2012 IL App (4th) 110355WC-U

NO. 4-11-0355WC

Workers' Compensation
Commission Division
Filed: April 17, 2012

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

INSIGHT COMMUNICATIONS, INC.,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Appellant,	)	MACON COUNTY
	)	
v.	)	No. 10 MR 0393
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, et al.,	)	
(KIMBERLY D. LOWE,	)	HONORABLE
	)	A.G. WEBBER,
Appellee).	)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment.

O R D E R

HELD: The Commission's imposition of penalties under sections 19(k) and 19(l) of the Workers' Compensation Act (Act) (820 ILCS 305/19(k), 19(l) (West 2004)z0 and award of attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2004)) is against the manifest weight of the evidence.

¶ 1 Insight Communications, Inc, (Insight) appeals from an order of the Circuit Court of

Macon County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Kimberly D. Lowe, penalties under sections 19(k) and 19(l) of the Workers' Compensation Act (Act) (820 ILCS 305/19(k), 19(l) (West 2004) and attorney fees under section 16 of the Act. For the reasons which follow, we reverse that portion of the circuit court's order that confirmed the Commission's award of penalties under sections 19(k) and 19(l) of the Act (Act) and attorney fees under section 16, and we remand the matter back to the Commission for further proceedings.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on September 25, 2006.

¶ 3 The claimant testified that, in July 2005, she was employed by Insight as a cable installer, and her responsibilities included driving a company work van and using various tools, including an extension ladder weighing between 75 and 85 pounds. On July 21, 2005, she disconnected the service of a customer and then replaced the extension ladder on top of the van by lifting the ladder to shoulder height and twisting to the left. As she did so, she felt as though she had pulled a muscle in her lower back. The claimant finished her shift and also worked the next two days, but she noticed that the pain in her lower back was becoming worse. On July 24, 2005, she sought treatment at the emergency room at St. Mary's Hospital. Upon being diagnosed with an acute lumbar muscle strain, she was prescribed an MRI and pain medication and was advised to refrain from work for two days and to follow up with her family physician.

¶ 4 An MRI of the claimant's lumbar spine, performed on July 25, 2005, showed a central disc protrusion at L5-S1 without neural encroachment, an annular tear at the posterior left lateral aspect of the L4-L5 intervertebral disc, and a mild posterior disc bulge at L3-L4. In addition, the MRI showed that the claimant had multilevel degenerative disc disease.

¶ 5 On July 28, 2005, the claimant sought treatment from her family physician, Dr. Stephen Goetter, who diagnosed degenerative arthritis of the low back. Dr. Goetter took her off work and

recommended that she undergo a course of physical therapy. In accordance with to Dr. Goetter's recommendation, the claimant underwent physical therapy through August 29, 2005, but she did not experience any improvement in the condition of her lower back.

¶ 6 At the request of Insight, the claimant was evaluated by Dr. David Fletcher on September 6, 2005. Dr. Fletcher noted that he previously had treated the claimant in 2000 and 2001 in connection with a prior workers' compensation claim for a lower-back injury. Upon examining the claimant, Dr. Fletcher found that the claimant did not have any neurological complaints, and he diagnosed a lumbar strain that was superimposed on preexisting degenerative changes at L5-S1. After comparing the MRI films taken on July 25, 2005, with those taken in 2000 and 2001, Dr. Fletcher determined that there were no structural changes in the claimant's lumbar spine. Based on her age, subjective complaints, and the lack of any neurological symptoms or a "significant annular tear," Dr. Fletcher concluded that the claimant was not a candidate for surgical intervention. In addition, he did not believe that she would have any permanent loss from the July 2005 injury, which he thought was a temporary aggravation of her preexisting condition. The claimant's responses to a Mensana pain questionnaire indicated that she could have been exaggerating the level of her pain, but Dr. Fletcher did not have any other evidence of exaggeration. He recommended that the claimant undergo a functional capacity evaluation (FCE) and that she participate in physical therapy and work hardening. Though Dr. Fletcher did not think that the claimant was capable of performing her normal duties as a cable installer, he did believe that she could have returned to work with certain temporary restrictions on her physical activities.

