2011 IL App (2d) 101250WC-U
2–10–1250WC
Order filed December 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

EDMAR HEATING AND COOLING,	)	Appeal from the Circuit Court
	)	of the 19th Judicial Circuit,
Appellant,	)	Lake County, Illinois
	)	
v.	)	Appeal No. 2-10-1250WC
	)	Circuit No. 10-MR-1080
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Charles Szymczak,	)	Christopher C. Starck,
Appellee).	)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ *1* *Held*: (1) The Commission's finding that the claimant proved that his lower back injury was causally related to a work-related accident was not against the manifest weight of the evidence; (2) the Commission's findings that certain medical treatments provided after August 21, 2007, were reasonable and necessary and that the employer must pay for those treatments and for certain prospective medical treatments were not against the manifest weight of the evidence; (3) the exclusion of a Utilization Review Report offered by the employer was not an abuse of discretion; and (4) portions of the appellee's brief would be stricken for failure to file a cross appeal.

¶ 2 The claimant, Charles Szymczak, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking benefits for a lower back injury he claimed to have sustained while working for Edmar Heating and Cooling (employer). Following a hearing, an arbitrator found that the claimant had failed to prove that his current condition of ill-being was causally related to a work-related accident and denied benefits. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission reversed the arbitrator's decision, with one Commissioner dissenting. The claimant sought judicial review of the Commission's decision in the circuit court of Lake County, which confirmed the Commission's decision. This appeal followed.

¶ 3 FACTS

¶ 4 The claimant worked in the heating and air conditioning business since June 1986 as the owner, president, and employee of the employer. He filed a workers' compensation claim against the employer for injuries he claimed to have sustained in an unwitnessed, work-related accident on June 20, 2006. On that date, the claimant was setting an air conditioner in place on two rails attached to a building when the unit shifted, requiring him to catch it before it fell. The claimant estimated that the air conditioner weighed between 250 and 300 pounds. As he caught the air conditioner, the claimant felt pain in his lower back. The claimant completed an accident report and returned it to his insurance broker on June 26, 2006.

¶ 5 The claimant had been treated for chronic low back pain several times prior to his June 20, 2006, work accident. From 1994 to 2003, the claimant was treated sporadically by Dr. Marshall Dickholtz, a chiropractor. For example, in December 1994, the claimant experienced pain in his lower back for three days and was assessed with chronic lower back pain. On August

3, 1995, Dr. Dickholtz questioned whether the claimant had a pinched nerve because he was experiencing numbness in his left leg and thigh for four days.

¶ 6 The claimant treated with Dr. Dickholtz for chronic low back pain and other problems every year from 1997 through 2003. For example, on January 8, 1998, the claimant returned to Dr. Dickholtz complaining of "pain in low back." In 1999, the claimant was involved in a car accident for which he sought treatment. He reported feeling numbness in his left leg which he continued to experience for many years thereafter. On March 21, 2000, the claimant complained of headaches, numbness in his right hand and left leg, and pain in his "right low back." Three weeks later, he complained of pain in his "left lower dorsal." He reported continued lower and middle back pain in September and October of 2000. Several times in 2001, the claimant complained of lower back pain which he alternately described as "strong," "shooting," and as radiating into his leg. He also complained of sciatica, nerve pain in hands, and intermittent leg pain. On July 2, 2001, a therapist cautioned the claimant to take "care with golfing." On September 25, 2001, the therapist noted "occasional low back pain—leg pain greatly diminished (2 weeks) *** low back and left leg pain." Three weeks later, the claimant returned with "intermittent pain, low back, sore back/lats and calves from golfing," which diminished somewhat by December 2001. On February 15, 2002, Dr. Dickholtz's notes reflected that the claimant's low back pain had improved. However, on January 5, 2003, the claimant suffered a lower back injury after lifting 80 pounds and returned for treatment. The chiropractic records that were introduced into evidence do not include any records of chiropractic treatment after 2003.

¶ 7 Following the June 20, 2006, work accident, the claimant returned to Dr. Dickholtz. Dr. Dickholtz gave the claimant chiropractic treatment until October 2006, when the claimant underwent treatment for a kidney stone. The claimant resumed chiropractic treatment resumed

in December 2006 and continued through March 2007 when the claimant's workers' compensation carrier denied further treatment. The claimant continued working throughout this period.

