2011 IL App (3rd) 100547WC-U

NO. 3-10-0547WC

Order Filed November 1, 2011

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| PARSEC, INC., | ) | Appeal from |
| d/b/a OHIO PARSEC, INC., | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Will County |
| v. | ) | No. 09MR888 |
| WORKERS' COMPENSATION COMMISSION (Brian | ) | |
| W. Lewis, Appellee), | ) | Honorable |
| Defendant-Appellee | ) | Barbara Petrungaro, |
| | ) | Judge Presiding. |

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JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held*: The Commission committed no error in upholding certain evidentiary rulings made by the arbitrator and its awards of TTD benefits and prospective medical expenses were not against the manifest weight of the evidence. The Commission's decision is modified to reflect an award of 28-1/7 weeks' TTD benefits to correct a miscalculation in its award. We affirm the circuit court's judgment, confirming the Commission's decision as modified.

¶ 2 On May 19, 2008, claimant, Brian W. Lewis, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2006)), seeking benefits for a left knee injury from employer, Parsec, Inc. Following a hearing, the arbitrator found claimant sustained accidental injuries that arose out of and in the course of his employment on March 4, 2008. He awarded claimant 30 weeks' temporary total disability

(TTD) benefits and ordered employer to pay for prospective medical care in the form of claimant's left knee surgery.

¶ 3 On review, the Workers' Compensation Commission (Commission) modified the arbitrator's decision, reducing his TTD award to 29-1/7 weeks and rejecting one of claimant's previously admitted exhibits. It otherwise affirmed and adopted the arbitrator's decision. The circuit court of Will County confirmed the Commission's decision. Employer appeals, arguing (1) the Commission erred by refusing to vacate the arbitrator's decision and remand for rehearing where the arbitrator improperly denied employer's motion to continue the arbitration hearing, (2) the Commission abused its discretion by excluding the admission of evidence submitted by employer, and (3) the Commission's awards of TTD and prospective medical benefits were against the manifest weight of the evidence. We affirm the circuit court's confirmation of the Commission's decision as modified.

¶ 4 The parties are familiar with the evidence presented and we discuss it only to the extent necessary to put their arguments in context. The record shows claimant worked for employer as a hostler driver. On March 4, 2008, he sustained work-related injuries to his left knee after a crane on employer's job site inadvertently lifted his work truck.

¶ 5 On September 30, 2008, an arbitration hearing was conducted. At that start of the hearing, employer requested a continuance in the matter, arguing claimant improperly failed to provide it with a completed request-for-hearing form 15 days in advance of the hearing. Employer maintained that proceeding with a hearing under such circumstances would violate the Commission's rules and declined to sign the stipulation sheet on the request-for-hearing form. The arbitrator denied employer's request, noting the Commission's rules provided for arbitrator

discretion "in the event a party *** refuses to complete [a] request for hearing form." Also at arbitration, employer sought to admit as evidence an August 2008 report from its examining doctor, Dr. Blair Rhode. Claimant objected to the admission of such evidence, arguing it was hearsay and had not been timely disclosed. The arbitrator sustained claimant's objection.

¶ 6 On October 8, 2008, following the arbitration hearing, employer filed a motion to reopen proofs, alleging a material misrepresentation of facts by claimant's attorney, Daniel Capron. Specifically, it alleged Capron misrepresented his receipt of Dr. Rhode's August 2008 report at arbitration for the purpose of keeping it out of employer's case. Attached to its motion was the affidavit of Cheryl Tippett, the adjuster for employer's third-party workers' compensation administrator, asserting she sent Capron a letter on August 25, 2008, along with Dr. Rhode's report. Tippet further averred that Capron never asked for a copy of the report after that date even though he was aware of Dr. Rhode's evaluation of claimant. Claimant filed a response to employer's motion in which Capron denied receiving Dr. Rhode's report until the date of the arbitration hearing. Capron alleged that, prior to the arbitration hearing, he corresponded with employer's representatives by telephone and through email and informed them that he had never received the report. Claimant attached the email correspondence to his response. On October 24, 2008, the arbitrator conducted a hearing and denied employer's motion to reopen proofs.

