Workers' Compensation
Commission Division
Filed: January 9, 2012

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2011 IL App (1st) 103274WC-U

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RICHARD OLCIKAS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
Appellant,	)	
v.	)	Appeal No. 1-10-3274WC
	)	Circuit No. 09-L-51761
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Dominick's Finer	)	James C. Murray,
Foods, Inc., 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*: The Commission's finding that the claimant failed to prove that his knee injury was causally related to a work-related accident was not against the manifest weight of the evidence. Accordingly, the Commission properly denied the appellant's claims for benefits, penalties, and attorney fees. In addition, the Commission's calculation of the claimant's average weekly wage was not against the manifest weight of the evidence.

¶2. The claimant, Richard Olcikas, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for a knee injury he claimed to have sustained while working as an employee of respondent Dominick's Finer Foods, Inc. (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). Although it rejected some of the arbitrator's findings and applied somewhat different reasoning, the Commission affirmed the arbitrator's decision, with one Commissioner dissenting. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶3. FACTS

¶4. The claimant has worked for the employer since 1967. Since 1973, the claimant has worked as an order picker in one of the employer's warehouses. His responsibilities include picking products from the warehouse shelves for later distribution to the employer's stores. In performing his job duties, the claimant used a lift truck, but he had to remove the products from the shelves manually.

¶5. On May 6, 2002, the claimant was working in the warehouse, picking an order of bottled water. The bottles of water were stacked on a pallet that was located behind an empty pallet. In order to reach the water, the claimant wedged his foot between the empty pallet and a vertical rail that was attached to a set of shelves. The claimant then began to toss cases of bottled water

onto his lift truck. While tossing a case of water, the claimant lost his balance. His body twisted but his left foot stayed in place between the empty pallet and the vertical rail, causing him to feel a sharp pain "on the inside of" his left knee. He continued to work that day, but his knee was painful and he was limping. The following day, he reported the accident to his employer and filled out an accident report.

¶6. On May 9, 2002, the claimant saw the company physician, Dr. John McConnell. Dr. McConnell's notes of that visit reflect that the claimant reported that he "felt a sharp pain along the medial aspect of the left knee" during his recent work accident and that he was still having pain. Dr. McConnell's records also note that the claimant was concerned that he might have a significant injury, although he denied experiencing any clicking or locking in his knee. While examining the claimant, Dr. McConnell noted some "mild swelling of the superior medial aspect of the [claimant's] left knee," and that the claimant "complain[ed] of pain with palpitation along the medial aspects of the upper left knee." However, Dr. McConnell noted that the knee joint was not swollen, and stress testing revealed that the claimant had no "laxity or ligament separation." Dr. McConnell's assessment was "[l]eft knee pain; rule out medial collateral ligament strain." He prescribed physical therapy and Vioxx and released the claimant to work full duty without restrictions.

¶7. Dr. McConnell saw the claimant three more times in May 2002. On May 22, 2002, the claimant told Dr. McConnell that his left knee was "feeling a little better." Dr. McConnell's notes reflect that the claimant had no swelling or deformity in the knee and that he had full range of motion in the knee and a normal gait. Dr. McConnell continued the claimant on Vioxx. On

May 29, 2002, the claimant reported that he "still had some soreness in his medial left knee with ambulation but overall his knee [was] improving." He still had full range of motion and no swelling in the knee. Dr. McConnell again continued him on Vioxx.

¶8. On August 27, 2002, the claimant returned to see Dr. McConnell for a reevaluation of his left medial knee pain. Dr. McConnell's notes of that visit indicate that the claimant "stat[ed] that the pain in his left knee [was] largely gone now, except that on Monday when he does a lot of picking, he feels pain along the medial, inferior aspect of the left knee and that the pain persists until about Wednesday, at which point it resolves." The claimant was working full duty at that time and was no longer taking pain medication. He denied experiencing any clicking or locking of his left knee. He had a normal gait and did not have any swelling. However, the claimant experienced "mild tenderness with palpation of the medial aspect of the tibial tuberosity."[1] Dr. McConnell's assessment was "[l]eft medial knee pain. Rule out posttruamatic arthritis/neuritis." He recommended that the claimant "[r]estart the Vioxx" on "Sunday, Monday, and Tuesday only" and apply ice to the medial aspect of the left knee as necessary. He authorized the claimant to continue working full duty and recommended that the claimant return for a follow-up appointment two weeks later. The claimant asked Dr. McConnell if he should have an MRI "to evaluate his continued knee pain," but Dr. McConnell did not think that an MRI was necessary at that time.

