2012 IL App (3d) 110167WC-U

No. 3-11-0167WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ABF FREIGHT SYSTEMS, INC.,	) Appeal from the
	) Circuit Court of
Appellant,	) Will County.
	)
	)
v.	) No. 10-MR-414
	)
	)
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Marisa Ochs, Surviving Spouse,	)
	) Honorable
	) Barbara Petrungaro
Appellee).	) Judge, presiding.

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

O R D E R

Held: The Commission's finding of a causal connection between the employee's work-related injury and his death was not against the manifest weight of the evidence. The employer waived its argument that the employee's use of prescription medications was an injurious practice under section 19(d) of the Act. The Commission's award of TTD benefits was not against the

> manifest weight of the evidence. The Commission's finding that the facts justified an award of penalties under sections 19(k) and 19(*l*) and attorney fees under section 16 of the Act was against the manifest weight of the evidence. The Commission's calculation of the employee's average weekly wage was not against the manifest weight of the evidence.

¶ 1 The claimant, Marisa Ochs, is the surviving spouse of Brian Ochs (the employee), deceased. The employee was working as a truck driver for the employer, ABF Freight Systems, when he was involved in a slip and fall work-related accident that resulted in injuries to his head and neck. The employee subsequently underwent treatments from several different medical providers over a two-year period for a variety of conditions, including neck and shoulder pain, headaches, nausea, vision problems, sleeplessness, anxiety, seizures, and depression. The employee's treating physicians prescribed a variety of potent medications, and the employee eventually died from polypharmacy (the adverse effects of Diazepam and Oxycodone in his system). The Commission awarded the claimant death benefits, temporary total disability (TTD) benefits, and medical expenses, as well as penalties and attorneys' fees pursuant to sections 16, 19(k), and 19(*l*) of the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/16, 19(k), and 19(*l*) (West 2008)). The circuit court entered a judgment confirming the Commission's awards, and the employer appeals the circuit court's judgment..

¶ 2 BACKGROUND

¶ 3 The evidence relevant to the claimant's claim was presented to the arbitrator in a hearing that was conducted on three separate dates. The arbitration hearing began when the

employee was still alive and was brought as a 19(b) hearing. The first day of the hearing included only the employee's testimony and was continued. The employee subsequently passed away, and the parties presented additional evidence after his death.

¶ 4 The evidence established that the employee worked as an over-the-road truck driver for the employer beginning in August 2000. When he began working for the employer, he was in good health, liked to workout regularly, and did not take any medications. On January 9, 2001, at the age of 34, he suffered a work-related accident when his left boot caught a broken piece of metal grating on his truck's step as he exited his truck. The employee fell approximately four to five feet to the pavement, landed on his lower back, and struck his head and neck on the pavement. He was in Owatonna, Minnesota when the accident occurred.

¶ 5 The fall "stunned" him, and he felt a sharp pain within his cervical and head regions. In addition, his eyes and lower back hurt, and he experienced spasms in his lower back. The accident occurred at approximately 10:00 p.m., and the employee completed his work duties which included filling out paperwork. When he noticed a laceration on his head, he notified his employer of the accident and drove himself three miles to a hospital. He arrived at the hospital approximately forty minutes after the fall.

¶ 6 At the hospital, an x-ray was taken of the employee's neck and a CT scan of his head. The hospital's emergency room records state that the employee "present[ed] with a chief complaint of headache, dizziness, and left upper back pain since falling four feet off a truck

and hitting the back of the head and the upper back." Records from the hospital indicated that the "unenhanced CT scans" of the employee's head were negative. He was instructed to wear a neck collar and follow up with his physician.

¶ 7 The next day, the employee was scheduled to drive his truck from Owatonna, Minnesota to Blaine, Minnesota, and then from Blaine, Minnesota, to Chicago, Illinois. During his drive from Blaine to Chicago, the employee started vomiting, feeling light-headed, and experiencing spotty vision and depth perception problems. He had to pull over "quite a few times to vomit and collect [him]self." He eventually stopped, called the employer, and informed his manager that he was not "driving in a safe condition." The manager advised the employee to drive as far as he could, and the employee drove as far as Rockford, Illinois.

¶ 8 When the employee arrived in Rockford, his manager directed him to go to an occupational care facility, Physicians Immediate Care. The medical records from the facility indicate that the employee complained of headaches, nausea, and two episodes of vomiting that day. The examining physician recommended that the employee stay overnight and repeat a neurological evaluation in the morning. The physician also gave him Hydrocodone for his pain.

¶ 9 The next day, on January 11, 2001, the employee still complained of a mild headache and mild nausea. The records from Physicians Immediate Care state that the employee's "neurologic status [was] completely normal with full sensory and motor function for all four

extremities." The physician assessed the employee as having a closed head injury, lumbar strain, and cervical strain. The doctor released the employee to work without restrictions and prescribed him Tylenol #3 for pain to take while not working.

¶ 10 The employee completed the drive to Chicago. Upon arriving in Chicago, the employer directed the employee to go to the company's clinic, Suburban Heights Medical Center. The records from Suburban Heights Medical Center state that the employee "complain[ed] of headache, occasional dizziness, occasional blurred vision which only lasts seconds ***." The employee was examined by Dr. Elliot who prescribed Naprosyn for the employee's headache, Flexeril, and a cervical collar. Dr. Elliot advised the employee to take three days off of work and to take a couple of weeks of light duty and physical therapy. The doctor's assessment of the employee's conditions were concussion syndrome and cervical strain.

¶ 11 The employee testified that he wanted to return to full-duty after only a few days off of work. According to the employee, his manager told him that he could return to work if he could convince a doctor to release him to full driving. Therefore, on January 15, 2001, the employee followed up with Dr Elliot. The doctor's notes of January 15, 2001, state that the employee reported that he was "doing a lot better," had seen a chiropractor for a couple of adjustments, and had "just a little bit of soreness in the face, no headache." The doctor released him to full driving. The employee then resumed driving trucks for the employer. The employee testified, however, that shortly after he returned to full duty, he again started

feeling light-headed and experiencing visual problems, spasms, headaches, neck pain, and numbness in his arms. The last time the employee drove a semi-trailer was on January 30, 2001.

¶ 12 On the advice of his union representative, the employee went to the University of Iowa Healthcare on January 30, 2001, and saw Dr. Shoaib. Dr. Shoaib's records indicate that the employee reported that he had noticed increasing difficulty while driving and had complaints of poor memory, decreased depth perception, increased irritability, and trouble sleeping. In addition, he was experiencing continued headaches with "nausea, vomiting, lightheadedness, and photophobia." Dr. Shoaib diagnosed the employee as suffering from post-traumatic headache and post-concussion syndrome. Dr. Shoaib prescribed Compazine and Naproxen. He recommended a magnetic resonance imaging (MRI) scan of the employee's brain to "rule out the possibility of a subdural hematoma."

¶ 13 On February 9, 2001, the employee underwent the MRI of his brain ordered by Dr. Shoaib. The radiology report states: "Negative brain and brain stem MRI with no evidence of extra-axial fluid collections."

¶ 14 The employee began seeing a chiropractor, Dr. Kennedy, on February 16, 2001, with complaints of neck pain that went to his head and affected his eye sight, balance, moods, and memory. The employee also complained of pain, numbness, and tingling in both arms, constant headaches, and back pain and spasms. Dr. Kennedy advised the employee not to work, drive, or do any activity that required physical exertion. Dr. Kennedy began treating

the employee with physical and electrical manipulations and referred the employee to an eye surgeon to treat the employee's blurred vision, depth perception, and unsteadiness. Regular treatments with Dr. Kennedy occurred thereafter.

¶ 15 On March 6, 2001, the employee went to Eye Surgeons Associates and saw an eye surgeon, Dr. Wymore. Dr. Wymore believed that the employee's visual symptoms were "a result of the head trauma disrupting his latent hyperopia." He hoped that the effects of the head trauma were temporary and noted in a letter to Dr. Kennedy that if the employee's symptoms did not improve in three to four weeks, he would consider reading glasses or bifocals for the employee. He reported that "otherwise his eyes look quite healthy."

¶ 16 Dr. Kennedy also referred the employee to a neurologist, Dr. Robert Milas. The claimant saw Dr. Milas on March 16, 2001. Dr. Milas's records indicate that the employee complained of burred vision and intense headaches following the fall from the truck. In addition, the employee complained of "difficulty with cervical motion." Dr. Milas's examination of the employee's neck revealed "moderate limitation of cervical motion in all planes." Dr. Milas noted that his impression was cerebral concussion and cervical radiculopathy. He noted in a letter to Dr. Kennedy that he recommended an MRI scan of the cranial circulation and of the cervical spine. He also recommended the use of Prozac to help with both pain control and sleep disorder. After a follow up visit on March 20, 2001, Dr. Milas wrote in a letter to Dr. Kennedy that he recommended that the employee discontinue Prozac. Instead, he began the employee on Elavil at night with a gradual increase of dosage.

