*2009 Ill. Wrk. Comp. LEXIS 677, **

VICTOR MANUEL ZENDEJAS, PETITIONER, v. J & J BROTHERS CONSTRUCTION, RESPONDENT.

NO: 05 WC 03276 09 IWCC 650

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

2009 Ill. Wrk. Comp. LEXIS 677

June 26, 2009

CORE TERMS: temporary total disability, discogram, recommended, temporary, return to work, functional, treating, symptoms, maximum, totally disabled, temporarily, permanent, written request, recommendation, pain, permanent disability, total compensation, returned to work, medical care, claimant, immigration status, physical therapy, stabilization, degeneration, prescribed, subjective, underwent, recorded, examiner, surgeon

JUDGES: Yolaine Dauphin; Molly Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

While awarding a determinate period of temporary total disability benefits, from December 7, 2004 through January 15, 2007, the Arbitrator ruled Petitioner could not receive ongoing temporary total disability benefits because Respondent's section 12 examiner, Dr. Kornblatt, determined Petitioner reached maximum medical improvement (MMI). The Arbitrator further considered Petitioner's present inability to work attenuated from **[*2]** his medical condition and, instead, a result of his immigration status as an illegal alien.

To begin, a petitioner's immigration status has no bearing on his eligibility for any benefits under the Act. As the Illinois Appellate Court held in **Economy Packing** Co. v. Illinois Workers' Compensation Commission, 387 Ill. App. 3d 283, 295 (2008), "the Act allows workers' compensation benefits *** to be awarded to undocumented aliens and *** and an award of such benefits is not preempted by federal immigration law." Therefore; should the medical evidence prove Petitioner to be temporarily totally disabled, Petitioner may receive temporary total disability benefits.

"Temporary disability is a condition which exists until the injured workman is as far restored as the permanent character of his injury permits. [Citation.]" Yellow Freight System, Inc 124 Ill. App. 3d at 733. In determining the duration of temporary total disability, "the only questions that need to be asked and answered are whether the claimant has yet reached maximum medical improvement and, if so, when." Freeman United Coal Mining Co. v. Indus. Comm'n, 318 Ill. App. 3d 170, 178 (2000). **[*3]** See also Mobil Oil Corp. v. Industrial Comm'n, 327 Ill. App. 3d 778 (2002) (affirming a temporary total disability award where the claimant was released to light duty work, but not yet at MMI); Whitney Productions, Inc. v. Industrial Comm'n, 274 Ill. App. 3d 28 (1995) (same).

In this case, Petitioner's treating orthopedic surgeon, Dr. Miz, operated on Petitioner November 7, 2005, performing a microdiscectomy at L5-S1. During the course of the operation, Dr. Miz removed an extended disc fragment from Petitioner's lumbar spine.

At Petitioner's first postoperative visit, on November 17, 2005, his recovery was generally on schedule. Dr. Miz assigned Petitioner a home exercise program. The same was true as of his next visit on December 15, 2005. Following this visit, Dr. Miz prescribed formal physical therapy.

Petitioner continued physical therapy into March 2006. At that time, Dr. Miz recommended a work conditioning program. At Petitioner's April 11, 2006 office visit, Dr. Miz observed that Petitioner had experienced a relapse of nerve root pain as a result of the work hardening. Dr. Miz prescribed a Medrol Dose Pack and recommended **[*4]** a functional capacity evaluation. Petitioner underwent a functional capacity evaluation on May 11, 2006. The evaluation showed him capable of sedentary work.

Based on Petitioner's worsened nerve root symptoms, Dr. Miz recommended another MRI that was performed on May 22, 2006 and showed no reherniation of the L5-S1 disk, but degeneration at that site. Dr. Miz attempted to treat the degeneration with steroid treatments. However, Petitioner only had a 20 percent temporary improvement after the first injection, so, on August 6, 2006, Dr.

Miz recommended discography.

On October 19, 2006, Petitioner underwent a second functional capacity evaluation that showed him capable of between light and medium work, although with some concerns about demonstrated effort. Dr. Miz advised Petitioner that, without additional treatment, the October 19 functional capacity evaluation results would reflect his permanent capacity. At his visit February 1, 2007, Dr. Miz recorded that Petitioner's symptoms of back and leg pain had not improved and Petitioner wanted to proceed with another discogram. However, he did not undergo the procedure; Dr. Miz recorded in his August 10, 2006 office note that Respondent **[*5]** had refused to authorize additional treatment after Petitioner's section 12 examination with Dr. Kornblatt. Dr. Miz continued to see Petitioner through October 2007. Petitioner's symptoms remained consistent and the doctor maintained his recommendation of another discogram to confirm whether Petitioner was a candidate for a curative surgical procedure.

Dr. Miz did not believe Petitioner could return to work as a carpenter. He also opined that Petitioner's work injury of November 29, 2004, was responsible for his current state of ill being.

The Commission recognizes that Respondent's section 12 examiner, Dr. Kornblatt, held a different opinion of Petitioner's progress. According to Dr. Kornblatt, Petitioner could have returned to work as of January 15, 2007. However, we find Dr. Miz the most credible source of medical analysis of Petitioner's condition as Petitioner's treating surgeon. See O'Neal Bros. Constr. Co. v. Indus. Comm'n, 93 Ill.2d 30, (1982) (noting treating physicians regularly make contemporaneous observations, evaluate complaints, test symptoms, and keep records); Holiday Inns of America v. Indus. Comm'n, 43 Ill.2d 88, 90 (1969) **[*6]** ("[The Commission] might properly *** attach greater weight to the opinion of the treating surgeon who had examined [the petitioner], operated upon her twice and subsequently treated her).

The Commission concludes that Petitioner's condition had not stabilized as of January 15, 2007, and Petitioner remained temporarily totally disabled as of the time of the hearing. Accordingly, the Commission awards temporary total disability through May 29, 2008.

In light of the lack of stabilization in Petitioner's condition, the Commission also orders Respondent to provide reasonable medical care necessary to achieve stabilization and maximum medical improvement. Dr. Miz first recommended a discogram on August 6, 2006. He maintained that recommendation at Petitioner's subsequent visits on December 7, 2006, February 1, 2007, May 29, 2007, and October 9, 2007. Petitioner has not treated with Dr. Miz since his October 2007 visit. The Commission considers it prudent for Dr. Miz to examine Petitioner to determine whether a discogram remains appropriate. If Dr. Miz's examination determines that Petitioner should proceed with the discogram, the Commission orders Respondent to provide for performance **[*7]** of that procedure and such further treatment as proved necessary by the discogram.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 853.33 per week for a period of 180 6/7 weeks, from December 7, 2004 through May 29, 2008, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide for a consultation between Petitioner and Dr. Miz for the purpose of determining the present propriety of a discogram, and, should Dr. Miz determine a discogram to currently be in order, to further provide for performance of that procedure and any treatment as proved to be necessary by the discogram.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 6,093.20 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with **[*8]** this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 61,830.23. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision finding that Petitioner remained temporarily totally disabled through the date of arbitration and ordering Respondent to provide for diagnostic testing and any subsequent treatment **[*9]** as recommended by Dr. Miz. The Petitioner has failed to prove he is entitled to temporary total disability benefits after January 15, 2007. Based upon the FCE, opinions of Dr. Kornblatt, and testimony of Dr. Miz indicating he had released Petitioner to return to work in the Fall of 2006 with permanent restrictions, Petitioner is at maximum medical improvement and could have returned to work. The Majority's award of additional temporary total disability benefits and prospective medical care is based upon Dr. Miz's treatment recommendations which are based solely upon Petitioner's subjective complaints. In light of Petitioner's submaximal effort during the FCE, subjective complaints of pain, and lack of candor during trial when asked about being released to return to work by Dr. Miz, I view Petitioner's desire for further treatment as being motivated by a desire to not return to work. Dr. Miz clearly stated that in the absence of a recurrent herniation (there was none) Petitioner could return to work. Petitioner has done nothing in that regard except deny being told he could do so. The Majority's extension of temporary total disability benefits and additional care only encourages his **[*10]** inactivity. For this reason, I dissent.

DATED: JUN 26 2009

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "economy packing" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, December 22, 2009 - 3:56 PM EST

*2009 Ill. Wrk. Comp. LEXIS 553, **

MERCEDES CORONA, PETITIONER, v. CHICAGO PARK DISTRICT, RESPONDENT.

NO: 06 WC 37555 09 IWCC 580

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 553

June 9, 2009

CORE TERMS: knee, replacement, pain, arbitrator, surgery, left knee, exacerbation, doctor, temporary total disability, truck, causal connection, osteoarthritis, injection, banner, ice, right knee, disability, medication, co-worker, arthritis, started, pocket, swell, paint, stiff, anti-inflammatory, pre-existing, recommended, worsening, bilateral

JUDGES: David L. Gore; James F. DeMunno; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent/Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, permanency, and Other-Arbitrator's evidentiary ruling excluding Respondent's §12 examination report and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a, 53 year old employee of Respondent, who described her job as a journeyman sign painter. Petitioner had worked for Respondent since June 1999. Petitioner's job entails everything from on premises signs (make and create them and screen paint). She makes all signs for pools. She makes sure all department markers are correct per regulatory statutes for Illinois. She makes specialty banners for different occasions, recreation signs and specialty banners. She also maintained lake front signage, like on bike paths and all visual message signs.

