Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

DAVID PATRICK HALL
Springfield, Illinois

ATTORNEY FOR APPELLEE:

MARK D. GERTH
Kightlinger & Gray, LLP
Indianapolis, Indiana

FILED
Sep 04 2009, 8:58 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

CHEYENNE SORRILL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 93A02-0902-EX-193
	)	
SOUTHERN ERECTORS,	)	
	)	
Appellee.	)	

APPEAL FROM THE FULL WORKER'S COMPENSATION BOARD OF INDIANA
APPLICATION NO. C-168764

September 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Cheyenne Sorrill ("Sorrill") appeals an order of the Full Worker's Compensation Board of Indiana ("the Board"), affirming the Single Hearing Member's ("the Single Member") decision whereby Sorrill was awarded compensation upon his claims arising from his permanent partial impairment and temporary total disability, and from bad faith conduct of Southern Erectors' worker's compensation insurer, but was denied an order for the payment of future medical benefits. We affirm in part, reverse in part, and remand for further proceedings.

Issues

Sorrill presents four issues for review:

I. Whether the Board erroneously concluded that Sorrill waived a claim for the payment of future medical benefits;
II. Whether the bad faith award and corresponding order for attorney's fees is inadequate;
III. Whether the impairment rating given by Sorrill's treating physician was improperly disregarded because the rating failed to reference the American Medical Association Guides to Impairment; and
IV. Whether an injured worker is entitled to payment of temporary partial disability benefits until he actually receives compensation for his permanent partial impairment.

Facts and Procedural History

Sorrill, a pipe welder employed by Southern Erectors, was working on a catwalk at a jobsite in Mitchell, Indiana on March 22, 2002, when he fell and sustained injuries to each of his upper extremities. He underwent four surgeries, three of which were performed by Dr. Christopher Wottowa ("Dr. Wottowa"). On August 16, 2004, Dr. Wottowa found Sorrill to be at maximum medical improvement.

On February 9, 2004, Sorrill filed an Application for Adjustment of Claim, making claims for temporary total disability and unpaid medical expenses and alleging bad faith on the part of Southern Erectors' worker's compensation insurer, AIG. Additionally, Sorrill indicated that there were "probable claims" for permanent partial impairment and future medical benefits. (App. 32.) A hearing was conducted before the Single Member on September 13, 2007.

On February 5, 2008, the Single Member issued an order providing that Sorrill should receive $13,650 for a 21% upper extremity permanent partial impairment, $13,155.87 for twenty-six weeks of temporary total disability, $8,768 for sixteen weeks of compensation attributable to the employer's bad faith and lack of diligence, statutory attorney's fees, and $2,893 as attorney's fees chargeable to the employer for bad faith. Sorrill sought review before the Full Board and, on February 28, 2009, the decision of the Single Member was adopted, subject to two mathematical corrections. The permanent partial impairment award was increased to $13,750 and the temporary total disability payments were increased to $14,248. This appeal ensued.

Discussion and Decision

Standard of Review

The Indiana Worker's Compensation Act ("the Act") provides compensation for personal injury or death by accident arising out of and in the course of employment. Ind. Code § 22-3-2-2. In evaluating a decision of the Board, we employ a two-tiered standard of review. We review the record to determine if there is any competent evidence of probative

value to support the Board's findings. Wholesalers, Inc. v. Hobson, 874 N.E.2d 622, 627 (Ind. Ct. App. 2007). We then examine the findings to see if they are sufficient to support the decision. Id. We do not reweigh the evidence or assess witness credibility, and we consider only the evidence most favorable to the award, including the reasonable inferences flowing therefrom. Id.

As to the Board's interpretation of the law, we employ a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in a given area. Young v. Marling, 900 N.E.2d 30, 34 (Ind. Ct. App. 2009). The Board will only be reversed if it incorrectly interpreted the Act. Id. However, the Act must be liberally construed to effectuate its humane purposes, and doubts in the application of its terms are to be resolved in favor of the employee. Id.

I. Future Medical Benefits

Sorrill contends that he was wrongfully denied future medical benefits when the Single Member concluded that he had waived this claim. The Single Member's decision, subsequently adopted by the Full Board, included a statement of the issues for determination. Those issues consisted of permanent partial impairment, temporary total disability benefits, and bad faith. The Single Hearing Member additionally stated:

> The parties failed to submit written stipulations of the issues at hearing which is unfortunate considering that issues were raised in the Plaintiff's post-hearing brief that were not addressed at hearing.

