2016 IL App (1st) 141468WC-U
No. 1-14-1468WC
Order filed: June 30, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CITY OF CHICAGO,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff -Appellant,	)	
	)	
v.	)	No. 13-L-50742
	)	
CARLOS FERRAL and ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION,	)	Honorable
	)	Edward B. Harmening,
Defendants-Appellees.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Commission's decision regarding causation, penalties and fees, and temporary total disability were not against the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, the City of Chicago, appeals an order of the circuit court of Cook County awarding certain benefits, penalties, and fees to claimant, Carlos Ferral. Respondent contends

that the Commission's decisions are against the manifest weight of the evidence. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 On November 24, 2000, claimant was injured when he sat on a chair at work and the chair collapsed. According to claimant, his back and right elbow struck either the floor or a wall. He sought medical care at MercyWorks on the same day. Claimant was instructed to remain off work. A long course of treatment ensued, including approximately 75 visits to MercyWorks.

¶ 6 At the arbitration hearing, claimant was the only witness to testify. He testified that he had been employed by respondent since 1996 as a truck driver. He first worked for the aviation department but was later transferred to the water department. On November 24, 2000, claimant was injured at work. After he arrived for his shift and put his lunch in his truck, he went to the foreman's office to pick up his paycheck. It was busy, and claimant was asked to wait. Claimant sat down on a chair, which collapsed. Claimant testified, "I smashed my back against the wall and I was on the floor." The chair was wooden, and claimant noted no defects prior to sitting on it. Subsequently, claimant learned that someone had set up a broken chair as a "gag." The floor upon which claimant landed was made of cement. Claimant sought medical treatment at MercyWorks that same day. It was respondent's policy to send injured employees there.

¶ 7 At MercyWorks, X rays were taken, and an MRI of claimant's back was later performed on December 6, 2000. It showed a herniated disc. Claimant was referred to Chicago Ridge Radiology for an MRI of his shoulder. Claimant estimated that he made approximately 75 visits to MercyWorks between the time of his accident and August 31, 2004. Claimant was directed to attend an examination with Dr. Edward Goldberg on February 9, 2001. Goldberg was

respondent's examining physician. Dr. David Spencer also examined claimant on respondent's behalf on September 22, 2004.

¶ 8 Claimant was referred to Dr. William Heller, an orthopedic surgeon, on December 19, 2000. Heller gave claimant an injection in his right shoulder and ordered physical therapy. A second injection was administered on February 26, 2001. Heller ordered an MRI of claimant's right shoulder, which was performed on August 20, 2001. Eventually, on February 26, 2003, Heller performed a surgery on claimant's right shoulder. Claimant returned to physical therapy after the surgery.

¶ 9 Claimant testified that he also treated with Dr. Julie Wehner, a "spinal [o]rthopaedic surgeon." He first saw her on December 21, 2000. She examined his back on two occasions. He saw Dr. Lorenz in March of 2001, who prescribed physical therapy. Claimant also had a myelogram and CAT scan. Lorenz also ordered an MRI of claimant's thoracic spine. Lorenz referred claimant to Dr. Fronczak, a neurosurgeon. In April 2001, Lorenz ordered a Gadolinum MRI due to poor contrast on the earlier MRI. He also recommended that claimant stop physical therapy. Lorenz further recommended claimant undergo a functional capacity examination (FCE). Following the FCE, Lorenz did not release claimant to work. However, after a second FCE in July 2001, he released claimant to light duty, but also ordered another MRI of claimant's right shoulder. Sometime in August, 2001, claimant contacted his superintendent, who told claimant he had no light-duty work for him and that claimant could not drive a truck due to the medications he was taking.

¶ 10 In March 2002, claimant had another MRI of his cervical region as well as an EMG. Lorenz went over the results with claimant on March 27, 2002. Lorenz again took claimant off work and, in May 2002, ordered a steroid injection. Since that time, claimant has never been

released to work. In June 2002, Lorenz recommended a cervical rhizotomy.[1] Fronczak and Lorenz performed the procedure on November 14, 2003 (the surgery was delayed while more conservative measures were tried). Following the procedure, claimant continued to undergo physical therapy and occasionally received shots. In April 2004, a lumbar and thoracic MRI was performed, and in June 2004, claimant underwent another MRI of his right shoulder. Lorenz ordered a discogram of the lumbar spine, which was conducted on October 6, 2004. When asked whether he ever had a second surgery to his right shoulder, claimant stated he was "still waiting" for approval. Lorenz and a pain specialist, Dr. Lipoz, also recommended a lumbar spinal fusion. Claimant testified he was also waiting for approval regarding this surgery.