2. Petitioner testified **[*2]** they were finishing repainting of the bike path to include a bicycle stop. The markers were from 100 North to 100 South; they had started it in May and had started north going south. During the project they were on foot and in the vehicle. They would drive to the location they had to be at and they would unload the truck with barricades and place signs for pedestrians and bikes to go around. They had to load and unload 5 gallon pails of paint (white marking paint), paint rollers with 8 foot extension poles. She stated that mostly the heaviest part was the barricades. They also had initially started with a plywood stencil cut in the carpentry shop and it was pretty heavy. Petitioner stated that they could not block the pedestrian way with the truck so they had to park the vehicle as close to the grassy area, but not on the landscaping; really close to the curb.

3. On the date of accident, November 10, 2005, Petitioner stated that they were unloading at their destination. They had pulled up after doing a couple of locations (intersections they had to mark). Petitioner stated that as she was getting out of the truck, her ankle turned and she fell on her knee because there was the curb **[*3]** (step about height in Arbitrator's room; about 10 inches) where she was getting out. She remembered telling her co-worker and she might have started to cry because of how she fell on her knees and had been hurt. Petitioner stated that her co-worker came around and had asked her if she was alright and he had helped Petitioner get up. Petitioner stated that she was in pain from that point and the co-worker told her that there were going to take it easy. He stated he had asked Petitioner if she wanted to go back and Petitioner stated that she would try to finish. She stated it was around just after lunch. Petitioner stated she cleaned off and she had abrasions and her knee swelled up a lot. She stated that they finished what they had to do. She stated she had a lot of pain and she called and told her manager and she filled out the forms and she called the doctor and went to the doctor as soon as possible.

4. Petitioner stated she saw Dr. Bennett on November 14, 2005 and she believed he had provided Vicodin or something for the pain and anti-inflammatory medication and he told her to ice it. Dr. Bennett had x-rays done because Petitioner stated that her left knee did not feel the same. **[*4]** Petitioner testified that she had some medical treatment on her left knee a few years prior to the accident; she had an arthroscopic surgery in 2002. In the summer of 2005 Dr. Bennett had also treated Petitioner for some arthritis in the left knee. Petitioner stated that after this accident, her left knee definitely felt different then before the accident. Petitioner stated that after this accident it was very stiff and it would swell and she had to ice it. She stated that with approaching cold weather it would really be painful and stiff. The stiffness was really the worse, she did not have a lot of motion and she knew she was limping. Petitioner continued to see Dr. Bennett for her left

knee after the accident and in June 2006 she saw Dr. Bennett and he referred Petitioner to Dr. Ghate and she saw Dr. Ghate July 25, 2006 and he recommended a total knee replacement. Petitioner had the total knee replacement surgery September 11, 2006 at Rush North Shore Hospital and she was also taken off work the day before surgery or the prior Friday. Petitioner remained in-patient until September 16 and she was discharged and she went to Alden North Shore Rehabilitation for two weeks. She had **[*5]** rehab on her knee every day at that hospital. After she was released from Alden, Petitioner had physical therapy September through November 2006 as Health South. Petitioner again saw Dr. Ghate at the end of November 2006 and he released Petitioner to return to work December 4, 2006 and Petitioner did return to work that day. Petitioner testified that the time she was off work, September 11, 2006 until December 4, 2006, she did not receive any TTD benefits whatsoever; nor did she receive any non-occupational disability.

5. Petitioner identified Px 6 group exhibit as medical bills resulting from her left knee injury. Petitioner stated that the bills were paid (by group) and some of it was out of her pocket. Petitioner stated that the represented charges she paid out of pocket appeared accurate; she had provided actual receipts. The bills were related to the total knee replacement surgery, some pre-dated the injury, and there were some bills for unrelated arm/shoulder treatment.

6. Regarding Petitioner's left knee since her return to work, Petitioner stated that she does a lot of standing and she has a problem standing as long and cannot run; she used to be able to stand for longer **[*6]** periods. When they do banners, they pull them off of a 300 pound roll and use both arms to pull the length of a table and she had to use her whole body for each banner. She also does lifting on her job of metal planks onto drawing boards. She lifts 4X8 MDO wood sheets, thicker then a desk top. She stated that the stability of her 2 feet is not as strong as it was; it had weakened tremendously. Petitioner stated that she iced her knee; in the winter it is much more; it is stiff, much worse. On occasion it will swell up maybe three times per week. Her knee is sensitive to the cold and she wears a knee wrap that tends to warm it because she has pain now and then. She had asked the doctor about it and she stated she found comfort wearing it but the doctor told her not to wear it so the knee could move more naturally as possible. Petitioner takes medication still. Since the injury she takes Arthrotek (anti-inflammatory) and also Lyrica (pain medication). Petitioner stated that she used to run but she can't because the doctor told her to use her steps wisely; she used to run the treadmill all the time and she could not do it with the pounding of running; her knee would not withstand that, **[*7]** it would put too much wear and tear on the new knee. Petitioner stated that one of the things that really concerned her was that ever since, her mobility has diminished quite a bit and she is not as active as she was due to the pain in her knee.

The Commission finds there is no question in testimony and evidence that Petitioner had a pre-existing condition of arthritis involving both knees. The December 30, 2003 medical records noted osteoarthritis in both knees; Right knee with acute exacerbation of symptoms. The records communicated the nature of disorder and there was 2002 treatment for the left knee, with diagnosis of bilateral patellofemoral chondromalacia with probable medial meniscus tear left knee. The June 1, 2005-left knee MRI report (pre-injury) noted tri-compartmental degenerative change; large patellofemoral joint effusion with several tiny intraarticular lose bodies; midgrade injury medial collateral ligament; status post partial medial meniscectomy; illotibial band syndrome-(similar finding on right knee MRI.). Petitioner had a series of Synvisc injections August 2005 for both knees with diagnosis of moderate bilateral osteoarthritis. The August 9, 2005 follow-up **[*8]** evaluation noted post MRI right knee and left knee also because she was having worsening pain as well.

On the date of accident, November 10, 2005, Petitioner stated that they were unloading at their destination. They had pulled up after doing a couple of locations (intersections they had to mark). Petitioner stated that as she was getting out of the truck, her ankle turned and she fell on her knee because there was the curb (step about height in Arbitrator's room; about 10 inches) where she was getting out. She remembered telling her co-worker and she might have started to cry because of how she fell on her knees and had been hurt. Petitioner stated that her co-worker came around and had asked her if she was alright and he had helped Petitioner getup. Petitioner stated that she was in pain from that point and the co-worker told her that there were going to take it easy. He stated he had asked Petitioner if she wanted to go back and Petitioner stated that she would try to finish. She stated it was around just after lunch. Petitioner stated she cleaned off and she had abrasions and her knee swelled up a lot. She stated that they finished what they had to do. She stated she had a lot **[*9]** of pain and she called and told her manager and she filled out the forms and she called the doctor and went to the doctor as soon as possible. Dr. Bennett stated that he saw Petitioner November 14, 2005 and she came in and stated that recently had worsening of the left knee pain, she had stated it came on rather suddenly when she had twisted her knee in a truck. She had described the pain as different then before now being more sharp pain. Dr. Bennett stated he examined Petitioner and noted slightly limited range of motion, medial joint line tenderness and ligaments were stable and normal. Dr. Bennett testified that prior to November 14, 2005 she had been diagnosed with bilateral arthritis of the knees. He indicated that prior to then also her right knee had been more problematic. This corresponds to the contemporaneous medical record. The records did not state it had occurred at work. Dr. Bennett at deposition viewed the accident report and noted that history essentially was the same history of injury and the cause of an exacerbation of the underlying arthritic condition.

Petitioner testified that she had some medical treatment on her left knee a few years prior to the accident; she **[*10]** had an arthroscopic surgery in 2002. In the summer of 2005 Dr. Bennett had also treated Petitioner for some arthritis in the left knee. Petitioner stated that after this accident, her left knee definitely felt different then before the accident. Petitioner stated that after this accident it was very stiff and it would swell and she had to ice it. She stated that with approaching cold weather it would really be painful and stiff. The stiffness was really the worse, she did not have a lot of motion and she knew she was limping. Petitioner stated she continued to see Dr. Bennett for her left knee after the accident and in June 2006 she saw Dr. Bennett and he referred Petitioner to Dr. Ghate and she saw Dr. Ghate July 25, 2006 and he recommended a total knee replacement. Petitioner had the total knee replacement surgery September 11, 2006; the operative report noted-left knee degenerative joint disease-total knee replacement; History=Left knee DJD-failed conservative care. The September 11, 2006 pathology report noted degenerative joint disease.

The medical records between November 2005 until surgery is as follows:

-February 28, 2006-Dr. Bowen-known left knee osteoarthritis. Since **[*11]** she fell a few months ago left knee bothering her a little. Also right elbow pain. Right tennis elbow; acute exacerbation of left knee osteoarthritis.

-June 28, 2006-evaluation Dr. Bowen. Left knee; follow-up. Chronic arthritis both knees but her left knee has been bothering her recently. Assessment=severe left knee osteoporosis. Injection.

-July 25, 2006-evaluation left knee, had previously been seen by Dr. Bennett and had Synvisc injections both knees and noted prior left knee surgery. Problems with ambulation and standing extended periods; stairs. Assessment=left knee DJD that had failed conservative care. Left knee DJD with mild right knee DJD. Nothing noted with injury history.

