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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 1/31/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TERRY L. WHITE, a married woman,)	1 CA-CV 12-0040
)	
Plaintiff/Appellant,)	DEPARTMENT E
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
COSTCO WHOLESALE CORPORATION, a)	Rule 28, Arizona Rules of
foreign corporation; and)	Civil Appellate Procedure)
SEDGWICK CLAIMS MANAGEMENT)	
SERVICES, INC.,)	
)	
Defendants/Appellees.)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-012319

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Terry White appeals from a jury verdict in favor of Costco Wholesale Corporation ("Costco") on her claim for insurance bad faith. She also appeals the denial of her motions for judgment as a matter of law and new trial. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On June 2, 2005, White suffered an industrial injury while working in Costco's bakery department. Costco, which is self-insured for purposes of workers' compensation, accepted White's claim, and its third-party administrator, Sedgwick Claims Management Services, Inc. ("Sedgwick") began processing benefits.

¶3 White initially saw a physician at Banner Desert Occupational Health Clinic ("Banner"), who diagnosed shoulder and lumbar strains. The doctor referred White to a physical therapist. Several weeks later, Banner staff also identified a contusion to White's coccyx and ordered an MRI.

¶4 White did not progress under Banner's care, and Costco sent her to Dr. Mary Merkel, a physiatrist, who diagnosed a degenerative condition in White's lumbar spine. Dr. Merkel also diagnosed coccydynia and treated White with injections for pain relief. Dr. Merkel ultimately referred White to Dr. Allan Rowley, who administered a coccyx injection that White reported

was ineffective. Dr. Merkel then referred White to a spinal surgeon, Dr. Edward Dohring, who determined surgery was not warranted. Dr. Merkel also referred White to chiropractor Eric Neufang.

¶15 At Dr. Merkel's suggestion, Costco asked Dr. Stephen Kaster to conduct an Independent Medical Examination ("IME") to evaluate White's condition. Dr. Kaster conducted the IME in January 2006 and concluded White required further treatment and could not yet return to work. Dr. Kaster did not believe additional chiropractic treatment would be beneficial but recommended injections to the sacrococcygeal region.

¶16 White declined the recommended injections. Costco then scheduled another IME with Dr. Kaster, who reported that White had sustained a permanent functional impairment of 5%.

¶17 On August 3, 2006, Costco filed a notice with the Industrial Commission of Arizona ("ICA") closing the active medical care portion of White's claim. White protested and requested a hearing, which the ICA set for November 20, 2006.

¶18 In the meantime, White obtained a referral from her own primary care physician to Dr. Susan Sorosky, a pain management specialist. Dr. Sorosky diagnosed a degenerative disc and coccydynia, recommended physical therapy, and began injection treatments. White then saw Dr. Paul Saiz, a spinal

surgeon, who diagnosed a fractured coccygeal and scheduled a coccygectomy to remove part of White's coccyx.

¶9 After White advised Costco that she intended to undergo the coccygectomy, the ICA, at Costco's request, ordered the surgery postponed so that Costco could obtain another IME. Dr. Terry McLean conducted the IME on November 7, 2006. He diagnosed coccydynia and hypermobility of the coccygeal segments and agreed that a coccygectomy was appropriate. Dr. McLean stated that if White chose not to undergo the surgery, her condition would be permanent and stationary with a 5% impairment.

¶10 White advised Costco she had decided to postpone the surgery and instead undergo a coccyx manipulation procedure with a California chiropractor, Christopher Kemper. She asked the ICA to change the authorized physician for her industrial injury to Kemper. The ICA denied her request, and White's challenge to that ruling was added to the issues to be considered at the November 20, 2006 ICA hearing. The hearing did not proceed as scheduled, though, because White's counsel informed Costco that White planned to travel to California and undergo the Kemper procedure at her own expense. Costco's counsel responded that if the procedure were successful, he would recommend to Costco that it reimburse White for the costs.

¶11 White underwent Kemper's treatment in December 2006. In January 2007, White's counsel advised Costco that the treatment was successful but that White would require follow-up care with Kemper. He also provided White's medical records and requested reimbursement for the Kemper procedure as well as expenses incurred by White and her husband. On February 15, 2007, Costco sent White a check for \$1,575.53 to reimburse for White's airfare, car rental, meals, and lodging in California, as well as anesthesiology bills associated with the Kemper treatment, but it did not include reimbursement for the chiropractor's bills.

