

No. 1-13-0431WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KOCH FOODS,)	Appeal from the Circuit Court
)	of Cook County.
)	
Appellee,)	
)	
v.)	No. 12 L 050784
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	Honorable
)	Margaret Ann Brennan,
(Miguel Serrano, Appellant).)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The portion of the Illinois Workers' Compensation Commission's decision which awarded the claimant prospective and unpaid medical expenses was reinstated; the portion of the Commission's decision which denied imposition of section 19(l) penalties (820 ILCS 305/19(l) (West 2008)) was reversed as such penalties were mandatory in light of the Commission's findings under sections 16 and 19(K) (820 ILCS 305/16, 19(k) (West 2008)); all other aspects of the Commission's decision were confirmed.

¶ 2 After sustaining a right shoulder injury while in the employ of Koch Foods (Koch), the claimant, Miguel Serrano, sought benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). The claimant now appeals the circuit court order which set aside that portion of the decision of the Illinois Workers' Compensation Commission (Commission) awarding him prospective and unpaid medical benefits under sections 8(a) and 8.2 of the Act (820 ILCS 305/8(a), 8.2 (West 2008)) and which confirmed the Commission's decision denying him penalties under section 19(l) of the Act (820 ILCS 305/19(l) (West 2008)). For the following reasons, we: reverse that portion of the circuit court's judgment which set aside the Commission's decision regarding prospective and unpaid medical expenses and which confirmed the Commission's decision denying the claimant section 19(l) penalties; affirm all other aspects of the circuit court's judgment; reinstate that portion of the Commission's decision regarding prospective and unpaid medical expenses and fees and penalties; reverse the Commission's decision denying the claimant section 19(l) penalties; and remand the matter for a determination of the amount of those penalties.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on August 25, 2010.

¶ 4 The claimant, age 20 at the time of the hearing, testified that he was employed by Koch as a crater in its chicken processing plant. His duties included shoveling chicken parts into crates and stacking the crates on pallets. The claimant explained that each shovel-full of chickens weighed about 10 to 25 pounds and that he shoveled the parts into crates; each crate weighed anywhere from 20 to 140 pounds when full. He then had to stack the crates on top of each other,

until about six feet high, on pallets. The claimant testified that, on January 12, 2009, he was swinging a heavy crate onto a pallet when he "felt a pop in [his right] shoulder and [he felt] a sharp pain." Within five minutes, his supervisor noticed that he was not performing his job as usual and sent him to human resources.

¶ 5 The claimant was immediately referred to Dr. T. S. Wright at the Occupational Medicine and Family Practice office in Chicago. That same day, Dr. Wright examined the claimant and ordered x-rays of his right shoulder, which were "negative for gross fracture." Dr. Wright diagnosed the claimant with a strain/sprain to the right anterior shoulder and a rotator cuff injury. He ordered that the claimant not use his right arm or hand at work, use medication as directed, and wear a sling for two to three weeks. Dr. Wright also ordered an MRI of the right shoulder and physical therapy for the claimant.

¶ 6 On January 14, 2009, the claimant saw Dr. Wright and told him that the pain in his shoulder had not subsided and that he also felt a "pulling on [the] muscles" in his neck. Dr. Wright ordered that the claimant work only on a light-duty basis.

¶ 7 The January 16, 2009, MRI showed that the claimant's rotator cuff appeared intact and showed "mild rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon."

¶ 8 Upon Dr. Wright's referral, the claimant underwent physical therapy treatment at Mayfair Physical Therapy from January 15, 2009, through February 6, 2009. Because the physical therapy was not relieving his symptoms, the claimant sought chiropractic and physical therapy treatment from Marque Medicos for his shoulder and neck pain.

¶ 9 On February 7, 2009, the claimant was first treated at Marque Medicos by Dr. Ryan Fuelleman, and x-rays were taken. Dr. Fuelleman noted that the x-rays were being sent to a radiologist for review and he recommended a course of chiropractic adjustments, ultrasound therapy, and physical therapy. The February 7, 2009, x-ray report indicated that there was no evidence of any fracture.

¶ 10 While treating at Marque Medicos, the claimant was ordered not to work from February 8, 2009, through February 15, 2009. He was then released to work on a light-duty basis, which he did so beginning on February 16, 2009.

¶ 11 On March 9, 2009, at the request of Koch, the claimant was examined by Dr. William Heller, an orthopedic surgeon. Dr. Heller testified that he reviewed the claimant's medical records, including his records from Dr. Fuelleman, Dr. Wright, and his MRI exam dated January 16, 2009. Based on the records and his physical exam of the claimant, he opined that the claimant had a mild right shoulder strain. He recommended an additional course of physical therapy for four weeks, three sessions per week. After that, he believed the claimant would be able to return to work without restrictions. Dr. Heller further testified that the claimant did not require further diagnostic exams or surgical intervention to treat his condition.