¶ 8 At the employer's request, Dr. Julie Wehner, an assistant professor of spine surgery at Loyola University Medical Center in Chicago, performed a Section 12 evaluation of the claimant. Dr. Wehner recommended that the claimant undergo a lumbar MRI, which was performed on April 5, 2007. After reviewing the MRI results, Dr. Wehner opined that the claimant had a disc protrusion at L4-L5 on the right side, resulting in a moderate amount of spinal stenosis. She recommended that the claimant receive an epidural steroid injection to treat this condition. Thereafter, Dr. Dickholtz referred the claimant to Dr. Daniel Di Iorio, the claimant's family physician. After reviewing the MRI scan, Dr. Di Iorio also recommended an epidural steroid injection, and referred the claimant to Dr. Gary Magee.

¶ 9 On August 21, 2007, Dr. Magee administered an epidural steroid injection and prescribed physical therapy. The physical therapist's notes of September 19, 2007, reflect that the claimant reported that the chiropractic treatments he received after his June 20, 2006, work accident improved his symptoms "for a while" but that his symptoms "never completely went away." The therapist's notes also indicate that the claimant reported he was "pain free for almost a month" after the August 21, 2007, steroid injection, but his symptoms "began to return" "this weekend." The claimant reported experiencing pain when getting in and out of his vehicle and after prolonged sitting. However, he was able to lift groceries without pain and to golf without increased discomfort. The therapist noted that one of the goals of the claimant's physical therapy was to "remove pain." The therapy notes of October 8, 2007, indicate that the claimant reported that he was "very sore since work on Friday," that he had been "sore for the past 3

days," and that the pain rendered him unable to perform the stretching exercises prescribed by his doctor as "consistently" as he had done in the past.

¶ 10 In mid-October 2007, the claimant traveled to Texas to attend a golf tournament where he played 36 holes of golf in a 3-day period. When he got home, he was sore. He returned to Dr. Magee for a second epidural steroid injection on October 22, 2007. Dr. Magee's records of that visit indicate that, although the claimant "felt significantly improved" following the first steroid injection, he noticed a "recurrence of his back symptoms"—including "pain in his back with some radiation to the left leg"—when he traveled through the airport and during physical therapy. The claimant reported that the second injection did not help as much as the first injection. He continued physical therapy through October 31, 2007.

¶ 11 At the employer's request, Dr. Wehner reviewed additional medical records (including the physical therapist's notes) on December 11, 2007, and issued an additional report. Dr. Wehner concluded that the first epidural steroid injection had resolved the claimant's pain complaints. In support of this conclusion, Dr. Wehner cited the September 19, 2007, physical therapist record which indicated that the claimant reported being pain free for one month after the injection and the facts that the claimant was able to work and to golf without increased discomfort after the injection. Although she acknowledged that the claimant had made "some increased complaints of pain" after the first injection, she opined that these complaints were "the result of golfing" and were "no longer related" to the claimant's work injury. Dr. Wehner opined that the claimant had reached MMI after the first steroid injection and the first course of physical therapy and that there was no need for any further treatments.

¶ 12 On January 22, 2008, Dr. Di Iorio prescribed an electromyography (EMG), which was performed on March 13, 2008. The test was abnormal, showing right L5 and left L4 radiculopathy. Dr. Di Iorio subsequently referred the claimant to Dr. Jack Perlmutter, an

orthopedic surgeon. The claimant saw Dr. Perlmutter on April 16, 2008. After examining the claimant and reviewing his MRI and EMG results, Dr. Perlmutter diagnosed the claimant with symptomatic degenerative disc disease in the lower back and ordered a repeat MRI. Dr. Perlmutter noted that the claimant would probably have to have a discography performed at L4/L5 and possibly elsewhere in the lumbar spine depending on the results of further testing.

¶ 13 At the request of his attorney, Dr. Avi Bernstein, a spinal surgeon, evaluated the claimant on October 28, 2008. Two days later, Dr. Bernstein sent a report of his examination and his opinions to the claimant's counsel. The report noted that the claimant reported the history of his June 20, 2006, work accident to Dr. Bernstein and "denie[d] any prior history of lower back pain." The claimant reported that he had constant pain in his low back, ranging in intensity from approximately 6 through 9 on a scale of 10. Dr. Bernstein noted that the claimant's April 5, 2007, MRI showed degenerative changes in the claimant's lumbar spine at L4-L5 and a "small central protrusion consistent with an annular tear."[1] Dr. Bernstein opined that the claimant suffered a work-related injury on June 20, 2006, which "aggravated a pre-existing degenerative condition of the lumbar spine which appears to have resulted in an annular tear." He noted the claimant could either live with the condition or consider "further workup with surgical intervention." Dr. Bernstein recommended an updated MRI and a lumbar discogram. He opined that, if the discogram was positive, the claimant would be a candidate for either a spinal fusion or a disc replacement.

