

No. 1-23-2152WC

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

SCOTT CONKLIN,)	Appeal from the
)	Circuit Court of
Appellant,)	Cook County
)	
v.)	Nos. 20232 L 050002,
)	consolidated with
)	2022 L 050667
THE ILLINOIS WORKERS' COMPENSATION)	
COMMISSION <i>et al.</i> ,)	Honorable
)	Jean M. Golden,
(City of Chicago-OEMC, Appellee).)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Mullen, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* Although we found no error in the Illinois Workers' Compensation Commissions' issuance of a corrected decision to correct a clerical error in its original decision or in its granting of a continuance after a hearing held on May 12, 2022, we vacated both the judgement of the circuit court and the decision of Illinois Workers' Compensation Commission (Commission) which awarded the claimant penalties pursuant to section 19(k) of the Workers' Compensation Act (Act) (820 ILCS

305/19(k) (West 2022)) and attorney fees pursuant to section 16 of the Act ((820 ILCS 305/16 (West 2022)) by reason of the failure of the City of Chicago-OEM's (City) to pay wage differential benefits owed to the claimant from March 7, 2022, through March 16, 2022. We remanded the matter back to the Commission with direction to address questions related to a questionnaire sent by the City to the claimant, determine the reasonableness of the City's failure to pay wage differential benefits post March 16, 2022, and to award the claimant section 19(k) penalties and section 16 attorney fees to which he is entitled.

¶ 2 The claimant, Scott Conklin, appeals from a judgement of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding him \$694.50 in penalties pursuant to section 19(k) of the Workers' Compensation Act (Act) (820 ILCS 305/19(k) (West 2022)) and \$138.90 in attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2022)) for the failure of the City of Chicago-OEMC (City) to pay wage differential payments owed him for the period from March 7, 2022, through March 16, 2022. For the reasons which follow, we vacate both the judgement of the circuit court and the decision of the Commission, and we remand the matter back to the Commission with directions.

¶ 3 The facts relevant to the disposition of this appeal are not in dispute. The following factual recitation is taken from the record in this case, the evidence adduced at a May 22, 2022, hearing on the claimant's petition for an award of penalties pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2022)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2022)), and the exhibits received in evidence at that hearing.

¶ 4 The claimant filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2016)), seeking benefits for injuries sustained while working for the City of Chicago-OEMC (City). Following an arbitration hearing held on July 31, 2018, the arbitrator issued a written decision on September 24, 2018, finding that the claimant suffered an accident that arose out of and in the course of his employment with the

City and that his current condition of ill-being is causally related to that accident. The arbitrator awarded the claimant his outstanding medical bills and a wage differential of \$972.32 per week pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2016)). Neither party sought a review of that decision by the Commission.

¶ 5 The City commenced paying wage differential benefits to the claimant beginning on April 2, 2018. Some time in early 2022, Gallagher Bassett Service, Inc. (Gallagher Bassett), the City's workers' compensation administrator, sent a questionnaire directly to the claimant requesting the following information: (1) the name of the claimant's attorney along with the attorney's phone number and address; (2) the claimant's mailing address where the claimant resides and his street address; (3) the claimant's mailing address if different from above; (4) the claimant's current phone number; (5) whether he was receiving his checks in a timely manner; (6) "Are you currently treating with a doctor related to your Workers Compensation injury? If so[,] please provide the doctor's name, number, address, the type of treatment and the frequency of office visits."; (7) "Have you returned to work for any employer since this injury? If yes, name and address of company? When did you return to work? What are your wages per week?"; (8) "Are you self-employed in any manner? If yes, what type of business are you involved in? "; (9) "Do you perform any volunteer work? If yes, where?"; and (10) "Are you currently receiving any benefits besides your workers' compensation benefits? If yes, what benefits are you receiving?" In addition to requesting answers to the enumerated questions, the form also requested that the claimant confirm his social security number and date of birth. (Hereinafter referred to as the questionnaire.) According to the City, mailing of the questionnaire to individuals awarded wage differentials was an established procedure to verify the individual's continued existence, current mailing address,

and current medical and employment status. The claimant testified that he never received the questionnaire directly. He admitted, however, that he had not notified the City that he had changed his address.

¶ 6 Gallagher Bassett ultimately sent the questionnaire to the claimant's attorney. On March 2, 2022, Gallagher Bassett sent a letter to the claimant's attorney stating that the claimant's wage differential payments were being suspended by reason of his failure to comply with an "alive and well" check and would remain suspended until the claimant completed the questionnaire. The letter acknowledged that the last check issued to the claimant was on February 4, 2022.

