# ILLINOIS OFFICIAL REPORTS

## Appellate Court

***Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC**

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| Appellate Court Caption | LINDA DYE, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Plymouth Tube, Appellee). |
| District & No. | Third District<br>Docket No. 3-11-0907WC |
| Filed | December 31, 2012 |
| Held<br>(*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*) | The denial of claimant's request for prospective cosmetic medical care for a head injury related to her employment on the ground that it was "unclear" whether she suffered from an "observable disfigurement" was against the manifest weight of the evidence, since one of her physicians said the injury left a "dent" in her forehead. |
| Decision Under Review | Appeal from the Circuit Court of La Salle County, No. 11-MR-31; the Hon. R.J. Lannon, Jr., Judge, presiding. |
| Judgment | Affirmed in part and reversed in part; cause remanded. |

Counsel on Appeal

Thomas M. Strow, of Law Offices of Peter F. Ferracuti, of Ottawa, for appellant.

Brad A. Elward and Natalie D. Thompson, both of Heyl, Royster, Voelker & Allen, of Peoria, and Kevin J. Luther, Thomas P. Crowley, and Lynsey A. Welch, all of Heyl, Royster, Voelker & Allen, of Rockford, for appellee.

Panel

JUSTICE HUDSON delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman and Stewart concurred in the judgment and opinion.

Justice Turner specially concurred in part and dissented in part, with opinion.

## OPINION

¶ 1 Claimant, Linda Dye, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking benefits for injuries she allegedly sustained while in the employ of respondent, Plymouth Tube. Following a hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)), the arbitrator determined that claimant's current condition of ill-being is causally related to her employment. However, he denied her claim for prospective cosmetic medical care (see 820 ILCS 305/8(a) (West 2006)) and her request that penalties, additional compensation, and attorney fees be assessed against respondent (see 820 ILCS 305/16, 19(k), (*l*) (West 2006)). The Illinois Workers' Compensation Commission (Commission) affirmed these findings, and the circuit court of La Salle County confirmed the decision of the Commission. On appeal, claimant insists that the Commission's decision to deny authorization for prospective cosmetic medical care as well as its decision to deny the imposition of penalties, additional compensation, and attorney fees are against the manifest weight of the evidence. For the reasons which follow, we reverse the Commission's denial of prospective cosmetic medical care, but affirm the denial of penalties, additional compensation, and attorney fees, and remand the matter for further proceedings in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 2 I. BACKGROUND

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing held on April 30, 2010, as well as the record on appeal. Claimant began working for

respondent in June 1978. In January 2007, claimant's position was that of a furnace operator. Claimant suffered an undisputed work injury on January 27, 2007, when a steel cylinder struck her right temple as she was attempting to hook the cylinder to an air hose. Shortly after the accident, claimant was taken to St. Mary's Hospital. Hospital records note an abrasion to the right side of claimant's forehead. However, a CT scan of the brain was normal and showed no evidence of a skull fracture. Claimant was diagnosed with closed head trauma, a concussion, and an abrasion to the forehead. She was instructed to remain off work for two days and to seek follow-up treatment. On January 29, 2007, claimant was examined by Dr. Amit Garg of Parkview Family Practice. Dr. Amit Garg noted that claimant was doing well overall, with the only complaint of significance being "mild generalized headaches." Upon returning to work, claimant worked light duty for five days. She then resumed full duty in her position as a furnace operator.

¶ 4 The medical records indicate that claimant did not receive any additional treatment relative to her work injury until February 4, 2009, when she returned to Parkview Family Practice and was examined by Dr. Glen Ricca. At that time, claimant complained of headaches. Claimant told Dr. Ricca that the headaches resolve after she takes an allergy pill and that she did not think that the headaches were related to her work injury. Upon examination, Dr. Ricca noted a nontender "small indentation" in the right lateral forehead. Dr. Ricca's notes reflect that "workman's comp wanted [claimant] to be checked by 'neurosurgeon.' " In accordance with that request, Dr. Ricca referred claimant to Dr. Rakesh Garg. Dr. Rakesh Garg examined claimant on February 11, 2009. In his report, Dr. Rakesh Garg noted that claimant's neurological examination was "completely normal." Dr. Rakesh Garg also reported that claimant had a "dent in the right frontal area which is most likely related to the trauma and loss of front muscle in that area." He concluded that the dent was "left over from the trauma," but determined that no further treatment was necessary and that the dent would not cause claimant any "trouble" in the future.

