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2013 IL App (1st) 121219WC-U
1-12-1219WC
Order Filed: March 11, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MORTON'S STEAKHOUSE,)	Appeal from the Circuit Court
)	of Cook County, Illinois
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 1-12-1219WC
)	Circuit No. 11-L-50124
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Brian Albazzaz,)	Alexander P. White,
Defendant-Appellee).)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The Commission's finding that the claimant suffered an accidental injury arising out of and in the course of his employment was not against the manifest weight of the evidence. The Commission's award of penalties and attorney fees was neither contrary to law nor against the manifest weight of the evidence.

¶ 2 The claimant, Brian Albazzaz, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for injuries to his left ankle allegedly sustained on December 12, 2007, while working as a waiter at Morton's Steakhouse, his employer. After a hearing, Arbitrator Edward Lee found that the

claimant proved by a preponderance of the evidence that he sustained repetitive trauma injuries arising out of and in the course of his employment on December 12, 2006, resulting in his being temporarily and totally disabled (TTD) from December 13, 2007, until November 9, 2008, and again from February 21, 2009, until October 14, 2009, for a total of 83 2/7 weeks. The arbitrator further awarded reasonable and necessary medical benefits totaling \$30,029.47. The arbitrator denied the claimant's request for penalties and attorney fees, finding that the claim was "sufficiently complex [as] to give [the employer] cause to pause the payment of benefits."

¶ 3 The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission), which modified the award to state that the claimant had made out a claim under both a specific trauma and a repetitive trauma theory. The Commission also awarded the claimant penalties under sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2002)), and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2002)). Commissioner Nancy Lindsey filed a partial concurrence, partial dissent, concurring with the finding that the claimant had established a specific trauma claim, but dissenting from the finding the claimant had made out a repetitive trauma claim and dissenting from the award of penalties and attorney fees. The Commission's decision was subsequently recalled, and a corrected decision was issued to correct certain computational errors, noting that the period of eligibility for TTD benefits was 81 2/7 weeks.

¶ 4 The employer then sought judicial review of the Commission's decision in the circuit court of Cook County. The court confirmed the Commission's decision that the claimant's injuries arose out of and in the course of his employment and, also confirmed the award of TTD

and medical benefits.¹ The court, however, reversed the Commission's award of penalties and attorney fees as being contrary to law and against the manifest weight of the evidence.

¶ 5 The employer filed a timely appeal to this court. The claimant filed a cross-appeal, maintaining that the circuit court erred in vacating the Commission's award of penalties and attorney fees.

¶ 6 On appeal, the employer maintains that: (1) the Commission's finding that the claimant sustained accidental injuries arising out of and in the course of his employment was against the manifest weight of the evidence and contrary to law; (2) the Commission's finding that the claimant's current condition of ill-being was causally related to the risks of his employment was against the manifest weight of the evidence and contrary to law; and (3) because the Commission erred in finding that the claimant's injuries arose out of and in the course of his employment and his condition of ill-being was not causally related to the risks of his employment, the Commission erred in awarding any TTD or medical benefits.

¶ 7 The claimant maintains in his cross-appeal that the Commission's award of penalties and attorney fees under the Act was proper and should be reinstated by this court.

¶ 8 **FACTS**

¶ 9 The claimant was employed at Morton's Steakhouse in Chicago as a waiter on two separate occasions: from May 2006 until sometime in January 2007 and from May 2007 until

¹ The circuit court, in its recitation of the facts, listed an incorrect amount of medical expenses and an incorrect number of weeks of TTD benefits. However, the amount of medical expenses and the number of weeks of TTD awarded by the Commission are not at issue in this appeal.

December 12, 2007. His job duties included taking orders, serving food and drinks, cleaning tables, and moving tables and chairs. The claimant testified that his duties required long periods of walking and standing during a typical eight-hour shift. He described the job as "fast paced" and physically demanding. His testimony was unrebutted.

