



diagnosis and treatment for thoracic outlet syndrome, was causally related to a work accident that occurred on March 25, 2005. The arbitrator ordered Continental Tire to pay temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, accrued compensation, medical services, and mileage, and awarded the claimant penalties and attorney fees pursuant to sections 16, 19(k), and 19(l) of the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/16, 19(k), 19(l) (West 2008)).

¶ 3 On review, the majority of the Illinois Workers' Compensation Commission (the Commission) corrected and modified the arbitrator's decision by vacating the TTD award from September 12, 2006, through October 26, 2006 (reducing the award from 61 1/7 weeks to 54 5/7 weeks), reducing the PPD award from 175.6 weeks to 172 weeks,<sup>1</sup> and vacating the arbitrator's awards of penalties and attorney fees. The Commission affirmed the remainder of the arbitrator's decision. The dissenting commissioner would have affirmed the awards of penalties and attorney fees.

¶ 4 Both parties appealed the Commission's decision to the circuit court of Jefferson County. The circuit court confirmed the Commission's decision. The claimant filed a timely notice of appeal from the trial court's order, and Continental Tire filed a timely cross-appeal. We affirm the Commission's decision.

¶ 5 **BACKGROUND**

¶ 6 The facts recited are derived from the June 3, 2009, arbitration hearing. In 2005, the claimant worked for Continental Tire as a passenger tire builder. Her job required her to work 12-hour shifts with frequent pushing and pulling of tire components weighing up to 50 pounds and frequent above-shoulder work. She testified that, before her accident, she was physically capable of performing her job. Her specific job description was admitted into evidence and is as follows:

---

<sup>1</sup>The claimant concedes that she is entitled to only 172 weeks of PPD benefits.

"Remove from beads rack. Bead racks take a force of 45 lbs. to push. Remove filed beads from shells. Place beads on bead rings. Push cycle button. Pull innerliner forward and cut in guide. Push cycle peddle and splice innerliner, push cycle peddle again. Apply first ply, push jog peddle, cut first ply and splice, and push cycle peddle. Apply second ply repeat same for first ply. Change liners when out, use hoist for full liners and pick up empty liners by hand (empties weigh up to 40 lbs). Retrieve pads from pad book (force to push up to 100 lbs. and a distance of 40 ft.), place pads on drum. Push cycle peddle. Remove finished carcass, weighing up to 15 lbs. Place on cart with 3 shelves 76 in. for highest and 16 in. for lowest, cart holds 8 carcasses per shelf. Builder may be required to handle scrap green tires up to 37.7 lbs."

The production rate for the machine the claimant worked on was "approximately 27.3 per hour," depending on tire size and daily plant inventories.

¶ 7 On March 25, 2005, the claimant turned in a statement relating what happened that day. She stated that, while she was building tires, she lifted a leaf to remove the pads and felt a pulling sensation in her shoulder. She explained that she put a finished carcass on a cart, then turned to remove the pads from the book, and when she lifted the leaf, she felt a pulling sensation and pain in her right shoulder. She said that the production rate for her machine was 23.3 per hour. The claimant testified that the leaf she bent down to pull was stuck, so she "jerked up on it two or three times," and when it broke loose, she "instantly felt pain" from her right shoulder blade, across the top of her back, and up her neck. After the accident, she went to the plant physician, Dr. Keith Byler, who sent her to Work Fit, the plant's physical therapy department.

¶ 8 On March 28, 2005, Work Fit issued a report noting that, after the claimant's work injury, someone at human services gave her Advil and iced her shoulder. The claimant went back to work but "could only build a few more tires before she had to quit." The employer

put the claimant on light duty. The report from Work Fit states that the claimant had no prior history of shoulder problems before March 25, 2005.

¶ 9 In April 2005, the claimant continued to work light duty and received physical therapy from Work Fit. She sought treatment from Dr. Neal at UltiMed Plus. Dr. Neal ordered a magnetic resonance imaging (MRI) of the claimant's neck and right shoulder, imposed light-duty work restrictions, and performed trigger-point injections. In May 2005, Dr. Neal referred the claimant to Dr. Susan Wu, who then referred her to Dr. Paul Juergens, a pain management specialist. On July 14, 2005, Dr. Juergens gave the claimant botox injections in her shoulder.

¶ 10 Dr. Juergens recommended the claimant undergo a functional capacity evaluation. On August 29, 2005, Shay Wiggs, a physical therapist for Fit for Work, submitted a report indicating that the claimant could work at the medium physical demand level and that she met all the demands for her job as a passenger tire builder except that she should be limited to carrying no more than 30 pounds. Ms. Wiggs recommended that the claimant continue treating with Dr. Juergens, return to work full duty on an 8-hour shift, and progress to 12-hour shifts as tolerated.