-August 18, 2006-pre-operative left knee evaluation. Known DJD left knee; plans for total left knee replacement.
Petitioner also had some unrelated epicondylitis visits with no noted knee complaints during this period.
The first medical opinion regarding causation/aggravation to a job injury came during the deposition testimony of Dr. Bennett, who is not an orthopedic surgeon (not board certified) and did not perform the knee replacement. While there is testimony and evidence to suggest an exacerbation **[*12]** to the osteoarthritic condition occurring November 2005, there are few examinations and no real substantial treatment until 7 months after the injury when Petitioner receives left knee cortisone injection and then is referred to Dr. Ghate, who has no knowledge of a work accident, and diagnoses the bilateral osteoarthritic knee condition and then recommends the left knee replacement surgery with only a diagnosis of the osteoarthritis/degenerative joint disease (DJD). There can be found a causal connection to an aggravation of the underlying condition, but Petitioner had also worked from the time of the incident through September 2006 when she finally had the surgery, and again the pathology report only indicating the DJD. There is no x-ray or MRI exam shortly after the incident for the doctors to have compared the pre-injury 2005 MRI for changes. The scattered nature of the medical visits after November 2005 until the time of surgery was recommended is more consistent with her chronic worsening condition (again noting she suffered from degenerative joint disease in both knees). Petitioner's pre-injury care was due to her chronic worsening condition and Petitioner had the Synvisc series **[*13]** prior to the accident; there was really mare pre-injury treatment (3 months before) then there was post injury for 7 months and then with the surgery about 10 months after the accident. The evidence and testimony finds that Petitioner proved a causal connection to an exacerbation of her pre-existing condition, but with no real treatment for all that time, it cannot be found to extend causal connection to the need for the total knee replacement.

The Commission finds with a causal connection to only an exacerbation, Petitioner failed to prove entitlement to temporary total disability benefits as the lost time period claimed related to after her total knee replacement that the Commission found not causally related. Temporary total disability benefits are therefore denied.

The Commission finds that there clearly are medical bills in evidence that pertain to treatment prior to the accident as well as medical bills that pertain to unrelated right arm/shoulder treatment. The Commission also finds that the remainder of the medical expenses pertains to the total knee replacement surgery and with the Commission finding of no causal connection beyond an exacerbation, all of the medical bills **[*14]** are therefore denied.

The Commission finds with above finding of causal connection to only an exacerbation, Petitioner failed to prove entitlement to permanent disability benefits regarding a total knee replacement. Nature and extent regarding exacerbation of her pre-existing condition is found to be a 20% loss of use of her left leg. (40 weeks at $ 591.77 per week equals $ 23,670.80)

Regarding the Arbitrator's evidentiary ruling, the Commission with a finding above of no causal connection beyond an exacerbation would render this a moot point. However, Petitioner was injured November 2005 and had completed treatment before the end of 2006. This matter was motioned up and finally heard July 24, 2008 in a bifurcated hearing that closed proofs September 22, 2008. Respondent apparently had requested a continuance with the initial hearing to obtain a §12 examination, which the Arbitrator denied but advised Respondent attorney as the case was going to be bifurcated to have the §12 examination report to close proofs and Respondent did have the report of the September 3, 2008 exam at that time. Petitioner's attorney held the deposition of Petitioner's Dr. Bennett (the treating doctor) on **[*15]** August 22, 2007. The Arbitrator rejected Respondent's §12 examination report based on Marks, Marks v. Acme found violation of the **48 hour** rule in Section 12, finding the trial began with the initial doctor's deposition. Clearly, Respondent's §12 here would be the same violation and the report properly rejected. Regardless, even if Marks is considered killed by Townsend v. **City of Chicago**, Respondent had from before August 22, 2007 until the hearing began July 24, 2008 to obtain their §12 and did not get it until shortly before proofs closed. The fact that the trial had begun shows of itself a violation of the **48 hour** rule as the report was clearly not tendered "prior to hearing".

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ -0- per week for a period of -0- weeks, under §8(b) of the Act, the Arbitrator's award of temporary total disability benefits is reversed and Petitioner is therefore denied benefits for temporary total disability.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 591.77 per week for a period of 40 weeks, as provided in §8(e)(12) of the Act, for the reason that the injuries **[*16]** sustained caused the 20% loss of use of Petitioner's left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ -0- for medical expenses under §8(a) of the Act. The Arbitrator's award of medical expenses benefits is reversed and Petitioner is therefore denied medical expense benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUN 9 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles DeVriendt**, arbitrator of the Commission, in the **city [*17] of Chicago**, on **7/24/08 and 9/22/08**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?

K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **November 10, 2005**, the respondent **Chicano Park District *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 54,372.24**; the average weekly wage was **$ 1045.62**

. At the time of injury, the petitioner was **53** years of age, ***single*** with **0** children under 18.

. Necessary **[*18]** medical services ***have not*** been provided by the respondent.

. To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **697.07**/week for **12 1/7** weeks, from **9/11/06** through **12/4/06**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ 591.77**/week for a further period of **107.5** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **50% loss of use of the left leg**.

. The respondent shall pay the petitioner compensation that has accrued from **11-10-05** through **9-22-08**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of **$ 88,764.50** for necessary medical services, as provided in Section 8(a) of the Act. Respondent is entitled to an 8(j) credit of $ 88,764.50 for group payments.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section **[*19]** 19(l) of the Act.

. The respondent shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

Respondent chill reimburse Petitioner $ 997.40 for out of pocket medical payments.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

10-24-08

Date

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact:

The Petitioner, Mercedes Corona, testified that she is a journeyman sign painter for the Respondent, Chicago Park District. (Tr. 7/24/08 p. 8). She has worked for Respondent since June of 1999. As a sign painter, Corona makes and creates premises signs, signs for pools, and specialty banners for promotions. **[*20]** She also creates and maintains lake front signage, such as bike path messaging.

On November 10, 2005, Petitioner was working for Respondent. She and another employee were finishing a repainting of the bike bath. (Tr. p. 9). During the project she was both on foot and in a vehicle. (Tr. p. 10). She and the other employee would drive to a location and unload the truck. They would unload the truck consisting of 5 gallon pails of paint, paint rollers, 8 foot extension poles and barricades. (Tr. p. 10-11). They would place barricades and signage for the pedestrians and bikers to go around the truck. So as not to block the main pedestrian lane, the vehicle had to be parked as close to the grass as possible but not on the grass. (Tr. p. 11). As such, the vehicle was parked very close to the curb. (Tr. p. 11).

As Petitioner was getting out of the vehicle her ankle turned and she fell on her knees. (Tr. p. 13). She believes she started to cry. (Tr. p. 13). After the accident, her left knee swelled up a lot. (Tr. p. 14). Petitioner's Exhibit 3 is a Chicago Park District Employee Incident Report dated November 10, 2005. (Pet. Ex. 3). The report notes that Petitioner was injured when getting **[*21]** out of her truck onto the bicycle bath, and that she landed on her knee and twisted her left foot. The reports refers to a witness to the accident, James Orr, from maintenance services. The report notes that Corona was going to be seen by Dr. Bennett. (Pet. Ex. 3). Page 2 of the report has a section to note where the employee was injured. Petitioner noted she was injured on the left knee. (Pet. Ex. 3).

Prior to the accident, Corona had had some medical treatment regarding her left knee. However, there was no recommendation for a total knee replacement before her accident of November 10, 2005. (Tr. p. 38-39). Petitioner underwent left knee arthroscopy, partial medial meniscectomy and debridement with Dr. Bowen on July 12, 2002. (Pet. Ex. 4, p. 103). A pre-operative M.R.I. showed minimal degenerative changes. (Pet. Ex. 4, p. 104). Corona had been seen by Dr. Bennett on May 25, 2005 for right knee pain. (Pet. Ex. 7, p. 6). Petitioner underwent an M.R.I. of both knees in August 2005. (Pet. Ex. 4, p. 26). The M.R.I. demonstrated tricompartmental osteoarthritis as well as some small loose bodies in the left knee. (Pet. Ex. 2, p. 30). Dr. Bennett testified this was not an unusual finding **[*22]** in a woman of Corona's age. (Pet. Ex. 7, p. 10). Dr. Bennett recommended some synvisc injections. (Pet. Ex. 7, p. 11). Dr. Bennett testified that prior to the accident Corona had bilateral arthritis of the knees and that her right knee was more problematic than her left. (Pet. Ex. 7, p. 13).

Petitioner presented to Dr. Bennett on November 14, 2005. (Tr. p. 15; Pet. Ex. 2, p. 24). Corona confirmed that she had recently had worsening left knee pain. (Pet. Ex. 7, p. 12). Corona reported that her pain came on rather suddenly when she twisted her knee in a truck. (Pet Ex. 7, p. 12-13). Corona reported that the pain was different than before and more sharp. (Pet. Ex. 7, p. 13). Petitioner testified that her left knee did not feel the same after the accident as it did prior to the accident. (Tr. p. 16, 17). Her knee was stiff and it would swell. (Tr. p. 17). Dr. Bennett prescribed Arthroteck, an anti-inflammatory medication. (Pet. Ex. 7, p. 13). Corona returned to see Dr. Bennett on February 28, 2006. (Pet Ex. 2, p. 22). She was still suffering from left knee pain. (Pet. Ex. 7, p. 14). Dr. Bennett noted that her left knee was swollen. (Pet. Ex. 7, p. 16). He recommended a cortisone injection **[*23]** which was performed at that time. (Pet. Ex. 7, p. 16). He diagnosed her with acute exacerbation of left knee osteoarthritis. (Pet. Ex. 4, p. 18).