¶ 10 After finishing his shift around midnight on Friday, November 23, 2007, the claimant went straight home after work. Upon removing his shoe on his left foot, he noticed immediate swelling and pain in that foot. He testified that he could not put any weight on that foot. He reported off from work the next day, applied ice, remained off the ankle, and utilized an over-the-counter ankle brace. He returned to work three days later, November 26, 2007.

¶ 11 On December 12, 2007, while performing his duties as a waiter, the claimant began to experience pain in his left ankle. He testified that, when his shift began, his left ankle started to feel "uncomfortable." As the evening progressed, the ankle began to swell, pain became progressively worse, and he began to limp. As he was walking down a flight of stairs, he felt a "snapping, pulling" sensation in his left ankle. He finished his shift and went home.

¶ 12 On December 13, 2007, the following day, the claimant sought treatment from his podiatrist, Dr. Mark Gagnon. The claimant had been treating with Dr. Gagnon since August 2006 for significant pain in both his feet. Dr. Gagnon noted a history of left ankle swelling and pain on November 27, 2007, that subsided after approximately two days, followed by left ankle pain, swelling, and difficulty walking on December 12, 2007. Dr. Gagnon diagnosed left ankle tendinitis flexor and tendinitis tibialis. He instructed the claimant to stay off his left foot as much as possible, including remaining off work. At Dr. Gagnon's request, the claimant underwent an MRI on December 14, 2007, which revealed to Dr. Gagnon a "very severe acute tenosynovitis" of the posterior tibial tendon, which Dr. Gagnon opined caused "very significant distention of the

tendon sheath" with no evidence of acute tendon tear. On December 18, 2007, Dr. Gagnon placed the claimant's left ankle in a Cam Walker boot and ordered him off work for three weeks. On January 9, 2008, Dr. Gagnon continued the claimant's off work status and prescribed a regime of physical therapy.

¶ 13 On January 15, 2008, the claimant was examined at the request of the employer by Dr. Simon Lee, a board-certified orthopedic surgeon. After examining the claimant and reviewing his medical records, including Dr. Gagnon's treatment records dating back to August 2006, Dr. Lee noted that the claimant had a preexisting condition relating to his left ankle but opined "in this particular case, there does appear to be aggravation of his condition based upon his work activities." Dr. Lee further opined, "[c]urrently, it appears that [the claimant's] work activities have incited this event."

¶ 14 Based upon his observations and conclusions, Dr. Lee recommended that the claimant "should be restricted from any prolonged standing and walking activity greater than thirty minutes an hour, as well as no uneven ground or elevated work." The claimant testified that immediately after Dr. Lee's examination, he began to receive TTD and medical benefits from the employer.

¶ 15 On January 25, 2008, the claimant began physical therapy at Accelerated Rehabilitation Center in Chicago. After several sessions, the claimant reported that the pain in his left ankle was increasing and the "snapping" sensation in that ankle was actually getting worse. After receiving this information, Dr. Gagnon referred the claimant to Sportho Physical & Aquatic Therapy (Sportho) for aquatic exercise therapy. The claimant participated in therapy at Sportho from March 10, 2008, through June 11, 2008.

¶ 16 On March 20, 2008, the claimant was again examined at the employer's request by Dr. Lee. Dr. Lee issued a written report in which he opined that the claimant had not reached maximum medical improvement (MMI) and that further conservative care and physical therapy was warranted. Dr. Lee further opined that surgery was not necessary at the time but that an MRI would be useful to determine further treatment options. Dr. Lee authorized the claimant to return to sedentary, light-duty work.

¶ 17 On April 2, 2008, Dr. Gagnon ordered further diagnostic testing, including an MRI. The tests revealed acute tenosynovitis, with no discernable tears, but with a possible functional subluxation of the tibial tendon.

