

No. 1-15-1613WC

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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| ELIAS URENA, |) | Appeal from the |
| |) | Circuit Court of |
| Appellant, |) | Cook County |
| |) | |
| v. |) | No. 14 L 50673 |
| |) | |
| ILLINOIS WORKERS' COMPENSATION |) | |
| COMMISSION, <i>et al.</i> , |) | Honorable |
| |) | James M. McGing, |
| (Eagle Concrete Contractors, Inc., Appellee). |) | Judge, Presiding. |

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

ORDER

- ¶ 1 *Held:* We found that the decision of the Illinois Workers' Compensation Commission following a hearing held pursuant to section 19(h) Workers' Compensation Act (Act) (820 ILCS 305/19(h) (West 2008)), awarding the claimant additional benefits as the result of an increase in disability, failed to contain factual findings supporting the Commission's determination that his disability had increased to 75% loss of use of his right eye. Consequently, we: vacated that portion of the circuit court's order which confirmed the Commission finding that the claimant's disability had increased to 75% loss of use of his right eye and awarding him an additional 37 1/2 weeks of permanent partial disability (PPD) benefits; affirm the circuit court's judgment in all other respects; vacate that portion of the Commission's decision finding that the claimant's disability had increased to 75% loss of use of his right eye and awarding him an additional 37 1/2 weeks of PPD

benefits; and remand this matter back to the Commission with directions to make factual findings supporting its determination as to the percentage of the loss of use of his right eye that the claimant had on the date of its section 19(h) decision and to award the claimant additional benefits corresponding to the increase in that loss of use over 50%.

¶ 2 The claimant, Elias Urena, appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) entered following a hearing held pursuant to section 19(h) Workers' Compensation Act (Act) (820 ILCS 305/19(h) (West 2008)), finding that his loss of use of his right eye had increased to 75% and awarding him an additional 37 1/2 weeks of permanent partial disability (PPD) benefits. He also appeals from the Commission's denial of his petition seeking penalties under sections 19(k) and (l) of the Act (820 ILCS 305/19(k),(l) (West 2012)). For the reasons which follow, we: vacate that portion of the circuit court's order which confirmed the Commission finding that the claimant's disability had increased to 75% loss of use of his right eye and awarding him an additional 37 1/2 weeks of PPD benefits; affirm the circuit court's judgment in all other respects; vacate that portion of the Commission's decision finding that the claimant's disability had increased to 75% loss of use of his right eye and awarding him an additional 37 1/2 weeks of PPD benefits; and remand this matter back to the Commission with directions to make factual findings supporting its determination as to the percentage of the loss of use of his right eye that the claimant had on the date of its section 19(h) decision and to award the claimant additional benefits corresponding to the increase in that loss of use over 50%.

¶ 3 The following factual recitation is taken from the evidence adduced at the original arbitration hearing held on March 22, 2006, and the hearings before the Commission on the claimant's section 19(h) petition held on August 13, 2012, and February 4, 2013.

¶ 4 The claimant was employed by Eagle Concrete Contractors, Inc. (Eagle) as a laborer. On July 11, 2001, while working on the foundation of a home, the claimant suffered a puncture

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injury when a nail struck his right eye. The claimant presented at Sherman hospital where he was diagnosed with a corneal laceration and treated with sutures. Thereafter, the claimant came under the care of Dr. Harry A. Bernstein who took the claimant off of work. According to Dr. Bernstein's records, a cataract had formed in the claimant's right eye as a result of his work injury.

¶ 5 At the request of Eagle, the claimant was examined by Dr. Parag Majmudar who recommended that the claimant undergo a cataract extraction and corneal transplant procedure. On October 23, 2001, the claimant underwent a phacoemulsification and received an intraocular lens implant in his right eye. Subsequent to that procedure, the claimant came under the care of Dr. Robert Mack on referral from Dr. Bernstein.

¶ 6 On February 2, 2002, Dr. Mack performed a right-sided penetrating keratoplasty on the claimant's right eye with non-mechanical vitrectomy.

¶ 7 On March 21, 2002, the claimant returned to work with restrictions which were accommodated by Eagle, and on May 21, 2002, he was released to return to full duty work.

¶ 8 Dr. Mack referred the claimant to Dr. George Wyhinny for evaluation. Dr. Wyhinny examined the claimant on September 9, 2002, and noted that the claimant's corneal graft was clear, his macular reflex was only slightly decreased, and that angiography revealed minimal cystoids macular edema. According to Dr. Wyhinny, the edema was mild, and the claimant's retina was contributing relatively little to the decrease in the visual acuity of his right eye.

