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2025 IL App (3d) 240361WC-U

Order filed January 6, 2025

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ROBERT BERNDT,)	Appeal from the Circuit Court
)	of DuPage County, Illinois
)	
Appellant,)	
)	
v.)	Appeal No. 3-24-0361WC
)	Circuit No. 2023 MR 680
)	
ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION, <i>et al.</i> , (Phoenix Logistics Inc.)	Bryan S. Chapman,
and Keenan Transit Company, Appellees.))	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Mullen, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 (1) The Commission's reduction of the arbitrator's award of penalties and attorney fees was not barred by principles of *res judicata* or collateral estoppel; (2) the Commission correctly ruled that penalties are not awardable under section 19(k) for unpaid medical expenses that were not submitted to the employer prior to the arbitration hearing; and (3) the Commission did not err by raising the latter issue *sua sponte*.

PROCEDURAL HISTORY

¶ 2 The claimant, Robert Berndt, filed five separate claims for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)), seeking benefits for work-related injuries he sustained on October 15, 2014, and March 23, 2015. The claimant initially filed two separate claims (one for each accident) against respondent Phoenix Logistics Inc. (Phoenix). Phoenix responded that it was not the claimant's employer. The claimant then filed two additional claims (one for each accident) against respondent Keenan Transit Company (Keenan). Keenan also responded that it was not the employer. Phoenix and Keenan each claimed that the claimant had been employed by Amerisafe Consulting and Safety (Amerisafe) at the time of his work accidents. Accordingly, the claimant filed a separate claim for benefits against Amerisafe.

¶ 3 The claimant's five claims were consolidated for hearing before an arbitrator. Following the hearing, the arbitrator found that, at the time of the claimant's work accidents, Phoenix and Keenan were the "loaning employers," and Amerisafe was the "borrowing employer." The arbitrator further found that Amerisafe was not liable to pay the claimant workers' compensation benefits. The arbitrator concluded that Phoenix and Keenan were liable for all the claimant's claims under section 1(a)(4) of the Act (820 ILCS 305/1(a)(4) (West 2014)).

¶ 4 The arbitrator further found that (1) the claimant had sustained work-related accidents on October 15, 2014, and March 23, 2015; (2) the claimant's various conditions of ill-being were causally related to his employment; (3) the claimant had provided timely notice of his work accidents to the respondents; and (4) the medical treatments that the claimant received following each of his work accidents were reasonable and necessary. The arbitrator awarded the claimant temporary total disability benefits (TTD) from March 23, 2015, through the date he was placed at maximum medical improvement (MMI) with permanent work restrictions on November 20,

2017. The arbitrator also awarded the claimant permanent total disability benefits (PTD) for life, commencing on November 20, 2017.

¶ 5 The arbitrator further found that Phoenix and Keenan's delay in paying the claimant's medical expenses and TTD was unreasonable or vexatious, and awarded penalties against the employer under section 19(l) of the Act (820 ILCS 305/19(l) (West 2014)) in the maximum amount of \$10,000, additional penalties under section 19(k) of the Act (820 ILCS 305/19(k) (West 2014)) in the amount of 50 percent of the unpaid TTD, PTD and medical expenses, plus attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2014)). These penalties amounted to \$10,000 under section 19(l), \$151,739.85 under section 19(k), and \$60,695.94 in attorney fees.

¶ 6 Phoenix and Keenan appealed the arbitrator's decisions on the four separate claims filed against them to the Illinois Workers' Compensation Commission (Commission). They did not appeal the arbitrator's decision on the claim brought against Amerisafe.

¶ 7 The Commission affirmed the arbitrator's finding that Phoenix and Keenan were liable for the claimant's workers compensation benefits under section 1(a)(4) of the Act, affirmed the arbitrator's findings on accident, causation, and notice, and upheld the arbitrator's award of medical expenses, TTD and PTD. However, the Commission reduced the arbitrator's award of penalties and attorney fees for unpaid PPD and medical expenses. The Commission concluded that no penalties could be imposed against Phoenix and Keenan for their failure to pay PTD because PTD had not been awarded prior to the arbitration hearing. The Commission further ruled that penalties could not be awarded against Phoenix and Keenan for their failure to pay any medical bills that the claimant had not submitted to them. Following his March 23, 2015, work injury, the claimant had submitted only one medical bill to Phoenix and Keenan that their

insurance company had failed to pay (a bill in the amount of \$534). Accordingly, the Commission modified the arbitrator's award of section 19(k) penalties to 50 percent of the total TTD award plus 50 percent of the \$534 in eligible medical expenses. This amounted to a total of \$10,000 in penalties under section 19(l), and \$32,608.80 in penalties under section 19(k). The Commission also reduced the attorney fee award to \$13,043.52.