¶ 14 On December 8, 2008, Dr. Wehner reevaluated the claimant. She opined that the claimant had a preexisting degenerative condition in his spine (as shown by the MRI scans). Although she conceded that the claimant's June 20, 2006, work accident had aggravated this preexisting condition, she described such aggravation as "temporary," and she reiterated her

[1] An annular tear occurs when the tough exterior on an intervertebral disc rips or tears.

conclusion that the claimant reached MMI after receiving the "physical therapy and the epidural [injection]." She stressed that the June 20, 2006, work accident did not cause the degenerative changes in the claimant's spine. Accordingly, although Dr. Wehner agreed that a repeat MRI and a spinal fusion would be reasonable based on the "chronicity" of the claimant's pain, she suggested that the claimant's current symptoms were caused by his preexisting degenerative condition and his reaggravation of that condition while golfing in October 2007, not by his June 2006 work injury.

¶ 15 The MRI recommended by Dr. Bernstein was performed on December 17, 2008. After reviewing the MRI results, Dr. Perlmutter concluded that the claimant needed to undergo an interbody fusion. He agreed with Dr. Bernstein that the claimant should also undergo a discography to determine how extensive his surgery would be.

¶ 16 Dr. Bernstein testified by evidence deposition on April 21, 2009. Although he testified that the claimant probably had some preexisting degenerative changes at L4-L5 (which Dr. Bernstein described as normal for a man his age), he opined that there was a causal connection between the claimant's June 20, 2006, work accident and the chronic lower back pain that the claimant had suffered ever since that accident. Dr. Bernstein disagreed with Dr. Wehner's opinions that the claimant reached MMI after the first steroid injection on August 21, 2007, and that his golfing in October 2007 caused an new injury. Dr. Bernstein stated that he might agree with Dr. Wehner's conclusions if the claimant was "completely relieved of his symptoms for months" after the first steroid injection. However, Dr. Bernstein found that a period of two months without pain was too short to support Dr. Wehner's opinion.

¶ 17 During his cross-examination, Dr. Bernstein reviewed Dr. Dickholtz's records which outlined the chiropractic treatment that the claimant had received from 1994 through 2003. Dr. Bernstein was asked whether the claimant's history of back pain and chiropractic treatment from

1997 through 2003 and the fact that the claimant had suffered a lifting accident in 2003 would lead him to conclude that the claimant's current condition of ill-being might be related to the claimant's preexisting back condition. Dr. Bernstein responded that it depended on whether the claimant was symptomatic between 2003 and 2006. Because Dr. Dickholtz's records did not reflect that the claimant sought any treatment for back pain between June 2003 and June 2006, Dr. Bernstein concluded that the claimant was asymptomatic during that period and, therefore, that his June 20, 2006, work injury caused a new aggravation of his preexisting back condition. Dr. Bernstein testified that he "didn't find any evidence that [the claimant] had a temporary aggravation" of his preexisting condition. Rather, he opined that the claimant's June 20, 2006, work accident had caused a "permanent" aggravation of that condition. Dr. Bernstein also noted that the back problems that the claimant suffered from 1994 through 2006 could have been "lumbar strains" which are "muscular causes of pain" that, unlike his current injury, are merely "temporary aggravations of degenerative conditions" which may be successfully treated by chiropractic care. For these reasons, Dr. Bernstein concluded that his review of the records of the claimant's chiropractic treatment did not change his causation opinion "in any way."

¶ 18 Dr. Wehner testified by evidence deposition on May 20, 2009. Dr. Wehner testified that the radiographic images of the claimant's lower back revealed a preexisting degenerative process. She read the claimant's physical therapy records as showing that the claimant's pain had resolved completely after his first steroid injection on August 21, 2007, and that his symptoms returned only after he played golf in October 2007. Thus, Dr. Wehner opined that the claimant's June 20, 2006, work accident caused a temporary aggravation of his preexisting condition which had resolved completely before a new injury (which occurred when the claimant played golf) reaggravated that condition and caused his current symptoms. However, during her

cross-examination, Dr. Wehner admitted that lifting can cause an annular tear or aggravate a preexisting degenerative disc disease or a preexisting lumbar spinal stenosis.

