Order filed December 21, 2016

2016 IL App (2nd) 151183WC-U

NO. 2-15-1183WC

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ABF FREIGHT SYSTEM, INC.,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Kane County.
	)	
v.	)	No. 15-MR-291
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	David R. Akemann,
(Keith Littlejohn, Appellee).	)	Judge, presiding.

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

ORDER

¶ 1 *Held:* We affirmed the judgment of the circuit court which confirmed the decision of the Illinois Workers' Compensation Commission, awarding the claimant

benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)) for injuries he sustained while working for ABF Freight System.

¶ 2 The employer, ABF Freight System, Inc., appeals from an order of the circuit court of Kane County which confirmed the decision of the Illinois Workers' Compensation Commission (Commission). The Commission had modified the arbitrator's decision, affirming some penalties, but declining to award other penalties, because the Commission found there was a legitimate dispute as to the claimant's average weekly wage. The Commission had also modified the arbitrator's decision by increasing the claimant's PPD to "17% loss of use person as a whole," because the Commission found that the claimant "sustained multiple tears to the ligaments and tendons of the shoulder, requiring repair," and "underwent an excision of the distal clavicle in the left shoulder." For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 On January 30, 2013, the claimant, Keith Littlejohn, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), seeking benefits for injuries he allegedly sustained on February 22, 2012, while working for the employer, ABF Freight System, Inc. On August 8, 2013, the claimant filed a petition for penalties and attorney fees pursuant to sections 19(*l*), 19(k), and 16 of the Act (820 ILCS 305/19(*l*), 19(k), 16 (West 2012)).

¶ 5 An arbitration hearing was held on November 14, 2013. The following factual recitation is taken from the evidence presented at the arbitration hearing. The claimant testified that he is right-hand dominant, began working for the employer in 1990, and was

injured while working for the employer on February 22, 2012. He testified that on that date, he was unloading a trailer for the employer and was injured when boxes upon which he was standing "gave way," causing him to fall against the side of the trailer, and causing "a sharp pain and tear" in his left arm. The claimant testified that on March 14, 2012, he went to Dreyer Medical Clinic, where x-rays were taken and he was given light-duty work restrictions whereby he was not to lift more than 10 pounds on his left side. He testified that subsequently he was prescribed physical therapy, which he began March 26, 2012, at ATI Physical Therapy. Following an MRI arthrogram of his left shoulder, he was referred to an orthopedic surgeon, Dr. Arif Saleem, with whom he met for the first time on May 3, 2012. The claimant testified that subsequently Dr. Saleem prescribed left shoulder surgery, which was performed on July 18, 2012, and in part involved a left shoulder arthroscopic distal clavicular excision. Thereafter, Dr. Saleem prescribed a course of physical therapy, and the claimant remained off of work through October 17, 2012. The claimant testified that Dr. Saleem prescribed a course of work conditioning on November 15, 2012, which the claimant began at ATI Physical Therapy on November 28, 2012, and which culminated in a functional capacity evaluation on January 17, 2013. The claimant testified that he returned to "work full duty" on February 4, 2013.

¶ 6 The claimant also testified that pursuant to a request from "[t]he insurance company," he was examined by Dr. Ram Aribindi for a "PPI rating examination." The claimant testified that the examination took "[a]bout five to 10 minutes." The claimant authenticated a bill from ATI Physical Therapy and testified that it had been submitted to the insurance company. He testified that prior to the February 22, 2012, accident, he did

not have any problems with his left shoulder. He testified that as of the date of the hearing, with regard to his left shoulder, he still had "periods where I get pain shoot through it," and that he was not as strong as he used to be with his left arm, and therefore would "overtax" his right arm to avoid using his left arm. He testified that both at work, and at home, he is careful not to use his left arm, that he can no longer sleep on his left side, and that he avoids heavy lifting that would increase his pain. Nevertheless, he sometimes, "out of the blue," gets "a sharp pain."