Corona followed-up with Dr. Bennett on June 29, 2006. She continued to complain of left knee pain that was bothering her and interfering with her quality of life. (Pet. Ex. 7, p. 17). Dr. Bennett ordered x-rays. Based on the x-rays, Dr. Bennett performed another cortisone injection and referred Petitioner to Dr. Ghate, an orthopedic surgeon specializing in knee replacements. (Pet. Ex. 7, p. 18; Pet. Ex. 4, p. 15).

Corona presented to Dr. Ghate on July 25, 2006. (Pet. Ex. 4, p. 13). Dr. Ghate noted that Corona failed conservative care for her left knee. (Pet. Ex. 4, p. 14). Dr. Bennett agreed with this assessment. (Pet. Ex. 7, p. 19). Therefore, Corona was a candidate for knee replacement surgery.

Dr. Bennett opined that the need for the knee replacement was due to the exacerbation or at least in part to the exacerbation she suffered at work in November of 2005. (Pet. Ex. 7, p. 26). He based his opinion on her level of disability prior to the accident versus her level of disability after the accident. (Pet. Ex. 7, p. 26-27).

Petitioner had **[*24]** right total knee replacement surgery on September 11, 2006 at Rush North Shore Hospital. (Tr. p. 18). She was taken off work at that time. She remained an in-patient at Rush until September 16th. (Tr. p. 19). Following discharge from Rush, she was sent to Alden North Shore Rehabilitation Hospital for two weeks of inpatient physical therapy. (Tr. p. 19-20). After her discharge from Alden, Corona underwent physical therapy in late September, October and November of 2006. Corona continued to complain that her knee was uncomfortable and reported stiffness with rainy weather. (Pet. Ex. 4, p. 54).

Corona was released to return to work effective December 4, 2006. (Pet. Ex. 4, p. 47). Corona returned to work that day as instructed. (Tr. p. 20). During the time she was off work, Corona did not receive any temporary total disability benefits. (Tr. p. 20).

Petitioner identified Petitioner's Exhibit 6, a group of medical bills incurred as a result of the accident (Tr. p. 22). She testified that the bills were paid, including her own out of pocket payment. (Tr. p. 22).

Corona testified that since she returned to work, she has noticed that she has trouble standing for long periods of time and has **[*25]** trouble running. (Tr. p. 24). Corona described the difficulty she had at work, such as when she attempts to pull banners off a 300 pound roll and when she lifts metal blanks onto drawing boards. (Tr. p. 25). She also described having difficulty lifting wood sheets. (Tr. p. 25). She also has problems with the stability of her feet and feels that her stability has weakened tremendously. (Tr. p. 26). Corona frequently ices her left knee. (Tr. p. 26). Specifically, in the winter her knee will swell and she ices it approximately three times a week. (Tr. p. 26). The Petitioner also continues to take medication to treat her injuries. She takes Arthrotek, an anti-inflammatory drug, and Lyric for pain management (Tr. p. 27). Petitioner testified that prior to her accident she used to run on a treadmill and the doctor instructed her to stop this activity because she needs to use her steps wisely. (Tr. p. 27). Finally, Corona noted that since her accident she has had diminished mobility and is not as active as she used to be because of pain in her knee. (Tr. p. 28).

Dr. Ghate noted that because of her young age, Corona will likely require revision procedures for her knee. (Pet. Ex. 4, p. 14).

[*26] Conclusions of Law:

(F) Is the Petitioner's present condition of ill-being causally related to the injury?

The Arbitrator finds that the Petitioner's left knee injury and need for left total knee replacement is causally related to her work-related injury of November 10, 2005. The Petitioner presented un-rebutted medical testimony that her need for surgery was exacerbated by her work accident. (Pet. Ex. 1; Pet. Ex. 7). Un-rebutted medical testimony cannot be arbitrarily rejected. Sorenson v. Industrial Comm., 281 Ill.App.3d 373 (1st Dist. 1996). It is well recognized that aggravation or acceleration of a pre-existing condition satisfies the medical causal relationship requirement for compensation. See, e.g., Ramberg v. Abitua Plumbing, 07 I.W.C.C. 1298 (2007).

There is no dispute that Petitioner suffered a work-related accident on November 10, 2005. Here, although Petitioner had treatment to her left knee prior to the date of the accident, there was no recommendation for surgery until after her accident. (Tr. p. 38-39). Dr. Bennett treated Petitioner prior to her accident and subsequent to her accident and is **[*27]** in the best position to assess whether her need for surgery was related to her accident. Dr. Bennett clearly opined that Corona's November 2005 accident aggravated her knee injury and caused the need for surgery. (Pet Ex. 1; Pet. Ex. 7, p. 26). His opinion was based in part on Corona's level of disability prior to the accident versus her level of disability after the accident. (Pet. Ex. 7, p. 26-27). The Arbitrator finds the opinions of Dr. Bennett credible. The Arbitrator also notes that Respondent offered no admissible contrary medical opinion. Moreover, Respondent failed to call its own employee and witness to the accident, James On. The failure of a party to produce testimony or evidence within its control creates a presumption that the evidence, if produced, would have been adverse to that party. Stypula v. **City of Chicago**, 03 I.I.C. 0833 (2003).

Additionally, the Arbitrator finds persuasive the many decisions finding that an employee's need for knee replacement surgery was related to a work accident, despite pre-existing knee problems. See Ramberg v. Abitua Plumbing, 07 I.W.C.C. 1298 (2007); Bredesen v. Folger Adams, 02 I.I.C. 0018 (2002); **[*28]** Brown v. ABF Freight Systems, Inc., 05 I.W.C.C. 0715 (2005); Naskrent v. The Fountains of Crystal Lake, 08 I.W.C.C. 0524 (2008).

Therefore, the Arbitrator finds that Petitioner's current condition of ill-being, including her need for left knee replacement surgery, is causally related to her work accident.

(J) Were the medical services provided reasonably and necessary?

Petitioner's Exhibit 6 are bills related to Corona's left knee treatment. Respondent did not pay any of the bills. The bills were paid by group insurance and Petitioner's out of pocket payments. Respondent is ordered to pay to Petitioner medical expenses in the amount of $ 88,764.50, itemized as followed:

1. Black Hawk Medical Transportation	$ 82.50
2. University Anesthesiologists	$ 3,843.75
3. Select Physical Therapy FKA HealthSouth	$ 8,609.00
4. Rush North Shore Medical Center	$ 43,376.96
5. CMS Lab	$ 355.97
6. Advanced Medical Rehab Alden North Shore/ Midwest Healthcare	$ 475.00
7. Homecare Plus	$ 96.85
8. Physicians of North Shore	$ 865.00
9. Northwestern Orthopedic Institute	$ 25,859.47
10. Alden Nursing Center	$ 5,200.00
11. Prescriptions	$ 30.00

[*29]

These charges were incurred as a result of reasonable and necessary medical services related to her left knee injury. Respondent is also to hold Petitioner harmless from any claim for reimbursement. Respondent is entitled to an 8(j) credit for group payments in the amount of $ 88,764.50. Respondent shall pay Petitioner $ 997.40 for out of pocket medical payments. (see patient payments PX6 #'s 1-11 which are awarded as reasonable and necessary except for # 9 whose payments are denied as not related to this accident and not calculable.

(K) What amount of compensation is due for temporary total disability?

There is no dispute that Petitioner was unable to work from the date of her surgery, September 11, 2006 until December 4, 2006. The Arbitrator has already found that Petitioner's injury and need for surgery is related to her work accident. Therefore, the Arbitrator finds that the Respondent liable for temporary total disability benefits for 12&1/7th weeks at a rate of 697.07.

(L) What is the nature and extent of injury?

Corona's accident required a right total knee replacement. She continues to experience disability as a result of her injury. Corona testified that since she **[*30]** returned to work, she has noticed that she has trouble standing for long periods of time and has trouble running. (Tr. p. 24). Corona described the difficulty she had at work, such as when she attempts to pull banners off a 300 pound roll and when she lifts metal blanks onto drawing boards. (Tr. p. 25). She also described having difficulty lifting wood sheets. (Tr. p. 25). She also has problems with the stability of her feet and feels that her stability has weakened tremendously. (Tr. p. 26). Corona frequently ices her left knee. (Tr. p. 26). Specifically, in the winter her knee will swell and she ices it approximately three times a week. (Tr. p. 26). The Petitioner also continues to take medication to treat her injuries. She takes Arthrotek, an anti-inflammatory drug, and Lyric for pain management. (Tr. p. 27). Petitioner testified that prior to her accident she used to run on a treadmill and the doctor instructed her to stop this activity because she needs to use her steps wisely. (Tr. p. 27). Finally, Corona noted that since her accident she has had diminished mobility and is not as active as she used to be because of pain in her knee. (Tr. p. 28).

Dr. Ghate noted that because **[*31]** of her young age, Corona will likely require revision procedures for her knee. (Pet. Ex. 4, p. 14).

Therefore, the Arbitrator finds that Petitioner sustained permanent partial disability in the amount of 50% loss of use of the leg.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

*2009 Ill. Wrk. Comp. LEXIS 1062, **

THOMAS BELLAMY, PETITIONER, v. FLEXWAY TRUCKING CO., INC., RESPONDENT.