¶ 19 During the arbitration hearing, the claimant admitted that he had experienced episodes of low back pain from 1995 through 2003 for which he sought treatment from Dr. Dickholtz. According to the claimant, Dr. Dickholtz's treatment of the claimant's back problems during this period consisted entirely of chiropractic manipulation and ultrasound therapy. The claimant testified that his complaints during this period consisted of minor, muscle-related low back pain which was always resolved by chiropractic care. For example, when the claimant experienced low back pain while lifting in June 2003, the pain was resolved after only one visit to Dr. Dickholtz.

¶ 20 However, the claimant testified that, after his June 20, 2006, work injury, the pain that he experienced was more intense and it did not go away with chiropractic care. Moreover, although he conceded that he felt better temporarily after the first steroid injection on August 21, 2007, the claimant testified that he continued to have lower back pain thereafter, even before he played golf in October 2007. He claimed that he called the employer's workers' compensation insurer on September 24, 2007, and told an insurance adjuster that he needed to schedule another steroid injection. He also stated that he had back pain while traveling to Texas and walking through the airport before he golfed.

¶ 21 Although the claimant admitted that he told his treating doctors that he did not have a prior back problem before the June 20, 2006, accident, he suggested that this statement was not untrue or inaccurate because his prior chiropractic treatments had merely "helped [his] muscle[s]."

¶ 22 The arbitrator found that the claimant had sustained an accident arising out of and in the course of his employment but denied benefits because he found that the claimant had failed to

prove that his current condition of ill-being was causally related to the accident. The arbitrator found that the claimant had a preexisting condition of lower back pain and a substantial history of treatment for that condition prior to the accident. The arbitrator also found that the claimant had fully recovered from his June 20, 2006, injury after the first steroid injection and then reaggravated his preexisting back condition while golfing in October 2007. Thus, the arbitrator concluded that the June 20, 2006, injury was merely a temporary aggravation of the claimant's chronic preexisting lower back condition that had fully resolved by August 2007, and it was the subsequent golf outing, not the June 20, 2006, accident, that caused the claimant's current condition of ill-being. In reaching these conclusions, the arbitrator credited Dr. Wehner's medical opinions over those of Dr. Bernstein, in part because it found that Dr. Bernstein's causation opinion was based on false information (specifically, the claimant's misrepresentation that he had no prior back pain or back treatments). The arbitrator found the claimant's testimony to be "of limited credibility and not persuasive."

¶ 23 Based on these findings, the arbitrator ordered the employer to pay for claimant's back treatments only through the date of the first steroid injection (August 21, 2007), including two months of chiropractic treatments by Dr. Dickholtz.[2] It ruled that any subsequent medical treatments were "unreasonable and unnecessary due to the break in the causal connection." Further, the arbitrator noted that the employer had paid all medical bills through April 16, 2008, and was entitled to a credit for the amounts it had paid. The arbitrator also ruled that the employer was entitled to a credit for a $7,500 advance it made to the claimant on December 8, 2008. In addition, the arbitrator declined to bar the testimony and expert report of the

[2] Based on the deposition testimony of Drs. Wehner and Bernstein, the arbitrator concluded that chiropractic treatment of more than two months is not effective and is therefore excessive.

employer's medical expert and declined to award the claimant other penalties and fees as a sanction for the employer's alleged misuse of the Commission's subpoena power.

¶ 24 The claimant appealed the arbitrator's decision to the Commission. The Commission reversed, with Commissioner Basurto dissenting. The Commission found Dr. Bernstein's testimony to be "more credible and more persuasive" than Dr. Wehner's testimony. First, the Commission noted that there was "no evidence" to indicate that the claimant had received any treatment to his lower back from 2003 until the June 20, 2006, work accident. The Commission agreed with Dr. Bernstein that this "indicates that the lower back was not an active problem and [the claimant] did not feel the need to seek care" during that period. The Commission credited Dr. Bernstein's opinion that the claimant's June 20, 2006, work accident "permanently aggravated [his] pre-existing lumbar condition." Moreover, the Commission rejected Dr. Wehner's opinion that the claimant reached MMI after the first steroid injection because it found that the physical therapy records and the claimant's testimony indicated that the claimant had suffered back pain after the injection and before the October 2007 golf outing (*e.g.*, during physical therapy and while walking through the airport).