¶ 11 The claimant returned to work full duty in September 2005. On October 3, 2005, Work Fit conducted an evaluation of the claimant. In a report, the evaluator noted that the claimant stated that she was back to work full duty but had muscle spasms and pain in her right upper back and neck. The claimant stated that she could get through about two hours of building tires and then her shoulder and back started to "really burn and hurt."

¶ 12 On October 25, 2005, Dr. Sherwyn Wayne conducted an independent medical examination (IME) of the claimant at the request of the employer. Dr. Wayne found that the claimant had been performing her regular job duties since September 2005 but that she complained of "severe neck, right trapezius, and right shoulder pain with no radiating pain

or paresthesia distally." Dr. Wayne examined the claimant and reviewed an April 21, 2005, cervical spine x-ray and April 26, 2005, MRI tests of her cervical spine and right shoulder. He determined that his findings were "compatible with myofascitis involving the right levator scapular muscle and possibly the right rhomboid minor muscle" but no indication of cervical spine or right shoulder joint pathology. He stated that thoracic nerve neuropathy was unlikely. He did not recommend any further diagnostic testing and did not consider her a candidate for "any form of surgery." He believed she was capable of performing her regular work duties on a full-time basis. He concluded:

"With regard to causation, it is probable that muscle strain occurred on March 25, 2005, which has localized to the levator scapular area with apparent resolution of trapezius or paracervical symptoms. In view of the above recommendations, at this time the patient is not considered at maximum medical improvement. The consideration of MMI should be revisited in 3-4 months."

¶ 13 The claimant testified that she was still having problems after October 25, 2005, and she returned to Dr. Byler on January 12, February 2, and February 6, 2006. She stated that she was not getting any relief from her symptoms, but Dr. Byler would not put her on light duty even though she told him about the pain.

¶ 14 On March 9, 2006, the claimant began seeing Alicia Markley, the physician's assistant for her family physician, Dr. Quincy Scott.

¶ 15 On July 27, 2006, Dr. Michael John Milne, an orthopedic surgeon, conducted an IME of the claimant on behalf of the employer. In addition to conducting a physical examination of the claimant, he ordered and reviewed three x-rays of her shoulder and reviewed her previous medical records. He diagnosed her with right shoulder impingement syndrome with possible tendinosis of the rotator cuff. He believed she could work at her regular job duties. He recommended that if she had no other symptoms during the next four to six weeks, she

would need no further treatment, but if she began having additional symptoms, she should receive anti-inflammatory medication and cortisone injections to attempt to diagnose and treat her for rotator cuff tendinosis and/or bursitis.

¶ 16 On August 2, 2006, the claimant saw Dr. George Arthur Paletta, Jr., an orthopedic surgeon, as a referral from Dr. Scott's assistant. At that visit, the claimant complained that she still had pain in the right upper extremity of her shoulder region, which Dr. Paletta described as "predominantly related to activities and that any significant use of the arm caused a flare in her symptoms." He noted that she also complained of intermittent numbness, tingling, and burning in the right arm and pain in the base of her neck. She told him that if she put her arm in an overhead position, her right upper extremity became numb. During his examination, he noted positive impingement signs. He concluded that her right shoulder symptoms were causally related to her March 25, 2005, work accident. He recommended that she have an electromyogram (EMG) and nerve conduction study and be evaluated by Dr. Robert W. Thompson. Dr. Paletta testified that he was concerned that her "overwhelming symptoms" of numbness and tingling might have a "cervical origin" or a "thoracic outlet." He placed her on work restrictions of no overhead work, a lifting limit of 10 pounds, and no more than an 8-hour workday.

¶ 17 The claimant testified that on August 9, 2006, she was at work and Steve Crane, the employer's workers' compensation administrator, called her into his office and informed her that Dr. Milne had released her to return to work full duty and that when she next reported to work, she was to "build tires or go home and stay home." She said that she attempted to return to full-duty work on a 12-hour shift. She worked one shift on August 12, 2006, to the best of her ability. She returned for the next shift, on August 13, 2006, but about two hours into the shift, she went to the nurse and explained that, due to the pain in her shoulder from building tires, there was no way she could stay at work. She left and went to Herrin Hospital,

where emergency room personnel gave her a light-duty slip. She testified that she gave the light-duty slip to the employer on August 14 or 15, 2006, but the employer told her to go home. After that, she stayed off work.

¶ 18 On August 16, 2006, the claimant saw Dr. Thompson, a vascular surgeon with a subspecialty of treating patients with thoracic outlet syndrome. The claimant explained her March 25, 2005, work injury to Dr. Thompson and told him that Dr. Paletta had treated her most recently. Dr. Thompson testified that the claimant told him that the possibility of thoracic outlet syndrome "had been raised" in her visit with Dr. Paletta and that he had referred her to Dr. Thompson "for further evaluation of that possibility." After examining the claimant, Dr. Thompson diagnosed her with neurogenic thoracic outlet syndrome, which he described as nerve compression involving the nerve roots of the brachial plexus. He testified that the claimant's March 25, 2005, work accident was the "primary inciting event causing her symptoms and her condition."

