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No. 3--10--0046WC

Order filed January 19, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KELLY TEMPORARY SERVICES,	)	Appeal from the Circuit Court
	)	of La Salle County, Illinois
Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 09--MR--14
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION <i>et al.</i> (Dustin Cashmer, Appellee	)	Joseph P. Hettel,
and Cross-Appellant.)	)	Judge, Presiding

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concur in the judgment.

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**ORDER**

*Held:* The Commission's finding that the claimant proved a causal connection between the current condition of ill-being and an industrial accident, and its award of penalties and attorney fees were not against the manifest weight of the evidence.

The claimant, Dustin Cashmer, filed an application for adjustment of claim against his employer, Kelly Temporary Services, seeking workers' compensation benefits for injuries to his lower back on December 9, 2003. The matter proceeded to a hearing on August 24, 2005, on a section 19(b) petition. 820 ILCS 305/19(b) (West 2002). A decision was issued on November

23, 2005, in which the arbitrator found that the claimant had suffered a work-related injury on December 9, 2003, and awarded temporary total disability (TTD) benefits from the date of injury to the date of the hearing. The arbitrator also ordered payment of medical bills and ordered the employer to approve certain prospective treatment and medical testing. The arbitrator further recommended to the parties that they agree upon a second opinion physician to evaluate possible post-surgery treatment. On October 18, 2006, the Illinois Workers' Compensation Commission (Commission) issued a decision which affirmed the arbitrator's decision with certain clerical corrections. Neither party appealed from the Commission's decision.

A second hearing was held on January 30 and 31, 2008, to address the claimant's section 19(b) petition, as well as his claim for penalties and attorney fees pursuant to sections 19(k), 19(l) and section 16 of the Workers' Compensation Act. 820 ILCS 305/19(b), (k), (l); 805 ILCS 305/16 (West 2006). The arbitrator found that the claimant's current condition of ill-being was causally related to the December 8, 2003, incident and that medical services provided to the claimant since the last hearing date were reasonable and necessary. The arbitrator awarded TTD benefits for 126 6/7 weeks for the period from August 25, 2005, through January 31, 2008, and \$13,133.33 for reasonable and necessary medical expenses. The arbitrator also awarded a total of \$15,658.71 in penalties under section 19(k) for unreasonable and vexatious delay in payment of TTD and medical expenses, \$10,000 in penalties under section 19(l), and \$6,263.52 in attorney fees under section 16 of the Act.

The employer sought review by the Commission, which affirmed and adopted the arbitrator's decision with a clarification assigning greater weight to the treating physicians' opinions than the opinion of the second opinion chosen by both parties. One commissioner

dissented from the award of penalties and attorney fees. The employer then appealed to the La Salle County circuit court, which confirmed the Commission's decision on all issues but the penalties and attorney fees. The employer now appeals the Commission's decision and the claimant cross-appeals from the circuit court's ruling denying him penalties and attorney fees.

### BACKGROUND

On December 8, 2003, the claimant was employed by Kelly Temporary Services, an employment agency that provides employees for other commercial enterprises. For approximately two months prior, the claimant had been working at Windstrom Windows in Toluca, Illinois. The claimant's job duties required him to process and clean windows which were transported to his work area via conveyor belt. The windows, which were usually large truck windshields, weighed approximately 50 pounds. The claimant testified that, while lifting a window to finish cleaning it, he noticed an immediate pain in his upper and lower back. The claimant reported the incident to his immediate supervisor and attempted to continue working. However, the pain became too intense and the claimant called a family member to pick him up and take him to a nearby hospital.

Medical records from the hospital indicated a diagnosis of lumbar strain and overexertion due to strenuous movements at his job. The claimant was instructed to contact his physician and was given a 20-pound work restriction. The claimant treated with his family physician, Dr. Podzamsky, who referred him to Dr. Sinha. Dr. Sinha diagnosed discogenic degenerative disease and lumbosacral spasms. He ordered an MRI which demonstrated diffuse disc bulging at L4-5 and L5-S1. Dr. Sinha prescribed physical therapy and medication.

The claimant underwent physical therapy from January 23, 2004, through February 20, 2004. Following completion of physical therapy, Dr. Sinha released the claimant to return to work on March 2, 2004. However, the claimant, having been laid off by the employer, was unable to find work.