¶ 9 The claimant continued to treat with Dr. Mack who placed him at maximum medical improvement (MMI) as of April 11, 2003. Dr. Mack's records contain notations of "suspicious for malingering," "subjective greater than physical findings" and "can't account for decreased visual acuity." He also noted that the claimant was non-compliant in his medical care.

¶ 10 On October 5, 2004, the claimant was examined by Dr. Richard Gieser at the request of Eagle. Dr. Gieser opined that the claimant had a good surgical result following his corneal transplant surgery and that the back of his eye looked normal. Dr. Gieser noted that, although the claimant subjectively reported 20/400 vision in his right eye, he failed in his attempts to find an objective cause for the claimant's decreased vision. Dr. Gieser's records state that the claimant's fluorescein angiogram and "OCT" were normal. He was of the opinion that the claimant was not in need of further medical treatment and found the claimant to have reached MMI.

¶ 11 During the arbitration hearing on March 22, 2006, the claimant testified that he could not see anything out of his right eye. Later, however, he testified that he had blurred vision in his right eye and saw black spots.

¶ 12 Following the hearing, the arbitrator issued a decision, finding that the claimant sustained a nail puncture injury to his right eye on July 11, 2001, which arose out of and the course of his employment with Eagle. The arbitrator found that the claimant's need for a cataract extraction and corneal transplant was causally related to his work injury. As Eagle had paid the claimant temporary total disability (TTD) benefits for the period of 37 2/7 weeks at an inflated benefit rate, the arbitrator determined that Eagle was entitled to a credit of \$2,465.33 for the overpayment. The arbitrator found that the claimant failed to establish that he is permanently and totally disabled, but rather concluded that the claimant had sustained PPD to the extent of 50% of his right eye and awarded him 75 weeks of PPD benefits at the rate of \$534.16 per week as provided in Section 8(e) of the Act (820 ILCS 305/8(e) (West 2006)). Finally, the arbitrator denied the claimant's request for an award of penalties under sections 19(k) and 19(l) of the Act

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(820 ILCS 305/19(k), (l) (West 2006)) and an award of attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2006)).

¶ 13 The claimant filed a petition for review of the arbitrator's decision before the Commission. The Commission issued a decision on April 28, 2008, with one commissioner dissenting, affirming and adopting the arbitrator's decision. No judicial review of that decision was sought by either party.

¶ 14 The claimant's medical records reflect that he continued to treat with Dr. Mack following the arbitration hearing.

¶ 15 On December 11, 2008, the claimant filed a petition pursuant to sections 8(a) and 19(h) of the Act (820 ILCS 305/8(a), 19(h) (West 2008)), alleging a material increase in his disability and seeking an award of additional benefits and an award for the additional medical expenses which he had incurred.

¶ 16 In March of 2009, the claimant was examined by Dr. Mildred Oliver on referral from Dr. Mack. Dr. Oliver diagnosed ocular hypertension and prescribed steroids. In that same month, the claimant underwent a Baeroldt Seton implant to the right eye with Healon 5 to the anterior chamber. On April 14, 2009, Dr. Oliver noted that the claimant was doing well following the procedure.

¶ 17 On April 24 and 27, 2009, Dr. Oliver reformed the anterior chamber of the claimant's right eye. On May 29, 2009, she diagnosed corneal decompensation in the claimant's right eye.

¶ 18 On August 14, 2009, the claimant was examined by Dr. Anna Park at the request of Eagle. The claimant complained of blurred vision and discomfort in his right eye. Dr. Park diagnosed the claimant as suffering from a failed corneal graft with recurrent erosions in the

right eye. She recommended that he undergo a "Descemet's Stripping Automated Endothelial Keratoplasty."

¶ 19 On October 5, 2009, Dr. Mack attempted a right sided cornea transplant, right corneal tissue removal, right goniosynechialysis, and right anterior vitrectomy. However, the procedure was interrupted due to the claimant's apnea. On January 14, 2010, Dr. Mack completed the surgery, performing a right sided penetrating keratoplasty, goniosynechialysis, and tube revision.

¶ 20 When the claimant was seen by Dr. Mack on April 12, 2010, he reported that he felt that his vision had decreased following surgery. However, Dr. Mack noted "large improvement in visual acuity." When deposed, Dr. Mack testified that the claimant had 20/70 vision following the graft procedure, that is to say he had the ability to see at 20 feet what a normal eye would see at 70 feet.

¶ 21 Dr. Oliver again examined the claimant on April 27, 2010. In her report to Dr. Mack of that examination, Dr. Oliver wrote that she was "excited about the possibility of improvement in the right [eye]."