¶ 12 The claimant testified that the treatment he received from Marque Medicos relieved his neck symptoms. However, his shoulder pain persisted, and the chiropractors at Marque Medicos referred him to Dr. Ellis Nam, an orthopedic surgeon at Chicago Orthopedic and Sports Medicine. The claimant admitted that he never provided Dr. Nam with the x-rays ordered by Dr.

Wright. However, he stated that he brought Dr. Nam the Marque Medicos x-rays at the time of his first appointment on March 16, 2009.

¶ 13 On March 16, 2009, Dr. Nam stated that he thought the claimant had a right shoulder acromioclavicular (AC) joint separation and a cervical strain. He did not have the MRI films to review and requested that those films be sent to him. Dr. Nam advised the claimant to remain on light-duty work, continue with physical therapy, and return for follow-up in three to four weeks. Upon examination, Dr. Nam noted that the claimant's right shoulder demonstrated a prominence along the right AC joint, which was tender to palpation, and that he had a limited range-of-motion in the shoulder. He also reviewed the x-rays of the claimant's right shoulder and observed an "abnormal appearance of the distal clavicle superior migration," which he rated as a "grade II to III separation." Dr. Nam's testimony was consistent with his notes regarding his opinion that the claimant had an AC joint separation.

¶ 14 On April 20, 2009, Dr. Nam noted that he reviewed the MRI films dated January 16, 2009, and informed the claimant that he may need a distal clavicle resection. However, Dr. Nam recommended that the claimant continue with physical therapy in an attempt to avoid surgery.

¶ 15 On May 8, 2009, Dr. Heller, at the request of Koch, examined the claimant a second time. Dr. Heller testified that he reviewed additional medical records from Dr. Nam and Marque Medicos and performed a physical examination of the claimant, which showed that he had normal range-of-motion in the shoulder, adequate overhead strength, and normal rotator cuff function. His diagnosis was unchanged from his original diagnosis of a mild right shoulder strain. Dr. Heller testified that he did not recommend any additional treatment for the claimant

and that he saw no evidence of any impingement or separation in the shoulder joint. He stated that, in his opinion, the claimant had reached maximum medical improvement (MMI) as of May 8, 2009, and that he could return to work without any restrictions.

¶ 16 On cross-examination, Dr. Heller admitted that the claimant's MRI showed inflammation of the tendon, which was an abnormal finding in a person of the claimant's young age. He explained inflammation of the tendon was consistent with his diagnosis of a right shoulder strain. However, the MRI was not consistent with an AC joint separation because the MRI report indicated the AC joint was intact.

¶ 17 The claimant testified that, on May 11, 2009, Koch informed him that it did not have any more light-duty work available for him. Therefore, between May 12 and July 12, 2009, the claimant applied for other light-duty jobs, but he testified that he was unable to find work that fit within his restrictions.

¶ 18 On May 11 and June 1, 2009, Dr. Nam advised the claimant to continue with physical therapy and told him that he might consider cortisone injections if his symptoms persisted.

¶ 19 On July 13, 2009, the claimant saw Dr. Nam, reporting persistent shoulder pain. Dr. Nam ordered another x-ray of his shoulder, which indicated that there may be a "small bony ossicle fragment in the AC joint," indicative of a type II or type III AC joint separation or a ligamentous injury. He advised the claimant that he could try cortisone injections, additional physical therapy, and pain medications to avoid surgery. The claimant stated that he wanted to proceed with surgical intervention. Dr. Nam testified that, in his opinion, a distal clavicle

resection with a subacromial decompression was a reasonable and necessary medical procedure for the claimant's condition.

¶ 20 On follow-up visits from August 2009 through June 2010, Dr. Nam stated that the recommended right shoulder arthroscopic surgery, including subacromial decompression and distal clavicle resection, was a reasonable and necessary course of action given the claimant's ongoing pain. He stated that the claimant wanted to proceed with the surgery, but he was waiting for authorization. The claimant continued with his physical therapy sessions.

¶ 21 On cross-examination, Dr. Nam admitted that he did not review any medical records from Dr. Wright, Marque Medicos, or Mayfair Physical Therapy. However, upon redirect, Dr. Nam clarified that he did review one set of the claimant's prior x-rays and his prior MRI films. He admitted that the MRI report did not indicate any bony fragment or ligamentous injury, but he stated that he rarely relied on a radiologist's interpretation and that the MRI may have been of poor quality.

¶ 22 The claimant testified that, on October 16, 2009, he found employment as a valet attendant at Ameristar Casino. Before accepting the position, the claimant obtained approval from Dr. Nam.

¶ 23 The claimant denied having any shoulder complaints before his January 12, 2009, workplace accident. He testified that his current condition prevents him from playing sports and engaging in other physical activities that he used to perform.

