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

LIQUID TRANSPORT CORP.,)	Appeal from the Circuit Court
)	of Shelby County
Appellant,)	
)	
v.)	No. 12-MR-23
)	
WORKERS' COMPENSATION COMMISSION,)	
<i>et al.</i>)	Honorable
)	Daniel E. Hartigan,
(John Wakeland, Appellee).)	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 Commission abused its discretion in applying missing-witness rule, nevertheless its award of penalties and fees was not contrary to the manifest weight of the evidence; the Commission's determination that claimant had not reached maximum medical improvement prior to period of award of temporary total disability was not against the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Liquid Transport Corp., appeals an order of the circuit court of Shelby County awarding benefits to claimant, John Wakeland, in accordance with the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). On appeal, respondent contests the Commission's decision to impose penalties and fees against it and also argues that the Commission's awards of temporary total disability (TTD) and future medical expenses are erroneous. For the reasons that follow, we affirm and remand for further proceedings, if any, consistent with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 4 II. BACKGROUND

¶ 5 Claimant was employed by respondent as a truck driver. He was injured on August 12, 2008, when a power take-off (PTO) shaft struck him in the forehead. Claimant's supervisor took him to Gateway Regional Hospital (Gateway), where he was treated for a laceration. Subsequently, claimant followed up with Dr. Kia Swan-Moore at Midwest Occupational Medicine (Midwest).

¶ 6 On November 11, 2008, claimant returned to Midwest, complaining of discomfort in the area of the laceration. He also reported a glare in his left eye, predominantly at night. Claimant testified that between the time he went to Midwest in August and the time he returned in November, he sought further medical treatment on multiple occasions, but respondent refused to authorize it. He also stated that he was taking 15 to 18 aspirin per day during this period. Swan-Moore ordered X rays.

¶ 7 On November 21, 2008, claimant saw Dr. Joseph Marcin, an optometrist. Claimant reported headaches and was concerned his accident had affected his vision. Marcin found claimant's vision to be normal, but noted "mild eye irritation." A letter authored by Marcin states, "The forehead injury was causing headaches, but seemed to be manageable with the use

of Motrin.” Marcin examined claimant on December 11, 2008, and noted that “headaches were not an issue.” In this letter, Marcin incorrectly states that the injury occurred in November 2008. On October 6, 2009, claimant saw Marcin, complaining that he was “experiencing pain [in] the same area of his head as last fall after the accident.” Marcin suggested claimant return to his regular physician.

¶ 8 On December 1, 2009, claimant returned to see Swan-Moore. He stated he was experiencing “headaches or pain localized only to the area where the laceration was.” Swan-Moore ordered a CAT scan and allowed claimant to continue working without restrictions. The results of the CAT scan were “unremarkable.” On December 14, 2009, claimant saw a chiropractor for a problem with his neck. On an intake form that asked claimant to identify “each sign of symptom you presently have or previously had,” claimant left blank the spot on the form corresponding to headaches. Swan-Moore referred claimant to Dr. David Peeples, a headache specialist.

¶ 9 On February 15, 2010, Peeples performed an independent medical examination of claimant. Peeples diagnosed claimant with “[t]raumatic left supraorbital neuropath with residual neuritic pain.” He further opined that claimant’s condition of ill-being was “directly related” to claimant’s work injury of August 12, 2008. Peeples suggested that claimant might benefit from gabapentin. If gabapentin was ineffective, Peeples continued, claimant was at maximum-medical improvement (MMI).

¶ 10 From March 2010 to December 2010, claimant treated in the office of Dr. David Oligschlaeger. Claimant treated with Gary Hayden, a physician’s assistant. Claimant reported that he suffered a work injury that led to an “immediate headache that has not let up since the injury.” In a deposition taken on June 14, 2011, Oligschlaeger opined that claimant was not at

MMI and that claimant's condition was causally related to his at-work accident. The headache is exacerbated by bright light. Hayden prescribed Topamax and referred claimant to Dr. Bennett Frank, a neurologist.

¶ 11 Claimant saw Frank on May 13, 2010. Frank diagnosed a left supraorbital neuralgia. He recommended a nerve block.

¶ 12 Claimant again saw Hayden on August 4, 2010. Claimant stated that he had seen Frank and that Frank had recommended a steroid shot, which "work comp refused." Claimant was experiencing worsening pain and nausea. In September and October 2010, claimant received trigger-point injections. They provided only temporary relief. A supraorbital nerve block was performed at Midwest. Hayden prescribed various narcotics throughout the fall of 2010. Hayden took claimant off work on October 15, 2010. Hayden referred claimant to Dr. Mohamed El-Ansary.