¶9. The claimant testified that he returned to Dr. McConnell's office in September 2002 but

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[1] The "tibial tuberosity" is an elevation at the end of the shin bone to which the ligament of the kneecap attaches.

was told by the doctor's office that the employer had not authorized the visit. The claimant testified that he continued to experience pain in his left knee at that time and he asked the employer to approve further treatment. He claimed that he repeatedly spoke with Joseph Reformando, a fellow warehouse employee, about his situation.[2] Reformando informed Antoinette Blumenberg, who worked in the employer's risk management department, that the claimant was requesting authorization to see his own doctor for his left knee injury. On December 12, 2002, Blumenberg sent Reformando an e-mail stating that the employer would not provide authorization under the claimant's claim. On March 11, 2003, Blumenberg sent the claimant a letter formally denying his claim and informing him that the employer had concluded that his claim did not arise out of and in the course of his employment. The claimant testified that, some time between August 27, 2002 and May 2003, he asked the employer if he could see a Dr. Hennessey to obtain treatment for his knee, but the employer denied authorization. The claimant also testified that his group insurance carrier would not cover any treatment for his left knee because they considered it work related and, therefore, a matter for workers' compensation.

¶10. In May 2003, while being treated by Dr. McConnell for a ruptured biceps tendon that he had suffered at work, the claimant complained of having some pain in his left knee. Dr. McConnell's notes reflect that the claimant related this pain "to a previous injury." However, Dr. McConnell "suggest[ed] that we focus on [the claimant's] present medical condition," *i.e.*,

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[2] Reformando also worked in the employer's warehouse. The claimant described him as a liaison between the warehouse employees and the employer's human resources department.

his biceps injury.

¶11. Throughout 2002 and 2003, the claimant was treated by his regular physician, Dr. Daleo, for high blood pressure and other medical issues. The claimant testified that he told Dr. Daleo that he still had a knee problem, but he "never confronted him" about his knee because he was the claimant's "regular M.D." Dr. Daleo recommended that the claimant see Dr. Alan Brecher, an orthopedic surgeon, for treatment of his biceps injury.

¶12. On May 27, 2003, Dr. Brecher surgically repaired the claimant's biceps tendon. During a postoperative visit on July 9, 2003, the claimant told Dr. Brecher that he had injured his left knee a year before at work and complained of continuing knee pain. Dr. Brecher's medical report of the July 9, 2003, visit states that the claimant "is tender along the medial joint line today. He says it hurts on the jog [*sic*]. I think he needs an MRI scan to rule out a meniscal[3] tear. I will go ahead and order that MRI scan." The MRI was conducted on July 17, 2003. It revealed that the claimant had a tear in the posterior horn of the medial meniscus. It also showed that the claimant had degenerative changes involving the menisci. Dr. Brecher told the claimant that he could either live with the meniscal tear or that he could have an arthroscopy to repair it at some point. The claimant saw Dr. Brecher again on July 23, 2003, September 17, 2003, and February 25,

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[3] A "meniscus" is a disk of cartilage that acts as a cushion between the ends of bones in a joint. The "medial meniscus" is a crescent-shaped band of cartilage attached to the shinbone that acts as a shock absorber for the knee.

2004. Each time, the claimant exhibited the same symptoms, and Dr. Brecher recommended arthroscopy. However, each time, the claimant elected not to have surgery. The claimant returned to work from his right arm injury in October 2003 and continued to work in the employer's warehouse thereafter.

¶13. On November 3, 2006, the claimant took the evidence deposition of Dr. Brecher. Dr. Brecher opined that claimant's torn left medial meniscus was causally related to the claimant's May 6, 2002, work accident. Dr. Brecher noted that, when he examined the claimant's left knee on July 9, 2003, the claimant had tenderness along the medial joint line, which Dr. Brecher believed was indicative of a meniscal tear. Dr. Brecher also testified that he had reviewed Dr. McConnell's medical records, and he opined that the type of knee injury that the claimant had described to Dr. McConnell during the May 9, 2002, visit was consistent with Dr. Brecher's clinical findings in July 2003 and with the subsequent MRI results. However, during cross-examination, Dr. Brecher acknowledged that the MRI also showed degenerative changes in the menisci, and he conceded that it was possible that the claimant's meniscal tear was a degenerative condition rather than the result of a work-related injury. During redirect examination, however, Dr. Brecher stated that he believed the claimant's meniscal tear was separate from the degenerative changes shown in the MRI.

