In the Missouri Court of Appeals
Eastern District

DIVISION ONE

TERRY HORNBECK,	)	No. ED95680
	)	
Claimant/Appellant,	)	Appeal from the Labor and Industrial Relations Commission
	)	
vs.	)	
	)	
SPECTRA PAINTING, INC.,	)	
	)	
Employer/Respondent,	)	
	)	
and	)	
	)	
TREASURER OF THE STATE OF MISSOURI SECOND INJURY FUND,	)	
	)	
Respondent.	)	FILED: September 6, 2011

I. BACKGROUND

Terry Hornbeck ("Claimant") is a painter and drywall taper who, in 2006, was employed by Spectra Painting, Inc. ("Employer"). This case began as the result of an accident on a work assignment on November 9, 2006. Claimant, while working with another employee to paint a restaurant roof, unsuccessfully tried to reach the roof by scaling a ladder that had been placed atop a small scaffold. As he neared the roofline, the ladder and scaffolding collapsed and Claimant fell approximately ten feet to the concrete below. Claimant hit the ground feet first and then crumbled to his left side. Immediately thereafter, Claimant was taken by ambulance to the emergency room at St. Louis University Hospital complaining of pain in his feet, legs, back, and

left shoulder. The diagnostic imaging revealed no structural abnormalities and Claimant was released from the hospital later that afternoon.

In the coming months, Claimant visited with three different physicians provided by Employer. Unfortunately, each of those physicians was unable to diagnose a physical cause that correlated with the level of continued discomfort and pain expressed by Claimant. Consequently, Claimant was released from the care of Employer's physicians and cleared to return to work in April 2007. Yet, with continued complaints of pain, beginning in October 2007, Claimant utilized his own insurance and sought care from another group of physicians.

In January 2008, Claimant filed a motion for a hardship hearing pursuant to Section 287.202 RSMo Cum. Supp. 2005.[1] In the original hearing, Claimant sought: payment for unpaid medical expenses; additional temporary total disability ("TTD") benefits; attorney fees and costs; a 15% enhancement penalty pursuant to Section 287.120.4 RSMo; and Second Injury Fund ("Fund") liability. After a hearing, the Administrative Law Judge ("ALJ") found that: (1) Claimant reached maximum medical improvement ("MMI") on April 24, 2007; (2) Claimant was not entitled to unpaid medical expenses or future medical treatment; (3) Claimant was not entitled to additional TTD benefits; (4) Employer did not violate Section 292.090 ("Scaffolding Act") and thus was not liable for a 15% penalty; (5) Employer was not liable for attorneys' fees and costs; (6) the injuries sustained on November 9, 2006 resulted in permanent partial disability ("PPD") of 20% of the left biceps, 5% for each foot, and 2.5% of the total body as a whole for lower back pain; (7) Claimant's injuries warranted the application of a 5% multiplicity factor; and (8) Claimant was entitled to 42.4 weeks of PPD compensation from the Fund.

Claimant then filed an Application for Review with the Labor and Industrial Relations Commission ("Commission"), which both affirmed and modified the findings of the ALJ. The

[1] All subsequent statutory references are to RSMo Cum. Supp. 2005 unless otherwise indicated

Commission reviewed the testimony and records from various doctors who had either treated Claimant in the past, or who had examined him in relation to the hearing and reviewed his medical records.

Concerning the treatment provided through his private insurance, Claimant presented the medical records and reports of Drs. Martin, Rummel, and Graven. All three physicians began to treat Claimant in October 2007. Dr. Rummel, an orthopedic surgeon, evaluated Claimant's left shoulder and recommended surgical repair of Claimant's ruptured biceps tendon. Dr. Rummel performed that surgery in December 2007 and, although the surgery lessened the sharpness of the pain, it does not appear to have markedly improved Claimant's condition. Dr. Martin, an orthopedic surgeon specializing in foot and ankle care, treated Claimant's foot problems. Dr. Martin saw no structural abnormalities on the x-rays, but did prescribe palliative care in the form of injections to the feet, adjustments to Claimant's orthotics, and placing Claimant in night splints and wraps. These steps alleviated some of Claimant's foot discomfort but he continues to complain of significant amounts of pain, numbness, and tingling.