¶ 7 An FCE conducted on September 27, 2005, indicated that the claimant demonstrated a consistent, maximum effort and that she was not able to return to her regular job duties due to poor overall strength and an inability to perform forward bending or lifting tasks without a sharp increase in low-back pain.

¶ 8 Pursuant to Dr. Fletcher's recommendation, the claimant participated in a course of work hardening during October and November 2005. At that time, she described her pain as a burning, stabbing pain of constant duration, which began to radiate into the right hip. The records of her participation indicated that the claimant gave good effort through all the work-hardening exercises. A second FCE conducted on November 7, 2005, indicated that the claimant's functional level had not improved since the previous test six weeks earlier, and Dr. Fletcher recommended that she undergo an additional two weeks of work hardening.

¶ 9 While the claimant was participating in the work-hardening program, she was referred by Dr. Goetter to Dr. Yvette Ross Hebron of the Decatur Memorial Hospital Medicine and Rehabilitation Center. Upon examination, Dr. Hebron noted that the claimant had pain in her lumbar spine and mild dysfunction of the right sacroiliac joint. Dr. Hebron took the claimant off work, prescribed additional pain medications, and referred her to Dr. Gregory Gordon for epidural steroid injections.

¶ 10 Dr. Gordon administered a sacroiliac joint injection on November 1, 2005, and three successive L5-S1 facet injections on November 7, 15, and 22, 2005, but these injections did not alleviate the claimant's pain.

¶ 11 The claimant returned to Dr. Fletcher on November 8, 2005, and she reported that she had experienced some improvement and was gaining strength and endurance through the work-conditioning program. When she next saw Dr. Fletcher on November 29, 2005, he noted that there was not much change in her condition, and he determined that she was temporarily and totally disabled from work.

¶ 12 Dr. Goetter released the claimant to return to work as of December 2, 2005. In addition, he noted that the claimant was also following the care of Dr. Fletcher, who had ordered her off work for two weeks, and that "[f]urther work info may come from Dr. Fletcher."

¶ 13 The claimant underwent a third FCE examination on December 9, 2005, which indicated

that she was at the same functional level as that indicated by the two prior tests. In addition, the examination report reflected that she exhibited certain excessive pain behaviors, such as rubbing her back, grimacing, and groaning.

¶ 14 The claimant returned to Dr. Fletcher on December 27, 2006, and reported that she continued to experience pain with right-side weight bearing. Dr. Fletcher noted, however, that she was neurologically intact and that her physical examination was completely normal. He also noted that there was no discernable, objective basis for the claimant's continued complaints, which he concluded were subjective in nature. Upon determining that the claimant had reached maximum medical improvement (MMI), Dr. Fletcher released her to return to work with no restrictions, and he issued a report of his findings. Based on Dr. Fletcher's report, Insight terminated the claimant's temporary total disability (TTD) and medical benefits under the Act as of December 27, 2005.

¶ 15 Pursuant to a referral by Dr. Hebron, the claimant subsequently began treating with Dr. Ramsin Benyamin. Dr. Benyamin reviewed the claimant's MRI films from April 2000, which showed mild degenerative changes at L4-L5 and L5-S1 and facet arthritis. He also reviewed the MRI taken on July 25, 2005, which revealed an annular tear at L4-L5 and a disc protrusion at L5-S1. On December 20, 2005, Dr. Benyamin administered a sacroiliac joint injection, but he had great difficulty in placing the needle in the joint and could not be certain that he had properly completed the procedure. In January 2006, he ordered another MRI, which showed an annular tear at L5-S1 and a small disc herniation, and administered a second sacroiliac joint injection. Because neither of the sacroiliac injections provided the claimant with any relief, Dr. Benyamin concluded that the sacroiliac joint was not the source of the claimant's pain.

¶ 16 Dr. Benyamin took the claimant off work on February 22, 2006, and subsequently performed a discography to identify the source of her pain. He tested three levels and found a concordant pain response at the L5-S1 level, with the L3-L4 and L4-L5 levels acting as controls.

