 12* did in fact apply to treating physician reports, this court noted clearly that the "hearing" referred to in *Section 12* was the "arbitration hearing." The *Ghere* [***8] court noted that the purpose of the 48 hour rule was to prevent surprise medical testimony at the arbitration hearing:

> "We believe [HN3] the purpose of *section 12* would frustrated if we read *section 12* to only apply to examining physicians. It seems to us from the language of *section 12* that the purpose in having the employee's physician send a copy of his records to the employer no later than 48 hours before the *arbitration* hearing is to prevent the employee from springing surprise medical testimony on the employer." (Emphasis added). *Ghere, 278 Ill. App. 3d at 845.*

Given this court's prior determination that the purpose of *section 12* is to prevent surprise medical testimony at the arbitration hearing, the Commission's ruling in *Marks* that the "hearing" referred to in *Section 12* is the treating physician's deposition is completely at odds with this court's statement of the purpose of *Section 12*. The Commission's decision to exclude Dr. Slack's report was error as a matter of law. We note that had Dr. Slack's report been completed by withheld until after Dr. Chmell's deposition the outcome may have been different.

We therefore reverse the circuit court's decision confirming the Commission's [***9] decision excluding Dr. Slack's report pursuant to *Section 12* of the Act as being error as a matter of law; and remand for further proceedings before the Commission.

Reversed and remanded.

MCCULLOUGH, P.J., and GROMETER and DONOVAN, JJ., concur.

CONCUR BY: ROBERT E. GORDON

CONCUR

[*281] JUSTICE ROBERT E. GORDON, specially concurs:

I agree with the result reached by the majority, but I write separately to more fully address the issues raised by the parties.

In refusing to allow the employer to introduce into evidence Dr. Charles Slack's September 6, 2004, report, the arbitrator, whose decision in this regard was adopted by the Commission, found that the "commencement of trial" in this matter began when the claimant's treating physician was deposed on May 7, 2004. As Dr. Slack's September 6, 2004, report was not tendered to the claimant until after the treating physician's deposition, the arbitrator concluded that the September 6, 2004, report was barred under *section 12* of the Illinois Workers' Compensation Act (Act) (*820 ILCS 305/12* (West 2004)).

The relevant portion of *section 12* of the Act provides that:

> "In all cases where the examination is made by a surgeon engaged by the employer, and the injured employee has [***10] 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 [**1251] 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 2004).

Section 12 of the Act explicitly states that an examining physician's report must be provided to the injured employee no later than 48 hours before the start of a hearing and that, if the report is not disclosed, the examining physician will not be allowed to testify. The Act, however, fails to define "hearing" or "testify."

The primary goal of statutory interpretation is to ascertain and give effect to the [***11] intent of the legislature. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205, 216 Ill. 2d 455, 473, 837 N.E.2d 1, 297 Ill. Dec. 221 (2005)*. The best indication of legislative intent is the language of the statute itself. *People ex. rel. Ryan v. Agpro, Inc., 214 Ill. 2d 222, 226, 824 N.E.2d 270, 291 Ill. Dec. 694 (2005)*. Where, as in this case, the terms of a statute are undefined, they are given their plain and ordinary meaning. *Price v. Phillip Morris, Inc., 219 Ill. 2d 182, 243, 848 N.E.2d 1, 302 Ill. Dec. 1 (2005)*.

A "hearing" is generally defined as "synonymous with trial." *Donovan v. Industrial Comm'n, 125 Ill. App. 3d 445, 449, 465 N.E.2d* [*282] *1071, 80 Ill. Dec. 725 (1984)*. Therefore, given its plain and ordinary meaning, a hearing begins when the parties start to present their arguments and evidence to the arbitrator, not with the taking of an evidence deposition. See *In re Marriage of Wright, 92 Ill. App. 3d 708, 710, 415 N.E.2d 1196, 47 Ill. Dec. 883 (1980)* (rejecting a claim that a trial begins with the taking of an evidence deposition), *vacated as moot, 89 Ill. 2d 498, 434 N.E.2d 293, 61 Ill. Dec. 140 (1982)*.

In this case, it is undisputed that Dr. Slack's September 6, 2004, report was tendered to the claimant more than 48 before the arbitration hearing commenced [***12] on February 8, 2005. Accordingly, the employer complied with *section 12* of the Act, and the September 6, 2004, report should not have been excluded.

Furthermore, Dr. Slack's September 6, 2004, report should not have been barred because the report is not testimony. According to *section 12* of the Act, if an examining physician fails to furnish a report to the injured employee, the physician "shall not be permitted to testify." *820 ILCS 305/12* (West 2004). "Testimony" is commonly defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary 1485 (7th ed. 1999). As the September 6, 2004, report was not made under oath or affirmation, it cannot be considered "testimony" and, therefore, is not subject to exclusion under *section 12* of the Act.

Finally, I do not believe that Dr. Slack's September 6, 2004, report was merely commutative of evidence already before the arbitrator and the Commission. Although a previous report from Dr. Slack, dated December 15, 2002, was admitted into evidence, the basis for Dr. Slack's opinions differed in the two reports. In his September 6, 2004, report, Dr. Slack analyzed nearly [***13] two years of additional treatment and testing. Consequently, I cannot say that the improper exclusion of Dr. Slack's September 6, 2004, report was harmless error. *Cf. Greaney v. Industrial* [**1252] *Comm'n, 358 Ill. App. 3d 1002, 1013, 832 N.E.2d 331, 295 Ill. Dec. 180 (2005)* ("When erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless").

For these reasons, I concur with the majority's decision to reverse the judgment of the circuit court and remand the cause for further proceedings before the Commission.

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WILLIAM MULLIGAN, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, (Rand McNally, Appellee).

NO. 1-09-2507WC

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

408 Ill. App. 3d 205; 946 N.E.2d 421; 2011 Ill. App. LEXIS 275; 349 Ill. Dec. 227

March 28, 2011, Filed

SUBSEQUENT HISTORY: Released for Publication May 6, 2011.
Rehearing denied by *Mulligan v. Workers' Comp. Comm'n, 2011 Ill. App. LEXIS 471 (Ill. App. Ct. 1st Dist., Apr. 27, 2011)*

PRIOR HISTORY: [***1]
Appeal from the Circuit Court of Cook County. Nos 09-L-50515, 09-L-50516. Honorable Lawrence O'Gara, Judge, presiding.

DISPOSITION: Reversed; Commission decision vacated; cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that confirmed a decision of the Commission awarding appellant employee 12 weeks of temporary total disability benefits and permanent partial disability benefits to the extent of 50 percent of the person as a whole as a result of a work-related accident. The employee appealed.

OVERVIEW: The employee suffered two work-related accidents in which he fell and injured both his neck and right knee. The Commission agreed with an arbitrator's findings that the employee's neck conditions were causally connected to the later accident and that the claimant's knee conditions were not causally related to it. It modified the arbitrator's decision by finding that the employee suffered the loss of 50 percent of the person as a whole as a result of his permanent partial disability. He believed that the Commission's finding that his right knee condition was not causally connected to the work accidents and the Commission's decision to deny benefits for permanent total disability were against the manifest weight of the evidence. The trial court confirmed the Commission's decisions. The appellate court found that the arbitrator erred in allowing the testimony of two doctors whose medical reports had not been furnished to the employee within 48 hours prior to the date the arbitration case was set for hearing, as was required by *820 ILCS 305/12* (2008). It noted that he objected, good cause was not shown for allowing admission of that evidence, and that the error was not harmless.

OUTCOME: The appellate court reversed the trial court's judgment, vacated the Commission's decision, and remanded the cause to the Commission for further proceedings.

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN1] A claimant is required 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 claimant. *820 ILCS 305/12* (2008).

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
[HN2] See *820 ILCS 305/12* (2008).

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation
[HN3] When resolution of an issue on appeal involves a question of statutory construction, the proper standard of review is de novo. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN4] *820 ILCS 305/12* (2008), on its face, applies to "physical examinations."

Governments > Legislation > Statutes of Limitations > Time Limitations
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
[HN5] The purpose of *820 ILCS 305/12* (2008) would be frustrated if a reviewing court read that law to only apply to examining physicians. The language of it evidences that its purpose is to prevent a party from springing surprise medical testimony on the other party at an arbitration hearing. That purpose is served by having the proponent of medical testimony send a copy of the physician's records to the other party no later than 48 hours prior to the arbitration hearing.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN6] The testimony of a physician that is based upon a review of medical records rather than a physical examination falls within the 48-hour disclosure requirements of *820 ILCS 305/12* (2008).

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN7] Reviewing courts give the term "hearing" its plain and ordinary meaning, and, thus, hold that compliance with *820 ILCS 305/12* (2008) of the Workers' Compensation 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 an arbitration hearing. That holding is consistent with the purpose of that law, which is to prevent one party from springing surprise medical testimony on the other party. Circumstances may occur where strict compliance with the requirements of that law would result in substantial prejudice, and a showing of good cause would justify relaxing those requirements.

Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN8] When a party objects to the admission of medical testimony on *820 ILCS 305/12* (2008) grounds, the proponent of the medical testimony has the burden to prove compliance with the requirements of that section of the Workers' Compensation Act.

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
[HN9] The Rules adopted by the Commission govern the timing of evidence depositions in workers' compensation proceedings. *Ill. Admin. Code tit. 50, § 7030* (2008). That section provides that evidence depositions of any witness may be taken after a hearing begins only upon order of the Arbitrator or Commissioner, for good cause shown.

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule
[HN10] When erroneously admitted evidence does not prejudice an objecting party, error in its admission is harmless.

JUDGES: JUSTICE STEWART delivered the judgment of the court, with opinion. Presiding Justice McCullough and Justices Hudson and Hoffman concurred in the judgment and opinion. Justice Holdridge specially concurred, with opinion.

OPINION BY: STEWART

OPINION

[**423] [*205] The central issue in this appeal concerns the requirement in section 12 of the Illinois Workers' Compensation Act (*820 ILCS 305/12* (West 2008)) (the Act), that the proponent of medical testimony furnish a report of the medical expert to the other party at least" 48 hours before the time the case is set for hearing." This appeal is brought by [*206] the claimant, William Mulligan, from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (the Commission), awarding the claimant 12 weeks of temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits to the extent of 50% of the person as a whole as a result of a work-related accident. On appeal, the claimant argues, among other issues, that the Commission improperly admitted [***2] the medical testimony of two witnesses over his objection in violation of section 12 of the Act. We agree with the claimant and reverse the judgment of the circuit court, vacate the decision of the Commission, and remand the matter to the Commission for further proceedings.

BACKGROUND

The claimant, who worked as the vice president of sales and marketing for the employer, Rand McNally, suffered two work-related accidents, one in February 1994, and one in May 1994. On March 21, 1995, the claimant filed a separate application for adjustment of claim for each of these 1994 accidents. The arbitrator conducted [**424] a consolidated hearing on the claimant's claims on three different days, spanning a period of over two years: April 20, 2004, July 27, 2005, and July 31, 2006. At the arbitration hearing, it was undisputed that the claimant suffered from significant degenerative conditions in his neck and right knee prior to the 1994 accidents at issue. The parties disputed whether the claimant's accidents aggravated his preexisting neck and knee conditions.

The claimant had a number of surgical procedures on his right knee prior to the 1994 work accidents, including a total right knee replacement in [***3] January 1988. In March 1991, the claimant had surgery on his neck which included a "cervical hemilaminectomy at C4/5 and C5/6" and a "foraminotomy at C4/5 and C5/6." The claimant testified that after his knee replacement in January 1988, his knee was pain free and he was "able to do just about anything." In June 1993, however, the claimant experienced sudden pain and swelling in his right knee. The claimant saw Dr. Sonnenberg, and he found" a 2+ effusion of the right knee" and that the claimant had tenderness" over the base of the patellar tendon where it inserts into the anterior tibial tubercle." Dr. Sonnenberg noted in his June 18, 1993, report that the claimant did a lot of golfing and swimming and that he encouraged "swimming over golfing until the effusion goes down." Dr. Sonnenberg stated in his report that an x-ray of the claimant's right knee did not reveal any loosening and that the knee looked "very good."

[*207] The first work-related accident involved in this appeal occurred on February 23, 1994. On that day, the claimant was headed to the employer's Nashville, Tennessee, facility with a coworker, and they were walking in the parking lot of the Chicago Midway Airport to catch [***4] their flight. There was approximately 8 inches of snow on the ground that day. As the claimant walked through the parking lot, carrying his overnight bag and briefcase, his feet slipped on the snow and he fell. He testified that his right knee got caught under his body, twisted, and hyperflexed. He testified that he also struck his neck during the fall, but the only pain at the time was in his knee. He could not walk, but his coworker helped him into the terminal where they got a wheelchair to get him to his flight. The next day he had to get another wheelchair in Nashville, and on the third day after the accident, he was able to walk with a limp.

The claimant testified that his right knee hurt and was swollen for a week. The claimant's neck hurt after the accident, but not to the extent of his knee. A week or two after the accident, however, his neck started hurting more than his knee. The claimant did not miss any work as a result of the February 1994 fall. Although he testified that he was treated by a chiropractor, he did not produce any medical records for treatment following that accident.

