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2014 IL App (1st) 132067WC-U

FILED: December 19, 2014

NO. 1-13-2067WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SANTOS MORIN,	)	Appeal from
	)	Circuit Court of
Appellant,	)	Cook County
	)	No. 12L51244
v.	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION <i>et al.</i> (City of Chicago Department	)	
of Streets and Sanitation, Appellee).	)	Honorable
	)	Robert Lopez-Cepero,
	)	Judge Presiding.

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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 Commission's denial of sections 19(l) and 19(k) penalties (820 ILCS 305/19(l), 19(k) (West 2012)) and section 16 attorney fees (820 ILCS 305/16 (West 2012)) was not against the manifest weight of the evidence.

¶ 2 On March 12, 2009, claimant, Santos Morin, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer City of Chicago, Department of Streets and Sanitation. He alleged that he sustained multiple injuries in a work accident that occurred on December 18, 2008. Following a hearing, the arbitrator concluded that claimant "suffered a

temporary aggravation of his preexisting degenerative condition and that his current condition of ill-being [was] not causally related to the work accident occurring on December 18, 2008." The arbitrator found claimant reached maximum medical improvement (MMI) on May 27, 2009, and that claimant was entitled to 21 2/7 weeks temporary total disability (TTD) benefits for the period of December 19, 2008, through May 17, 2009. The arbitrator further found the employer was entitled to a credit for the overpayment of TTD benefits already paid to claimant.

Additionally, the arbitrator concluded claimant was not entitled to any prospective medical care and that the employer was acting in good faith when it delayed payment of TTD benefits and, therefore, was not subject to penalties or attorney fees.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) reversed the arbitrator's decision on the issues of causation, medical bills, prospective medical care and TTD. The Commission affirmed the arbitrator's decision as to the denial of penalties and attorney fees. On judicial review, the circuit court of Cook County confirmed the Commission's decision. On appeal, claimant asserts that the Commission erred by failing to award penalties under sections 19(l) and 19(k) of the Act, and attorney fees under section 16 of the Act. We affirm the circuit court's judgment, confirming the Commission's decision, and remand the matter for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 The following factual evidence relevant to this appeal was elicited at the May 27, 2010, arbitration hearing.

¶ 6 Claimant has worked for the employer since 1997. Although originally employed as a truck driver, due to a prior work accident claimant was working in a light-duty capacity as a dispatcher on December 18, 2008. On December 18, 2008, claimant's left foot became entangled

in computer and phone cords causing him to fall forward on top of a 6-inch wide metal plate located on the floor, striking both knees. The parties stipulated that this accident arose out of and in the course of claimant's employment.

¶ 7 The prior work accident which resulted in claimant's light-duty dispatch position occurred on October 3, 2005. On that date, claimant was working as a truck driver when he tripped and fell onto his knees. That accident resulted in injuries to both of claimant's knees and his low back. As a result of those injuries, claimant underwent lumbar decompressive surgery in November 2005 and bilateral arthroscopic knee surgeries in January 2006. In conjunction with the October 2005 accident, and at the request of his attorney, claimant was evaluated by Dr. Jeffrey Coe, an occupational medical specialist, in December 2007. Dr. Coe concluded that the symptoms and impairments claimant presented with at that time were related to the October 2005 accident, which in Dr. Coe's opinion, resulted in permanent partial disability to the person as a whole with additional disability to both legs. Dr. Coe further opined that claimant might require bilateral total knee replacements at some point in the future due to persistent knee pain. As a result of the October 2005 work accident, claimant was awarded 30% loss of use of a man as a whole and 30% loss of use of both his right and left legs.

¶ 8 Prior to the October 2005 work accident, claimant testified that he sought treatment for his low back in 2002 and underwent a lumbar MRI and an epidural injection in April 2004. He also testified he had two prior right knee surgeries, neither of which were work related. In addition to the workers' compensation claim for the October 2005 accident, claimant testified he filed workers' compensation claims on January 20, 1993, for his right leg; June 14, 2000, for his right and left legs; and October 16, 2002, for which he received 7.5% loss of use of man as a whole.

¶ 9 Claimant testified that between the time he returned to work in a light-duty capacity as a dispatcher on October 3, 2007, and the December 18, 2008, accident at issue here, he had not missed any work due to problems with, or received active medical treatment for, his back or knees.

¶ 10 Regarding the December 18, 2008, work accident, claimant testified that when his knees hit the metal plate on the floor, the impact jarred his back and he was not able to get up. Claimant stated his knees hurt, he had a "light burn" in his back, and it took him awhile to be able to lift himself up. Claimant immediately sought treatment at Mercy Works on the referral of his supervisor, where he was treated by Dr. Jayant Sheth. Dr. Sheth diagnosed bilateral knee contusions and a lumbar muscle strain and released claimant to light-duty work. That same day, claimant treated with Dr. Ossama Zorub, his physician of choice, who ordered an MRI of claimant's lumbar and thoracic spine and authorized him off work.

