No. 2--10--0170WC

Order filed April 12, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ALEXANDER LUMBER COMPANY,	)	Appeal from the Circuit Court
	)	of the 15th Judicial Circuit,
Appellee,	)	Ogle County, Illinois
	)	
v.	)	No. 09--MR--25
	)	
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al.* (Leon A. Bozek,	)	Stephen C. Pemberton,
Appellant).	)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justices McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

Held: The Commission's award of penalties and attorney fees was not against the manifest weight of the evidence.

The claimant, Leon A. Bozek (claimant), filed an application for adjustment of claim against his employer, Alexander Lumber Company (employer), seeking workers' compensation benefits for injuries to his right shoulder on January 9, 2008. The matter proceeded to an arbitration hearing where the arbitrator found that the accident was compensable and awarded the

following: temporary total disability (TTD) benefits of $261.79 per week for 26 6/7 weeks (January 12, 2008, through July 17, 2008); reasonable and necessary medical expenses in the amount of $334; penalties in the amount of $1,798.82 pursuant to section 19(k) of the Workers' Compensation Act (Act) (820 ILCS 305/19(k) (West 2006)); penalties in the amount of $4,230.00 pursuant to section 19(l) of the Act (820 ILCS 305/19(l) (West 2006)); and attorney fees of $719.53 pursuant to section 16 of the Act (820 ILCS 305/16 (West 2006)). The employer appealed to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision after modifying the amount of the average weekly wage and thereby reducing the weekly benefit to $260.46. This modification resulted in a reduction in the amount of penalties under section 19(k) to $1,980.96 and attorney fees to $712.38. The section 19(l) penalty, calculated at $30 per day, was affirmed. The Commission also corrected the arbitrator's decision by deleting all references to certain medical records which the arbitrator had refused to admit into evidence. One commissioner dissented from the award of penalties and attorney fees, finding that the employer's conduct in delaying payment of benefits was not vexatious or unreasonable. The employer then appealed to the Ogle County circuit court, which confirmed the decision of the Commission except for the Commission's award of penalties and attorney fees, which it held was against the manifest weight of the evidence. The employer does not appeal from the circuit court's decision to confirm the Commission's finding as to causation or awarding benefits. The only matter on appeal is the claimant's claim that the Commission properly awarded penalties and attorney fees.

BACKGROUND

The claimant testified that he had worked as a truss builder and general laborer for the employer since June 2005. His duties included lifting and carrying 2x4 lumber of varying lengths and cutting and splicing the lumber to form floor splices weighing between 50 and 60 pounds each. He would then lift the splices onto shelves that were above shoulder level. The claimant testified that, on Wednesday, January 9, 2008, after working approximately four hours, he began to notice pain and numbness in his right arm and shoulder. He testified that he had not been in any pain before coming to work. He notified his acting foreperson, Anna Belcher, who instructed him to continue working. He was told that he would have to continue working until Dennis Keye, the plant manager, came to work on Friday. The claimant testified that he worked the remainder of the day on January 9, 2008, and that Belcher would check on him at approximately two-hour intervals to make sure the work was progressing. The claimant also testified that the numbness in his right arm progressed throughout the day. The claimant performed light work on Thursday, January 10, 2008, using only his left arm to cut lumber. On Friday, January 11, 2008, the claimant reported his condition to Keye, who filled out an accident form and transported the claimant to Kishwaukee Corporate Health Center in De Kalb, Illinois, for treatment.

On January 11, 2008, the claimant was examined by Dr. Christina Giacomin, D.O., who diagnosed right shoulder tendinitis, prescribed ibuprofen, and ordered an MRI of the right shoulder. Dr. Giacomin issued a return-to-work order that restricted any use of the right arm. On January 30, 2008, Dr. Giacomin issued a status sheet which indicated a diagnosis of right rotator cuff tendinitis and right bicipital tendinitis, prescribed physical therapy three times per week and

continued a work restriction prohibiting any work involving the use of the right arm. On or about February 14, 2008, Dr. Giacomin issued another work status report in which the diagnosis remained the same as prior diagnoses. However, the work restriction now allowed the claimant to use his right arm as he could tolerate any pain or discomfort. Dr. Giacomin also ordered no pushing or pulling more than 20 pounds and no lifting more than 20 pounds with both arms and only occasional lifting of no more than 7 pounds with the right arm alone.