The second accident occurred on May 31, 1994. In describing the second accident, the claimant [***5] testified that it occurred when he was coming down the stairs in front of the employer's headquarters as a coworker briefed him on a possible acquisition of a company in California. The claimant was heading to the airport for a flight to Los Angeles, California, and was running late. The stairs in front of the employer's headquar-

ters were "shiny marble," and the claimant slipped and fell backwards on the stairs because they were "slippery." The fall rendered the claimant unconscious for 10 to 15 minutes. He testified that he again hyperflexed his right knee during the fall. Paramedics transported the claimant to the emergency room at St. Francis Hospital. He missed [**425] his flight to Los Angeles and did not complete the business trip.

The emergency room records show that the claimant reported that he hit the right side of his neck and his right knee. X-rays of the right knee at the emergency room revealed the prior total knee replacement, but did not reveal anything wrong with the prosthetic. X-rays of the claimant's cervical spine revealed anterior osteophytes formation at C5, 6, and 7, and degenerative changes at the C5 and C6 discs.

At the arbitration hearing, the claimant presented evidence [***6] that his neck conditions worsened shortly after the May 1994 accident. He sought treatment by a chiropractor in June 1994, hoping that adjustments [*208] to his neck and shoulders would relieve the pain he experienced in his neck and head, which had increased after the May 1994 accident. By December 1994, the claimant continued to have an acceleration of headaches, neck pain that radiated into his right shoulder, and persistent numbness of his right thumb, index finger, and middle finger.

In April 1995, the claimant saw a neurologist, Dr. Jerva. According to Dr. Jerva's records, after the 1994 accidents the claimant suffered from numbness and tingling in his right arm and from "cervical radiculopathy and occipital headaches." Dr. Jerva wrote in his April 5, 1995 report: "Symptoms began increasing in December, 1994, and continued to accelerate until such time as it has become unbearable and intractable." The claimant's pain in the "occipital region and upper cervical region [was] severe with radiation into the right shoulder." Dr. Jerva concluded that the claimant's neck condition was "clearly" cervical degenerative osteoarthritis "with a C6 radiculopathy and an associated cerebral concussion [***7] with loss of consciousness for ten minutes or more."

Dr. Jerva's records from 1996 state that the claimant had "persistent tingling and numbness in the C5 and C6 distribution" and that the claimant complained mainly of headaches and numbness in his right thumb, index, and middle finger. In addition, the records state that the claimant had a "[r]adicular component extending up the right extremity to the middle arm" and had "[e]xquisite tenderness overlying the right greater occipital nerve."

After the May 31, 1994, accident, the claimant did not seek any medical attention with respect to his right knee until he saw Dr. Sonnenberg in June 1996. Dr. Sonnenberg wrote in his notes dated June 26, 1996, that the claimant had been doing well with his knee replacement, except for occasional swelling, but he was concerned about possible wear of the claimant's knee prosthesis.

The claimant saw Dr. Reinhart in August 1996 concerning his right knee pain and swelling. Dr. Reinhart noted that the claimant had effusion and tenderness in his knee area and that x-rays "demonstrated what appear[ed] to be metal on metal contact" in the knee prosthesis. The x-rays of the prosthesis showed "[s]ignificant medial [***8] tilting of the tibial tray." Dr. Reinhart suspected that the claimant's knee problems "related to wear from his original prosthesis." He did not know whether the conditions were a recent occurrence or had been "a chronic or progressive condition since no previous x-rays were available." Dr. Reinhart recommended a "[r]ight total knee revision."

Later in 1996, the claimant saw Dr. Sweeney who suspected a possible infection in the knee joint. Cultures from around the knee, [*209] however, returned negative which indicated that there was no infection. On February 25, 1997, Dr. Sweeney replaced the claimant's entire [**426] knee prosthetic. After the surgery, the claimant had to wear a knee brace to hold the new knee prosthetic in place while he walked. The brace reached the top of his right thigh and extended underneath his foot. He also walked with the assistance of a cane. He could walk only 100 to 150 yards at a time before the muscles and tendons in his knee got hot and sore, and he had to rest.

With respect to the claimant's neck pain, on October 8, 1998, Dr. Cerullo and Dr. Geisler performed a "C3 through C7 laminectomy." The claimant testified that, after the surgery, the back of his neck would [***9] become tight during the day which caused headaches. On a normal day, he could last two or three hours before he had to put his head down. When his neck got tight, he had to lay his head down for 45 minutes to an hour, and then he would feel better for another hour or two. In addition, he testified that if he could not lay down and take the weight off his neck, he had to take five to eight hydrocodone pills throughout the day. He did not take any hydrocodone pills on the days he could lay down frequently and take the weight off his neck. In March 2006, he started wearing a morphine patch that emitted pain medicine into his bloodstream. Pain injections in the claimant's shoulder and neck were successful for only a week or two.

The claimant testified that he had to hold his cane in his left hand because he suffered from carpal tunnel syndrome in his right arm. At times, he suffered numbness or pain from his right shoulder down to his hand, He

could not grasp anything forcefully with his right hand because of pain. At times, he could not open and close his right hand. The claimant testified that, at the time of the arbitration hearing, he spent his days watching television, reading the [***10] newspaper, and talking on the telephone. He laid down every two or three hours. He testified that he could not do anything around the house, such as mowing the lawn or gardening, because of pain in his neck and shoulders. On an ordinary day, he did not have much pain in his right knee because he did not walk much. If he tried to walk anywhere, however, his knee would start to hurt after walking approximately 100 yards. He testified that the pain in his neck was getting worse. The claimant also testified that at times, both hands felt paralyzed and he was unable to completely close his hands.

On the issues of causation and the nature and extent of his disability, the claimant presented the evidence deposition testimony of Dr. Gates. Dr. Gates testified that he examined the claimant in 2003, and also reviewed his medical records. Dr. Gates found that the claimant's 1997 right knee revision was unstable. He observed that [*210] the claimant had to use a cane, wear a brace, and walk with a painful and unstable gait. Dr. Gates could see that the lower leg shifted sideways when the claimant walked because his ligaments were stretched out, damaged, and not functioning properly. The claimant still [***11] had fluid or swelling in his right knee and had moderate to significant tenderness over the knee. Because of the knee instability, Dr. Gates did not believe that the claimant could perform any type of employment that involved walking. Dr. Gates felt that there was a causal connection between the claimant's two 1994 accidents and the claimant's knee and neck conditions. With respect to the knee injury, he testified that both accidents were "classical for causing loosening of the prosthesis." In his report dated July 11, 2003, Dr. Gates wrote that the two accidents that occurred in 1994 were "responsible for the subsequent surgeries and revision in 1997."

The claimant also presented the evidence deposition testimony of Dr. Chmell. [**427] Dr. Chmell is an orthopedic surgeon who examined the claimant and reviewed his medical records in January 2004. Dr. Chmell testified that the claimant's right knee suffered from "gross instability *** in all planes." The right knee also "demonstrated crepitus, clicking, and popping" as it was "ranged."

Dr. Chmell's diagnosis of the claimant included, "traumatic loosening" of the claimant's right knee prosthesis, "traumatic aggravation" of the degenerative condition [***12] of the claimant's cervical spine, aggravation of degenerative disc disease of his lumbar spine, aggravation of osteoarthritis in the claimant's left knee, aggravation of bilateral carpal tunnel syndrome, and aggravation of bilateral cubital tunnel syndrome. The claimant suffered from "double pinch syndrome," which was a nerve that was pinched at the claimant's wrists and also at the base of his neck. Dr. Chmell believed that these conditions were related to both of the accidents the claimant had on February 23, 1994, and on May 31, 1994. Dr. Chmell stated in his report that the claimant sustained injuries to his right knee and cervical spine as a result of the 1994 accidents and that the injuries resulted in multiple surgeries to the right knee and surgery to the cervical spine. He further stated that the claimant's knee injury hampered the claimant's ability to stand and walk, causing aggravation of underlying low back and left knee conditions.

Dr. Chmell testified that the claimant was fully and permanently disabled as a result of his conditions. According to Dr Chmell, the condition of the claimant's right knee precludes him from doing any meaningful walking or standing for job purposes. [***13] In addition, Dr. Chmell believed that the claimant was limited in his ability to work from a sitting position because of the condition of his upper extremities. [*211] Specifically, the condition of the claimant's cervical spine and upper extremities caused him pain, limited motion, limited strength, and limited sensation in his upper extremities. Dr. Chmell opined that the claimant could not "meaningfully use his upper extremities for a job." The claimant's lower back also precluded the claimant from sitting for prolonged periods, and his use of hydrocodone for his pain interfered with his ability to think and concentrate. Dr. Chmell concluded that all of the claimant's conditions together prevented the claimant from being "in a workable position to accomplish anything on a regular daily basis."

The employer presented the live testimony of Dr. Kornblatt and the evidence deposition testimony of Dr. Hopkinson on the issue of whether the 1994 accidents caused the claimant's right knee conditions. The claimant objected to the testimony of these doctors, arguing that the employer had not timely furnished him copies of the doctors' medical reports as required by section 12 of the Act (*820 ILCS 305/12* [***14] (West 2008)).

As noted above, the arbitrator conducted a consolidated hearing on the claimant's claims on April 20, 2004, July 27, 2005, and July 31, 2006. The claimant testified at the beginning of the hearing on April 20, 2004. The hearing did not conclude on April 20, 2004, and the proofs remained open at the conclusion of the proceedings that day. The parties appeared before the arbitrator on August 17, 2004, on the employer's motion for a *dedimus potestatem* to take the evidence deposition of its independent medical examiner, Dr. Hopkinson. Counsel for the employer noted that the motion was brought pursuant to Commission Rule 7030.60. Dr. Hopkinson had

examined the claimant in February 1999, but for reasons not stated in the record, the employer had not taken an evidence [**428] deposition of Dr. Hopkinson prior to the start of the hearing on April 20, 2004.

In his objection to the employer's motion for a *dedimus potestatem*, the claimant's attorney stated that he had never received Dr. Hopkinson's report until he received a letter from the employer's counsel dated July 15, 2004. The letter included a copy of Dr. Hopkinson's report and a statement that the employer would be relying on the [***15] report at trial. The claimant's attorney objected to the late request for an evidence deposition on the basis that section 12 of the Act required the report to be provided to the claimant no later than 48 hours before the commencement of the hearing on April 20, 2004. Because the employer had not furnished the doctor's report until July 2004, the claimant argued that the doctor's testimony should be excluded under section 12. Counsel for the employer stated his belief that a copy of the report had been sent to the claimant's attorney at the time the [*212] report was created, but offered no proof of that claim. He offered no explanation for failing to schedule the deposition before the arbitration hearing. Instead, he argued that the claimant would "suffer no prejudicial effect" if he was allowed to proceed with the deposition.

The arbitrator overruled the claimant's objection to the employer's request for an evidence deposition of Dr. Hopkinson. In doing so, the arbitrator simply noted that "the examination of the doctor has not started" and that the parties "have not completed the hearing." No finding was made that the employer had shown good cause for taking the deposition after the arbitration [***16] hearing had commenced. The parties subsequently took Dr. Hopkinson's evidence deposition on November 4, 2004.

In addition to obtaining Dr. Hopkinson's evidence deposition after the start of the hearing on April 20, 2004, the employer also retained a new medical expert, Dr. Kornblatt, to conduct a review of the claimant's medical records and render opinions concerning the claimant's knee conditions. On September 24, 2004, Dr. Kornblatt prepared a report that set out his findings and opinions based on his document review, and that report was then furnished to the claimant.

When the parties appeared at the arbitration hearing on July 27, 2005, the employer called Dr. Kornblatt as a witness. The claimant objected to his testimony, arguing that section 12 required that the employer furnish him a copy of Dr. Kornblatt's report at least 48 hours prior to the start of the April 20, 2004, hearing. The claimant's attorney argued that section 12 bars the testimony of a new examining physician retained by the employer after the arbitration hearing has commenced, the claimant has testified, and the depositions of the claimant's physician witnesses have been taken. The arbitrator overruled the claimant's [***17] objection and again ruled that the 48 hour requirement in section 12 applied to the day of the hearing on which the doctor testified, not to the first day of the hearing on April 20, 2004. The arbitrator, therefore, allowed Dr. Kornblatt to testify on July 27, 2005, over the claimant's objection.

Dr. Kornblatt testified that he never examined the claimant, but he was requested to perform a review of the claimant's medical records and offer opinions concerning the claimant's conditions based on the records. Dr. Kornblatt testified that, in his opinion, the claimant "had an ongoing early failure of his right total knee replacement, beginning with his problem in 1993." To a reasonable degree of medical and surgical certainty, he believed that the claimant's "prosthesis would have failed whether or not the claimant had actually sustained [the 1994 accidents]." [**429] He testified: "I think it is certainly possible that those injuries may have aggravated the underlying failure that was in [*213] place, but I don't think that the end result would have been any different had he not sustained the injury." In addition, Dr. Kornblatt testified that, "[b]ased on the time between the injury and [the claimant] [***18] seeking further medical care," it was likely that the 1994 accidents aggravated the claimant's knee condition only temporarily.