Lastly, Dr. Graven, an orthopedic surgeon specializing in the spine, evaluated Claimant's complaints of back pain that radiated into his legs. In order to more precisely pinpoint his pain, Claimant underwent an MRI and a discogram, which indicated a mild narrowing at the L5-S1 level of Claimant's spine. Initially, Dr. Graven gave Claimant steroidal injections on three different occasions to reduce the pain. The injections provided only temporary relief, and Dr. Graven performed a surgical back fusion in March 2009. As with the other surgeries, the back fusion alleviated some discomfort but Claimant continues to suffer considerable pain.

Claimant also submitted to the ALJ the testimony of Dr. David Volarich, an osteopathic physician. Dr. Volarich began seeing Claimant in March 2008, and testified that: Claimant's left shoulder was impinged; his left biceps tendon was torn; his right shoulder was impinged;

both feet had plantar fasciitis and tissue damage; there was a narrowing of Claimant's L5-S1 spinal disc space; and, finally, Claimant's pre-existing asymptomatic degenerative disc disease became symptomatic as a result of the November 9, 2006 injury. He further stated that he believed the combination of these injuries left Claimant permanently and totally disabled.

On behalf of Employer, the testimony and treatment records of Drs. Paletta, Aubuchon, and Chabot were introduced. Dr. Paletta, an orthopedic surgeon, first saw Claimant within a week of the accident. While in his care, Dr. Paletta had Claimant submit to multiple physical examinations and a multitude of diagnostic imaging tests of Claimant's back, feet, shoulder, and legs. According to Dr. Paletta's interpretations, these tests demonstrated no structural abnormalities or injuries that correlated with Claimant's complaints regarding his back, legs, and feet. Claimant's left shoulder was found to have suffered a rupture of the bicep tendon, but Dr. Paletta recommended it be treated through non-surgical means. Ultimately, in April 2007, Dr. Paletta concluded that Claimant was at MMI and assigned a 5% PPD rating to the left shoulder.

Also testifying on behalf of Employer was Dr. Chabot. Dr. Chabot, an orthopedic spine surgeon, first evaluated Claimant in February 2007. Dr. Chabot examined Claimant, reviewed the notes and tests done under Dr. Paletta's care, and ordered further diagnostic tests of Claimant's spine. However, similar to Dr. Paletta, Dr. Chabot was unable to determine the precise physical cause of Claimant's pain except for a finding of trochanteric bursitis,[2] which was treated with an injection. In the end, Dr. Chabot opined that Claimant's subjective complaints exceeded his physical findings, assigned a 2% PPD rating due to Claimant's lower back, and released Claimant back to his work duties in April 2007.

The final physician that testified for Employer was Dr. Aubuchon, an orthopedic surgeon specializing in foot and ankle care. Although Dr. Aubuchon interpreted the diagnostic images of

[2] Trochanteric bursitis is an inflammation of the bursa located on the outside of the hip. As was done here, one of the common treatment options is an injection into the inflamed bursa. See American Academy of Orthopaedic Surgeons, Hip Bursitis, http://orthoinfo.aaos.org/topic.cfm?topic=a00409 (last visited August 22, 2011).

Claimant's feet to be unremarkable, upon physical examination Dr. Aubuchon diagnosed Claimant as having traumatic contusions to the fat pads of his heels resulting from a direct blow to that area. In order to treat this injury, Dr. Aubuchon had orthotics made for Claimant and ordered the continuation of physical therapy. Still, following more than six weeks, Claimant asserted that the prescribed treatment did not result in an appreciable improvement to his condition. With only Claimant's subjective feelings of pain and no further objective findings of structural injury from which to proceed, Dr. Aubuchon released Claimant from his care in April 2007 and assigned a 3% PPD for each of Claimant's heels. Accordingly, based upon the recommendations of Drs. Aubuchon, Chabot, and Paletta, Employer determined that Claimant reached MMI in April 2007.