¶ 25 Accordingly, the Commission ordered the employer to pay all of the claimant's medical bills that were incurred after August 21, 2007, subject to the medical fee schedule. In addition, the Commission ordered the employer to pay for discography and fusion surgery recommended by Dr. Perlmutter, all subsequent treatment and physical therapy, and two months' worth of Dr. Dickholtz's chiropractic treatments.[3]

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[3] The Commission did not require the employer to pay for the entire regimen of chiropractic treatments performed by Dr. Dickholtz (which continued for approximately nine months after the June 20, 2006, accident) because "[e]ven Dr. Bernstein testified that a chiropractor's treatment lasting more than 2 months is not effective and therefore may not be

¶ 26 Commissioner Basurto dissented. He noted that the arbitrator did not find the claimant to be credible, and there was "no basis to reverse the decision of the arbitrator" because "the record is replete with instances of the [claimant] not telling the truth to his treating physicians[.]" Commissioner Basurto stated that "the arbitrator is in the best position to judge credibility" because he observed the claimant's demeanor firsthand. Moreover, he found that the "manifest weight of the evidence" supported the arbitrator's credibility finding. Thus, Commissioner Basurto concluded that the arbitrator's "well reasoned" decision should be affirmed.

¶ 27 The employer sought judicial review of the Commission's decision in the circuit court of Lake County. In the claimant's brief to the circuit court, the claimant defended the Commission's decision regarding causation and benefits but challenged another ruling contained in the Commission's order. Specifically, the claimant argued that the Commission's denial of the claimant's request for attorney fees and penalties was against the manifest weight of the evidence. The circuit court held that the Commission's decision was neither contrary to law nor against the manifest weight of the evidence, and it confirmed the Commission's decision "on all issues raised by the appellant and on cross-appeal by the cross-appellant." This appeal followed.

¶ 28 ANALYSIS

¶ 29 1. Causal Connection Between Work Injury and the Claimant's Present Condition

¶ 30 The employer argues that the Commission's finding that the claimant's June 20, 2006, work accident was causally related to his current lower back condition and need for surgery is against the manifest weight of the evidence. We disagree.

¶ 31 To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial*

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reasonable."

Comm'n, 359 Ill. App. 3d 582, 592 (2005). However, a work-related injury "need not be the sole causative factor, nor even the primary causative factor, as 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 (2003). Thus, even if an employee has a preexisting condition which makes him more vulnerable to injury, recovery will not be denied as long as it can be shown that his employment was also a causative factor. *Id.* Accordingly, an employee may recover under the Act if he shows that he suffered a work-related accident that aggravated or accelerated a preexisting condition. *Id.*

¶ 32 Whether a causal connection exists between a claimant's condition of ill-being and his employment is an issue of fact to be decided by the Commission. *Id.*; see also *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (2011). In determining causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences from the evidence may be drawn. *Berry*, 99 Ill.2d at 407. The Commission's findings will not be overturned unless they are against the manifest weight of the evidence (*Tower Automotive*, 407 Ill. App. 3d at 434), *i.e.*, unless the record discloses that an opposite conclusion is "clearly apparent." *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992); see also *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729-30 (2000). When the evidence is sufficient to support the Commission's causation finding, we must affirm. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 33 Applying these standards, we cannot conclude that the Commission's causation finding was against the manifest weight of the evidence. Dr. Bernstein opined that the claimant's June 20, 2006, work injury permanently aggravated his preexisting lower back condition. He disagreed with Dr. Wehner's conclusion that the claimant had reached MMI after the first steroid injection on August 21, 2007, because the claimant was pain free for too short a time after that injection to support a finding of MMI. Dr. Bernstein also disagreed with Dr. Wehner's finding that the claimant suffered a new, entirely independent aggravation of his preexisting back problem while golfing in October 2007. The record evidence supports Dr. Bernstein's conclusions. For example, the physical therapy records show that the claimant complained of lower back pain after the first steroid injection but before the claimant's October 2007 golf outing. In addition, the claimant testified that he called the employer's workers' compensation insurance carrier to schedule a second injection on September 24, 2007, three weeks before the golf outing.

¶ 34 These facts strongly suggest that the aggravation of the claimant's lower back which was caused by the June 20, 2006, work injury had not resolved prior to the golf outing. Thus, the golf incident was at most a "contributing cause" of the claimant's current condition, not an "intervening cause" that broke the causal chain between the June 20, 2006, aggravation and the claimant's current condition of ill-being. See, *e.g.*, *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 247 (1970); *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742 (1994). The fact that the claimant reported that he felt better for a while before the October 2007 golf outing and worse afterwards does not change this analysis. *See Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 788 (2005) (holding that the fact that the claimant testified that he was "doing fine" and experiencing no pain until after he was involved in a subsequent, non-work-related accident "d[id] nothing to change the fact" that the claimant was in a weakened condition

as a result of the initial work-related accident and was therefore susceptible to the injury he suffered after the subsequent accident); *Teska*, 266 Ill. App. 3d at 742-43 (reversing the Commission's finding that claimant suffered an intervening accident when he experienced pain while bowling approximately a year after he sustained a cervical injury at work, and holding that "[m]erely because claimant experienced an upsurge of neck pains while bowling *** does not mean that the causal connection was broken"); see also *Lasley Construction Co., Inc. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893 (1995); *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 836 (1993).