¶ 8 The claimant sought judicial review of the Commission's decision to the circuit court of Cook County, which confirmed the Commission's ruling.

¶ 9 This appeal followed.

BACKGROUND

¶ 10 Amerisafe sells insulation products. It uses its own trucks to transport its products but outsources its drivers. Amerisafe contacted Kennan to obtain drivers. Kennan sent the claimant to Amerisafe. At all times relevant to this case, the claimant was driving trucks for Amerisafe.

¶ 11 The claimant's work for Amerisafe required him exit the cab of a truck during delivery stops, open the cargo doors to unload the product, unload the product, and close the door and the lift gate. The job included loading and unloading pallets with a pallet jack, and pushing and pulling loads weighing up to 3,000 pounds.

¶ 12 On October 14, 2015, the claimant was training another driver on Amerisafe's lot when he stepped into a pothole, injuring his right leg. A November 7, 2014, MRI revealed medial meniscal tearing of the right knee. The claimant underwent arthroscopic surgery to repair the tear. After surgery, the claimant continued to experience some pain and other symptoms in his right knee and hamstring. The claimant's surgeon took the claimant off work temporarily and prescribed physical therapy. Before he began therapy, the claimant improved significantly.

Although he continued to experience mild pain while getting in and out of the truck, he returned to work full duty on February 16, 2015.

¶ 13 On March 23, 2015, the claimant was involved in a vehicle collision while driving an Amerisafe truck for work. A truck traveling alongside his vehicle lost control in the snow, hitting the side of the claimant's truck and causing the claimant's truck to travel sideways across the road. The claimant jammed down on the brake repeatedly with both legs in an attempt to get his vehicle back under control. When his truck came to rest, the claimant saw that the other driver was trapped in his own truck. The claimant exited his truck, pulled the door of the other truck open and pulled the other driver out of the truck. The claimant testified that, when the adrenaline wore off, he noticed pain in his back, his left side, and both of his knees radiating down both of his legs. He felt immobilized. He was taken to a hospital by ambulance.

¶ 14 Nine days after the accident, the claimant went to see his primary care physician, Dr. Geoffrey Kuhlman. The claimant reported experiencing pain in his back, left shoulder, and right knee. His right knee was swollen, he was limping, and he felt as if his knee would give way. Dr. Kuhlmann diagnosed internal derangement of the right knee. He suspected that the vehicle accident had exacerbated the preexisting meniscal tear. Dr. Kuhlman ordered MRI scans and took the claimant off work.

¶ 15 In April 2015, the claimant underwent MRIs on his right knee and left shoulder. The scans revealed a new medial meniscal tear in the claimant's right knee, an osteochondral lesion of the articular surface of the femoral condyle, and a SLAP tear in his left shoulder, among other conditions.

¶ 16 On May 6, 2015, Dr. Troy Karlsson performed surgery on the claimant's right knee to repair the new meniscal tear. Dr. Karlsson noted that the complex meniscal tear and the

osteochronal lesion were new findings after the March 23, 2015, accident. He opined that these new conditions were logically related to that accident.

¶ 17 The claimant continued to experience symptoms in both his knees and in his left shoulder. On July 30, 2015, Dr. Karlsson recommended a total knee arthroplasty and restricted the claimant to sedentary work with no pushing, pulling, or unloading of trucks.

¶ 18 On October 14, 2015, the claimant underwent a total knee arthroplasty for the right knee. He continued to complain of right knee symptoms thereafter. To relieve these symptoms, the claimant underwent a right knee synovectomy on April 28, 2016. The claimant also experienced continuing symptoms in his left knee which required him to undergo a total left knee arthroplasty on June 22, 2016. The claimant's left knee symptoms continued to worsen after surgery. To treat these conditions, the claimant had additional surgeries on his left knee on February 10, 2017, and May 15, 2017. At that time, the claimant began to experience additional symptoms in his right knee due to overcompensation from the left knee.