The CT findings were consistent with significant degeneration at L5-S1, disc herniation, and central and right annular tears at L5-S1. Based on the discogram, Dr. Benyamin diagnosed the claimant as having discogenic pain at L5-S1 as a result of annular tears at that level. He recommended that the claimant undergo an intradiscal electrothermal therapy (IDET) procedure, in which a catheter is inserted into the disc and heated, causing the disc material to harden and coagulate the proteins and seal off the cracks and tears.

¶ 17 Dr. Benyamin testified that the IDET procedure had a 60% success rate. He acknowledged that lumbar-fusion surgery was another treatment option available to the claimant, but he did not feel that this procedure had produced good, long-term results. In addition, he stated that fusion surgery remained a possible treatment option, in the event that the IDET failed to relieve the claimant's pain. Dr. Benyamin did not agree that a back brace could help determine whether fusion surgery would be beneficial because the evidence regarding the use of a back braces to predict the possible benefits of a fusion was anecdotal and not backed by scientific studies.

¶ 18 The claimant was last seen by Dr. Fletcher on May 12, 2006. At that time, she still had subjective complaints, but no neurological deficit, and she was being considered for an IDET procedure.

¶ 19 At his evidence deposition, Dr. Fletcher expressed his expert medical opinion that the claimant's acute employment injury had resolved as of December 2005, but that she still could be symptomatic as a result of her preexisting degenerative changes. Dr. Fletcher acknowledged that annular tears can be a source of pain and that the 2005 and 2006 MRI films showed that the claimant had an annular tear, a disc protrusion at L5-S1, and a disc bulge at L3-L4. However, Dr. Fletcher opined that the earlier films indicated the claimant had an annular tear in 2000 and 2001, even though the radiological reports of those films did not mention the existence of an annular tear or a disc protrusion. Dr. Fletcher explained that the claimant's annular tear might not

have been noted in 2000 and 2001 because that term was not commonly used until 2002 or 2003, and radiologists did not begin to focus on and look for annular tears until that time. He further explained that the frequency with which annular tears are currently noted is a consequence of the way medicine has evolved and what therapy is available.

¶ 20 Dr. Fletcher also expressed his opinion that the IDET procedure recommended by Dr. Benyamin is "a very controversial therapeutic modality" that "does not work," and the use of a discogram to determine the source of pain is controversial because it requires a subjective interpretation by the patient. In addition, he stated that Dr. Gordon had taken a "shotgun" approach but had not identified the source of the claimant's pain. According to Dr. Fletcher, a person who has significant pain due to an annular tear would be better served with a lumbar fusion procedure. Dr. Fletcher also testified that he would recommend that the claimant first use a "turtle customized" (TLSO) brace, which simulates what fusion surgery would do. He also would recommend that she undergo some psychological testing to verify that she is a good candidate for surgical intervention.

¶ 21 The claimant testified that her employment with Insight was terminated on December 23, 2005, because she had missed too much time from work. She further testified that, as of the date of the hearing, her back remained "very painful" and that she continued to experience "a lot of pain" with any kind of weight-bearing activity, the application of pressure, and sitting for longer than 30 to 45 minutes. In addition, she stated that the pain is constant and prevents her from sleeping and from engaging in most normal, everyday activities.

¶ 22 Upon consideration of the evidence, the arbitrator found that the claimant sustained a work-related injury on July 21, 2005, and that the current condition of ill-being in her lower back was causally connected to that employment injury. The arbitrator determined that the claimant was entitled to TTD benefits for 59 weeks from July 24, 2005, through the date of the hearing on September 25, 2006. The arbitrator also determined that the claimant was entitled to recover

$31,765.84 for reasonable and necessary medical expenses related to that injury, as well as the cost of the IDET procedure recommended by Dr. Benyamin. In addition, the arbitrator ordered that Insight pay $20,533.11 in penalties under section 19(k) of the Act, $2,250 in penalties under section 19(l) of the Act, and $8,213.24 in attorney fees under section 16 of the Act.