¶ 35 Moreover, although the claimant received chiropractic treatments for back problems from 1994 through 2003, the evidence suggests that the June 20, 2006, accident significantly aggravated his lower back condition. Dr. Dickholtz's records show that, in the nine years that Dr. Dickholtz treated the claimant, Dr. Dickholtz never recommended that the claimant undergo an MRI or an EMG or suggested that the claimant should consider surgery to repair his lower back. The claimant's intermittent back pain was treated successfully by chiropractic care during this period, and the claimant never filed a workers' compensation claim relating to his lower back condition at that time. By contrast, after the June 20, 2006, accident, chiropractic care was no longer effective, and the claimant was forced to seek other remedies, including steroid injections and surgery. It was only after the work accident that the claimant's doctors ordered him to undergo an MRI and an EMG, and only then that the claimant filed a workers' compensation claim. Moreover, Dr. Dickholtz's records suggest that the claimant received no chiropractic treatment from June 2003 until after the June 20, 2006, accident. Dr. Bernstein took this to mean that the claimant was asymptomatic during that period. Further, the claimant testified that his back pain was both more intense and more resistant to treatment after the work accident.

¶ 36 Accordingly, there was ample evidence to support the Commission's causation finding. Although Dr. Wehner reached a different conclusion, it is the Commission's province to weigh the evidence and to resolve conflicts in medical opinion testimony. The Commission chose to resolve the conflict between the expert's opinions in favor of the claimant. On this record, we cannot say that the opposite conclusion was clearly apparent.

¶ 37 The employer argues that we should "give deference" to the arbitrator's finding that the claimant was not a credible witness because "only [the arbitrator] had the opportunity to observe the claimant's character and demeanor while testifying." We have repeatedly rejected this argument, and we do so again here. The Commission "exercises original jurisdiction and is not bound by an arbitrator's findings." *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (2010); see also *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279, 285 (2004); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483 (1989). Thus, when the Commission makes credibility findings which are contrary to those of the arbitrator and gives sufficient reasons to permit judicial review, the only question is whether the Commission's findings are against the manifest weight of the evidence. *R & D Thiel*, 398 Ill. App. 3d at 866. We will not employ an extra degree of scrutiny to the Commission's credibility findings merely because they contradict those of the arbitrator. *Id.;* see also *Hosteny*, 397 Ill. App. 3d at 676.[4]

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[4] In *S & H Floor Covering, Inc. v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 259, 267 (2007), we stated in *dicta* that "it may very well be time to reconsider the Commission's prerogative to determine credibility regardless of the arbitrator's decision," and that we "will consider" employing an "extra degree of scrutiny" to the record in determining whether there is sufficient support for the Commission's decision when the Commission "makes credibility determinations regardless of the arbitrator's findings." However, in several subsequent decisions, we reaffirmed the traditional standard of review and declined to employ

¶ 38 Moreover, contrary to the employer's argument, the issue of the claimant's credibility was not dispositive in this case because there was other credible evidence to support the Commission's causation finding, including the physical therapy records, Dr. Dickholtz's records, and Dr. Bernstein's testimony. The employer erroneously maintains that Dr. Bernstein's opinion was "based on" the claimant's misrepresentation that he had never experienced or been treated for low back pain prior to the June 20, 2006, accident. Contrary to the claimant's assertion, however, Dr. Bernstein reviewed Dr. Dickholtz's records—which outlined the chiropractic treatment that the claimant had received for his lower back condition from 1994 through 2003—and concluded that these records did not change his causation opinion "in any way."

¶ 39 2. Whether the Claimant's Medical Treatments Were Reasonable and Necessary

¶ 40 The employer argues that all of the medical treatments the claimant received for his lower back after the August 21, 2007, epidural steroid injection were unreasonable and unnecessary and that only the first 12 chiropractic treatments he received were reasonable and necessary. Because we uphold the Commission's findings that the claimant did not reach MMI on August 21, 2007, and that his current condition of ill-being is causally related to his work accident, we agree with the Commission that the medical treatments provided after August 21, 2007, were reasonable and necessary and that the employer must pay all of the claimant's medical bills for those treatments subject to the medical fee schedule. We also agree that the employer must pay for the discography and fusion surgery recommended by Dr. Perlmutter and all subsequent treatment and physical therapy. The Commission's conclusions on these issues were not against the manifest weight of the evidence.