Dr. Kornblatt agreed that the type of falls that the claimant sustained could loosen or cause damage to the claimant's prosthesis. However, Dr. Kornblatt noted that in 1993, Dr. Sonnenberg found a 2+ effusion. Dr. Kornblatt explained that "[a] knee that's five years out doing well does not have an effusion in the absence of injury, and there was no injury" in 1993. Dr. Kornblatt also testified that he believed that if a fall had caused the polyethylene in the claimant's prosthesis to loosen, he would have expected the polyethylene to have cracked, and he did not think that the claimant could have gone on with his normal activities for several months before seeing a physician for further care.

Dr. Kornblatt testified: "I believe that this is just the ongoing microscopic wear that has happened historically with this type of prosthesis." He believed that the prosthesis was failing before the claimant's accidents and that the accidents caused only a temporary aggravation. He testified that if the accidents increased the speed of the wear of the prosthesis, they [***19] did so only minimally.

The parties appeared before the arbitrator again on July 31, 2006, to complete the proofs on the claimant's claims. At that hearing, the employer offered the November 4, 2004, evidence deposition of Dr. Hopkinson. The claimant renewed his section 12 objection, and the

arbitrator admitted Dr. Hopkinson's deposition over the claimant's objection.

Dr. Hopkinson testified at the evidence deposition that he performed an independent medical examination of the claimant's right knee on February 2, 1999. The claimant complained at that time of constant knee pain and complained that rest and narcotic medications did not seem to alleviate the pain. Dr. Hopkinson noted that the claimant wore a long leg brace and walked with a cane.

Dr. Hopkinson testified that he believed that the second knee replacement that was conducted in February 1997 was required because of "progressive osteolysis from rapid failure of [the claimant's] original right knee replacement surgery." He testified that "at the present time" knee prosthesis components were expected to last 10 to 15 years of normal use, but prostheses used during the time when the claimant received his first knee replacement "have [***20] polyethylene inserts that are not of the same quality and durability as the ones that are now." Dr. Hopkinson also felt that the claimant "would be [*214] extremely limited in his work-related capacity due to the constant soft tissue pain in his knee and that he would have extreme limitations and could not work or stand more than 20 minutes or lift greater than 20 pounds." Dr. Hopkinson felt that the claimant's knee conditions "would be permanent and that he would be limited at best to a sedentary lifestyle or sedentary activities." Dr. Hopkinson explained that, from a surgeon's perspective, there was nothing more that could be done with the claimant's knee conditions except pain modalities and therapy with bracing.

With respect to the claimant's 1994 accidents, he testified that they were the kind of accidents that could have caused or lead to a premature failure of the claimant's knee prosthesis, but it was hard for him to [**430] say that conclusively. He did not think the accidents were the sole cause of the failure of the claimant's prosthesis because the claimant "also had the process of osteolysis," but he stated that the accidents could have been a contributing factor. Dr. Hopkinson offered [***21] no opinion about the claimant's spine.

At the conclusion of the consolidated arbitration hearing, the arbitrator rendered separate decisions for each of the 1994 accidents. The arbitrator found that the claimant injured his right knee, neck, and back when he fell on February 23, 1994, at the airport. The arbitrator, however, concluded as follows: "Based upon the testimony and the evidence submitted, the [claimant] failed to prove that he sustained an accident on February 23, 1994, arising out of and in the course of his employment with the [employer] and that his current condition of ill-being is causally connected to an injury on February 23, 1994." The arbitrator further found that "the incident on February 23, 1994, is superceded by the incident and resulting injuries on May 31, 1994."

The Commission affirmed and adopted the arbitrator's decision with respect to the February 23, 1994, accident except that the Commission clarified the arbitrator's decision as follows: "The Arbitrator's finding of no causal connection and denial of benefits was based upon [the claimant's] failure to prove that this accident is related to [the claimant's] current condition of ill-being." The Commission [***22] stated that it "affirms and adopts the finding that, while [the claimant] did sustain accidental injuries arising out of and in the course of employment, [the claimant] did not seek any medical care after the accident, did not miss any time from work, and any current condition of ill-being is causally related to [the claimant's] second accident on May 31, 1994."

With respect to the May 31, 1994, accident, the arbitrator found that the accident arose out of and in the course of his employment and [*215] that the condition of the claimant's neck was causally related to the work accident. The arbitrator stated: "Although the [claimant] reported having cervical problems prior to May 31, 1994, when he sought chiropractic care on June 9, 1994, subsequent to his accident, he reported more numbness in his right arm and fingers and increase in the frequency of reoccurrence of neck pain and headaches." The arbitrator found, however, that the claimant "failed to prove that his right knee, back, carpal tunnel and cubital tunnel are related to the work injury." The arbitrator found as follows:

> "The [claimant] reported falling and striking the back of his neck and a trauma to his right knee at St. Francis [***23] Hospital on May 31, 1994. When he sought chiropractic care on the 9th of June, he reported that both feet went up and his neck hit the stairs. The [claimant] did not report that he hyperflexed or twisted his right leg or describe a fall that would have been consistent with a hyperflexion of his right leg. He did not seek any medical care for his knee until June 26, 1996, at which time Dr. Sonnenberg suspected problems with the polyethylene tray and wear debris. The opinion of Dr. Gates [is] not consistent with the evidence and is conjecture."

The arbitrator found that the injuries that the claimant sustained caused permanent partial disability to the extent of 35% loss of use of the person as a whole. The

arbitrator awarded temporary total disability (TTD) benefits for the 12 weeks after the claimant's cervical surgery on October 8, 1998. Although the arbitrator found that necessary medical services had not been provided by the employer, he found that the claimant's medical expenses [**431] for his cervical spine could not "be determined from the evidence submitted." The claimant had submitted a lengthy exhibit which included bills for the combined treatment of the claimant's multiple injuries. [***24] The arbitrator ordered that the employer receive credit for any amount paid for the medical bills and ordered the employer to hold the claimant harmless for all medical bills paid by its group health insurance carrier.

The Commission, however, modified the arbitrator's decision concerning the May 31, 1994, accident. The Commission agreed with the arbitrator's findings that the claimant's neck conditions were causally connected to the accident and that the claimant's knee conditions were not causally related. The Commission further found, however, that the claimant's medical expenses and treatment for carpal tunnel syndrome and cubital tunnel syndrome were causally connected to the accident on May 31, 1994. The Commission stated as follows:

> "As early as June 2, 1994, [the claimant] was complaining of numbness/tingling in the right arm and hand and those complaints [*216] continued. Eventually, [the claimant] began treating for his carpal tunnel symptoms and the October 2003 EMG indicated right-sided carpal tunnel syndrome. Ultimately, as [claimant] testified, it was determined that he did not have carpal tunnel syndrome and, rather, that his arm numbness/tingling, etc, was due to his cervical [***25] condition. As such, we find that [the claimant's] treatment for carpal and cubital tunnel syndrome were reasonable attempts to determine if the symptoms were being caused by something other than the neck."

However, the Commission implicitly affirmed the arbitrator's finding that the medical expenses could not "be determined from the evidence."

The Commission further modified the arbitrator's decision by finding that the claimant suffered the loss of 50% of the person as a whole as a result of his permanent partial disability. The claimant appealed the Commission's decisions with respect to both accidents, and in a consolidated proceeding for review, the circuit court confirmed the decisions of the Commission. This appeal followed.

ANALYSIS

The claimant raises several issues on appeal, including that the Commission's admission of the testimony of Dr. Kornblatt and Dr. Hopkinson violated section 12 of the Act (*820 ILCS 305/12* (West 2008)). The claimant further argues that, without their testimony, the Commission's finding that his right knee condition was not causally connected to the 1994 work accidents and the Commission's decision to deny benefits for permanent total disability (PTD) [***26] as a result of the 1994 accidents were against the manifest weight of the evidence.

Section 12 of the Act requires [HN1] the claimant 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 claimant. *820 ILCS 305/12* (West 2008). Section 12 further provides as follows:

> [HN2] "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 [**432] 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 [*217] statement to the same extent as that furnished the employer said surgeon [***27] shall not be permitted to testify at the hearing next following said examination." (Emphasis added) *820 ILCS 305/12* (West 2008).

Our analysis of the claimant's objection to the testimony of Dr. Kornblatt and Dr. Hopkinson requires us to construe this language of section 12 of the Act. [HN3] When resolution of an issue on appeal involves a question of statutory construction, the proper standard of re-

view is *de novo*. *City of Chicago v. The Workers' Compensation Comm'n, 387 Ill. App. 3d 276, 278, 899 N.E.2d 1247, 1248, 326 Ill. Dec. 596 (2008)*. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205, 216 Ill 2d 455, 473, 837 N.E.2d 1, 11, 297 Ill. Dec. 221 (2005)*.

With respect to Dr. Kornblatt's testimony, the first issue we must address is whether his testimony, based on a review of medical documents rather than an examination of the claimant, falls within the purview of section 12. In doing so, we note that [HN4] section 12, on its face, applies to "physical examinations." *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996)*, offers us guidance in interpreting the scope of the requirements [***28] of section 12.

In *Ghere*, an employer objected to the testimony of a treating physician because his opinions were not furnished to the employer 48 hours before the arbitration hearing pursuant to section 12 of the Act, and the arbitrator sustained that objection. *Ghere, 278 Ill. App. 3d at 842, 663 N.E.2d at 1048*. On appeal, the claimant contended that section 12 of the Act applies only to examining physicians, not treating physicians. *Ghere, 278 Ill. App. 3d at 845, 663 N.E.2d at 1050*. The *Ghere* court disagreed and held that section 12 applies to treating physicians. *Ghere, 278 Ill. App. 3d at 845, 663 N.E.2d at 1050*. The court reasoned that [HN5] "the purpose of section 12 would be frustrated if we read section 12 to only apply to examining physicians." *Ghere, 278 Ill. App. 3d at 845, 663 N.E.2d at 1050*. The language of section 12 evidences that its purpose is to prevent a party from springing surprise medical testimony on the other party at the arbitration hearing. *Ghere, 278 Ill. App. 3d at 845, 663 N.E.2d at 1050*. This purpose is served by having the proponent of medical testimony send a copy of the physician's records to the other party "no later than 48 hours prior to the arbitration [***29] hearing." *Ghere, 278 Ill. App. 3d at 845, 663 N.E.2d at 1050*. The *Ghere* court concluded: "With this purpose in mind, we see no justification in limiting section 12 of the Act to examining doctors and we now so hold."

We apply this same reasoning in the present case with respect to Dr. Kornblatt's testimony. Dr. Kornblatt formed his opinions, not by [*218] examining the claimant, but by examining his medical records. The purpose of section 12 would be frustrated if parties were allowed to spring surprise medical testimony at the arbitration hearing from doctors who form their opinions exclusively through a review of medical records without conducting an examination of the injured employee. Accordingly, [**433] we hold that[HN6] the testimony of a physician that is based upon a review of medical records rather than a physical examination falls within the 48-hour disclosure requirements of section 12.

Having determined that Dr. Kornblatt's testimony falls under the requirements of section 12 of the Act, we must next determine whether the employer complied with the section 12 requirement that the claimant be sent a copy of the doctor's report no later than 48 hours "before the time the case is set for hearing" [***30] (*820 ILCS 305/12* (West 2008)). This step in our analysis requires us to determine when the case is "set for hearing" for purposes of measuring the 48-hour disclosure requirement. In *City of Chicago*, we construed this phrase under different circumstances, but our analysis in that case is relevant to construing the statute under the procedural history of the present case.

In *City of Chicago*, prior to the matter being heard by the arbitrator, the parties took the deposition of the claimant's treating physician in May 2004. *City of Chicago, 387 Ill. App. 3d at 277-78, 899 N.E.2d at 1248*. The employer subsequently furnished the claimant a report of an independent medical examiner in September 2004. *City of Chicago, 387 Ill. App. 3d at 277-78, 899 N.E.2d at 1248*. The matter was heard before the arbitrator in February 2005 and May 2005. *City of Chicago, 387 Ill. App. 3d at 277-78, 899 N.E.2d at 1248*. During the arbitration hearing, an issue arose concerning the admissibility of evidence from the employer's independent medical examiner under section 12. *City of Chicago, 387 Ill. App. 3d at 277-78, 899 N.E.2d at 1248*. The arbitrator concluded that the hearing began when the parties took the deposition [***31] of the treating physician in May 2004. *City of Chicago, 387 Ill. App. 3d at 278, 899 N.E.2d at 1248*. Therefore, the arbitrator excluded evidence from the employer's independent medical examiner based on a determination that the report had not been produced prior to the commencement of the hearing. *City of Chicago, 387 Ill. App. 3d at 278, 899 N.E.2d at 1248*.

On appeal, the *City of Chicago* court held that the testimony was improperly excluded. *City of Chicago, 387 Ill. App. 3d at 280, 899 N.E.2d at 1250*. The court held that the term "hearing" in section 12 referred to the arbitration hearing, not the treating physician's deposition. *City of Chicago, 387 Ill. App. 3d at 280, 899 N.E.2d at 1250*. In his concurring opinion, Justice Gordon noted that the term "hearing" [*219] is generally defined as being synonymous with the term "trial." *City of Chicago, 387 Ill. App. 3d at 281-82, 899 N.E.2d at 1251* (Gordon J., concurring) (citing *Donovan v. Industrial Comm'n, 125 Ill. App. 3d 445, 449 465 N.E.2d 1071, 1074, 80 Ill. Dec. 725 (1984)*). "Therefore, given its plain and ordinary meaning, a hearing begins when the parties start to present their arguments and evidence to the arbitrator, not with the taking of an evidence [***32] deposition."