¶ 23 Insight sought review of the arbitrator's decision before the Commission. On review, the Commission adopted and affirmed the arbitrator's decision and remanded the cause for further proceedings pursuant to Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 24 Insight sought judicial review of the Commission's decision in the circuit court of Macon County, and the circuit court vacated the Commission's decision and remanded the cause to the Commission for reconsideration of the imposition of penalties and attorney fees. In so doing, the circuit court stated that "to support such an award [of penalties and attorney fees], the conduct sought to be sanctioned must be of a flagrant, deplorable, and preposterous nature, and not simply unreasonable."

¶ 25 The Commission thereafter remanded the matter to the arbitrator for further proceedings consistent with the circuit court's decision. On remand, the arbitrator found that Insight's termination of TTD and medical expenses was "unreasonable or vexatious" and was "without good and just cause." The arbitrator again awarded penalties and attorney fees under sections 19(k), 19(l), and 16 of the Act.

¶ 26 Insight requested review before the Commission, and the Commission adopted and affirmed the arbitrator's decision on remand.

¶ 27 Insight again sought judicial review of the Commission's decision in the circuit court of Macon County. The circuit court confirmed the Commission's decision on remand, and this appeal followed

¶ 28 On appeal, Insight challenges the Commission's imposition of penalties and attorney fees under the Act. The question of whether to award penalties and fees presents a factual question,

and the findings of the Commission will not be disturbed unless they are against the manifest weight of the evidence. McKay Plating Co. v. Industrial Comm'n, 91 Ill. 2d 198, 209, 437 N.E.2d 617 (1982); Global Products v. Workers' Compensation Comm'n, 392 Ill. App. 3d 408, 413-14, 911 N.E.2d 1042 (2009). A factual finding is against the manifest weight of the evidence when an opposite conclusion is clearly apparent. Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, ¶ 21; University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006).

¶ 29 Penalties may be imposed under section 19(l) where the employer or its insurance carrier fails, neglects, or refuses to make payment or unreasonably delays payment without good and just cause. 820 ILCS 305/19(l) (West 2004); McMahan v. Industrial Comm'n, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998). A section 19(l) award is in the nature of a late fee. McMahan, 183 Ill. 2d at 515. Thus, if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of additional compensation is mandatory. McMahan, 183 Ill. 2d at 515.

¶ 30 Generally, penalties and fees are not warranted when the employer acts in reliance upon a reasonable medical opinion or when there are conflicting medical opinions. Global Products, 392 Ill. App. 3d at 414; USF Holland, Inc. v. Industrial Comm'n, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810 (2005); Matlock v. Industrial Comm'n, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751 (2001). In such a circumstance, the relevant question is " 'whether the employer's reliance was objectively reasonable under the circumstances.' " Global Products, 392 Ill. App. 3d at 414 (quoting Electro–Motive Division v. Industrial Comm'n, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145 (1993)); see also McMahan, 183 Ill. 2d at 515. The employer bears the burden of establishing that it had a reasonable belief that the delay in payment was justified. Global Products, 392 Ill. App. 3d at 414; Zitzka v. Industrial Comm'n, 328 Ill. App. 3d 844, 848, 767 N.E.2d 405 (2002).

¶ 31 Section 19(k) provides that penalties may be imposed where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or where the party who is liable to pay the compensation has instituted or pursued proceedings that do not present a real controversy, but are merely frivolous or intended to delay. 820 ILCS 305/19(k) (West 2004). Imposition of penalties under section 19(k) is discretionary and is intended to address situations where the delay in payment is deliberate or the result of bad faith or an improper purpose. McMahan, 183 Ill. 2d at 515. Section 16 similarly authorizes an award of attorney fees where the employer has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy within the purview of section 19(k). 820 ILCS 305/16 (West 2004). The imposition of section 19(k) penalties and section 16 attorney fees requires a higher standard of proof than an award of additional compensation under section 19(l). McMahan, 183 Ill. 2d at 514.