¶14. On April 19, 2007, claimant underwent a Section 12 examination by Dr. Scott Kale at the employer's request. Dr. Kale interviewed and examined the claimant and reviewed his medical records. The claimant gave a consistent history of the May 6, 2002, work accident. He reported intermittent left knee pain with no limping, leg collapse, or altered gait. Dr. Kale's examination

revealed normal range of motion of claimant's left knee with no evidence of internal derangement. The claimant was working full duty without restrictions at the time. Dr. Kale opined that the claimant had reached maximum medical improvement and no further care was necessary.

¶15. On July 18, 2007, claimant returned to Dr. Brecher. The claimant reported ongoing pain in his left knee. Dr. Brecher noted that the claimant was "tender along the medial joint line." Dr. Brecher was still of the opinion that claimant would benefit from an arthroscopy. This time, the claimant agreed to undergo the procedure and asked his employer to authorize a repeat MRI and an arthroscopy. However, the employer never authorized the arthroscopy.[4]

¶16. On March 14, 2008, the employer's attorney sent a letter to Dr. Kale requesting comment concerning claimant's accident on May 6, 2002. The employer's attorney provided Dr. Kale with more contemporary data, including Dr. Brecher's July 18, 2007, medical record, which identified the need for an MRI scan of the claimant's left knee with a subsequent arthroscopy due to complaints of continued pain in the medial left knee. Dr. Kale reviewed the additional information and issued an addendum report on March 24, 2008. In that report, Dr. Kale acknowledged that the treatment provided by Dr. Brecher in 2003 and 2004 included evidence of left knee tenderness with an option towards future surgery, but he noted that this option "had not been acted on until 2007." He also noted the "absence of care from April 2004 through July 18,

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[4] The claimant's attorney had sent the employer's attorney two letters in October 2004 informing him that the claimant's group insurance carrier was refusing to cover the arthroscopy because it deemed the claimant's knee injury to be work related.

2007." Dr. Kale opined that claimant had reached maximum medical improvement with respect to his left knee injury by August 2002 and that "any complaints that [the claimant] was currently experiencing and any need for invasive care [were] functions of a non-work related experience and/or degenerative changes, and [were] not reasonably associated with his left knee injury in 2002," both because he had reached maximum medical improvement by August 2002 and because of the large gaps in his care and treatment for his knee. Insofar as claimant had reached maximum medical improvement in 2002 and was shown to have a medial meniscal tear in 2003, Dr. Kale opined that the "dysjunction [*sic*] between those two periods is too long to relate them reasonably." Dr. Kale opined that any need that the claimant had for an MRI scanning or for surgery of his left knee were "not work-related" and "represent[ed] an independent cause not related to any trauma [the claimant] experienced at [work]."

¶17. On May 27, 2008, the employer took the evidence deposition of Dr. Kale. During the deposition, Dr. Kale opined that, from May 6, 2002, through August 27, 2002, the claimant showed no sign of a tear in the meniscus or any evidence of internal derangement that would justify a need for surgery of his left knee. He opined that, if the claimant's May 6, 2002, work injury had caused a meniscal tear, it would have been demonstrated before 2003. He opined that Dr. McConnell's August 27, 2002, examination of the claimant showed no indication of a meniscal tear. Instead, that examination revealed only that the claimant had some "mild tenderness in the medial aspect of the tibial tuberosity," which is "the area of a bone which is attached to a tendon" that "has nothing to do with the inside of the knee itself." Accordingly, Dr. Kale reiterated his opinion that the trauma the claimant experienced on May 6, 2002, was

effectively resolved by August 27, 2002, and the meniscal tear was a new injury or alteration to claimant's left knee that was caused by additional events.