¶ 24 The claimant submitted a schedule of unpaid medical bills which outlined the following dates of service, providers, and fees: Dr. T.S. Wright, January 15 and 22, 2009, \$340.22; Marque

Medicos, February 7, 2009, through February 18, 2010, \$58,009.79; Chicago Orthopedics and Sports Medicine, March 16, 2009, through December 7, 2009, February 15, 2010, \$535.24; and Medicos Pain and Surgical Specialists, February 15, 2010, \$304.00. The total of all unpaid bills submitted by the claimant was \$59,189.23. The record contains the claimant's written demands for the payment of medical expenses, including letters dated October 19, 2009, and July 8, 2010.

¶ 25 On July 28, 2009, the claimant filed his petition for penalties and attorney fees, stating that Koch had refused to pay temporary total disability (TTD) benefits and medical expenses and that its refusal was in bad faith, arbitrary, and vexatious.

¶ 26 Following the hearing, on September 17, 2010, the arbitrator ordered that Koch pay the claimant TTD benefits pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2008)) for the weeks of February 8, 2009, through February 15, 2009, and May 12, 2009, through October 15, 2009, and various unpaid medical bills pursuant to sections 8(a) and 8.2 of the Act. The arbitrator determined that the medical opinions of Dr. Nam and Dr. Heller were conflicting and neither was based on a totality of the credible medical evidence. Specifically, the arbitrator noted that Dr. Heller did not review the July 13, 2009, x-ray and Dr. Nam's interpretation of the MRI was inconsistent with that of the radiologist's findings. However, both doctors opined that they thought three to four months of physical therapy was reasonable. Therefore, the arbitrator found that the medical bills for physical therapy treatment and chiropractic care and medical treatment which the claimant received through May 8, 2009, were reasonable and necessary; additionally, the August 10, 2009, follow-up appointment with Dr. Nam was deemed a reasonable and necessary expense. However, the arbitrator denied the claimant's request for

prospective medical benefits; namely, the surgical procedure recommended by Dr. Nam, and she denied the claimant's demand for fees and penalties under sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2008)). The arbitrator noted that the claimant was only 20 years old and that she was "not going to subject this young [claimant] to a surgery which at this point has not been shown by the preponderance of credible evidence to be reasonable and necessary."

¶ 27 The claimant sought review before the Commission. On May 10, 2012, the Commission, with one commissioner dissenting, modified the arbitrator's decision and remanded the case to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). Specifically, the Commission reversed the arbitrator's denial of prospective medical benefits, modified the award of unpaid medical bills to include unpaid bills for services rendered after May 8, 2009, and reversed the denial of penalties and fees, finding that the claimant was entitled to section 19(k) penalties and section 16 fees. In its decision, the Commission also noted the claimant's young age, but stated that it was unwilling to subject "such a young person without any prior injuries or complaints to his right shoulder to a long life of unnecessary pain that clearly resulted from a work injury." The Commission found it relevant that the claimant had no prior complaints and a significant prominence in his right shoulder joint. It also found Dr. Nam's opinions credible.

¶ 28 In its decision awarding penalties and fees, the Commission determined that Koch's failure to pay for medical services rendered before Dr. Heller's May 8, 2009, report and TTD benefits for the week of February 8 through February 15, 2009, was unreasonable and vexatious

where there was no evidence upon which to base its denial of benefits. It calculated that there was \$8,620.42 in outstanding bills that were unreasonably and vexatiously denied by Koch. Therefore, the Commission ordered that Koch pay \$4,310.1 in section 19(k) penalties and \$1,724.08 in section 16 fees. The Commission declined to award section 19(l) penalties without further explanation.

¶ 29 Koch sought judicial review of the Commission's decision in the circuit court of Cook County. On February 1, 2013, the circuit court set aside the Commission's decision which awarded prospective medical benefits and additional unpaid medical bills and reinstated the arbitrator's award. The circuit court confirmed the Commission's decision regarding fees and penalties, but did not address the claimant's argument that he was entitled, as a matter of law, to section 19(l) penalties. In its decision, the circuit court stated that the Commission's decision was against the manifest weight of the evidence "[b]y relying so heavily on Dr. Nam's opinion despite its inconsistency with significant evidence to the contrary," including the opinions of Dr. Wright, Dr. Heller, and the claimant's x-ray and MRI exams which did not show any significant abnormality. The claimant now appeals.

¶ 30 The claimant first argues that the circuit court erred when it set aside the Commission's award of prospective medical benefits and outstanding medical bills for services incurred after May 8, 2009.