¶ 22 The claimant continued monthly treatment with Dr. Mack who also referred the claimant to Dr. Stephen Conti, a retina specialist. Dr. Conti examined the claimant on October 21, 2010. In his letter to Dr. Mack of that same date, Dr. Conti reported that the claimant was "counting fingers in his right eye and 20/30 in his left eye." On examination, Dr. Conti found the center of the corneal graft was clear and there was a small apparent astigmatism from the sutures. Dr. Conti's evaluation of the retinal periphery revealed no retinal tears, holes, or detachment. He concluded that the retinal status in both of the claimant's eyes appeared stable. Although there was a posterior vitreous detachment on the right eye, Dr. Conti found no peripheral pathology.

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¶ 23 On January 26, 2011, and March 25, 2011, the claimant underwent placement of a cyropreserved amniotic membrane. As of March 2011, the claimant reported to Dr. Mack that he felt much better.

¶ 24 In his notes of the claimant's April 15, 2011, examination, Dr. Mack recorded an impression of a questionable early graft rejection. However, an MRI of the claimant's right eye taken on May 3, 2011, was normal.

¶ 25 The claimant was again seen by Dr. Park on June 13, 2011. As of that visit, the claimant complained of "no vision." Dr. Park again noted corneal edema or swelling of the corneal transplant along with adhesions. She also noted that the glaucoma tube in the claimant's right eye was touching the cornea. Dr. Park measured the claimant's visual acuity and testified that he was only able to see hand motion at one foot with his right eye and had 20/25 vision in his left eye. When asked if the claimant is "more than legally blind" in his right eye, she responded, "Yes." According to Dr. Park, the claimant lacks depth perception because he is "blind in the right eye." She testified that the claimant's vision is worse than when he was examined by Dr. Gieser in October of 2004 "because his corneal transplant is swollen."

¶ 26 On October 11, 2011, Dr. Mack diagnosed the claimant as suffering from a failed corneal graft and noted a low likelihood of achieving visual clarity in the future with another graft.

¶ 27 Dr. Mack was deposed on March 1, 2012. He testified that, as of that date, no additional surgery has been prescribed for the claimant, but that additional surgery is likely. According to Dr. Mack, several of his treatment notes state that the claimant was non-compliant with medical treatment. He admitted his pre-2003 records of the claimant's treatment reflect an inability to account for the claimant's loss of visual acuity. However, as of the date of his deposition, Dr. Mack testified that there are objective findings which correlate with a decrease in the claimant's

visual acuity. He stated that the claimant has no depth perception and is not expected to recover it.

¶ 28 When he testified before the Commission on August 13, 2013, the claimant testified that he "can't see anything" out of his right eye.

¶ 29 On August 14, 2014, the Commission issued a decision finding, *inter alia*, that the claimant's loss of use of his right eye had increased to 75% and awarding him an additional 37 1/2 weeks of PPD benefits. In addition, The Commission denied the claimant's petition seeking penalties under sections 19(k) and 19(l) of the Act for Eagle's alleged failure to pay medical expenses.

¶ 30 Thereafter, the claimant sought judicial review of the Commission's August 14, 2014, decision in the circuit court of Cook County. On May 14, 2015, the circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 31 The claimant has raised two issues on appeal. He argues that the Commission erred in finding that his disability had only increased to 75% loss of use of his right eye and awarding additional PPD benefits based on that finding. He contends that there is no dispute as to the extent of his current visual acuity and that he should have been awarded additional benefits based upon an increase in his disability from 50% loss of use of his right eye to 100%. In addition, the claimant argues that the Commission erred in refusing to award penalties under sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2012)). First, we will address the issue of penalties.

¶ 32 The claimant argues that Eagle "has presented no good cause for the non-payment of medical bills[.]" and as a consequence, the Commission erred in failing to award penalties under both sections 19(k) and 19(l). In his brief on appeal, the claimant has identified three bills which

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he contends were either not paid or paid untimely. We, therefore, limit our review to the propriety of the Commission's decision as it relates to those three bills only.