¶ 19 On June 13, 2017, the claimant returned to Dr. Kuhlman. Dr. Kuhlman opined that the claimant was unable to perform work of any kind.

¶ 20 On September 7, 2017, Dr. Karlsson imposed permanent work restrictions on the claimant of no kneeling, squatting, climbing, or lifting more than 15 pounds. He opined that the claimant's right knee condition was causally related to the March 23, 2015, vehicle accident.

¶ 21 On November 20, 2017, Dr. Andrew Kim, an orthopedic surgeon, also placed permanent work restrictions on the claimant, agreeing with Dr. Karlsson's restrictions and adding restrictions of no standing or walking more than 45 minutes without 15 minutes of rest. Dr. Kim opined that the claimant's March 23, 2015, accident reinjured his right knee and caused the need for his total right knee replacement surgery.

¶ 22 Lisa Helma, a certified vocational rehabilitation specialist, later evaluated the claimant and testified via evidence deposition on November 2, 2018. Helma opined that the claimant was unable to perform work of any kind and that no stable labor market existed for the claimant given his substantial physical limitations.

¶ 23 Phoenix and Keenan paid the claimant TTD benefits and medical expenses for approximately four months after the March 23, 2015, accident. However, they stopped paying all benefits in August 2015, purportedly in reliance on the opinions of their independent medical examiners.

¶ 24 The claimant filed a total of five workers' compensation claims for his work injuries. He initially filed claim 16WC6712, relating to the 2014 accident, and claim 15WC 14407, relating to the March 23, 2015, accident, naming Keenan as the employer. Keenan responded that it was a merely lending agency, not the employer. Claimant then filed claim 16WC 20211, relating to the 2014 injury, and claim 16WC20206, relating to the 2015 injury, naming Phoenix as the employer. Phoenix responded that it was also not the employer. This led the claimant to file claim 17WC35300, naming Amerisafe as the employer. A dispute then arose between Phoenix and Keenan as lending entities and Amerisafe as a borrowing entity regarding who was the appropriate employer for purposes of workers' compensation liability. All five cases were consolidated for hearing before an arbitrator because they were all premised on the same underlying facts. The hearing was focused on the on the claimant's claims for benefits relating to the March 23, 2015, work accident.

¶ 25 During the arbitration hearing, Phoenix and Keenan presented no evidence suggesting that they were separate entities. Toward the end of the hearing, they admitted that they were covered by the same workers' compensation carrier. Amerisafe was covered by a different

workers' compensation insurer. Evan Wollak, Amerisafe's warehouse manager, testified that Amerisafe had entered into the lending/borrowing agreement with Keenan and Phoenix specifically for the purpose of not having to pay workers' compensation claims, and that the final agreement between the parties was that Amerisafe would not be liable for any such claims.

Phoenix and Keenan offered no evidence to rebut Wollak's testimony. Phoenix and Keenan also offered no evidence to rebut the claimant's claims that he suffered work-related accidents on October 15, 2014, and March 23, 2015, and that he provided Keenan and Phoenix timely notice of these accidents.

¶ 26 The arbitrator found that the claimant had sustained work-related accidents on October 15, 2014, and March 23, 2015, and that the claimant's current conditions of ill-being were causally related to those accidents. The arbitrator also ruled in the claimant's favor on the issues of notice and the reasonableness and necessity of his medical treatments. The arbitrator found that Phoenix and Keenan were the employers responsible for the claimant's worker's compensation claims. The arbitrator awarded the claimant TTD from March 23, 2015, through the date he was placed at MMI with permanent work restrictions on November 20, 2017, and PTD for life, commencing on November 20, 2017.

¶ 27 The arbitrator also awarded penalties against Phoenix and Keenan under sections 19(l) and 19(k) of the Act (820 ILCS 305(19)(l), (k) (West 2014)), and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2014)), because he found that Phoenix and Keenan's delay in paying the claimant's medical expenses and TTD was objectively unreasonable and vexatious. The arbitrator found that Phoenix and Keenan's asserted defense that they were not the claimant's employer was a "shell game" that was meritless and frivolously raised. The arbitrator noted that Phoenix and Keenan ultimately admitted that they were covered by the same insurance

carrier (thereby obviating their claim to be separate entities for purposes of workers' compensation liability), six years after the claimant's March 23, 2015, accident.