On February 27, 2008, Dr. Giacomin issued a final report which indicated that the claimant was discharged from further care with instructions to discontinue physical therapy and continue a home exercise program. The report also recommended an independent medical examination. The report was ambiguous as to work restriction. A box on the preprinted form was checked which corresponded to "Patient may return to work with NO limitations." However, next to the line "Patient may return to work with the following limitations," a notation had been added which stated "with lifting up to 10 pounds."

When the claimant took the February 27, 2008, form to the plant manager he was told that, with a ten-pound lifting restriction, there was no work for him within that restriction and he would not be able to return to work unless he was released to full duty without limitation. The employer terminated payment of all benefits on February 27, 2008.

On March 5, 2008, the claimant sought medical care from Dr. Allen Van, an orthopedic surgeon. Dr. Van took a history of an injury at work on January 9, 2008, as well as a prior history of right shoulder surgery in 1983. Dr. Van noted that a recent MRI showed a mild AC joint disease and some degenerative tissue. Dr. Van also noted no evidence of a torn rotator cuff. He diagnosed right shoulder rotator cuff tendinitis and possible impingement syndrome. He

prescribed physical therapy and imposed a 10-pound lifting restriction. The arbitrator inferred from Dr. Van's diagnosis that the claimant's current condition of ill-being regarding his right shoulder was causally related to the January 9, 2008, activities involving lifting and splicing of heavy lumber, noting that the right shoulder pain and numbness began while the claimant was performing those activities.

The claimant received a letter dated April 9, 2008, from the employer, informing him that his employment had been terminated. The letter referenced Dr. Giacomin's February 27, 2008, report, and concluded "[w]e are unable to accommodate your restrictions since they would affect the essential functions of your job as a Truss Laborer." The employer refused to authorize or pay for Dr. Van's treatment.

On June 11, 2008, the claimant was examined, at the request of the employer, by Dr. Lawrence Lieber. Dr. Lieber concurred in a diagnosis of right rotator cuff tendinitis and also agreed that a 10-pound lifting restriction was appropriate. Dr. Lieber opined that the claimant's current condition of ill-being was unrelated to his employment, but was instead related solely to a preexisting degenerative condition that was not aggravated or accelerated by the January 9, 2008, work injury.

Regarding the claimant's condition prior to January 9, 2008, the claimant testified that in 1984, while he was a United States Marine stationed in Japan, he underwent right shoulder surgery for a shoulder separation. The surgery was followed by six months of limited duty and physical therapy. The claimant then returned to full duty without restriction in the Marines until he was discharged in 1986. After working in the housing construction industry of six months, the claimant enlisted in the United States Army and served from 1986 until he retired in 1995.

Upon retirement, the claimant underwent a complete retirement physical, which disclosed no abnormalities, disabilities, or restrictions.

Following retirement from the military in 1995, the claimant had several jobs, all involving heavy lifting. From 1995 to 2003, the claimant worked at an Auto Zone. His duties there included lifting heavy objects such as batteries, cases of motor oil and brake drums. Sometimes he would have to lift these objects onto shelves above his head. In 2003, the claimant worked at a food products warehouse where his duties included lifting and stacking heavy cases. This was followed by one year of working for a temporary service which hired him out as a general laborer, often to do work which involved heavy lifting. For approximately one year prior to being hired by the employer, the claimant worked for another lumber company, performing duties which included lifting and carrying lumber on a daily basis. The claimant testified that from 1984 until January 9, 2008, he had no medical treatment on his right shoulder and had been pain free throughout that time. The arbitrator noted that the claimant's testimony regarding freedom from pain or medical treatment on his right shoulder was consistent with the history he gave to Drs. Van and Lieber.