NO: 07WC24892 09 IWCC 1090

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 1062

October 27, 2009

CORE TERMS: arbitrator, pain, biacuplasty, intradiscal, recommended, posterior, lumbar, proven, discogenic, annulus, temporary total disability, experimental, discogram, patients, degenerative, temporarily, utilization, undergoing, accidental injury, totally disabled, behavioral, ill-being, credible, disease, temporary, radio frequency, paracentral, randomized, herniated, extremity

JUDGES: Molly C. Mason; Yolaine Dauphin; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under § 19(b) having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, and prospective medical expenses, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, the Commission modifies the Decision of the Arbitrator by vacating the award of prospective care, i.e., the intradiscal biacuplasty recommended by Dr. Jain. The specific record before us does not convince us that Petitioner was a good candidate for this procedure as of February **[*2]** 18, 2009, the date of the second 19(b) hearing. When the Arbitrator ordered the procedure, she cited a concession made by Dr. Babus, the **utilization review** physician who responded to Dr. Jain's appeal letter. Dr. Babus did in fact acknowledge that patients in a study conducted by Dr. Kapural, et al. showed improvements in several pain assessments after undergoing intradiscal biacuplasty. This study, however, specifically excluded patients with pending workers' compensation claims, a fact not noted by the Arbitrator.

Regardless of its decision not to award the biacuplasty at this time, the Commission finds Petitioner's pain complaints to be credible. The Commission also notes that Respondent's prior examiner, Dr. Wehner, recommended treatment in the form of a weight loss program in February of 2008 and that, when the Commission heard oral arguments on September 15, 2009, Respondent's counsel conceded that no action had been taken toward providing such treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 362.99 per week for a period of 31-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that **[*3]** as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the prospective care, i.e., the intradiscal biacuplasty recommended by Dr. Jain, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 11,400.00. The probable cost **[*4]** of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 27 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen H. Pulia**, arbitrator of the Commission, in the city of **Chicago**, on **2/18/09**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for temporary total disability?
N. Other **Prospective Medical Expenses**

FINDINGS

. On **12/4/06**, the respondent **Flexway Trucking Co., Inc.** ***was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** **[*5]** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **28,313.48**; the average weekly wage was $ **544.49**.

. At the time of injury, the petitioner was **53** years of age, ***married*** with **0** children under 18.

. Necessary medical services ***have*** been provided by the respondent.

. To date, $ **00.00** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **362.99**/week for **31-1/7** weeks, from **7/16/08** through **2/18/09**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) Of the Act.

. The respondent shall pay $ **00.00** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay all reasonable and necessary **[*6]** medical expenses related to the intradiscal biacuplasty recommended by Dr. Jain, consistent with the fee schedule defined in Section 8.2 of the Act.

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

The respondent shall have credit for all amounts paid, if any, to or on behalf of petitioner on account of said accidental injury.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

March 4, 2009

Date

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

A 19(b) **[*7]** hearing on this matter was previously heard on 3/24/08, with the Decision of the Arbitrator being filed on 4/4/08. The issues at that hearing were causal connection, temporary total disability and prospective medical expenses. The arbitrator held that "the petitioner's current condition of ill-being as it relates to his low back is causally related to the accidental injury he sustained while working for respondent on December 4, 2006." The arbitrator found that petitioner was temporarily totally disabled from 12/5/06 through 6/1/07, a period of 25-4/7 weeks. She further found that on 4/16/07, respondent had made available to petitioner work within his restrictions as defined by his treating doctor, and after discussing this further with the respondent it was petitioner's own decision not to attempt to return to work within those restrictions. As to prospective medical expenses, the arbitrator Ordered the respondent to pay all reasonable and necessary medical expenses related to the discogram ordered by Dr. Chami. No other prospective medical expenses were awarded at that time.

This hearing pursuant to Section 19(b) of the Act involves the period beginning 3/25/08 up to and including **[*8]** 2/18/09. Since the hearing on 3/24/08, petitioner has been treating with Dr. Neeraj Jain at Pain Care Specialists.

On 5/5/08, petitioner underwent a CT lumbar discogram. The impression was posterior tears within the disc annulus was present at L2-L3, L3-L4 and L4-L5; a small left paracentral protruded herniated disc at L3-L4; and a small right paracentral protruded herniated

disc at L4-L5, associated with tears within the posterior disc annulus. Following evaluation of the CT lumbar discogram, Dr. Jain recommended that the petitioner have intradiscal biacuplasty or bipolar radio frequency at the posterior annulus for recalcitrant back and lower extremity pain. Dr. Jain was of the opinion that the petitioner was an ideal candidate for a percutaneous procedure rather than a surgical procedure in light of his obesity and multiple other medical problems. Dr. Jain was of the opinion that petitioner had met the criteria for the procedure including failure of conservative therapy, proven discogenic pain on discography, adequate disc space height, and no evidence of instability.

On 5/21/08, petitioner followed-up with Dr. Jain. Petitioner rated his pain at a 4-6 on a scale of 10. He stated **[*9]** that his activity level was poor and that he was not working. Petitioner denied any new symptoms and stated that he was not in physical therapy or home exercise program. Petitioner stated that he was not on any pain medications. Following an examination, Dr. Lain recommended that petitioner proceed with an L3-L4 biacuplasty with IV sedation. Dr. Jain was of the opinion that petitioner should remain off work. Dr. Jain's diagnosis was lumbar spinal stenosis, lumbar facet syndrome, lumbar degenerative disc disease, lumbar radiculopathy and lumbar discogenic pain.

On 6/9/08, Dr. Lisa Gill, D.O., physician advisor for Genex, and Board Certified Anesthesiologist, was asked by respondent to perform a **utilization review** and issue an opinion regarding whether or not an intradiscal biacuplasty or bipolar radio frequency at the posterior annulus was medically necessary and appropriate for petitioner. Dr. Gill performed a record review and due to the fact that this procedure is considered experimental with no proven benefit per the literature, opined that the procedure was non-certified. Dr. Gill noted that there have been minimal studies on this topic and that the procedure is a new radiofrequency **[*10]** type procedure to treat degenerative disc disease. Dr. Gill was of the opinion that the conclusions have shown that randomized controlled studies are warranted and needed to assess the efficacy of the procedure.

On 7/16/08, Dr. Jain appealed the opinion of Dr. Gill's **utilization review** opinion. On 7/24/08, Genex issued the results of the physican review of the appeal filed by Dr. Jain. The review was performed by Dr. Glenn D. Babus, D.O. Dr. Babus affirmed the decision of Dr. Gill. Dr. Babus' rationale for not certifying the procedure was that the ODG Guidelines do not address intradiscal biacuplasty. Dr. Babus opined that this procedure is similar to the IDET procedure and considered experimental with no proven benefit per the literature. He noted that only minimal studies have been done and that there is minimal clinical support and literature on this procedure. Dr. Babus noted that intradiscal biacuplasty is a new radiofiequency type procedure to treat degenerative disc disease and that no controlled randomized studies exist to support the use of this procedure. Dr. Babus stated that patients showed improvements in several pain assessment measures after undergoing intradiscal biacuplasty **[*11]** for discogenic pain. Dr. Babus is a Diplomat, American Board of Pain Medicine, American Academy of Pain Management and American Board of Anesthesiology, is certified by the Texas Worker's Compensation Commission, and is licensed to practice in the State of New York and Texas.

Petitioner returned to Dr. Jain on 7/16/08 complaining of increased severity in his pain going down his back into his right leg. He reported that ambulation was very difficult and he had been essentially home bound because of this. Petitioner stated that he was using Hydrocodone 10/324 up to three times per day. He reported that behavioral evaluation and further physical therapy had not been approved. Following an examination, Dr. Jain reiterated his recommendation for the L3-L4 biacuplasty for posterior bulging and discogenic pain as proven by the discogram. Dr. Jain prescribed Norco and Lyrica and a Medrol Dosepak for acute pain. Dr. Jain was also of the opinion that petitioner needed behavioral evaluation and ongoing physical therapy. Dr. Jain continued his off work authorization.

On 8/22/08, a letter was issued by C. Edward Anderson Jr., M.D./Marquita Adkins, R.N., B.S.N., CCM, CRRN at Genex Services regarding **[*12]** a request for behavioral evaluation. The letter stated that after careful consideration of the available information (not identified) by their Physician Advisor, Dr. Anderson, American Boards of Anesthesiology and Pain Medicine, CA License, the requested behavioral evaluation had not been certified. The principal reason for non-certification was that the documentation provided did not elaborate on petitioner's current psychological status, and did not describe the symptoms related to the injury that might require evaluation. Dr. Anderson noted that the ODG Guidelines recommend psychological testing and therapy where there is clear evidence of depression.

On 9/24/08, petitioner presented to Dr. Jain for a routine follow-up. Petitioner reported a pain score of 4-6 out of 10. Petitioner complained of increased severity in his pain mainly in his low back extending into the right lower extremity with numbness in the left anterior thigh, left foot, right posterolateral thigh, and foot as well. The petitioner stated that his activity level had remained limited due to his pain symptoms. Following an examination, Dr. Jain increased petitioner's dosage of Lyrica to 150 mg twice a day to help **[*13]** with his numbness and tingling in the lower extremities.