¶ 28 Moreover, the arbitrator found that Phoenix and Keenan's purported reliance on the opinion of Dr. Thomas Gleason, one of their IME physicians, as a basis for withholding payments was unreasonable and vexatious for several reasons. Dr. Gleason's opinion that the claimant was at MMI and was able to return to work with restrictions was based upon his examination of the claimant in June of 2015, which occurred before the claimant had a total right knee replacement and further treatments for his medical conditions. Further, Keenan obtained Dr. Gleason's work release by providing Gleason with a job description that failed to inform him of the weight demands the claimant would have to handle on the job.

¶ 29 Based on these findings, the arbitrator awarded penalties against Phoenix and Keenan under section 19(l) in the maximum amount allowed by that section, additional penalties under section 19(k) in the amount of 50 percent of the unpaid TTD, PTD and medical expenses, and attorney fees under section 16. These penalties amounted to \$10,000 under section 19(l), \$151,739.85 under section 19(k), and \$60,695.94 in attorney fees.

¶ 30 The arbitrator issued five separate decisions (one for each claim filed by the claimant), each of which contained identical written findings. Phoenix and Keenan appealed the arbitrator's decisions on the four claims filed against them to the Commission. However, they did not appeal the arbitrator's decision on the claim brought against Amerisafe.

¶ 31 The claimant filed a motion before the Commission seeking dismissal of review. In his motion, the claimant argued that the arbitrator's factual findings and conclusions of law in the case against Amerisafe, including the arbitrator's awards of penalties and attorney fees, are now the law of the case, and the Commission's review was therefore barred by the doctrines of *res*

judicata and/or collateral estoppel. The claimant maintained that Phoenix and Keenan's petition for review could not proceed because all the issues they sought to appeal had received a final and binding determination by the arbitrator in favor of Amerisafe and against Phoenix and Keenan. Phoenix and Keenan filed an objection to the claimant's motion.

¶ 32 The Commission found that neither *res judicata* nor collateral estoppel applied because the claimant could not establish privity between the parties. The Commission further found that Phoenix and Keenan lacked standing to appeal the arbitrator's award against Amerisafe because they were not parties to that case. Accordingly, the Commission ruled that there was no obstacle to its review of Phoenix and Keenan's appeal.

¶ 33 The Commission ultimately affirmed the arbitrator's finding that Phoenix and Keenan were liable for the claimant's workers compensation benefits, affirmed the arbitrator's findings on accident, causation, and notice, and upheld the arbitrator's award of medical expenses, TTD and PTD.

¶ 34 However, the Commission substantially reduced the arbitrator's award of penalties and attorney fees for unpaid PTD and medical expenses. The Commission concluded that no penalties could be imposed against Phoenix and Keenan for their failure to pay PTD because penalties may be assessed only for unpaid benefits that have accrued prior to the arbitration hearing, and the claimant was not awarded PTD prior to the arbitration hearing.

¶ 35 The Commission further ruled that penalties could not be awarded against Phoenix and Keenan for their failure to pay any medical bills that the claimant had not submitted to them. Following his March 23, 2015, work injury, the claimant had submitted only one medical bill to Phoenix and Keenan that their insurer had failed to pay (a bill in the amount of \$534). The

remainder of the claimant's medical bills had been paid by his wife's insurer and were not presented to Phoenix or Keenan until the arbitration hearing.

¶ 36 Accordingly, the Commission reduced the arbitrator's award of section 19(k) penalties to 50 percent of the total TTD award plus 50 percent of the \$534 in eligible medical expenses. This amounted to a total of \$10,000 in penalties under section 19(l), and \$32,608.80 in penalties under section 19(k). The Commission also reduced the attorney fee award to \$13,043.52.

¶ 37 Commissioner Doerries dissented. Commissioner Doerries would have reversed the arbitrator's finding of a causal relationship between the claimant's left knee condition and his March 23, 2015, work accident, and vacated its award of TTD and medical expenses related to the left knee condition. Commissioner Doerries concluded that TTD benefits should have terminated on June 22, 2016, the date of the claimant's last treatment for his right knee.

Commissioner Doerries further opined that the arbitrator's award of PTD should be vacated and that the claimant should instead receive compensation in the amount of 50 percent person-as-a-whole under section 8(d)(2) of the Act.