¶ 17 The MRI's recommended by Dr. Milas were performed on March 31, 2001. The MRI of the employee's cranial circulation was unremarkable. The MRI of his cervical area showed some disc bulging at C3-4 and C5-6 as well as degenerative disc disease. The employee had a follow up visit with Dr. Milas on April 3, 2001. In a letter to Dr. Kennedy, Dr. Milas noted that the employee reported only transient relief of symptoms since beginning his Elavil prescription. However, Dr. Milas continued the employee's Elavil prescription because he felt "a more prolonged trial is needed."

¶ 18 On April 12, 2001, the employee went to a sleep clinic, the Genesis West Sleep Clinic, upon a referral from both Dr. Kennedy and Dr. Milas. The claimant saw Dr. Rasmus at the sleep clinic, and Dr. Rasmus's impression was "[h]istory of chronic insomnia exacerbated by posttraumatic syndrome." Dr. Rasmus noted that, at that time, the employee was taking amitriptyline (Elavil) prescribed by Dr. Milas. Dr. Rasmus conducted a polysomnogram (sleep study) on April 19, 2001, and concluded that the employee's "primary problem may be insomnia."

¶ 19 The employee had a follow up visit with Dr. Milas on May 4, 2001. Dr. Milas noted in a letter to Dr. Kennedy that the employee reported "no change in his symptoms thus far." He noted that the employer had requested a return to work status, and Dr. Milas believed that a functional capacity evaluation (FCE) was appropriate. He further noted that the employee had reported "a number of symptoms which he feels would make it unsafe for him to operate a motor vehicle." None of the employee's medical records indicate that an FCE was ever

performed.

¶ 20 Instead, on May 11, 2001, the employee saw Dr. Heaney at the pain clinic at the Illini Hospital upon a referral from Dr. Kennedy. In his report, Dr. Heaney noted that the employee's continued symptoms included headaches, cervical pain, vision difficulties, and trouble sleeping. Dr. Heaney's assessment of the employee was "post[-]concussion syndrome and chronic cervical pain and headaches." Dr. Heaney recommended "interventional therapy." Dr. Heaney wrote in his report: "I would initially to [sic] rule out a cervical facet joint pain, with cervical facet injections. If no improvement with injection of C2-3 and lower, we will proceed with a trial of C1-2 or C1 occipital joint injection." Dr. Heaney also noted that the employee had several recent panic attacks and that he had prescribed Ativan for his anxiety before any injection therapy. In his evidence deposition, Dr. Heaney testified that Ativan "is a benzodiazepine similar to Valium."

¶ 21 The employee returned to the Genesis West Sleep Clinic on May 17, 2001, with complaints of "posttraumatic headaches, neck pain, and insomnia." Dr. Rasmus stated in his report that the employee's injury "clearly has exacerbated the insomnia." He prescribed Ambien for the employee's insomnia. The next day, May 18, 2001, the employee underwent left cervical medial branch blocks, and the employee reported some relief. Dr. Heaney then recommended cervical facet rhizotomy, and he prescribed Ativan and Hydrocodone.

¶ 22 On June 5, 2001, the employee went to the emergency room at Illini Convenient Care with complaints of shortness of breath, racing heart, abdominal pain, weakness, sweating,

chest pain, neck pain, and arm pain. The employee was diagnosed with anxiety and atypical chest pain. The emergency room doctor prescribed Ativan and told him to follow up with his doctor.

¶ 23 On June 28, 2001, the employee followed up with Dr. Rasmus who noted that the employee's sleep had improved with the Ambien. Dr. Rasmus's notes also indicate that the only other medication that the employee was taking at that time was Tetracycline and that the employee had obtained some Soma through the internet from Mexico. Dr. Rasmus wrote, "He found some relief from that, but ran out and did not order it again because of the expense." Dr. Rasmus believed that it was reasonable to continue the employee's Ambien prescription "until symptoms resolve to the point that he is able to get back to his normal sleep pattern."

¶ 24 Dr. Heaney administered a cervical radiofrequency ablation on July 5, 2001, and his notes of that procedure stated that the employee was "given more Percocet" for "postprocedural pain." In addition, Dr. Heaney noted that "it would be wise to have a psychiatric evaluation for the [employee] for a possible treatment of panic disorder." He wrote, "We will also restart him on an SSRI, Paxil 20 mg q.a.m. to see if this might help improve his symptoms."

¶ 25 The employee testified that on July 14, 2001, he experienced pain in his cervical region, thoracic region, shoulders, trapezius muscles, as well as headaches behind the eyes, and spasms in his lower back. He believed that he was experiencing an adverse reaction to

Dr. Heaney's treatments. He called Dr. Heaney's office, and his answering machine directed him to the Illini Hospital. Therefore, the employee went to the emergency room at the Illini Hospital. At the emergency room, he was given injections of Morphine, Phenegan, and Valium, advised to follow up at the pain clinic, and given prescriptions for Vicodin and Valium.

¶ 26 On July 17, 2001, the employee returned to Eye Surgeons Associates and saw eye specialist, Dr. Frederick. In his report to Dr. Kennedy, Dr. Fredrick noted that the employee had "been complaining of headaches and visual symptoms for some time now." The employee complained to Dr. Frederick of "blur and visual distortion on an episodic basis often associated with his headaches." The employee described the sensation as "like a kaleidoscope." Dr. Frederick's impression after examining the employee was that he suffered from migraine headaches and suggested that he see a neurologist to fully evaluate the headaches. He recommended the employee "continue over-the-counter reading glasses only at a power of +1."

¶ 27 On July 26, 2001, the employee submitted to an independent medical examination by Dr. Jeffery Kramer that had been directed by the employer's nurse case manager, Ed Pagella. Dr. Kramer noted in a July 26, 2001, letter to Pagella[1] that the employee's medications at that

[1] In her brief, the claimant maintains that this letter is not included in the record on appeal and asks us to disregard the employer's arguments based on this letter. The employer responds to this assertion by attaching the letter to its reply brief. Although the record on appeal cannot be supplemented by attaching documents to the appendix of a

time included Ambien, Paxil, cyclobenzaprine, and Oxycodone. Dr. Kramer stated that his impression was that the employee suffered from "post[-]concussion syndrome secondary to traumatic brain injury with secondary visual preference, inadequate overcompensation of the visual system to the vestibular injury." Dr. Kramer also believed that the employee suffered from "chronic cervical and posterior headaches, which are unrelated to his disc problem." Dr. Kramer reported to Pagella that he had started the employee "on a course of vestibular rehabilitation to resolve his visual referencing" as well as prescriptions for Klonopin and Zoloft. Dr. Kramer referred the employee to a physical therapy specialist, Jim Buskirk.

¶ 28 The employee testified that on July 31, 2001, he went to Peak Therapeutics for an evaluation by Buskirk. In a July 31, 2001, letter, Buskirk informed Dr. Kramer that the employee continued to experience neck pain, felt unbalanced, was jittery, had difficulty focusing his eyes, difficulty concentrating, and was anxious about his symptoms. Buskirk felt that the employee had "post head injury with vestibulopathy and marked visual preferenced dysequilibrium." Buskirk wanted to develop a plan for physical therapy which required a battery of testing. His findings and the employee's anxiety lead Buskirk to concluded that the employee should not be driving a truck. Buskirk noted in his letter that the employee's medications included "Ambien for sleep, Zoloft, Klonopin and Tetracycline

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brief, the claimant's assertion that the letter is missing from the record is incorrect. The letter is contained in the records of Trinity Medical Center that were admitted as "Petitioner's Exhibit 14." See, pages R. 781-83 of the record.

for his acne." On August 6, 2001, the employee began vestibular rehabilitation at Trinity Hospital Rehab Service.

¶ 29 On August 20, 2001, on Dr. Heaney's referral for a psychological evaluation, the employee saw Dr. Yaratha at the Vera French Community Mental Health Center. Dr. Yaratha noted that the employee reported significant symptoms of depression as well as significant panic symptoms. Dr. Yaratha increased the employee's Zoloft and Klonopin prescriptions. In addition, because the employee complained of sleep difficulties, Dr. Yaratha also prescribed Trazodone.