¶12 Costco thereafter scheduled another IME to determine White's health status and work limitations. Dr. John Beghin performed the IME on February 7, 2007. He opined that White had suffered a lumbar strain, found no objective evidence of work restrictions, and stated that White's condition was stationary with no permanent impairment. Costco asked Dr. Beghin to issue a revised report and assume for purposes of that report that White had a coccyx injury that was related to her industrial injury. Dr. Beghin's revised report indicated that assumption did not alter his opinions.¹ Based on Dr. Beghin's report,

¹ Dr. Beghin's IME report and addendum indicate he found no coccyx injury at the time of his February 8, 2007 exam but did not rule out a prior injury.

Costco filed a notice of claim status closing White's claim.²

¶13 On February 8, 2008, the ICA ruled that White was entitled to reimbursement for the Kemper treatment and ordered Costco to pay for any follow-up care that White required with Kemper based on the ICA fee schedule. On June 30, 2008, Costco paid White \$3,358 for the outstanding Kemper bills and also tendered \$2,000 for anticipated follow-up treatment with Kemper.

¶14 On May 27, 2008, White filed this action against Costco for breach of the implied covenant of good faith and fair dealing in the administration of her claim.³ After a seven-day trial, the jury returned a verdict in favor of Costco. White filed a renewed motion for judgment as a matter of law. She also moved for a new trial. The superior court denied both motions.

¶15 White timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (A)(5)(a).

² Costco rescinded its August 3, 2006 notice of claim status and simultaneously closed the claim as of the date of Dr. Beghin's report.

³ White initially asserted an independent claim against Sedgwick, but later dismissed it. White maintained Costco was liable for Sedgwick's actions under an agency theory.

DISCUSSION

I. Renewed Motion for Judgment as a Matter of Law ("JMOL")⁴

¶16 "A trial court should grant a motion for JMOL 'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Acuna v. Kroack*, 212 Ariz. 104, 110-11, ¶ 24, 128 P.3d 221, 227-28 (App. 2006). We review the denial of a motion for JMOL *de novo*, viewing "the evidence in a light most favorable to upholding the jury verdict" and affirming if any substantial evidence exists that would permit reasonable persons to reach the jury's result. *Id.* at ¶¶ 23-24.

¶17 Costco presented evidence at trial that its failure to reimburse White for Kemper's treatment was the result of an oversight. Claims adjuster Pamela Moon testified that after Costco's counsel recommended a "generous" approach to reimbursing White, she increased the medical reserves on the file for purposes of reimbursing the Kemper treatment. Moon explained that because she did not receive the chiropractor's bills directly from Kemper, but from Costco's attorney, she misfiled the bills in the legal file, and they were consequently

⁴ White moved for JMOL at the close of evidence, in accordance with Rule 50(a), Arizona Rules of Civil Procedure ("Rule").

not processed for payment. She further testified about an ongoing miscommunication with Costco's counsel during the following year about whether White had been fully reimbursed. Although counsel advised that White was complaining Costco had not paid all of the Kemper expenses, Moon believed she had reimbursed all "expenses" because she had paid all of the travel expenses. Moon did not appreciate that the ongoing requests for reimbursement of "expenses" included Kemper's bills. She testified:

[E]xpenses to me don't include medical costs. The expenses are out-of-pocket cost for travel, hotel, that sort of thing. So I was trying to get through to [Costco's attorney] all of the expenses had been paid. And he kept saying they weren't, so I sent him a copy of the payment history and outlined this is what was paid. So we were just -- we weren't communicating. He was using the word expenses, and expenses to me mean expenses. There was a lack of communication.

Moon admitted she mishandled White's reimbursement claim, but testified she had increased the reserves specifically to pay the Kemper bills and always intended to pay them.⁵

⁵ White attempted to impeach Moon's trial testimony with her earlier deposition testimony and other evidence. But as noted *supra*, we review the trial evidence in the light most favorable to affirming the jury's verdict. *Acuna*, 212 Ariz. at 111, ¶ 24, 128 P.3d at 228 (citation omitted). Additionally, "[n]o rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

¶18 White was not entitled to JMOL on her bad faith claim. The evidence established genuine disputes of fact about whether Costco denied White's reimbursement claim, whether it investigated that claim, and whether the failure to timely reimburse for the Kemper bills was intentional. See *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000) ("The tort of bad faith arises when the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'"); see also *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986) (insurer should not be held liable for bad faith when it makes a good faith mistake in performance or judgment). The superior court did not err in denying White's JMOL motion.