(App. 7.) Accordingly, the order made no provision for the payment of future medical benefits. Southern Erectors argues that the omission is proper, contending that the Hearing

Member need not address issues that have not been raised, and citing Havlin v. Wabash International, 787 N.E.2d 379 (Ind. Ct. App. 2003). In Havlin, a separate panel of this Court found that a stipulation of issues "limited the parties to submitting and the Hearing Member to considering only evidence relevant to the stipulated issues." Id. at 382.

Southern Erectors concedes that there was no "formal stipulation as to the issues to be decided in this case," Appellee's Brief at 7, but argues that issues were nevertheless limited when the following exchange took place at the outset of the hearing before the Single Member:

> Member: I show we are here today in Bloomington, Indiana on 9/13/2007 at 1 pm on cause number C-168764, Cheyenne Sorrill v Southern Erectors. The Plaintiff is represented by Mr. David Hall and the Defendant is represented by Van Willis. I do show that the parties have agreed on certain basic facts including the employment relationship, compensability of the accident on 3/23/02, and Plaintiff's average weekly wage was $548.00. The Defendant has paid a total of 134 and 1/7 weeks of TTD benefits. The disputes are regarding TTD benefits and PPI. I do show that the parties have also stipulated to the medical exhibits and are being admitted with no objection. Mr. Hall you want to go ahead with your opening?
>
> Mr. Hall: I think technically you stated, the primary issue that we are concerned about is the PPI rating and also the TTD benefits and also we are pursuing [a] claim for bad faith on [the] part of the insurance adjuster in terminating the TTD benefits improperly on multiple occasions.
>
> Member: Ok, I'm going to go ahead and swear in your witness.

(App. 16). Sorrill's attorney then elicited the following testimony from Sorrill with regard to past surgeries and the prospect of future surgery:

> Sorrill: I had some other issues from that first surgery on my left wrist. It wasn't quite right. So, they had to go back in and put a different plate in there with some bone graft. The third one was to reroute a tendon. Fourth one

> would have been if I remember right, to reroute a tendon and place a plate in the right wrist and to also put a spacer in the right elbow.
>
> . . .
>
> Mr. Hall: What's your understanding of that situation?
>
> Sorrill: He said there is a good chance I would have to have surgery on these two bones going up my arm to fuse them together, and to also to remove the plate if it gets to where I can't stand it anymore.

(App. 20). Additionally, the exhibits submitted for the Hearing Member's consideration included Dr. Wottowa's assessment summary of August 3, 2005, wherein he predicted that Sorrill "will probably have at least one if not 2 surgeries in the future to help treat this problem." (App. 111). Finally, Dr. Andrew Vicar's 2003 assessment summary acknowledged the potential for future surgery, although he cautioned that, "any reconstructive surgery for this situation would have to be very carefully considered by both the patient and the surgeon." (App. 79).

The opening remarks of Sorrill's counsel failed to address a future medical benefits claim. Nevertheless, the Application for Adjustment of Claim put the Hearing Member on notice that such a claim might be presented, and the evidence included testimony and exhibits revealing the potential for further surgery. Mindful that our worker's compensation scheme is an enactment with humanitarian purposes, designed to provide "an expeditious and adequate remedy," Sims v. U.S. Fidelity & Guar. Co., 782 N.E.2d 345, 352 (Ind. 2003), we conclude that Sorrill did not waive his claim to future medical benefits. Accordingly, we remand for consideration of this claim.

II. Bad Faith Sanctions

The Single Member found that AIG's adjuster threatened termination of benefits for reasons not allowed by law, improperly terminated Sorrill's benefits on multiple occasions, and failed to provide proper notice of termination. Sorrill was awarded bad faith damages of $8,768 and corresponding attorney's fees of $2,893. The order specified that those fees were not chargeable against Sorrill's award. Sorrill contends that he should receive the maximum bad faith damages permitted by Indiana Code Section 22-3-4-12.1. He further contends that he is entitled, pursuant to Indiana Code Section 22-3-4-12, to an order that the statutory attorney's fees provided for by the Single Member's order, see Ind. Code § 22-3-1-4, are not chargeable against his award.