¶ 19 Dr. Thompson explained that the basis of his diagnosis was a combination of the history given to him by the claimant and his physical examination of her:

"The symptoms that she complained of were predominantly related to those of the right upper extremity and included pain, heaviness and numbness and tingling that extended down from the shoulder level to the hand. Her description of that was that it was dominantly in fingers four and five of the hand, which corresponds to the ulnar nerve distribution or the lower nerve roots of the brachial plexus.

She described that these symptoms in addition to the pain and tightness in the neck had been progressive, and that they originated at the time of the injury in question. There was a point during the follow-up care after that injury where she returned to work and the symptoms were magnified at that time. After that she then had not been working. So they had been exacerbated as well by that period when she

returned to work."

¶ 20 Dr. Thompson stated that he reviewed the claimant's diagnostic testing, but the results had "not identified another clear-cut cause for her symptoms." Additionally, because she did not have a "complete response" to the medications prescribed for her and his examination ruled out vascular forms of thoracic outlet syndrome, he believed that "her thoracic outlet syndrome included some compression at the level just beyond the first rib where the pectoralis minor muscle tendon covers the nerve root." He noted that one of the most important diagnostic tests for thoracic outlet syndrome is the elevated arm stress test. He testified that, when the claimant performed this test, she "very quickly developed pain, numbness and tingling in the right arm even immediately upon elevation of the arms, which quickly worsened with the exercise and forced her to discontinue that within the first minute."

¶ 21 Dr. Thompson explained that accurately diagnosing thoracic outlet syndrome is difficult because symptoms of that condition overlap with other problems. He ruled out a shoulder injury as the source of her symptoms based on his physical examination. He also had "strong faith" in Dr. Paletta's exam and conclusion that he could not attribute the claimant's symptoms to her shoulder.

¶ 22 After his August 16, 2006, examination of the claimant, Dr. Thompson recommended that she undergo "an initial trial of physical therapy" for six to eight weeks. The claimant began that therapy, but it was suspended after the first three visits because she could not tolerate the stretching exercises and her symptoms were increasing.

¶ 23 The claimant testified that Dr. Thompson took her off work completely after his initial examination on August 16, 2006. She acknowledged that she was scheduled to see Dr. Milne on September 12, 2006, but said that her father was in the hospital with "some kind of heart problems." She testified that she asked her attorney if she could reschedule the appointment

with Dr. Milne so that she could be with her father instead and that her attorney told her the appointment was rescheduled for October 26, 2006.

¶ 24 On September 8, 2006, the claimant's attorney wrote a letter to the employer stating that the claimant "just saw Dr. Milne on July 27, 2006." The attorney stated that the claimant's medical condition had not changed since that date and that she remained off work but was not receiving any benefits, and her medical bills were "going unpaid." The claimant's attorney objected to "a repeat examination by Dr. Milne" and suggested that the employer might "like to reschedule the examination in a couple of months or once [the claimant's] medical condition changes." The attorney did not mention the claimant's request to be with her father on September 12, 2006, or Dr. Paletta's referral of the claimant to Dr. Thompson. The claimant did not attend the IME with Dr. Milne on September 12, 2006.

¶ 25 On September 15, 2006, Dr. Thompson performed a right supraclavicular thoracic outlet decompression including a radical anterior and middle scalenectomy, brachial plexus neurolysis, and resection of the first rib with a right pectoralis minor tenotomy. The claimant followed up with Dr. Thompson.

¶ 26 On October 26, 2006, Dr. Milne conducted another IME on the claimant. He reported that he examined the claimant and reviewed his prior IME as well as the claimant's updated medical records, including the additional records from Dr. Thompson. He stated in his report that because the claimant felt that her symptoms were resolving after Dr. Thompson's surgery, he could not disagree with Dr. Thompson's diagnosis of thoracic outlet syndrome or the subsequent surgery. He wrote: "Trauma such as the [claimant's] reported injury can cause thoracic outlet syndrome. It remains my feeling that [she] does suffer from impingement about the shoulder and rotator cuff tendinosis. We will only know with time and rehabilitation from her thoracic outlet syndrome surgery whether these are symptomatic or asymptomatic." He noted, however, that it would have been best if he had been able to

examine the claimant before Dr. Thompson's surgery. He stated that the claimant told him she "had an illness in her family, specifically her father, and that she was unable to keep her September 12, 2006, appointment for that reason." He concluded that it was "very difficult" for him to provide a conclusive response to the employer since he did not reexamine the claimant before Dr. Thompson's surgery.