¶18. On cross-examination, Dr. Kale acknowledged that, on May 9, 2002, the claimant had complained to Dr. McConnell of sharp pain in the medial aspect of the left knee, and that such pain can, "in the most general way," be an indication of a torn medial meniscus. He also acknowledged that the claimant had mild swelling of the superior medial aspect of the left knee at that time, and that such swelling can also be an indication of a torn medial meniscus "in a general sense." Dr. Kale also conceded that the claimant reported to Dr. McConnell on May 22, 2002, that he was "walking differently" and that this symptom is "not inconsistent" with a torn medial meniscus. He also acknowledged that Dr. McConnell's August 27, 2002, medical record diagnosed the claimant as suffering from "left medial knee pain." However, Dr. Kale opined that this diagnosis was inconsistent with the notes of Dr. McConnell's examination of the claimant on that date, which stated that the claimant reported tenderness in his *medial tibial tuberosity*, not his "knee." In other words, Dr. Kale opined that the pain that the claimant was experiencing on August 27, 2002, was outside the knee, and the problem with the knee had resolved. Although Dr. Kale admitted that it was possible that the claimant suffered a meniscal tear during his May 6, 2002, work accident, he opined that the evidence suggested the tear was not related to the accident.

¶19. An arbitration hearing was conducted on July 28, 2008. During the hearing, the claimant testified that, prior to the May 6, 2002, work accident, he had never injured his left knee or had any problems with that knee. He also stated that he had not suffered any injury to his knee after

the work accident. The claimant testified that, since the accident, he has continued to experience pain in the medial aspect of his left knee and his knee condition has remained essentially the same. He stated that he continued to work for the employer in the same job, but, because of his age and seniority, he was able to devote more time to operating the lift truck and to avoid the more physically demanding aspects of the job.

¶20. The claimant also testified about the employer's overtime policy. According to the claimant, if the employer needed employees to work overtime on a given day, it would announce over the loud speakers in the morning that overtime assistance was needed and would ask for volunteers. If the number of volunteers was insufficient to cover the overtime work for that day, the employer would make overtime mandatory. The employer's "Distribution Center Employee Handbook," which the claimant introduced into evidence, provided that "[a]cceptance of mandatory overtime assignments is a condition of employment" and that "[r]efusal to work overtime when ordered to do so will result in discipline up to and including termination." The claimant testified that there was a large amount of overtime work in the year preceding his accident. However, the claimant could not say for any particular week how much of his overtime was voluntary and how much was mandatory because the defendant did not differentiate in its pay stubs between voluntary and mandatory overtime. The claimant estimated that, in the year preceding his accident, approximately 10% of his overtime work was voluntary and the rest was mandatory.

¶21. Michael Leitner was the employer's warehouse manager. The parties stipulated that, if Leitner were called to testify, he would testify that overtime was generally first offered on a

voluntary basis and employees were allowed to sign up for voluntary overtime, with priority being given to more senior employees. If there were not enough volunteers, the employer would impose mandatory overtime in reverse order of seniority, so that the less senior employees were required to work mandatory overtime prior to the more senior employees. Leitner would also testify that overtime varied on a weekly basis depending on the employer's business needs. He would testify that overtime was sometimes mandated for all employees, but that generally occurred only during peak holiday periods.

¶22. In the year preceding his accident, the claimant worked only 33 weeks, and he worked overtime in 32 weeks. His overtime hours during this period varied from 2 to 19.25 hours per week. At the time of the arbitration, the claimant was the employer's 11th most senior employee in the warehouse, which made him one of the most senior employees. It is unknown what the claimant's exact seniority rank was during the year before his accident.

¶23. The arbitrator adopted the opinions of Dr. Kale and found that the claimant's "current condition of ill-being as it relates to his left knee is not causally related to the accident he sustained on May 6, 2002." The arbitrator found that the complaints the claimant had on August 27, 2002 were "in the tibial tuberosity and not the medial meniscus as they were immediately following the accident." The arbitrator also noted that, although Dr. Brecher opined that claimant's torn left medial meniscus was causally related to the May 6, 2002, accident, Dr. Brecher could not say "whether the tear was acute or due to degeneration," and Dr. Brecher conceded that it was "possible that claimant's left knee condition could be of a personal nature rather than related to a work accident."