¶ 18 On April 30, 2008, at the employer's request, Dr. Lee read the diagnostic test results previously ordered by Dr. Gagnon on April 2, 2008. Dr. Lee reiterated his opinion that the claimant's work activities aggravated his preexisting condition, stating, "[a]s I have indicated in the past, while there was no specific trauma or accident, this condition can be brought on by prolonged standing and walking activities in a repetitive manner." Dr. Lee opined that the claimant's prognosis was only "fair" and concluded that "I would not recommend him to return back to his duties as a waiter."

¶ 19 On June 13, 2008, Dr. Gagnon recommended a Functional Capacity Evaluation (FCE). The employer sought the opinion of Dr. Lee regarding Dr. Gagnon's recommendation. Dr. Lee issued a written report stating his agreement with Dr. Gagnon's recommendations, again reiterating his opinion that the claimant's condition was the result of a work-related aggravation of a preexisting condition. Dr. Lee further opined that the claimant was likely to require permanent work restrictions.

¶ 20 On June 20, 2008, an FCE was performed at Sportho; however, the evaluation was incomplete due to the failure of the employer's insurance company to provide complete information regarding the physical requirements of the claimant's job. Shortly thereafter, Dr. Gagnon released the claimant to light-duty with an initial limitation of no more than 30 minutes standing per hour. Dr. Gagnon, concurring with Dr. Lee's April 30, 2008, recommendation, advised the claimant to seek alternative employment.

¶ 21 On July 28, 2008, the claimant returned to Dr. Gagnon with reports of increased left foot pain. Upon examination, Dr. Gagnon could detect objective indications of tendon slippage. He opined that conservative treatment was no longer useful and referred the claimant for a surgical consultations with Dr. Stephen Perns, a podiatrist, and Dr. Michael Pinzur, an orthopedic surgeon. Dr. Gagnon revoked the claimant's light-duty restrictions and ordered the claimant off work until he could have his surgical consultation. The employer resumed payment of TTD benefits.

¶ 22 On July 30, 2008, Dr. Lee issued a fifth report, for which he reviewed surveillance video showing the claimant walking normally for short periods. Dr. Lee opined that the video was "inadequate to fully determine the level of function and activity that [the claimant] can undergo." Dr. Lee generally concurred with Dr. Gagnon's assessment of the claimant's prognosis for limited recovery and need for permanent restrictions. Dr. Lee further opined that further conservative treatment and work hardening might, in fact, worsen his condition.

¶ 23 On August 25, 2008, the claimant was examined by Dr. Perns, who recommended surgical intervention to take the pressure off the tendon by means of an arch reconstruction.

¶ 24 On September 2, 2008, Dr. Pinzur diagnosed posterior tibial tendon dysfunction with tendinitis and opined that the claimant "very likely has a preexisting medical condition that,

based on history, was aggravated by a specific injury at work." Dr. Pinzur recommended surgical procedures to reconstruct the tendon and ligament and lengthen the lateral column. Dr. Pinzur also recommended a procedure to surgically straighten the heel bone to relieve pressure on the tendon. The claimant decided to follow Dr. Pinzur's recommendations.

¶ 25 On September 9, 2008, the employer terminated TTD benefits and ordered the claimant to return to full-duty without restrictions. The record contains no explanation for the employer's decision to terminate TTD and order the claimant to return to unrestricted employment. The claimant filed a motion for a hearing, along with a motion for penalties against the employer. The hearing on the motions was set for October 22, 2008. However, the day before the hearing, the employer communicated by email that it would offer the claimant a sedentary desk job. The claimant accepted the offer, and the hearing was continued. The claimant worked at the sedentary job from November 9, 2008, through February 20, 2009. The TTD benefits for September 9, 2008, through November 9, 2008, were not paid.

¶ 26 On January 9, 2009, the claimant sought treatment from Dr. Gagnon. The claimant reported that he was engaged in sedentary work 10 to 15 hours per week. Dr. Gagnon repeated his advice that the claimant undergo surgery as soon as possible.