¶ 7 On March 15, 2022, the claimant's attorney sent an e-mail to Kim Israel, the claims adjuster from Gallagher Bassett, confirming that the claimant was still alive and stating that, in the event that payment of the claimant's benefits was not resumed, a petition for penalties and attorney fees for nonpayment of the award would be filed. On March 16, 2022, Israel sent an e-mail to the claimant's attorney stating that she wanted further proof that the claimant was alive and requested an affidavit from the claimant to that effect or a picture of him holding a current periodical and a copy of his I.D. On March 16, 2022, the claimant's attorney sent an e-mail to Israel stating that his word as an officer of the court was proof of the claimant's existence and again stating that, if payment of the claimant's benefits was not resumed, a petition for penalties and attorney fees for nonpayment of the award would be filed.

¶ 8 On March 30, 2022, the claimant filed a petition before the Commission, seeking an award of penalties pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2022)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2022)) for the City's failure to pay wage differential benefits.

¶ 9 In an e-mail to Jeanette Estrella of Gallagher Bassett, the claimant's attorney requested that she provide the section of the Act that entitled the City the information being requested. The record contains no response.

¶ 10 A hearing on the claimant's petition was held on May 12, 2022. The claimant testified that he had not received wage differential payment from the City in March, April, and May of 2022. The last payment that he received was issued on February 4, 2022. When asked if he had been paid benefits through March 6, 2022, the claimant responded that he was not sure. After proofs were closed, the City requested seven days to provide the Commission with evidence of the payments it had made to the claimant. The claimant objected, but the presiding commissioner granted the continuance.

¶ 11 On May 19, 2022, the parties filed a stipulation with the Commission, stating that the claimant had been paid wage differential payments through March 6, 2022. The City e-mailed a printout showing all payments it made to the claimant from April 2, 2018, through March 6, 2022.

¶ 12 On November 22, 2022, the Commission entered an order, with one commissioner specially concurring, finding that it was unreasonable for the City to have suspended the claimant's benefits but also finding that the claimant's attorney may have exacerbated the problem. The Commission awarded the claimant penalties in the sum of \$2,613.11 and attorney fees in the sum of \$522.62 for nonpayment of benefits from February 7, 2022, through March 16, 2022, the date upon which the claimant's attorney threatened to file a petition for sanctions rather than provide the documentation requested. On December 6, 2022, the claimant filed an action for judicial review of the Commission's decision in the Circuit Court of Cook County. The action was docketed in the circuit court as No. 2022 L 050677.

¶ 13 On December 6, 2022, the City filed a motion before the Commission to correct a clerical error in its decision. The Motion was heard on December 15, 2022. On December 20, 2022, the Commission issued a corrected decision, with one commissioner specially concurring, awarding the claimant penalties in the sum of \$694.50 and attorney fees in the sum of \$138.90 for non-payment of benefits from March 7, 2022, through March 16, 2022.

¶ 14 On December 22, 2022, the Commission, acting on its own motion “to correct a clerical error in the corrected order” entered a second corrected order “*sua sponte*,” again with one commissioner specially concurring, awarding the claimant penalties in the sum of \$694.50 and attorney fees in the sum of \$138.90 for nonpayment of benefits from March 7, 2022, through March 16, 2022. On January 3, 2023, the claimant filed a second action for judicial review of the Commission’s corrected decisions in the Circuit Court of Cook County. The action was docketed in the circuit court as No. 2023 L 050002.

¶ 15 On February 6, 2023, the circuit court consolidated case Nos. 2022 L 050677 and 2023 L 050002.

¶ 16 On October 17, 2023, the circuit court entered an order finding that the Commission’s findings and corrections are not against the manifest weight of the evidence or an abuse of discretion. The circuit court’s order stated that “The Commission’s Decision and Opinion on Review is affirmed.” On November 13, 2023, the claimant filed his notice of appeal.

¶ 17 The claimant’s brief sets out three issues for review. Two of the issues contain compound questions, and from a procedural standpoint, the issues are presented in inverse order. We will attempt to address the issues raised by the claimant in some logical sequence.

¶ 18 The claimant appears to argue that the Commission’s decision to grant a continuance after

proofs were closed on May 12, 2022, to enable the City to submit proof of the wage differential payment that it made to the claimant was “against the manifest weight of the evidence.” To begin with, the claimant has set out an incorrect standard of review. The granting or denial of a request for a continuance is a matter committed to the sound discretion of the Commission and will not be disturbed on review absent an abuse of that discretion. *Edward Don Co. v. Industrial Comm’n*, 344 Ill. App. 3d 643, 650 (2003). A ruling by the Commission is an abuse of discretion when it is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the view adopted by the Commission. *Centro v. Illinois Workers’ Compensation Comm’n*, 2929 IL App (2d) 180815WC, ¶ 34.