¶ 30 On September 5, 2001, the employee suffered a seizure while he was in physical therapy, and he was taken to the emergency room at Trinity Medical Center in an ambulance. It was the employee's first seizure. At the emergency room, a CT scan of the employee's head showed "no discreet abnormality." The emergency room records state that the employee reported that he was taking Ambien and Klonopin. A urine drug screen, however, "turned positive for barbiturates and amphetamines." The report states, "Having discussed that, he states that he is also taking an unidentified medication that he obtained over the internet." An emergency room doctor, Dr. Paul C. McLoone, wrote in a report that he felt that the employee's seizure was "probably post-concussion plus Zoloft plus/minus Internet-obtained medicine plus/minus infection with fevers." At the emergency room, the employee was also treated by a neurologist, Dr. Michael Cullen, who diagnosed the claimant's seizure activity, etiology unknown.

¶ 31 The employee followed up with Dr. Heaney on September 9, 2001. In his notes, Dr. Heaney wrote as follows:

> "I went over the pros and cons of long term opioid usage with the [employee]. We will initially start him off on Percocet 10 mg b.i.d. We will give him 120 for a month's supply. If this is ineffective, we might try switching him to methadone. The patient also has been recently started on Klonopin and Dilantin as well as Zoloft and Trazodone. We will have him return in four to six weeks' time then for re-evaluation. Judging by the condition, this is turning into more of a permanent disability, and at some point he might need disability rating."

¶ 32 In his deposition testimony, Dr. Heaney testified about these medications. He described Percocet as Oxycodone with Tylenol. Oxycodone is a synthetic narcotic. He testified that Oxycodone is somewhat similar to Hydrocodone except it is more potent. He testified that Klonopin is in the benzodiazepine class of medications and is"sometimes used for seizure control or other symptoms." Dilantin is an anti-seizure medication, Zoloft is an antidepressant, and Trazodone is another antidepressant and is sometimes used as a sleep aid.

¶ 33 On September 19, 2001, the employee saw Dr. Yaratha who noted that the employee still had persistent pain, difficulty sleeping, and had been "somewhat despondent due to his difficulty with his pain and dealing with his worker's comp. bureau." Dr. Yaratha's assessment of the employee was "Panic Disorder with agoraphobia" and "Depressive Disorder secondary to general medical condition. (Chronic pain/back pain, neck pain.)" Dr.

Yaratha continued the employee's Zoloft prescription and increased his Klonopin and Trazodone prescriptions.

¶ 34 The employee saw the neurologist, Dr. Cullen, again on September 21, 2001. Dr. Cullen's notes describe the visit as a "follow up with diagnosis of chronic axial spine complaints with new onset seizure disorder." The doctor noted that the employee's "original drug screen was positive for amphetamines however a follow up drug screen was pertinent for barbiturate, diphenhydramine, and Desyrel." He noted that the employee was being treated by Dr. Kennedy and Dr. Yaratha, in addition to facet blocks by Dr. Heaney.

¶ 35 On October 1, 2001, Dr. Kramer issued a report in which he opined that the employee should discontinue Neurontin and physical therapy and have neuropsychological testing and treatment at a formalized pain clinic. Dr. Kramer also prescribed Dilantin, Klonopin, Zoloft, and Trazadone.

¶ 36 The employee saw Dr. Heaney on October 5, 2001, for a "followup of his post[-]concussion syndrome, chronic cervical pain, and myofascial pain." Dr. Heaney noted that the employee was "continuing to have significant pain and spasm." The doctor's notes further state that the employee had run out of Soma and Percocet and felt that the Soma helped somewhat with his spasms. In addition, the employee told Dr. Heaney that he had started on Zoloft and Trazodone and had continued on Klonopin.

¶ 37 Dr. Heaney's plan on October 5, 2001, for the employee was to try "a long-acting opioid, Methadone" and also continue the employee on Soma. In his deposition testimony,

Dr. Heaney described Methadone as a synthetic narcotic "which has more of a steady action." Dr. Heaney told the employee that he did not have any other ideas for resolving the pain and that they might try referring him to another pain clinic if he could not get his pain under control. Dr. Heaney noted that the employee appeared "quite anxious with tremors in his arms" and recommended "that he continue with psychiatric evaluation too."

¶ 38 The employee underwent a neuropsychological evaluation on October 22, 2001. The records from the October 22, 2001, neuropsychological evaluation state that the employee reported seeing 22 doctors but that none of them could pinpoint his problem. The employee also told the evaluator that he had tried "over 100 prescription medications." He complained of visual problems, tremors, spasms, seizures, pain from the thoracic area up to the cervical column of the occipital lobe, depression, and anxiety/panic attacks. The examiner observed as follows: "The [employee] perceives himself as very symptomatic and disabled and distressed. He is also actively involved in researching his case on the internet. He has already done a great deal of 'doctoring.' He has familiarized himself with medical jargon."

¶ 39 The examiner concluded that the employee was "unlikely to benefit much from any procedure which is intended to eliminate his disability and return him to normal functioning." The examiner concluded that the employee may experience and/or report partial relief from certain specific modalities, but doubted that there would be any overall cure or major

improvement. The examiner believed that the employee was "susceptible to iatrogenic[2] problems and should be approached in a conservative manner."

¶ 40 The records from Trinity Medical Center indicate that the employee also saw Dr. Kerry Panozzo at the pain clinic at Trinity Medical Center the same day as his neuropsychological evaluation. The records state that Dr. Panozzo diagnosed the employee with cervical radiculopathy. The employee underwent a "cervical epidural steroid injection" as a diagnostic and therapeutic maneuver on October 22, 2001. The employee reported that the injection provided him with temporary relief.

¶ 41 The employee followed up with Dr. Cullen, on October 25, 2001. The employee told Dr. Cullen about incidents of loss of consciousness, and the doctor was concerned about the employee's Dilantin level. On November 2, 2001, Dr. Cullen sent a correspondence to the employee stating that he had received the results of the employee's Dilantin levels. Dr. Cullen wrote that the Dilantin levels indicated that he was not taking his medication as instructed. He concluded: "If this continues, it may result in self injury and mislead this office with regard to appropriate advice."

¶ 42 Dr. Panozzo conducted a follow up examination on November 5, 2001. The report from the follow up visit indicates that the employee was given a second injection that

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[2] The term iatrogenic is defined as "induced by a physician--used chiefly of ailments induced in a patient by autosuggestion based on a physician's words or actions during examination" Webster's Third New International Dictionary 1119 (1993).

provided him "with approximately 50% relief of his pain symptomatology for approximately one hour." The results of the epidural injections as well as the October 22, 2001, neuropsychological evaluation lead Dr. Panozzo to conclude that "a significant form of [the employee]'s pain should be dealt with through" a psychologist/social worker as well as occupational and physical therapy. He did not believe that there would be any significant benefit to any further invasive therapies.

¶ 43 On November 6, 2001, Dr. Kramer reviewed the neuropsychological report and recommended following the suggestions contained in the report. In addition, Dr. Kramer opined that the employee was at MMI and could be released back to full duty if his psychological condition was continually managed.

¶ 44 The employee received his last temporary total disability check from the employer in November 2001. Ed Pagella sent the claimant a letter stating that Dr. Kramer had released him to full-duty status.

¶ 45 Dr. Yaratha saw the employee on November 13, 2001, and the employee reported that he was still in persistent pain. Dr. Yaratha wrote: "[The employee] noticed when he was off his pain medications he became severely incapacitated. He does notice the pain medications to be working in that respect." Dr. Yaratha's report states that the employee was still suffering from sleep problems, depression, and seizures. Dr. Yaratha increased the employee's Zoloft prescription, continued his Klonopin prescription, and discontinued his Trazodone prescription.

¶ 46 On November 16, 2001, the employee sent a facsimile correspondence to Dr. Cullen informing him that the employer had ordered him back to work full-time. The employee's facsimile correspondence further stated, in part, as follows:

> "My Atty. says I need an OFF-WORK statement stating that the injuries were 'likely' sustained in my work accident/head/neck injury on Jan. 9, 2001. The Company Dr. states it's impossible to have seizures 8 months post TBI, but I need someone on my side sir. My family is going to lose everything if I don't get this stopped. I realize you don't want to get involved in such a mess, but, sir I need your help DRASTICALLY! Please write a brief off work report due to my seizures. . . the heavy medications alone should be enough to warrant my company from putting the public at risk, but apparently they don't care. I need a work slip that indicates seizures can indeed occur 8 months post head trauma."

