OFFICIAL ARKANSAS
COURT OF APPEALS OPINION

Cite as 2011 Ark. App. 583

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-463

ST. EDWARD MERCY MEDICAL CENTER and SISTERS OF MERCY HEALTH SYSTEM APPELLANTS	Opinion Delivered OCTOBER 5, 2011
V.	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F613791]
LINDA DART and SECOND INJURY FUND APPELLEES	AFFIRMED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL

JOSEPHINE LINKER HART, Judge

Appellants, St. Edward Mercy Medical Center and its carrier Sisters of Mercy Health System, argue that substantial evidence does not support the Arkansas Workers' Compensation Commission's finding that Linda Dart did not reach maximum medical improvement until August 7, 2009. Appellants further assert that substantial evidence does not support the Commission's decision to award Dart a twenty-percent penalty for benefits untimely paid to her by appellants. Dart cross-appeals, asserting that because appellants' failure to pay was willful and intentional, she was entitled to a thirty-six-percent penalty. We affirm the Commission's decision.

In its October 13, 2009 decision, the Commission awarded Dart temporary total-disability benefits for her compensable back injury from January 28, 2008, to a date yet to be determined. No appeal was taken from that decision. Dart ultimately received a check issued

OFFICIAL ARKANSAS COURT OF APPEALS OPINION

January 8, 2010, for temporary total-disability benefits. A hearing was held on July 1, 2010, to determine the date Dart's entitlement to temporary total-disability benefits ended and whether appellants should be subject to penalties for failing to timely pay benefits that had been awarded by the Commission.

Before the administrative law judge, Dart asserted that she had reached maximum medical improvement on August 7, 2009. The Commission, which adopted the administrative law judge's decision, agreed. The Commission noted that Dart's treating physician, Dr. J. Michael Standefer, originally opined in his December 30, 2008 deposition that the anticipated healing period for Dart's back surgery would be twelve to eighteen months from the surgery, which was performed on January 29, 2008. The Commission, however, noted that in a June 29, 2010 deposition, Dr. Standefer was questioned about Dr. John Swicegood's August 7, 2009 report in which Dr. Swicegood wrote that Dart was permanently disabled. Dr. Standefer opined that it "would be fine" to date Dart's maximum medical improvement at August 7, 2009, roughly eighteen months from the date of Dart's surgery. He further opined that it was not surprising that it would take eighteen months to reach maximum medical improvement. Given this evidence, the Commission concluded that Dart reached maximum medical improvement on August 7, 2009.

Appellants argue that the Commission's decision was not supported by substantial evidence. Where the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the findings of the Commission and will affirm if those findings are supported by substantial evidence. *Owens Planting Co. v. Graham*, 2011 Ark. App.

444, 384 S.W.3d 634. The Commission determines the credibility of the witnesses and the weight to be given their testimony, and when the medical evidence is conflicting, the resolution of that conflict is a question for the Commission. *Id*. As for temporary total disability, it is the period within the healing period in which an employee suffers a total incapacity to earn wages. *Id*. The healing period ends when the employee is as far restored as the permanent nature of his injury will permit. *Id*. The question of when the healing period has ended is a factual determination for the Commission that will be affirmed if it is supported by substantial evidence. *Id*.

On appeal, appellants assert that, in sum, the evidence of the date of Dart's maximum medical improvement is conflicting, and appellants conclude that, on the whole, evidence pointing to an earlier date for maximum medical improvement is entitled to greater weight. But as stated earlier, conflicts in the evidence and the weight and credibility to be afforded to that evidence is for the Commission. Given our standard of review, we affirm the Commission's decision.

The Commission further concluded that Dart was entitled to a twenty-percent penalty on benefits from January 29, 2008, to January 15, 2009. The relevant statutory provision provides that "[i]f any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-711 and 11-9-712." Ark. Code Ann. § 11-9-802(c) (Repl. 2002).

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

The Commission found that the payment was outside the statutory time frame. It determined that appellants' explanation that it may have been entitled to an offset from disability benefits paid to Dart by a third party did not absolve it of its responsibility to timely pay. The Commission noted that appellants did not take any offset and paid benefits. The Commission concluded that appellants would be required to assert its right to such an offset before the Commission's order became final and certainly before it became past due. The Commission then imposed a twenty-percent penalty.

On appeal, appellants assert that they did not timely make payment because they were uncertain of their obligations. Particularly, they assert that temporary total-disability benefits had been awarded to Dart to a date that had not been determined, and they were unsure when Dart would reach maximum medical improvement and end her healing period. Further, appellants assert that because Dart was receiving long-term-disability benefits, arguably they were entitled to an offset on the temporary total-disability benefits, even though they ultimately decided not to pursue the issue and instead issued a check to Dart.

We hold that appellants' uncertainty did not absolve them from timely paying benefits. Failure to begin paying benefits within the statutory period gives rise to the statutory twenty-percent penalty. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Further, this court has previously held that an employer's unsureness about its obligations, which stemmed from an award of benefits to an employee to a date uncertain, did not relieve an employer's responsibility to promptly pay benefits. *Castleberry v. Elite Lamp Co.*, 69 Ark.

OFFICIAL ARKANSAS COURT OF APPEALS OPINION

App. 359, 13 S.W.3d 211 (2000). Accordingly, substantial evidence supports the Commission's decision.

The relevant statute also provides that "[i]n the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant." Ark. Code Ann. § 11-9-802 (e). The Commission concluded that there was no evidence in the record to show that appellants' actions were willful and intentional. Dart argues on cross-appeal that substantial evidence does not support the Commission's decision not to impose this penalty on appellants. But given that appellants asserted a basis for possible confusion over payment of benefits, the Commission could properly conclude that appellants' lack of diligence was neither willful nor intentional conduct. Thus, substantial evidence supports the Commission's decision.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *Megan E. Wooster*, for appellants.

Walker, Shock & Harp, PLLC, by: *Eddie H. Walker, Jr.*, for appellee.