On 10/23/08, a letter was issued by Sue Weihrouch, R.N., B.S.N., CCM at Genex Services regarding a request for appeal of their non-certification of a behavioral evaluation. Ms. Weihrouch noted that the appeal had been reviewed by Genex's consulting practitioner, Dr. Denise Rubino, Anesthesiology and Pain Medicine, and that the original non-certification recommendation had been upheld. What specific information was reviewed by Dr. Rubino is unknown given the fact that the materials Dr. Rubino reviewed are not noted in the letter.

On 12/12/08, petitioner underwent a Section 12 examination performed by Dr. Jesse Butler, at the request of the respondent. Dr. Butler described petitioner as a morbidly obese truck driver. After a review of medical records and an examination, Dr. Butler's impression was lumbosacral strain, morbid obesity and severe physical deconditioning. Dr. Butler was of the opinion that the petitioner has no structural issue with the spine that would preclude him from returning to work in an unrestricted capacity. Dr. Butler was of the opinion that petitioner's general physical health was quite poor and that petitioner's **[*14]** spine itself is not a major issue. Dr. Butler was of the opinion that he would not recommend any invasive procedures on the spine, in particular any type of disc ablative procedure. Dr. Butler was of the opinion that the purpose of the discogram was to determine if petitioner was a candidate for a spinal fusion and not a percutaneous discectomy-type procedure. Dr. Bulter was of the opinion that this would aggravate the degenerative condition in the spine and likely lead to increased pain and further deterioration in function. Dr. Butler was of the opinion petitioner had reached maximum medical improvement as it relates to his lumbar strain that he sustained on 12/4/06. Dr. Butler opined that petitioner is not in need of any additional treatment as it relates to his lumbosacral strain.

On 2/13/09, respondent sent a letter to petitioner via his attorney informing him that the work that was offered to petitioner on 4/10/07 was still available. The letter of 4/10/07 informed petitioner that respondent had work for petitioner within the restrictions recommended by Dr. Mekhail on February 19, 2007. During the first 19(b) hearing held on 3/24/08, petitioner testified that he had not returned **[*15]** to work because he did not feel he could perform the work that was expected of him. Petitioner has not looked for any alternate employment.

Petitioner testified that he has not returned to work since the 19(b) hearing on 3/24/08. He further testified that he wants to undergo the intradiscal biacuplasty recommended by Dr. Jain. Petitioner denied any new accidents or injuries since the 19(b) hearing on 3/24/08. Petitioner stated that he experiences on and off pain. He stated that his pain varies and some days are better than others. Petitioner reported difficulty walking up and down stairs. He also stated that he uses a cane when not at home. Petitioner stated that since the 19(b) hearing on 3/24/08, his pain level has remained the same or gradually increased a bit. He reported that he no longer has pain that reaches a level of 10 on a scale of 10. Petitioner reported some pain with his activities of daily living including shopping, vacuuming, and laundry. Petitioner takes Lyrica, Norco and Celebrex. Petitioner's current weight is approximately 300 pounds and he still resides with his mother. Petitioner testified that he has not looked for any work and has not reported back to work **[*16]** for respondent.

F. IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

In the Decision of the Arbitrator being filed on 4/4/08, the arbitrator held that "the petitioner's current condition of ill-being as it relates to his low back is causally related to the accidental injury he sustained while working for respondent on December 4, 2006." Since that date the petitioner has continued to undergo treatment for his back. Petitioner denied any new accidents or injuries. Respondent offered no evidence to rebut petitioner's ongoing treatment or the fact that he has not sustained any new accidents or injuries to his back. As such, the arbitrator finds the petitioner's current condition of ill-being is still causally related to the accidental injury he sustained while working for respondent on December 4, 2006.

K. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?

Petitioner claims he was temporarily totally disabled from 3/25/08-2/18/09. The respondent disputes, claiming the petitioner was not temporarily totally disabled.

In the Decision of the Arbitrator filed on 4/4/08, the arbitrator held that petitioner was temporarily totally disabled **[*17]** from 12/5/06 through 6/1/07, a period of 25-4/7 weeks. She further found that on 4/16/07, respondent had made available to petitioner work within his restrictions as defined by his treating doctor, and after discussing this further with the respondent it was petitioner's own decision not to attempt to return to work within those restrictions.

The credible medical records support a finding that from 3/25/08 through 7/15/08, petitioner's condition remained essentially unchanged from what it was as of 3/24/08, the date on which the prior 19(b) hearing was held. As such, the arbitrator reiterates her finding as to temporary total disability benefits for this period. The arbitrator finds that during this time respondent had restricted work available for petitioner within the restrictions defined by Dr. Mekhail, his treating physician, and that it was petitioner's own decision not to attempt to return to work and try to perform the restricted duty work.

The arbitrator notes that based on the credible medical records, petitioner's condition of ill-being worsened as of 7/16/08. On that date, petitioner complained of increasing severity in his pain going down his back into his right leg. Petitioner **[*18]** reported that ambulation was very difficult and he was now essentially home bound due to the pain. At that time Dr. Jain reiterated his recommendation for a L3-L4 biacuplasty. Based on these increased symptoms petitioner was continued off work.

Although the arbitrator finds the petitioner was not temporarily totally disabled from 3/25/08-7/15/08, based the fact that his condition during this period was essentially the same as it was on 3/24/08, the arbitrator finds petitioner's symptomatology worsened as of 7/16/08 and remains unchanged as of 2/18/09. As a result, the arbitrator finds the petitioner was temporarily total disabled from 7/16/08 through 2/18/09, a period of 31-1/7 weeks. The arbitrator finds the opinions of petitioner's treating physician, Dr. Jain, more credible than those of Dr. Butler, respondent's examining physician.

N. IS THE PETITIONER ENTITLED TO PROSPECTIVE MEDICAL EXPENSES?

The petitioner claims the intradiscal biacuplasty recommended by Dr. Jain is reasonable and necessary to cure or relieve petitioner from the effects of his injury. The respondent claims this procedure is not reasonable and necessary.

On 5/5/08, petitioner underwent a discogram that **[*19]** revealed posterior tears within the disc annulus at L2-L3, L3-L4 and L4-L5; a small left paracentral protruded herniated disc at L3-L4; and a small right paracentral protruded herniated disc at L4-L5, associated with tears within the posterior disc annulus. Following evaluation of the CT lumbar discogram, Dr. Jain recommended that the petitioner have intradiscal biacuplasty or bipolar radio frequency at the posterior annulus for recalcitrant back and lower extremity pain. Dr. Jain was of the opinion that the petitioner was an ideal candidate for a percutaneous procedure rather than a surgical procedure in light of his obesity and multiple other medical problems. Dr. Jain was of the opinion that petitioner had met the criteria for the procedure including failure of conservative therapy, proven discogenic pain on discography, adequate disc space height, and no evidence of instability.

In support of its position, the respondent offered the findings of Dr. Gill and Dr. Babus, Genex's **utilization review** doctors. Dr. Gill is a Board Certified Anesthesiologist, asked by Genex to perform a **utilization review** and issue an opinion regarding whether or not an intradiscal biacuplasty or bipolar **[*20]** radio frequency at the posterior annulus was medically necessary and appropriate for petitioner. Dr. Gill performed a record review and due to the fact that this procedure is considered experimental with no proven benefit per the literature, pined that the procedure was non-certified. Dr. Gill noted that there have been minimal studies on this topic and the procedure is a new radiofrequency type procedure to treat degenerative disc disease. Dr. Gill was of the opinion that the conclusions have shown that randomized controlled studies are warranted and needed to assess the efficacy of the procedure.

Dr. Jain appealed this decision. The appeal was reviewed by Dr. Babus affirmed the decision of Dr. Gill. Dr. Babus' rationale for not certifying the procedure was that the ODG Guidelines do not address intradiscal biacuplasty. Dr. Babus opined that this procedure is similar to the IDET procedure and considered experimental with no proven benefit per the literature. He noted that only minimal studies have been done and that there is minimal clinical support and literature on this procedure. Dr. Babus noted that intradiscal biacuplasty is a new radiofrequency type procedure to treat degenerative **[*21]** disc disease and that no controlled randomized studies exist to support the use of this procedure. However, Dr. Babus noted that patients showed improvements in several pain assessment measures after undergoing intradiscal biacuplasty for discogenic pain.

Based on the overall medical evidence, the arbitrator finds the primary reason for the **utilization review's** denial of this procedure is the fact that the ODG Guidelines do not address intradiscal biaculplasty. Dr. Babus indicated that this procedure is similar to an IDET procedure, and is at this point considered experimental with no proven benefit. Despite this opinion, Dr. Babus noted that patients

showed improvements in several pain assessment measures after undergoing intradiscal biacuplasty for discogenic pain.

Although this procedure is not addressed by the ODG Guidelines and is at this point considered experimental with no proven benefit, the arbitrator notes that Dr. Babus noted that patients showed improvements in several pain assessment measures after undergoing intradiscal biacuplasty for discogenic pain. Given the fact that patients have shown improvements in several pain assessment measures after undergoing intradiscal **[*22]** biacuplasty, the arbitrator believes this finding is more important than the fact that the procedure is not addressed by the ODG Guidelines and is still experimental.

Based on the above, as well as the credible medical evidence the arbitrator finds the respondent shall pay all reasonable and necessary medical expenses pursuant to Sections 8(a) and 8.2 of the Act, for the intradiscal biacuplasty recommended by Dr. Jain. No other prospective medical expenses are being ordered at this time.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > **IL Workers' Compensation Decisions**
Terms: **"utilization review" and date(geq (04/01/2009) and leq (12/01/2009))** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, December 24, 2009 - 8:20 AM EST

*2009 Ill. Wrk. Comp. LEXIS 874, **

GINA EARLY, PETITIONER, v. UNITED AIRLINES, RESPONDENT.