¶ 47 Also on November 16, 2001, Dr. Heaney wrote a "To Whom It May Concern" letter on the employee's behalf stating that he had the employee "on long-term medication management with a long-acting pain reliever called methadone. Methadone is a narcotic." He opined in his November 16, 2001, letter that "the fact that [the employee's] symptoms have continued now for 11 months without resolution would make one think that this is more of a permanent condition, and he is going to have a permanent disability from this." Dr. Heaney testified that he wrote the letter because the employee had called and asked him to write a letter about his condition.

¶ 48 Because Dr. Kramer's opinion conflicted with the other physicians' opinions, the employer sent the employee to the company's clinic, Suburban Heights Medical Center, on November 28, 2001, for a reevaluation by Dr. Elliot. After his reevaluation, Dr. Elliot would not release the employee to return to work as a truck driver because of his seizure disorder and told the employee that he could not hold a CDL driver's license because of the seizures. Dr. Elliot wrote in his report that he did not believe that the seizure disorder was related to post-concussion syndrome or a cervical strain. Dr. Elliot's November 28, 2001, report further states as follows:

> "According to the patient, he has brought in a multiple page day-to-day incidents of what he has been going through. He has had multiple procedures from multiple doctors. He is in a pain clinic. He is receiving psychiatric care and wants more. Dr. Yaratha is treating his psychosis with Zoloft and he is being treated by a neuropsychologist with Dilantin for 'seizure disorder.' He has a sleep disorder for which he is using Ambien. He has been using methadone through the pain clinic and Klonopin and Soma. He is also hypertensive and has been using atenolol and to deal with the pain Vioxx 25."

¶ 49 Dr. Elliot noted in his report that the employee had been diagnosed with a "vestibular system disorder with visual impairment, balance, coordination, panic attacks, speech disorder, post[-]concussion syndrome, with severe cervical strain, with bulging discs and chronic cervical headache pain." The doctor concluded his report as follows:

"The post[-]concussion syndrome is an interesting presentation. When I saw the patient last he was certainly having minimal, if any, symptoms and he states that actually he was doing quite well for two weeks after I saw him when he did experience some headaches. He did not follow up with us however when his symptoms worsened. Therefore, I am uncertain of these symptoms that he tells me today is due to the post[-]concussion syndrome. It certainly is quite a difficult picture to follow based on his written evaluation. Most of this sounds psychiatric."

¶ 50 On December 5, 2001, the employee testified at a 19(b) arbitration hearing. He testified that his daily medications included, Wellbutrin as a muscle relaxer, Hydrocodone for pain, Carisoprodol as a skeletal muscle relaxer, Zoloft for anxiety, Dilantin and Klonopin for seizures, and Ambien for sleeplessness. He testified that Dr. Kennedy had also prescribed a spine stimulator that he used every other day. He testified that he still suffered from visual difficulties, shaking, trembling, seizures, headaches, muscle spasms, and pain in his cervical region that extended from C1 into his lower thoracic area. He said that the pain also radiated into his shoulders and trapezoid muscles.

¶ 51 The employee testified that prior to the accident, he had not suffered any seizures and that he had not suffered any head injuries except "a couple of concussions during high school, college athletics, 17 years ago, roughly." Prior to the accident, he did not take any medications or have any major health problems, vision problems, sleep disorders, or tremors. Prior to the accident, he did not receive any counseling and did not suffer from panic attacks.

With respect to his neck and back, he testified that he had "some spasms every now and then with sports-related activities" that he described as "minor" and which last occurred in 1997.

¶ 52 With respect to the Hydrocodone he was taking for pain, the employee testified that when the employer would not authorize any further treatments, he "had to seek help elsewhere." He testified that the Hydrocodone he was taking was prescribed by Dr. Juan Ibanez of the Tri-County Pain Clinic in Clearwater, Florida. Dr. Ibanez required copies of all of the employee's medical records, and he spoke with the employee over the telephone, but he did not personally examine the employee. With respect to the Carisoprodol prescription, he testified that Dr. Heaney initially had prescribed the medication, but at the time of the hearing, it was prescribed by Dr. Ibanez.

¶ 53 The December 5, 2001, 19(b) arbitration hearing concluded with the admission of only the employee's testimony. The parties had agreed to "bifurcate the matter by agreement because of an additional medical testimony and medical depositions." Therefore, the hearing was continued.

¶ 54 On December 20, 2001, the employee saw Dr. Cullen for a follow up and reported that he continued to have headaches and was on methadone twice daily, Klonopin, and Soma. The employee told Dr. Cullen about an incident that occurred on December 2, 2001, in which his legs went out from under him and he was barely able to keep his balance. Dr. Cullen noted in his report that his impression was "[e]pilepsy, seemingly controlled at this time." He offered to review the employee's medical records to offer an opinion "regarding causation

with regard to his head injury."

¶ 55 The employee followed up with Dr. Heaney on December 27, 2001, to discuss his "long-term pain medication management." Dr. Heaney's notes state that the employee told him that he had "been trying to gain[] employment but has been having trouble with employment applications secondary to the long list of medications he is on, specifically the methadone." The employee expressed concern that the methadone had "a certain stigma associated with it which would make employers reluctant to hire him." The employee inquired about "whether it would be better not to be taking methadone and to be taking another pain medication instead." Dr. Heaney's report stated that the employee had stopped taking methadone and had been taking Vicodin "which he got from his oral surgery and felt that this was effective as well."

¶ 56 Dr. Heaney noted that his plan for the employee was to wean him off of methadone and have him start Hydrocodone instead. He further noted that if the employee did well and tolerated the Hydrocodone, he would write a prescription for a monthly supply, up to three per day. He testified in his evidence deposition that he believed that the employee was at MMI when he saw him on December 27, 2001.

¶ 57 On January 18, 2002, the employee returned for a follow up with Dr. Cullen concerning his seizures, and Dr. Cullen reported that the employee had been "fairly problematic free." Dr. Cullen's report states that the employee was taking Dilantin and had no seizure activity. With respect to causation, the doctor told the employee that he had

reviewed his emergency room records and that there appeared "to be no significant concussive/closed head injury" and therefore he was "unable to causally relate that event with his current epileptic difficulties." Dr. Cullen's impression with respect to the employee's seizures was epilepsy which was stabilized with the Dilantin.

¶ 58 On February 25, 2002, the employee saw Dr. Michael A. Swanson at the Genesis Medical Center's pain management clinic. The employee reported that his pain was "moderately well controlled" by the Hydrocodone. He inquired about switching to OxyContin. Dr. Swanson's notes state that the employee was "on disability and [had] essentially given up on employment." Dr. Swanson told the employee that he would not prescribe him OxyContin and that methadone and Hydrocodone prescriptions were for "less severe pain."

¶ 59 The employee saw Dr. Yaratha on March 27, 2002. Dr. Yaratha noted in his March 27, 2002, report that the employee had difficulty accepting his condition, but his mood was "fairly decent with the Zoloft," and his panic attacks were improved and "fairly good." Dr. Yaratha continued the employee's medications and added Provigil to help with his daytime alertness and excessive sleepiness.

¶ 60 On April 12, 2002, the employee saw Dr. Cullen and "vaguely" described an event which occurred on April 2, 2002, where he knocked over some items in his home. Dr. Cullen's impression was "[p]ossible breakthrough seizures."

¶ 61 The employee returned to Dr. Swanson at the pain management clinic at Genesis

Medical Center on July 2, 2002. Dr. Swanson's notes state that the employee had "increased his Soma to eight a day without any instructions to do so." The employee described experiencing confusion which he attributed to his head injury, but Dr. Swanson told the employee that Soma "has a barbiturate in it and this can be causing confusion for him as well." Dr. Swanson told the employee that he needed to get off of the Soma or at least decrease his dose from eight to averaging no more than three per day.

¶ 62 Dr. Swanson told the employee that because of his "irregularity" he needed to have a urine drug screen. Dr. Swanson noted in his report that the employee was "somewhat vague as to where his pain is bad." He noted that the employee's prescriptions would be "phoned in after the laboratory received his urine drug screen." The record does not show any followup with Dr. Swanson or anyone at the Genesis Medical Center after July 2, 2002.

¶ 63 The employee saw Dr. Yaratha again on July 15, 2002. The employee reported that he had been "doing somewhat better" and that "his medication is doing well." Dr. Yaratha reported: "Overall, [the employee] is feeling good and tolerating the medications well." Dr. Yaratha continued the employee's prescriptions which included Zoloft, Klonopin, Ambien, and Provigil.