¶ 7 On November 7, 2008, the arbitrator awarded claimant 30 weeks' TTD benefits and prospective medical expenses. On August 5, 2009, the Commission modified the arbitrator's decision by rejecting the admission of one of claimant's exhibits and reducing his TTD award to 29-1/7 weeks. It otherwise affirmed and adopted the arbitrator's decision. Regarding evidentiary matters, the Commission found the arbitrator did not abuse its discretion in (1) denying em-

ployer's request for a continuance or (2) denying admittance of Dr. Rhode's August 2008 report. The circuit court of Will County confirmed the Commission's decision.

¶ 8 This appeal followed.

¶ 9 On appeal, employer first argues the arbitrator erred by denying its motion to continue and the Commission erred by failing to vacate the arbitrator's decision and remand for rehearing. It contends claimant improperly failed to (1) have a completed request for hearing accompany his 19(b) petition and notice of motion and order and (2) attach either "a statement from a physician of recent date relating to current inability to work or a description of such evidence of temporary total disability" to his 19(b) petition. Employer maintains such documents were required by the Commission's rules and their absence warranted a continuance in the matter.

¶ 10 "Although not binding on the courts, the Commission's interpretation of its rules is entitled to deference and will be set aside only if it is clearly erroneous, arbitrary, or unreasonable." *Banks v. Industrial Comm'n*, 345 Ill. App. 3d 1138, 1141, 804 N.E.2d 629, 632 (2004). The rules at issue in this case pertain to the filing of a petition for an immediate hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)) and the setting of the case for trial before the arbitrator.

¶ 11 Pursuant to section 7020.80(a)(1)(B)(ii) of the Illinois Administrative Code (Code) (50 Ill. Adm. Code 7020.80(a)(1)(B)(ii) (2011)) a petition for an immediate hearing pursuant to section 19(b) of the Act must set forth "a statement that a signed physician's report of recent date relating to the employee's current inability to work, or a description of such other evidence of temporary total disability as is appropriate under the circumstances, has been

delivered to the [employer]." The petition must then "be filed and heard in accordance with Section 7020.70" of the Code (50 Ill. Adm. Code 7020.70 (2011)). 50 Ill. Adm. Code 7020.80 (2011).

¶ 12 Section 7020.70(a) of the Code (50 Ill. Adm. Code 7020.70(a) (2011)) provides that all motions, except for certain motions made under circumstances not present in this case, "must be accompanied by an Industrial Commission form entitled Notice of Motion and Order and must be served on the Arbitrator or Commissioner and all other parties." "Motions requesting a trial date will be heard during the status call in accordance with Section 7020.60(b)(2)" of the Code (50 Ill. Adm. Code 7020.60(b)(2) (2011)). 50 Ill. Adm. Code 7020.70(a)(1)(A) (2011). Additionally, "[m]otions for an immediate hearing under Section 19(b) of the Act and motions requesting a date for trial shall be served on the Arbitrator and on all other parties 15 days preceding the status call day set forth in the notice." 50 Ill. Adm. Code 7020.70(b)(1)(B) (2011).

¶ 13 Section 7020.60(b)(2) of the Code (50 Ill. Adm. Code 7020.60(b)(2) (2011)) provides that, during the arbitrator's monthly status call, cases will be continued in accordance with other provisions of the code "unless a request for a trial date is made in accordance with Section 7030.20" of the Code (50 Ill. Adm. Code 7030.20 (2011)). That section provides for the setting of a case for trial and states that, where there is no agreement between the parties, "[a]ny party may file a motion requesting a date certain for trial." 50 Ill. Adm. Code 7030.20(c)(1) (2011). "The motion must be accompanied by a form provided by the Industrial Commission called a Request for Hearing, which sets forth the moving party's claims on each issue." 50 Ill. Adm. Code 7030.20(c)(1) (West 2011). Additionally, that section states as follows:

"The motions for trial dates shall be filed and heard pursuant to

Section 7020.70 and Section 7020.60. If the Arbitrator determines that proper and timely fifteen (15) days notice was given of the motion for trial date to the opposing party, opposing party was provided with a completed Request for Hearing, said case appears on the monthly status call on the date the motion is heard, or if the case is not on the status call, the Arbitrator has determined that the case falls within the exceptions in Section 7020.60(b)(2)(B), and that the matter should proceed to trial, the Arbitrator shall set the matter for trial on a date certain." 50 Ill. Adm. Code 7030.20(c)(3) (2011).