¶ 33 Penalties under section 19(l) of the Act are in the nature of a fee for late payment. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20. Assessment of a penalty under section 19(l) is mandatory if the payment is late and the employer is unable to show adequate justification for the delay. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The employer has the burden of justifying the delay, and the standard to be applied is reasonableness. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20. That is to say, whether a reasonable person in the employer's position would have believed that the delay is justified. *Id.* Whether an employer's justification for the delay was reasonable is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 34 Section 19(k) of the Act provides that, when there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, the Commission may award additional compensation equal to 50% of the amount payable at the time of such an award. 820 ILCS 305/19(k) (West 2012). The standard for awarding penalties under section 19(k) is higher than the standard for awarding penalties under section 19(l). See *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 24. For section 19(k) penalties to be imposed, it must be established that the employer's delay or non-payment was deliberate or the result of bad-faith or an improper purpose. *McMahan*, 183 Ill. 2d at 515. Even when the facts support an award of penalties under section 19(k), the decision to award the penalties is left to the discretion of the Commission. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 44. Our review of the Commission's denial of section 19(k) penalties involves a two-step inquiry. *Id.* ¶ 25. First, we determine whether the

Commission's factual findings are against the manifest weight of the evidence, and then we determine whether the Commission's refusal to award penalties was an abuse of discretion. *Id.*

¶ 35 The medical bills referenced in the claimant brief were owed to Westbrook Internal Medicine, Retina Center, and Mack Eye Center. The evidence presented to the Commission established that the first time that Eagle received the subject bills was when the bills were tendered by claimant's attorney on August 12, 2012, the first day on which the claimant's section 19(h) petition came on for hearing. The Commission continued the issue of outstanding medical bills to February 14, 2013. At that hearing, Eagle produced evidence that Westbrook Internal Medicine's bill had a zero balance as of October 16, 2012, Retna Center's bill had a balance of \$14.84 which was paid on September 10, 2012, and the balance due Mack Eye Center was paid pursuant to the fee schedule after the August 12, 2012, hearing.

¶ 36 The Commission found that Eagle's delay in payment of the subject bills was the result of its not knowing of the balances owed until claimant's attorney tendered the bills on August 12, 2012. The Commission found that Eagle paid the balances owed once they became known and was not guilty of any intentional delay or bad faith.

¶ 37 We believe that the Commission's determination that Eagle acted reasonably under the circumstances is not against the manifest weight of the evidence, and as a consequence, its denial of section 19(l) penalties is not against the manifest weight of the evidence and its denial of section 19(k) penalties was not an abuse of discretion.

¶ 38 We turn next to the claimant's argument that the Commission erred in failing to award him additional benefits based upon an increase in his disability from 50% loss of use of his right eye to 100%. Before addressing the merits of the claimant's argument, we will comment briefly on our standard of review. The claimant appears to argue that legal blindness without corrective

lenses is, as a matter of law, 100% loss of use, and consequently, we should apply a *de novo* standard of review in this case. Eagle argues that the issue presented to the Commission involved a determination of the extent of the claimant's increased disability which is a question of fact. We agree with Eagle. The extent of a claimant's disability, including the loss of vision, is a question of fact to be resolved by the Commission, and its determination will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980). We, therefore, apply the manifest weight standard to our review of the Commission's determination of the extent of the increase in claimant's disability.

¶ 39 The purpose of a section 19(h) proceeding is to determine whether a claimant's disability has changed subsequent to an award or settlement. *Zimmerly Construction Co. v. Industrial Comm'n*, 50 Ill. 2d 342, 344 (1972). In determining whether an increase in disability has occurred, the entire record must be examined. *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 71 Ill. 2d 287, 295 (1978). The evidence introduced at the original arbitration hearing must be considered, but only to determine whether the disability existing at the time of the original award has changed. *Zimmerly*, 50 Ill. 2d at 344. Whether a claimant's disability has increased since the Commission's original award is a question of fact to be resolved by the Commission. *Board of Trustees of the University of Illinois*, 71 Ill. 2d at 295.

¶ 40 In this case, the evidence of record clearly established that the claimant suffered an increase in disability since the Commission's original award of benefits. When deposed in March of 2012, Dr. Mack testified that there are objective findings which correlate with a decrease in the claimant's visual acuity. In addition, Eagle's own section 12 (820 ILCS 305/12 (West 2008)) examiner, Dr. Park, testified that the claimant's vision is worse than when he was

examined by Dr. Gieser prior to the original arbitration hearing. The issue in this case is not whether the claimant has suffered an increase in disability; rather, the issue is whether the Commission's determination that he suffered an increase from 50% to 75% loss of use of his right eye is against the manifest weight of the evidence.

¶ 41 The claimant argues that the evidence adduced at the section 19(h) hearing established that he is now "legally blind" in his right eye without the use of corrective lenses and that the extent of his disability has, therefore, increased from 50% to 100% loss of use. According to Eagle, the evidence of record reveals that the claimant has sight in his right eye, and the Commission's determination that his disability has increased to 75% loss of use is not against the manifest weight of the evidence.

¶ 42 As noted earlier, the extent of a claimant's loss of vision is a question of fact to be resolved by the Commission. *Oscar Mayer*, 79 Ill. 2d at 256. The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009).