¶ 64 In a report dated October 8, 2002, Dr. Yaratha wrote that the employee said that he was "doing worse recently since he's not been on pain medicines for some time." The report notes that the employee "was released from the Pain Clinic approximately three months ago and they did not renew his medication" and that he had been in severe pain since. The

employee reported to Dr. Yaratha that he had been "self-medicating with alcohol in order to get rid of his pain." In addition, the employee reported that his "mood has been down, energy's been poor, and he has difficulty falling asleep and maintaining sleep, and he feels more irritable."

¶ 65 Dr. Yaratha continued the employee's Zoloft, Klonopin, Ambien, and Provigil prescriptions. He also added a prescription for Seroquel "as needed for sleep in place of Ambien for a short period of time."

¶ 66 On February 25, 2003, the employee showed up at Dr. Yaratha's pain clinic for an appointment that, unknown to him, had been cancelled. While he was at the clinic, he talked to a registered nurse, Elaine Moss. The employee told Moss that he was not sleeping, had run out of Zoloft and Seroquel, and could not afford them. Moss gave him a one month's supply of samples of both medications and advised him that it was important for him to stay on his medications.

¶ 67 On March 18, 2003, at approximately 6:30 a.m., the claimant (employee's wife) found the employee unresponsive. His eyes were rolled back, he was not breathing, he had no heart beat, and he had frothy material coming out of his mouth. The claimant called 9-1-1. When paramedics arrived, they found the employee "mottled, blue, with fixed and dilated pupils, unresponsive, with no pulse, no spontaneous respirations, and signs of life." They transported the employee to the emergency room where he was subsequently pronounced deceased at 7:20 a.m.

¶ 68 The forensic pathologist who conducted the autopsy of the employee concluded that the cause of death was "polypharmacy (the adverse effects of diazepam and oxycodone)." At a coroner's inquest on May 7, 2003, a chief deputy coroner testified that the toxicology result "indicated a high level of oxycodone which is a pain killer also known as oxycontin. There was also some Valium in his system. The combination of the two proved to be lethal." The chief deputy coroner believed that the employee had been taking these medications "all along probably at a higher dose than any physician would have prescribed them" and that he was taking them to "relieve himself of his chronic pain." He further testified that he was unaware of where the Oxycontin came from. He noted that investigators had found a bottle of Hydrocodone, but that Hydrocodone was not found in the employee's system.

¶ 69 The chief deputy coroner testified that when medications are broken down by the body, they leave behind certain metabolites. The employee's metabolites were high which indicated that the employee "had been taking all along" and that the medications were not "something he abruptly took at one time." He also explained that the Oxycodone concentration was at a level "consistent with those that had resulted in fatalities" and that the Valium would be "contributory to the fatal result as well." The jury at the coroner's inquest found the employee's death to be accidental.

¶ 70 On May 27, 2008, Dr. James O'Donnell, an expert in the area of pharmacology, conducted a documents review at the request of the employer to offer an opinion concerning the cause of the employee's death. Dr. O'Donnell wrote in his report that "[t]he unfortunate

death of [the employee] was a result of his abusing prescription medications illegally obtained without the benefit of professional monitoring by physicians and pharmacists." He opined that the employee consumed "Oxycontin (or some other single source oxycodone), not Percocet," on the evening before his death and that his death was "an overdose of oxycodone, enhanced by the diazepam, obtained illegally." He further wrote in his report as follows: "These drugs were not part of any post accident treatment, and therefore the death should not be considered directly related to the accident. The 'polypharmacy' was created by [the employee], not any medical treatment."

¶ 71 Dr. O'Donnell also believed that the employee's "clinical record and treatment includes reasonable and customary medications for pain control, mood, depression, and seizures." He wrote: "The types, combinations, doses, and numbers of medications used appears reasonable and customary. The pain doctors appear to have approached [the employee]'s drug treatment reasonably and did not provide unmonitored and excessive amounts of dosages of prescription narcotics."

¶ 72 Finally, Dr. O'Donnell concluded that the employee "abused prescription medications as well as alcohol" and that the employee "would not have died from oxycodone overdose had the medication been prescribed and consumed in usual analgesic dosage, and under the control of a physician."

¶ 73 On October 1, 2008, the parties appeared before the arbitrator for a second bifurcated hearing to present the testimony of the claimant. The attorneys for the parties stated that they

were still involved in expert depositions, review of expert reports, further deposition testimony, and that expert testimony was not completed.

¶ 74 At the second bifurcated hearing, the claimant testified that she had married the employee on January 30, 1998, and that they had three children together. According to the claimant, prior to the work accident, the employee worked out at a gym for an hour on a daily basis. After the accident, she noticed the employee having trouble with his vision and trouble remembering things. She also noticed that he had problems with his neck. The October 1, 2008, bifurcated hearing ended with the claimant's testimony.

¶ 75 On November 5, 2008, the parties took the evidence deposition of Dr. Nelson Borelli, who had conducted a medical records review at the request of the claimant. Dr. Borelli testified that he was board certified in psychiatry. Dr. Borelli opined that the employee's death was directly related to the January 9, 2001, accident. He testified: "The polypharmacy diagnosis by the examining pathologist was consistent with the records of [the employee]'s drug treatment starting at the time of the accident." He explained as follows:

> "[A]fter consultation with ten different doctors in the course of his treatment until his death, he was prescribed 15 different medications that were highly - - very potent medications with side effects of their own combined with side effects upon the combination of drugs that intoxicated his body, put his brain in disarray, and, you know, ended up with his death."

¶ 76 According to Dr. Borelli, polypharmacy means "many drugs, many medications that

the individual has taken." He testified that when more than one drug is taken, the risk of bad side effects and death increases. With respect to the employee's situation, Dr. Borelli noted that there was no "coordinating doctor, no generalist that would see what the other doctor was doing, and no monitoring of the drug use." He emphasized that the employee died in the course of two years, that his case involved 15 "very potent antipsychotic drugs," and that some of the drugs were given in "very high doses."

¶ 77 Dr. Borelli testified that post-concussion syndrome could "include confusion, decreased concentration, decreased attention, may include certain neurological signs if the brain was injured and, of course, depending on the individual, may be accompanied by depression or anxiety." He testified that the treatment for post-concussion syndrome varied. For cases in which the patient is not exhibiting much agitation, depression, or anxiety, the best treatment was conservative treatment, *i.e.*, rest, avoiding physical or psychological stress, avoiding alcohol, and allowing the brain to self-heal. According to Borelli, Dilantin was appropriate if seizures occur because seizures could result in "bad consequences." Dr. Borelli believed that mild depression and mild anxiety would be most likely a temporary condition and would heal over time.

¶ 78 Dr. Borelli stated that diazepam is Valium, which is an antianxiety drug, and its most common side effect is sleepiness and sluggishness and even unconsciousness. In addition, one of the side effects from the withdrawal of Valium is the possibility of seizures. Dr. Borelli explained that anyone can have a seizure based on the person's level of tolerance to

brain simulation. He testified that Valium is an anticonvulsant that raises a person's threshold to brain stimulation. However, when Valium or Dilantin is stopped, the person's seizure threshold goes down, and they can have seizures and be more prone to anxiety as a side effect.

¶ 79 Dr. Borelli testified that he had no way of knowing whether the employee took more medications than what was prescribed for him on a regular basis. He did note, however, that in the course of a year and a half, the employee saw ten different doctors and took 15 different "very potent" prescribed medications which can cause confusion. He did not see any evidence in the employee's medical records that led him to believe that the employee purposefully took medication against medical advice.

¶ 80 Dr. Borelli's opinion was that the polypharmacy that caused the employee's death was related to the work-injury. On cross-examination, Dr. Borelli was asked if his opinion would vary if the drugs in the employee's system at the time of his death were not prescribed by a treating physician. He explained that the pathologist's polypharmacy diagnosis was "consistent with the records of the treatment that started at the time of the accident." He testified further:

> "For two years he had been seeing ten different doctors with ten different medications with nightmare treatment because one hand didn't know what the other hand was doing, fumbling all over, diagnosis of epilepsy, two - - at times two very potent antidepressants being prescribed at once. *** [T]he man is involved in a sloppy

management of a condition *** he's not going to outsmart or second-guess the doctors. He's just following the treatment the best he can."

¶ 81 Dr. Borelli stated that the employee had been on a polypharmacy track for two years and that the two drugs mentioned in the pathology report probably would not have caused his death by themselves. According to Dr. Borelli, the two years of receiving drugs disrupted the employee's life and his brain and conditioned his system. He testified: "[T]o prescribe these medications in high doses, that makes a circumstance, if you wish, circumstantial evidence that we are dealing with a body and a system that is in bad shape." He explained that the medications that were found in the claimant's body could not be isolated from the other medications that the claimant had been prescribed.