¶ 14 Finally, section 7030.40 of the Code (50 Ill. Adm. Code 7030.40 (2011)) governs requests for hearings. That section states as follows:

"Before a case proceeds to trial on arbitration, the parties (or their counsel) shall complete and sign a form provided by the Industrial Commission called Request for Hearing. However, in the event a party (or his counsel) shall fail or refuse to complete and sign the document, the Arbitrator, in his discretion, may allow the case to be heard and may impose upon such party whatever sanctions permitted by law the circumstances may warrant. The completed Request for Hearing form, signed by the parties (or their counsel), shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case." 50 Ill.

Adm. Code 7030.40 (2011).

¶ 15 Here, the record shows, on August 19, 2008, claimant filed a notice of motion and order, setting September 15, 2008, as the date he would appear before the arbitrator and present his petition for an immediate hearing under section 19(b). The record also contains his section 19(b) petition which was filed the same date. In that petition, claimant alleged knee injuries in connection with a March 2008 accident and that employer refused to pay proper compensation. He provided the names and addresses of his medical providers. Claimant further alleged that, on July 1, 2008, employer's adjuster, Cheryl Tippett, was given information that stated claimant was unable to return to work in the form of "a recent statement, signed by a medical provider." On September 15, 2008, the arbitrator set the matter for hearing on September 30, 2008. Employer contends, and claimant does not refute, that a completed request for hearing was not presented to employer until the date of the arbitration hearing.

¶ 16 On September 30, 2008, employer notified the arbitrator of its refusal to sign the request for hearing on the basis that it was requesting a continuance rather than a hearing. The arbitrator denied employer's request for a continuance, stating section 7030.40 of the Commission's rules provided for arbitrator discretion in the event a party failed or refused to complete and sign a request for hearing. On review, the Commission found no abuse of discretion by the arbitrator. We agree and find no error in the Commission's decision.

¶ 17 The record does not show, nor does employer argue, that it raised any objections to the form of claimant's motion or 19(b) petition on September 15, 2008, when his 19(b) petition was heard and the matter was set for hearing. Instead, employer waited until the date the hearing was to begin and refused to sign the request for hearing. In such instances, section

7030.40 clearly provides for arbitrator discretion to allow the case to be heard. We find no abuse of discretion in this case as employer was aware of the issues to be presented at arbitration. The record shows employer's representative attended claimant's medical appointments and, in particular, was aware that Dr. Tariq Iftikhar's recommended surgery and that claimant not work. Employer had paid claimant TTD benefits under the Act until after claimant was examined by Dr. Rhode in August 2008, at employer's request.

¶ 18 Employer points out that certain information would have been provided to it through a completed request for hearing, such as claimant's allegations concerning his average weekly wage, medical costs, TTD dates, and group benefits received by claimant. However, none of those issues represented a significant matter of contention between the parties. Also, employer ultimately stipulated to several of those factual matters after seeking a continuance of the hearing.

¶ 19 Employer further attacks claimant's 19(b) petition because it "was not accompanied by a physician's report or any other sufficient document or description as set forth in Commission Rule 7020.80(a)(1)(B)(ii)." However, that section provides only that the 19(b) petition "set forth *** a statement" that such information was "delivered to" employer. Claimant's 19(b) petition contained such a statement and it was unnecessary for him to attach further documentation to his petition. As discussed, he alleged Tippett was given a recent statement on July 1, 2008 that was signed by a medical provider and stated claimant was unable to return to work. The record supports the existence of such a statement as it shows claimant saw Dr. Iftikhar that same date. Dr. Iftikhar noted modified work duties were unavailable at claimant's job and ordered him to remain off work.

¶ 20 The record does not show the arbitrator abused his discretion in denying employer's request for a continuance and proceeding with a hearing. Similarly, the Commission committed no error in affirming the arbitrator's decision.

¶ 21 On appeal, employer next argues the arbitrator abused its discretion by excluding Dr. Rhode's August 2008 report because it was not disclosed to claimant within 48 hours prior to the arbitration hearing. It contends Tippett, its representative, mailed claimant a copy of the report well in advance of the arbitration hearing and a presumption exists that he received it.