¶ 27 On February 2, 2009, the claimant was examined by Dr. Armen Kelikian at the request of the employer. Dr. Kelikian concurred in the diagnosis rendered by Drs. Gagnon, Lee, and Pinzur. However, Dr. Kelikian opined "I do not think his job caused this. I do not think it even aggravated it. It mostly exacerbated it." Dr. Kelikian recommended further diagnostic tests which, apparently, were never administered. Dr. Kelikian did not release the claimant to return to full-duty and opined that the claimant had reached maximum medical improvement. One

week later, on February 20, 2009, the employer terminated the claimant's light-duty employment and ceased TTD payments.

¶ 28 On April 29, 2009, the claimant underwent surgery to his left foot performed by Dr. Pinzur. After surgery, the claimant progressed through physical therapy and was released to light-duty shortly before the hearing date in October 2009. As of the date of the hearing, the claimant had not been released to return to work as a waiter. Dr. Pinzur opined that the claimant might achieve MMI within nine months of surgery. The record indicated that the claimant had a surgical follow-up appointment scheduled in December 2009.

¶ 29 The arbitrator found that the claimant's current condition of ill-being and need for medical treatment was causally related to his employment. The arbitrator concluded that the claimant suffered a repetitive motion accident to his left foot resulting from prolonged standing and walking required by his work as a waiter. The arbitrator further concluded that the claimant's employment as a waiter required him to be on his feet in a repetitive manner and for a longer period of time than the general public and found the date of accident to be the claimant's last day of employment, December 12, 2007. As to the claimant's current condition of ill-being, the arbitrator found that all the medical opinions, treating physicians, surgeon, and both the employer's examining physicians opined that the claimant's employment was an "aggravation" or "exacerbation" or his preexisting posterior tibial tendinitis. The arbitrator noted that "[a]ll the treating and examining doctors have found that work duties played a role in making the tibial tendinitis symptomatic and the eventual need for surgical repair."

¶ 30 Based upon a determination that the claimant had not reached MMI by the date of the hearing, the arbitrator determined that the claimant was entitled to TTD benefits for the periods of December 13, 2007, through November 8, 2008, and from February 21, 2009, through the date

of the hearing, October 14, 2009. Having found that the claimant's medical expenses incurred by, or at the request of, Drs. Gagnon and Pinzur were reasonable and necessary, the arbitrator ordered the claimant to pay \$30,029.47 for the claimant's medical expenses incurred up to the date of the hearing.

¶ 31 On the issue of penalties, the arbitrator found that, although a causal connection existed between the claimant's employment and his condition of ill-being, the connection was "sufficiently complex to give the [employer] cause to pause in the payment of benefits." Accordingly, the arbitrator denied the motion for penalties and fees.

¶ 32 Both parties filed exceptions to the arbitrator's decision with the Commission. The employer maintained that the claimant suffered a specific trauma to his left ankle while descending a stairway on December 12, 2007. Thus, his injury was not causally related to his employment since the risks to which he was exposed was no greater than that to which a member of the general public would be exposed. The Commission disagreed with the employer's position. The Commission found that the claimant's symptoms of ankle pain and swelling began on November 23, 2007, after a "busy, busy day" at the restaurant. The Commission also noted that the claimant credibly testified that he felt the same ankle pain and swelling while working on December 12, 2007, in the hours prior to the incident on the stairway when the claimant experienced the "snapping" sensation in his left ankle. Thus, the Commission found that the claimant experienced elements of both repetitive and specific trauma related to his employment.

¶ 33 On the issue of penalties and attorney fees, the Commission modified the arbitrator's award to order both. Specifically, the Commission found that the employer's delay in paying medical expenses was unreasonable and awarded penalties equal to 50% of the unpaid medical expenses pursuant to section 19(k) of the Act. 820 ILCS 305/19(k) (West 2002). The

Commission also found that the employer had unreasonably withheld TTD payments for the periods September 9, 2008, through November 8, 2008, and April 22, 2009, through October 14, 2009.