¶ 38 Commissioner Doerries would also have vacated the arbitrator's award of penalties and attorney fees. In Commissioner Doerries' view, it was not unreasonable for Phoenix and Keenan to rely upon Dr. Gleason's opinion that the claimant could return to work with restrictions in August of 2015 because the addendum to Dr. Gleason's report was sent to Keenan on August 26, 2015, and because the job description given to Dr. Gleason by Keenan was not inaccurate. Commissioner Doerries also agreed with the Commission majority that penalties could not be awarded for medical expenses that were not submitted to Phoenix and Keenan for payment prior to the arbitration hearing.

¶ 39 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. The claimant argued that the Commission lacked the authority to modify the arbitrator's award of penalties and attorney fees because Phoenix and Keenan had failed to appeal the arbitrator's decision in the case against Amerisafe, which thereby became a final, unappealable order. The claimant argued that the Commission's order reducing the penalties and fees was barred by *res judicata* or collateral estoppel. He argued in the alternative that the Commission had erred in reducing the arbitrator's award of penalties and attorney fees under sections 19(k) and 16 based on a misreading of the requirements of those sections. The claimant maintained that the Commission had read additional burdens into the statute that do not exist, thereby reviewing the claimant's petition under an improper standard.

¶ 40 The circuit court confirmed the Commission's decision. The circuit court agreed with the Commission that neither *res judicata* nor collateral estoppel precluded the Commission's review because the claimant could not demonstrate privity between Amerisafe and Phoenix or Keenan.

¶ 41 The circuit court also upheld the Commission's finding that Phoenix and Keenan lacked standing to appeal the arbitrator's decision in favor of Amerisafe because neither Phoenix nor Keenan was a party to the claim against Amerisafe. The circuit court noted that the fact that all the claimant's claims were consolidated for hearing before the arbitrator did not mean that they were merged into one single case. The arbitrator issued four separate decisions. The circuit court therefore concluded that the arbitrator's decision in the case against Amerisafe could be enforced only against Amerisafe and was not binding on Phoenix and Keenan.

¶ 42 The circuit court also rejected the claimant's argument that the Commission had added burdens into section 19(k) that did not exist. Although it acknowledged that section 19(l) is the only section that explicitly requires the claimant to tender his medical bills to the employer and

ask the employer to pay them before seeking penalties based on the employer's delay in paying medical expenses, the court held that this "tender" requirement must apply under sections 19(k) and 16 as well. The circuit court reasoned that those sections, like section 19(l), authorize the imposition of penalties based on unpaid medical expenses only upon proof that the employer improperly delayed his payment of such expenses, and there can be a "delay" only if the employer is notified of the expenses. The court found that only one medical bill that was submitted to Phoenix and Keenan went deliberately unpaid (the \$534 bill). The court therefore held that it was not against the manifest weight of the evidence for the Commission to assess penalties and fees for the unreasonable and vexatious denial of the \$534.00 medical bill.

¶ 43 This appeal followed.

ANALYSIS

I. Estoppel

¶ 44 The claimant argues that the Commission had no authority to modify the arbitrator's award of penalties and attorney fees. He maintains that the arbitrator made the same findings as to penalties and fees in Amerisafe's case that he made in the cases against Phoenix and Keenan. Because Phoenix and Keenan failed to appeal the arbitrator's decision in the Amerisafe case, the claimant contends that all the findings made in that case were binding on Phoenix and Keenan. The claimant argues that Phoenix and Keenan's attempt to appeal those findings to the Commission was therefore barred by principles of *res judicata* or collateral estoppel.

¶ 45 The applicability of *res judicata* or collateral estoppel are questions of law that we review *de novo*. *Arvia v. Madigan*, 209 Ill. 2d 520, 526 (2004); *In re A.W.*, 231 Ill. 2d 92, 99 (2008). Under the doctrine of *res judicata*, a final judgment rendered on the merits is conclusive as to the rights of the parties and their privies, and constitutes an absolute bar to a subsequent action

involving the same claim. *P.I. & I. Motor Express/ FOR U LLC v. Industrial Comm 'n*, 368 Ill. App. 3d 230, 239 (2006). The party seeking to invoke *res judicata* has the burden of establishing that the doctrine applies. *Id.* To prevail on a *res judicata* claim, the invoking party must prove that: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008).