¶ 82 On December 23, 2008, the parties appeared before the arbitrator and concluded the presentation of evidence relevant to the claimant's claim. On May 13, 2009, the arbitrator filed his decision which included 24 pages of findings of facts and conclusions of law. The arbitrator found that following the work-related accident, the employee suffered from various conditions, including persistent and unremitting pain, headaches, seizures, vestibular injury, anxiety, and panic disorder which were causally related to the accident. In addition, concerning whether the employee's death was attributable to the work injury, the arbitrator relied "on Dr. Borelli's credible opinion that the polypharmacy diagnosed by the examining pathologist was consistent with the records of [the employee]'s drug treatment starting at the time of his accident." The arbitrator found Dr O'Donnell's opinion to be "simplistic and

unpersuasive." The arbitrator stated that the long-term effects of the amount and variety of medications that were prescribed to the employee could not be ignored and that he rejected the employer's "attempt to refute liability based on the fact that [the employee] hadn't been prescribed drugs in four months leading up to his death." The arbitrator specifically found Dr. Borelli's conclusions to be persuasive and more reliable than Dr. O'Donnell's conclusions.

¶ 83 The arbitrator awarded the claimant death benefits, benefits for the period of the employee's temporary total disability (TTD), and the medical expenses he incurred. The arbitrator also found that the employer's failure to pay TTD benefits, death benefits, and medical expenses was unreasonable and vexatious. Accordingly, the arbitrator awarded the claimant penalties and attorney fees pursuant to sections 19(*l*), 19(k), and 16 of the Act (820 ILCS 305/19(*l*), *19*(k), 16 (West 2008)).

¶ 84 The employer appealed the arbitrator's decision, challenging the arbitrator's calculation of the employee's average weekly wage, his finding that the employee's death was causally related to the work injury, his award of TTD and medical expense benefits, and his award of penalties under sections 19(*l*) and 19(k) and attorney fees under section 16. On April 1, 2010, the Commission filed its decision and opinion on review. The Commission affirmed and adopted the arbitrator's decision, except that it modified the arbitrator's award for penalties and attorney fees.

¶ 85 The Commission agreed with the arbitrator with respect to his sanctions based on unpaid TTD benefits and medical expenses, but disagreed with the arbitrator with respect to

sanctions for unpaid death benefits. The Commission noted: "Based on the findings of the coroner and the opinion of Dr. O'Donnell, the [employer] was aware of the fact that the medications discovered in the [employee]'s system at the time of his death were not prescribed or taken at the direction of a physician from whom he was receiving treatment at that time." Although the Commission agreed with the arbitrator that there was a causal connection between the work-related accident and the employee's death, the Commission found that the employer's "position was not so unreasonable as to be the basis for the imposition of penalties and attorneys' fees for the withholding of the payment of death benefits." The Commission awarded the employee "penalties under Section 19(k) in the sum of 50% of the temporary total disability award of $56,288.22, which equals $28,144.11, and 50% of unpaid medical expenses of $28,173.52, equals $14,086.76, which totals $42, 230.87." The Commission awarded attorney fees in the amount of 20% of 84,461.71, or $16,892.20, and awarded $2,500 for section 19(*l*) penalties.

¶ 86 One Commissioner dissented from the Commission's decision and opinion on review. The dissenting Commissioner believed "that the preponderance of the evidence failed to show that [the employee]'s work injury and his condition of ill-being were causally connected." He believed that the employee manipulated his treating physicians in order to obtain prescription drugs. The Commissioner stated that the employee "had a concurrent condition that was a drug addiction in which [the employee] took an active role in hiding."

¶ 87 The employer appealed the Commission's decision to the circuit court of Will County.

On review, the circuit court entered a judgment that confirmed the Commission's decision. The court found that the "medical records combined with Dr. Borelli's opinions sufficiently support the Commission's findings." The employer argued, for the first time, that the employee's drug use was an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d) (West 2008)). However, the circuit court noted that the argument could be considered waived since it was not raised before the Commission. However, the court also noted, "[t]o the extent that the argument ties into Dr. O'Donnell's opinions ***, the Commission's decision is not against the manifest weight of the evidence." The court also held that the Commission's award of penalties and attorney fees was within its discretion. The employer now appeals the circuit court's judgment.

¶ 88 ANALYSIS

¶ 89 I.

¶ 90 Causal Connection

¶ 91 The first argument that the employer raises is that the Commission's finding of a causal connection between the employee's work-related accident and his condition of ill-being and death was against the manifest weight of the evidence. The employer, therefore, argues that the Commission's award for TTD benefits, medical benefits, and death benefits should be reversed.

¶ 92 Under the Act, a compensable injury is one that both "arises out of" and is "in the course of" a claimant's employment. *Hosteny v. Illinois Workers' Compensation Comm'n*,

397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). "An injury is said to 'arise out of' one's employment when there is a causal connection between the employment and the injury; that is, the origin or cause of the injury must be some risk connected with the claimant's employment." *Hosteny*, 397 Ill. App. 3d at 676, 928 N.E.2d at 483.

¶ 93 It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Republic Steel Corp. v. Industrial Comm'n*, 26 Ill. 2d 32, 45, 185 N.E.2d 877, 884 (1962). "[W]hether an injury arose out of and in the course of one's employment is generally a question of fact." *Hosteny*, 397 Ill. App. 3d at 674, 928 N.E.2d at 482. We will not reverse findings of fact unless they are against the manifest weight of the evidence. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 868, 923 N.E.2d 870, 878 (2010).

¶ 94 "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). The appropriate test is not whether this court might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R & D Thiel*, 398 Ill. App. 3d at 866, 923 N.E.2d at 877. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny*, 397 Ill. App. 3d at 674, 928

N.E.2d at 482. Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003).

¶ 95 On review, a court "must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Id*. In the present case, under the manifest-weight-of-the-evidence standard, we must affirm the Commission's decision with respect to causation.

¶ 96 The parties do not dispute that the employee suffered a closed head injury and a neck injury when he fell from his truck on January 9, 2001. The parties also do not dispute that the employee experienced symptoms after the work-related accident that included headaches, dizziness, nausea, neck and shoulder pain, vision difficulties, sleeplessness, anxiety, and depression. The employee had no history of any of these problems prior to the work-accident. The employee sought treatment for the symptoms, and his treatments resulted in numerous referrals to a number of specialists who, in turn, prescribed the employee numerous potent, antipsychotic drugs at high doses. There is nothing in the record to suggest that the employee took any of these medications prior to the work-related accident. Instead, the record suggests that the employee was healthy and exercised on a regular basis. The claimant's expert, Dr. Borelli, was highly critical of the employee's medical treatment because it did not include a "coordinating doctor, no generalist that would see what the other doctor

was doing, and no monitoring of the drug use."

¶ 97 Dr. Borelli believed that the employee was over medicated. The employee himself testified at the 19(b) arbitration hearing before he died that he also felt that he was over medicated. The Commission agreed with Dr. Borelli that the employee tried to follow his doctors' treatment plan the best he could. Dr. Borelli described the treatment plan as a "nightmare" that put the employee on a "polypharmacy track" for two years. According to Dr. Borelli, the employee's medical treatments conditioned his system to break.

¶ 98 Based on this evidence, the Commission concluded that the employee's death could be attributed to the work injury. The employer presented the medical opinion of Dr. O'Donnell who opined that the employee's medical treatments were reasonable and included customary medications for pain control, mood, depression, and seizures. However, the Commission did not find Dr. O'Donnell's opinions to be persuasive or credible. Instead, the court found Dr. Borelli to be more credible than Dr. O'Donnell.

¶ 99 The evidence suggests that the employee had obtained pain medications over the internet and from a doctor in Florida who had examined the employee's medical records, but had not examined the employee. In addition, the autopsy revealed that the employee died from the effects of a high level of Oxycodone in his system combined with some level of Valium. The record does not establish where the employee obtained the Oxycodone or the specific Valium, although the employee's treatment records include a prescription for Valium in July 2001.

¶ 100 The Commission noted the unknown origin of the specific medications that the employee took resulting in his death. However, the Commission was persuaded by "Dr. Borelli's conclusions regarding the cumulative effects and consequences of [the employee]'s long-term use of numerous potent medications as prescribed by a multitude of physicians." The Commission found, based on Dr. Borelli's opinion, that the employee's medical treatments over the course of the two years following the work-related accident disrupted the employee's brain and system. The medications in the employee's system at the time of his death, Dr. Borelli opined, would not have caused the employee's death if he had not been on a two-year polypharmacy track as a result of treatments he received to relieve the conditions of the work-accident. The Commission found: "It is undisputed that [the employee] had been taking a variety of potent drugs, including pain medications, sleep medications, and anti-depressant medications, on a long-term basis; these drugs were prescribed by a host of physicians, none of whom seemed to know what the others were doing. The long-term effects of this amount and variety of medication cannot be ignored."