¶ 19 During the May 12, 2022, hearing on his petition for penalties and attorney fees, the claimant was asked if he had been paid through March 6, 2022. The claimant responded that he was not sure. The City requested a continuance to obtain a printout of all wage differential payments that had been made to the claimant, when the payments had been made, and for what period he was last paid. The claimant’s counsel objected, arguing that the City should have brought that information to the hearing. The presiding commissioner granted the continuance, stating “it will make life a lot easier for me and my staff to find out exactly what is due and owing.”

¶ 20 Section 9030.20(g) of the Rules Governing Practice before the Commission states that “[b]ifurcated hearings will be allowed only for good cause.” 50 Ill. Adm. Code 9030.20(g) (2016). In this case, the claimant was unsure if he had been paid his wage differential for the period ending March 6, 2022. In cases where there has been any unreasonable or vexatious delay in payment of compensation, section 19(k) of the Act provides the Commission may award additional compensation equal to 50% of the amount payable at the time of the award. It follows, therefore,

that the amount due must be ascertained in order to calculate any award of additional compensation pursuant to section 19(k). Based upon the claimant's testimony at the May 12, 2022, hearing, the Commission had no way of knowing the beginning of the period during which the City had suspended wage differential payments. We believe that there was good cause for granting a continuance in order to ascertain that date. Since the granting of the continuance was neither arbitrary, fanciful, nor unreasonable, we find no abuse of discretion.

¶ 21 On May 19, 2022, the parties filed a stipulation stating that the claimant had been paid wage differential benefits through March 6, 2022. The City also e-mailed a printout to the Commission reflecting all wage differential payments to the claimant covering the period from April 2, 2018, through March 6, 2022.

¶ 22 On November 22, 2022, the Commission entered an order, with one commissioner specially concurring, awarding the claimant section 19(k) penalties in the sum of \$2,613.11 and section 16 attorney fees in the sum of \$522.62 for nonpayment of benefits for the period from February 7, 2022, through March 16, 2022. On December 6, 2022, the City filed a "Motion to Correct Clerical Error" with the Commission. In that motion, the City noted that the Commission's November 22, 2022, order stated that "the parties stipulated that Respondent [City] had paid Petitioner [the claimant] benefits through February 6, 2022", when in fact, the stipulation states that the claimant "has been paid wage differential payments through March 6, 2022." The City argued that the Commission based its calculation of penalties and fees on this clerical error concerning the stipulated date through which benefits had been paid to the claimant and requested that the Commission recall its decision, correct the clerical error to reflect the correct date of wage differential payments through March 6, 2022, and recalculate the penalties and fees to be awarded.

¶ 23 The Commission granted the City’s motion, recalled its November 22, 2022, order and, on December 20, 2022, issued a corrected order. In its corrected order, the Commission stated that the parties “filed a stipulation indicating that benefits had been paid through March 6, 2022” and it recalculated its award of section 19(k) penalties and section 16 attorney fees for nonpayment of wage differential benefits for the 10-day period between March 7, 2022, and March 16, 2022. The Commission’s recalculation resulted in an award of \$694.50 in penalties under section 19(k) and \$138.90 in attorney fees under section 16. On December 22, 2022, the Commission, *sua sponte*, recalled its corrected order of December 20, 2022, and issued a second corrected order, “for the purpose of correcting the clerical error.” It appears that the only difference between the corrected order and the second corrected order is the Commission’s statement that the purpose of the second corrected order was to correct a clerical error, whereas the corrected order of December 20, 2022, was silent as to its purpose. In its second corrected order, the Commission again awarded the claimant \$694.50 in penalties under section 19(k) and \$138.90 in attorney fees under section 16 for the City’s nonpayment of wage differential benefits for the 10-day period between March 7, 2022, and March 16, 2022.

¶ 24 The claimant argues that the Commission decision to grant the City’s motion to correct a clerical error in the November 22, 2022, order was erroneous as a matter of law. He requests that we reverse the Commission’s decision granting the motion, strike both the corrected order and the second corrected order, and consider his appeal as directed toward the November 22, 2022, order. The claimant argues that the City’s motion was in actuality a motion for rehearing or reconsideration of the November 22, 2022, order, not a motion to correct a clerical error brought pursuant to section 19(f) of the Act (820 ILCS 305/19(f) (West 2020)). The claimant acknowledges

that the parties entered into a stipulation that the claimant was paid wage differential benefits through March 6, 2022, and not February 6, 2022. He argues, however, that “the original Commission order did not consider that stipulation and awarded penalties from February 7, 2022, through March 16, 2022.” According to the claimant, the City’s motion was a request that the Commission consider evidence that it missed, not one to correct a clerical error. The claimant concludes that the City’s only option was to file an action for judicial review in the circuit court which it failed to do.