¶ 13 El-Ansary examined claimant on December 16, 2010. El-Ansary's records indicate that claimant had not worked for two years due to his condition. El-Ansary believed supraorbital nerve injection accompanied by "post [*sic*] radiofrequency" might help. On December 30, 2010, El-Ansary performed the procedure (RF treatment).

¶ 14 Claimant had two visits with Hayden in January 2011. He had been rating his pain as a 7 to 8 on a 10 point scale. Following the RF treatment, he rated his pain as 3 or 4. Hayden recommended tapering claimant off narcotics, and claimant's headache stayed at the 3-4 level as they did so. Hayden released claimant to full-duty work on January 12, 2011.

¶ 15 Claimant underwent a second independent medical examination on February 24, 2011. It was performed by Dr. John Selhorst, a neurologist. Selhorst noted that there was no indication that claimant had a preexisting condition. Selhorst believed that the delay in the manifestation of

pain complaints after the date of the accident made it difficult to relate claimant's condition to the accident. He opined that claimant reached MMI in the first week following the accident.

¶ 16 The relief claimant experienced from the RF treatment lasted a few months. Claimant returned to Hayden in April 2011, complaining of a headache that had been ongoing for about a month. Hayden prescribed Norco. He also took claimant back off work until claimant could receive a trigger-point injection, as respondent would not allow claimant to drive a truck while taking Norco two to three times per day. Respondent refused to pay for further treatments.

¶ 17 Claimant moved for sanctions. In his petition, he alleged that “[r]espondent has denied benefits since September 16, 2010” and that “[r]espondent has refused to pay TTD to [claimant] since April 13, 2011.” The petition also states that respondent has failed to pay certain medical expenses, which are attached as an exhibit to the petition. Several demands for payment concern bills incurred in August 2008.

¶ 18 At the arbitration hearing, claimant first called Amy Taylor, respondent's terminal manager. She testified that, in August 2008, claimant reported an at-work accident to her. She took him to Gateway and later referred him to Midwest. She only recalled claimant complaining of headaches on one occasion, which was in August 2009 when she sent him to Midwest. She was not aware of any other occasions when claimant sought or was denied care. She indicated that claimant was a good employee and that he was credible and honest.

¶ 19 Claimant also testified on his own behalf. He stated that he is employed by respondent as a truck driver and he cannot work while under the influence of drugs. He was injured on August 12, 2008, when a PTO shaft struck him in the area of his left eyebrow. He never had any problems with this area prior to the accident. Taylor took him to Gateway, where they treated the wound. Over the next three months, he had constant pain in that area, which would

sometimes be worse than at other times. He was taking 15 to 18 aspirins per day. Claimant testified that he asked Taylor about getting an appointment at Midwest, and she told him that respondent's workers' compensation carrier would not approve it. Claimant was allowed to go to Midwest in November 2008. Subsequently, he continued to have headaches, but respondent denied his requests to get further medical care. Aspirin eventually failed to provide relief. After trying several other medications, claimant was placed on narcotics. Narcotics rendered him unable to drive a truck. In December 2010, an RF treatment was performed by El-Ansary. This provided relief for several months.

¶ 20 Respondent presented the testimony of Cindy Kallsen by affidavit, to which both parties stipulated. She is a claims adjuster for respondent's workers' compensation insurance carrier. She averred that she relied on the opinions of Selhorst and Peeples in making decisions regarding payment of benefits to claimant.

¶ 21 The arbitrator found that claimant sustained a work-related injury that led to his headaches. He sought treatment at Midwest, but respondent refused to approve the treatment. Marcin causally related claimant's headaches to the accident. Claimant took up to 15 aspirin per day. Peeples performed an examination of claimant pursuant to section 12 of the Act (820 ILCS 305/12 (West 2008)). Peeples found a causal connection between claimant's condition and his accident. He also "claimed that if the medication did not work he would place [claimant] at MMI." Frank also found a causal relationship between claimant's headaches and the accident, as did Oligschlaeger and El-Ansary. The RF treatments provided relief. Selhorst, the second section 12 examiner who placed claimant at MMI a week after the accident, examined claimant when claimant's condition "was relieved due to the radio frequency ablations." Respondent refused to authorize further RF treatments.