City of Chicago, 387 Ill. App. 3d at 281-82, 899 N.E.2d at 1251 (Gordon J., concurring).

[HN7] We now give the term "hearing" its plain and ordinary meaning and hold that compliance with 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. This holding is consistent with the purpose of section 12, which is to prevent one party from springing surprise medical testimony on the other party. While circumstances may occur where strict compliance with the requirements [**434] of section 12 would result in substantial prejudice, and a showing of good cause would justify relaxing those requirements, this is not such a case. As occurred in this case, one party should not be allowed to retain a new examining physician, over objection, after the arbitration hearing has commenced, and the other party has testified and obtained the depositions of his physician witnesses. We note, however, that nothing in the Act would Prevent the parties from stipulating to the admission of medical testimony that would not otherwise meet the requirements of [***33] section 12. We further note that our holding should discourage the unfortunate practice of continuing an arbitration hearing for the presentation of evidence on multiple days over a period of months or, as in this case, a period of years.

In the present case, the parties began presenting evidence to the arbitrator on April 20, 2004. Although the proofs were not completed that day, April 20, 2004, was the day that "the case was set for hearing" under the requirements of section 12. Therefore, both parties' physicians were required to furnish their reports to the opposing party at least 48 hours prior to the commencement of the hearing on April 20, 2004. Since Dr. Kornblatt was not even retained to perform a records review until after the arbitration hearing had commenced, his report could not have been timely submitted. His report was not submitted until September 2004, several months after the time the case was set for hearing. Accordingly, pursuant to section 12 of the Act, the Commission should not have allowed Dr. Kornblatt to testify and should have sustained the claimant's objection to his testimony.

Likewise, the Commission improperly allowed the admission of the evidence deposition [***34] of Dr. Hopkinson over the claimant's section 12 [*220] objection. As noted above, after the arbitration hearing commenced on April 20, 2004, the parties appeared before the arbitrator in August 2004 on the employer's motion for a *dedimus potestatem* to take the evidence deposition of Dr. Hopkinson. Dr. Hopkinson examined the claimant and prepared a report in February 1999. The claimant objected to Dr. Hopkinson's testimony, arguing that he did not receive Dr. Hopkinson's report until July 2004, well beyond the time the case was set for hearing. The employer's attorney stated: "It was our understanding that a report of Dr. Hopkinson was generated and transmitted contemporaneous to the production of the report [to the claimant's attorney's] office. A few weeks back I had sent Ii copy of the report with some deposition dates or an indication to [the claimant's attorney] that we wanted to secure the deposition of Dr. Hopkinson, and then [the claimant's attorney] had refused to agree to the deposition of Dr. Hopkinson." The claimant's attorney denied that he had ever received Dr. Hopkinson's report prior to July 2004, and the employer offered no proof that the report had been submitted to the claimant [***35] on any earlier date. The arbitrator granted the employer's motion for a *dedimus potestatem* over the claimant's objection, and the parties took the evidence deposition of Dr. Hopkinson on November 4, 2004, which was admitted into evidence over the claimant's objection.

We conclude that Dr. Hopkinson's testimony was improperly admitted. We hold that [HN8] when a party objects to the admission of medical testimony on section 12 grounds, the proponent of the medical testimony has the burden to prove compliance with the requirements of section 12 of the Act. In the present case, the employer's attorney stated that it was his "understanding" that Dr. Hopkinson's report was [**435] furnished to the claimant contemporaneously with its production. The only proof, however, that the report was sent to the claimant was a transmittal letter sent in July 2004, indicating that the employer intended to rely on Dr. Hopkinson's report. The transmittal of the report in July 2004 was untimely under section 12 of the Act. Accordingly, Dr. Hopkinson's testimony should have been excluded.

In addition, Dr. Hopkinson's testimony should have been excluded because the employer failed to show "good cause" for taking his evidence [***36] deposition after the start of the arbitration hearing. Section 7030.60 of [HN9] the Rules adopted by the Commission governs the timing of evidence depositions in workers' compensation proceedings. *50 Ill. Adm. Code § 7030* (2008). Section 7030.60 provides that "[e]vidence depositions of any witness may be taken after the hearing begins *only upon order of the Arbitrator or Commissioner, for good cause shown*." (Emphasis added). In the present case, [*221] the employer's counsel stated that the motion for a *dedimus potestatem* was brought pursuant to section 7030.60.

However, our review of the record does not reveal any showing of good cause to allow Dr. Hopkinson's late evidence deposition after the hearing had begun. As we have already held, the arbitration hearing in this case began on April 20, 2004. By allowing Dr. Hopkinson's deposition without requiring the employer to show good

cause, the arbitrator violated section 7030.60, and the Commission erred in adopting the arbitrator's ruling on that issue. Since there was no showing of good cause, section 7030.60 mandated that the claimant's request for a late deposition be denied.

Further, we cannot find that the admission of Dr. Kornblatt's and Dr. [***37] Hopkinson's testimony was harmless error. [HN10] When erroneously admitted evidence does not prejudice the objecting party, error in its admission is harmless. *Greaney v. Industrial Comm'n, 358 Ill. App. 3d 1002, 1013, 832 N.E.2d 331, 342, 295 Ill. Dec. 180 (2005)*. In the present case, the parties disputed the issue of whether the claimant's work related accidents contributed to the claimant's conditions of ill-being in his right knee. In addition, the parties disputed the extent of the claimant's disability as a result of the work-related injuries.

The arbitrator and the Commission found that the claimant's knee conditions were not causally connected to the work accidents, and neither the arbitrator nor the Commission expressly relied on the employer's medical testimony. However, our review of the record reveals that the only medical opinion admitted at the hearing that supported the Commission's finding was the testimony of Dr. Kornblatt In fact, the employer's attorney conceded at oral argument that Dr. Kornblatt's testimony was the only medical testimony in the record that supported a finding that the claimant's knee conditions were not causally connected to the 1994 accidents. The claimant presented medical [***38] testimony of two examining physicians who opined that the 1994 accidents aggravated his knee conditions and were causally connected to the conditions of ill-being in his right knee. Accordingly, we cannot uphold the Commission's decision. We must remand this matter to the Commission for new findings that do not rely on the testimony of Dr. Hopkinson or Dr. Kornblatt.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County confirming the decision of the' Commission is reversed. We vacate the decision of the Commission and remand the cause to [*222] the [**436] Commission for further proceedings consistent with the holdings contained herein.

Reversed; Commission decision vacated; cause remanded.

CONCUR BY: HOLDRIDGE

CONCUR

JUSTICE HOLDRIDGE, specially concurring:

I concur. I write separately to note my concurrence only with the majority's holding that the Commission's admission of testimony by Drs. Kornblatt and Hopkinson violated section 12 of the Act. (*820 ILCS 305/12* (West 2009). When a party objects to the admission of medical testimony on section 12 grounds, the proponent of the medical testimony has the burden to prove compliance with the requirements of section 12 of the Act. The judgment [***39] of the court in the instant matter is that the employer failed to meet the specific requirement of section 12 which requires that a report of a physician who will give testimony at the arbitration hearing must be provided to the opposing party at least 48 hours prior to the commencement of the arbitration hearing. Here the record supported the finding that the reports of Drs. Kornblatt and Hopkinson were not provided to the claimant before the hearing commenced on April 20, 2004.

Having found that the proposed medical testimony was barred under section 12 of the Act, there is no need for this court to address the "good cause" provision found in Section 7030.60 of the Commission Rules. *50 Ill. Adm Code § 7030* (2008). Section 7030.60 is a general evidentiary provision which provides that "[e]vidence depositions of any witness may be taken after the hearing begins *only upon order of the Arbitrator or Commissioner, for good cause shown.* " (Emphasis added). This provision applies to an evidence deposition of any party, and does not specifically address medical testimony. Medical testimony is specifically addressed by section 12 of the Act.

I would find that Section 7030.60 clearly has no [***40] application to the instant matter. The "good cause" provision of section 7030.60 cannot allow an arbitrator or the Commission to excuse noncompliance with section 12 of the Act. See *Board of Trustees of the University of Illinois v. Illinois Educational Labor Relations Board, 274 Ill. App. 3d 145, 148, 653 N.E.2d 882, 210 Ill. Dec. 687* (an agency rule or regulation which conflicts with a statute is invalid). Simply put, if a party does not comply with section 12 of the Act by providing the physician's written report at least 48 hours prior to hearing, that physician cannot testify, either in person or by evidence deposition. Neither the arbitrator nor the Commission can excuse noncompliance with section 12 of the Act for "good cause." While section 7030.60 of the Commission Rules might allow the arbitrator [*223] or the Commission to permit the taking of an evidence deposition of an occurrence witness after the hearing has commenced, it cannot allow the taking of an evidence deposition from a physician where the proffering party has failed to provide a report from that physician to the other party prior to the commencement of the hearing. To allow the taking of that physician's deposition after

the hearing had commenced, even [***41] for "good cause" shown, would violate section 12 of the Act.

I would hold that where, as here, a party has failed to comply with section 12 of the Act, the medical testimony is barred. The Commission may not excuse noncompliance with the Act for "good cause" pursuant to section 7030.60 of Commission [**437] Rules. I therefore, disagree with the portion of the judgment of the court discussing compliance with section 7030.60 of the Commission Rules.

ISAACSON CONSTRUCTION COMPANY, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (ONIS BAIZE, Appellee).

No. 4-10-0057WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, WORKERS COMPENSATION COMMISSION DIVISION

2011 Ill. App. Unpub. LEXIS 380

January 13, 2011, Filed

NOTICE: This order was filed under *Supreme Court Rule 23* and may not be cited as precedent by any party except in the limited circumstances allowed under *Rule 23(e)(1)*.

PRIOR HISTORY: [*1]
APPEAL FROM THE CIRCUIT COURT OF McLEAN COUNTY. No. 09 MR 121. HONORABLE G. MICHAEL PRALL, JUDGE PRESIDING.

DISPOSITION: Affirmed.

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

OPINION BY: HOFFMAN

OPINION

ORDER

HELD: The Workers' Compensation Commission's decision awarding the claimant, Onis Baize, benefits pursuant to the Workers' Compensation Act is not against the manifest weight of the evidence.

Isaacson Construction Company (Isaacson Construction) appeals from an order of the circuit court confirming a decision of the Workers' Compensation Commission (Commission) which awarded the claimant, Onis Baize, benefits pursuant to the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2004)) for injuries which he allegedly received on April 5, 2005. For the reasons which follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the evidence presented at the arbitration hearing, which was held pursuant to *section 19(b)* of the Act (*820 ILCS 305/19(b)* (West 2006)) on September 14, 2007, and September 24, 2007.

The claimant was employed by Isaacson Construction as a semi-truck [*2] driver. His duties included driving approximately 500 miles per day to deliver gravel to various businesses. According to the claimant, he was required to regularly work overtime to complete the job duties he was assigned. He stated that he would normally work from 5 a.m. until 5 or 6 p.m., five days a week and sometimes worked a half day on Saturdays.

The claimant testified that, on April 5, 2005, he was delivering a load of gravel, when he struck the tailgate of the truck with his right elbow. According to the claimant, his left ankle gave way, and he fell onto to his back. Immediately after the accident, the claimant experienced pain in his elbow and in his lower back. The claimant described the lower-back pain as occurring slightly above the buttocks and down to his left ankle.

The claimant finished his shift that day, arriving back at the plant at around 5:30 or 6 p.m. After work, the claimant soaked in a tub, used a heat pad, elevated his leg, and wrapped his elbow.

The following day, April 6, 2005, the claimant returned to his job at Isaacson Construction. The claimant testified that he informed his supervisor, Steve Clark, of the accident and asked for an accident report to complete. [*3] In the accident report, the claimant noted

that he injured his right elbow after he was hit by the tailgate of a truck. According to the claimant, Clark was ill and asked him to return the form before he was able to complete it.

The claimant continued to work as a truck driver after April 6, 2005. The claimant testified that during this period he was in a lot of pain. To alleviate the pain while driving, he would place his left leg on the dashboard and use the cruise control.

The claimant testified that, on June 8, 2005, he had a disagreement with Isaacson Construction about the safety of the truck he was assigned to drive and stopped working for the company. The following day the claimant started working as a truck driver for Price Trucking Company.

On June 16, 2005, the claimant sought treatment from Dr. Lawrence Li, an orthopedic surgeon. In explaining his delay in seeking treatment, the claimant stated that he tried to work through the pain, but it kept getting worse, so he finally decided "to do something about it." During the visit, the claimant gave a history of a tailgate striking his right elbow causing him to twist his left ankle and fall down. Dr. Li's report states that the [*4] claimant complained of pain in his right elbow and left ankle radiating to his buttock. An examination revealed that the claimant had some tenderness in his elbow and foot. The claimant's lumbar spine, however, was not tender, and a straight-leg raising test was negative for nerve root impingement. Dr. Li diagnosed the claimant with an ankle sprain and an elbow contusion and prescribed physical therapy.

The claimant began physical therapy on July 11, 2005. In a letter to Dr. Li dated that same day, the physical therapist noted that the claimant's chief complaints were a left-ankle sprain and pain from the left foot which radiated upward to the buttock. The note also indicated that the claimant had a decreased lumbar range of motion that prevented full functional activity.