¶ 25 Section 19(f) of the Act provides, in relevant part, that:

“[T]he Arbitrator or the Commission may on his or its own motion, or on the motion of either party, *correct any clerical error or errors in computation* within 15 days after the date of receipt of any award by the Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision.” (Emphasis added.) 820 ILCS 305/19(f) (West 2020).

The City’s motion was filed with the Commission on December 6, 2022, well within the 15 days following the issuance of the Commission’s order of November 22, 2022. The issue is whether the motion was one to correct a clerical error. We believe that it was.

¶ 26 Contrary to the claimant’s assertion, the Commission’s original order did consider the parties’ stipulation. The November 22, 2022, order states specifically: “After the hearing the parties stipulated that Respondent [City] paid Petitioner [the claimant] benefits through February 6, 2022.” As noted earlier, the stipulation entered into between the parties on May 19, 2022, following the hearing on the claimant’s petition for an award of penalties and attorney fees states

that the claimant had been paid wage differential benefits through March 6, 2022. In its second corrected order, the Commission stated that the purpose of the second corrected order was to correct a clerical error. We believe that error in the original order was the statement that the parties stipulated that the claimant had been paid benefits through February 6, 2022, when in actuality, the parties had stipulated to payments through March 6, 2022. Our conclusion in that regard is further supported by the fact that the dates of February 6, 2022, and February 7, 2022, have no relation to the facts of this case. The claimant's testimony was that he received a wage differential payment on February 4, 2022, and that is the only date in February that is referred to in the facts of this case. We find no basis to contradict the statement in the Commission's second corrected order that the purpose was to correct a clerical error; a statement that was absent from the corrected order of December 20, 2022. For these reasons, we reject the claimant's argument that the Commission's order granting the City's motion to correct a clerical error and the Commission's issuance of corrected decisions was contrary to the law.

¶ 27 Finally, the claimant argues that the Commission erred as a matter of law in basing its penalty calculation on the objective reasonableness of the conduct of his attorney rather than the conduct of the City. Within the argument is the contention that the Commission failed to consider whether the questionnaire was appropriate under the Act and disregarded his attorney's attestation that the claimant was alive and well.

¶ 28 As noted earlier, Gallagher Bassett sent the questionnaire directly to the claimant at an address where he no longer resided. On March 2, 2022, Gallagher Bassett sent a letter to the claimant's attorney stating that the claimant's wage differential payments were being suspended by reason of his failure to comply with an "alive and well" check and that his benefits would

remain suspended until the claimant completed the questionnaire. The City did not pay the claimant the wage differential benefit due on March 7, 2024. The claimant never completed the questionnaire; rather, on March 15, 2022, the claimant's attorney sent an e-mail to Israel at Gallagher Bassett stating: "My client is alive and well. Issue the check or we will file a petition for penalties and attorneys fees for nonpayment of the award." On March 16, 2024, Israel sent an e-mail to the claimant's attorney, stating: "We will need proof that your client is alive & well. Please send in a signed Affidavit from your client or a picture with him holding a current periodical and his ID. Once we have proof that he is alive & well, benefits will be reinstated." The claimant never executed the questionnaire or forwarded the documentation requested in Israel's e-mail of March 16, 2024.

¶ 29 The hearing on the claimant's petition for penalties and attorney fees was held on May 12, 2022. On March 19, 2022, the parties filed their stipulation stating that the claimant has been paid wage differential payments through March 6, 2022.

¶ 30 In its second corrected order, the Commission concluded that "it is not unreasonable for employers with awards paid over multiple years such as permanent & total awards and wage differential awards, to seek and obtain periodic verification of the claimant's continued existence and status." However, the Commission found that, in this case, it was not reasonable "for Respondent [City] to suspend benefits before giving Petitioner [claimant] a reasonable opportunity to provide the requested information." The Commission went on to hold that the claimant's attorney "may have exacerbated the problem by refusing to comply with the request and instead filing the instant petition for penalties and attorney fees." Based on those findings, the Commission awarded the claimant \$694.50 in penalties under section 19(k) and \$138.90 in attorney fees under

section 16 for the City's nonpayment of wage differential benefits for the 10-day period between March 7, 2022, and March 16, 2022, the date that the claimants attorney "threatened sanctions rather than simply having the document executed."