¶ 22 The arbitrator also found that respondent failed to produce the adjuster (Kallsen) for the hearing or allow her to be deposed despite receiving proper notice of claimant's desire to do so. Based on the failure to produce her, the arbitrator drew an adverse inference and concluded that her testimony would have been that claimant sought treatment at various points where there were gaps in the course of his treatment and that she denied claimant's requests. The arbitrator noted that Kallsen's affidavit states she relied on the opinions of Peebles and Selhorst; however, Peebles did not examine claimant until February 2010 and Selhorst's examination was even later. As claimant was seeking treatment since November 2008, she could not have relied on them in denying claimant's requests during this period.

¶ 23 The arbitrator ordered that respondent pay existing medical bills and future medical expenses, including RF treatments. He awarded claimant 24-4/7 weeks of TTD benefits. Finally, he imposed penalties and fees against respondent, specifically, \$10,000 pursuant to section 19(l) of the Act; \$7,946.95 in accordance with section 19(k); and \$3,178.78 under section 16. 820 ILCS 305/16, 19 (West 2008).

¶ 24 The Commission adopted the decision of the arbitrator in its entirety. The circuit court confirmed the decision. This appeal followed.

¶ 25 **III. ANALYSIS**

¶ 26 On appeal, respondent raises two main issues. First, it attacks the Commission's award of penalties and fees. Second, it contends that Commission should not have awarded TTD. We will address these issues in turn.

¶ 27 **A. PENALTIES AND FEES**

¶ 28 Regarding the Commission's award of penalties and fees, respondent advances two arguments. It argues that the Commission should not have applied the missing-witness

inference. Second, it asserts that the decision to impose penalties and fees is contrary to the manifest weight of the evidence.

¶ 29 As a preliminary matter, we note respondent's contention that the scope of claimant's fee petition is limited to events occurring after September 16, 2010, as this is the earliest date mentioned in the petition. We agree. Thus, sanctions are appropriate for events occurring after this date. However, we note that to the extent that events occurring before this date have some bearing on events occurring after this date, they may be considered.

¶ 30 We also note that at oral argument, respondent suggested that it had paid some earlier medical bills. However, respondent makes no attempt in its brief to identify such bills with any specificity or explain how it would affect the awards in this case. Similarly, respondent asserts with little explanation that section 19(l) penalties (820 ILCS 305/19(l) (West 2008)) were not calculated correctly. Respondent asserts that "the demand for payment was made 242 days before the hearing." The arbitration hearing was held on July 11, 2011. November 12, 2010, is 242 days before the hearing. Respondent does not explain the significance of this date. In short, we will not consider these undeveloped arguments, and we will treat the awards as a whole rather than addressing individual bills, as that is how respondent chose to treat them in its brief.

¶ 31 1. The Missing-Witness Inference

¶ 32 The Commission inferred that Kallsen would have testified that claimant sought treatment at various points where there were gaps in the course of his treatment and that she denied claimant's requests. This was based on respondent's purported failure to produce her as a witness. This is known as the missing-witness inference. See *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 22 (1989). Claimant did not subpoena Kallsen to

testify or otherwise attempt to set up a deposition. Rather, claimant's counsel simply sent an e-mail to respondent's counsel stating:

“Please construe this as a demand to produce Cindy Kallsen at the hearing or provide me with an opportunity to conduct and [sic] evidence deposition of her prior to the 19(b) hearing in the Wakeland matter. Be advised that the failure to produce a witness in [r]espondent's control will create an adverse inference that her testimony would be harmful to respondent.”

This message was sent on June 21, 2011, and the section 19(b) hearing was held on July 11, 2011.

¶ 33 To allow an adverse inference from a party's failure to produce a witness, the following foundational requirements must be established:

“(1) the missing witness was under the control of the party against whom the inference is drawn, (2) the witness could have been produced in the exercise of reasonable diligence, (3) the witness was not equally available to the party in whose favor the inference is drawn, (4) a reasonably prudent person would have produced the witness if the party believed the testimony would be favorable, and (5) no reasonable excuse for the failure to produce the witness is shown.” *Board of Education, City of Peoria School District No. 150 v. Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 148 (2000).

The inference is not available where the missing witness's testimony would be cumulative. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 696 (2003). Whether these foundational requirements have been met is a matter within the discretion of the trial court. See *Montgomery v. Blas*, 359 Ill. App. 3d 83, 87 (2005). Thus, we will reverse only if no reasonable person could

agree with the Commission. See *Edwards v. Addison Fire Protection District Firefighters' Pension Fund*, 2013 IL App (2d) 121262, ¶ 41.