¶ 46 Collateral estoppel is an equitable doctrine that precludes parties from relitigating an issue in a subsequent proceeding where that issue was “actually or necessarily decided by a court of competent jurisdiction in an earlier proceeding involving the same parties in a different cause of action.” *Frankel v. Otiswear, Inc.*, 216 Ill. App. 3d 204, 212 (1991), quoting *Hammond v. North American Asbestos Corp.*, 207 Ill. App. 3d 556, 562 (1991). The threshold requirements for application of collateral estoppel are: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final determination on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 295 (1995).

¶ 47 The party asserting collateral estoppel bears the burden of showing “with clarity and certainty” that the identical question was decided in an earlier proceeding. *Givens v. City of Chicago*, 2023 IL 127837, ¶ 50. For an issue to be identical, the party sought to be bound must actually have litigated the issue in the first suit and a decision on the issue must have been “necessary to the judgment in the first litigation.” *Id.*; see also *Talarico v. Dunlap*, 177 Ill. 2d 185, 191 (1997).

¶ 48 Neither *res judicata* nor collateral estoppel apply in this case. Both doctrines apply only where the party invoking them proves that the prior proceeding involved the same parties or their privies. The claimant has failed to make that showing. Phoenix and Keenan were not parties to the claim the claimant brought against Amerisafe. Moreover, Amerisafe was clearly not in privity with Phoenix or Keenan. Litigants are considered privies to one another when "a person is so identified in interest with another that he represents the same legal right." *Langone v. Schad*, 406 Ill. App. 3d 820, 832 (2010). In this case, Keenan's and Phoenix's interests were not aligned with Amerisafe's interests. To the contrary, the parties' interests were directly opposed. Amerisafe wanted the arbitrator to determine that Phoenix or Keenan was the liable employer, because that would relieve Amerisafe of any liability for the claimant's workers' compensation claims. Likewise, Keenan and Phoenix wanted Amerisafe be identified as the liable employer. While all three parties arguably shared an interest in limiting the exposure of the employer, there is no question that Amerisafe was in direct conflict with Phoenix and Keenan regarding the primary issue of which company was liable for the claimant's injuries. This conflict is further evidenced by the fact that the companies are covered by separate insurers and were represented by separate counsel.

¶ 49 Collateral estoppel does not apply for an additional reason. The issue of penalties and attorney fees was not actually decided in the arbitrator's decision in the Amerisafe case, and those issues were not necessary to the judgment in that case. The only issue actually decided in the Amerisafe case was that Amerisafe was not liable for any of the claimant's claims. Given that decision, penalties and attorney fees were not (and could not have been) awarded against Amerisafe. The arbitrator's discussion of Phoenix's and Keenan's liability for penalties and fees in the Amerisafe decision was *dicta* that was not necessary or even pertinent to the judgment in

favor of Amerisafe. The arbitrator decided Phoenix's and Keenan's liability for penalties and fees in the cases brought against them, not in the case brought against Amerisafe.¹

¶ 50 Accordingly, Phoenix and Keenan's failure to appeal the Amerisafe decision did not bar them from challenging the arbitrator's award of penalties and fees before the Commission. Nor did it bar the Commission from modifying that award.

II. The Commission's Penalty and Attorney Fee Awards

¶ 51 The claimant further argues that the Commission's reduction of the arbitrator's award of penalties under section 19(k) for Phoenix and Keenan's failure to pay the claimant's medical expenses was based on a misreading of the Act. Specifically, the claimant contends that the Commission erred by ruling that such penalties are available only for medical expenses that have been submitted to the employer for payment. The claimant maintains that no such requirement exists in section 19(k). We review the Commission's interpretation of the Act's provisions *de novo*. *Hamilton v. Industrial Comm'n*, 203 Ill. 2d 250, 254-55 (2003).

¶ 52 Section 19(l) of the Act provides that a monetary penalty may be assessed against an employer under that section "*if the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b),*" and the employer unreasonably delays payment of the benefit after the demand is made. (Emphasis added.) 820 ILCS 305/(19)(l) (West 2014). The claimant argues that, unlike section 19(l), section 19(k) does not require an employee to make a

¹ Because the arbitrator did not actually decide Phoenix and Keenan's liability for penalties and attorney fees in the Amerisafe decision, Phoenix and Keenan arguably lacked standing to appeal the Amerisafe decision on that basis. We do not need to decide this issue. Even if Phoenix and Keenan had standing to appeal the Amerisafe order, their failure to appeal it would not have barred them from raising the issue of penalties and fees before the Commission because they were not in privity with Amerisafe.

demand for payment in order to obtain penalties and attorney fees for the employer's unreasonable and vexatious failure to pay medical bills as they become due.