¶ 22 The Act required that employer provide claimant or his attorney with a copy of Dr. Rhode's report "as soon as practicable but not later than 48 hours before the time the case is set for hearing." 820 ILCS 305/12 (West 2006). As a general rule, "correspondence is presumed to have been received when the correspondence has been placed in a properly addressed envelope with adequate postage affixed and deposited in the mail." *First National Bank of Antioch v. Guerra Construction Co., Inc.*, 153 Ill. App. 3d 662, 667, 505 N.E.2d 1373, 1376 (1987). However, "[t]he presumption is not conclusive and may be rebutted by evidence that the correspondence was not received by the addressee." *First National*, 153 Ill. App. 3d at 667, 505 N.E.2d at 1376. Additionally, "[e]videntiary rulings made during a workers' compensation proceeding will not be disturbed on review absent an abuse of discretion." *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 590, 834 N.E.2d 583, 590 (2005).

¶ 23 Here, the arbitrator sustained claimant's objection to employer's request to admit Dr. Rhode's August 2008 report due to untimely disclosure of the report. Employer argues Tippet mailed claimant a copy of the report on August 25, 2008, well in advance of the September 30 hearing. However, claimant denied that he or Capron, his attorney, received the report.

Additionally, he presented emails between the parties' attorneys that showed Capron informed employer's attorney that he had not received Dr. Rhode's report. Specifically, on September 22, 2008, Capron sent an email to employer's attorney stating as follows:

> "This case is a hot potato. *Your adjuster cut TTD on the basis of an IME with Dr. Rhode (which she never bothered to send to us!) in early August.* The Treating MD has dx'd patellar malalignment, consistent with the work accident, and prescribed arthroscopic surgery for a likely lateral release. So...we have both a TTD and a medical problem. I motioned this case up as a 19(b) before Dollison in Joliet and we are set for 9-30-08. I think your adjuster should reinstate TTD and authorize surgery." (Emphasis added.)

On September 25, 2008, Capron sent the following additional correspondence to employer's attorney:

> "Bob: I will be out of the office ***, so I need to hear from you on [claimant's case], which is set for a 19(b) hearing in Joliet on Tuesday. As I told you earlier, I have not yet received your substitution of attorney on this one, so that should probably be the first order of business. *Secondly, your adjuster cut TTD based on an IME which she has refused to share with me.* The treating MD has prescribed knee surgery and instructed [claimant] to remain off work. Unless your adjuster relents, I'm planning on proceeding on Tuesday. Let me know." (Emphasis added.)

¶ 24 The Commission affirmed the arbitrator's rejection of Dr. Rhode's report, finding that employer's attorney had the responsibility to resend the report once it learned that Capron claimed he had not received it. We agree. Although employer maintains it mailed Dr. Rhode's report to claimant's attorney in August 2008, on two occasions in September 2008, Capron informed employer's attorney that the report had never been received. Such evidence was sufficient to rebut the presumption that correspondence has been received when it was properly addressed, affixed with adequate postage, and deposited in the mail.

¶ 25 Employer maintains that Capron never stated in his emails that he had not received the report. It argues that he "indicate[d] only that temporary benefits had been terminated before he had seen the report." We disagree and find the arbitrator and Commission correctly interpreted the evidence presented.

¶ 26 The arbitrator did not abuse its discretion by excluding Dr. Rhode's August 2008 report. Further, the Commission committed no error by affirming the arbitrator's decision.

¶ 27 Finally, on appeal, employer argues the Commission's awards of TTD benefits after June 17, 2008, and prospective medical treatment in the form of knee surgery were against the manifest weight of the evidence. It complains that claimant failed to follow through with Dr. Anuj Puppala's recommendations on June 17, 2008, that he have a cortisone injection and attempt his regular work duties.

¶ 28 "An employee is temporarily totally disabled from the time that an injury incapacitates her from work until such time as she is as far recovered or restored as the permanent character of her injury will permit." *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 471, 949 N.E.2d 1158, 1166 (2011). However, an

injured employee is no longer eligible for TTD benefits once his physical condition stabilizes or he reaches maximum medical improvement. *Absolute Cleaning*, 409 Ill. App. 3d at 471, 949 N.E.2d at 1166. "The determination of the period of time during which a claimant is temporarily and totally disabled is a question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Absolute Cleaning*, 409 Ill. App. 3d at 471, 949 N.E.2d at 1166.