On July 12, 2005, Dr. Li took the claimant off of work due to his elbow condition. The claimant testified that he took the off-of-work slip to his attorney, who advised him to update his accident report. According to the claimant, he then completed a second accident report for Isaacson Construction, specifically adding that he had injured his ankle and back.

When the claimant returned to Dr. Li on August 4, 2005, he [*5] complained of numbness and tingling in the ring and small fingers of his right hand. The claimant also complained of worsening back pain. As Dr. Li did not treat back problems, he referred the claimant to Dr. Won Heum Jhee, a physician board certified in physical medicine and rehabilitation.

The claimant first saw Dr. Jhee on August 8, 2005. Following an examination, Dr. Jhee observed moderate tenderness on the medial and lateral epicondylar region of the claimant's right elbow, a positive Tinel's sign for the median nerve, and a positive Phalen's test on his right hand. Dr. Jhee also performed an EMG and nerve conduction study, the results of which showed mild carpal tunnel syndrome.

On August 16, 2005, the claimant returned to Dr. Jhee for treatment of his back complaints. Dr. Jhee's examination revealed some moderate tenderness of the left sacroiliac joint, with consistently limited movement on the left side. The claimant's deep tendon reflexes of the lower extremity also showed brisk and symmetrical knee jerks and a brisk right ankle jerk. Dr. Jhee suggested that the claimant undergo an MRI of his lumbar spine to rule out disc disease. He also recommended that the claimant not return [*6] to work.

On August 17, 2005, a lumbar MRI was performed. The radiologist's report noted significant degenerative disc disease at L4-L5 and L5-S1, as well as a moderate paracentral disc herniation at L5-S1. An additional nerve conduction study conducted by Dr. Jhee revealed moderately advanced S1 radiculopathy. Dr. Jhee then recommended that the claimant see a neurosurgeon.

On December 13, 2005, the claimant began treating with Dr. Ann Stroink, a neurosurgeon. On that day, Dr. Stroink noted complaints of low-back pain radiating to the left lower extremity and down to the toes. According to Dr. Stroink's medical records, the claimant stated that these symptoms were present since he sustained an injury at work in April of 2005. An examination of the claimant confirmed the August 17, 2005, MRI findings of degenerative disc disease at L4-L5 and L5-S1 and a disc herniation at L5-S1. Dr. Stroink recommended that the claimant undergo surgery, specifically a microdiscectomy at L5-S1.

Dr. Stroink performed the surgery on March 1, 2006. At her deposition, Dr. Stroink explained that during the surgery she removed a "chronic" disc herniation and a "superimposed" subacute disc herniation. Dr. Stroink [*7] opined that the April 5, 2005, accident either aggravated the claimant's underlying condition of an old disc herniation with a superimposed new disc herniation or could have caused both the new and old disc herniations. She also believed that pain in the buttocks, radiating to the left leg, could be consistent with a herniated disc.

The claimant also presented into evidence the depositions of Drs. Li and Jhee. When deposed, Dr. Li testified that the claimant's elbow contusion and ankle strain could be related to the April 5, 2005, work accident. Although Dr. Li did not render an opinion regarding the

cause of the claimant's back condition, he did testify that the claimant should have developed symptoms in his back within three to five days after the accident. At his deposition, Dr. Jhee opined that the April 5, 2005, accident could have aggravated the claimant's preexisting degenerative disc disease. On cross-examination, however, Dr. Jhee admitted that the claimant's back condition could have nothing to do with his accident.

At the arbitration hearing, the claimant denied that, prior to the April 5, 2005, accident, he experienced back or leg pain or received any medical treatment for [*8] pain in his back or legs. The claimant also admitted that he attempted to return to work as a janitor on June 6, 2006. He testified that he only worked a few hours and was in a lot of pain.

Isaacson Construction introduced into evidence the deposition of Dr. Stephen Pineda, an orthopedic and spinal surgeon. On October 17, 2005, Dr. Pineda had examined the claimant at the request of Isaacson Construction's attorneys. Dr. Pineda's examination of the claimant's lower extremities showed a dramatic weakness in his feet, which should have precluded him from walking in a normal fashion. Dr. Pineda, however, observed that the claimant had no trouble walking. His examination of the claimant's back, elbow, and ankle were otherwise normal. Dr. Pineda agreed with Dr. Li that if the April 5, 2005, accident resulted in a spinal injury, the symptoms would have begun immediately or a few days later. Because the claimant informed him that his back pain began two months after the accident, Dr. Pineda believed that the claimant's back condition was unrelated.

Testifying on behalf of Isaacson Construction, Clark denied that he took the first accident report away from the claimant prematurely. Clark testified [*9] that he gave the claimant an incident report to fill out and found it later that day on his desk, completed and signed by the claimant.

Isaacson Construction also presented the testimony of Todd Isaacson, the company's owner, and Dennis Backlund, a truck driver. Clark, Isaacson, and Backlund each testified that overtime was not mandatory and that Isaacson Construction did not force its drivers to work more than eight hours a day.

Following the conclusion of the hearing, held pursuant to *section 19(b)* of the Act, the arbitrator found that on April 5, 2005, the claimant sustained an injury to his right elbow arising out and in the course of his employment with Isaacson Construction and awarded the claimant $6,400 in medical expenses related to the treatment of his elbow. However, relying on the inconsistencies between the two accident reports, the fact that the claimant continued to work for months after the accident, and Dr. Li's initial finding that the claimant did not have a back condition, the arbitrator determined that the claimant's low-back and ankle conditions were not causally related to the April 5, 2005, accident. As a consequence, the arbitrator denied the claimant's request [*10] for temporary total disability (TTD) benefits. Although the arbitrator did not award TTD benefits, he still calculated the claimant's average weekly wage and included the overtime worked by the claimant at Isaacson Construction. The arbitrator also denied Isaacson Construction's request to bar the testimony of Dr. Stroink pursuant to *section 12* of the Act (*820 ILCS 305/12* (West 2004)).

Both the claimant and Isaacson Construction filed petitions for review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission reversed the arbitrator and found that the claimant met his burden of proving a causal connection between the April 5, 2005, accident and his low-back and ankle conditions. In reaching this conclusion, the Commission noted that the claimant's testimony regarding the mechanism of his injury was corroborated by Dr. Li's medical records and the physical therapy report dated July 11, 2005. In addition, the Commission relied on the fact that, at oral argument, Isaacson Construction had conceded liability for the claimant's ankle injury, and the fact that a letter from Isaacson Construction's workers' compensation insurance carrier denying benefits [*11] for treatment unrelated to the claimant's elbow mentioned that the claims adjuster took a recorded statement from the claimant on July 13, 2005. The Commission concluded that it was not unreasonable to infer that Isaacson Construction would have introduced the statement into evidence had it been favorable to its position.

The Commission also affirmed the arbitrator's calculation of the claimant's average weekly wage and the denial of Isaacson Construction's request to bar the testimony of Dr. Stroink pursuant to *section 12* of the Act (*820 ILCS 305/12* (West 2004)). The Commission ordered Isaacson Construction to pay TTD benefits in the sum of $350.67 per week from December 13, 2005, through September 24, 2007, as well as necessary medical expenses totaling $35,920.32. The Commission also remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980)*.

Thereafter, Isaacson Construction sought judicial review of the Commission's decision in the Circuit Court of McLean County. The circuit court confirmed the Commission's decision, and this appeal followed.

Initially, we address Isaacson Construction's argument that [*12] the Commission erred in denying its request to bar the testimony of Dr. Stroink pursuant to *section 12* of the Act (*820 ILCS 305/12* (West 2004)).

According to Isaacson Construction, Dr. Stroink's evidence deposition was inadmissible because the claimant failed to disclose the doctor's opinions prior to the commencement of the depositions of Drs. Li, Jhee, and Pineda. The decision whether to admit testimony into evidence is a matter within the sound discretion of the Commission, which will not be disturbed on review absent an abuse of that discretion. *Homebrite Ace Hardware v. Industrial Comm'n, 351 Ill. App. 3d 333, 337, 814 N.E.2d 126, 286 Ill. Dec. 477 (2004).*

Section 12 of the Act provides, in relevant part, that:

> "In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, 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 employee and the same shall be an exact copy of that furnished to the employee, said [*13] copy to be furnished the employer, 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 employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the *hearing* next following said examination." (Emphasis added.) *820 ILCS 305/12* (West 2004).

In the prior decision of *Marks v. ACME Industries*, 02 IIC 0892 (November 22, 2002), the Commission found that the "hearing" referred to in *section 12* of the Act was the deposition of a treating physician. This court, however, subsequently held that the Commission's reading of *section 12* was contrary to our prior determination that the purpose of this section is to prevent surprise medical testimony at the arbitration hearing. *City of Chicago v. Workers' Compensation Comm'n, 387 Ill. App. 3d 276, 280, 899 N.E.2d 1247, 326 Ill. Dec. 596 (2008)*, citing *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 845, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996).*

Isaacson Construction has not alleged that it was surprised by Dr. Stroink's testimony. In the absence of surprise, *section 12* does not require that an examining physician's [*14] testimony be excluded from the evidence. See *City of Chicago, 387 Ill. App. 3d at 280*; *Certified Testing v. Industrial Comm'n, 367 Ill. App. 3d 938, 947-48, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).* As a result, we cannot say that the Commission abused its discretion in denying Isaacson Construction's request to bar the testimony of Dr. Stroink.

Next, Isaacson Construction contends that the Commission's finding that the claimant's lower-back condition is causally related to his April 5, 2005, work accident is against the manifest weight of the evidence. Isaacson Construction asserts that the facts of this case do not support the Commission's decision to set aside the arbitrator's credibility determinations.

Before addressing the merits of Isaacson Construction's claim, we must first determine our standard of review. Whether a causal relationship exits between a claimant's employment and his current condition of ill-being is a question of fact to be decided by the Commission. *Certi-Serve, Inc. v. Industrial Comm'n, 101 Ill. 2d 236, 244, 461 N.E.2d 954, 78 Ill. Dec. 120 (1984).* The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987).* [*15] For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Durand v. Industrial Comm'n, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 308 Ill. Dec. 715 (2006).*

Citing to *Cook v. Industrial Comm'n, 176 Ill. App. 3d 545, 531 N.E.2d 379, 126 Ill. Dec. 84 (1988)*, Isaacson Construction suggests that, as the Commission overturned the credibility findings of the arbitrator, we should apply "an extra degree of scrutiny" in determining whether there is sufficient support for the Commission's decision. In *Cook*, this court held that "in cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence, [the reviewing court applies] an extra degree of scrutiny to the record." *Cook, 176 Ill. App. 3d at 552.* However, numerous other appellate decisions have rejected the extra-degree-of-scrutiny standard as an inaccurate statement of the law. See *e.g.*, *Hosteny v. Workers' Compensation Comm'n, 397 Ill. App. 3d 665, 675-76, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009)*; *Boatman v. Industrial Comm'n, 256 Ill. App. 3d 1070, 1071, 628 N.E.2d 829, 195 Ill. Dec. 365 (1993)*; *J & J Transmissions v. Industrial Comm'n, 243 Ill. App. 3d 692, 700, 612 N.E.2d 877, 184 Ill. Dec. 1 (1993).* Moreover, the Illinois [*16] Supreme Court has consistently held that when the Commission reviews an arbitrator's decision it exercises original, not appellate jurisdiction and is not bound by the arbitrator's findings of fact. See *Franklin v. Industrial Comm'n, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004)*; *Paganelis v. Industrial Comm'n, 132*

Ill. 2d 468, 483, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989); *Berry v. Industrial Comm'n, 99 Ill. 2d 401, 405, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984)*.

In light of the overwhelming weight of authority to the contrary, we decline to apply "an extra degree of scrutiny" even when the Commission rejects the credibility findings of the arbitrator. Nevertheless, when the Commission draws its own conclusions regarding the credibility of the witnesses, we deem it the better practice for the Commission to expressly state its reasons for doing so. Without a statement regarding its reasons for a contrary credibility determination, the Commission's decision may lack the findings which make meaningful judicial review possible, requiring that the matter be remanded back to the Commission with directions to make the necessary findings. *R&D Thiel v. Workers' Compensation Comm'n, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 338 Ill. Dec. 10 (2010)*.

Here, [*17] the Commission expressly stated its reasons for setting aside the credibility findings of the arbitrator. In finding a causal connection between the injuries the claimant sustained on April 5, 2005, and his lower-back condition, the Commission noted that the claimant's testimony regarding the mechanism of his injury was corroborated by Dr. Li's medical records and the physical therapy report dated July 11, 2005. In addition, the Commission found that, by conceding liability at oral argument for the ankle injury the claimant sustained, this, in turn, connected the back injury to the accident. The Commission also noted that a letter from Isaacson Construction's workers' compensation insurance carrier denying benefits for treatment unrelated to the claimant's elbow mentioned that the claims adjuster took a recorded statement from the claimant on July 13, 2005. The Commission concluded that it was not unreasonable to infer that Isaacson Construction would have introduced the statement into evidence had it been favorable to its position.

