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2013 IL App (1st) 122219WC-U

FILED: JUNE 10, 2013

NO. 1-12-2219WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

AIR FREIGHT EXPRESS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Cook County
THE ILLINOIS WORKERS' COMPENSATION)	No. 11L51376
COMMISSION <i>et al.</i> (Eric Akuetteh, Appellee).)	
)	Honorable
)	Daniel T. Gillespie,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The parties' settlement contract coupled with the Commission's factual findings regarding medical expenses established the employer's liability to pay claimant compensation under the Act and the Commission did not err as a matter of law by imposing section 19(k) penalties and section 16 attorney fees.

¶ 2 In November 1985, claimant, Eric Akuetteh, was injured while working for the employer, Air Freight Express. In May 1989, the Workers' Compensation Commission (Commission) approved a settlement contract between the parties which included the requirement that the employer continue to provide and pay for all reasonable and necessary medical expenses

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stemming from claimant's work-related injury. In April 2010, claimant filed a petition for payment of medical expenses under section 8(a) of the Workers' Compensation Act (Act) (820 ILCS 305/8(a) (West 2008)) and for penalties and attorney fees pursuant to sections 19(k), 19(l), and 16 of the Act (820 ILCS 305/19(k), 19(l), and 16 (West 2008)). Following hearings over six different dates, the Commission determined the employer failed to make payment of medical expenses totaling \$131,493.27, and its failure was not in good faith. The Commission ordered the employer to pay penalties pursuant to section 19(k) in the amount of \$65,746.64, and attorney fees pursuant to section 16 in the amount of \$13,152.93.

¶ 3 On judicial review, the circuit court of Cook County confirmed the Commission's decision. The employer appeals, arguing the Commission failed to enter an award of compensation and, therefore, erred as a matter of law in awarding penalties and attorney fees. We modify the amount of penalties and fees the Commission awarded and affirm the circuit court's judgment, confirming the Commission's decision as modified.

¶ 4 I. BACKGROUND

¶ 5 Claimant worked for the employer as an over-the-road truck driver. On November 27, 1985, he and a coworker were involved in a motor vehicle accident. The coworker was killed and claimant sustained severe injuries, including a broken left hip and left pelvis, multiple fractures in his left leg and foot, spine injuries, and a ruptured spleen. He was hospitalized for several months and underwent multiple surgeries, including a partial amputation of his left foot.

¶ 6 On January 23, 1986, claimant filed an application for adjustment of claim under the Act, seeking benefits from the employer. On May 2, 1989, the Commission approved a

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settlement contract between the parties. Pursuant to that contract, claimant agreed to accept a lump sum payment of \$125,000, based upon an 85.8% loss of use of the person as a whole. The parties further agreed as follows:

"[T]he [employer] shall continue to provide an[d] pay for all necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services reasonably required to cure or relieve the [claimant] from the effects of the accidental injury.

The employer also agrees to pay for treatment necessary for the physical and mental rehabilitation of the [claimant] including required institutional care all pursuant to section 8(a) of the *** Act."

¶ 7 Claimant filed petitions for medical expenses before the Commission on July 20, 1992; October 25, 2004; and January 19, 2007. The record reflects denial of his first petition but unknown dispositions as to the October 2004 and January 2007 petitions. On April 22, 2010, claimant filed another petition, seeking payment of section 8(a) medical expenses and penalties and attorneys fees under sections 19(k), 19(l), and 16. On June 11, 2010, he provided the employer with copies of approximately 1,500 pages of medical records, a letter summarizing his treatment, and a spreadsheet setting forth outstanding medical bills. Hearings in the matter were held before the Commission on July 15, 2010; February 14, 2011; March 15, 2011; April 6, 2011; May 17, 2011; and July 13, 2011.

¶ 8 At the July 15, 2010, hearing, the employer's attorney represented to the Commis-

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sion that, after receiving claimant's January 2007 petition for medical expenses, he contacted claimant's attorney every six months to learn what the petition was about but received no response. The employer's attorney asserted the information claimant provided to the employer in June 2010, was the first time the employer had been given an overview of what was going on with claimant's case.