¶ 34 Claimant has not met several of the foundational requirements that would allow the missing-witness inference to be drawn. First, it is not apparent to us that Kallsen was under the control of respondent. While an employee may be deemed to be under the control of an employer (*Simmons v. University of Chicago Hospital & Clinics*, 247 Ill. App. 3d 177, 186-87 (1993)), Kallsen was employed by respondent's insurance carrier rather than by respondent. Thus, it is not clear to us how she was under *respondent's* control. Moreover, it is similarly dubious that Kallsen was not equally available to claimant. In *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill. App. 3d 275, 284-85 (2008), the court explained:

“An analysis of the *Schaffner* factors shows Hall was under defendants' control to the extent that they had named him as a controlled expert witness, but plaintiff, with reasonable diligence, could have obtained Hall's appearance by subpoena under Rule 237 (166 Ill. 2d 237). This rule provides that the missing witness of one party can be compelled by another party to appear and testify at trial. Section (a) of the rule provides: ‘Any witness shall respond to any lawful subpoena of which he or she has actual knowledge * * *.’ 166 Ill. 2d R. 237(a). A subpoena is an order of the court, not an overture by a party, and it requires compliance.”

That claimant chose to send an e-mail rather than a subpoena did not render Kallsen unavailable to him. Finally, we note that the testimony the Commission inferred Kallsen would have given was cumulative of claimant's testimony, as claimant testified he repeatedly sought and was denied treatment. As such, it was outside the scope of the missing-witness rule. See *Kersey*, 344 Ill. App. 3d at 696.

¶ 35 In short, no reasonable person could conclude that the foundational requirements for the missing-witness inference were met in this case, and the Commission abused its discretion in finding otherwise. Nevertheless, we must still consider whether there is sufficient evidence without the missing-witness inference such that the Commission’s decision is not contrary to the manifest weight of the evidence.

¶ 36 2. Manifest Weight

¶ 37 Respondent also contends that the Commission erred when it imposed penalties (820 ILCS 320/19(k), 19(l) (West 2008)) and awarded attorney fees (820 ILCS 320/16 (West 2008)). Whether to award penalties and fees is a question of fact. *Greaney v. Industrial Comm’n*, 358 Ill. App. 3d 1002, 1024 (2005). Therefore, we will not disturb the decision of the Commission on such matters unless it is against the manifest weight of the evidence. *McKay Plating Co. v. Industrial Comm’n*, 91 Ill. 2d 198, 209 (1982). It is primarily for the Commission to assess the credibility of witnesses as well as to resolve conflicts in and attribute weight to the evidence. *O’Dette v. Industrial Comm’n*, 79 Ill. 2d 249, 253 (1980).

¶ 38 Penalties and fees under sections 16 and 19(k) are appropriate if an employer’s decision to deny benefits is unreasonable or vexatious. *McMahan v. Industrial Comm’n*, 183 Ill. 2d 499, 515 (1998). Typically, “[w]hen the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed.” *USF Holland, Inc. v. Industrial Comm’n*, 357 Ill. App. 3d 798, 805 (2005). Thus, the issue 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). Section 19(l) is more akin to a late fee and allows an award where an employer “neglects, or refuses to make payment or unreasonably delays payment ‘without good and just cause.’ ” *McMahan*, 183 Ill. 2d at 515.

An employer bears the “burden of showing that it had a reasonable belief that the delay was justified.” *Roodhouse Envelope Co. v. Industrial Comm’n*, 276 Ill. App. 3d 576, 579 (1995).

¶ 39 The Commission found that respondent’s refusal to pay benefits was vexatious and unreasonable. It first noted that five medical providers had linked claimant’s condition to his work-related accident. It then explained why respondent could not *reasonably* rely on the opinions of Peeples and Selhorst. Regarding Peeples, the Commission noted that his opinion as to MMI was equivocal and that he did not have the benefit of knowing that RF treatments (which occurred after Peeples examined claimant) would provide relief. It found that Selhorst’s opinion lacked substance because Selhorst examined claimant while claimant was experiencing relief due to an RF treatment. Further, Selhorst relied on the fact that there were various lapses in the course of claimant’s treatments, but Selhorst did not know that the lapses were caused by respondent’s refusal to authorize further medical visits.

¶ 40 Respondent now contends that its reliance on the opinions of Peeples and Selhorst renders its denial of benefits objectively reasonable. Initially, we note that Selhorst did not render his opinion until March 2011, so during the first six months of the period identified in claimant’s petition for fees and penalties, respondent had only the equivocal opinion of Peeples upon which to rely. Nevertheless, respondent cites a number of cases where an employer’s conduct was found reasonable where the employer relied upon the opinion of a medical expert in denying benefits. See, e.g., *O’Neal Brothers Construction Co. v. Industrial Comm’n*, 93 Ill. 2d 30, 41 (1982); *Global Products v. Illinois Workers’ Compensation Comm’n*, 392 Ill. App. 3d 408, 414 (2009). Thus, respondent asserts, its reliance on the medical opinions of Peeples and Selhorst renders sanctions inappropriate.