¶ 27 Dr. Milne testified that, if he had examined the claimant before Dr. Thompson's surgery, that examination "may have aided" him in confirming or denying Dr. Thompson's thoracic outlet syndrome diagnosis. Dr. Milne acknowledged that he did not treat patients for thoracic outlet syndrome, did not criticize Dr. Paletta for referring the claimant to Dr. Thompson, and had no criticisms of any of Dr. Thompson's care or treatment of the claimant. Dr. Milne acknowledged that he would defer to Dr. Thompson's recommendations about the claimant's treatment and ability to return to work. He also acknowledged that, even though the claimant's nerve conduction test did not show any abnormalities in her upper extremities, that test did not rule out the possibility of thoracic outlet syndrome.

¶ 28 On March 9, 2007, Dr. Milne reviewed the claimant's additional medical records, including her updated physical therapy notes, and reported to the employer that he had "no reason" to change his opinion "regarding concomitant thoracic outlet syndrome and right shoulder impingement and rotator cuff tendinosis."

¶ 29 The claimant continued to follow up with Dr. Thompson through 2007. In May 2007, Dr. Thompson recommended that the claimant continue off work and that she begin a work-hardening physical therapy program.

¶ 30 Dr. William H. Bradshaw examined the claimant on September 18, 2007, at the request of the employer. Dr. Bradshaw wrote a letter to the employer in which he stated his conclusions after examining the claimant and reviewing her medical history:

"In summary, Ms. Warriner is a 37-year-old female who sustained a right shoulder

injury and has undergone thoracic outlet surgery for this. She is currently recovering from her surgery. Since she developed shoulder pain while at work, her current condition is related to this. Since Ms. Warriner has had improvement in her symptoms with her thoracic outlet surgery, I would have to assume that she had this condition. As this was diagnosed by Dr. Paletta and Dr. Thompson based on their examination[s], I would have to defer to their diagnosis. At this time, Ms. Warriner should continue with her physical therapy as recommended by Dr. Thompson. The surgery performed by Dr. Thompson which, according to the patient, included resection of rib as well as division of the pectoralis minor muscle, is the appropriate therapy for thoracic outlet syndrome. The length of time Ms. Warriner would need to be off work is dependent upon the surgeon's recommendations for recovery. Since she is more than one year from surgery, she should most likely be able to return to work for light duty at least at this time. Her return to full work duty status would again be determined by Dr. Thompson's final evaluation of his surgery."

¶ 31 The claimant testified that she was completely off work from August 13, 2006, through September 30, 2007. From September through the end of 2007, the claimant continued physical therapy as directed by Dr. Thompson. On January 28, 2008, the claimant returned to Dr. Paletta on Dr. Thompson's recommendation for evaluation of her continuing right shoulder pain. Dr. Paletta wrote:

"Apparently during the course of her work hardening as part of her recovery from her thoracic outlet, she began to develop right shoulder pain. She has been seen by Dr. Thompson on several occasions for follow up and he felt this was not related directly to her thoracic outlet but rather presented a primary shoulder problem and recommended that she be seen here for further evaluation."

Dr. Paletta concluded that the claimant suffered from chronic impingement syndrome in her

right shoulder, and he recommended subacromial injection therapy and physical therapy.

¶ 32 On March 17, 2008, Dr. Paletta examined the claimant again and reviewed an MRI of her right shoulder taken on February 4, 2008. He determined that the injections had not offered the claimant prolonged relief and that she required shoulder surgery. On March 18, 2008, Dr. Paletta performed a right shoulder arthroscopy with extensive debridement of the posterior superior labrum and subacromial decompression, bursectomy, and acromioplasty.

¶ 33 On April 28, 2008, Dr. Paletta wrote a letter to the claimant's attorney. He stated that when he initially saw the claimant on August 2, 2006, he was of the opinion that "her right shoulder symptoms were causally related to her work activities and her work injury," and his suspicion was that "the majority of her symptoms were likely related to thoracic outlet syndrome." Dr. Paletta explained that Dr. Thompson had confirmed the tentative diagnosis of thoracic outlet syndrome and had ultimately performed surgery as a result. Dr. Paletta stated that, when he reexamined the claimant after Dr. Thompson's surgery, he found that, while her shoulder symptoms were present when he first examined her in August 2006, they were "clearly exacerbated by her work hardening activities."

¶ 34 The claimant saw Dr. Paletta on May 9, 2008, at which time he wrote that she had "significant improvement but incomplete relief" of her symptoms, which he said was "not necessarily a surprise." He found it likely that she would have residual pain symptoms given her history. On October 15, 2008, Dr. Paletta met with the claimant and determined that she had made a full recovery from her shoulder surgery. He found that she was at maximum medical improvement (MMI) and released her subject only to Dr. Thompson's restrictions. The claimant testified that she left employment with Continental Tire in October 2008 because she knew that she was not physically able to perform her job duties. By the arbitration hearing in June 2009, she had obtained alternative employment. She stated that she made \$7 less per hour than when she worked for Continental Tire but that she was not

seeking a wage differential award. She testified that Dr. Thompson released her to full duty in January 2009.