¶ 101 Based on Dr. Borelli's opinion and the medical records admitted at the arbitration hearing, the Commission concluded that the employee's "accidental overdose was causally connected to his January 9, 2001 work accident." The circuit court confirmed the Commission's decision in a 9-page judgment that included a detailed discussion of the facts supporting the Commission's findings. The circuit court stated that the Commission's "findings are certainly within the Commission's discretion" and that a "review of the medical

records combined with Dr. Borelli's opinions sufficiently support the Commission's findings."

¶ 102 We cannot overturn the Commissions findings with respect to causation without substituting our judgment on matters that are within the Commission's authority to decide. Choosing between two conflicting medical opinions is a matter particularly within the province and expertise of the Commission. *Jarrett v. Industrial Comm'n*, 156 Ill. App. 3d 898, 913, 511 N.E.2d 144, 153 (1987). While the employer would have liked the Commission to give greater weight to the opinions of Dr. O'Donnell, the Commission weighed the conflicting medical opinions and found Dr. Borelli to be more credible. Under such circumstances, we must affirm the Commission's finding under the manifest-weight-of-the-evidence standard.

¶ 103 II.

¶ 104 Injurious Practice Under Section 19(d) of the Act

¶ 105 The employer next argues that the Commission's failure to find the employee's medication use to be an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d) (West 2008)) was against the manifest weight of the evidence.

¶ 106 Section 19(d) provides as follows:

> "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission

may, in its discretion, reduce or suspend the compensation of any such injured employee." 820 ILCS 305/19(d) (West 2008).

¶ 107 Under section 19(d), "the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery." *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 412, 911 N.E.2d 1042, 1046 (2009). Because section 19(d) vests the Commission with discretion, its decision will be overturned only if it is an abuse of discretion. *Global Products*, 392 Ill. App. 3d at 412, 911 N.E.2d at 1047.

¶ 108 In its judgment confirming the Commission, the circuit court found that this issue was never specifically raised before the Commission and could be considered waived. The employer argues that, although it did not title any argument as specifically being under section 19(d), it nonetheless argued before the Commission that the employee's death was caused by drugs obtained illegally and not part of a post-accident treatment.

¶ 109 We have reviewed the employer's brief before the Commission and have determined that the specific issue it raised before the Commission concerned the arbitrator's finding of causation. The employer captioned its argument as follows: "Respondent respectfully requests the award *finding causal connection* between Decedent's work injury and his condition of ill-being is incorrect and not supported by the preponderance of the evidence and should be reversed." (Emphasis added.) The employer's argument challenged the arbitrator's finding of a "causal connection."

¶ 110 We believe that the employer's failure to specifically request the Commission to exercise its discretion under section 19(d) to be fatal to its argument on appeal. Whether the employee's medication use was self-inflicted behavior that broke the chain of causation is a separate issue from whether his medication use was an injurious practice under section 19(d); they are "principles of law governed by different standards." *Global Products*, 392 Ill. App. 3d at 411, 911 N.E.2d at 1046. The employer's argument before the Commission plainly invoked the concept of causation, not an injurious practice under section 19(d). Because the Commission was never asked to exercise its discretion under 19(d), we cannot review its exercise of discretion or conclude that it abused its discretion under 19(d) standards. It is a well settled rule that the failure to raise an issue before the Commission results in its waiver. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020, 832 N.E.2d 331, 348 (2005).

¶ 111 Furthermore, even if the employer had raised 19(d) and had the Commission decided not to reduce or deny benefits under section 19(d), we could not find that such a decision would be an abuse of the Commission's discretion. "An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission." *Global Products*, 392 Ill. App. 3d at 412, 911 N.E.2d at 1047.

¶ 112 The record does not contain evidence that requires a finding that the employee sought prescription medications for the purpose of retarding his recovery. *Global Products*, 392 Ill. App. 3d at 412-13, 911 N.E.2d at 1047 ("We see no evidence (and respondent provides no record citation to such evidence) that claimant smoked cigarettes for the purpose of retarding

recovery"). On the contrary, the Commission weighed the evidence and found that the employee sought treatments in an effort to gain relief from the effects of the workplace injury and that he followed his doctors' treatments to the best of his ability. Unfortunately, the medical treatments the employee received were described by Dr. Borelli as a "nightmare" and "sloppy" with adverse side effects on the employee's brain and body. The Commission agreed with Dr. Borelli and concluded that the treatments for the work-injury placed the employee on a two-year polypharmacy track that ultimately resulted in his death. When the employer raised section 19(d) for the first time on appeal, the circuit court concluded: "To the extent that the argument ties into Dr. O'Donnell's opinions, as noted above, the Commission's decision is not against the manifest weight of the evidence."

¶ 113 The evidence before the Commission in the present case supports a finding that the injurious practices that retarded the employee's recovery were the practices of his treating physicians. Under such circumstances, we cannot deny or reduce the claimant's award under section 19(d) or conclude that the Commission would have abused its discretion if it had denied a request to do so.

¶ 114 III.

¶ 115 TTD Benefits Award

¶ 116 The next argument the employer raises is that the Commission's award of TTD benefits was against the manifest weight of the evidence. Specifically, the employer argues that the award of TTD benefits after November 6, 2001, was against the manifest weight of

the evidence. The employee died on March 19, 2003. Therefore, the disputed period of TTD benefits is from November 7, 2001, through March 18, 2003.

¶ 117 With respect to the period of time in which the employee was temporary and totally disabled, the arbitrator's decision adopted by the Commission states as follows: "The parties stipulated that [the employee] was temporarily and totally disabled from January 11, 2001 through January 15, 2001 and January 30, 2001 through March 18, 2003. (December 23, 2008 Arb. Ex. No. 1)." The claimant argues that the employer is bound by this stipulation.

¶ 118 However, the transcript of the December 23, 2008, arbitration hearing does not contain an Arbitrator's Exhibit No. 1 and does not contain any reference to the admission of such an exhibit. The only reference the record contains concerning the admission of "Arbitrator's Exhibit No. 1" occurred at the December 5, 2002, 19(b) arbitration hearing. However, the record of that hearing does not include a copy of the exhibit, nor does it appear anywhere else in the record. At the December 5, 2002, 19(b) hearing, in describing the stipulations contained within Arbitrator's Exhibit No. 1, the arbitrator stated: "There is a dispute as to the amount of temporary total disability, if any, to be allowed to the Petitioner; and this is a 19(b) matter."

¶ 119 On review, the circuit court noted that the record did not "reveal Arbitrator's Exhibit 1" and that the transcript of the December 5, 2002, hearing indicated that the parties disputed the amount of TTD benefits. Therefore, the circuit court treated the issue "as though it is in dispute." We agree with the circuit court's review of the record and will also treat the issue

of TTD benefits as a matter that was in dispute before the Commission.

¶ 120 "[T]he period during which a claimant is temporarily totally disabled is a question of fact to be resolved by the Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 272 (2010). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 257, 899 N.E.2d 365, 378 (2008).

¶ 121 "The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force." *Interstate Scaffolding Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274. "Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Id*.

¶ 122 "The dispositive inquiry is whether the claimant's condition has stabilized, that is, whether the claimant has reached MMI." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542, 865 N.E.2d 342, 356 (2007). "In determining whether a claimant has reached MMI, a court may consider factors such as a release to return to work, medical testimony or evidence concerning the claimant's injury, the extent of the injury, and, most importantly, whether the injury has stabilized." *Id*.

¶ 123 The medical records outlined above support the Commission's determination that the employee suffered a temporary total disability through the date of his death on March 19, 2003. The employee was continually treated for the symptoms of the work-accident up to the date of his death. On November 16, 2001, Dr. Heaney wrote a letter on the employee's behalf stating that he had the employee "on long-term medication management with a long-acting pain reliever called methadone. Methadone is a narcotic." He opined that "the fact that [the employee's] symptoms have continued now for 11 months without resolution would make one think that this is more of a permanent condition, and he is going to have a permanent disability from this."