In seeking to set aside the Commission's decision, Isaacson Construction contends that the Commission failed to acknowledge certain evidence. Specifically, [*18] the Commission did not address: (1) the absence of documented complaints or treatment for a back condition during the months initially following the accident; (2) Dr. Li's opinion that symptoms should arise within three to five days of the injury; (3) the fact that the claimant was able to work at full-duty capacity for months after the accident; (4) the absence of any physical therapy for a lower-back condition; and (5) Dr. Li's finding, on June 16, 2005, that the claimant's back was normal. Contrary to Isaacson Construction's argument, the Commission's decision need not set forth a detailed description of all the evidence presented. *Setzekorn v. Industrial Comm'n, 353 Ill. App. 3d 1049, 1054, 820 N.E.2d 586, 289 Ill. Dec. 810 (2004)*. Rather, the Commission is presumed to have considered all competent and proper evidence in reaching its decision. *Swift & Co. v. Industrial Comm'n, 150 Ill. App. 3d 216, 221, 501 N.E.2d 752, 103 Ill. Dec. 435 (1986)*.

Isaacson Construction also takes issue with the Commission's findings that it made a concession at oral argument which connected the back injury to the accident and that adverse inferences could be drawn from its failure to introduce into evidence the statement made to the claims [*19] adjuster. However, even assuming that the Commission's findings in this regard were erroneous, it is well established that this court may affirm the decision of the Commission based on any ground appearing in the record. *Dodson v. Industrial Comm'n, 308 Ill. App. 3d 572, 575, 720 N.E.2d 275, 241 Ill. Dec. 820 (1999)*; *Freeman United Coal Mining Co. v. Industrial Comm'n, 283 Ill. App. 3d 785, 793, 670 N.E.2d 1122, 219 Ill. Dec. 234 (1996)*.

In this case, Dr. Stroink opined that the April 5, 2005, work accident either aggravated the claimant's underlying condition of an old disc herniation with a superimposed new disc herniation or could have caused both the new and old disc herniations. Furthermore, the claimant testified that prior to April 5, 2005, he did not experience back or leg pain, nor receive any medical treatment for pain in his back and legs. The claimant testified that, following the April 5, 2005, accident, he began experiencing pain in his lower back from his above buttocks and down to his left ankle. When an employee establishes both his state of health prior to a work-related accident and a change immediately following and continuing thereafter, this chain of events may be sufficient circumstantial evidence [*20] to prove that the impaired condition is due to the accident. See *Spector Freight System, Inc. v. Industrial Comm'n, 93 Ill. 2d 507, 513, 445 N.E.2d 280, 67 Ill. Dec. 800 (1983)*; *Navistar International Transportation Corp. v. Industrial Comm'n, 315 Ill. App. 3d 1197, 1205, 734 N.E.2d 900, 248 Ill. Dec. 609 (2000)*.

Based upon the opinion of Dr. Stroink and the claimant's own testimony, there is sufficient evidence in record to support the Commission's finding that the claimant's lower-back condition was causally connected to the April 5, 2005, work accident. As a consequence, it cannot be said that the Commission's decision in this regard is against the manifest weight of the evidence. See *P.I.&I. Motor Express, Inc. / FOR U, LLC v. Industrial Comm'n, 368 Ill. App. 3d 230, 240-41, 857 N.E.2d 784, 306 Ill. Dec. 385 (2006)* (where the Commission's decision is supported by competent evidence, its findings of fact are not against the manifest weight of the evidence).

Isaacson Construction also contends that the Commission's decision to award TTD benefits for the period of December 13, 2005, through September 24, 2007, is against the manifest weight of the evidence. Isaacson Construction argues that the award of TTD benefits is "dramatically inconsistent [*21] with the facts contained in the record."

We note that Isaacson Construction has failed to cite a single case in support of its contention that the Commission erred in awarded TTD benefits. *Supreme Court Rule 341(h)(7)* requires that the argument section of an appellant's brief contain its contentions "and the reasons therefor, with citation to the authorities *** relied on." 210 Ill. 2d *R. 341(h)(7)*. This court has consistently held that any argument which is not supported by citation to legal authority is deemed forfeited. See *e.g., Roper Contracting v. Industrial Comm'n, 349 Ill. App. 3d 500, 504-05, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004)*. In addition to the fact that Isaacson Construction has forfeited its arguments regarding the award of TTD benefits, we also find them lacking in merit.

An employee is temporarily and totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990)*. The time during which a claimant is temporarily and totally disabled is a question of fact to be resolved by the [*22] Commission, and the Commission's decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Choi v. Industrial Comm'n, 182 Ill. 2d 387, 398, 695 N.E.2d 862, 231 Ill. Dec. 89 (1998)*.

In its decision, the Commission found that the claimant was not entitled to TTD benefits in connection with his elbow or ankle condition. The Commission, however, did award the claimant TTD benefits in connection with his back condition from December 13, 2005, through September 24, 2007, the final date of the arbitration hearing. Despite Isaacson Construction's assertions to the contrary, we find nothing inherently inconsistent with the Commission's finding that the claimant's back condition entitled him to TTD benefits from December 13, 2005, and the claimant's testimony that the April 5, 2005, work injury caused him to suffer an injury to his lower back. During many of the months following the April 5, 2005, work accident, the claimant was either working or no physician had provided the claimant with a work restriction related to his back condition. To establish a temporary and total disability, the claimant must not only show that he did not work, but also that he was unable to work. [*23] *Archer Daniels Midland Co., 138 Ill. 2d at 119*; *Gallentine v. Industrial Comm'n, 201 Ill. App. 3d 880, 887, 559 N.E.2d 526, 147 Ill. Dec. 353 (1990)*. Based on the evidence in the record, we believe that it was reasonable for the Commission to conclude that the claimant's lower-back condition did not render him temporarily and totally disabled until December 13, 2005, the date on which Dr. Stroink recommended that the claimant undergo a microdiscectomy. We, therefore, cannot say that the Commission's decision to award the claimant TTD benefits from December 13, 2005, through September 24, 2007, is against the manifest weight of the evidence.

In reaching this conclusion, we reject Isaacson Construction's contention that the claimant should not have been awarded TTD benefits for June 6, 2006, as the claimant admitted that he worked a few hours that day as a janitor. The mere fact that an employee has been able to earn occasional wages or perform certain useful services does not preclude an award of TTD benefits. *Mechanical Devices v. Industrial Comm'n, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819, 279 Ill. Dec. 531 (2003)*; *Dolce v. Industrial Comm'n, 286 Ill. App. 3d 117, 121, 675 N.E.2d 175, 221 Ill. Dec. 268 (1996)*.

Isaacson Construction next [*24] argues that the Commission erred in including the claimant's overtime earnings when calculating his average weekly wage. It maintains that the claimant failed to prove that the overtime he worked was mandatory rather than voluntary.

Yet again, Isaacson Construction has failed to cite to any legal authority in support of its contention that the Commission erred in calculating the claimant's average weekly wage, and, therefore, any challenge before this court has been forfeited. See *Roper, 349 Ill. App. 3d at 504-05*. Forfeiture aside, we find no merit to Isaacson Construction's arguments in this regard.

As is the case with any element in a workers' compensation claim, the claimant has the burden of establishing his average weekly wage. *Cook v. Industrial Comm'n, 231 Ill. App. 3d 729, 731, 596 N.E.2d 746, 173 Ill. Dec. 122 (1992)*. The calculation of an employee's average weekly wage is a question of fact for the Commission, which will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. *Ogle v. Industrial Comm'n, 284 Ill. App. 3d 1093, 1096, 673 N.E.2d 706, 220 Ill. Dec. 562 (1996)*.

In calculating an employee's average weekly wage, *section 10* of the Act expressly excludes overtime. *820 ILCS 305/10* [*25] (West 2004). The Act, however, does not define "overtime." Nevertheless, this court has consistently interpreted the overtime exclusion to include those hours "in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. Workers' Com-*

pensation Comm'n, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 310 Ill. Dec. 259 (2007).

At the arbitration hearing, the claimant testified that he was required to work overtime to complete the job duties he was assigned and that this usually took between 11 to 12 hours a day. Although Backlund, Clark, and Isaacson each testified that there are no negative consequences if an employee refuses to work overtime, it was the responsibility of the Commission to resolve the conflicts in the evidence. *O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980).* After considering the evidence presented, the arbitrator found the claimant's testimony on the issue of overtime more credible and included the claimant's overtime earnings in computing his average weekly wage. The Commission subsequently [*26] adopted the arbitrator's findings in this regard.

Based on the claimant's testimony, we are unable to conclude that the Commission's determination that the overtime hours the claimant worked were mandatory is against the manifest weight of the evidence. As the hours that an employee is required to work as a condition of his employment are not considered "overtime" within the meaning of *section 10* of the Act (*Airborne Express, Inc., 372 Ill. App. 3d at 554*), we find that the Commission did not err in including the claimant's overtime earnings in the calculation of his average weekly wage.

Finally, Isaacson Construction argues that, based on the absence of a causal connection between the claimant's lower-back condition and his April 5, 2005, accident, the Commission's award of TTD benefits and certain medical expenses is against the manifest weight of the evidence. In light of the fact that we have previously rejected the premise upon which Isaacson Construction's arguments are based, these arguments must also be rejected.

For these reasons, we affirm the judgment of the circuit court which confirmed the Commission's decision.

Affirmed.

JOANNE NEAL, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Rockford Health System, Appellees).

No. 2-10-0279WC

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

2011 Ill. App. Unpub. LEXIS 823

March 1, 2011, Decision Filed

NOTICE: This order was filed under *Supreme Court Rule 23* and may not be cited as precedent by any party except in the limited circumstances allowed under *Rule 23(e)(1)*.

Decision filed 03/01/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Winnebago County. No. 09-MR-408. Honorable J. Edward Prochaska, Judge, Presiding.

DISPOSITION: Affirmed.

JUDGES: JUSTICE STEWART delivered the judgment of the court. Presiding Justices McCullough, and Justices Hoffman, Hudson, and Holdridge concurred in the judgment.

OPINION BY: STEWART

OPINION

ORDER

Held: The Commission did not abuse its discretion by denying the claimant's motion for a continuance during the arbitration hearing to obtain an independent medical examination. Additionally, the Commission's decision that the claimant failed to prove a causal connection between her injury and her employment is not against the manifest weight of the evidence.

The claimant, Joanne Neal, appeals from a decision of the circuit court of Winnebago County which confirmed a decision of the Illinois Workers' Compensation Commission (the Commission) denying benefits under the Illinois Workers' Compensation Act (Act). *820 ILCS 305/1 et seq.* (West 2008). The Commission affirmed the arbitrator's denial of the claimant's motion for a continuance and his dismissal of her claims for failure to prove that she had sustained an accident that arose out of and in the course of her employment with Rockford Health System [*2] (the employer). We affirm.

BACKGROUND

(A) The Claimant's Motion for a Continuance

The claimant initially filed an application for adjustment of claim (05 WC 32141) on July 22, 2005, alleging that the date of the accident was May 9, 2003, and that the part of her body affected was her "Upper Extremities-Bilateral." On September 21, 2007, the claimant filed another application for adjustment of claim (07 WC 42411) again alleging the date of the accident as May 9, 2003, and the part of the body affected as "RUE" (right upper extremity). On the date of the arbitration hearing, over objection, she was allowed to amend both applications to allege the date of the accident was March 3, 2005.

More than 30 days prior to the May 2008 arbitration docket, both parties served a notice of motion in both

cases asserting that they would appear at the May 13, 2008, status call to request a hearing date. At the May 13, 2008, status call, the attorneys for both parties appeared, and the case was set for arbitration hearing on May 15, 2008, without objection from either party.

At the beginning of the May 15, 2008, arbitration hearing, the arbitrator noted that he had received the "Request for Hearing form containing [*3] the stipulations of the parties," which was received into evidence as Arbitrator's Exhibit No. 1. In that exhibit, the parties stipulated that they were "prepared to try this matter to completion on 5-15-08, unless the arbitrator approves other arrangements." The parties also stipulated on that form that medical payments were not disputed and that the claimant was not entitled to receive any TTD payments. The disputed issues were accident, causal connection, and the nature and extent of the claimant's injury. The arbitrator then allowed the claimant to amend the applications to change the date of accident and admitted the amended applications into evidence as Arbitrator's Exhibits No. 2 and No. 3. Noting that both applications alleged the same accident date, the arbitrator, without objection, dismissed the claim designated as 07 WC 42411, and announced that the hearing would proceed only on 05 WC 32141.

Next, without objection, the claimant's exhibit list was admitted into evidence as Arbitrator's Exhibit No. 4, and both of the claimant's exhibits were admitted. Petitioner's Exhibit No. 1 was the medical records of Dr. Schroeder and Petitioner's Exhibit No. 2 was the medical records [*4] of Dr. Bear. After the claimant's exhibits were admitted, again without objection, the employer's exhibit list was admitted as Arbitrator's Exhibit No. 5, and all of the employer's exhibits were admitted into evidence. The employer admitted six exhibits, consisting of the report of Dr. Weiss, the evidence deposition of Dr. Koehler, and records kept by the employer pertaining to the claimant's work performance.