Indiana Code Section 22-3-4-12.1, pertaining to bad faith in adjusting or settling a worker's compensation claim, provides in relevant part:

> (a) The worker's compensation board, upon hearing a claim for benefits, has the exclusive jurisdiction to determine whether the employer, the employer's worker's compensation administrator, or the worker's compensation insurance carrier has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation.
>
> (b) If lack of diligence, bad faith, or an independent tort is proven under subsection (a), the award to the claimant shall be at least five hundred dollars ($500), but not more than twenty thousand dollars ($20,000), depending upon the degree of culpability and the actual damages sustained.
>
> (c) An award under this section shall be paid by the employer, worker's compensation administrator, or worker's compensation insurance carrier responsible to the claimant for the lack of diligence, bad faith, or independent tort.
>
> (d) The worker's compensation board shall fix, in addition to any award under this section, the amount of attorney's fees payable with respect to an award made under this section. The attorney's fees may not exceed thirty-three and one-third percent (33 1/3%) of the amount of the award.

This statute grants to the Board exclusive jurisdiction to determine whether the employer's worker's compensation insurance carrier has committed an independent tort in adjusting or settling the claim for compensation. Sims, 782 N.E.2d at 350. If the determination is made that such an independent tort has been committed, the Board is vested with discretion to fix an award of no less than $500 and no more than $20,000. See Indiana Code § 22-3-4-12.1(b).

Sorrill claims that AIG's conduct was so egregious that he deserves a maximum award. The Board made the factual determination as to the existence of bad faith; this finding is supported by the record and is not challenged on cross-appeal. Once that factual determination is made by the Board, it is not within our province to assess the degree of egregious conduct or to assign a different dollar amount as compensation therefor. We are not in a position to over-ride the discretion conferred upon the Board in this regard. See Ind. Code § 22-3-4-12.1(b). Sorrill has shown no error of law, as his award is within the statutory parameters.

Sorrill also requests that we review the award of attorney's fees. In relevant part, the Hearing Member's order, adopted by the Board, provided:

> Defendant is also charged $2,893.00 to be paid to Plaintiff's Attorney under Ind. Code 22-3-4-12.1 which is 1/3 of the above amount because Plaintiff was required to hire an Attorney in order to restore his TTD benefits which were improperly terminated. This amount shall not be charged against the Plaintiff's award. . . .
>
> It is further ordered that attorney fees are paid in accordance with the Plaintiff's retainer agreement with the Plaintiff's attorney but not to exceed the statutory maximums set forth in Ind. Code 22-3-1-4.

> It is further ordered that the Defendant will pay Plaintiff's Attorney in the amount of $2,893.00 under Ind. Code 22-3-4-12.1.

(App. 11.) Indiana Code Section 22-3-1-4, referenced by the order, provides in relevant part:

> The following schedule of attorney's fees applies to an attorney who represents a claimant before the board when the claim for compensation results in a recovery:
>
> (1) A minimum of two hundred dollars ($200).
> (2) Twenty percent (20%) of the first fifty thousand dollars ($50,000) of recovery.
> (3) Fifteen percent (15%) of the recovery in excess of fifty thousand dollars ($50,000).
> (4) Ten percent (10%) of the value of:
> (A) Unpaid medical expenses;
> (B) Out-of-pocket medical expenses; or
> (C) future medical expenses.
>
> (e) The board maintains continuing jurisdiction over all attorney's fees in cases before the board and may order a different attorney's fee or allowance in a particular case.

According to Sorrill, these statutory attorney's fees should not be charged against him, effectively imposing an additional sanction for AIG's conduct. Sorrill bases his argument upon the language of Indiana Code Section 22-3-4-12, which provides:

> Except as provided in section 12.1 of this chapter, the fees of attorneys and physicians and charges of nurses and hospitals for services under IC 22-3-2 through IC 22-3-6 shall be subject to the approval of the worker's compensation board. When any claimant for compensation is represented by an attorney in the prosecution of his claim, the worker's compensation board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his attorney, and the employer shall pay to the attorney out of the award the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award; provided, that whenever the worker's compensation board shall determine upon hearing of a claim that the employer has acted in bad faith in adjusting and settling said award, or

> whenever the worker's compensation board shall determine upon hearing of acclaim that the employer has not pursued the settlement of said claim with diligence, then the board shall, if compensation be awarded, fix the amount of the claimant's attorney's fees and such attorney fees shall be paid to the attorney, and shall not be charged against the award to the claimant.