The arbitrator also noted that the claimant had credibly established a work history of heavy lifting, including lifting which involved raising his right shoulder, without any pain or need for medical treatment from 1984 until the January 9, 2008, incident. The arbitrator concluded that the employer takes a claimant as he finds him and the fact that the claimant had no symptoms and no need for medical treatment on his right shoulder until his January 9, 2008, incident established that the claimant's current condition of ill-being was related to his employment.

On the question of penalties and attorney fees, the arbitrator found that the claimant was under a 10-pound lifting restriction which was causally related to the January 9, 2008, incident when the employer terminated all benefits. He noted that the employer's physician, Dr. Giacomin, had indicated that the claimant could only return to work with a 10-pound lifting restriction, which the employer acknowledged when it terminated the claimant's employment based upon its alleged inability to accommodate that restriction. The arbitrator further noted that, in view of the claimant's 20 years of prior work without pain or medical treatment for his right shoulder, it was unreasonable for the employer to take a position that the claimant's injury was related solely to his 1984 shoulder surgery. The arbitrator also noted that it would not have been possible for the employer to rely upon Dr. Lieber's opinion as to causation when it terminated benefits on February 27, 2008, since Dr. Lieber's opinion was not rendered until June 11, 2008.

The Commission, with modification and a dissent, affirmed and adopted the arbitrator's findings. The dissent would have reversed the ruling on penalties and attorney fees, maintaining that the employer acted reasonably in relying upon Dr. Lieber's findings to dispute whether the claimant was still under a work restriction on February 27, 2008, and whether the claimant's injury was causally related to his employment.

The employer sought review in the Ogle County circuit court. The claimant moved for the court to strike the employer's argument as to penalties and attorney fees, arguing that the issue had been waived by the employer's failure to cite authority on the issue. The court denied that motion. The court reversed the Commission's decision with regard to the imposition of penalties and attorney fees which it found to be against the manifest weight of the evidence. The court found that Dr. Giacomin's report dated February 27, 2008, which ambiguously reported

both return to work with no restrictions and return to work with a 10-pound lifting restriction, was sufficient to show that the employer did not unreasonably and vexatiously terminate benefits. The claimant now appeals from the circuit court's ruling, arguing that the court erred in not striking the employer's argument as to penalties and attorney fees and that the Commission's award was not against the manifest weight of the evidence.

Two business days prior to oral argument in this matter this court received from the appellee an emergency motion to bar argument and strike portions of the appellant's brief. Due to the late date of the filing, this court decided to take the emergency motion with the case and address the claims raised therein at the beginning of oral argument.

DISCUSSION

As a preliminary matter, we will first address the appellee's emergency motion. Attached to the emergency motion were two documents purporting to be office notes generated by Dr. Van on March 5, 2008 and June 11, 2008. The documents purported to establish that the claimant was released to return to work without restriction on June 11, 2008, and was further released from all medical care on that date. Thus, the employer maintained in the emergency motion, since the claimant was no longer entitled to temporary total disability benefits as of that date, the employer could not be unreasonable and vexatious in withholding benefits as of that date. It appears that the documents at issue were produced subject to a subpoena served on the keeper of Dr. Van's records on January 6, 2011, apparently in regard to another matter pending before the Commission regarding the claimant and the employer.

We note that the question for review in this matter is whether the Commission's award of penalties and attorney fees for unreasonable and vexatious refusal to pay benefits was against the

manifest weight of the evidence. The arbitrator's decision in this matter was issued on August 5, 2008, and the Commission's decision on June 8, 2009. Whether the documents presented with the emergency motion would have influenced the Commission's decision had they been presented in a timely manner cannot be determined. Although no understandable explanation for the late appearance of these documents was given, we are limited in our review of the Commission's ruling to the certified record presented upon appeal. It is well settled that an appellate court may not consider any material outside the certified record. See *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 898 (2000) (striking interrogatory answers which were attached to the brief but were not part of the certified record on appeal); *Jones v. The Police Board of the City of Chicago*, 297 Ill. App. 3d 922, 930 (1998) (appellate court struck supplemental appendix containing transcripts of hearing which were not part of the certified record on appeal). We find that the documents presented with the appellee's emergency motion are outside the certified record on appeal and therefore cannot be considered by this court. The emergency motion to bar argument and strike portions of the appellant's brief is, therefore, denied.