¶ 29 Here, the arbitrator initially, awarded claimant 30 weeks' TTD benefits from March 5, 2008, the day after his work accident, until September 30, 2008, the date of the arbitration hearing. The Commission modified that decision and awarded claimant 29-1/7 weeks' TTD benefits from March 5, 2008, through June 24, 2008, and July 1, 2008, through September 30, 2008. It appears from the Commission's decision that it intended to have benefits stop after Dr. Puppala recommended claimant attempt regular-duty work and then resume upon Dr. Iftikhar's imposition of work restrictions. However, the Commission misidentified the date of claimant's visit to Dr. Puppala as June 24, 2008, when the record, in fact, reflects claimant saw Dr. Puppala on June 17, 2008. However, aside from this misidentification, the Commission's TTD award is supported by the record.

¶ 30 Claimant sustained an undisputed work-related accident in March 2008 that caused injuries to his left knee. He suffered from no preexisting condition. Following his accident, he immediately and continuously sought medical care, experienced pain in his left knee, and received various work restrictions from his medical providers. On May 9, 2008, claimant was examined by Dr. Rhode at employer's request. Dr. Rhode found claimant, at that time, was capable of only a sedentary-duty work. He opined claimant had not yet reached

maximum medical improvement. On May 15, 2008, Dr. Puppala also opined claimant could perform only sedentary-duty work. Claimant testified employer had no such work available and, as the Commission pointed out, his testimony was unrebutted.

¶ 31 On June 17, 2008, Dr. Puppala recommended continued physical therapy. Although he also recommended claimant return to regular-duty work to see what he was capable of doing, he twice predicted that claimant would not be able to perform such work. Claimant did not return to work, stating he felt it was unsafe. He reported that he had difficulty with stairs and would have to climb steps leading in and out of his work truck. On July 1, 2008, claimant saw Dr. Iftikhar and reported pain and swelling in his left knee. Upon exam, Dr. Iftikhar found obvious swelling of the left knee and noted claimant's condition had not improved with conservative treatment. He discussed surgery with claimant and ordered him off work, noting modified duties were unavailable at claimant's job.

¶ 32 As stated, this evidence supports the Commission's decision and it is not against the manifest weight of the evidence. We modify the Commission's award of TTD benefits to 28-1/7 weeks to correct its misidentification of the date Dr. Puppala recommended claimant attempt to return to work but otherwise affirm the Commission's TTD award.

¶ 33 Employer also challenges the Commission's award of prospective medical treatment in the form of left knee surgery. The Act entitles a claimant to receive benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a) (West 2006). "Prescribed services not yet performed or paid for are considered to have been 'incurred' within the meaning of the

statute." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 317, 901 N.E.2d 1066, 1082 (2009). Again, "[w]hether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence." *Absolute Cleaning*, 409 Ill. App. 3d at 470, 949 N.E.2d at 1165.

¶ 34 On July 1, 2008, Dr. Iftikhar discussed arthroscopic surgery with claimant. The Commission adopted the arbitrator's findings with respect to the award of compensation for this prospective medical treatment. Specifically, the arbitrator noted claimant underwent several courses of physical therapy that failed to relieve his symptoms. Further, he stated as follows:

> "Although [employer's] examining doctor disagreed with this approach at the time of the Section 12 exam on May 9, 2008, the July 1, 2008, chart note from Dr. Iftikhar reflects positive objective findings including obvious swelling of the left knee, medial joint tenderness and some increase in the 'Q-angle' of the knee joint. For this reason, the decision to proceed with surgery does not appear to have been arrived at frivolously. On balance, the Arbitrator finds the opinion of Dr. Iftikhar to be more credible than that of Dr. Rhode on the issue of whether or not arthroscopic surgery is warranted. Furthermore, the Arbitrator notes [claimant's] first visit to Dr. Puppala on April 17, 2008, wherein the doctor noted then that [claimant] might be a candidate for lateral release if the symptoms were not improved through physical therapy."

¶ 35 The record supports the Commission's findings. It was within the province of the Commission to weigh the medical evidence presented and its decision to rely on Dr. Iftikhar's opinions over those of Dr. Rhode was not against the manifest weight of the evidence.

¶ 36 For the reasons stated, the we affirm the circuit court's judgment, confirming the Commission's decision as modified by this court.

¶ 37 Affirmed as modified.