¶ 9 At the February 14, 2011, hearing, the parties appeared before Commissioner James Demuno. Claimant testified and described his continuing medical services, including procedures for a left knee replacement, further amputation of his foot, left hip replacement, and care associated with those procedures. He received bills for those services and stated some of his medical expenses remained unpaid while others were paid through the health insurance he received through his current employment. Claimant testified his health insurance paid medical bills totaling \$214,205.07, but he had to sign paperwork agreeing to reimburse the insurer. Claimant also reported he had unpaid medical bills totaling \$50,391.97. Further, he identified various medical providers from which he received services in connection with his left toe, knee, and hip conditions of ill-being.

¶ 10 Claimant also submitted the deposition of Dr. Saul Haskell, a specialist in orthopedic surgery, taken November 15, 2010. Dr. Haskell testified regarding his treatment of claimant from 2001 to 2009. He noted claimant's ongoing difficulty with the partial amputation of his left big toe, his ankle, his left hip, and his left knee. Dr. Haskell opined those conditions of ill-being were caused by claimant's November 1985 motor vehicle accident. Further, he described medical care claimant needed and received to treat those ongoing conditions of ill-

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being, including multiple surgical procedures. Specifically, claimant underwent knee replacement surgery on November 24, 2004, with rehabilitation follow-up; left knee manipulations in April and May 2005, with follow-up therapy; lysis adhesion removal on the left knee on January 26, 2006; knee surgery in 2008; and left hip replacement on November 5, 2009, with follow up rehabilitation. Dr. Haskell testified claimant's medical treatment was causally connected to his 1985 accident.

¶ 11 Also at the February 2011 hearing, claimant submitted medical bills and records for treatment he received between 2001 and 2009. He offered a spreadsheet, setting forth his various medical providers; dates of service; charges for those services; amounts paid toward his medical bills by the employer, claimant's group insurer, or claimant; adjustments; and outstanding balances. The spreadsheet showed, between 2001 and 2009, claimant had medical expenses totaling \$345,909.90, and adjustments made toward those expenses totaling \$76,226.20. Additionally, payments for those expenses were made by the employer in the amount of \$5,078.16; by claimant's group insurer in the amount of \$214,205.07; and by claimant in the amount of \$8.50. The balance of claimant's unpaid medical expenses was \$50,391.97.

¶ 12 Finally, claimant submitted correspondence between his attorney and the employer's attorney from June and November 2010. That correspondence included letters from claimant's representative describing claimant's ongoing medical treatment and spreadsheets regarding dates and types of services, charges, amounts paid, and outstanding balances. In correspondence dated November 22, 2010, claimant's attorney provided the employer's attorney with a letter and spreadsheet that identified medical services and bills attributable to claimant's

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left knee, left hip, and toe amputation. He asserted claimant's group provider had paid a total of \$214,619.32, and outstanding balances totaled \$51,986.92. Claimant's attorney demanded that the employer pay \$266,606.24 ($\$214,619.32 + 51,986.92$) at that time.

¶ 13 The employer presented no evidence at the February 2011 hearing. However, its attorney objected to the closing of proofs and sought a continuance to review claimant's testimony and confer with his client. Over claimant's objection, the matter was continued.

¶ 14 On March 15, 2011, a further hearing was conducted in the matter before Commissioner Demuno. Claimant's attorney reported claimant had not received payment from the employer and reasserted that claimant requested payment in the amount of \$214,205.07, for payments made by claimant's group health insurance provider, and \$50,391.97, for unpaid medical expenses. Commissioner Demuno suggested the employer make at least a partial payment "to show good faith." The employer's attorney asserted he had gone through information provided by claimant and matched the medical bills to claimant's treatment records as well as he could. However, he complained he did not have "copies of the exhibits that were tendered last time that were bills." Commissioner Demuno pointed out that the information was in the record. The employer's attorney asserted he was going to ask for a copy of the record from the February 2011 hearing. Also, he asserted that "[w]hatever matches up, I will submit that for payment and direct it to be sent to counsel at his office." The matter was continued for further hearing.

¶ 15 On April 6, 2011, the parties appeared before Commissioner Demuno. Again, no payment for medical expenses had been made by the employer; however, the employer's attorney

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asserted a check was issued the previous day with respect to expenses the employer agreed it owed. The employer's attorney argued remaining amounts involved treatment claimant received after the Act's fee schedule provision had been put into effect. See (820 ILCS 305/8.2 (West 2006)). He argued, as a result, the employer's liability could be limited as the employer was "only liable for payments up to the fee schedule." The parties disputed who had the duty of providing fee schedule assessments and whether the employer had received all of the available information regarding medical expenses. Commissioner Demuno stated both parties had a duty to submit fee schedule assessments and directed the employer to submit a written statement of what information the employer needed. The employer's counsel submitted an accounting he prepared which identified bills and records the employer claimed not to have. Commissioner Demuno reasserted that the employer needed to make at least a partial payment to show good faith. The matter was continued for further hearing.