The Commission, with one member dissenting, disagreed with the standard of proof utilized by the ALJ, but affirmed the ALJ's ultimate determination that Claimant reached MMI on April 24, 2007.[3] In regards to causation, the Commission affirmed the ALJ's determination that Claimant had failed to show that the November 6, 2006 accident was the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after Claimant reached MMI. The Commission explicitly found Employer's experts to be more credible and persuasive than those proffered by Claimant. Moreover, the Commission supplemented the ALJ's determination by finding that Employer had not underpaid TTD benefits; an issue which Claimant alleged but the ALJ failed to address. For Claimant, the Commission reversed the ALJ by finding a Scaffolding Act violation and ordered a 15% enhancement of Claimant's award. Claimant and Employer appeal.

II. DISCUSSION

[3] Chairman William Ringer and Commissioner Alice Bartlett modified and affirmed while Commissioner John Hickey filed a dissenting opinion.

The Missouri Constitution, Article V, Section 18, directs this Court to determine whether the Commission's award is "supported by competent and substantial evidence upon the whole record." Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo. banc 2003). Section 287.495.1 RSMo provides this Court:

> [S]hall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:
> (1) That the commission acted without or in excess of its powers;
> (2) That the award was procured by fraud;
> (3) That the facts found by the commission do not support the award;
> (4) That there was not sufficient competent evidence in the record to warrant the making of the award.

In reviewing the Commission's decision, this Court is not bound by the Commission's conclusions of law or its application of the law to the facts. Difatta-Wheaton v. Dolphin Capital Corp., 271 S.W.3d 594, 595 (Mo. banc 2008). However, this Court will defer to the Commission on issues of fact, the credibility of witnesses, and the weight to be given to conflicting evidence. Hager v. Syberg's Westport, 304 S.W.3d 771, 773 (Mo. App. E.D. 2010).

In reviewing a workers' compensation award, we review the findings of the Commission and not those of the ALJ. Crowell v. Hawkins, 68 S.W.3d 432, 435 (Mo. App. E.D. 2001) (overruled on other grounds by Hampton, 121 S.W.3d at 225). When, as here, the Commission affirms or adopts findings of the ALJ, we review the decision and findings of the ALJ as adopted by the Commission. Id.

In his first point on appeal, Claimant argues that the Commission erred in misapplying the law by finding Claimant reached MMI in April 2007 and that such a determination was contrary to the overwhelming weight of the evidence. Claimant gives five separate sub-points in support of his first point, but, in the interest of brevity and clarity, we will address Claimant's first four sub-points together. Essentially, Claimant's first point turns on his contention that the Commission's determinations regarding MMI and lack of causation were against the

overwhelming weight of the evidence because substantial and competent evidence supports a finding that the work accident was the cause of his treatment and inability to work after MMI. We disagree.

In this case, the Commission had the opinions and records from at least six experts on which to base its decision, and it chose to rely on Employer's experts. Claimant contends that the opinions of Employer's experts were not supported by substantial and competent evidence because they were not involved in Claimant's care beyond April 2007, thus their opinions were "frozen in time." This purely temporal argument lacks merit. By asking this Court to insert a line of demarcation, before which expert testimony may not be considered, Claimant is asking this Court to substitute its judgment for that of the Commission on matters of the weight of the evidence and the credibility of witnesses. This we cannot do. "[T]he Commission has sole discretion to determine the weight to be given expert opinions." Gausling v. United Indus., 998 S.W.2d 133, 136 (Mo. App. E.D. 1999) (overruled on other grounds by Hampton, 121 S.W.3d at 226). Moreover, when opinions of medical experts are in conflict, it is the province of the fact-finding body to determine whose opinion is the most credible. Gordon v. City of Ellisville, 268 S.W.3d 454, 460 (Mo. App. E.D. 2008). Here, experts gave contradictory opinions, all of which were based on substantial and competent evidence because each doctor comprehensively examined Claimant and his history. Given that, the Commission is free to believe whichever expert it chooses, and it is in the best position to do so. Therefore, we will not disrupt the commission's decision.[4] Point one denied.