On March 26, 2004, the claimant reported to Dr. Podzamsky low back pain and tingling in his legs. The claimant sought medical attention from Dr. Podzamsky four times during the month of April 2004. Dr. Podzamsky then referred the claimant to a neurosurgeon, Dr. DePhillips. The claimant's initial examination with Dr. DePhillips was on April 29, 2004. Dr. DePhillips recommended an EMG as well as a lumbar epidural steroid injection and restricted the claimant from any work. The epidural injection was administered by Dr. Obegozo at St. Joseph Hospital in Joliet. A second epidural was administered on May 25, 2004.

The claimant continued to treat with Dr. DePhillips, who attempted to relieve the claimant's pain with a series of epidural blocks.

On September 14, 2004, the claimant was examined, at the request of his attorney, by Dr. Coe, an occupational health physician. Dr. Coe diagnosed bulging of the intervertebral discs in the lumbar spine and chronic lumbar myositis. He recommended continued epidural block therapy and the imposition of a "medium" work restriction.

On November 18, 2004, the claimant was again examined by Dr. DePhillips. The claimant reported continued pain in the lower back which radiated into both legs. After this examination, Dr. DePhillips opined that further epidural block treatment would be futile and recommended surgery at L4-L5 and L5-S1.

On February 10, 2005, the claimant returned to Dr. DePhillips, reporting pain in the lower back, as well as worsening pain in the extremities. Dr. DePhillips prescribed pain medication and restricted the claimant from any work. The claimant again saw Dr. DePhillips on March 25, 2005, at which time it was indicated that the employer would not pay for the recommended surgery. Dr. DePhillips then referred the claimant to Dr. Koehn for pain management.

The claimant was initially examined by Dr. Koehn on April 14, 2005. Dr. Koehn diagnosed multi-level degenerative bulging disc disease at L5-S1, with tears at L3-4 and L4-5. Dr. Koehn treated the claimant's pain with epidural blocks and pain medication.

On May 19, 2005, the claimant again treated with Dr. DePhillips, who opined that a lumbar discography and certain other diagnostic procedures were necessary to pinpoint the source of pain and were essential to determining the next step in the claimant's treatment. He restricted the claimant from any work until further notice.

A hearing was held on August 24, 2005, before Arbitrator George Andros, who issued a decision on November 22, 2005, finding that the claimant's current condition of ill-being was causally connected to an industrial accident on December 8, 2003. The arbitrator awarded temporary total disability (TTD) benefits and medical expenses up to the date of the hearing. The arbitrator also ordered the employer to approve in writing the discography and ancillary diagnostic procedures recommended by Dr. DePhillips. The arbitrator further recommended that "both sides agree on a true second opinion provider \*\*\* to evaluate the post discogram course of treatment not involved in the contentious litigation once the discogram has been completed and evaluated by his choice of treating providers." With minor corrections, the Commission affirmed and adopted the arbitrator's order. Neither party sought further review.

On January 30, 2006, Dr. Koehn evaluated the claimant for continuing pain management. That same day, the claimant underwent a CT scan which demonstrated a diffusely bulging L4-L5 disc and an annular tear.

On February 9, 2006, the claimant again treated with Dr. DePhillips, who expressed concern over the CT results and sought additional testing.

On March 20, 2006, a second CT scan was performed which showed evidence of a torn annulus at L5-S1 and slight bulging at L3-4 and L4-5. On March 23, 2006, Dr. DePhillips reviewed the results and contemplated surgery.

On April 17, 2006, the claimant was examined by Dr. Malek, who opined that the claimant was incapacitated by pain and would, therefore, be a candidate for fusion surgery at L5-S1.

The claimant testified that during this time he continued to treat with Dr. DePhillips and Dr. Malek and that he reported to each that his pain was increasing. He reported difficulty in sleeping, walking, or moving due to the pain in his lower back. The claimant met with Dr. DePhillips on May 11, 2006, at which time the doctor mistakenly indicated in his notes that the employer had approved a surgical procedure.

On June 27, 2006, Dr. DePhillips referred the claimant to Dr. Roland of the Joliet Pain Center for pain management. Dr. Roland examined the claimant and reviewed the prior MRI and discogram results. After noting a protruding disc at L5-S1 on an MRI and positive discogram at the same location, he indicated that he would contact the employer for pre-authorization for a surgical procedure. The employer denied the request.