¶ 11 On December 24, 2008, claimant again treated with Dr. Sheth at Mercy Works, complaining of pain in the lower back and in both knees. Dr. Sheth continued to impose light-duty restrictions. On December 27, 2008, claimant treated with Dr. Zorub who reviewed his MRI results. The results from the December 2008 MRI indicated no changes from a previous July 25, 2007, MRI. Dr. Zorub continued to authorize claimant off work.

¶ 12 On January 10, 2009, after being referred by Dr. Zorub, claimant began physical therapy with Dr. Ranjit Wahi. At that time, claimant complained of severe low back pain radiating to his left leg, bilateral knee pain, bilateral ringing in the ears and bilateral shoulder pain. There is no indication that the bilateral ringing in the ears and bilateral shoulder pain complaints were related to the work accident. On January 23, 2009, Dr. Wahi recommended that claimant undergo a lumbar epidural injection and bilateral knee steroid injections. Claimant

testified that he underwent therapy at Dr. Wahi's office until July 13, 2009, but the therapy was not helpful.

¶ 13 On January 24, 2009, Dr. Zorub referred claimant for a neurosurgical consultation with a Dr. Amine. On January 26, 2009, claimant treated at Mercy Works with Dr. Philippa Norman. Claimant discussed the injections recommended by Dr. Wahi with Dr. Norman, and Dr. Norman noted claimant would follow up with Dr. Michael G. Maday for his knees and Dr. Amine for his back. As of the date of arbitration, the employer had not authorized claimant to see Dr. Amine.

¶ 14 On February 16, 2009, Dr. Wahi injected claimant's left knee but claimant testified the injection only provided temporary relief. On February 23, 2009, claimant returned to Mercy Works where he saw Dr. Norman. Claimant complained that his knees were more swollen than normal. Dr. Norman referred claimant to Dr. Maday.

¶ 15 On March 4, 2009, after receiving authorization from the employer, claimant treated with Dr. Maday, an orthopedic surgeon, who diagnosed bilateral knee injuries with significant loss of motion and noted claimant's complaints of "catching and locking." Dr. Maday ordered MRIs of claimant's knees. On March 18, 2009, after reviewing the results of claimant's MRIs, Dr. Maday recommended bilateral knee replacements and referred claimant to his partner, Dr. Dirk Nelson, an orthopedic surgeon. Dr. Maday's report noted claimant had five prior arthroscopic surgeries on his left knee and four prior arthroscopic surgeries on his right knee. On March 20, 2009, Dr. Nelson recommended claimant undergo a total left knee replacement. On March 25, 2010, claimant returned to see Dr. Sheth at Mercy Works who noted Dr. Nelson's recommendation for a total left knee replacement.

¶ 16 On March 27, 2009, claimant met with Dr. Julie Wehner, an orthopedic and spine

surgeon, who diagnosed chronic low back pain and indicated he was a poor candidate for any surgeries or injections due to his obesity and use of Coumadin.

¶ 17 On March 31, 2009, claimant met with Dr. Nelson and was advised that the surgery for his left knee had been denied. On April 22, 2009, Dr. Wahi gave claimant an injection in his right knee, which, like the earlier injection in his left knee, provided only temporary relief. Claimant testified that at this time, he had not returned to work and had not received any TTD benefits.

¶ 18 On May 14, 2009, claimant received a check from the employer for \$15,333.10, representing TTD benefits from December 19, 2008, through April 30, 2009.

¶ 19 On May 27, 2009, claimant met with Dr. David Raab, an orthopedic surgeon, at the request of the employer for a Section 12 examination of his knees. Dr. Raab's report, dated May 27, 2009, indicated that claimant informed him he had five previous left knee arthroscopic surgeries dating back to 1990 and four previous right knee arthroscopic surgeries dating back to 1995. Dr. Raab diagnosed degenerative arthritis of bilateral knees. He opined that total knee arthroplasty was indicated, but found that the injury sustained on December 18, 2008, "was a temporary aggravation of pre-existing degenerative arthritis." Specifically, Dr. Raab noted that claimant's need for total knee arthroplasty was "related to his longstanding history of degenerative arthritis in both knees, morbid obesity and the natural progression of arthritis in his knee[s]." Dr. Raab further found claimant was at MMI from the December 18, 2008, work accident and that any further treatment needed was related to the longstanding arthritis in his knees.

¶ 20 On July 31, 2009, the employer terminated claimant's TTD benefits.

¶ 21 Claimant continued to seek treatment for his knees and low back up to the date of

arbitration, including having a total left knee replacement on October 14, 2009, which was submitted through his group insurance carrier because he had not been able to obtain authorization from the employer.