In his second point, Claimant maintains the Commission erred in failing to award past due medical expenses, interest, and future medical expenses. Similar to Claimant's first point on appeal, the argued basis for error is that the Commission misapplied the law and made findings

[4] Claimant's fifth sub-point concerns his request award for attorneys' fees and costs under Section 287.203. Since Claimant has not prevailed on the merits of his earlier sub-points this point is rendered moot.

against the overwhelming weight of the evidence concerning causation and the necessity of the past and future treatment. We disagree.

Here, Claimant's argument centers on Employer's refusal to provide continued medical care after Claimant was found to have reached MMI in April 2007. An employer is required to provide care "as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Section 287.140.1 RSMo. The burden is on the claimant to prove entitlement to an award of future medical care and this requires establishing a "reasonable probability" that he or she will need future medical care. Chatmon v. St. Charles County Ambulance Dist., 55 S.W.3d 451, 459 (Mo. App. E.D. 2001) (overruled on other grounds by Hampton, 121 S.W.3d at 225). Whether Claimant has achieved MMI is not dispositive when considering whether future care is reasonably required. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248-49 (Mo. banc 2003) (overruled on other grounds by Hampton, 121 S.W.3d at 224).

Through his second point, Claimant reasserts his belief that he has met his burden in establishing causation and the Commission wrongfully discounted the opinions of his medical experts. This argument fails for the same reasons outlined above. Claimant is attempting to take two bites of the apple by once again disputing the Commission's reliance on Employer's experts. However, the Commission unambiguously stated it found Employer's medical experts more credible than Dr. Volarich, leading to its conclusion that "the work injury was not the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 24, 2007." The Commission engaged in a thorough review of the conflicting testimony of the injuries, the treatment provided, and the need for future treatment. Ultimately, it made a finding, wholly within its province, that the opinions of Employer's physicians were more persuasive. In such instances, if the evidence before the Commission "would warrant

either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding." Pulitzer Pub. Co. v. Labor & Ind. Relations Comm'n, 596 S.W.2d 413, 417 (Mo. banc 1980). Again, we defer to the Commission's decision to accept Employer's expert opinions instead of Dr. Volarich's opinion on causation. Point denied.

On cross-appeal, Employer argues that the Commission erred in awarding Claimant a 15% enhancement to his award after finding that Employer violated the Scaffolding Act. Under Missouri law, a workers' compensation claimant is entitled to a 15% increase in compensation "where the injury is caused by the failure of the employer to comply with any statute in this state." Section 287.120.4 RSMo. In order to show an entitlement to a 15% enhancement of the benefits awarded, a claimant is required to establish: (1) the existence of a statute applicable to the facts surrounding the work injury; (2) violation of that statute by the employer; and (3) a causal connection between the violation and compensable injury. Akers v. Warson Garden Apts., 961 S.W.2d 50, 53 (Mo. banc 1998) (overruled on other grounds by Hampton, 121 S.W.3d at 224).

In its decision, the Commission reversed the ALJ's determination and found that Employer violated the Scaffolding Act, which provides, in relevant part:

> All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported . . . and so secured as to insure the safety of persons working thereon . . . against the falling therein . . . . All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or nearby.

As it is used in the statute, the term "scaffold" refers to a temporary or movable platform which is used in the repair of any kind of building. Bollinger v. Major Sheet Metal Co., 668 S.W.2d 106, 107 (Mo. App. W.D. 1984). In its analysis, the Commission found, and we agree, that the Scaffolding Act is clearly applicable to the facts surrounding Claimant's injury. Similarly, it is

undisputed that the scaffolding structure on which Claimant stood collapsed and caused Claimant's compensable injuries. Employer's only argument then is that the Commission erred by deviating from the established rule that it is the claimant's burden to produce evidence of a violation, and instead required Employer to present exculpatory evidence.