¶24. The arbitrator also emphasized the substantial gaps in treatment for the claimant's knee condition. The arbitrator noted that the claimant sought no treatment for his left knee between August 27, 2002 and July 9, 2003, and between April 29, 2004, and July 17, 2007. The arbitrator rejected the claimant's testimony that he did not pursue follow-up treatments after August 27, 2002, because the employer refused to authorize such treatments. Rather, the employee concluded that the claimant was not experiencing knee problems during that period. In support of this conclusion, the arbitrator stated that the claimant had not complained of knee pain to any of the doctors who treated him between August 27, 2002, and July 9, 2003. The arbitrator also noted that the claimant pursued treatment for his knee condition with Dr. Brecher in July 2003 despite the fact that neither his employer nor his group insurance carrier had authorized such treatment.

¶25. The arbitrator also stated that, when the claimant first complained of left knee pain to Dr. Brecher on July 9, 2009, he reported that his left leg "hurts when he jogs." It was only at this point that an MRI was deemed necessary, which revealed a meniscal tear. Also, it was only at this point that knee surgery was recommended. From this, the arbitrator concluded that "the claimant's left knee complaints at that time were brought on by his jogging," not by the May 6, 2002, accident.

¶26. Because she concluded that the claimant had failed to establish causation, the arbitrator denied all benefits (including reimbursement of medical expenses and prospective medical care) and found that the claimant's request for penalties and attorney fees was "moot."

¶27. The arbitrator also concluded that the claimant's overtime hours should not be included

in the calculation of his average weekly wage. The arbitrator noted that "the burden [was] on the claimant to prove by a preponderance of the credible evidence" that his overtime hours were mandated. The arbitrator found the claimant had failed to carry this burden. In addition, the arbitrator found that the claimant did not consistently work a set number of hours of overtime each week because the credible evidence showed that, in the weeks claimant worked overtime, his overtime hours varied from 2 to 19.75.[5]

¶28. The claimant appealed the arbitrator's decision to the Commission. The Commission affirmed the arbitrator's decision but applied different reasoning to reach its conclusion. The Commission rejected the arbitrator's conclusion that, some time after the May 6, 2002, work accident, the claimant injured his left knee while jogging. The Commission found that the arbitrator had based this finding on a notation in Dr. Brecher's July 9, 2003, medical record which stated that the claimant "says [his left knee] hurts on the jog." The Commission found

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[5] The arbitrator also found it "more likely than not that with a staff of over 304 employees and claimant's seniority being in the top 5% that all the overtime hours he worked were mandatory." This sentence makes no sense as written, since the claimant's high level of seniority would diminish, not increase, the likelihood that he would be required to work overtime. Moreover, if the arbitrator had found it more likely than not that all of the overtime hours worked by the claimant were mandatory, it would have been required to include all of those overtime hours in the calculation of the claimant's average weekly wage. Thus, it seems likely that the arbitrator made a typographical error and meant to say that all of the overtime hours that the claimant worked were *voluntary*, not mandatory.

that this was a typographical error, and that the claimant most likely told Dr. Brecher that his knee hurt "on the job." The Commission noted that there was no evidence that the claimant was a jogger and cited Dr. Brecher's testimony that the claimant had provided no history suggesting that his left knee injury arose from any personal activity.

¶29. Nevertheless, the Commission agreed with the arbitrator that the claimant failed to establish that his current knee condition was causally related to the May 6, 2002, accident. The Commission noted the significant gap in treatment between August 27, 2002, and July 9, 2003, and found that "while treating for an unrelated medical condition in May 2003, [the claimant] failed to make any mention of any ongoing left knee pain or condition." Moreover, the Commission found the findings and opinions of Dr. Kale "more persuasive" than those of Dr. Brecher. In doing so, the Commission noted that Dr. Kale took into account not only the gap in treatment from August 2002 to July 2003, but also "the facts that [the claimant's] medial meniscal tear was not identified until July 2003" and that from May 6, 2002, through August 27, 2002, "there was no evidence of a meniscal tear or of any form of internal derangement that would justify the need for left knee surgery." Further, the Commission found that Dr. Kale's opinion that the claimant reached maximum medical improvement on August 27, 2002, was supported by Dr. McConnell's August 27, 2002, record, which noted that the claimant had reported that his left knee pain was "largely gone" and that he was working full duty and not using any pain medication. The Commission credited Dr. Kale's opinion that the "disjunction between [the claimant's] condition having resolved in August 2002 and the discovery of a meniscal tear in 2003 'is too long to relate them reasonably.' " Considering "the gap in

treatment and the significant change in [the claimant's] medical condition that occurred during that gap," the Commission found that the claimant failed to establish that his current condition of ill-being was causally related to the May 6, 2002, accident.