¶ 41 Several cases cited by respondent reveal why this principle is not applicable in this case. Respondent cites *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971 (2009), a case in which this court held:

“The testimony [of the three doctors] was *relatively compelling*, even if it did not ultimately persuade the Commission. Accordingly, employer could rely upon Drs. Cisneros, Delheimer, and Andersson, and no reasonable person could conclude that employer was not entitled to do so.” (Emphasis added.)

¶ 42 *Global Products*, 392 Ill. App. 3d at 414, also cited by respondent, similarly holds that reliance upon “relatively compelling” medical opinions allows an employer to avoid sanctions. However, in this case, the Commission noted various problems with the bases of the opinions of Peeples and, particularly, Selhorst. Notably, Selhorst relied on gaps in claimant’s course of treatment to question causation. The Commission, crediting claimant’s testimony, noted that these gaps were caused by respondent failing to authorize treatment (respondent characterizes claimant’s testimony as “self-serving,” however, addressing such matters is primarily for the Commission (*O’Dette*, 79 Ill. 2d at 253)). While Selhorst was not aware of the real cause of these gaps, respondent obviously was, as it was the entity that caused them by denying treatment. In other words, not only was the opinion of Selhorst undermined, it was undermined by events uniquely within respondent’s knowledge.

¶ 43 As such, an opposite conclusion to the Commission’s that respondent could not rely on Selhorst’s opinion in good faith is not clearly apparent. Further, Peeples agreed with the other providers that claimant’s condition was caused by the at-work accident and his opinion on MMI was conditional. We simply cannot say that the Commission’s determination that sanctions are

warranted in this case is against the manifest weight of the evidence (even absent the inference the Commission erroneously drew from the purportedly missing witness).

¶ 44

B. THE TTD AWARD

¶ 45 Respondent next argues that because claimant reached MMI prior to the period for which the Commission awarded TTD and prospective medical expenses, those awards were made in error. It is true that once a claimant reaches MMI, he or she is no longer entitled to TTD. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). Respondent cites nothing to substantiate its position that reaching MMI always precludes an award of future medical expenses. Indeed, this is a questionable proposition, particularly concerning palliative care, which appears to be primarily at issue here. In any event, respondent's argument is premised on the Commission's finding regarding MMI being contrary to the manifest weight of the evidence. This, however, is not the case.

¶ 46 A claimant reaches MMI when his or her condition stabilizes. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175-76 (2000). A condition stabilizes when it improves as far as the character of the injury will permit. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005). This presents a factual question, which we will not disturb unless it is against the manifest weight of the evidence. See *Kawa v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120469WC, ¶ 105. A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005).

¶ 47 Respondent's argument relies heavily on the opinions of Selhorst and Peeples, which, for reasons explained above, the Commission rejected. Oligschlaeger, on the other hand, opined that claimant was not at MMI at the time of the hearing. He explained that RF treatments were

providing claimant with relief, but he was not getting them at the time. Thus, Oligschlaeger reasoned, resuming RF treatments would improve his condition. There is ample evidence in the record that RF treatment did improve claimant's condition when he was able to receive them.

¶ 48 Respondent criticizes Oligschlaeger's opinion for a number of reasons. First, unlike Selhorst, Oligschlaeger is not a neurologist and he never actually examined claimant (claimant saw Oligschlaeger's assistant, Hayden, for treatment). These concerns are relevant to credibility and weight, which are matters for the Commission to assess in the first instance. *O'Dette*, 79 Ill. 2d at 253. Respondent also points out that Oligschlaeger stated that he would consider a gap in treatment significant, as that could indicate that "it may not have been a significant injury." The persuasiveness of this critique is undermined by the Commission's finding that the gaps in the course of treatment were caused by respondent's refusal to authorize treatment—a finding that is not against the manifest weight of the evidence.

¶ 49 In short, given the Commission's reasoned rejection of the opinions of Peeples and Selhorst, we cannot say that an opposite conclusion is clearly apparent or that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 50 IV. CONCLUSION

¶ 51 In light of the foregoing, the order of the circuit court of Shelby County confirming the decision of the Commission is affirmed. We remand for further proceedings, if any, consistent with *Thomas*, 78 Ill. 2d 327.

¶ 52 Affirmed and remanded.