¶ 34 Commissioner Nancy Lindsey concurred with the decision, finding that the claimant had established that his current condition of ill-being and the need for surgical intervention was causally related to his employment on a repetitive trauma theory. She dissented from the Commission's award of penalties and fees, finding that the claimant's seemingly conflicting theories of specific and traumatic injury was sufficient "cause for pause" to find that the employer's decision not to pay TTD and medical benefits was reasonable.

¶ 35 The employer then sought judicial review of the Commission's decision in the circuit court of Cook County, which affirmed the Commission's award of TTD and medical expenses. The court found, however, that the Commission's award of penalties and attorney fees was contrary to law and against the manifest weight of the evidence. The employer appeals to this court from the judgment of the circuit court confirming the Commission's award of TTD and medical expenses. The claimant appeals from the court's order reversing the Commission's award of penalties and attorney fees.

¶ 36 ANALYSIS

¶ 37 The employer first maintains that the Commission erred in finding that the claimant's injuries arose out of and in the course of his employment. Whether an injury arises out of and in the course of employment is a question of fact to be determined by the Commission, and its finding will not be overturned on appeal unless it is against the manifest weight of the evidence. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 944 (2006). Factual determinations are against the manifest weight of the evidence where the opposite conclusion is clearly apparent

or when no rational trier of fact could reach the same determination based upon the record. *D.J. Masonry Co. v. Industrial Comm'n*, 295 Ill. App. 3d 924, 930 (1988). The employer suggests that the claimant's injury was the result of a fall on the stairs and was thus the result of an exposure to a risk no greater than that to which the general public might be exposed. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548 (1991). Alternatively, the employer suggests that the claimant's injuries resulted from an unexplained (idiopathic) occurrence not related to his employment. *Elliott v. Industrial Comm'n*, 153 Ill. App. 3d 238 (1987).

¶ 38 The employer's position that the claimant's injuries were specifically caused by an event on the stairway was rejected by the Commission. The Commission found that the claimant's symptoms first appeared on November 23, 2007, and were, in fact, present on December 12, 2007, immediately prior to the stairway episode. Moreover, the claimant reported his symptoms to all treating and examining physicians, each of whom opined that the claimant's pain and swelling of the left ankle predated the December 12, 2007, incident on the stairway. Given the record evidence regarding the presence of left ankle pain and swelling prior to the stairway incident, it cannot be said that the Commission's determination that the claimant's injury was not related solely to that incident was against the manifest weight of the evidence.

¶ 39 The employer also maintains that the Commission's finding that the claimant's injuries arose out of and in the course of his employment requires the Commission to adopt the positional risk doctrine, since the only connection between the claimant's injuries and his employment was the mere fact that his injury occurred while walking down the stairs. *Ruffalo*, 143 Ill. 2d at 552. This argument, however, does not recognize the Commission's factual finding that the claimant's injuries were not caused by a fall on the stairs. Given that the record supports the Commission's determination that the claimant's left ankle swelling and pain began before the incident on the

stairway and that the medical evidence supports a finding that the claimant's job duties as a waiter aggravated a preexisting condition, the Commission's determination that the claimant's injuries arose out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 40 The employer next maintains that the Commission erred in finding that the claimant's current condition of ill-being was causally related to his employment. Whether a causal connection exists between a claimant's current condition of ill-being and his employment is a question of fact to be resolved by the Commission, and its conclusion will not be overturned on appeal unless it is against the manifest weight of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Moreover, it is well-settled that a claimant is entitled to benefits where an accidental injury aggravates or accelerates a preexisting condition. *Id. at 215*.