¶ 31 Section 8(a) of the Act entitles a claimant to compensation for all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. 820 ILCS 305/8(a) (West 2008). "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'*

Comp. Comm'n, 388 Ill. App. 3d 297, 317 (2009). The claimant has the burden of proving that the medical services were necessary and the expenses were reasonable. *F & B Mfg. Co. v. Indus. Comm'n of Illinois*, 325 Ill. App. 3d 527, 534 (2001). What is reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence. *Id.*

¶ 32 In this case, the Commission determined that the services incurred after May 8, 2009, which included numerous physical therapy and chiropractic treatments, and the surgery recommended by Dr. Nam, were reasonable and necessary medical services based on the evidence that the claimant had no prior shoulder symptoms, had not reported much improvement after months of therapeutic treatments, and had a palpable bony prominence in his shoulder. The Commission also noted that the claimant's July 13, 2009, x-ray showed a bony fragment in the AC joint and the MRI indicated there was inflammation in the shoulder's tendon. While Dr. Heller did not agree with Dr. Nam's opinions, it was within the Commission's discretion to place more weight on the opinions of Dr. Nam, who had been treating the claimant for several months, and on the claimant's testimony that months of physical therapy had not resolved his pain, than on the opinions of Dr. Heller. Based on the record, we cannot find that the Commission's determinations, that the prospective shoulder surgery and the medical services provided after May 8, 2009, were reasonable and necessary, are against the manifest weight of the evidence.

¶ 33 Next, the claimant contends that, based on the Commission's award of section 16 and 19(k) penalties and fees, he is entitled to section 19(l) penalties as a matter of law. We agree.

¶ 34 Section 19(l) of the Act provides:

"If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set

forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of \$30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed \$10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(l) (West 2012).

¶ 35 Penalties under section 19(l) are in the nature of a late fee. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC (2011), ¶ 20, 959 N.E.2d 772. The assessment of a penalty under section 19(l) is mandatory if the payment is late, and the employer or its insurer cannot show an adequate justification for the delay. *Id.* The standard for determining whether an employer has "good and just cause" for a delay in payment is defined in terms of reasonableness. *Id.* "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified." *Id.* The question of reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Id.*

¶ 36 Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. 820 ILCS 305/16 (West 2012). Section 19(k) of the Act provides:

"In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2012).

¶ 37 The standard for awarding penalties under section 19(k) and section 16 is higher than the standard for awarding penalties under section 19(l) because they require more than an "unreasonable delay" in payment of an award. *Jacobo v. Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 24. Rather, section 19(k) penalties and section 16 fees are intended to address situations where the delay is deliberate or the result of bad faith or improper purpose. *Id.* Additionally, while section 19(l) penalties are mandatory, the imposition of penalties under section 19(k) and fees under section 16 is discretionary. *Id.*

¶ 38 Koch admits that the claimant made written demands for payment of the outstanding medical bills, but it argues that the schedules which were attached to those letters were not made part of the record. Koch also contends that the claimant never made a written demand as required by section 19(l) for payment of the TTD benefits. See 820 ILCS 305/19(l) (West 2012). Therefore, Koch argues that we have no basis to reverse the Commission's decision denying imposition of section 19(l) penalties. The claimant argues that his July 28, 2009, petition for attorney fees and penalties sought payment of both TTD benefits and medical expenses, thereby satisfying the written demand requirement of section 19(l). He further contends that, where the Commission determined that Koch's failure to pay the claimant's medical providers and TTD met the higher vexatious standard under section 19(k), imposition of section 19(l) penalties was mandatory.

¶ 39 We agree with the claimant. Having determined that Koch's failure to pay was vexatious, or something more than "unreasonable," under section 19(k), the claimant certainly satisfied the less stringent requirement of section 19(l). The Commission correctly determined that Koch had no basis to deny benefits before Dr. Heller's May 8, 2009, report, and it correctly observed that it was undisputed that the claimant was temporarily disabled from February 8 through February 15, 2009. As stated, the assessment of a penalty under section 19(l) is mandatory if the payment is late, and the employer cannot show an adequate justification for the delay. Thus, the Commission's decision which failed to impose section 19(l) penalties for Koch's failure to pay TTD benefits and medical expenses incurred before May 8, 2009, is against the manifest weight of the evidence.

¶ 40 Based on the foregoing analysis, we reverse those portions of the judgment of the circuit court of Cook County, which set aside the decision of the Commission regarding prospective and unpaid medical expenses and confirmed the Commission's denial of section 19(l) penalties, and affirm all other aspects of the circuit court's judgment; we reinstate that portion of the Commission's decision regarding prospective and unpaid medical expenses and reverse that portion of the Commission's decision which denied section 19(l) penalties; and remand the cause to the Commission for imposition of the appropriate section 19(l) penalties and for further proceedings.

¶ 41 Circuit court judgment affirmed in part and reversed in part.

¶ 42 Commission award reinstated in part and reversed in part; cause remanded to the Commission.