Although the claimant's attorney's fees incurred in obtaining an award are paid from the award, the Board may order fees "in addition to the award" upon a finding of bad faith. U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243, 1248 (Ind. Ct. App. 1995). These additional fees, available when there are requisite findings of bad faith or lack of diligence, as in this case, are subject to two limitations. The "attorney's fees payable with respect to an award made under this [bad faith] section" may not exceed 33 1/3% of the amount of the bad faith award. Ind. Code § 22-3-4-12.1(d). Also, these fees shall not be charged against the claimant. Ind. Code §§ 22-3-4-12, 22-3-4-12.1.

Here, the Board specified that the bad faith attorney's fees were not chargeable to the claimant but did not order the statutory attorney's fees to be assumed by the employer without charge to Sorrill. This allocates to Sorrill the attorney's fees incurred in obtaining compensation for his temporary total disability and permanent impairment while allocating to the employer[1] the attorney's fees occasioned by its bad faith. As previously stated, we employ a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement. Accordingly, we will not disturb the Board's attorney's fees order, which incorporates a reasonable interpretation of the relevant statutes.

[1] Pursuant to Indiana Code Section 22-3-6-1, "employer" generally includes the employer's insurer.

III. Dr. Wottowa Impairment Rating

Dr. Wottowa offered a permanent partial impairment rating of 50% for one arm and 30% impairment for the other arm. The Board did not utilize this impairment rating, instead accepting the opinions of Drs. Marburger and Vicar. Sorrill complains that Dr. Wottowa's rating should have been utilized "or at least given some weight by the Board." Appellant's Brief at 19. As previously stated, we do not engage in reweighing the evidence, but consider the evidence, and the reasonable inferences therefrom, favorable to the Board decision. Wholesalers, 874 N.E.2d at 627.

Furthermore, we disagree with Sorrill's contention that the Single Member adopted the AMA Guides to Evaluation of Permanent Partial Impairment as the exclusive method of determining impairment, without legislative authority to do so. The Single Member did not purport to adopt this guide as exclusive methodology, but merely noted that Dr. Wottowa had rejected the guidelines as too restrictive and then had ultimately offered a rating supported by an "educated guess." (App. 9). As such, Sorrill has shown no error of law in the impairment award.

IV. Temporary Partial Disability Award

Finally, Sorrill seeks to be paid temporary partial disability benefits past the date of his maximum medical improvement and up until the date of receiving compensation for permanent partial impairment. More specifically, he claims that he has not been fully compensated because, after his maximum medical improvement and return to employment, his earnings were significantly less than the pre-injury earnings.

Sorrill did not present evidence relative to his post-injury earnings.[2] Moreover, he has not demonstrated his entitlement to temporary partial disability benefits after reaching maximum medical improvement.

In Kohlman v. Indiana University, 670 N.E.2d 42 (Ind. Ct. App. 1996), a panel of this court considered whether the claimant was entitled to temporary partial disability benefits because of the continuing wage loss she incurred as a result of permanent restrictions placed on her. Finding that an employer may rightfully terminate temporary disability benefits once the permanency of the employee's injury has been established, the Kohlman court stated, "once the physical condition is quiescent, temporary disability ceases and the only compensation available is that prescribed for permanent impairment[.]" Id. at 44. While acknowledging that the claimant, Kohlman, had lost significant earnings post-injury, the court observed that the worker's compensation scheme "was not intended to accomplish a replacement of lost wages. Rather, worker's compensation is a series of carefully balanced compromises designed to share the social costs of work injuries[.]" Id.

Sorrill urges a liberal construction of our worker's compensation act. However, we agree with the Kohlman court that a compensation system, unlike tort recovery, is not meant to provide payment equivalent to actual loss, and even a liberal construction of the Act does not permit compensation outside its dictates. Sorrill was not entitled to be paid additional temporary partial disability benefits.

[2] Indiana Code Section 22-3-3-9 provides for a calculation of benefits to an employee able to work, but unable to perform the same or similar pre-injury work, by computing two-thirds of the difference between his average weekly wages and the weekly wages at which he is actually employed after the injury.

Conclusion

We remand for consideration of the claim for future medical benefits, and otherwise affirm the order of the Board.

Affirmed in part, reversed in part, and remanded.

VAIDIK, J., and BRADFORD, J., concur.