At that point, before receiving any testimony, the following exchange occurred:

> "THE ARBITRATOR: Any preliminary matters?
>
> [CLAIMANT'S ATTORNEY]: Your Honor, Petitioner asks that the right to be examined by an examining doctor be granted despite the fact the deposition of Dr. Koehler was taken in this case.
>
> [EMPLOYER'S ATTORNEY]: Respondent objects, Your Honor. Prior to the taking of Dr. Koehler's deposition, we confirmed with Petitioner's counsel at the time that they would not be getting any supplemental reports or have her seen by an examining doctor. And the deposition of Dr. Koehler went forward. The Respondent would be prejudiced at this time by the creating of a motion to take further independent medical examinations and having experts give opinions in the case.
>
> THE ARBITRATOR: [*5] The Arbitrator denies Petitioner's motion noting that the current Commission decisions have indicated that once a deposition of a party has begun, the trial has begun. And hence, it would not be appropriate to have an opinion by someone who -- by someone who hasn't opined by the start of the hearing. Anything further?
>
> [CLAIMANT'S ATTORNEY]: Not for the Petitioner.
>
> [EMPLOYER'S ATTORNEY]: Not for the Respondent."

The claimant's attorney made no further arguments in support of her request and called the claimant to testify. The employer also called one witness and then proofs were closed.

(B) Injury and Causal Connection

The claimant testified that she began working for the employer, a hospital, in 1998. She was still working there in 2008 at the time of the hearing. In 2005, she was cleaning patient rooms after the patients were discharged, a job referred to as "dismissals." Her job duties in 2005 included retrieving 15 to 20 pounds of dirty linens, picking up trash, cleaning the toilet and sink, washing the beds, flipping the mattresses, mopping the floors, and dusting and wiping down everything in the room. She testified that she had to grip her cleaning utensils and cloths in order to do [*6] her job. If the patient had been in isolation, she was also required to wash down all the walls and everything else in the room. Her last duty before exiting the room was to mop the floor, which required her to grip a dry towel in order to dry mop the floor, and then she used a bucket filled with cleaning solution in order to wet mop the floor. When she wet mopped, she used a wringer that she had to squeeze with her hand. Each room took 25 to 40 minutes. She was required to clean 14 to 16 rooms per day when she first began. She started noticing calluses on her hands in approximately 1999, which she attributed to using the mop, gripping the wringer, and using her hands to dust. She stated that doing dismissals was "a very hard job, stressful for your hands, because you do a lot of

mopping and cleaning and squeezing." She worked alone cleaning the rooms unless she was training someone.

From 1999 through 2005, she also did various other jobs, including cleaning other rooms, such as public bathrooms, the dialysis unit, or the physical therapy department. She testified that these alternate jobs often required her to lift heavy items with her hands. She was able to keep up with the employer's [*7] requirements until she started having problems with her hands. She testified that her hands "started getting dead and tingling," and the pain decreased the amount of work she was able to do each day, but she did not take time off work as a result. She began seeing her family physician, Dr. Paul Schroeder, in May 2003.

On May 10, 2003, Dr. Schroeder wrote that he examined the claimant regarding "right arm pain for the last two weeks with some swelling on her lower forearm and a bruise and pain when she bends her fingers." He noted tingling in her fingers, but "normal equal grip strength," and no obvious muscle loss. He noted "some swelling on the anterior aspect of the distal forearm." He assessed her condition as tendinitis and planned to schedule an EMG. Dr. Schroeder saw her again in October 2003, and on November 18, 2003, he examined her and reviewed her EMG, which showed "early carpal tunnel changes." He found a small cyst on the ulnar aspect of her right anterior wrist. He advised her to wear a wrist brace and a night splint and to begin physical therapy in December. He restricted her from lifting more than 10 pounds for 2 weeks. When the claimant followed up with Dr. Schroeder [*8] on November 21, 2003, to have him fill out her work restriction papers, he noted that he had diagnosed her with "early right carpal tunnel syndrome."

The claimant saw Dr. Schroeder again on December 8, 2003, and she continued to complain of right wrist and hand pain. She was wearing a wrist brace and taking Naprosyn. He noted that she was feeling better and that she wanted to return to regular duty work. She saw Dr. Schroeder three times in March 2004, but did not complain of right wrist pain, and he did not treat her for carpal tunnel syndrome or any other wrist or hand problem. She called Dr. Schroeder's office on April 30, 2004, and requested pain medication because her right arm was "hurting badly." Dr. Schroeder saw the claimant at his office on May 11, 2004, at which time she complained of carpal tunnel syndrome in her right hand. She had not been wearing her wrist brace. He referred her to Dr. Brian Bear for an orthopedic consultation. None of the medical records of Dr. Schroeder introduced into evidence contained any opinion that the claimant's medical condition was causally related to her work activities.

On October 28, 2004, the claimant met with Dr. Bear. She told Dr. Bear [*9] that her right hand had been numb and tingling for the previous year and that these symptoms occurred "at night when sleeping, when talking on the phone, driving a car, and reading a magazine." She told him that wearing splints helped. She had not done any physical therapy at that time. She told him that her work aggravated her problems. Dr. Bear's examination revealed "full digital flexion and extension," good capillary refill in her hand, and no evidence of flexor or extensor tenosynovitis. His review of the EMG of her hand showed "mild carpal tunnel syndrome of the right hand affecting sensory fibers only." He recommended she wear a splint, take anti-inflammatory medicine, and engage in physical therapy. She requested an injection, which he felt was reasonable. He allowed her to return to work with only one restriction, that she wear a wrist splint while at work. Dr. Bear gave her the injection on October 28, 2004, and afterwards, she felt nauseated, so he wrote her a note to allow her to take off work that afternoon.

When the claimant saw Dr. Bear on January 25, 2005, her right hand symptoms had "markedly improved" since receiving the injection in October 2004. She complained of [*10] swelling and stiffness that was worse in the morning and better by the afternoon. Dr. Bear noted that the claimant was "able to perform her job at Rockford Memorial Hospital as an environmental technician." He assessed an "insidious onset of swelling of the MCP joints with what appears to be a boggy synovitis." He recommended an "inflammatory arthritis panel" and prescribed Relafen. Dr. Bear met with the claimant on March 3, 2005, because her right hand paresthesias had returned. He noted that she had "numbness and tingling in her thumb, index and long finger as well as achy pain in the wrist." She requested surgery but wanted to wait until June. He diagnosed her with right hand carpal tunnel syndrome with severe symptoms that were affecting the quality of her life and her ability to perform daily activities. Dr. Bear scheduled her for a "mini open carpal tunnel release," and, until it could be performed, he restricted her from lifting more than 20 pounds at work but noted that she would be able to work with that restriction and had been doing so "without difficulty." The medical records of Dr. Bear contained no opinion on whether the claimant's medical condition was causally related [*11] to her work activities.

The claimant testified that she did not have that surgery because the employer denied her worker's compensation claim. She had continued to work for the employer through the arbitration hearing even though she still experienced tingling when she tried to sleep. She testified that she had begun having problems with her left hand since she had been using it more to avoid the pain in her right hand.

On April 13, 2005, Dr. Stephen F. Weiss, an orthopedic surgeon, conducted an IME on the claimant for the employer. In his report, Dr. Weiss noted that the claimant was right-handed and worked for the employer doing primarily housekeeping work, such as making beds, cleaning, dusting, and mopping. The claimant reported that her symptoms of right forearm pain and swelling began in May 2003 and that she had undergone an EMG, which showed early carpal tunnel syndrome. She told him that she had numbness, tingling, and pain in her thumb, index finger, and middle finger of her right hand, all of which became worse at night. She reported that her right hand was weak and that she could not use it for gripping. By the end of January 2005, she began to develop similar symptoms in [*12] her left hand. At the time of his examination, the claimant was still working with a 20 pound weight-lifting restriction.

Dr. Weiss reported that Dr. Schroeder had treated the claimant conservatively and that her symptoms had "fluctuated in severity." Dr. Weiss noted that Dr. Bear had diagnosed her with right carpal tunnel syndrome and had recommended surgery. Dr. Weiss diagnosed the claimant with right carpal tunnel syndrome and "probable multiple peripheral neuropathies including left carpal tunnel syndrome and bilateral cubital tunnel syndrome." He opined that her work activities did not contribute to either the carpal tunnel syndrome or the cubital tunnel syndrome. He based his opinion on studies that work activities do not usually cause carpal tunnel syndrome unless they involve "vigorous vibration as in the use of chain saws or jack hammers." He did not believe her work activities aggravated a pre-existing condition because her duties did not involve "highly repetitive" or "highly forceful gripping," with "gripping cycles of about one per minute and force of 20-30 pounds." He did not believe that the claimant's work was repetitive or forceful enough to cause carpal tunnel syndrome. [*13] His opinion that her work activities did not cause her condition was reinforced by his finding that she did most of her work right-handed but had started developing left side carpal tunnel syndrome. He noted that the claimant should undergo the surgery recommended by Dr. Bear regardless of causation.

On August 4, 2004, the claimant met with Dr. Koehler, an occupational medicine specialist working for Physicians Immediate Care, for an IME at the request of the employer. In his report, Dr. Koehler noted that the claimant had been experiencing progressively worse pain and numbness in her right wrist for at least a year. In the discussion section of his report, he stated as follows:

> "I inquired as to the type of things she does in her work. She is right-handed, and uses her right hand to scrub down beds, mop floors and clean rooms. She describes the gripping of sponges and cleaning cloths to rub down beds bothers her the most. This appears to involve power gripping. She states she cleans about 26 rooms per day. She has no symptoms in her left hand. She has no medical conditions that predispose to this.
>
> Therefore, it is my conclusion that it is reasonable to apply the Carpal Tunnel Syndrome [*14] condition to workers' compensation."

On October 19, 2005, Dr. Koehler submitted a second report to the employer. In this report, he stated that he had received "new information" about the claimant's job duties which had caused him to change his opinion regarding the cause of her carpal tunnel syndrome. He noted that, when he initially examined the claimant, based on what she told him, he had recorded that she cleaned 26 rooms per day, but based on the new information from the employer, he now had a "very different picture." He stated that he felt her job did "not require the repetition nor the intensity of wrist/hand activity associated with a workplace risk for carpal tunnel syndrome." Based on the new information, he opined that her carpal tunnel syndrome was not related to her work duties.

In a deposition taken on March 23, 2007, Dr. Koehler testified that, after he met with the claimant and issued his August 2004 report, the employer sent him additional information that the claimant was not cleaning 26 rooms per day, but that she was cleaning between 6 and 10 rooms per day. Based on that information, he changed his opinion and concluded that her condition was not caused by her employment [*15] "because cleaning six *** to ten rooms a day is insufficient to cause carpal tunnel syndrome," which was more likely caused by "normal daily activities." He determined that Dr. Weiss's findings of inflamed nerves and joints indicated that the claimant had an inflammatory disease. He opined that her work duties were not a causative factor to her carpal tunnel syndrome or her inflammatory disease.

Julie Thomas testified that she was the employer's environmental services manager, and in that capacity, she worked with the claimant's supervisor. Thomas testified that the claimant's job required her to perform 12-14 dismissals per day. She explained that a dismissal occurs when a patient is discharged, leaving his or her bed and that portion of the room ready for cleaning. Thomas testified that the claimant never met her requirement of 12-14 dismissals per day. She stated that she had never had an employee that had performed 26 dismissals in one

day. The claimant was not required to use any vibrating tools or vacuums in performing dismissals.

(C) Decisions of the Arbitrator, Commission, and Circuit Court

After the arbitration hearing, the arbitrator issued his written decision finding that [*16] the claimant had failed to prove that she sustained an accident that arose out of and in the course of her employment and that she had failed to prove that her condition of ill-being was causally related to her employment. The arbitrator made detailed findings about the medical evidence. Based on the medical evidence, the arbitrator concluded that there was "no evidence of any specific injury or accident at work" and no evidence to show that the cumulative effect of repetitive trauma at work caused her condition of ill-being. He noted that "neither of the petitioner's treating physicians, Dr. Schroeder or Dr. Bear, opined that petitioner's condition of ill-being arose out of and in the course of her employment." Further, the arbitrator found that both Dr.Koehler and Dr. Weiss found no causal relationship between her condition of ill-being and her work duties. He dismissed both of the claimant's cases. In his written order, the arbitrator did not comment on the claimant's request for an examination or for a continuance.

On appeal, the Commission unanimously affirmed the arbitrator's decision. Regarding the claimant's motion at the beginning of the arbitration hearing, the Commission [*17] noted that she had requested a continuance for the purpose of obtaining an IME and that the employer had objected because, before Dr. Koehler's March 23, 2007, deposition, the claimant's attorney had represented that he did not intend to have the claimant examined again. The Commission found that the arbitrator had denied the request for a continuance based on the Commission's decision in *Marks v. ACME Industries*, 02 I.I.C. 0892, 94 IL W.C. 01119, 2002 WL 31890986 (Ill. Indus. Comm'n) (November 22, 2002) (ruling that the hearing date set forth in section 12 of the Act referred to the evidence deposition of the claimant's treating physician and that the examining physician's report tendered after that deposition was properly excluded). The Commission noted that its *Marks* decision was "no longer valid precedent" in that its holding had been rejected in *City of Chicago v. Illinois Worker's Compensation Comm'n, 387 Ill. App. 3d 276, 899 N.E.2d 1247, 326 Ill. Dec. 596 (2008)*. The Commission rejected the claimant's argument that her motion for continuance should have been granted under *City of Chicago*, finding the facts of that case distinguishable from the facts in the claimant's case. The Commission determined [*18] that the claimant had not asked for a continuance in order to obtain an IME until the day of trial even though her attorney "had adequate time" to obtain the IME before the trial. Finding that the claimant had failed to demonstrate good cause for a continuance, the Commission affirmed the arbitrator's denial of her request for a continuance. The Commission further found that "the underlying evidence concerning Petitioner's work duties is insufficient to support a finding of liability."