II. Motion for New Trial

¶19 White also contends the superior court should have granted her motion for new trial because the verdict was contrary to the law and unsupported by the evidence. A trial court has substantial latitude in deciding whether to overturn a jury verdict; we review the denial of a motion for new trial for an abuse of discretion, viewing the evidence in the light most favorable to upholding the verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶¶ 2-13, 961 P.2d 449, 451 (1998) (citations omitted). Absent a clear abuse of discretion, we will affirm the denial of a motion for new trial brought on the

grounds that the verdict is against the weight of the evidence. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996) (citation omitted).

¶20 As previously discussed, Costco presented evidence that it did not deny or intentionally delay White's reimbursement claim, but that its adjustor failed to timely reimburse a portion of the claim because she misfiled the Kemper bills. Jurors could also conclude from the evidence presented that Costco's counsel and Moon both investigated White's continuing requests for reimbursement, though Moon kept reaching the faulty conclusion that she had fully reimbursed White.

¶21 The jury was entitled to consider Moon's testimony, together with other evidence about, *inter alia*, benefit payments made since the inception of the claim, Costco's willingness to fund the more expensive coccygectomy, and its increased reserves for the specific purpose of reimbursing the Kemper treatment, in determining that Costco did not act in bad faith. As our supreme court has held in discussing insurance bad faith:

Insurance companies, like other enterprises and all human beings, are far from perfect. Papers get lost, telephone messages misplaced and claims ignored because paperwork was misfiled or improperly processed. Such isolated mischances may result in a claim being unpaid or delayed. None of these mistakes will ordinarily constitute a breach of the implied covenant of good faith and fair dealing

As long as [an insurer] acts honestly, on adequate information and does not place paramount importance on its own interests, it should not be held liable because of a good faith mistake in performance or judgment.

Rawlings, 151 Ariz. at 157, 726 P.2d at 573.

¶22 The jury's verdict was supported by substantial evidence, and the superior court did not abuse its discretion by denying White's motion for new trial.

III. Dr. McLean's Testimony

¶23 White contends the court erred by admitting testimony from Dr. McLean about the Kemper treatment because it "unfairly confused jurors on the reasonableness of Costco's denials and state of mind during the denials and litigation." We conclude otherwise.

¶24 We generally review challenges to the admission of evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000). The trial court sustained White's objection to Dr. McLean's testimony insofar as it was intended to show that Costco acted reasonably. The court noted that Costco did not possess Dr. McLean's opinions when it made its claims decisions and therefore could not rely on them to demonstrate the reasonableness of its conduct. *See Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 158 n.31, ¶ 60, 213 P.3d 288, 307 n.31 (App.

2009) ("The reasonableness of an insurer's actions in handling a claim must be evaluated as of the time of those actions based on what it knew when it acted."). The court further agreed to instruct the jury "not to consider this particular evidence on the point as to the reasonableness of whatever actions the company took."

¶125 We discern no abuse of discretion and find no support in the record for White's contention that Dr. McLean's testimony confused jurors about the propriety of Costco's conduct. See *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 37, 800 P.2d 20, 24 (App. 1990) (trial court's evidentiary ruling will not be overturned absent a clear abuse of discretion and resulting prejudice).

IV. ICA Determinations

¶126 Prior to trial, White moved for partial summary judgment on the facts and issues adjudicated by the ICA and asked the court to order that those issues had been established as a matter of law.⁶ Costco moved to strike the motion, arguing

⁶ The specific facts and issues White asked the court establish as a matter of law were: (1) she suffered an injury compensable under the Workers' Compensation Act on June 2, 2005; (2) her compensable injury included pathology to the coccyx; (3) White required ongoing medical care as of August 3, 2006, when Costco closed her claim; (4) White was entitled to continuing medical care and wage benefits after February 15, 2007, when Costco closed her claim; (5) White was entitled to have Kemper designated her treating physician; (6) White's displaced coccyx was related to her June 2, 2005 industrial injury; (7) Kemper's

it was not a proper Rule 56 motion because it asked the court to establish certain facts, not grant judgment on a claim or defense. The court granted Costco's motion, without prejudice to White's ability to raise the issue in another context.

¶127 White then filed an amended motion for partial summary judgment, or in the alternative motion in limine, in which she argued the ICA's determinations established Costco's breach of contract and certain other facts and issues as a matter of law and asked the court to so instruct the jury. The court denied the motion as premature, without prejudice to White renewing the motion before the comprehensive pretrial management conference.

¶128 After the court set the matter for trial, White again asked it to recognize the preclusive effect of the ICA's determinations and to instruct the jury to accept those determinations in the bad faith action. The court granted White's motion, stating: "the jury will be instructed that the Industrial Commission's relevant findings and rulings are correct and are to be given preclusive effect." White asked the court to include the instruction in the preliminary jury instructions.

treatment of White's displaced coccyx was reasonable and necessary; and (8) all conflicts of medical opinion regarding diagnosis and treatment between Dr. Beghin and Kemper are resolved in favor of Kemper.