¶ 22 Following the hearing, the arbitrator concluded that claimant's current condition of ill-being in his knees was not causally related to the December 18, 2008, work accident and that claimant reached MMI on May 27, 2009. He awarded claimant 21 <sup>2</sup>/<sub>7</sub> weeks of TTD benefits from December 19, 2008, through May 17, 2009, for a total of \$17,178.01. At that time, the employer had paid TTD benefits to claimant in the amount of \$27,664.24 and the arbitrator found the employer was entitled to a credit of \$10,486.28 for the overpayment. The arbitrator further concluded claimant was not entitled to any prospective medical care and that the employer was acting in good faith when it delayed payment of TTD benefits and, therefore, was not subject to penalties or attorney fees. Additionally, the arbitrator concluded the employer could have reasonably relied upon Dr. Coe's medical opinion from the prior workers' compensation claim, as well as the medical opinions of Dr. Raab and Dr. Wehner, in reference to the December 18, 2008, claim. Thus, he found the employer's "dispute and nonpayment of TTD benefits was not unreasonable or vexatious[.]"

¶ 23 On review, the Commission reversed the arbitrator's decision on the issues of causation, medical bills, prospective medical care and TTD. Specifically, the Commission found claimant's current condition of ill-being was causally related to the December 18, 2008, work accident; found claimant had not reached MMI and awarded him 74 <sup>6</sup>/<sub>7</sub> weeks of TTD; awarded medical expenses; and found claimant entitled to receive prospective medical care. The Commission affirmed the arbitrator's decision as to the denial of penalties and attorney fees.

¶ 24 On judicial review, the circuit court of Cook County confirmed the Commission's

decision. This appeal followed.

¶ 25

## II. ANALYSIS

¶ 26

On appeal, claimant asserts that the Commission erred by failing to award penalties under sections 19(l) and 19(k) of the Act, and attorney fees under section 16 of the Act. Claimant argues he is entitled to such penalties and fees based on "the initial period of non-payment of benefits" as well as the TTD and medical benefits initially denied the by arbitrator but ultimately awarded by the Commission. For the reasons set forth below, we find the Commission did not err in failing to award penalties and attorney fees.

¶ 27

Section 19(l) of the Act provides as follows:

"If the employee has made a written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. \*\*\* In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of \$30 per day for each day that the benefits \*\*\* have been so withheld or refused, not to exceed \$10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(l) (West 2012).

¶ 28

"Penalties under section 19(l) of the Act are "in the nature of a late fee." *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772.

"[T]he assessment of a penalty under section 19(l) is mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show adequate justification for the delay.' " *Id.* (citing *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998)). "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Id.* "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified." *Id.* "The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence." *Id.*

¶ 29 Here, the evidence at arbitration established that claimant had prior workers' compensation claims involving his back and knees of which the employer had knowledge. Notably, the record contains the arbitrator's decision regarding the October 2005 accident, and the corresponding medical records and opinions, including Dr. Coe's December 2007 opinion. Dr. Coe opined that claimant's low back and bilateral knee symptoms and impairments at that time were related to the October 2005 work accident, that claimant's injuries from that accident caused permanent partial disability to the person as a whole with additional disability to both legs, and that claimant "may require bilateral total knee replacement surgeries at some point in the future for persistent knee pain."

¶ 30 Based on this evidence, the arbitrator in the instant case concluded that penalties and attorney fees were not appropriate. Specifically, the arbitrator noted that the employer "was acutely aware of [claimant's] preexisting degenerative condition and prior workers' compensation claims when the December 18, 2008[,] accident occurred as several prior claims

had been filed against [the employer]. [The employer] was also aware of [claimant's] December IME report from Dr. Coe in which Dr. Coe opined that [claimant] would likely require a total knee replacement as a result of the prior workers' compensation injuries. Respondent's causal connection dispute with regard to [claimant's] need for treatment, including total knee replacement, was therefore based upon [claimant's] own expert's opinion and was a good faith dispute based upon a real controversy. [The employer's] belief that the December 18, 2008[,] accident was not the cause of [claimant's] need for ongoing treatment and a total knee replacement was a conclusion that a reasonable person in the employer's position would have made based upon the facts available to [the employer] when the accident occurred."

The Commission adopted the arbitrator's finding on this issue.

¶ 31 Based on our review of the record, it is clear that the employer had full knowledge of claimant's preexisting condition and prior injuries during the period it did not pay TTD benefits. This includes the knowledge that, one year prior to the accident at issue here, claimant's medical expert opined that claimant could require total bilateral knee replacements in the future as the result of persistent knee pain. Under these facts, a reasonable person in the employer's position could have believed that claimant's knee complaints were not the result of the December 18, 2008, accident, but instead a continuation of the knee problems caused by his prior accident. Thus, in the context of claimant's request for section 19(l) penalties, we find that the Commission's determination that the employer's delay in paying TTD and medical benefits

for the period of December 19, 2008, to May 14, 2009, was reasonable is not contrary to the manifest weight of the evidence.