¶ 32 Here, Insight argues that its termination of benefits in December 2005 was justified because it was based on the medical opinions of Dr. Fletcher and of Dr. Goetter. The claimant opposes this argument by asserting that Insight's reliance on Dr. Fletcher's opinion was not reasonable because his deposition testimony revealed that his opinion was not supported by objective medical tests. In resolving this issue, we note that the critical determination is whether it was reasonable for Insight to rely on the information and opinion provided by Dr. Fletcher as of December 27, 2005.

¶ 33 The record demonstrates that Dr. Fletcher's professional medical opinion was premised on his physical examination of the claimant in September 2005, as well as his review of her FCE test results and of her MRI films. Dr. Fletcher found that the claimant did not have any neurological deficits, and he diagnosed a lumbar strain that was superimposed on preexisting degenerative changes at L5-S1. After comparing the MRI films taken in 2000, 2001, and 2005,

he concluded that there were no structural changes in the claimant's lumbar spine as a result of her employment accident. This conclusion was predicated on his review of the 2000 and 2001 MRI films, which he interpreted as showing the existence of an annular tear, despite the fact that an annular tear was not mentioned in the radiological reports of those films. Dr. Fletcher explained that the presence of the annular tear might not have been noted in the 2000 and 2001 reports because that term was not commonly used until 2002 or 2003, and radiologists did not begin to focus on and look for this condition until that time. He further explained that the frequency with which annular tears have been noted in recent years is a consequence of the way medicine has evolved and what therapy is available. According to Dr. Fletcher, the claimant did not have a "significant annular tear," and her condition of ill-being was a temporary aggravation of her preexisting degenerative condition. He also noted that the claimant's responses to a Mensana pain questionnaire indicated that she could have been exaggerating the level of her pain and that, though the December 9, 2005, FCE indicated that the claimant's condition had not improved, the report of that test also indicated that she exhibited certain excessive pain behaviors. On December 27, 2005, Dr. Fletcher observed that the claimant's physical examination was completely normal; she was neurologically intact and there was no discernable, objective basis for her continued complaints, which were subjective in nature. Dr. Fletcher determined that the claimant had reached MMI, and he released her to return to work with no restrictions. He testified that, in his expert medical opinion, the claimant's work injury had resolved as of December 2005, but that she still could have been experiencing symptoms as a result of her preexisting degenerative changes.

¶ 34 Upon careful consideration of the record presented at the arbitration hearing, we find that Dr. Fletcher's medical opinion that the claimant was able to return to work without restrictions as of December 27, 2005, was sufficiently compelling to warrant Insight's reliance, even if it did not ultimately persuade the Commission. Moreover, that opinion was corroborated by the opinion of

Dr. Goetter, one of the claimant's treating physicians, who reached the same conclusion on December 2, 2005. Contrary to the claimant's assertion, the mere fact that the questioning of Dr. Fletcher at his deposition pointed out possible deficiencies with regard to the validity of his opinion does not justify imposition of penalties and attorney fees. We note that, even in the face of such interrogation, Dr. Fletcher maintained his original opinion that the claimant had reached MMI in December 2005, and he explained the medical basis for that opinion. Based on the record presented, we find that Insight could rely upon the opinion of Dr. Fletcher and that no reasonable person could conclude that Insight was not entitled to do so. Accordingly, the Commission's finding that the claimant is entitled to penalties under section 19(l) is against the manifest weight of the evidence, and we reverse its decision in this respect.

¶ 35 In light of our determination that the lower standard of proof required to impose penalties under section 19(l) was not satisfied in this case, we necessarily conclude that the imposition of section 19(k) penalties and section 16 attorney fees is against the manifest weight of the evidence. Consequently, we reverse that portion of the judgment of the circuit court, which confirmed the Commission's imposition of penalties and attorney fees, reverse the Commission's award of penalties under sections 19(k) and 19(l) and its award of attorney fees under section 16 of the Act, affirm the decision of the circuit court in all other respects, and remand the cause for further proceedings, if any, pursuant to Thomas, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 36 Affirmed in part, reversed in part and remanded.