¶ 35 The claimant testified that, at the time of the arbitration hearing, she had much better range of motion than before her surgeries, but she still had difficulty with repetitive activities such as laundry, vacuuming, sweeping, mopping, and most other household work. She especially had difficulty using any tools that vibrated, such as a weed-eater. She said that she had enjoyed several sports, including baseball, softball, and bowling, but could no longer participate in them. She explained that she continued to have numbness from her mid-chest area all the way across her shoulder and down her right arm. The area where Dr. Thompson removed her rib bone was still tender and painful if she was hit in that area or if pressure was applied, as occurred when she wore a seat belt. However, she said that her right shoulder was much better than before Dr. Paletta's surgery, and she had no trouble performing her current job duties because she mainly worked sitting at a computer.

¶ 36 The arbitrator awarded the claimant TTD benefits of \$461.31 per week for 61 1/7 weeks, from August 13, 2006, through September 30, 2007, and March 18, 2008, through March 31, 2008. The arbitrator also awarded the claimant PPD benefits of \$415.18 per week for 175.6 weeks because her work injury caused a 25% disability to her body as a whole and a 20% disability to her right arm. The arbitrator ordered the employer to pay the claimant accrued compensation for the period of March 25, 2005, through June 3, 2009; \$91,613.28 for necessary medical services; \$1,639.61 for travel expenses while seeking medical treatment; \$8,808.53 in penalties pursuant to section 19(k); \$2,250.00 in penalties pursuant to section 19(l); and \$3,523.41 in attorney fees pursuant to section 16. 820 ILCS 305/16, 19(k), 19(l) (West 2008).

¶ 37 In support of her decision, the arbitrator found that the claimant's conditions of ill-being affecting her right shoulder and neck, including the diagnosis of thoracic outlet

syndrome, were causally related to her work accident of March 25, 2005. She based this finding on the "chain of events" and the records of the claimant's treating physicians. The arbitrator placed great weight on the opinions of Dr. Paletta and Dr. Thompson.

¶ 38 The arbitrator rejected the employer's claim that the claimant refused to attend the September 12, 2006, IME with Dr. Milne, finding that the record indicated that the appointment was simply rescheduled for October 26, 2006, and that the claimant did not refuse to submit to or unnecessarily obstruct the IME. The arbitrator awarded the claimant mileage while seeking treatment from Dr. Thompson, whose office is located in St. Louis, Missouri, finding that there were no other thoracic outlet syndrome specialists closer to the claimant's home of Benton, Illinois.

¶ 39 The arbitrator awarded the claimant penalties and attorney fees based on her findings that the employer refused to pay TTD benefits from August 13, 2006, through October 26, 2006; that the employer told the claimant she had to return to work full duty contrary to the recommendations of her treating orthopedist, Dr. Paletta; that the claimant returned to full-duty work on August 9, 2006, but was not able to do her job and had to leave to go to the emergency room; that Dr. Thompson took the claimant completely off work on August 16, 2006; and that Dr. Milne testified that he would defer to Dr. Thompson regarding the claimant's treatment and work status.

¶ 40 The Commission corrected and modified the arbitrator's decision. It vacated the TTD award from September 12, 2006, through October 26, 2006, based in part on the finding that the claimant's attorney did not list the circumstance of her father's illness in his September 8, 2006, letter. The Commission found that the claimant's attorney objected to the IME because the claimant "was not receiving benefits and had just seen Dr. Milne on July 27, 2006," and he indicated that the claimant's medical condition had not changed since that examination. The Commission viewed the claimant's diagnosis as changing after Dr. Milne's

first IME, stating that when the claimant first saw Dr. Milne on July 27, 2006, he understood that she was claiming an injury to her right shoulder as a result of her work accident. However, the Commission noted that, less than one week later, on August 2, 2006, Dr. Paletta referred the claimant to Dr. Thompson to evaluate her for thoracic outlet syndrome. The Commission stated, "Dr. Thompson diagnosed neurogenic thoracic outlet syndrome on August 16, 2006[,] and performed a right supraclavicular thoracic outlet decompression \*\*\* on September 15, 2006," but Dr. Milne did not conduct his reexamination until October 26, 2006, "almost two months after Dr. Paletta first suspected thoracic outlet syndrome and approximately six weeks after Dr. Thompson performed thoracic outlet surgery."

¶41 The Commission further found that the "physicians who rendered opinions in this case agreed that accurate diagnosis of thoracic outlet syndrome is highly dependent on physical examination." The Commission found that Dr. Milne was unable to render a conclusive opinion concerning the accuracy of Dr. Thompson's diagnosis absent a preoperative examination. In light of these findings, the Commission did not view the objection raised by the claimant's attorney on September 8, 2006, as valid and, accordingly, vacated the TTD award from September 12, 2006 (the date of the originally scheduled IME), until October 26, 2006 (the date of the rescheduled IME).