On October 19, 2006, the claimant again treated with Dr. DePhillips and again reported increasing pain in his lower back which radiated into his legs. Another MRI was performed on November 11, 2006, which indicated mild degenerative changes at L5-S1 and mild diffuse bulging at L4-L5.

On November 30, 2006, Dr. DePhillips compared the most recent MRI with the one done post-accident and opined that there was worsening of the L5-S1 disc disruption and that it was "clear \*\*\* the injury accelerated the degeneration of the L5-S1 disc." The claimant indicated to Dr. DePhillips that the pain was unbearable and he wished to proceed with surgery. Dr. DePhillips recommended spinal fusion at L5-S1. However, the employer would not authorize the procedure.

Pursuant to the arbitrator's recommendation in the November 22, 2005, order, the attorneys for each party agreed that Dr. Edward Goldberg was to examine the claimant and advise the attorneys pursuant to a joint request as to what treatment, if any, he would recommend. On January 29, 2007, the claimant was examined by Dr. Goldberg. The claimant testified that the examination was very brief and that Dr. Goldberg was rude and appeared apathetic. The claimant testified that he asked Dr. Goldberg for his opinion but was told that he could not have the doctor's opinion as it would be provided to the insurance company.

When Dr. Goldberg issued his report, he addressed the report and sent it to the insurance claims adjuster handling the claimant's compensation claim. Neither attorney was listed as receiving a copy of the report. From the fact that the report was addressed to the claims adjuster, the arbitrator inferred that there had been communication between the adjuster and Dr. Goldberg, which the arbitrator believed thwarted the goal of impartiality of Dr. Goldberg's opinion.

In his report, Dr. Goldberg noted the positive CT, MRI, and discogram findings, yet he challenged the claimant's pain complaints and need for care. Dr. Goldberg sent the claimant to Accelerated Physical Therapy (Accelerated) for a "Functional Capacity Evaluation" (FCE). The FCE noted that claimant's efforts were considered unreliable, yet the conclusion was that he could engage only in some level of light-duty work. The claimant testified that the tests were extremely painful and he cooperated to the best of his ability.

On May 4, 2007, Dr. DePhillips noted the claimant's continued and worsening pain. He continued to keep the claimant from work and ordered a new FCE, after noting the one done by Accelerated was "invalid." On May 30, 2007, the claimant was administered a new FCE by ATI Physical Therapy (ATI) in Tinley Park, Illinois. This FCE determined the claimant to be fully cooperative and also concluded that he could perform light-duty work. Following the FCE, Dr. DePhillips recommended that the claimant seek an evaluation from Dr. Sweeney, a neurosurgeon with Midwest Minimally Invasive Spine Specialists in Mokena, Illinois.

On May 15, 2007, Dr. Goldberg issued an addendum report in which he attributed the claimant's reports of pain to "symptom modification," opined that the claimant was not a candidate for surgery and further opined that the claimant could return to work without restrictions.

On May 31, 2007, Dr. Sweeney examined the claimant and took a detailed work and medical history. After the examination, Dr. Sweeney opined that the claimant's reports of pain were genuine and that the pain was related to the December 8, 2003, incident. He recommended either spinal fusion surgery or a total disc replacement. As of the date of the hearing, no surgery had been provided due to the employer's refusal to authorize surgery.

The claimant testified that although he was provided clearance to return to light-duty work, he was unable to locate work. On November 30, 2007, Dr. DePhillips restricted the claimant from even light-duty work due to the increasing pain. Dr. DePhillips continued to recommend surgery as the only option to relieve the claimant's pain.

A second hearing was held before Arbitrator Andros on January 30 and 31, 2008, and a decision was issued March 31, 2008. The arbitrator found that the claimant's current condition of ill-being was causally related to the December 8, 2003, incident and that medical services provided to the claimant up to the date of the hearing totaling \$13,133.33 were reasonable and necessary. The arbitrator awarded TTD benefits for 126 6/7 weeks for the period from August 25, 2005, through January 30, 2008. In reaching this decision, the arbitrator credited the medical opinion testimony of the claimant's treating physician, Dr. DePhillips, and the opinion of Dr. Sweeney. The arbitrator questioned the impartiality and credibility of Dr. Goldberg and gave his opinion no weight.