¶30. Commissioner Sherman dissented. She concluded that the claimant had proven a causal relationship between accidental injuries he sustained on May 6, 2002, and the tear of his left medial meniscus. She noted that the claimant "never experienced symptomatology referable to his left knee before the accident" and "consistently complained of pain on the medial aspect of his knee from the time of the accident to the time of hearing." Moreover, Commissioner Sherman noted that "[t]here is no evidence of any other injury to the [claimant's] left knee." Commissioner Sherman noted that the claimant attempted to obtain further treatment for his left knee after August 27, 2002, and complained to Dr. McConnell about left knee pain in May 2003, but the employer refused to authorize such treatment.

¶31. Moreover, Commissioner Sherman found that Dr. Kale's opinions were "entitled to little, if any, weight" because a significant basis for his conclusions was the absence of medical records indicating continuing knee problems from August 2002 to July 2003. Commissioner Sherman concluded that the absence of such medical records was explained by the employer's wrongful refusal to authorize treatment, not by any evidence suggesting that the claimant's knee problems had resolved. Dr. Sherman found that "[t]he medical records that do exist, and [the claimant's] unrebutted testimony, which is partly corroborated by the correspondence from [the employer], show that [the claimant] did have ongoing, if somewhat intermittent, symptomatology referable to the left knee, especially when engaging in the heavier physical

aspects of his job," and that there was "no evidence indicating otherwise." Moreover, Commissioner Sherman noted that Dr. Kale "acknowledged that [the claimant's] medial knee complaints following the accident were consistent with, although not necessarily diagnostic of, a medial meniscus tear."

¶32. For these reasons, Commissioner Sherman believed that the majority's conclusion as to causation was against the manifest weight of the evidence. Moreover, she found it "disturbing that [the employer] has been permitted to benefit by its unlawful denial of treatment, by successfully arguing that the absence of such treatment proves an absence of ongoing symptomatology to support a finding of lack of causation."

¶33. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. The circuit court issued an eight-page opinion affirming the Commission's decision. After thoroughly recounting the relevant evidence, the circuit court noted that "the medical evidence in [the] case was in conflict" in that "well qualified physicians came to different conclusions on the extent of [the claimant's] injury resulting from the May 6, 2002, accident." The circuit court noted that it is the Commission's province to weigh and resolve conflicting medical testimony, and that a reviewing court may overturn the Commission's conclusions on these matters only if they are against the manifest weight of the evidence. The court concluded that the claimant had failed to show that the Commission's resolution of the conflicting medical evidence was against the manifest weight of the evidence, and the claimant was improperly asking the court to reweigh that evidence. The court also found that the Commission had committed no error as to the other issues under review. This appeal followed.

¶34. ANALYSIS

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

¶36. The claimant argues that the Commission's finding that he failed to prove a causal connection between the May 6, 2002, work accident and his current left knee condition is against the manifest weight of the evidence. According to the claimant, the manifest weight of the evidence overwhelmingly supports the conclusion that he sustained a tear of the medial meniscus in his left knee during the May 6, 2002, accident.

¶37. 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 Comm'n*, 359 Ill. App. 3d 582, 592 (2005). 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. *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 may be drawn from the evidence. *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).

¶38. The appellant's argument that the Commission's finding of no causation is against the manifest weight of the evidence cannot be easily discounted. In finding no causation, the Commission relied heavily on the fact that the claimant did not seek further treatment for his knee condition between August 27, 2002, and July 9, 2003. However, as dissenting Commissioner Sherman noted, the employer had refused to authorize further treatment for the claimant's knee condition during this period, and the claimant's group insurance carrier refused to cover such treatment because it deemed the claimant's knee injury to be work-related and, therefore, a matter for workers' compensation. Thus, it is arguably inappropriate for the Commission to rely on this so-called gap to establish a lack of causation, both as a factual matter and as an equitable matter. Moreover, the Commission's finding that "while treating for an unrelated medical condition in May 2003, [the claimant] failed to make any mention of any ongoing left knee pain or condition" is erroneous. Dr. McConnell treated the claimant for a ruptured biceps tendon in May 2003, and his notes of that visit reflect that the claimant complained of having some pain in his left knee and related this pain "to a previous injury." Further, the claimant testified that he told his regular physician, Dr. Daleo, in 2002 or 2003 that