On appeal, the circuit court confirmed the Commission's decision affirming the arbitrator, including its denial of the claimant's motion for a continuance. This appeal followed.

ANALYSIS

(1) Claimant's Motion for Continuance

The claimant contends that the denial of her request for a continuance at the arbitration hearing was erroneous and contrary to Illinois law. She maintains that this issue involves only the interpretation of the Act and Commission rules, and consequently, her argument presents a question of law that is to be reviewed *de novo*. See *King v. Industrial Comm'n, 189 Ill. 2d 167, 171, 724 N.E.2d 896, 898, 244 Ill. Dec. 8 (2000)* (statutory interpretation is a question of law to be reviewed *de novo*). The employer [*19] argues that there is no statutory interpretation in the resolution of this issue and that the abuse of discretion standard applies. We agree that the grant or denial of a motion for continuance in a worker's compensation proceeding is a matter within the Commission's discretion, a decision we will not overturn absent an abuse of that discretion. *Edward Don Co. v. Industrial Comm'n, 344 Ill. App. 3d 643, 650, 801 N.E.2d 18, 24, 279 Ill. Dec. 726 (2003)*. However, to the extent that deciding this issue calls for an interpretation of the Act or the Commission's rules, we conduct that inquiry *de novo. King, 189 Ill. 2d at 171, 724 N.E.2d at 898.*

Initially, we consider whether the Commission abused its discretion in deciding that the claimant failed to show good cause for a continuance after the arbitration hearing had commenced. Both parties filed written requests for a hearing date prior to the May 2008 arbitration docket. At the status call on May 13, 2008, the claims were set for trial on May 15, 2008, and the parties indicated their agreement to that trial date in the request for hearing form admitted into evidence as Arbitrator's Exhibit No. 1. Under §7030.20(a) of the Commission's rules, written requests [*20] for trial dates may be made at the monthly status call. *50 Ill. Adm. Code §7030.20(a)* (2008). §7030.20(b) specifically provides that: "If the parties by agreement request a trial date, the arbitrator will assign a specific time and date for trial." *50 Ill. Adm. Code §7030.20(b)* (2008).

Rule 7030.20 also governs the standard upon which a continuance may be granted, and the manner in which the parties may request a continuance on the day of the arbitration hearing:

> "(f) On each trial day the Arbitrator shall begin hearing cases at 9:30 a.m.. Any party who requests a date certain for trial must be prepared, *absent good cause shown*, to proceed to trial. On the trial day parties may report the case settled or request a continuance on a form provided by the *** Commission. ***
>
> (g) Bifurcated hearings are discouraged and will be allowed only for good cause. Examples of good cause include, but are not limited to, where the number or location of witnesses makes it impossible to conclude the hearing in one day or the testimony of a witness must be taken prior to a deposition. All cases, except those which are heard under *Section 19(b-1)* of the Act, must be concluded within 3 months after the first [*21] hearing date or the Arbitrator will close proofs, absent good cause shown, and render a decision."

(Emphasis added.) *50 Ill. Adm. Code §7030.20(f), (g)* (2008).

In the case at bar, the parties agreed that the arbitration hearing would proceed on May 15, 2008. In fact, the claims did proceed to hearing and all of the exhibits were admitted into evidence, without objection. It was only after all documentary evidence had been admitted, but before any testimony, that the claimant's attorney made an oral request for "the right to be examined by an examining doctor." The claimant did not specifically ask for a continuance, although in the ensuing proceedings, she has characterized her request as one for a continuance. She did not file a written request for a continuance. The critical issue, however, is whether the claimant showed good cause in support of her oral request for a continuance after the arbitration hearing had commenced. She did not explain any reason for her request, did not name the physician to examine her, did not provide any time frame in which these events were to occur, and did not state why she had not obtained the IME earlier. When the employer objected to her request, [*22] she did not attempt to clarify. When the arbitrator denied her request, she did not make any further arguments or offer any explanation of why she made the request but simply proceeded to present her evidence to the arbitrator. Under these circumstances, where the claimant failed to offer any explanation in support of her request, the Commission did not abuse its discretion in finding that she did not show good cause for continuing the arbitration hearing.

The claimant argues that she was not required to show good cause for her request for a continuance because the case was not yet three years old. In support of her argument she cites §7020.60 of the Commission rules, which provides as follows:

> "(a) Continuances on Arbitration; Notices
>
> Written notices will be sent to the parties for the initial status call setting on arbitration only. Thereafter, cases will be continued for 3 month intervals, or at other intervals upon notice by the Commission, until the case has been on file at the *** Commission for 3 years, has been set for trial pursuant to Section 7030.20, or otherwise disposed of. ***
>
> (b) Monthly Status Calls
>
> * * *
>
> (2) The monthly status call shall be conducted by the Arbitrator as [*23] follows:
>
> (A) Cases shall be called in the order that they appear on the monthly status call.
>
> (B) Cases will be continued in accordance with subsection (a) above unless a request for trial date is made in accordance with Section 7030.20. ***" *50 Ill. Adm. Code §7020.60* (2008).

§7020.60 also provides the method by which cases that have been on file three or more years are to be scheduled, under which the case will automatically be set for trial "unless a written request has been made to continue the case for good cause." 50 Ill. Adm. Code §7020.60(b)(2)(C) (2008).

The claimant argues that her case was not yet three years old when she requested the continuance, and therefore, she did not have to show good cause for the request. The claimant asserts that §7020.60 required that the hearing be continued since the claims were less than three years old. In her brief, the claimant argues that there was "no agreement" to set the case for trial and that the arbitrator could not "force" her to trial. On the con-

trary, the record clearly reflects that the parties agreed to proceed to trial, in fact did proceed to trial and both parties introduced all of their documentary evidence before any continuance [*24] was requested. This case was properly scheduled for arbitration hearing, at the request of both parties, and pursuant to §7030.20. The age of the case has no bearing on this issue since the parties filed a request for hearing form pursuant to §7030.20, announcing ready for trial, which in turn required them to go forward with the hearing "*absent good cause shown.*" (Emphasis added.) *50 Ill. Adm. Code §7030.20(f)* (2008).

In the alternative, the claimant argues that she had "good cause for not obtaining an examination prior to the trial" because she was relying on her belief that the Commission's unpublished decision in *Marks* was binding law, but that decision was overturned by the *City of Chicago* case after the arbitration hearing. She maintains that the facts of her request for a continuance are similar to the facts in *City of Chicago* and that the holding of that case requires reversal of the Commission's denial of her motion to continue the arbitration hearing. As the employer points out, the facts of the instant case are distinguishable from *City of Chicago*, and that case does not require a finding that the Commission abused its discretion by affirming the arbitrator's denial of the [*25] motion to continue.

In *City of Chicago*, the court considered whether the Commission had erred in excluding an IME report submitted by the employer for use in the arbitration hearing. *City of Chicago, 387 Ill. App. 3d at 277-78, 899 N.E.2d at 1248*. There, the arbitrator excluded the report because it had not been disclosed to the claimant before the treating physician's deposition, which the arbitrator held to be the commencement of the arbitration hearing under *section 12* of the Act and the Commission's decision in *Marks*. *Section 12* of the Act provides that copies of reports from examining physicians must be supplied to the adverse party no later than 48 hours "before the time the case is set for hearing." *820 ILCS 305/12* (West 2008). In *Marks*, the Commission found that the "hearing" referred to in *section 12* was the deposition of a treating physician, which had been conducted before the beginning of the arbitration hearing.

In *City of Chicago*, however, the court overruled the holding in *Marks* that the arbitration hearing began with a physician deposition. *City of Chicago, 387 Ill. App. 3d at 280, 899 N.E.2d at 1250*. In that case, the report the employer sought to admit into evidence [*26] was already prepared and submitted to the claimant more than 48 hours before the arbitration hearing. *City of Chicago, 387 Ill. App. 3d at 279-80, 899 N.E.2d at 1249-50*. In the case at bar, the IME had not yet occurred, and, obviously, no IME report had been provided to the employer at any time before the arbitration hearing. Hence, the facts in our case are not similar to the facts in *City of Chicago*, and the ruling in that case is not relevant to our inquiry.

If the claimant desired an IME, she could have filed a motion setting forth the reasons for the request, before the case was set for arbitration hearing, and allowed the arbitrator to hear arguments and determine the issue. Instead, she requested a hearing date, agreed to proceed to hearing, allowed all documentary evidence to be admitted, and only then made a vague request for an IME in the middle of the hearing. The claimant's argument, that she relied on the *Marks* decision, mistakenly believing that she could not offer any additional medical reports into evidence after the taking of Dr. Koehler's deposition, misses the point. The glaring problem with this argument is that the claimant was required to *show* the arbitrator that [*27] she had good cause for the continuance. However, she did not refer to the *Marks* decision and offered no explanation in support of her request. Despite what she believed about the Commission's rulings, she did not make any explanation to the arbitrator concerning that belief or offer any other reason in support of her request. Not only did the claimant fail to make this argument during the arbitration hearing, she did not explain why she did not obtain an IME *before* Dr. Koehler's deposition. Dr. Koehler opined that her injury was not causally related to her employment on October 19, 2005, but was not deposed until March 23, 2007, a span of more than a year and five months. Without any argument to show why the IME was necessary and why she had not accomplished it earlier, the claimant did not show good cause for the continuance, and the Commission did not abuse its discretion in so finding.

(2) Causal Relationship

The claimant argues that the Commission's finding that her injury was not causally related to her employment is against the manifest weight of the evidence. It is clear, however, that the claimant offered no medical opinion that the claimant's medical condition was causally related [*28] to her work activities. Apparently, the claimant now argues that the Commission should have relied on Dr. Koehler's first report, used as an exhibit in his deposition, in which he found a causal connection between her injury and her work. The claimant maintains that Dr. Koehler's subsequent change of opinion was based upon faulty information and is not reliable.

It was the claimant's burden to prove all the elements of her claim, including causation, by the preponderance of the credible evidence. *Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840, 847, 663 N.E.2d 1046, 1051, 215 Ill. Dec. 532 (1996)*. To establish causation under the Act, the claimant must prove only that some act or phase of his or her employment was a causative factor in the ensuing injury. *Land and Lakes Co. v. In-*

dustrial Comm'n, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592, 296 Ill. Dec. 26 (2005). An accidental injury need not be the sole or principal causative factor so long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673, 278 Ill. Dec. 70 (2003)*. It is the function of the Commission to decide questions of causation, to judge the credibility of witnesses, and to resolve [*29] conflicting evidence. *Berry v. Industrial Comm'n, 99 Ill. 2d 401, 406, 459 N.E.2d 963, 966, 76 Ill. Dec. 828 (1984)*. A court of review may not substitute its judgment for that of the Commission merely because other inferences could be drawn from the evidence. *Berry, 99 Ill. 2d at 406-07, 459 N.E.2d at 966*. Findings of the Commission will not be overturned unless they are against the manifest weight of the evidence, *i.e.*, unless the record discloses that an opposite conclusion clearly was the proper result. *Gallianetti v. Industrial Comm'n, 315 Ill. App. 3d 721, 729-30, 734 N.E.2d 482, 489, 248 Ill. Dec. 554 (2000)*. When the evidence is sufficient to support the Commission's causation finding, we must affirm. *Benson v. Industrial Comm'n, 91 Ill. 2d 445, 450, 440 N.E.2d 90, 93, 64 Ill. Dec. 538 (1982)*.

Applying these rules, we cannot conclude that the Commission's causation finding was against the manifest weight of the evidence. The overwhelming weight of the evidence establishes that the claimant's condition of ill-being was not causally related to her work. Neither of the claimant's treating physicians expressed the opinion that her medical condition was work-related. The employer introduced the opinions of two physicians that her medical [*30] condition was not work-related. Although Dr. Koehler originally found causation, he changed his opinion after receiving new evidence from the employer which detailed the claimant's work activities. The claimant argues that the evidence the employer provided Dr. Koehler was not reliable and is an insufficient basis in support of his changed opinion. However, it was the Commission's responsibility to resolve questions of fact, to assign weight to the testimony and evidence, and to draw reasonable inferences from the evidence. *Ghere, 278 Ill. App. 3d at 847, 663 N.E.2d at 1051*. The claimant thoroughly cross-examined Dr. Koehler concerning his reliance on the evidence that the claimant did not perform 26 dismissals per day as he had originally believed when he found a causal connection. Dr. Koehler explained that he changed his opinion because the repetitive nature of cleaning 26 rooms per day could cause carpal tunnel syndrome but cleaning only 6 to 10 rooms per day could not. There was ample evidence in the record to support the decision of the Commission. The Commission's finding that the claimant failed to prove causation is not against the manifest weight of the evidence.

CONCLUSION

We [*31] affirm the decision of the circuit court confirming the decision of the Commission.

Affirmed.