The arbitrator also found the employer's refusal to pay TTD benefits and reasonable and necessary medical expenses to be vexatious and unreasonable. He awarded penalties under section 19(k) of the Act in the amount of \$9,092.14 for the employer's refusal to pay TTD benefits and \$6,566.57 for refusal to pay medical expenses, \$10,000 in penalties under section 19(l) of the Act, and attorney fees of \$6,263.52 pursuant to section 16 of the Act.

The Commission affirmed and adopted the arbitrator's decision. Although the Commission agreed with the arbitrator's decision to assign less weight to Dr. Goldberg's opinion, the Commission was less critical of the fact that his report had been sent to the insurance adjuster, but more critical of the fact that Dr. Goldberg's opinion noted symptom

magnification, yet recommended a 20-pound lifting restriction. Moreover, the Commission found Dr. Goldberg lacked credibility in changing his opinion after receiving the invalid FCE from Accelerated and in not being asked to comment upon the valid FCE performed by ATI.

The Commission also affirmed and adopted the arbitrator's award of penalties and attorney fees. The Commission noted that it can be unreasonable for an employer to rely upon the opinion of one medical expert without placing that opinion in context with other opinions and circumstances. See *Continental Distributing v. Industrial Comm'n*, 98 Ill. 2d 407, 415-16 (1983). One commissioner dissented from the Commission's ruling on penalties and fees, noting that *Continental Distributing* was distinguishable from the instant matter.

The employer sought review in the circuit court of La Salle County, which confirmed the decision of the Commission on all issues except the award of penalties and attorney fees, which the court held to be against the manifest weight of the evidence. The employer now appeals the issues of causation, TTD, and medical expenses to this court, and the claimant appeals the circuit court's ruling as to penalties and attorney fees.

## DISCUSSION

### 1. Causation

The employer maintains that the Commission erred in finding that the claimant's current condition of ill-being is causally related to the industrial accident on December 8, 2003. Causality is a question of fact for the Commission to determine based upon the evidence presented and the reasonable inferences which may be drawn therefrom. The Commission's factual determinations will not be overturned upon review unless they are against the manifest weight of the evidence. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450 (1995). A

reviewing court may not substitute the judgment of the Commission, and questions of credibility, conflicting medical testimony and the weight to be given to conflicting evidence are all within the unique province of the Commission. *Caterpillar Tractor Co. v. Industrial Comm'n*, 124 Ill. App. 3d 650, 656 (1984). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 539 (2007).

Here, the Commission found that the claimant's current condition of ill-being was causally related to the December 8, 2003, accident based upon the opinions of Dr. DePhillips and Dr. Sweeney, each of whom had a detailed history of the claimant's accident and a complete medical history. Each opined that the claimant suffered from a degenerative condition made symptomatic by the December 8, 2003, accident. In reaching the finding that the claimant's current condition of ill-being was related to his employment, the Commission specifically rejected the opinion to the contrary offered by Dr. Goldberg.

The employer argues that the Commission was precluded from rejecting Dr. Goldberg's opinion. Citing *Brinks v. Industrial Comm'n*, 368 Ill. 607 (1938), the employer maintains that the claimant is estopped from asserting that Dr. Goldberg's opinions were not valid. According to the employer, the fact that both parties chose Dr. Goldberg and agreed that his opinion would control further treatment options amounted to a binding stipulation by the parties.

The employer's characterization of the agreement to seek the opinion as a binding stipulation is mistaken. There is nothing in the record to indicate that the parties agreed to be bound by Dr. Goldberg's opinion. The record reveals that Dr. Goldberg was chosen by the parties, pursuant to a recommendation by the arbitrator, to provide a "true second opinion" as to

prospective treatment. There is nothing in the record to indicate that the parties or the arbitrator envisioned this opinion to be binding upon the parties. We find nothing in the record to indicate that Dr. Goldberg's opinion was binding upon the parties or the Commission.

Given that the Commission was free to weigh the medical opinion testimony, its decision to give more weight to the claimant's treating physician, Dr. DePhillips, and the neurosurgeon, Dr. Sweeney, and less weight to Dr. Goldberg cannot be said to be against the manifest weight of the evidence. Even if Dr. Goldberg's opinion were not found to be tainted in the manner described by the arbitrator, Dr. DePhillips and Dr. Sweeney each had sufficient access to the claimant and the detailed medical history to support their opinion that the claimant's current condition of ill-being was the result of his industrial accident on December 8, 2003. The record is uncontested that the claimant reported no symptoms prior to that date and that the symptoms he reported post-accident were consistent with the objective findings of several diagnostic tests. Given the record before the Commission, it cannot be said that the opposite conclusion as to causation was clearly apparent.