¶ 16 On April 26, 2011, the employer made a payment to claimant in the amount of \$135,112.97. On May 17, 2011, a further hearing was conducted before Commissioner Demuno. Claimant's counsel submitted a letter he prepared to respond to the employer's complaints regarding incomplete records. The letter identified the location of bills and records among the information claimant previously submitted and noted the records for one provider, Midwest Orthopaedics, would be submitted as an additional exhibit before the closing of proofs. Following the parties' arguments, the commissioner directed the employer to provide claimant with an itemization as to what bills were to be paid through its \$135,112.97, partial payment. He also ordered claimant to compile "a list of the bills that are owed and due."

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¶ 17 On July 13, 2011, a final hearing was conducted in the matter before Commissioner Demuno. Claimant offered records from Midwest Orthopaedics and submitted a list of unpaid medical bills, totaling \$131,426.22, and toward which he asserted the employer had paid \$4,695.30. Proofs were closed and the matter was taken under advisement.

¶ 18 On November 8, 2011, the Commission issued its decision. It found the parties had a settlement contract that required the employer to continue to pay for reasonable and necessary medical expenses related to claimant's November 1985, work accident and, thereafter, claimant underwent extensive medical care. His treatment included multiple surgical procedures to his left leg, knee, and left hip, which Dr. Haskell testified were directly caused by claimant's work accident. The Commission found claimant's medical treatment resulted in extensive medical bills that were either paid by collateral insurance or remained unpaid. Specifically, it noted claimant testified and alleged \$214,619.32 in medical expenses were paid by a collateral insurer, and \$51,986.92 remained unpaid. The Commission found the employer paid claimant \$135,112.97, but "[t]he rest of the amount was not paid" because the employer asserted it did not possess adequate medical records to determine liability and because it was entitled to fee schedule reductions for medical charges incurred after February 2006.

¶ 19 The Commission determined the employer's payment of \$135,112.97, was made in good faith, noting it had been over 20 years since the settlement contract was approved and it had a right to question claimant regarding his recent treatment and to receive a report from Dr. Haskell that causally connected claimant's current condition to his work accident. However, the Commission also stated as follows:

"[T]he Commission further finds that [the employer's] failure to make payment of the additional amount of \$131,493.27 was not in good faith. If [the employer] feels it is entitled to a fee schedule reduction for medical charges, the burden is on them to calculate those reductions. They cannot in good conscience refuse to make a payment because the fee schedule reduction was not calculated for them. [The employer] also refused payment of that amount because they allegedly did not have medical records to justify payment. [Claimant] presented [the employer] all the medical records they had in their possession in June 2010. [The employer] also had [claimant's] testimony on February 11, 2011. The Commission notes that [the employer] has not issued a single subpoena in this matter and has not made a single request to a provider of medical service for medical records."

The Commission then ordered the employer to pay \$65,746.64 in penalties under section 19(k) and \$13,152.93 in attorneys fees pursuant to section 16. On June 20, 2012, the circuit court of Cook County confirmed the Commission.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, the employer argues the Commission erred as a matter of law in awarding penalties and attorneys fees under sections 19(k) and 16 of the Act. It contends those

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sections of the Act "presuppose[] an underlying award of compensation" and, in the present case, the Commission awarded no compensation. Specifically, the employer argues the Commission issued no award regarding what, if any, medical bills were due and owing. Conversely, claimant maintains the parties settlement agreement has the effect of a legal award and that the Commission implicitly determined the amount of medical expenses the employer owed was \$131,493.27. He notes the Commission's factual findings and its ultimate determination that the employer refused, in bad faith, to pay claimant \$131,493.27.

¶ 23 Section 19(k) of the Act provides as follows:

"In case [*sic*] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2010).

Under section 19(k), the imposition of penalties is discretionary and "intended to address situations where there is not only a delay [in payment], but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553 (1998). Section 16, regarding the imposition of attorney fees, uses identical language to section 19(k) and was intended to apply in the same circumstances. *McMahan*, 183

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Ill. 2d at 515, 702 N.E.2d at 553; 820 ILCS 305/16 (West 2010).

