

2014 IL App (1st) 130247WC-U
No. 1-13-0247WC
Order filed March 17, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

| | | |
|--------------------------------|---|-------------------------------|
| CITY OF CALUMET CITY, |) | Appeal from the Circuit Court |
| |) | of Cook County |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 12-L-50504 |
| |) | |
| ILLINOIS WORKERS' COMPENSATION |) | |
| COMMISSION and KEITH EMBREY, |) | Honorable |
| |) | Daniel T. Gillespie, |
| Defendants-Appellees. |) | Judge, Presiding. |

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

ORDER

¶ 1 *Held:* The evidence supported the periods of TTD awarded by the Commission, and the Commission did not err in imposing penalties and fees against respondent where respondent's denial of benefits was not reasonable.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, the City of Calumet City, appeals an order of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission)

awarding plaintiff, Keith Embrey, benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2002)). Respondent appeals two aspects of the Commission's order. First, it challenges the period to which the Commission determined claimant was entitled to temporary total disability (TTD) benefits. Second, it contends that the Commission erred in awarding penalties and fees. For the reasons that follow, we affirm.

¶ 4

II. BACKGROUND¹

¶ 5 Claimant worked for respondent as a mechanic. His duties involved maintaining garbage trucks. It is undisputed that claimant suffered a work-related injury on September 9, 2003. He was lying under a truck holding a drive shaft in place when he heard his shoulder "pop." After a course of conservative treatment, claimant underwent surgery on September 27, 2004. The surgery was performed by Dr. Guido Marra. An office note authored by Marra on August 30, 2005, states that [claimant] "feels that at this point he is ready to return back to work." The note further says, [Claimant] "demonstrates full, painless range of motion with no signs of impingement." It concludes, "At this point in time we will release [claimant] from our care"; "[h]e is at maximum medical improvement and is returned to work without restrictions."

¶ 6 Claimant returned to work in January 2006, but he was laid off as part of a general layoff sometime prior to January 31, 2006. He noted some problems with his shoulder, so he returned to see Marra. Subsequently, Marra recommended an MRI, which was delayed due to the insurance company's failure to authorize the procedure. On October 9, 2006, Marra imposed a

¹ We remind the parties' counsel that *all* factual assertions in the statement of facts and argument sections of an appellate brief must be supported by citation to the *pages* of the record on which the pertinent material appears. See Illinois Supreme Court Rule 341(h)(6), (h)(7) (eff. February 6, 2013).

15-pound work restriction. In September 2009, an “MR Anthrogram” was performed. It showed, *inter alia*, a “small tear,” “distal supraspinatus tendinopathy,” and “postsurgical changes involving distal clavicle and AC joint.” On November 22, 2010, Marra performed arthroscopic surgery. He released claimant to work on January 6, 2011, restricting the use of claimant’s right arm. Marra opined that the mechanism of injury described by claimant “was certainly plausible to cause a problem in his shoulder.”

¶ 7 Dr. Brian Cole examined claimant on respondent’s behalf. He diagnosed claimant’s condition as myofascial pain and AC joint pain. Cole opined that claimant’s condition of ill-being was indirectly causally related to the initial surgery claimant underwent as a result of his work-related accident. He also opined that the second surgery claimant underwent was “a reasonable option.”

¶ 8 Pertinent here, the arbitrator concluded that claimant was entitled to TTD from September 10, 2003, to August 30, 2005, and from January 31, 2006, to January 13, 2011 (the date of the arbitration hearing). The arbitrator also found that penalties and fees were appropriate in accordance with sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2002)) based on respondent’s delay in paying TTD and medical expenses (the arbitrator specifically noted that an MRI prescribed by Marra in October 2007 was not performed until September 2009). The Commission largely adopted the arbitrator’s decision; however, it modified the second period of TTD awarded by the arbitrator. The Commission found that there was no evidence that claimant was restricted from working from August 30, 2005, to August 21, 2007. Accordingly, it concluded that the proper period of TTD was from September 10, 2003 to August 30, 2005, and from August 21, 2007, to January 13, 2011. The circuit court confirmed the Commission’s award, and this appeal followed.