¶ 31 The claimant argues that the Commission failed to address several issues; namely, whether the questions posed by the City in its questionnaire are permissible under the Act, whether his failure to complete the questionnaire was a basis to suspend his wage differential payments, and whether his attorney's attestation that he was alive and well satisfied the City's right to make an alive and well inquiry. The claimant admits in his brief that "[i]t is certainly reasonable for the Defendant [City] to make an alive and well inquiry when it is making periodic payments." He argues, however, that the questionnaire was not an alive and well inquire but rather an attempt at discovery to determine whether his wage differential award could be modified under sections 19(h) (820 ILCS 305/19(h) (West 2020)) and 8(d)(1) (820 ILCS 305/8(d)(1) (West 2020)) of the Act. According to the claimant, his failure to answer the questionnaire was not a basis to suspend his wage differential payments as the document does not even inquire into his continued existence. Finally, the claimant argues that the attestation of his attorney satisfied the City's right to inquire whether he was alive and well. We believe there is merit in the claimant's argument that the Commission failed to address issues relevant to an inquiry as to whether the City unreasonably suspended his wage differential payments and for what period.

¶ 32 As the claimant admits, the City had a right to inquire as to whether he was still alive, but the question of whether the questionnaire constituted a proper inquiry was never addressed by the Commission. Further, the Commission never addressed the question of whether an attorney's attestation that his client is alive is sufficient to satisfy an employer's right to inquire into the

continued existence of a former employee to whom it is paying periodic wage differential payments, and if it is not, whether the claimant's refusal to supply the affidavit or picture requested by Israel in her March 16, 2024, email to the claimant's attorney was a reasonable basis for the City to suspend the claimant's wage differential payments.

¶ 33 Sections 19(k) and 16 of Act are intended to address situations where there is not only a delay in the payment of benefits, but the delay is deliberate or the result of bad faith or improper purpose. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The question of whether an employer's conduct in declining to pay benefits justifies the imposition of section 19(k) penalties and section 16 attorney fees is considered in terms of reasonableness. See *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209 (1982). However, the standard is one of objective reasonableness. *General Refractories v. Industrial Comm'n*, 255 Ill. App. 3d 925, 931 (1994). The question of whether an employer acted unreasonably or vexatiously in declining to pay benefits under the Act or whether it acted reasonably under the circumstances is one of fact to be resolved by the Commission, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579 (1995); *Continental Distributing Co. v. Industrial Comm'n*, 98 Ill. 2d 407, 415–16 (1983).

¶ 34 In this case, the Commission found that it was not reasonable for the City to suspend wage differential benefits before giving the claimant a reasonable opportunity to provide evidence of his continued existence. We find that the Commission's finding in that regard was not against the manifest weight of the evidence. However, the Commission's order fails to resolve several questions impacting on the issue of whether the City acted reasonably in failing to make wage differential payments after March 16, 2022. The Commission found that the claimant's attorney

“may have exacerbated the problem by refusing to comply with the request and instead filing the instant petition for penalties and attorney fees,” and it, therefore, declined to award penalties and attorney fees for nonpayment of benefits for the period following March 16, 2022, the date that the claimant’s attorney “threatened sanctions rather than simply having the document executed.” The question, however, is not whether the claimant’s attorney exacerbated the problem, but rather whether the City acted reasonably in not paying benefits after March 16, 2022. Necessary to a resolution of the question is a determination of: (1) whether the claimant was required to answer the questions posed in the questionnaire; and (2) whether the March 15, 2022, e-mail from the claimant’s attorney stating that the claimant was still alive satisfied the City’s right to determine the claimant’s continued existence, and if it was not, whether the City acted reasonably in failing to make wage differential payments after the claimant failed to furnish the affidavit or picture requested in the March 16, 2022, e-mail from Israel to the claimant’s attorney.

¶ 35 In light of the Commission’s failure to address these issues which impact on the question of the City’s reasonableness in failing to make wage differential payments after March 16, 2022, we believe that the appropriate action is to vacate the Commission’s December 22, 2022, second corrected order and remand the matter to the Commission with directions to enter an order: addressing the questions we have identified; determine the reasonableness of the City’s nonpayment of wage differential benefits post March 16, 2022; and award the claimant the section 19(k) penalties and section 16 attorney fees to which he is entitled.

¶ 36 For the reasons stated, the judgment of the circuit court which confirmed the Commission’s second corrected order is vacated; the Commission’s December 22, 2022, second corrected order is vacated; and the case remanded to the Commission with directions.

No. 1-23-2152WC

¶ 37 Circuit court judgement vacated

¶ 38 Commission decision vacated and remanded with directions.