¶ 11 Claimant underwent additional treatment and shots over the next few years. During this time, rotator cuff surgery was also recommended (for which claimant was also "still waiting"). On September 14, 2006, claimant saw Lorenz for the last time. Lorenz "put [him] on permanent disability." At the time of the hearing, claimant was taking Vicodin, Celebrex, Flexeril, Elavil, and Nexium. He testified that he was still under Lorenz's care.

¶ 12 On cross-examination, claimant agreed that Dr. Diadula (of MercyWorks) recommended that claimant be returned to full duty on October 4, 2004. Claimant acknowledged that in October 2003, he hurt his back while trying to carry his son. After Lorenz placed claimant on permanent disability, he instructed claimant to try and walk more and be more active. However, claimant explained, it is difficult to do so given his physical limitations. Lorenz told claimant to "get healthier," and Spencer told him to lose weight.

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[1]A rhizotomy "is a surgical procedure to sever nerve roots in the spinal cord." Http://www.spine-health.com/glossary/rhizotomy (last visited June 21, 2016).

¶ 13 In addition to claimant's testimony, voluminous medical records were admitted into evidence. Dr. Goldberg, who examined claimant on respondent's behalf, confirmed a herniated disc. Spencer, also acting on respondent's behalf, opined that claimant did not need any further treatment for his lumbar injury. Chudik recommended a second surgery to claimant's right shoulder. Lorenz opined that claimant's injuries to his cervical, thoracic, and lumbar spine were all work related, as was a rotator cuff tear. The outcome of this case largely turned on the resolution of the conflict in the opinions of Spencer and Lorenz, so we will set them forth in additional detail.

¶ 14 Spencer authored a report following his examination of claimant. He noted that, outside of claimant's obesity, he "has a normal standing contour to his torso." Claimant walks without a limp. Flexion and extension of his torso is "moderately limited but not particularly painful." Spencer's examination of claimant's lumbar and thoracic spine showed some limitation of motion, which Spencer attributed to claimant's obesity. Spencer interpreted the most recent MRI as showing that claimant's disc herniation was stable. He opined that claimant's "current complaints are in no way related to a specific spinal abnormality." He saw no signs of any ongoing spinal pathology. Spencer believed claimant could return to truck driving. He further opined that claimant should undergo no further diagnostic studies or treatment to his spine.

¶ 15 Lorenz also prepared a report. He first chronicled claimant's treatment history in detail. He noted that on his last visit with claimant, he believed that claimant's conditions rendered him unable to pursue gainful employment. He added, "The condition is chronic and not expected to change over time." Lorenz then diagnosed claimant with: a thoracic disc herniation; a cervical disc herniation; a rotator cuff tear in the right shoulder; degenerative disc disease of the lower back; diabetes mellitus; morbid obesity; and hypertension. He further opined that claimant's two

disc herniations and rotator cuff tear were causally related to his fall at work. He believed that claimant would not be able to return to gainful employment.

¶ 16 Relevant to this appeal, the arbitrator made the following findings. First, he found that a causal connection existed between claimant's condition of ill-being and his at-work, accident. In support of this finding, the arbitrator primarily relied on the opinion of Dr. Lorenz. As for penalties and fees, the arbitrator first noted that respondent used the incorrect weekly rate for calculating claimant's payment for temporary total disability (TTD), which resulted in an underpayment. The arbitrator found that this warranted penalties in accordance with section 19(l) of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/19(l) (West 2000)) of $1,399, section 19(k) of the Act (820 ILCS 305/19(k) (West 2000)) of $20,158.76 and section 16 of the Act (820 ILCS 305/16 (West 2000)) of $8,063.50. It found that respondent was aware that its payment was insufficient. He then went on to find that respondent's decision to terminate TTD based on the opinion of Dr. Spencer unreasonable. It noted that Spencer examined claimant on one occasion and his report was "fraught with inconsistencies and devoid of details." The arbitrator continued, "It was as though [r]espondent had tunnel vision allowing it to only consider the opinion of a one time examiner while ignoring the opinions of several treating physicians and even it's [sic] own examining physician." On this basis, the arbitrator awarded additional sums of $55,817.90 pursuant to section 19(k), $2,500 pursuant to section 19(l), and $22,327 in accordance with section 16. The arbitrator also awarded TTD of $772.78 for 238-2/7 weeks, found claimant reached MMI and was permanently and totally disabled as of July 2, 2005, and made various additional findings not at issue in this appeal.