¶42 The Commission vacated the arbitrator's award of penalties and attorney fees based on its findings that the employer had a reasonable basis for refusing to pay the claimant benefits from September 12, 2006, through October 26, 2006, and that the claimant was not owed benefits during that period. In support of this ruling, the Commission cited the evidence that Dr. Milne had found the claimant capable of returning to work at full duty on July 27, 2006, and that the employer had reasonably relied on that opinion in refusing to initiate TTD payments on August 16, 2006. The Commission also noted that Dr. Milne conceded that he would defer to Dr. Thompson's decision regarding the claimant's work

status because he had not had the opportunity to examine the claimant himself before Dr. Thompson's surgery.

¶ 43 The Commission found that the employer did not act in an objectively unreasonable manner with respect to the payment of the claimant's medical expenses for her shoulder care. The Commission stated that the employer "viewed the treatment relating to the shoulder as beyond the two choices afforded by Section 8(a)." 820 ILCS 305/8(a) (West 2008). Although the Commission concluded that the employer had "waived" the section 8(a) choice issue at arbitration, "based in part on its failure to object to any of [the claimant's] medical expenses, waiver was a contested issue on review." The Commission found that the record did not permit a finding that the employer acted in an objectively unreasonable manner in challenging its liability for the shoulder expenses. Finally, the Commission affirmed the arbitrator's award of \$91,613.28 for necessary medical expenses and affirmed and adopted the remainder of the arbitrator's decision.

¶ 44 The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 45 ANALYSIS

¶ 46 We first consider the claimant's argument that the Commission's decision to vacate the arbitrator's TTD award from September 12, 2006, through October 26, 2006, is against the manifest weight of the evidence. The claimant points out that she had already undergone two IMEs when Dr. Milne's second IME was scheduled for September 12, 2006. She argues that she did not refuse to attend the September 12, 2006, IME, but only asked for it to be rescheduled. The claimant relies on her testimony at the arbitration hearing that she needed Dr. Milne's second IME to be rescheduled because her father was in the hospital at the time, that the IME was rescheduled, and that she attended it on October 26, 2006.

¶ 47 The employer points out that the Commission stated that it viewed the evidence on this issue differently than the arbitrator. The employer emphasizes that the claimant's

attorney did not mention her father's illness as a basis for the request to reschedule. Resolution of this issue begins with a review of section 12 of the Act, which provides in pertinent part, as follows:

"An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act. \*\*\*

\* \* \*

If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period." 820 ILCS 305/12 (West 2008).

¶ 48 It is the function of the Commission to resolve disputed questions of fact, and that resolution should be set aside only if it is against the manifest weight of the evidence. *Peabody Coal Co. v. Industrial Comm'n*, 349 Ill. App. 3d 493, 497, 812 N.E.2d 59, 63-64 (2004). It is the Commission's responsibility to decide which of the conflicting medical views to accept, judge the credibility of the witnesses, and draw permissible inferences from the evidence. *Id.* For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.* at 497, 812 N.E.2d at 64. In the instant case, the Commission viewed the evidence differently than the arbitrator and arrived at a different conclusion about which evidence to accept, which is allowed because the

Commission exercises original jurisdiction. See *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 284, 811 N.E.2d 684, 692 (2004) ("Original jurisdiction is vested in the Commission, even though it is reviewing the decision of an arbitrator without hearing additional evidence."). When a court reviews a decision of the Commission, "the relevant test is whether there is sufficient evidence in the record to support it." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 143, 923 N.E.2d 266, 272 (2010). Therefore, the issue is whether the Commission's finding that the claimant unreasonably refused to submit to the September 12, 2006, IME is against the manifest weight of the evidence.

¶ 49 We find sufficient evidence in the record to support the Commission's decision to vacate the award of TTD benefits from September 12, 2006, through October 26, 2006. The Commission's decision is supported by the September 8, 2006, letter from the claimant's attorney in which he incorrectly asserted that there had been no change in the claimant's medical condition since Dr. Milne's last IME. In fact, after Dr. Milne's first IME and before September 8, 2006, Dr. Paletta had examined the claimant, had reached a tentative but previously undisclosed diagnosis of thoracic outlet syndrome, and had referred the claimant to Dr. Thompson to evaluate her for that condition, and Dr. Thompson had examined the claimant, confirmed the diagnosis of thoracic outlet syndrome, and scheduled her for physical therapy on that basis. Three days after the scheduled IME, Dr. Thompson performed surgery to relieve the symptoms caused by thoracic outlet syndrome. The Commission was free to rely on this evidence in finding that the claimant's objection to the September 12, 2006, IME was not valid.