¶ 9

III. ANALYSIS

¶ 10 On appeal, respondent raises two issues. First, it argues that the period claimant was awarded TTD should be further reduced. Second, it asserts that penalties and fees were not appropriate in this case.

¶ 11

A. TTD

¶ 12 Respondent's first argument is that the second period of TTD awarded claimant should be reduced to from November, 22, 2010, to January 13, 2011. November 22, 2010, is the date of claimant's second surgery. We do not find respondent's request to be persuasive.

¶ 13 To be entitled to TTD, a claimant must prove that he or she is unable to work. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 177 (2000). A claimant may recover TTD up until the point that his or her condition stabilizes. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). A condition has stabilized where the claimant has recovered to the extent that the nature of the injury will permit, that is, when the claimant reaches maximum medical improvement. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 471 (2011); *Briggs Manufacturing Co. v. Industrial Comm'n*, 212 Ill. App. 3d 318, 320 (1989). Moreover, "when an employee who is entitled to receive workers' compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employer's obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and he has reached maximum medical improvement." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 136 (2010). A claimant's entitlement to TTD presents a question of fact. *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 716 (1993). As such, we conduct review using the manifest-weight standard, pursuant to which we

will reverse only if an opposite conclusion is clearly apparent. *Elmhurst-Chicago Stone Co. v. Industrial Comm'n*, 269 Ill. App. 3d 902, 906 (1995).

¶ 14 Initially, we note that respondent raises the fact that claimant was released as part of a general layoff after he returned to work following the first period of TTD. This is not relevant to our inquiry. See *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 136. Respondent also attacks claimant's testimony that Marra restricted him from work on January 31, 2006. While the arbitrator used this date in calculating TTD, the Commission did not. It found that the second period of TTD began on August 21, 2007. We review the decision of the Commission and not the arbitrator. See *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 173 (2007); *National Biscuit, Inc. v. Industrial Comm'n*, 129 Ill. App. 3d 118, 120 (1984). Thus, respondent's attack on this portion of claimant's testimony is beside the point.

¶ 15 In selecting August 21, 2007, as the date the second period of TTD commenced, the Commission noted that this was "the next date that [claimant] was restricted from working" because "Dr. Marra stated [claimant] could return to a 'medium' level of work." The record does, in fact, contain a prescription slip signed by Marra that is dated August 21, 2007, and states "Medium Level work restriction." Thus, there is evidentiary support for the date chosen by the Commission. Respondent contends that the Commission should have chosen November 22, 2010, instead, which is the date of claimant's second surgery. While the fact that claimant had surgery on this date would have supported a finding that the second period of TTD commenced on November 22, 2010, it does not compel such a finding. At most, this simply created a conflict in the evidence. Resolving such conflicts is primarily for the Commission. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Moreover, we owe substantial deference to the Commission's findings regarding medical issues, as its expertise in this area is well recognized.

Long v. Industrial Comm'n, 76 Ill. 2d 561, 566 (1979). Here, we cannot say that a finding that claimant's second period of temporary disability commenced on November 22, 2010, as respondent advocates, is clearly apparent. Accordingly, we also cannot say that the Commission's decision is contrary to the manifest weight of the evidence. *Elmhurst-Chicago Stone Co.*, 269 Ill. App. 3d at 906.

¶ 16 Respondent also implausibly claims that there is no medical opinion relating the cause of claimant's condition to his employment around the time the Commission determined the second period of TTD began. It is undisputed that claimant's initial injury and surgery were work related. Respondent's own expert, Dr. Cole, opined that the condition necessitating claimant's second surgery was causally related to claimant's work-related injury. The Commission could readily infer that the condition of claimant's shoulder during the intervening period between claimant's accident and his second surgery stemmed from the same cause and was thus work related.