¶ 17 The Commission affirmed and adopted the decision of the arbitrator in all but one respect. It vacated the permanency award and extended the award for TTD to March 7, 2007

(328-1/7 weeks). It also remanded in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). The circuit court of Cook County set aside the Commission's decision and remanded, directing the Commission to recalculate claimant's average weekly wage. The Commission did so, and the circuit court confirmed its decision. This appeal followed.

¶ 18 III. ANALYSIS

¶ 19 On appeal, respondent raises three main issues. First, it contends the Commission's decision regarding causation is contrary to the manifest weight of the evidence. Second, it argues that the Commission erred in awarding claimant attorney fees and penalties. Third, it briefly contends that the extent of TTD awarded by the Commission is against the manifest weight of the evidence. We find none of respondent's contentions persuasive.

¶ 20 All issues raised by respondent are subject to review using the manifest-weight standard. *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209 (1982) (penalties and fees); *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005) (TTD); *Homebrite Ace Hardware v. Industrial Comm'n*, 351 Ill. App. 3d 333, 337 (2004) (causation). Hence, we will reverse only where an opposite conclusion is clearly apparent. *Id.* at 592. Assigning weight to evidence, assessing credibility, drawing inferences, and resolving conflicts in the record are primarily matters for the Commission. *C. Iber & Sons, Inc. v. Industrial Comm'n*, 81 Ill. 2d 130, 136 (1980). We owe great deference to the findings of the Commission, especially where medical issues are involved, as its expertise is well recognized in that field. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655 (1999); *Long v Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). With these standards in mind, we now turn to respondent's arguments.

¶ 21 A. CAUSATION

¶ 22 To recover under the Act, a claimant must establish a causal link between a condition of ill-being and an at-work accident. *National Castings Division of Midland-Ross Corp. v. Industrial Comm'n*, 55 Ill. 2d 198, 203 (1973). Respondent's argument is limited to one consideration. The arbitrator relied on the opinion of Dr. Lorenz in finding claimant had shown causation. Respondent contends that this decision is contrary to the manifest weight of the evidence because, while Lorenz opined in a report dated November 29, 2005, that the condition of claimant's lumbar spine is causally related to his at-work injury, "Lorenz had previously found that the lumbar condition was *not causally related to the injury*." (Emphasis by respondent.)

¶ 23 In support of this claim, respondent points only to an earlier report dated July 7, 2005. However, contrary to respondent's representation, Lorenz never opined in this report that the condition of claimant's lower back was not related to his employment. Rather, Lorenz simply opined that claimant did have some degenerative disc disease in his lower back, but he never states whether it was aggravated by claimant's accident or whether the accident caused some other problem in claimant's lumbar spine. In other words, the earlier report does not address the relationship between the condition of claimant's lumbar spine and his employment. In the latter report, Lorenz opines that claimant's lower back problems were aggravated by his injury.

¶ 24 Thus, the reports are in no way inconsistent. While it is true the earlier report does not mention a causal connection between the accident and the lower back condition, it also does not rule one out. Any effect on Lorenz's failure to mention this in his earlier report is a matter weighing on his credibility. Assessing credibility is primarily for the Commission. *C. Iber & Sons, Inc.*, 81 Ill. 2d at 136. More fundamentally, this purported defect that respondent identifies is in no way sufficient for us to conclude that an opposite conclusion to the Commission's is

clearly apparent. As such, its decision regarding causation is not contrary to the manifest weight of the evidence.

¶ 25 B. PENALTIES AND FEES

¶ 26 Respondent next attacks the Commission's decision to award claimant penalties and fees in accordance with sections 16, 19(k) and 19(l) of the Act. 820 ILCS 305/16, 19(k), 19(l) (West 2000). Section 19(l) is akin to a late fee, where there is a delay in payment for no good or just cause. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The other two sections, conversely, are punitive in nature and are warranted where a refusal to pay is unreasonable, vexatious, or in bad faith. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶¶ 21-24.

¶ 27 Respondent's argument on this point is, again, quite narrow. It begins by citing *USF Holland, Inc. v. Illinois Workers' Compensation Comm'n.*, 357 Ill. App. 3d 798, 805 (2005), for the following proposition: "When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed." We point out that this case requires *reasonable* reliance—not just any reliance—upon a medical opinion.

¶ 28 Respondent then asserts that it was relying on the opinion of Dr. David Spencer, a board-certified orthopedic surgeon. Without explaining why, respondent states that it was justified in relying on Spencer's opinion. It conclusorily states that "reliance on a board certified physician is certainly reasonable." Respondent then asserts that there is "no reason why the general rule as described in *USF Holland* should not be applied here."

¶ 29 Indeed, the issue is not simply whether an employer was able to procure a favorable medical opinion to rely upon; it 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). On this issue, the Commission (adopting the arbitrator's decision) made far more nuanced findings than respondent acknowledges in its argument. It began by noting that respondent terminated TTD "solely based upon the independent medical examination of Dr. Spencer." However, it found that Spencer "did not adequately examine [claimant's] shoulder despite the fact that the undisputed evidence was that" claimant suffered a severe shoulder injury. It expressly found that "[i]t was unreasonable for [respondent] to rely solely on the one time Section 12 IME examination of Dr. Spencer." It noted, "Dr. Spencer's report is fraught with inconsistencies and devoid of details." It observed that Spencer opined that claimant did not need any further treatment to his lower back "without bothering to even review the discogram which he acknowledges was necessary." The Commission then found:

> "It was as though [respondent] had tunnel vision allowing it to only consider the opinion of a one time examiner while ignoring the opinions of several treating physicians and even its own examining physician, Dr. Goldberg, who specifically stated that [claimant] could not work because the herniated disc at T4-T5 was inoperable. [Respondent's] decision to terminate T.T.D. required it to ignore the opinions of Dr. Lorenz, Dr. Bardfield, Dr. Chudik, Dr. Heller and even the opinions of Dr. Goldberg, another IME examining physician. It should also be noted that all of [claimant's] treating physicians were referrals emanating from MercyWorks, [respondent's] company clinic. It was unreasonable and vexatious for [respondent] to terminate T.T.D. based upon the confusing statements of Dr. Spencer at [claimant's] expense."

Respondent never addresses any of these detailed findings. Respondent's simple assertion that it was reasonable to rely on Spencer's opinion does nothing to show that the Commission's finding to the contrary is against the manifest weight of the evidence. Essentially, respondent would

have us substitute our judgment for that of the Commission, but that is something we cannot do. *Martin v. Industrial Comm'n*, 227 Ill. App. 3d 217, 219 (1992).

¶ 30 On appeal, respondent, as the appellant, bears the burden of establishing that the Commission erred. See *TSP Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). In failing to address the Commission's findings *why* respondent's reliance on Spencer's opinion was not reasonable, respondent has not carried that burden. Therefore, we affirm this portion of the Commission's decision.

¶ 31 C. TTD

¶ 32 Finally, respondent attacks the Commission's award of TTD. It argues that we "should remand the matter to the Commission for the determination of the proper period of" TTD. The reason for this request is that, "[d]espite numerous releases," claimant was awarded TTD for the entire period beginning at the accident and running through March 7, 2007 (the date of the hearing). It points out that Spencer—whom the Commission earlier discredited—believed claimant could return to work on September 23, 2004. Respondent cites no authority in support of its purported argument, thereby forfeiting it. *International Union of Operating Engineers Local 965 v. Illinois Labor Relations Board, State Panel*, 2015 IL App (4th) 140352, ¶ 20.

¶ 33 Moreover, respondent does not identify any period where it asserts that TTD was erroneously awarded; rather, it simply states that there were "numerous releases," yet claimant remained off work continuously. If respondent wanted to contest the period of TTD, it should have properly raised these issues before the Commission and brought any decision it believed to be error to this court, identifying it with specificity. In short, we find respondent's argument insufficient to establish error, even if it were not forfeited.

¶ 34 IV. CONCLUSION

¶ 35 In light of the following, the order of the circuit court of Cook County confirming the decision of the Commission is affirmed. This cause is remanded to the Commission in accordance with *Thomas*, 78 Ill. 2d 327.

¶ 36 Affirmed and remanded.