¶ 50 Furthermore, the Commission's decision to vacate the TTD award from the date the IME was cancelled until it was rescheduled was authorized by section 12 of the Act. That section provides that if an employee refuses to submit to or unnecessarily obstructs an IME,

his or her "right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period." 820 ILCS 305/12 (West 2008). The statute does not limit the employer to a specific number of section 12 IMEs, and it does not require a set amount of time between IMEs, but requires only that they must be at a time and place "reasonably convenient" for the claimant and that the employer bears the expenses. 820 ILCS 305/12 (West 2008); *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 406-07, 830 N.E.2d 584, 591 (2005) (the purpose of section 12 medical examinations is to determine the nature, extent, and probable duration of the injury and to ascertain the amount of compensation that may be due the claimant, and there is no limitation on the number of section 12 examinations the employer may request). Therefore, the objection expressed by the claimant's attorney, that Dr. Milne had just completed an IME less than two months before the September 12, 2006, IME, was not a valid reason to object. For all of these reasons, the Commission's decision to vacate the arbitrator's TTD award from September 12, 2006, through October 26, 2006, is not against the manifest weight of the evidence.

¶ 51 The claimant next argues that the Commission's decision to vacate the arbitrator's award of penalties and attorney fees is against the manifest weight of the evidence. In the claimant's motion for penalties and attorney fees, she claimed that the employer had failed and refused to pay medical bills and TTD benefits. In its response to that motion, the employer stated that it had "essentially accepted" the claim for impingement syndrome and had authorized payment for that condition. The employer argued, however, that the claimant later began treating for thoracic outlet syndrome and refused to comply with a section 12 IME "after the diagnosis had been made and prior to surgery." The employer argued that, after "significant treatment for thoracic outlet syndrome," the claimant's treating physician "failed to explain" why she had not recovered.

¶ 52 The Commission explained that it vacated the arbitrator's award of penalties and attorney fees for two reasons: (1) the claimant was not owed benefits during the period of September 12, 2006, through October 26, 2006, due to her refusal to attend the September 12, 2006, IME, and (2) the employer did not act unreasonably in its payment of the medical expenses associated with her shoulder care because the employer viewed those medical bills as "beyond the two choices afforded by Section 8(a)." 820 ILCS 305/8(a) (West 2008) (limiting the employer's liability to pay for medical services beyond the initial and second providers and those within the "chain of referrals").

¶ 53 We agree with the Commission that the denial of penalties and fees for nonpayment of TTD benefits during the period of September 12, 2006, through October 26, 2006, was reasonable given the requirements of section 12 of the Act, which we have already fully discussed. As to the additional period of August 13, 2006, through September 12, 2006, the Commission noted that the employer reasonably relied on Dr. Milne's finding that the claimant was capable of unrestricted work duty on July 27, 2006, and reasonably relied on his full-duty release when it declined to accommodate Dr. Paletta's restrictions on August 13, 2006. It was within the discretion of the Commission to consider the employer's arguments in light of the conflicting medical evidence and to rely on the medical evidence that supported the employer's position. See *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055, 820 N.E.2d 586, 591 (2004). Since there is support in the record for the Commission's decision to vacate the award of penalties and attorney fees on the basis of nonpayment of TTD benefits, we affirm the ruling on that basis.

¶ 54 We also find support in the record for the Commission's denial of penalties and attorney fees based on the employer's reasons for nonpayment of certain medical bills. In that part of the ruling, the Commission found that the nonpayment was based on the employer's position that it was beyond the claimant's choice of two physicians as provided

in section 8(a) of the Act. 820 ILCS 305/8(a) (West 2008). The Commission found that the employer waived the two-physician rule for purposes of appeal but that its reliance on that rule was a reasonable basis for its nonpayment of medical expenses before the arbitration hearing. The Commission stated that the record did not permit it to conclude that the employer acted in an objectively unreasonable manner in challenging its liability for the shoulder expenses, given its reliance on the two-physician rule.

¶ 55 The record supports the Commission's finding that the employer could reasonably argue that the claimant had chosen more than two physicians, including the "chain of referrals" from those two physicians. Without deciding the issue, we can see a reasonable argument that the seven physicians from whom the claimant sought treatment between her injury in March 2005 and her release to full duty in January 2009 were more than allowed by section 8(a). Since there is evidence in support of the Commission's denial of penalties and attorney fees, we affirm that ruling.

¶ 56 We next consider the employer's first cross-appeal argument, that the Commission's ruling, that the employer waived its argument regarding the two-physician rule for failure to raise it during the arbitration hearing, is against the manifest weight of the evidence. The employer notes that, on review of the arbitrator's decision, it requested the Commission to consider whether the claimant's choice of physicians was beyond the two allowed under section 8(a) of the Act. The Commission declined to consider the issue, finding that the employer waived it at the arbitration hearing. The employer cites several cases for the proposition that it did not waive the two-physician rule because it did not explicitly manifest its intention to relinquish the important statutory right to limit its liability beyond two physicians and their chains of referral. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 874 N.E.2d 43 (2007); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 821 N.E.2d 269 (2004). We reject the employer's argument because it confuses the concept of waiver and

forfeiture.