¶ 53 We disagree. Although section 19(k) does not explicitly provide that an employee must submit his medical bills to the employer before he can obtain penalties for the employer's failure to pay them, common sense dictates that result. Section 19(k) authorizes the imposition of penalties where an employer unreasonably delays or refuses to pay medical expenses. No such "delay" or refusal to pay can occur unless the employer knows about the medical expenses at issue and then fails to pay them in a timely fashion. It stands to reason that an employer cannot know what medical expenses are being claimed until the claimant submits the medical bills at issue to the employer. *Anders v. Industrial Comm'n*, 332 Ill. App., 3d 501 (2002) (upholding the Commission's denial of penalties under section 19(k) and section 16 attorney fees based on unpaid medical expenses that were submitted to the employer for the first time at the arbitration hearing, and ruling that a claimant cannot establish that a delay in payment occurred unless he meets his burden of proving that the medical bills were submitted to the employer and when they were submitted).

¶ 54 In this case, the claimant submitted only a single medical bill to the employer that the employer failed to pay. The rest of his medical expenses were paid by his wife's insurance carrier, and the claimant did not submit any of those medical bills to the employer until the arbitration hearing. The Commission correctly held that section 19(k) penalties (and attorney fees based on those penalties) could not be awarded against Phoenix and Keenan for its nonpayment of those expenses.

¶ 55 The Commission also correctly ruled that the claimant could not obtain penalties based upon Phoenix and Keenan's failure to pay PTD benefits in this case because PTD was not

awarded to him under the until the arbitration hearing. No PTD benefits were due and owing prior to the hearing, so the failure to pay PTD benefits prior to the hearing cannot support an award of penalties. *Zitzka v. Industrial Comm's*, 328 Ill. App. 3d 844, 852 (2002) (“[p]enalties and attorney fee awards should be calculated on the amount of the award that has accrued at the time of the penalty hearing. Amounts that have not yet accrued should not be included in the calculation.”); *Anders*, 332 Ill. App. 3d at 512 (“The Commission may not impose penalties and attorney fees on any portion of an award that has not yet accrued.”).

¶ 56 The claimant argues that Phoenix and Keenan forfeited the argument that penalties were not awardable for unpaid medical bills never submitted to them because they did not raise that argument before the arbitrator or the Commission. He maintains that the Commission improperly raised this issue *sua sponte*. We are not persuaded. The Commission has original jurisdiction in proceedings under the Act. Therefore, “[t]he jurisdiction of the Commission to review the decision of the arbitrator shall not be limited to the exceptions stated in the Petition for Review.” 820 ILCS 305/19(b) (West 2014). Indeed, “If a petition for review and agreed statement of facts or transcript of evidence is filed, * * * the Commission shall promptly review the decision of the Arbitrator and *all questions of law or fact which appear from the statement of facts or transcript of evidence.*” (Emphasis added.) 820 ILCS 305/19(e) (West 2014). Accordingly, the Commission may raise an issue not raised by the parties *sua sponte*, even an alternate theory of recovery, so long as doing so does not substantially prejudice a party’s rights by raising an issue that the party could not possibly have foreseen from the evidence in the record. *Caterpillar Tractor Co. v. Industrial Comm’n*, 215 Ill. App. 3d 229 (1991). The Commission’s raising of an issue *sua sponte* is particularly unproblematic if it is

based on the Commission's interpretation of a relevant statute. See generally *World Color Press v. Industrial Comm'n*, 125 Ill. App. 3d 469, 470 (1984).

¶ 57 In this case, the issue of penalties under section 19(k) and attorney fees under section 16 was raised and litigated before the arbitrator. The claimant sought such penalties and fees based, in part, on unpaid medical expenses. The Commission's reduction of penalties for such expenses was not based on a new theory of recovery or on the consideration of facts or evidence not presented to the arbitrator. Rather, it was based entirely on the Commission's interpretation of section 19(k), which was dictated by our decision in *Anders*. The claimant is charged with knowledge of relevant decisions of our court that are binding on the Commission. Accordingly, the Commission's reduction of the section 19(k) penalty award based upon its interpretation of that statute did not substantially prejudice the claimant.

CONCLUSION

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of DuPage County, which confirmed the Commission's decision.

¶ 59 Affirmed.