¶ 124 In its brief, the employer highlights Dr. Kramer's November 6, 2001, opinion that the employee was at MMI and could be released back to full duty if his psychological condition is continually managed. However, Dr. Kramer's opinion conflicted with Dr. Heaney's opinion and does not establish the award of TTD benefits after November 6, 2001, was against the manifest weight of the evidence. In fact, the employer acknowledged that Dr. Kramer's opinion conflicted with other medical opinions when it asked the employee to submit to a reevaluation by Dr. Elliot on November 28, 2001. After his reevaluation, Dr. Elliot wrote in his report only that he was "uncertain" that the employee's symptoms were due to a post-concussion disorder since the employee had not followed up with him since January 2001.

¶ 125 In addition, Dr. Elliot would not release the employee to work as a truck driver

because he suffered from seizures. Although Dr. Elliot opined that the employee's seizure disorder was not related to post-concussion syndrome or cervical strain, he offered no opinion concerning whether the seizures could be a side effect from the employee's medical treatments that he received as a result of the post-concussion syndrome and cervical strain.

¶ 126 In contrast, Dr. Borelli explained that Valium or Dilantin can raise a person's threshold to seizures and when the medication is stopped, the person's seizure threshold goes down, making the patient susceptible to seizures and anxiety. In May 2001, the employee was first prescribed Ativan, which is a benzodiazepine similar to Valium. He received additional Ativan during an emergency room visit in June, a Valium prescription during an emergency room visit in July 2001, and began using Klonopin (which is also in the benzodiazepine class of medications) in July 2001. The employee suffered his first seizure on September 5, 2001, and had not suffered from any seizures prior to that time. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63–64, 442 N.E.2d 908, 911 (1982). Considering the chain of events and the medical testimony, the record supports a finding that the employee's seizure disorder was causally related to the workplace accident and prevented him from returning to work as a truck driver.

¶ 127 The testimony of the employee also supports the Commission's TTD benefits award

after November 6, 2001. When the employee testified at the 19(b) hearing, he said his daily prescribed medications included a muscle relaxer, a skeletal muscle relaxer, pain medication, anxiety medication, two different seizure medications, and a sleep medication. In addition, he used a spine stimulator. He testified that he was still suffering from visual difficulties, shaking, trembling, seizures, headaches, muscle spasms, and neck and shoulder pain.

¶ 128 The employee continued to follow up with various medical providers after the 19(b) hearing. Approximately three weeks before he died, he arrived at Dr. Yaratha's pain clinic for a treatment, and a registered nurse told him that it was important for him to remain on his medications. She gave him one month's supply of samples of Zoloft and Seroquel.

¶ 129 Under these facts, the Commission's award of TTD benefits for a period after November 6, 2001, and up to the day the employee died was not against the manifest weight of the evidence. The opposite conclusion is not clearly apparent.

¶ 130 IV.

¶ 131 Penalties Pursuant to Sections 19(k) and (*l*) and Attorneys' Fees Pursuant to Section 16

¶ 132 The employer's next argument is that the Commission's award of penalties and attorneys' fees was against the manifest weight of the evidence.

¶ 133 As noted above, the arbitrator originally awarded the claimant penalties and fees, finding that the employer unreasonably and vexatiously failed to pay TTD benefits as well as death benefits and medical expenses. On review, the Commission found that there was a causal connection between the employee's death and the workplace injury. However, the

Commission found that the employer's position that the death and the accident were unrelated was not "so unreasonable as to be the basis for the imposition of penalties and attorneys' fees for the withholding of the payment of death benefits." Accordingly, the Commission limited its award of penalties and fees only for the employer's failure to pay TTD benefits and medical expenses. On appeal, the employer argues that these penalties and fees are also against the manifest weight of the evidence.

¶ 134 The issues surrounding awards of penalties and fees under sections 16, 19(k) and 19(*l*) of the Act involve two different standards.

¶ 135 Penalties under section 19(*l*) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late and the employer cannot not show an adequate justification for the delay. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id*. When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, section 19(*l*) penalties ordinarily are not imposed. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 756 (2001). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121-22, 578 N.E.2d 140, 143 (1991).

¶ 136 The standard for awarding penalties pursuant to section 19(k) is higher than the

standard under section 19(*l*). Section 19(k) requires more than a showing that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan v. Industrial Comm'n*, 183 Ill.2d 499, 515, 702 N.E.2d 545, 552 (1998). Section 19(k) penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 137 With respect to attorneys' fees, Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2005). The imposition of penalties and attorney fees under sections 19(k) and section 16 fees is discretionary. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 138 A review of the Commission's decision concerning penalties and attorney fees pursuant to sections 19(k) and 16 involves a two-part analysis. First, we must determine whether the Commission's finding that the facts justified section 19(k) penalties and section 16 attorney fees is "contrary to the manifest weight of the evidence." *McMahan*, 183 Ill. 2d at 516, 702 N.E.2d at 533. Second, we must determine whether "it would be an abuse of discretion to refuse to award such penalties and fees under the facts present here." *Id*.

¶ 139 In the present case, we believe that the Commission's imposition of section 19(*l*) penalties was against the manifest weight of the evidence. In addition, because the facts do not support the imposition of penalties under section 19(*l*)'s lower standard, the Commission's finding that the facts met the higher standard of section 19(k) penalties and

section 16 attorney fees is also contrary to the manifest weight of the evidence.

¶ 140 In the present case, the employer reasonably relied on a series of medical examinations and medical opinions to conclude that the employee had reached MMI when it terminated TTD benefits and payment of medical expenses. Although we affirm the Commission's finding that the employer was incorrect, nonetheless, we believe that the employer's justification in terminating workers' compensation benefits on November 6, 2001, was adequate to prevent an award of penalties and attorney fees.

¶ 141 On October 1, 2001, Dr. Kramer issued a report in which he recommended that the employee undergo neuropsychological testing. The employee underwent the testing on October 22, 2001, and the examiner believed that the employee was unlikely to "benefit much from any procedure which is intended to eliminate his disability and return him to normal functioning." The examiner believed that the employee was "susceptible to iatrogenic problems and should be approached in a conservative manner." On November 6, 2001, Dr. Kramer reviewed the neuropsychological report and concluded that the employee was at MMI and could be released back to full duty if the employee's psychological condition is continually managed.

¶ 142 As noted above, Dr. Kramer's opinion on November 6, 2001, conflicted with the opinions of other physicians familiar with the employee's conditions. Although Dr. Kramer's opinion did not ultimately persuade the Commission, we cannot conclude that the employer was unreasonable in relying on his opinion. Accordingly, we are compelled to concluded

that the Commission's award of penalties and attorneys fees was against the manifest weight of the evidence. See, *e.g.*, *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 115, 118, 466 N.E.2d 1221, 1223 (1984) (Commission's assessment of section 19(*l*) penalties reversed, where the employer disputed causation relying on a physician's report that indicated the claimant suffered from conditions that were unrelated to his work accident).

¶ 143 V.

¶ 144 Calculation of Average Weekly Wage

¶ 145 The employer's final argument on appeal is that the Commission's calculation of the employee's average weekly wage was against the manifest weight of the evidence.

¶ 146 In a workers' compensation case, the claimant has the burden of establishing his or her average weekly wage. *Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 731, 596 N.E.2d 746, 748 (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 is against the manifest weight of the evidence. *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 1096, 673 N.E.2d 706, 708-09 (1996).

¶ 147 With respect to the calculation of a worker's average weekly wage, section 10 of the Act provides as follows:

> "The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the

last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed" 820 ILCS 305/10 (West 2008).

¶ 148 The employee began working as a truck driver for the employer in August 2000. He suffered the work-related accident on January 9, 2001. Accordingly, the employee worked for the employer for a period of less than 52 weeks. When the employee works less than 52 weeks, the calculation of the employee's average weekly wage is based upon days actually worked. The "time which an employee does not work must be factored out of the calculation of average weekly wage." *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 233, 756 N.E.2d 822, 828 (2001).

¶ 149 Based on the evidence presented at the arbitration hearing, the Commission found that "between August 17, 2000 and January 6, 2001, [the employee] earned $18,983.66. During that time, he worked 105 days ***." The Commission divided 105 days worked by the employee's normal six-day workweek and found that he worked 17.5 weeks in the year

preceding his accident. The Commission properly calculated the employee's average weekly wage by dividing his earnings ($18,983.66) by the weeks he worked (17.5) and concluded that his average weekly wage was $1,084.78. We agree with the claimant and the circuit court that the Commission's calculation comports with the plain language of the Act and is not against the manifest weight of the evidence.

¶ 150 CONCLUSION

¶ 151 For the foregoing reasons, we reverse the Commission's award of penalties and attorneys' fees pursuant to sections 16, 19(*l*), and 19(k). We affirm the remainder of the judgment of the circuit court which confirmed the Commission's decision.

¶ 152 Affirmed in part, reversed in part.