¶ 57 Although many courts have used the terms "waiver" and "forfeiture" interchangeably, they are distinct concepts, and the court in *Gallagher* explained the difference. Waiver arises from an affirmative act, is consensual, and involves an intentional relinquishment of a known right. *Gallagher*, 226 Ill. 2d at 229, 874 N.E.2d at 56 (quoting *Home Insurance Co.*, 213 Ill. 2d at 326, 821 N.E.2d at 282). Forfeiture is different from waiver because it does not involve an intentional relinquishment of a known right, but rather, forfeiture is the failure to timely assert a right. *Gallagher*, 226 Ill. 2d at 229, 874 N.E.2d at 56. When a party in a workers' compensation case does not raise an issue at the arbitration hearing, the court on review may find that the party has forfeited any argument regarding that issue. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020, 832 N.E.2d 331, 348 (2005); *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256, 899 N.E.2d 365, 378 (2008). The employer asserts that we should find that its failure to bring the issue of the two-choice rule to the attention of the arbitrator should not result in a forfeiture of the issue because the statutory right of employers to limit their liability is an important and substantive right. That argument is meritless.

¶ 58 Regardless of whether the term "waiver" or "forfeiture" is used in their opinions, Illinois courts have frequently found that both employees and employers forfeited important and substantive statutory rights for failure to timely assert those rights. See generally *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336, 399 N.E.2d 1322, 1326 (1980) (the employee waived issues concerning settlement negotiations, prior injuries, and interference with his redirect examination because he failed to raise them before the arbitrator); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208-09, 904 N.E.2d 1122, 1137 (2009) (the employer waived the issue of the Commission's calculation of the employee's average weekly wage for failure to cite relevant authority and failure to

include facts in evidence necessary to address the issue); *Ming Auto Body/Ming of Decatur, Inc.*, 387 Ill. App. 3d at 256, 899 N.E.2d at 377 (the employer forfeited the issue of the employee's entitlement to additional TTD benefits by not contesting the issue at the arbitration hearing). We reject the employer's argument that it need not assert the two-physician rule during the arbitration hearing in order to preserve that issue on review before the Commission. Accordingly, the Commission's ruling in this case, that the employer forfeited any argument concerning the two-physician rule, is not against the manifest weight of the evidence.

¶ 59 Finally, the employer argues that the Commission's finding that the claimant's condition of thoracic outlet syndrome was causally related to her work accident is against the manifest weight of the evidence. The employer argues that the record shows that the claimant's work injury caused her shoulder injury but not her condition of thoracic outlet syndrome. The employer's argument on this issue disregards the evidence of causation from the claimant's treating physicians, Dr. Thompson and Dr. Paletta, and from the employer's experts, Dr. Milne and Dr. Bradshaw.

¶ 60 On August 2, 2006, Dr. Paletta suspected that the claimant's symptoms might be caused by thoracic outlet syndrome. Based on that possibility, he ordered an EMG and a nerve conduction study, and he referred the claimant to Dr. Thompson. On August 16, 2006, Dr. Thompson diagnosed the claimant with neurogenic thoracic outlet syndrome. Dr. Thompson testified that the claimant's March 25, 2005, work accident was the "primary inciting event causing her symptoms and her condition."

¶ 61 After Dr. Thompson's surgery, Dr. Milne reexamined the claimant and her additional medical records. Dr. Milne wrote that trauma such as the claimant's work injury "can cause thoracic outlet syndrome" and that he did not disagree with Dr. Thompson's diagnosis or the surgery he performed. Dr. Milne also testified that the claimant's nerve conduction test did

not rule out the possibility of thoracic outlet syndrome. Dr. Bradshaw examined the claimant on September 18, 2007, a year after Dr. Thompson's surgery. Dr. Bradshaw indicated that, since the claimant had improved after Dr. Thompson's surgery, he had to assume she had the condition of thoracic outlet syndrome before the surgery. Dr. Bradshaw stated that he would defer to the diagnoses of Dr. Paletta and Dr. Thompson. Neither Dr. Milne nor Dr. Bradshaw opined that the claimant did not suffer from thoracic outlet syndrome or that her work injury did not cause that condition. In April 2008, Dr. Paletta wrote to the claimant's attorney that all of the claimant's right shoulder symptoms, including those related to thoracic outlet syndrome, were "causally related to her work activities and her work injury."

¶ 62 Given the evidence from Dr. Paletta and Dr. Thompson that the claimant's condition of and treatment for thoracic outlet syndrome were causally related to her work injury of March 25, 2005, and that the employer's experts did not refute that opinion, the Commission's decision that the claimant's condition of and treatment for thoracic outlet syndrome is supported by the record and is not against the manifest weight of the evidence.

¶ 63 **CONCLUSION**

¶ 64 For all the reasons stated, we affirm the decision of the circuit court confirming the Commission's decision.

¶ 65 Affirmed.