¶ 7 With regard to his job responsibilities, the claimant testified that as of the date of the hearing, he was still doing the same job that he was at the time of the accident, but due to union scale raises, now earned more money than he did at the time of the accident. He described his work as "all physical work" and stated that he was "constantly physically doing manual work." The claimant testified that he did not have a high school diploma or a GED and that he had never worked as anything other than a truck driver. He testified with regard to his pay scale, his working hours, and his general working conditions. On cross-examination, the claimant testified that he was "pretty much" able to do all the things he could do before the accident, and agreed that he had never complained about not being able to perform his job.

¶ 8 Following the claimant's testimony, the claimant rested. The employer presented one witness, Deborah McCoy, who testified that she was an operations manager employed by the employer, and that she was the claimant's direct supervisor. She testified that she would be the person to whom the claimant would complain if he was unable to perform any of the functions required by his employment, and that he had never

complained to her about anything. She characterized the claimant as "a great employee" who "[d]oes whatever you ask him to do." Following McCoy's testimony, a number of exhibits were admitted into evidence, including, *inter alia*, treatment records of the claimant, paid and unpaid bills from medical providers, redacted correspondence between counsel regarding unpaid bills, and the August 9, 2013, deposition of Dr. Aribindi.

¶ 9 Therein, Dr. Aribindi testified that he is an orthopedic surgeon, licensed to practice medicine in Illinois since 1996. He testified that he performed an independent medical evaluation, or IME, on the claimant on May 31, 2013, and drafted a report to document the evaluation. He testified that the claimant had "full range of motion of the left shoulder, normal strength." Dr. Aribindi noted that the claimant reported "mild left shoulder pain at night with lying down on the left side at nighttime, as well as a mild pain and discomfort and end of forward elevation." Dr. Aribindi testified that he believed the claimant "had achieved maximum medical improvement." Dr. Aribindi testified as to his knowledge and experience with regard to the performance of impairment ratings, and testified that his conclusion with regard to the impairment rating of the claimant was that "[u]pper extremity impairment was 3 percent and the whole body is 2 percent." On cross-examination, Dr. Aribindi testified in more detail about his methodology, and that he is a "fully practicing orthopedic surgeon" who has "[q]uite routinely" performed the surgery the claimant underwent. He testified that an examination such as the one he conducted on the claimant would take "[t]ypically about 40 minutes or so."

¶ 10 On January 27, 2014, the arbitrator filed his decision, in which he found that on February 22, 2012, the claimant sustained accidental injuries arising out of and in the

course of his employment and that his current condition of ill-being was causally related to the accident. The arbitrator awarded him, *inter alia*, permanent partial disability (PPD) benefits, concluding that the claimant had "sustained a 15% loss of use to the person as a whole." The arbitrator also awarded the claimant penalties and attorney fees pursuant to sections 19(*l*), 19(k), and 16 of the Act (820 ILCS 305/19(*l*), 19(k), 16 (West 2012)), finding, *inter alia*, that the employer failed to pay the outstanding bills of ATI Physical Therapy, and that the employer failed to provide a legitimate defense as to why the bills were not paid.

¶ 11 Both parties sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On January 15, 2015, the Commission modified the arbitrator's decision, affirming penalties pursuant to section 19(*l*), but declining to award penalties and attorney fees pursuant to sections 19(k) and 16, because the Commission found there was a legitimate dispute as to the claimant's average weekly wage, which was the issue to which the section 19(k) and 16 penalty and attorney fee requests were related. The Commission also modified the arbitrator's decision by increasing the claimant's PPD to "17% loss of use person as a whole," because the Commission found that the claimant "sustained multiple tears to the ligaments and tendons of the shoulder, requiring repair," and "underwent an excision of the distal clavicle in the left shoulder." The Commission otherwise affirmed and adopted the arbitrator's decision.

¶ 12 The employer filed a timely petition for judicial review in the circuit court of Kane County. On October 29, 2015, the circuit court confirmed the Commission's decision. The employer now timely appeals the circuit court's judgment.