¶ 24 Penalties and fees may be imposed based upon conduct either following entry of an award in favor of the claimant or where the employer's delay in payment occurred prior to the entry of any award. *McMahan*, 183 Ill. 2d at 507-08, 702 N.E.2d at 549. Further, under section 19(k), the Commission is "authorized to assess penalties following approval of a settlement contract" as a "settlement contract has the same legal effect as an award." *Flynn v. Industrial Comm'n*, 94 Ill. App. 3d 844, 850, 419 N.E.2d 526, 530 (1981).

¶ 25 Generally, the imposition of penalties and attorney fees involves questions of fact and the Commission's decision is subject to a manifest-weight-of-the-evidence standard of review. *Dye v. Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 15, 981 N.E.2d 1193. However, statutory construction issues involve questions of law and are subject to *de novo* review. *Hollywood Casino-Aurora, Inc. v. Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC, ¶ 13, 967 N.E.2d 848. "The cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature" and where "the language of the statute is clear and unambiguous, courts must interpret the statute according to its terms without resorting to aids of construction." *Hollywood Casino-Aurora*, 2012 IL App (2d) 110426WC, ¶ 16, 967 N.E.2d 848.

¶ 26 As stated, the employer argues sections 19(k) and 16 require an underlying award of compensation. Claimant does not dispute this contention and we agree. Clearly, the imposition of additional compensation under section 19(k) and fees under section 16 must be based upon the employer's liability to pay compensation under the Act in the first place. Without an

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ultimate finding by the Commission that the employer had an obligation to pay, there can be no improper delay in payment or underpayment. While penalties and fees may be based upon conduct that occurs either prior to or after an award of compensation, there must, nevertheless, be an ultimate award of compensation to claimant.

¶ 27 Although we agree that sections 19(k) and 16 require an award of compensation to claimant and an obligation of the employer to pay that award, we disagree with the employer's contention that this case does not present such circumstances. Here, the employer complains the Commission failed to issue an "award *** regarding what, if any, medical bills [were] due and owing to" claimant. However, as claimant argues, a settlement contract has the same legal effect as an award for section 19(k) purposes and, in this case, the parties' settlement contract provided that the employer would be liable for all reasonable and necessary medical expenses associated with claimant's work-related accident. The employer's continued obligation to pay for medical treatment for claimant's work-related injuries stemmed from that settlement contract. Moreover, the Commission made findings regarding the precise dollar amount of medical expenses that the employer owed but failed to pay, \$131,493.27. That amount served as the basis for its calculation of penalties.

¶ 28 The employer's challenge to the Commission's imposition of penalties and fees appears to be that the Commission did not use certain express language in its decision when setting forth the employer's medical expenses obligation. Specifically, in its briefs, the employer argues that "[t]o date, no such determination has been made by the Commission as to reasonable and necessary medical expenses" or "what, if any, medical bills are due and owing." The record

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does not support its position.

¶ 29 Although the Commission did not use the precise language referenced by the employer, its decision clearly shows it found the employer owed claimant \$131,493.27 in medical expenses but, acting in bad faith, refused to pay that amount. Its finding came after multiple hearings on the issue of medical expenses, during which claimant presented specific evidence regarding his ongoing medical treatment, submitted medical bills, and offered medical opinion testimony that causally connected to his treatment to his work-related injuries. By finding the employer failed, in good faith, to pay \$131,493.27, the Commission implicitly found that amount "due and owing" to claimant and established its reliance on claimant's evidence regarding the reasonableness and necessity of medical expenses.

¶ 30 Here, the parties' settlement contract coupled with the Commission's factual findings regarding medical expenses established the employer's liability to pay claimant compensation under the Act. The Commission did not err as a matter of law by imposing section 19(k) penalties and section 16 attorney fees.

¶ 31 Finally, although the employer does not challenge the Commission's decision as being against the manifest weight of the evidence, it does argue there was no basis in the record for the Commission to find the employer owed an outstanding amount of \$131,493.27 in medical expenses. That amount was based upon evidence that claimant's medical expenses totaled \$266,606.24 (\$214,619.32 paid by claimant's collateral health insurer which required reimbursement + \$51,986.92 in unpaid medical expenses) and the employer paid \$135,112.97 toward that total ($\$266,606.24 - \$135,112.97 = \$131,493.27$). The record reflects these figures and calcula-