No. 07 WC 3021 09 IWCC 839

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 874

August 10, 2009

CORE TERMS: right hand, thumb, splint, pain, pinning, doctor, recommended, surgery, fusion, video, functional, utilization, wearing, lifting, pound, surveillance, percutaneous, lift, rehabilitation, metacarpal, performing, permanent, brace, wear, claimant, examiner, therapy, undergo, wrist, grip

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Cronin in this Section 8(a) matter finding that Petitioner established a causal connection between her undisputed accident of January 29, 2006 and her current right hand condition of ill-being and ordering Respondent to authorize the percutaneous pinning procedure recommended by Dr. Schiffman.

The issues on review are whether the Arbitrator erred in allowing Petitioner to proceed solely on the issue of prospective surgery, while deferring the issues of temporary total disability and credit, and whether the Arbitrator erred in granting Petitioner's request for the surgery.

After considering the entire record, and viewing the surveillance video offered by Respondent, the Commission affirms the Decision of the Arbitrator. In accordance with Respondent's request, the Commission issues the following HI written decision pursuant to Section 19(e).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner filed a Section 8(a) Petition on July 15, 2008 asking the Arbitrator to order Respondent to authorize a percutaneous pinning procedure recommended by her treating physician, Dr. Schiffman. **[*2]**

2. The Section 8(a) Petition was set for hearing before Arbitrator Cronin on September 12, 2008. Prior to the hearing, the parties completed a Request for Hearing form, with Respondent stipulating to employment, average weekly wage, and timely notice and disputing the need for the pinning procedure. Arb Exh 1. The Request for Hearing form reflects that other disputed issues, including Petitioner's entitlement to temporary total disability benefits and Respondent's claim for credit for an overpayment of such benefits, were deferred over Respondent's objection. Before any testimony was taken, Respondent's counsel restated his objection to proceeding on the issue of prospective surgery alone. He argued that he should have been allowed to introduce evidence concerning the overpayment and that a claimant "cannot pick and choose issues she would like to prove at the time of [a] 19(b) hearing." T. 5. After Petitioner's counsel clarified that she was proceeding only under Section 8(a) and not under Section 19(b), the Arbitrator again overruled Respondent's objection. He also indicated that by participating in the hearing, Respondent would not be waiving any issues relating to temporary total **[*3]** disability or credit. T. 5-6.

3. Petitioner, a 40-year-old ramp service worker, testified that she started working for Respondent twenty-one years before January 2006. She began performing ramp service duties, including loading and unloading airplanes and operating heavy equipment, in 1989. T. 9. She was required to carry up to one hundred pounds on her own and more than one hundred pounds with assistance. T. 10.

4. Petitioner denied having any problems with either of her hands before January 29, 2006. She also denied having any problems before that date with her right thumb, right forefinger, right wrist or right arm. T. 10-11.

5. Petitioner testified that on January 29, 2006, she was attempting to position a piece of luggage inside a cart when her right hand became stuck between two pieces of luggage. She immediately felt severe pain in her right hand. She attempted to continue working but, after five minutes, noticed that her right hand was becoming numb. She removed her glove and saw that her hand was swollen, bruised and "very red." She provided notice of the injury and was sent to Respondent's medical department at O'Hare Airport, where she underwent X-rays and was instructed **[*4]** to seek follow-up care. T. 12.

6. On February 1, 2006, Petitioner consulted Dr. Butler of Southside Orthopaedics and provided a history of the January 29, 2006 accident. After the doctor noted tenderness of the first metacarpal base on examination, he ordered an MRI of the right hand. His note contains the following comment: "I guess the possibility of de Quervain tenosynovitis from aggravating from a direct blow to it while she was working [is] a possibility." The MRI, performed on February 22, 2006, demonstrated minor degenerative changes involving the articulation of the base of the first metacarpal with the carpal bones, medial subluxation, mild flexor tenosynovitis of the flexor pollicis longus, extensor tenosynovitis of the first and second dorsal compartments and no masses or fluid collections within the first web space. PX 1. On February 24, 2006, Dr. Butler called Petitioner to inform her of the results of the scan. After Petitioner indicated that her hand was no better, the doctor recommended that she see a specialist. Petitioner testified that he referred her to Dr. Schiffman at Hinsdale Orthopaedic Associates. T. 14. PX 1.

7. Petitioner saw Dr. Schiffman on March 16, 2006, **[*5]** and described the accident of January 29, 2006. Petitioner indicated that she had been off work and that her pain had persisted. On examination of the right wrist and hand, Dr. Schiffman noted a slight prominence at the base of the right thumb metacarpal and a positive CMC grind test. His impression was "right thumb pain, possible ligament injury or aggravation of joint arthrosis." He injected Petitioner's thumb with Celestone and Marcaine and indicated that surgery might be required if Petitioner's pain recurred after the injection. PX 2.

8. On April 10, 2006, Petitioner reported temporary improvement of her symptoms and Dr. Schiffman prescribed physical therapy and light duty with no right hand lifting or gripping. PX 2.

9. On May 17, 2006, Dr. Schiffman noted that repeat X-rays demonstrated significant degenerative changes at the base of the right thumb. His impression was "right thumb basilar joint arthrosis, which was aggravated by the previously mentioned injury at work." PX 2.

10. On June 8, 2006, after Petitioner again reported only temporary improvement following a second injection, Dr. Schiffman recommended surgery. He performed a right thumb trapezial resection arthroplasty **[*6]** on July 10, 2006 and noted "significant articular cartilage damage between the trapezium and thumb metacarpal" during the procedure. T. 16. PX 2.

11. Following the surgery, Petitioner's right hand was inunobilized in a thumb spica splint. T. 16. On July 20, 2006, Dr. Schiffman replaced the splint and instructed Petitioner to avoid using her right hand in any capacity. PX 2.

12. At a "tech visit" on August 1, 2006, Petitioner indicated that she was experiencing swelling, numbness and tingling despite icing and elevating the hand as instructed. An orthopedic technician reapplied Petitioner's Ace wrap and informed Dr. Schiffman of Petitioner's symptoms. On August 9, 2006, the doctor described the swelling as "much diminished" and prescribed therapy.

13. On September 11, 2006, Dr. Schiffman instructed Petitioner to discontinue the splint and continue therapy. He imposed restrictions of no lifting over five pounds. Petitioner reported improvement on October 19, 2006 and the doctor upgraded the lifting restriction to ten pounds. PX 2. On November 30, 2006, the doctor noted that Petitioner had experienced a "setback" in the sense that she had sustained a stress fracture to her tibia but **[*7]** that her right hand range of motion and grip strength had improved. He noted that her pinch strength was still "quite limited." PX 2.

14. Petitioner continued therapy thereafter until February 15, 2007, when Dr. Schiffman recommended that she begin work conditioning. PX 2.

15. On March 23, 2007, Petitioner informed Dr. Schiffman that she was continuing to experience significant pain near the base of her right thumb with grip tasks. Repeat X-rays demonstrated "maintenance of a satisfactory resection space." The doctor expressed concern that "for some reason the thumb base is not at the present time able to withstand force and load." He felt that this problem was mechanical rather than nerve- or tendon-related, and instructed Petitioner to cut back on all activities other than those of daily living. PX 2.

16. At the next visit, on May 10, 2007, Petitioner again complained of pain in the base of her right thumb. Dr. Schiffman told her that, given the passage of time since surgery, this pain might persist and she might require permanent work restrictions. He ordered a functional capacity evaluation. PX 2.

17. Petitioner underwent the functional capacity evaluation at ATI on May 31, 2007. **[*8]** The evaluator found the results to be valid and described Petitioner as "pleasant and cooperative throughout the course of the assessment." Based on a job analysis provided by Respondent, the evaluator found Petitioner's ramp service duties consistent with a medium physical demand level. In his opinion, Petitioner's abilities, particularly with respect to right hand grasping and right arm lifting, fell below this level. PX 3-4.

18. On June 25, 2007, Dr. Schiffman reviewed the results of the functional capacity evaluation and imposed a permanent 25-pound lifting restriction. He instructed Petitioner to return to him in three months. PX 2.

19. Petitioner next saw Dr. Schiffman on September 24, 2007 and reported that she had not been taken back to work. She described herself as "still limited in her ability to grip and lift" and "fatiguing easily even with activities of daily living." On examination, Dr. Schiffman noted that Petitioner's right thumb range of motion was only "minimally limited" but that "her CMC grind test still provoke [d] some pain." He again noted the permanent lifting restriction and told Petitioner to return in three months. PX 2.

20. At the next visit, on December **[*9]** 21, 2007, Dr. Schiffman noted that Petitioner was continuing to experience significant pain at the base of her right thumb, even with routine activities. He ordered new X-rays and described them as showing maintenance of an adequate resection space. He told Petitioner she could either opt to live with her pain or undergo surgery to fuse the scaphoid to the thumb metacarpal. After Petitioner expressed some reservations about the restriction of motion that would result from a fusion, the doctor ordered a thumb spica splint to simulate the effects of the contemplated procedure. PX 2.