As relevant, the preliminary instructions given to the jury stated:

Ms. White and Costco have already had several hearings about what workers' compensation benefits she was entitled to receive. Those hearings were held at the Industrial Commission of Arizona, an agency our Legislature has established to hear these kinds of claims. **In this trial, you must assume that the Industrial Commission's decisions were correct.** The question you will decide is whether Costco acted in bad faith in denying or delaying treatment or payment of Ms. White's claims.

(Emphasis added.) The court further instructed the jury as follows in its final instructions:

Plaintiff Terr[y] White filed a claim for benefits as a result of injuries she suffered while working for Defendant Costco. Defendant Costco, through Defendant Sedgwick, and subject to the provisions of the Workers' Compensation Laws of this State, timely accepted the claim for benefits by Notice of Claim Status dated August 3, 2005. The parties disagreed about certain matters. They presented evidence in support of their positions to an Administrative Law Judge for the Industrial Commission of Arizona.

Following hearings, the Administrative Law Judge decided February 8, 2008 that Ms. White was entitled to receive medical and compensation benefits from June 5, 2005 until such time as her condition was determined to be medically stationary. The Judge also approved Plaintiff's request for change of doctor to Dr. Kemper that the Commission had previously denied. He ordered that Costco reimburse Ms. White for her out-of-pocket costs for treatment to the

date of his decision. The Judge ordered that any further costs for Dr. Kemper's services related to her injury were to be paid to Dr. Kemper in compliance with the Commission's medical fee schedule.

By notice of claim status filed March 17, 2009, Ms. White's industrial claim was closed with no permanent disability and the need for active medical care was terminated on February 19, 2009 because the plaintiff was discharged. This notice of claim status was not protested by plaintiff or her counsel and has since become final.

These issues are now final, and are not in dispute here. You must accept them as true.

¶30 Relying on *Mendoza*, White argues that the failure to instruct the jury about the preclusive effect of the ICA's determinations at the beginning of trial was prejudicial error. We disagree.

¶31 In *Mendoza*, a former McDonald's employee sued the company for bad faith arising out of its handling of her workers' compensation claim. 222 Ariz. at 142, 147, ¶¶ 1, 24, 213 P.3d at 291, 296. Prior to trial, the ICA determined Mendoza had suffered an industrial injury that disabled her from working and entitled her to temporary disability benefits, and that the injury resulted in further physical harm that was compensable under the Workers' Compensation Act. *Id.* at 156-57, ¶ 57, 213 P.3d at 305-06. The superior court did not instruct the jury that it was required to accept the ICA's determinations as true, and McDonald's argued at trial that Mendoza was not

actually injured on the job and that she had perpetrated a fraud by obtaining disability and medical benefits. *Id.* at 157, ¶ 58, 213 P.3d at 306. On appeal, this Court held that the superior court erred by refusing to instruct the jury to accept the ICA's factual findings as true and by failing to consider Mendoza's objections to McDonald's trial evidence regarding her alleged fraud. *Id.* at 157-58, ¶ 60, 213 P.3d at 306-07.

¶32 Unlike *Mendoza*, the court here instructed the jury in both the preliminary and final instructions that it must accept the ICA's determinations as true. White cites no authority for the proposition that the court was required to give the more detailed jury instruction at the outset of trial, rather than after the close of evidence. We review jury instructions as a whole to determine whether the trial court properly guided the jury in its deliberations. *Callender v. Transpac. Hotel Corp.*, 179 Ariz. 557, 560, 880 P.2d 1103, 1106 (App. 1993) (citations omitted); *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 270-71, ¶ 68, 92 P.3d 882, 900-01 (App. 2004) (citations omitted). We will not overturn a verdict unless there is "substantial doubt" about whether the jury was properly guided. *Crackel*, 208 Ariz. at 271, ¶ 68, 92 P.3d at 901. We have no doubt, let alone "substantial doubt" that the jury here was properly guided in applying the ICA determinations.

CONCLUSION

¶133 We affirm the judgment of the superior court. We deny White's request for an award of costs and attorneys' fees because she is not the successful party. We also deny Sedgwick's request for attorneys' fees. White dismissed her claim against Sedgwick, and it is not at issue in this appeal. As the successful party, Costco is entitled to its appellate costs upon compliance with ARCAP 21.

/s/

MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

PHILIP HALL, Judge