¶ 32 Section 19(k) of the Act provides, "where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation \*\*\* 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 2012). Section 16 of the Act further provides that attorney fees and costs may be assessed against an employer or its carrier where additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2012). Section 19(k) penalties and section 16 fees are intended to "address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 44, 959 N.E.2d 772. Thus, the standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding section 19(l) penalties. *Id.* Even when the facts support an award under sections 19(k) and 16, the decision to award penalties or attorney fees is left to the discretion of the Commission. *Id.* Our review of the Commission's denial of penalties and attorney fees under sections 19(k) and 16 of the Act involves a two-step process. *Id.*, ¶ 25, 959 N.E.2d 772. First, we must determine, under the facts presented, whether the Commission's factual findings were against the manifest weight of the evidence, and then we must determine whether the Commission abused its discretion by refusing to award penalties and attorney fees. *Id.* at ¶ 25, 959 N.E.2d 772.

¶ 33 Regarding the first prong of the analysis, as set forth above we have determined that the Commission's finding that the employer's delay in paying TTD and medical benefits was reasonable is not contrary to the manifest weight of the evidence. In addition, there is no

evidence in the record that the employer's delay was deliberate or the result of bad faith or improper purpose. Rather, at the time of the December 18, 2008, accident, the employer had knowledge of claimant's preexisting bilateral degenerative knee condition which would have raised concerns regarding whether the December 18, 2008, accident was, in fact, the cause of claimant's injuries. Under these facts, we find that the Commission did not abuse its discretion by concluding section 19(k) penalties and section 16 attorney fees were not appropriate in light of the employer's delayed payment of benefits for the period of December 19, 2008, through May 14, 2009.

¶ 34 The claimant next argues the Commission erred in failing to award penalties and attorney fees based on the employer's termination of TTD and medical benefits. In the proceedings below, the Commission affirmed the denial of penalties and attorney fees, concluding that the employer "evidences they had clear issues of ongoing compensability to terminate benefits and as such, [claimant] failed to prove that [the employer] acted in an unreasonable and vexatious manner to support imposition of penalties and attorney fees." We interpret this statement by the Commission to mean that the employer could have credibly concluded claimant's condition of ill-being was not related to the December 18, 2008, accident, such that its decision to terminate benefits—while erroneous—was not unreasonable or vexatious.

¶ 35 As mentioned above, prior to terminating claimant's TTD and medical benefits under this claim, the employer obtained a section 12 evaluation from Dr. Raab, who, based on his examination of claimant and claimant's medical history, concluded claimant's current condition of ill-being was not causally related to the December 18, 2008, accident. Although Dr. Raab believed that total knee arthroplasty was indicated, he opined this need for surgery was

"related to [claimant's] longstanding history of degenerative arthritis in both knees, morbid obesity and the natural progression of arthritis in the knees." According to Dr. Raab, the injury sustained by claimant on December 18, 2008, "was a temporary aggravation of pre-existing degenerative arthritis," and that claimant was at MMI from the December 2008 accident. In addition to Dr. Raab's medical opinion, the employer had knowledge of Dr. Coe's findings following his December 2007 evaluation of claimant. At that time, Dr. Coe opined that the claimant's low back and bilateral knee symptoms and impairments were the result of the October 2005 accident which caused permanent partial disability to the person as a whole with additional disability to both legs. Dr. Coe further noted that claimant "may require bilateral total knee replacement surgeries at some point in the future for persistent knee pain."

¶ 36 Claimant argues that in the present claim, the employer relied on Dr. Coe's 2007 report in support of its position that the need for the total knee replacement surgeries was a result of the October 2005 accident and the corresponding payment of benefits were due under the October 2005 claim. He then contends that the fact the employer did not authorize the surgeries under the October 2005 claim prevents it from arguing it was acting in good faith when it terminated TTD benefits and refused to authorize the surgeries in this case. In support of this contention, claimant cites *Bunnow v. Industrial Comm'n*, 327 Ill. App. 3d 1039, 765 N.E.2d 467 (2002). The issue in *Bunnow* centered on which of two different employers was responsible for paying the claimant's TTD benefits and medical expenses for which he was owed. *Id.* at 1044-45, 765 N.E.2d at 471-72. In this case, however, the issue was whether claimant was entitled to TTD benefits and medical expenses at all, not which claim the benefits and expenses were to be paid in as claimant suggests. Here, Dr. Raab opined that claimant's condition of ill-being was the result of his "longstanding history of degenerative arthritis in both knees, morbid obesity and the