¶ 5 Thereafter, claimant consulted the telephone directory in search of a dermatologist to repair her right temple. To that end, on February 23, 2010, claimant saw Dr. J. Eric Lomax of Soderstrom Dermatology. Dr. Lomax noted that claimant was hit in the head by a piece of steel at work several years earlier, resulting in a laceration to the area. Upon examination, Dr. Lomax noted the existence of a two-centimeter by one-centimeter "depressed area on the right frontal temporal region in the area in front of the temporal hairline." Dr. Lomax's examination revealed that, although nontender to palpation, the area does have a raised lower edge as if there was some scarring. Dr. Lomax recommended "autologous fat grafting to fill the area [and] correct the deformity with minimal intervention." Claimant testified that she did not have any skin blemishes or indentations on her right temple prior to January 27, 2007. Claimant added that she would like to undergo the procedure recommended by Dr. Lomax because she "want[s] it back the way it was."

¶ 6 During the arbitration hearing, claimant's attorney asked the arbitrator to "take notice" of the area in question. Following a brief pause, the arbitrator asked if Dr. Lomax was "proposing to repair that indentation." Claimant responded in the affirmative.

¶ 7 Based on the foregoing evidence, the arbitrator found that claimant's current condition of ill-being is causally related to the January 27, 2007, accident. However, the arbitrator

concluded that claimant's consultation with Soderstrom Dermatology, which claimant acknowledged was not the result of a referral, was outside the so-called two-physician rule. See 820 ILCS 305/8(a) (West 2006). In particular, the arbitrator found that after being seen at St. Mary's Hospital, claimant followed up "separately" with Dr. Ricca and Dr. Rakesh Garg. Additionally, the arbitrator denied claimant's request for prospective cosmetic medical treatment, citing the report of Dr. Rakesh Garg and the fact that the prospective medical treatment was prescribed by claimant's third choice of physician. Finally, the arbitrator denied claimant's request for penalties, additional compensation, and attorney fees (see 820 ILCS 305/16, 19(k), (*l*) (West 2006)). The arbitrator reasoned that respondent did not act unreasonably or vexatiously in withholding payment for prospective medical care given that such treatment was prescribed by a physician outside the allowable chain of referrals.

¶ 8 The Commission modified the arbitrator's decision to reflect that claimant did not exceed the permissible allotment of physicians. The Commission noted that under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), an emergency-room visit does not constitute a choice of physician. In addition, the Commission concluded that Dr. Amit Garg, Dr. Ricca, and Dr. Rakesh Garg were all within the same chain of referrals. The Commission reasoned that because Dr. Amit Garg and Dr. Ricca treat at the same facility, they constitute only one physician choice. Further, claimant was referred to Dr. Rakesh Garg by Dr. Ricca. Accordingly, the Commission found that Soderstrom Dermatology was not outside the two-physician rule. Nevertheless, the Commission affirmed the denial of prospective cosmetic medical treatment. Citing the report of Dr. Rakesh Garg, the Commission concluded that there is no precedent for awarding medical expenses for a procedure such as the one prescribed for claimant "where the evidence is at best unclear as to whether [claimant] has an observable disfigurement." In addition, the Commission affirmed the denial of penalties, additional compensation, and attorney fees. In support, the Commission noted that prior to treating at Soderstrom Dermatology, claimant indicated that her accident-related headaches had resolved. Thus, the Commission reasoned, it was not unreasonable or vexatious for respondent to deny liability for claimant's visit to the dermatology clinic after claimant herself stated that she experienced no physical limitations other than an indentation which was not found to be a disfigurement. On judicial review, the circuit court of La Salle County confirmed the decision of the Commission. This appeal ensued.