Because the employer's argument as to the appropriateness the award of TTD and medical expenses is predicated upon its argument that the Commission's finding as to causation was against the manifest weight of the evidence, there is no need to address those issues separately.

## 2. Penalties and Fees

The penalty provisions of the Act are intended to penalize an employer who unreasonably, or in bad faith, delays or withholds compensation owed to an employee. *Avon Products v. Industrial Comm'n*, 82 Ill. 2d 297 (1980). The key factor in determining whether

penalties can be awarded is whether the employer's actions in denying or delaying payment of benefits were reasonable. *The Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1 (1982). The "objective reasonableness" standard is used in the assessment of penalties under sections 19(k) and (l). *Consolidated Freightways, Inc. v. Industrial Comm'n*, 136 Ill. App. 3d 630, 634 (1985). The burden of proof regarding reasonableness rests with the employer. *Consolidated Freightways*, 136 Ill. App. 3d at 365. Whether there has been an unreasonable or vexatious delay in the payment of benefits is a question of fact, the resolution of which by the Commission will not be judicially disturbed unless it is contrary to the manifest weight of the evidence. *City of Chicago v. Industrial Comm'n*, 63 Ill. 2d 99, 104 (1976).

The employer maintains that it was reasonable for it to withhold benefits based upon the uncertainty of the medical evidence as to whether the claimant's condition of ill-being was causally related to the December 8, 2003, accident. Generally, when an employer relies upon a reasonable medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed. *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805 (2005). However, where an employer relies exclusively upon one medical opinion, it would be unreasonable to ignore other contrary medical opinions. *Ford Motor Co. v. Industrial Comm'n*, 140 Ill. App. 3d 401 (1986). Moreover, whether the employer's conduct in relying on a medical opinion to contest liability is reasonable must be viewed in light of all the circumstances presented. *Continental Distribution v. Industrial Comm'n*, 98 Ill. 2d 407 (1983).

While there is little in the way of discussion regarding the Commission's finding of unreasonableness in the employer's delay or refusal to pay TTD and medical expenses, we find sufficient evidence in the record to support a conclusion that the Commission's awarding of

penalties and fees was not against the manifest weight of the evidence. The employer's claim of reasonableness rests upon its decision to rely solely upon Dr. Goldberg's opinion in denying benefits. However, the record shows that for several months prior to Dr. Goldberg's evaluation, all the other medical opinions were unanimous in recommending surgical procedures to remedy the claimant's pain. On at least three occasions after the first arbitration hearing, the employer denied requests to authorize surgical procedures. At the time of these requests, Dr. Goldberg had yet to render an opinion. Given the fact that the Commission had already determined in the first arbitration proceeding that the claimant's current condition of ill-being was caused by the December 8, 2003, accident, it would be unreasonable for the employer to continue after that decision had become final to maintain that the claimant's condition of ill-being was not causally related to his employment. In fact, it appears from the record that the physician to be chosen to render a "true second opinion" was to be given the task of determining what specific type of treatment was advisable and not to render an opinion as to causation. Since Dr. Goldberg's appointed task was to render an opinion as to treatment and not as to causation, it would be unreasonable for the employer to withhold payment of benefits in anticipation of an opinion as to causation which had not been sought. For the employer to be arguing causation as its sole basis for refusing to pay TTD and medical expenses after the first arbitration hearing and even before receiving Dr. Goldberg's unsolicited causation opinion could be found by the Commission to be unreasonable given the circumstances. It cannot be said, therefore, that the Commission's award of penalties and fees was against the manifest weight of the evidence.

#### CONCLUSION

For the foregoing reasons, we find that the Commission's decision awarding benefits, penalties, and attorney fees to the claimant was not against the manifest weight of the evidence. The order of the La Salle County circuit court is affirmed in part and reversed in part. The Commission's decision is reinstated and the cause is remanded to the Commission for further proceedings.

Affirmed in part and reversed in part; Commission decision reinstated and remanded.