¶ 41 Here, the Commission noted that all the treating and examining physicians found a causal connection between his employment duties as a waiter and his left ankle injuries. All the physicians, except Dr. Kelikian, characterized the claimant's current condition of ill-being as an "aggravation" of a preexisting condition causally related to his employment. Even Dr. Kelikian linked the claimant's current injuries to his employment, using the word "exacerbation" rather than "aggravation" to describe its effect on his preexisting condition. The Commission saw no meaningful distinction between "aggravation" and "exacerbation" and found the medical opinion evidence that the claimant's employment worsened his preexisting condition to be overwhelming. The employer maintains that the complete tendon tear was not revealed in the MRI immediately after the December 13, 2007, accident. Thus, it maintains, there could be no causal connection between the claimant's employment and his subsequent condition of ill-being. The employer's position, however, fails to take into account the fact that all the physicians reported a connection

between the claimant's employment and his condition of ill-being. Each physician, including the employer's examining physicians, had access to all diagnostic testing results. Given the nature of the record evidence, we cannot say that the Commission's conclusions as to causation were against the manifest weight of the evidence.

¶ 42 The employer also argues that the award of TTD benefits and medical expenses were against the manifest weight of the evidence. However, since these arguments are based upon the premise that the Commission's causation finding was erroneous, these contentions can be rejected without further analysis. *Tower Automotive v. Industrial Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 43 The claimant appeals from the circuit court's finding that the Commission's award of penalties and attorney fees was erroneous. An employer that unreasonably, or in bad faith, delays or withholds compensation from an injured worker is subject to the penalty and fee provisions of the Act. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301 (1980). Ordinarily, where an employer acts in reliance on a reasonable medical opinion or when there is conflicting medical opinions, penalties and attorney fees will not be imposed. *Id.* at 302. The standard is one of objective reasonableness (*Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9 (1982)), and the employer bears the burden of justifying the delay in payment of compensation (*Zitka v. Industrial Comm'n*, 328 Ill. 3d 844, 848 (2002)). The reasonableness of the employer's conduct is a factual question for the Commission, and its findings will not be overturned on appeal unless they are against the manifest weight of the evidence. *Board of Education*, 93 Ill. 2d at 11.

¶ 44 In the instant matter, a majority of the Commission found the employer's delay in paying TTD benefits from September 9, 2008, through November 8, 2008, to be unreasonable and

vexatious. The Commission found that there was no objectively reasonable basis upon which to deny benefits, noting that the employer's examining physician, Dr. Lee, had issued four reports prior to September 9, 2008, in which he opined that a causal connection existed between the claimant's current condition of ill-being and his employment. The Commission also noted that on August 25, 2008, Dr. Perns had found a causal connection between the claimant's employment and his current condition of ill-being and recommended surgery. The employer responded the following day by offering the claimant full-duty employment and terminating his TTD benefits. The Commission also noted that it was only on the eve of the 19(b) hearing on the claimant's petition for penalties and fees that the employer offered light-duty and reinstated TTD payments. However, the employer never paid the TTD benefits that accrued during the period between September 9, 2008, and November 8, 2008. Given the record, it cannot be said that the Commission erred in finding that the employer failed to establish that its withholding of TTD payments during this period was objectively reasonable.

¶ 45 The Commission's majority also determined that the employer's refusal to pay postoperative TTD benefits was, likewise, unreasonable and vexatious. The Commission found that it was unrebutted that the claimant remained off work following surgery, and no postoperative medical opinion supporting a conclusion that the claimant could return to work. Thus, there was no objectively reasonable basis for denying postoperative TTD benefits. Given the record, it cannot be said that the Commission's determination was against the manifest weight of the evidence.

¶ 46 Regarding the refusal of the employer to pay medical expenses incurred after September 9, 2008, the Commission found that the employer had presented no medical opinion testimony to support this position. As with TTD benefits terminated on that same date, the Commission noted

no opinion at the time supported a conclusion that the claimant's current condition was not related to his employment. Based upon the medical opinion testimony available at the time, the employer had no support for its decision to terminate medical benefits at that time.

CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the Cook County circuit court is affirmed in part and reversed in part. The judgment of the circuit court reversing the Commission's award of penalties and attorney fees is reversed, and the Commission's award of penalties and attorney fees is reinstated. The Commission's decision is reinstated, and the cause is remanded to the Commission for further proceedings.

¶ 48 Affirmed in part; reversed in part; Commission decision reinstated; cause remanded.