¶ 43 The Act does not contain standards for determining the percentage of loss of use of an eye. *Pridgeon v. Industrial Comm'n*, 89 Ill. 2d 477, 479 (1982). In *Lambert v. Industrial Comm'n*, 411 Ill. 593, 599-607 (1952), the supreme court declined to restrict such a determination to either a naked vision or corrected vision standard. The extent of the loss of use of an eye is not to be determined by a mechanical measurement of corrected or uncorrected vision. *Oscar Mayer*, 79 Ill. 2d at 257 (citing *Walker v. Industrial Comm'n*, 72 Ill. 2d 408, 413 (1978)). Rather, the determination is to be made by the Commission according to the

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circumstances of each particular case. *Gilbert & Shughart Painting Contractors v. Industrial Comm'n*, 136 Ill. App. 3d 163, 169 (1985). Because of the Commission's expertise in the area of workers' compensation, its findings as to the extent of disability should be given substantial deference. *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624 (1999).

¶ 44 Prior to his work injury on July 11, 2001, the claimant did not use corrective lenses to see from his right eye. In its original decision, the Commission fixed the claimant's loss of use of his right eye as a result of his work accident at 50%.

¶ 45 Following the original arbitration hearing, the claimant continued to receive medical treatment for his eye which included additional surgical procedures. As early as August of 2009, Dr. Park diagnosed a failed corneal graft, and the claimant had a subsequent cornea transplant. Dr. Conti examined the claimant on October 21, 2010, and reported that the claimant could count fingers with his right eye. The claimant underwent additional surgical procedures on his right eye in January and March of 2011. In April of 2011, Dr. Mack was questioning whether the claimant had an early graft rejection. When the claimant was examined by Dr. Park in June of 2011, he complained of "no vision" in his right eye. However, on examination, Dr. Park found that the claimant was able to see hand motion at one foot with his right eye. Although Dr. Park testified that there is no objective component to testing visual acuity, she, nevertheless, stated that the claimant was "more than legally blind" in his right eye and that he lacks depth perception as a result.

¶ 46 When he testified at the section 19(h) hearing on August 13, 2013, the claimant testified that he "can't see anything" out of his right eye. The claimant's medical records reflect that he told his examining physicians that he was unable to see from his right eye. To the contrary, both Dr. Conti and Dr. Park found that the claimant had some limited sight in his right eye.

¶ 47 In its decision of August 15, 2014, the Commission found that the claimant's loss of use of the right eye had increased to 75%. Although that decision contains more than sufficient findings to support the conclusion that the claimant's disability had increased since the Commission's original decision, there are no factual findings supporting the Commission's determination that his disability had increased to 75% loss of use of his right eye. The decision does not inform us as to those facts that the Commission relied upon to assess the increased disability, other than to say that it found Dr. Mack's testimony credible. When the Commission gives no reasons for its determinations, its decision may be lacking in factual findings which make a meaningful judicial review possible. We believe that this is such a case. We have no idea from the Commission's August 15, 2014, decision as to the factual basis supporting its calculation of the claimant's increased disability. We know that in the Commission's original decision the claimant was found to have sustained a 50% loss of use of his right eye, and it is clear that his disability increased thereafter, but how the Commission determined that the claimant's disability had increased to 75% loss of use is not set forth in its August 15, 2014, decision. We believe, therefore, that the only appropriate remedy in this case is to vacate that portion of the Commission's August 15, 2014, decision fixing the claimant's loss of use of his right eye at 75% and its corresponding award of an additional 37 1/2 weeks of PPD benefits. We remand the matter back to the Commission with directions to make factual findings which support its ultimate conclusion as to the percentage loss of use of the claimant's right eye that he had on the date of its section 19(h) decision and to award him additional benefits for his increase in the loss of use of the claimant's right eye above 50%.

¶ 48 For the reasons stated, we: vacate that portion of the circuit court's order which confirmed the Commission finding that the claimant's disability had increased to 75% loss of use

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of his right eye and awarding him an additional 37 1/2 weeks of PPD benefits; affirm the circuit court's judgment in all other respects; vacate that portion of the Commission's decision finding that the claimant's disability had increased to 75% loss of use of his right eye and awarding him an additional 37 1/2 weeks of PPD benefits; and remand this matter back to the Commission with directions to make factual findings supporting its determination as to the percentage of the loss of use of his right eye that the claimant had on the date of its section 19(h) decision and to award the claimant additional benefits corresponding to the increase in that loss of use over 50%.

¶ 49 Circuit court affirmed in part and vacated in part; Commission decision vacated in part and remanded with directions.