In reviewing a decision by the Commission where the facts are not disputed, the award that should be entered by the Commission becomes a question of law and the Commission's ruling is not binding on the appellate court. Ikerman v. Koch, 580 S.W.2d 273, 278 (Mo. banc 1979). As this is a question of law, we review the Commission's determination on this issue de novo.

In the 1919 case Propulonris v. Goebel Constr. Co., the Missouri Supreme Court evaluated Section 7843 RSMo (1909), the nearly identical predecessor to the Scaffolding Act, in order to determine if it had been violated.[5] 213 S.W. 792 (Mo. 1919). In that case, four men fell approximately sixty feet from a scaffolding platform and brought suit under the scaffolding safety statute. Id. at 793. The employer, Goebel Construction, claimed that, absent evidence of any specific negligence on the employer's part, the employee failed to meet his burden and his cause of action must fail. Id. at 794. The Court disagreed and determined that such a result would strip away the statute's intended effect if it were the plaintiff's burden to "point out a specific defect in the scaffold or platform which was furnished him." Id. at 795. Thus, the Court held that "in the absence of [an] exculpatory showing on the part of the employer, the fall of a scaffold is prima facie evidence of negligence on the part of the employer and a violation of the statute." Id. This decision has remained undisturbed for nearly 100 years and we find its well-reasoned holding just as applicable to cases involving the modern Scaffolding Act as it did its predecessor.

[5] The single difference between the modern Scaffolding Act and the statute evaluated in Propulonris is the modern statute replaces the word "thereof" with the word "therein".

The uncontradicted evidence demonstrates that Claimant's injuries were the result of his fall from a scaffolding structure. Thus, under Propulonris, a violation is presumed unless Employer presents sufficient exculpatory evidence. Employer presented no such evidence. Therefore, the Commission was correct in finding a violation of the Scaffolding Act and, resultantly, assessing a 15% penalty under Section 287.120.4 RSMo. Employer's point denied.

Lastly, both Claimant and Employer dispute the amounts to which the 15% penalty should be assessed. The Commission found simply that the penalty should increase the amount awarded by the ALJ by 15%. Claimant asserts that the penalty should be assessed in the broadest means possible and against all amounts, whether medical payments or compensation, previously made by Employer or ordered by the ALJ. Employer argues that the penalty is only applicable against the $27,636.89 in PPD compensation ordered by the ALJ, less a $7000.00 payment Employer has already made, and should not be levied against the $32,801.15 in medical benefits already paid, the $16,754.88 in TTD compensation benefits already paid, or the $15,965.72 ordered against the Fund.

In order to determine the scope of the penalty, we must turn first to the language of the statute. The primary rule of statutory construction is to determine the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute. Bolen v. Orchard Farm R-V Sch. Dist., 291 S.W.3d 747, 751 (Mo. App. E.D. 2009). Here, the language of Section 287.120.4 provides: "Where the injury is caused by the failure of the employer to comply with any statute in this state…the compensation and death benefit provided for under this chapter shall be increased fifteen percent." Absent a statutory definition, a statute is interpreted to give effect to the legislative intent as reflected in the plain language of the statute. Akins v. Dir. of Revenue, 303 S.W.3d 563, 565 (Mo. banc 2010). A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.

Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. banc 1998). In this instance, the ambiguity in Section 287.120.4 concerns the scope of the word "compensation." We will discuss each amount at issue in turn.

First, TTD benefits act to compensate an employee during the period the employee is healing from an injury. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo. App. E.D. 2002) (overruled on other grounds by Hampton, 121 S.W.3d at 225). As a result, the $16,754.88 in compensation Claimant received in the form of TTD benefits are clearly within the plain meaning of the statute and should be assessed the 15% penalty.

Second, in regards to the medical benefits paid by Employer; it is a more difficult issue, but one this Court has previously addressed. In Martin v. Star Cooler Corp., this Court reaffirmed the rule that the worker's compensation act "should be liberally construed as to the persons to be benefited . . . and a doubt as to the right compensation should be resolved in favor of the employee." 484 S.W.2d 32, 36 (Mo. App. E.D. 1972) (quoting Pruitt v. Harker, 43 S.W.2d 769, 773 (Mo. 1931)). Consequently, this Court held that the cost of medical aid furnished to a claimant shall be considered compensation provided him and includable in computing the 15% penalty. Id. Accordingly, the $32,801.15 in medical benefits paid by Employer is included.