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extra scrutiny when reviewing a Commission decision that was based on credibility findings which contradicted the credibility findings made by the arbitrator. See, *e.g.*, *R & D Thiel*, 398 Ill. App. 3d at 866; *Hosteny*, 397 Ill. App. 3d at 676.

¶ 41 We also agree with the Commission's conclusion that the employer should be required to pay for only the first two months of Dr. Dickholtz's chiropractic treatments. The Commission's conclusion on this issue was based on Dr. Bernstein's testimony that chiropractic treatment for more than two months is not effective. The employer notes that Dr. Wehner testified that the usual course of chiropractic treatment is 12 to 15 visits and argues that only 12 visits were reasonable and necessary in this case. Dr. Wehner's testimony does not appear to conflict materially with Dr. Bernstein's testimony on this issue. However, assuming there was a conflict, it was the Commission's province to resolve it. The Commission's finding that the employer must pay for two months of chiropractic treatment was not against the manifest weight of the evidence.

¶ 42 3. The Exclusion of the Utilization Review Report

¶ 43 The employer argues that the Commission abused its discretion when it upheld the arbitrator's decision to exclude the employer's Exhibit No. 10, which was a report that stemmed from the utilization review performed of the claimant's chiropractic treatment. During the June 15, 2009, arbitration hearing, the claimant's counsel objected to the report on hearsay grounds, and the arbitrator sustained the objection and excluded the report. Although the employer had sent the claimant a letter on February 16, 2009, communicating its intent to introduce the utilization review report into evidence during the hearing, the claimant did not indicate that he was objecting to the report until the employer's counsel moved to introduce it at the hearing four months later. The employer argues that the claimant waived any objection to the admission of the report by this dilatory conduct and that the report should have been admitted.

¶ 44 We disagree. As an initial matter, the employer raised this issue for the first time in its appeal of the Commission's decision to the circuit court. It did not raise the issue before the Commission. The issue is therefore waived. See, *e.g., R.D. Masonry, Inc. v. Industrial Comm'n*,

215 Ill. 2d 397, 414 (2005) ("Arguments not raised before the Commission are waived on appeal."); see also *U.S. Steel Corporation-South Works v. Industrial Comm'n*, 147 Ill. App. 3d 402, 406 (1986) (ruling that an issue raised for the first time in the circuit court "may be considered waived because the circuit court *** has no authority to consider evidence or arguments not presented before the Commission").

¶ 45 In any event, even if we were to consider the issue, we would reject the employer's argument. The employer has presented no authority for the proposition that a party to a workers' compensation proceeding waives an objection to the admission of evidence, even though the party objected at the time the opposing party moved for its admission, merely because the party failed to announce its intention to object to the evidence before the hearing.[5] Nor have we found any such authority. The claimant's objection to the admission of the utilization review report was timely and proper. Moreover, because the claimant had not stipulated to the admission of the report prior to the hearing, the employer should have anticipated that the claimant might

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[5] The cases cited by the employer are distinguishable and inapposite. *City of Chicago v. Workers' Compensation Comm'n*, 387 Ill. App. 3d 276 (2008), addressed the Act's requirement that the parties exchange IME reports no later than 48 hours before a case is set for hearing. Although we reversed the arbitrator's decision excluding the employer's IME report in that case, we did so based upon our construction of the Act, not upon the claimant's failure to object to the admission of the report prior to the hearing. *Department of Transportation v. Bouy*, 69 Ill. App. 3d 29, 40 (1979), is also inapposite. That case held that a party's objection to the admission of expert witness testimony was timely, even though it was raised *after* the opposing party first moved to admit the testimony at trial, where the objection was raised "as soon as the character of the objectionable testimony [became] apparent." If anything, *Bouy* undermines the employer's argument that the claimant waived its objection by not raising it before the hearing.

object to its admission on hearsay grounds and should have prepared to meet such an objection. At a minimum, the employer could have moved for a continuance so the author of the report could testify and be cross-examined at the hearing. The employer failed to do so. Its only argument in favor of admission was that the claimant had failed to object prior to the hearing. The employer does not argue that the report was not hearsay or that it fell within a hearsay exception. Accordingly, the Commission's decision to exclude the report was not an abuse of discretion.