¶ 17 In short, as the appellant, the burden before this court is on respondent to demonstrate that the Commission erred. *Lenny Szarek, Inc. v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 597, 606 (2009) (citing *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008)). Respondent has not carried that burden here. Respondent has failed to convince us that an opposite conclusion to the Commission's is clearly apparent

¶ 18 B. Fees and Penalties

¶ 19 Respondent next challenges the Commission's imposition of penalties and fees pursuant to sections 19(k), 19(l), and 16 of the Act. See 820 ILCS 305/16, 19(k), 19(l) (West 2002). We conduct review of these issues using the manifest-weight standard (*Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003)); therefore, we will reverse only if an

opposite conclusion is clearly apparent (*Mobil Oil Corp.*, 327 Ill. App. 3d at 789)). This is not the case here.

¶ 20 An award under section 19(l) is mandatory when payment is late and an employer does not show an adequate justification for the delay. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). This section is essentially a late fee. *Dye v. Illinois Workers' Compensation Commission*, 2012 IL App (3d) 110907WC, ¶ 15. The employer bears the burden of justifying the delay. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20. Fees and penalties in accordance with sections 16 and 19(k) are warranted where an employer's denial of benefits is unreasonable or vexatious. *Vulcan Materials, Co. v. Industrial Comm'n*, 362 Ill. App. 3d 1147, 1150 (2005). Under these sections, the refusal to pay must result from bad faith or improper purpose. *McMahan*, 183 Ill. 2d at 515. Generally, penalties and fees are inappropriate when an employer honestly believes a claimant is not entitled to compensation. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301-02 (1980). However, this is judged using an objective standard, so an employer's decision to deny benefits must be assessed with respect to what a reasonable person in the employer's position would believe. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10 (1982).

¶ 21 We find respondent's arguments unpersuasive for a number of reasons. First, respondent stands the law on its head by asserting that it was not until Dr. Cole opined that claimant's condition was work related in April 2010 that it had notice that claimant's condition was related to his employment. The law, however, holds that "when the employer acts in reliance upon responsible medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed." *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173 (2001). Respondent

does not point to the existence of an opinion negating causation, only to the absence of an opinion confirming causation. It bears emphasizing that, by 2007, claimant had suffered an undisputed at-work accident necessitating surgery to the very same shoulder claimant was experiencing difficulties with in 2007. As such, we cannot say that the absence of a medical opinion confirming causation so clearly shows respondent's good faith as to render the Commission's decision contrary to the manifest weight of the evidence. As the Commission properly noted, "Respondent's delay in authorization of medical [expenses] and refusal to pay TTD benefits is unsupported by any of the doctors' opinions."

¶ 22 Second, even if we were to accept respondent's premise that it had a good faith basis to deny benefits prior to Cole opining that claimant's condition was work related, respondent would not prevail. The Commission found as follows:

"In addition, Dr. Cole, [r]espondent's IME doctor, agreed with Dr. Marra and opined [claimant] needed surgery and should be restricted from work. Dr. Cole wrote his opinion on April 26, 2010. [Claimant's] surgery was not authorized until November 2010. Respondent unreasonably and vexatiously delayed [claimant's] surgery for seven months."

Thus, that Cole did not issue his opinion until April 2010 would not, in itself, allow respondent to escape liability here.

¶ 23 However, we note that this court recently held that section 19(k) penalties are not available where an employer delays in authorizing a procedure. See *Hollywood Casino—Aurora, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC, ¶ 19. Here, the Commission's award pursuant to this section is based, at least in part, on respondent's delay in authorizing claimant's surgery. It is also properly based, in part, on respondent's

unreasonable and vexatious denial of “payment of [claimant’s] TTD and medical benefits.” Accordingly, we vacate that award and remand to the Commission to recalculate the award, deducting whatever portions is attributable to respondent’s delay in authorizing the procedure at issue.

¶ 24 Again, respondent has not carried its burden of establishing that an opposite conclusion to the Commission’s is clearly apparent. *Lenny Szarek, Inc.*, 396 Ill. App. 3d at, 606. Accordingly, we cannot find that the Commission’s decision is against the manifest weight of the evidence.

¶ 25 **IV. CONCLUSION**

¶ 26 In light of the foregoing, we vacate the decision of the Commission as it pertains to section 19(k) penalties and otherwise affirm. We remand this cause for further proceedings consistent with the views expressed herein.

¶ 27 Affirmed in part, vacated in part, and remanded with instructions