¶ 13 ANALYSIS

¶ 14 The first issue on appeal is whether the Commission's decision to award section 19(*l*) penalties to the claimant because the Commission found that the employer refused to pay medical bills without adequate justification was against the manifest weight of the evidence. A penalty under section 19(*l*) of the Act is like a late fee, and it is mandatory if the payment is late and the employer cannot show adequate justification for the delay. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). When the employer relies on responsible medical opinion or when there are conflicting medical opinions, penalties are not usually imposed. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 302, 412 N.E.2d 468, 470 (1980). The relevant question that must be asked is "whether the employer's reliance was objectively reasonable under the circumstances." *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436 (1993). Likewise, when "determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay [citation omitted], and the standard**is one of objective reasonableness" in the belief of the employer. *Board of Education v. Industrial Comm'n*, 93 Ill. 2d 1, 9 (1982). An employer's belief is objectively reasonable "only if the facts

which a reasonable person in the employer's position would have would justify it." *Id*. at 10. The propriety of imposing a penalty under section 19(*l*) is a question of fact for the Commission, and its decision will not be reversed unless it is against the manifest weight of the evidence. *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill. 2d 107, 123, 561 N.E.2d 623, 630 (1990).

¶ 15 In this case, the employer argues that the Commission's decision "is nonsensical and against the manifest weight of the evidence." The employer contends that "[m]edical bills themselves are not substantial enough to adjudicate compensability," and that the employer's "delayed payment in this instance is solely a function of [the claimant's] lack of compliance with a request for further information pursuant to the Act." To support this contention, the employer points to its letter dated February 12, 2013, wherein the employer stated that "[e]nclosed is your letter from 02/08/2013 in which you inquire about ATI PT bills. We are paying bills per fee schedule when all documentation is provided. Please see the enclosed EOBs which document this." The letter was written in response to a letter from the claimant's counsel, dated February 8, 2013, wherein counsel stated that "[e]nclosed is a medical bill from ATI Physical Therapy for dates of service between 11/28/2012 and 1/17/2013 in the amount of $20,835.90 with $13,457.82 outstanding for which payment is requested pursuant to the Workers' Compensation Act. If you are disputing this bill, please advise me in writing. If there is no response, we will assume the bill will be processed."

¶ 16 On appeal, the employer claims that its February 12, 2013, letter is "a clear assertion of [the employer's] defense to liability of the particular bill in question."

According to the employer, the February 12, 2013, letter instructed the claimant that the outstanding bill would be paid when all documentation was provided, which in turn should have alerted the claimant to the need to provide additional documentation, pursuant to section 8.2(d)(2) of the Act, so that the employer had "all the required data elements necessary to adjudicate the bill." See 820 ILCS 305/8.2(d)(2) (West 2012). However, as the claimant points out, the February 12, 2013, letter is not in any way a "clear assertion" of a defense to liability: the letter does not request any additional documentation, nor does it dispute in any other way the employer's liability for the bill. Indeed, a reasonable person receiving the February 12, 2013, letter would believe payment would be forthcoming, especially as the claimant's letter of February 8, 2013—which by the employer's own admission prompted the February 12, 2013, response—specifically stated: "If you are disputing this bill, please advise me in writing. If there is no response, we will assume the bill will be processed." Although there was a response, it certainly did not dispute the bill.

¶ 17 Moreover, as the claimant also notes, section 8.2(d)(2) of the Act states that when an employer disputes liability for a bill, the employer "shall provide written notification, explaining the basis for the denial and describing any additional necessary data elements, to the provider within 30 days of receipt of the bill." 820 ILCS 305/8.2(d)(2) (West 2012). The employer—who, as described above, bears the burden of justifying the delay in payment (see *Board of Education v. Industrial Comm'n*, 93 Ill. 2d 1, 9 (1982))—has provided no evidence that it ever made a request to the provider, ATI Physical Therapy, for further documentation, or that such a request was made and denied. Indeed, at no

time in this case, including on appeal, has the employer offered any kind of evidence that it is not liable for paying the ATI bill in question, or that the bill is unreasonable, or not related to the claimant's legitimate treatment. The arbitrator awarded the bill as a reasonable and necessary medical expense related to the claimant's accident and injury, and the Commission confirmed this award. The employer does not challenge this aspect of the award on appeal. Accordingly, we agree with the claimant that the Commission, after weighing the evidence in the record, came to the conclusion that the employer acted unreasonably in its refusal to pay the bill, and we agree that the Commission's conclusion is not against the manifest weight of the evidence. Accordingly, we decline to disturb it.