¶ 9 II. ANALYSIS

¶ 10 On appeal, claimant first argues that the Commission's decision to deny prospective cosmetic medical care is against the manifest weight of the evidence. Section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) governs medical care. That provisions states in relevant part:

> "The employer shall provide and pay *** all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a) (West 2006).

Specific procedures or treatments that have been prescribed by a medical service provider

are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655-56 (1999). The claimant bears the burden of proving, by a preponderance of the evidence, his or her entitlement to an award of medical care under section 8(a). *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 546 (2007). Questions regarding entitlement to prospective medical care under section 8(a) are factual inquiries for the Commission to resolve. *Max Shepard, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 893, 903 (2004). The Commission's decisions on factual matters will not be disturbed on appeal unless they are against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (2001). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, ¶ 15. Although we are reluctant to conclude that a factual determination of the Commission is against the manifest weight of the evidence, we will not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion. *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 491 (2004). We find this to be such a case.

¶ 11 Here, in denying claimant's request for prospective cosmetic surgery, the Commission determined that "the evidence is at best unclear as to whether [claimant] has an observable disfigurement." The meaning of "disfigurement" is not set forth in the Act. However, in *Superior Mining Co. v. Industrial Comm'n*, 309 Ill. 339, 340 (1923), the supreme court defined the term as "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, mis-shapen, or imperfect, or deforms in some manner." Given this definition, we find that the undisputable weight of the evidence compels a conclusion opposite to the one reached by the Commission.

¶ 12 Significantly, claimant testified that she did not have any skin blemishes or indentations on her right temple prior to January 27, 2007. Shortly after the accident, however, claimant was examined at St. Mary's Hospital, where she was noted to have an abrasion on the right side of her forehead. Further, when claimant was examined by Dr. Ricca on February 4, 2009, more than two years after the accident, he observed a "small indentation" on the right lateral forehead which he attributed to her work injury. A week later, Dr. Rakesh Garg reported that claimant had a "dent" as a result of the loss of muscle in the right frontal area of her head. Dr. Rakesh Garg also attributed this condition to claimant's industrial accident. On February 23, 2010, Dr. Lomax, a dermatologist, confirmed the existence of a two-centimeter by one-centimeter "depressed area on the right frontal temporal region in the area in front of the temporal hairline." Dr. Lomax recommended fat grafting to fill the area and correct the deformity with minimal intervention. Further, claimant's attorney asked the arbitrator to "take notice" of claimant's forehead. Following a brief pause, the arbitrator asked whether Dr. Lomax "is proposing to repair *that indentation*." (Emphasis added.) The foregoing evidence clearly shows that, as a result of the January 27, 2007, industrial accident, claimant suffered a "disfigurement" as that term was defined by the supreme court in *Superior Mining Co.* The evidence also clearly demonstrates that the disfigurement is observable to the naked eye. As such, we conclude that the Commission's denial of

prospective cosmetic medical care on the basis that it was "unclear" whether claimant had an "observable disfigurement" is against the manifest weight of the evidence.

¶ 13 In finding to the contrary, the Commission apparently relied on the report of Dr. Rakesh Garg. As noted above, however, Dr. Rakesh Garg expressly found the existence of a "dent" in claimant's forehead which he attributed to the industrial accident. Although Dr. Rakesh Garg also opined that nothing further needed to be done and that the dent will not cause claimant any "trouble" in the future, he is a neurologist and was presumably speaking from a neurological standpoint.

¶ 14 Relying on *Superior Mining Co.*, 309 Ill. at 340-41, and *Corn Products Co. v. Industrial Comm'n*, 51 Ill. 2d 338, 341-42 (1972), respondent suggests that any disfigurement claimant sustained was not serious and therefore she is not entitled to prospective cosmetic medical care. However, both *Superior Mining Co.* and *Corn Products Co.* dealt with permanency under section 8(c) of the Act (820 ILCS 305/8(c) (West 2006)). That statutory provision specifically requires that the disfigurement be "serious and permanent." Respondent identifies no such language in section 8(a).