¶ 46 4. Whether the Employer is Entitled to any Credits

¶ 47 After concluding that the claimant had reached MMI on August 21, 2007, and that the claimant had failed to prove a causal connection between his work accident and his current state of ill-being, the arbitrator ruled that the employer was entitled to a credit for any bills it paid for medical services rendered after August 21, 2007, and for a $7,500 advance it made to the claimant on December 8, 2008. However, as noted above, the Commissioner reversed the Commission's causation finding and ordered the employer to pay for medical services rendered after August 21, 2007, including prospective medical care. Therefore, although it did not address the issue of whether the employer was entitled to any credits, it implicitly rejected the arbitrator's ruling on that issue. The employer now argues that, if we reverse the Commission and reinstate the arbitrator's award, we should also reinstate the arbitrator's rulings on the issue of credits. Because we affirm the Commission's decision, we need not reach this issue.[6]

¶ 48 5. The Employer's Motion to Strike Portions of the Appellee's Brief for Failure to File a Cross-Appeal

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[6] Although the claimant challenges the Commission's "[d]etermination" that the employer shall have credit for the $7,500 advance it paid to the claimant, we do not believe that the Commission ever made any such determination.

¶ 49 The claimant argues in his appellee's brief that the Commission erred by refusing to bar the testimony and expert report of the employer's medical expert and by refusing to award the claimant other penalties and fees as a sanction for the employer's alleged misuse of the Commission's subpoena power. Although the claimant raised this issue before the arbitrator, the Commission, and the circuit court, he did not file a cross-appeal raising the issue before this Court. The employer has filed a motion to strike the claimant's arguments because the claimant failed to file a cross-appeal.

¶ 50 We agree with the employer that this issue has not been properly presented to this court. Where a decision of the Commission "contains a specific finding adverse to an appellee," "the appellee must file a cross-appeal raising as an issue that adverse finding." *Ruff v. Industrial Comm'n of Illinois*, 149 Ill. App. 3d 73, 78 (1986); see also *City of Wilmington v. Industrial Comm'n*, 52 Ill. 2d 587, 591 (1972); *Nelson v. Industrial Comm'n*, 194 Ill. App. 3d 10, 17-18 (1990); *Burrgess v. Industrial Comm'n*, 169 Ill. App. 3d 670, 677 (1988). Here, the claimant's challenges to the Commission's decisions to admit the employer's medical expert's testimony and to deny the claimant's request for sanctions concern specific findings adverse to the claimant contained in a judgment which was otherwise favorable to him. Moreover, these findings are separate from and unrelated to the issues raised by the employer on appeal. Thus, the claimant could only challenge the Commission's findings on these issues in this court by filing a cross-appeal. See, *e.g.*, *City of Wilmington*, 52 Ill. 2d at 591; *Ruff*, 149 Ill. App. 3d at 78; *Burrgess*, 169 Ill. App. 3d at 677.

¶ 51 The cases cited by the claimant do not affect this analysis. *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 174-75 (1988), merely stands for the proposition that an appellee may "*sustain* the decision of the circuit court on any grounds called for by the record," and that, when urging an appellate court to *affirm* a judgment, the appellee

may challenge findings of the circuit court that are adverse to him without filing a cross-appeal. (Emphasis added.) However, *Landmarks Preservation Council* has no application to the situation presented here, where the claimant is urging us to *reverse* certain rulings that the circuit court made against him. *Hurt v. Industrial Comm'n*, 191 Ill. App. 3d 733, 738 (1989), *Harrawood v. Industrial Comm'n* 66 Ill. 2d 230, 232-33 (1977), and *Murrelle v. Industrial Comm'n*, 382 Ill. 128, 132-33 (1943), also do not apply. Those cases merely hold that because a writ of *certiorari* to the circuit court brings the entire record before the circuit court, an appellee does not need to file a separate writ of *certiorari* in order to challenge aspects of the Commission's decision before that court. None of these cases stands for the proposition that an appellee may challenge adverse findings by the Commission in the *appellate court* without filing a cross-appeal. As noted above, all of the cases addressing this issue have reached the opposite conclusion.

¶ 52 Accordingly, the issues that the claimant attempts to raise have not been properly presented before this court and are therefore waived. See, *e.g.*, *Ruff*, 149 Ill. App. 3d at 78. The employer's motion to strike the portions of the appellee's brief addressing these issues is granted.

¶ 53 CONCLUSION

¶ 54 For the reasons set forth above, we affirm the judgment of the circuit court of Lake County, which confirmed the Commission's decision. In addition, we grant the employer's motion to strike portions of the appellee's brief for failure to file a cross-appeal.

¶ 55 Circuit court affirmed. Appellant's motion to strike granted. The matter is remanded to the Commission for further proceedings.