Third, PPD benefits are intended to cover an injured party's loss of earning power. Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). As such, PPD benefits act as compensation under Section 287.120.4 and the $27,636.89 in PPD benefits awarded by the ALJ and affirmed by the Commission are included in the penalty. However, in this instance, the inquiry does not end there. Employer contends that $7000.00 of that amount should be excluded from the penalty because the parties stipulated that Employer was entitled a $7000.00 indemnity credit against any award. Employer misunderstands the effect of the indemnity credit.

Employer's stipulated indemnity credit is effective only in reducing the amount ultimately due Claimant. Claimant was awarded $27,636.89 in PPD benefits. That is the amount of PPD compensation awarded and includable in the penalty. While it is true that the indemnity credit reduces the actual amount due Claimant to $20,636.89, it does not serve to shelter that $7000.00 from the 15% penalty. Allowing Employer to exempt amounts by prepaying the Claimant would lead to the illogical result of allowing future employers to circumvent the impact of the 15% penalty by providing prepayments to the injured employee. See Spradlin, 982 S.W.2d at 258. That is an unacceptable result and, thus, the entire $27,636.89 shall be subject to the 15% penalty.

Finally, Claimant and Employer disagree as to whether the 15% penalty should be applied to the amount ordered payable from the Fund. Employer maintains it is against public policy to penalize those amounts payable by the Fund. Claimant counters that the legislature intended the penalty be applied against all amounts, to include the Fund. We hold that the penalty does not apply to amounts ordered from the Fund.

The Fund operates to pay compensation when a permanent partial disability which pre-dated an employee's work-related injury and resulting disability combines with the work-related disability in such a way as to cause a greater overall disability than that caused by the work-related injury alone. Garibay v. Treasurer of State of Mo., 964 S.W.2d 474, 479 (Mo. App. E.D. 1998). This is done to encourage the employment of the physically disabled in industry without creating a greater exposure for their employers than employment of persons without preexisting disabilities. Id. Moreover, and most importantly here, the Fund was created to relieve an employer of his liability for the previously disabled employee's partial or total disability, where that disability is not specifically attributed to an injury suffered during the employment period with that employer. Id.; Meilves v. Morris, 422 S.W.2d 335, 338 (Mo. 1968).

Requiring an employer to pay a penalty on an award from the Fund would erode its purpose of protecting employers against liability from preexisting disabilities. Quite to the contrary, it would expose the employer to some of the very liability from which the Fund was to serve as a shield. Furthermore, applying the penalty to the Fund award would do little to further the desired effect of the penalty. The purpose of the 15% penalty is to "encourage employers to comply with the laws governing safety." Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 244 (Mo. App. S.D. 2003). Should an employer violate a statute and have a Section 287.120.4 penalty assessed, it would be punished for causing that injury by the levying of a 15% penalty on all of the amounts discussed above. Adding the 15% penalty to Fund awards would serve only to punish the employer for preexisting injuries that it did not cause. As a result, we hold that it would be incongruous to the intent of both the Fund and the 15% penalty to allow a Section 287.120.4 penalty to be assessed against a Fund award.

In summary, the 15% penalty is to be applied to the PPD benefits awarded, including the indemnity amount, and to the TTD and medical benefits already paid. It will not include the benefits payable by the Second Injury Fund. Thus, as provided by the parties, the total considered compensation is $77,192.92 and the resulting penalty amount is $11,578.94.

III. CONCLUSION

The Commission's decision regarding the application of the 15% penalty is reversed and remanded for proceedings consistent with this opinion. The remainder of the Commission's decision is affirmed.

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Roy L. Richter, Judge

Clifford H. Ahrens, P.J., concur
Gary M. Gaertner, Jr., J., concur