he still had a knee problem.[6] Moreover, the Commission's conclusion that the claimant's knee problems had resolved by August 27, 2002, is questionable because: (1) the claimant told Dr. McConnell on August 27, 2002, that he was still experiencing some pain in his medial left knee when he worked; (2) Dr. McConnell restarted the claimant on pain medication on that date and scheduled a follow-up appointment; and (3) the claimant continued to complain of knee pain thereafter. Further, because Dr. Kale relied on several questionable factual assumptions in rendering his causation opinion (*e.g.*, the supposed gap in treatment, the supposed resolution of the claimant's knee problems by August 2002, and the claimant's supposed failure to complain of pain thereafter), the credibility of his opinion is diminished in several respects.

¶39. However, other aspects of Dr. Kale's causation opinion which do not depend on erroneous factual assumptions support the Commission's decision. For example, Dr. Kale opined that, from May 6, 2002, through August 27, 2002, there was no evidence of a tear in the claimant's meniscus or any evidence of internal derangement that would justify a need for surgery of his left knee. This opinion is arguably supported by Dr. McConnell's conclusion on August 27, 2002, that it was not necessary to take an MRI of the claimant's left knee at that time. Dr. Kale further opined that, if the claimant's May 6, 2002, work injury had caused a meniscal tear, it would have been demonstrated before 2003. In addition, Dr. Kale noted that Dr. McConnell's August 27, 2002, examination of the claimant revealed only that the claimant had some "mild tenderness in the medial aspect of the tibial tuberosity," which is "the area of a bone

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[6] This testimony was apparently unrebutted, and Dr. Daleo's medical records were not introduced into evidence.

which is attached to a tendon" that "has nothing to do with the inside of the knee itself." This arguably supports Dr. Kale's opinion that the trauma that the claimant experienced on May 6, 2002, (a medial knee strain) was effectively resolved by August 27, 2002, and the meniscal tear must have been the result of new injury or alteration to claimant's left knee that was caused by some subsequent event. Further, although he opined that the claimant's meniscal tear was caused by the May 6, 2002, work accident, Dr. Brecher acknowledged that the July 2003 MRI showed degenerative changes in the menisci and conceded that it was possible that the claimant's meniscal tear was a degenerative condition rather than the result of a work-related injury.

¶40. Accordingly, given the highly deferential standard of review that we must employ, we uphold the Commission's decision. Although Dr. Kale's causation opinion has some obvious weaknesses and is based, in part, on erroneous factual assumptions, it is the Commission's province to judge the credibility of expert witness testimony and to resolve conflicts in medical opinion evidence. It is not a reviewing court's function to resolve these conflicts or reweigh the evidence. Nor may we substitute our judgment for that of the Commission merely because another inference is possible. Because there is evidence in the record supporting the Commission's finding of no causation and the opposite conclusion is not "clearly apparent," we affirm the Commission's finding of no causation and its subsequent denial of benefits (including medical expenses and prospective medical care).[7]

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[7] Contrary to the claimant's argument, *Clark v. Industrial Comm'n*, 276 Ill. App. 3d 429, 431-32 (1995), does not require us to reverse the Commission's finding of no causation in this

¶41. 2. Penalties and Attorney Fees

¶42. The claimant argues that he is entitled to penalties and attorney fees under sections 305/16 and 305/19(k) of the Act because the employer unreasonably and vexatiously refused to approve his requests for further treatment of his left knee condition after August 27, 2002. 820 ILCS 305/16, 305/19(k) (West 2002). However, because we uphold the Commission's finding that the claimant failed to prove causation, we also uphold its finding that the claimant was not entitled to further treatment of his knee condition. If the claimant was not entitled to such treatment under the Act, the employer's refusal to pay for it cannot be deemed "vexatious" or otherwise sanctionable. See, *e.g.*, *Pemble v. Industrial Comm'n*, 181 Ill. App. 3d 409, 418