¶ 15 Claimant also challenges the Commission's denial of penalties under section 19(k) of the Act (820 ILCS 305/19(k) (West 2006)), additional compensation under section 19(*l*) of the Act (820 ILCS 305/19(*l*) (West 2006)), and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2006)). The intent of sections 16, 19(k), and 19(*l*) is to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301 (1980). Awards under section 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). An award under section 19(*l*) is more in the nature of a late fee, so an award under that section is appropriate if an employer neglects to make payment without good and just cause. *McMahan*, 183 Ill. 2d at 515. The employer has 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). Thus, where the employer relies upon "responsible medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed." *Avon Products, Inc.*, 82 Ill. 2d at 302. Whether to impose penalties and attorney fees under the foregoing provisions is a question of fact for the Commission subject to the manifest-weight standard of review. *Residential Carpentry, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 975, 983 (2009). In this case, there were conflicting medical opinions regarding whether claimant's disfigurement necessitated additional treatment. While we find that the Commission erred in attributing more weight to the opinion of Dr. Rakesh Garg than the opinion of Dr. Lomax, we are unable to conclude that respondent's reliance on Dr. Rakesh Garg's opinion was unreasonable, vexatious, or without good cause, especially given claimant's testimony that she no longer experienced any physical limitations as a result of the industrial injury and the fact that claimant did not consult with Dr. Lomax until more than a year after being examined by Dr. Rakesh Garg.

¶ 16 III. CONCLUSION

¶ 17 For the reasons set forth above, we conclude that the Commission erred in denying claimant's request for prospective cosmetic medical care. However, we affirm the Commission's denial of penalties, additional compensation, and attorney fees. Accordingly, the judgment of the circuit court of La Salle County, which confirmed the decision of the Commission, is affirmed in part and reversed in part. This cause is remanded pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 18 Affirmed in part and reversed in part; cause remanded.

¶ 19 JUSTICE TURNER, specially concurring in part and dissenting in part.

¶ 20 While I agree with the majority's affirmation of the Commission's denial of penalties, additional compensation, and attorney fees, I respectfully dissent from its reversal of the Commission's denial of claimant's request for prospective cosmetic medical care.

¶ 21 It is the Commission, not this court, that possesses the responsibility of judging the witnesses' credibility, drawing reasonable inferences from their testimony, and determining what weight the testimony is to be given. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483-84 (1989). Accordingly, we should "not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). Here, the majority reweighs the evidence and rejects reasonable inferences drawn by the Commission in finding the Commission's conclusion "the evidence is at best unclear as to whether [claimant] has an observable disfigurement" was against the manifest weight of the evidence. See *supra* ¶ 8.

¶ 22 Beyond Dr. Garg's and Dr. Lomax's descriptions of the indentation, the claimant provided little evidence as to the appearance of the indentation, which under both descriptions is small. Instead of providing photographs of the indent, she simply showed it to the arbitrator, who did not describe the indent for the record. The lack of photographs raises a red flag as to how observable the indentation is. The arbitrator's statement after seeing the indentation provides no information as it is vague and subject to different interpretations. While the majority concludes the arbitrator's statement clearly indicates claimant had a disfigurement observable to the naked eye (*supra* ¶ 18), one can just as reasonably infer the arbitrator was questioning the need to fix something so trifling, *i.e.*, "you have got to be kidding." In fact, the record does not disclose how close the arbitrator was to the claimant when the arbitrator made the statement. Moreover, the Commission's focus on Dr. Garg's testimony suggests it did not find Dr. Lomax's testimony was credible. Accordingly, the record supports the Commission's conclusion "the evidence is at best unclear as to whether [claimant] has an observable disfigurement," and I would affirm the Commission's decision.