At issue on appeal is whether the Commission erred in awarding penalties and attorney fees based upon a finding that the employer's action in terminating the claimant's benefits on February 27, 2008, was unreasonable and vexatious. The Commission's decision to award penalties and attorney fees is a question of fact which will not be overturned upon review unless it is against the manifest weight of the evidence. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1024 (2005). For a finding of the Commission to be against the manifest weight of the evidence, the opposite conclusion must be clearly apparent. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993). Penalties under section 19(k) of the Act

and attorney fees under section 16 are appropriate where an employer's decision to delay or deny payment of benefits is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). Penalties under section 19(l) of the Act are appropriate where an employer neglects or refuses to pay benefits or unreasonably delays payment without good and just cause, which is generally a lesser degree of culpability than vexatious delay. *Id.* In any question of penalties or attorney fees, the employer bears the burden of showing that it had a reasonable belief that delay or termination of benefits was justified. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579 (1995).

In the instant matter, the employer maintains that its denial of benefits was reasonable, based upon Dr. Giacomin's apparent indication that the claimant could return to work with no restrictions and Dr. Lieber's opinion that the claimant's condition of ill-being was not causally related to his employment. The employer points out that, generally, "[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).

The Commission rejected the employer's claim of reasonable reliance upon the opinions of Dr. Giacomin and Dr. Lieber. As to Dr. Giacomin's report, the report was contradictory regarding whether the claimant could return to work without restrictions. The report contained an indication that the claimant could work without restriction, but it also contained an indication that he could only work under a 10-pound weight restriction. If the report had been clear in establishing that the claimant could return to work without restriction, then the TTD benefits obviously would not be warranted and the employer would have been completely justified in

terminating benefits. But the report was not clear and was in need of clarification. When faced with such an inconsistency, the reasonable thing for the employer to do would have been to ask Dr. Giacomin to resolve the inconsistency. There is no indication in the record that the employer sought a clarification of the ambiguity. Given the discrepancy in Dr. Giacomin's report, it cannot be said that the employer was justified in relying upon a reasonable medical opinion.

Moreover, the Commission could reasonably find that the employer did not, in fact, rely upon Dr. Giacomin's opinion that the claimant was able to return to work without restrictions. The record clearly indicates that the employer believed that the claimant was under a 10-pound work restriction since that restriction was listed in the April 9, 2008, termination letter from the employer. It would not be against the manifest weight of the evidence for the Commission to find that the employer did not reasonably believe the claimant was fit to return to duty without restriction on February 27, 2008, since it terminated the claimant's employment on April 8, 2008, for being under the same 10-pound lifting restriction that it chose to ignore in Dr. Giacomin's February 27, 2008, report.

Likewise, the Commission's rejection of Dr. Lieber's June 11, 2008, report is supported by the record. Dr. Lieber's opinion that the claimant's current condition of ill-being was solely the result of a degenerative condition did not provide a reasonable basis upon which the employer could terminate benefits on February 27, 2008, since he did not issue his opinion until more than three months after the employer terminated benefits. It cannot be said, therefore, that the Commission's finding that the employer could not have reasonably relied upon Dr. Lieber's opinion in terminating benefits was against the manifest weight of the evidence.

Based upon the record, it cannot be said that the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. The Commission's award of penalties and attorney fees is, therefore, reinstated.

The claimant also maintains that the circuit court erred in denying his motion to strike the employer's appeal to the circuit court for failure to cite any supporting authority. In view of the fact that we are reversing the circuit court's ruling and reinstating the Commission's decision, we find that this issue is moot and need not be addressed on appeal.

CONCLUSION

The appellee's emergency motion to bar argument and strike portions of the appellant's brief, having been taken with the case at the beginning of oral argument, is denied. The judgment of the Ogle County circuit court, which reversed the Commission's award of penalties and attorney fees, is reversed and the Commission's decision awarding penalties and attorney fees is reinstated. The matter is remanded to the Commission for further proceedings.

Emergency motion denied; circuit court reversed; Commission's decision reinstated; cause remanded to the Commission.

Reversed and remanded.