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case. In *Clark*, this Court reversed the Commission's finding that the claimant was capable of returning to work, which was based exclusively on the deposition testimony of the employer's medical expert, where the "indisputable weight of the evidence"—including the other medical opinions, all of the medical tests, and the initial opinion of the employer's expert—"compel[led] an opposite conclusion." *Id.* *Clark* is distinguishable from this case. Although Dr. Kale characterized the claimant's knee injury in passing as a "work-related" injury in his April 21, 2007, report, he never opined that the claimant's meniscal tear was caused by the May 6, 2002, work accident. (The April 21, 2007, report addressed the issue of maximum medical improvement, not causation.) Moreover, unlike the situation presented in *Clark*, other evidence in the record arguably supports Dr. Kale's finding that the meniscal tear was not caused by the work accident, including Dr. McConnell's decision that an MRI was not needed in August 2002.

(1989) ("it cannot be said the employer vexatiously delayed paying benefits to which claimant was not entitled").

¶43. 3. Whether the Claimant's Overtime Hours Should Be Included in the Calculation of his Average Weekly Wage

¶44. The claimant argues that the Commission's refusal to include the claimant's overtime hours in its calculation of his average weekly wage was against the manifest weight of the evidence. In a workers' compensation case, the claimant has the burden of establishing his average weekly wage. *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 437, 440 (2008); *Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 731 (1992). The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it against the manifest weight of the evidence. *United Airlines*, 382 Ill. App. 3d at 440; *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 1096 (1996). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *United Airlines*, 382 Ill. App. 3d at 440.

¶45. Section 10 of the Act explicitly states that overtime is to be excluded in calculating an employee's average weekly wage. 820 ILCS 305/10 (West 2002). However, the statute fails to define "overtime." Our appellate court has consistently interpreted the statutory term "overtime" to mean 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. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 554 (2007). Thus, any hours that an employee is

required to work each week as a condition of his employment may be included in the calculation of his average weekly wage under the Act, even if the employer labels some of these hours "overtime." See, *e.g.*, *Freesen, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 1035, 1042 (2004); *Ogle*, 284 Ill. App. 3d at 1097; *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666-67 (1990). However, although such mandatory, regular overtime hours may be counted in determining the average number of hours that an employee worked per week, *voluntary* overtime hours may not be counted. See *Airborne Express, Inc.*, 372 Ill. App. 3d at 555 ("If merely working overtime on a regular, voluntary basis were sufficient to include the overtime hours worked in the calculation of an employee's average weekly wage, the overtime exclusion in section 10 of the Act would be rendered meaningless.").

¶46. The Commission's refusal to include the claimant's overtime hours in its calculation of his average weekly wage was not against the manifest weight of the evidence. Although the claimant worked some overtime in 32 of the 33 weeks that he worked in the year prior to his accident, the claimant could not say for any particular week how much of his overtime was voluntary and how much was mandatory. The claimant estimated that approximately 90% of the overtime he worked was mandatory. However, the Commission was not required to credit this estimation, particularly since the claimant's high level of seniority made it unlikely that he would have to work overtime unless he voluntarily chose to do so.[8] In addition, the claimant's

[8] The claimant would have had to work mandatory overtime when the employer required *all* of its employees to work mandatory overtime. However, the parties stipulated that this only occurred during peak holiday periods.

overtime hours varied from 2 to 19.25 hours per week. Thus, the claimant failed to establish that he worked a regular number of overtime hours per week. For all these reasons, the Commission's calculation of the claimant's average weekly wage was not against the manifest weight of the evidence. See, *e.g.*, *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 657 (2003) (holding that Commission erred in including claimant's overtime hours in the calculation of his average weekly wage even though his wage summary sheet reflected that he worked "some amount of overtime" in 15 of the 16 weeks that he worked for the employer where, *inter alia*, the claimant "presented no evidence establishing the number of [overtime] hours that he was required to work," and there was "no evidence" that the claimant "consistently worked a set number of overtime hours each week" or that "the overtime hours [he] worked were part of his regular hours of employment"); see also *Freesen, Inc.*, 348 Ill. App. 3d at 1042-43.

¶47. CONCLUSION

¶48. For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision.

¶49. Affirmed.