¶ 18 The second issue on appeal is whether the Commission's decision to award permanent partial disability (PPD) of 17% loss of use of the whole person for the repair of the claimant's injuries was against the manifest weight of the evidence. As the claimant notes in his brief on appeal, under section 8.1b(b) of the Act, because the injury in this case occurred after September 1, 2011, to determine the claimant's PPD, the Commission was required to consider the following factors: (1) the reported level of impairment pursuant to AMA guidelines; (2) the claimant's occupation; (3) the claimant's age at the time of injury; (4) the claimant's future earning capacity; and (5) evidence of disability, corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2012). The Commission was also required to consider that no single enumerated factor was to be used as "the sole determinant of disability." *Id.* As the Supreme Court of Illinois has long noted, findings of the Commission " 'regarding the nature and extent of a disability will not be set aside unless they are contrary to the manifest weight of the

evidence.' " *County of Cook v. Industrial Comm'n*, 78 Ill. 2d 320, 324 (1979). A finding of fact is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 822 (2009).

¶ 19 In this case, the employer argues that "[b]ased upon the testimony, medical evidence submitted, and past awards of the Commission, an award for no more than 10% loss of the person as a whole would be proper." In support of this argument, the employer notes that less than one year after the accident, the claimant had reached maximum medical improvement, and had returned, without medical restrictions, to "the same job as he did pre-injury." The employer acknowledges the claimant's "subjective complaints of pain and stiffness," but argues that "it is impossible to distinguish whether the compensable injury and subsequent surgery or his pre-existing arthritis and dislocation" are the source of the claimant's pain and stiffness.

¶ 20 The claimant counters that the evidence properly before the Commission supports the Commission's decision. We agree. With regard to the reported level of impairment, Dr. Aribindi's conclusion that the impairment rating of the claimant was that "[u]pper extremity impairment was 3 percent and the whole body is 2 percent," was based upon Dr. Aribindi's use of a diagnosis in Table 15-5 of the AMA guides. The arbitrator took issue with Dr. Aribindi's method of diagnosis, finding that "Dr. Aribindi should have used acromioclavicular (AC) joint injury or disease as the diagnosis." The arbitrator noted that "[u]sing Dr. Aribindi's findings" for functional history, physical examination, and clinical studies, the PPI rating would be "10% of the upper extremity, or 6% whole

person impairment." Turning to the second factor, the arbitrator noted that the claimant had returned to work in his pre-injury job, and further noted that "this position is heavy work" and that accordingly the claimant's "PPD will be larger than an individual who performs lighter work." With regard to the third factor, the arbitrator ruled that the claimant's PPD was not as extensive as it would have been with a younger individual, because the claimant "is less likely to live and work longer." As for the fourth factor, the arbitrator found no evidence that the claimant's future earning capacity had been diminished by the accident and injury. With regard to the fifth and final factor, the arbitrator ruled that evidence of disability was corroborated by the treating medical records of Dr. Saleem. Considering the five factors together, the arbitrator concluded that the claimant "sustained a 15% loss of use to the person as a whole."

¶ 21 When the Commission reviewed the arbitrator's findings, and decided to increase the loss of the whole person to 17%, the Commission commended the arbitrator's "thorough analysis" of the issues, but found "that additional PPD is required, as [the claimant] sustained multiple tears to the ligaments and tendons of the shoulder, requiring repair, as noted in the operative report." The Commission went on to point out that the "operative report also demonstrates that [the claimant] underwent an excision of the distal clavicle in the left shoulder." As the claimant aptly notes, there is no evidence that the Commission failed to consider Dr. Aribindi's report, or otherwise erred in its conclusions. Indeed, the findings of the Commission are amply supported by the evidence in the record, described in detail above. Because a conclusion opposite to that reached by the Commission is not "clearly apparent," we decline to conclude that the Commission's

findings are against the manifest weight of the evidence, and we decline to set them aside.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision.

¶ 24 Affirmed.