21. On February 21, 2008, Petitioner informed Dr. Schiffman that she had tried the splint but that it was still difficult for her to tell how functional she would be after undergoing a fusion. She also wanted to know the extent to which a fusion would relieve her pain. The doctor found her questions to be "very appropriate." In an effort to allay her concerns, he recommended that he "temporarily immobilize the joint" via percutaneous pinning so that she see what it would be like to function post-fusion. In his view, it would be reasonable to proceed with a fusion if she remained significantly pain free for **[*10]** two weeks following the pinning procedure. PX 2.

22. At the Section 8(a) hearing, Petitioner indicated that the splint helps her pain but prevents her from moving her wrist. She also indicated that the fusion, as described by Dr. Schiffman, would allow her to move her wrist but would reduce her thumb and forefinger movement. T. 21. Because she was "very hesitant" to undergo the fusion, Dr. Schiffman had recommended that she undergo an outpatient "pin procedure" and leave the pins in for three to four weeks to "simulate" the fusion. T. 21. The doctor had also indicated she could simply opt to live with her pain but, since she has young children, she would like to be pain free and able to use her hand more. T. 21-22. She is currently unable to use both hands to place dishes in an overhead cabinet. She likes to work out but cannot perform a push-up or other exercise that would require her to put weight on both hands. She is "definitely weaker on [her] right side" and sometimes uses her teeth rather than her thumb to manipulate a small item or fastener. She is unable to tie a shoe or put her daughter's hair in a ponytail the way she used to. She also has difficulty opening jars and bags **[*11]** of cereal. She used to write with her left hand and do everything else with her right hand but now tries to use her left hand to perform tasks. T. 25.

Under cross-examination, Petitioner testified that she was unsure when she began wearing the splint but thought she had started wearing it before summer. T. 26. She is in pain every day. Even the slightest activities are painful. T. 27-28. Over objection, she acknowledged meeting with Joseph Belmonte of Vocamotive and telling him that she was not to perform firm or simple grasping tasks. T. 27-28. She was wearing the splint at the hearing and acknowledged wearing the same splint when she met with Belmonte. T. 29. At Respondent's request, she was examined by Dr. Hoepfner in December of 2006 and June of 2007. She told this doctor that even simple activities caused right hand pain. T. 30. She acknowledged receiving a $ 1,200 workers' compensation settlement for a left hand injury of June 17, 1999. T. 31. She also acknowledged undergoing treatment for bilateral carpal tunnel syndrome at one point but, by way of explanation of the testimony she gave on direct examination, indicated that she did not think of this syndrome as an "injury." **[*12]** She did not recall receiving a workers' compensation settlement for carpal tunnel syndrome. T. 32. She had not seen Dr. Schiffman or any other doctor for her right hand since February of 2008. T. 32-33. She recalled telling Belmonte that she disagreed with the results of the functional capacity evaluation and could only lift twelve pounds with her right hand. T. 33. The evaluator had said she could "maybe" lift twenty-three pounds but she knows that she is unable to lift a dumbbell overhead. T. 34. She denied taking a "break" from vocational rehabilitation but admitted telling Belmonte in July of 2008 that her right hand still hurt and that she was still wearing a brace. T. 34-35.

The Arbitrator and parties then watched most of a surveillance video taken at Respondent's request on April 17, 18 and 24, 2008. Petitioner agreed that the video accurately depicted her activities. T. 41. She also agreed that she is not shown wearing a splint in any portion of the video. She explained that she does not need to wear the splint every day. T. 42. She denied telling doctors that she is unable to turn a key with her right hand and agreed that the video shows her performing this activity. While **[*13]** the video shows her walking her dog, and while she acknowledged that this activity would involve pulling, she indicated that she "mostly use [d]" her left hand to hold the leash. T. 43. She acknowledged testifying that she has difficulty lifting objects with her right hand and agreed that the video shows her using only her right hand to lift two grocery bags at one time. T. 44. She decided to wear her splint to court because her hand was hurting in the morning. T. 45.

On redirect, Petitioner testified that no doctor has advised her to wear the splint at all times and that she tends to wear it while performing activities (such as watching television) that do not require her to move her hand. The splint helps reduce the pain that she would otherwise experience due to inactivity. T. 46. It bothers her to use her right hand to lift bags of groceries but this is an activity she has to perform.

23. Respondent offered vocational rehabilitation records from Voca motive. On November 13, 2007, Petitioner informed rehabilitation counselor Joseph Belmonte that she was not using any brace and that she was "not to perform firm or simple grasping" with her right hand. In December of 2007, Petitioner **[*14]** requested two weeks off of rehabilitation efforts to care for her school-age children. By mid-January 2008, Petitioner was keyboarding at a rate of 34 words per minute and had completed training in Windows XP, Word Introduction and Word Intermediate. In February of 2008 Petitioner began looking for alternative employment. In March of 2008, Belmonte noted that Petitioner had "very limited hours available" to devote to a job search due to child care and volunteer activities. In April of 2008, Petitioner advised Belmonte that she was still under treatment and that "surgery [was] pending." The file was placed on hold until late June 2008. On July 22, 2008, Belmonte noted that Petitioner had advised him she would be unable to continue rehabilitation efforts during the summer because her children were out of school. He also noted that Petitioner reported utilizing some type of wrap or brace. On September 3, 2008, Belmonte indicated that Petitioner had first worn a brace and/or Ace bandage to his office in February 2008 and that she had continued to do so at each subsequent appointment. RX 1.

24. Respondent also offered two Section 12 examination reports authored by Dr. Hoepfner, an orthopedic **[*15]** surgeon. In his first report, dated December 21, 2006, Dr. Hoepfner noted that Petitioner lacked fully symmetric strength in her thumbs and had some residual weakness in her right thumb but opined that she was capable of resuming full duty for Respondent. He recommended that she work only four hours a day for two weeks, while continuing to undergo therapy, and that she utilize a thumb spica splint during the first four weeks of work. He found it likely that Petitioner would have "some residual pinch and grip strength deficits in her right hand" but did not think that these deficits would result an in overall functional deficit. RX 2.

In his second report, dated June 29, 2007, Dr. Hoepfner found that Petitioner had reached maximum medical improvement and that she could return to work with permanent restrictions relative to her right hand per the functional capacity evaluation. RX 3.

The Commission notes that Dr. Hoepfner issued his second report months before Dr. Schiffman discussed performing a fusion and recommended the percutaneous pinning procedure.

25. Respondent also offered reports from its **utilization review** physicians, Drs. Lee and Silverman, both of whom denied certification **[*16]** for the pinning procedure. RX 4.

26. As discussed above, Respondent also offered surveillance showing Petitioner performing various activities in April of 2008. Petitioner is shown jogging, walking her dog (usually holding the leash in her left hand), interacting with her children, using her left hand to open a trunk and, at one point, using her right hand to carry two bags of groceries. She is never seen wearing a splint or brace on her right hand. RX 5.

27. The Commission initially addresses the procedural issues raised by Respondent. In the Commission's view, the Arbitrator did not err in allowing Petitioner to proceed solely pursuant to Section 8(a). The Commission disagrees with Respondent's assertion that the question of temporary disability is always implicated in a Section 8(a) proceeding. Clearly, some claimants continue to work while seeking authorization of care. The Commission also relies on its previous decision in Thurston v. Illinois Secretary of State, 08 IWCC 102. In Thurston, a panel consisting of Commissioners DeMunno, Basurto and Gore affirmed and adopted Arbitrator O'Malley's Decision finding that he had jurisdiction to hear **[*17]** a claim based solely on 8(a) "without the filing of an accompanying Petition

for Immediate Hearing pursuant to Section 19(b)." The Arbitrator cited the "Commission's longstanding practice" of allowing such hearings to address claimants' "pressing and ongoing need" for treatment.

The Commission also notes that Respondent received adequate notice of Petitioner's request for a limited Section 8(a) hearing and that, at this hearing, Respondent was permitted to offer evidence relating to Petitioner's credibility. The Commission, like the Arbitrator, has considered this evidence and finds Petitioner credible.

The Commission also affirms the Arbitrator's award of prospective surgery. The Commission, like the Arbitrator, assigns greater weight to the opinions of Petitioner's treating hand surgeon, Dr. Schiffman, than to those of Respondent's Section 12 examiner and **utilization review** physicians. Dr. Schiffman has treated Petitioner over an extended period and has consistently taken a conservative approach in addressing Petitioner's "very appropriate" questions concerning her options. The surgery he is currently recommending is a reversible outpatient procedure which will help Petitioner determine **[*18]** whether she in fact will benefit from a considerably more complicated operation, i.e., a fusion. Respondent's examiner, Dr. Hoepfner, last saw Petitioner months before Dr. Schiffman recommended the pinning procedure and the second **utilization review** physician, who addressed the appeal of the initial denial, acknowledged that ACOEM and ODG do not address the specific issues associated with the procedure.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the percutaneous pinning procedure recommended by Dr. Schiffman.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest tinder Section 19(n), if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of the expiration of time for filing a written request for Summons to the Circuit Court without the filing of such a written request or after the time of completion of any judicial proceedings, **[*19]** if such a written request has been filed.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

DATE: AUG 10 2009

CONCURBY: NANCY LINDSAY

DISSENTBY: NANCY LINDSAY

DISSENT: I concur in most aspects of the Majority's Decision; however, I respectfully dissent with its award of the percutaneous pinning procedure recommended by Dr. Schiffman. In affirming the Arbitrator's award of prospective medical treatment, the Majority indicated its agreement with the Arbitrator's assignment of greater credibility to Dr. Schiffman than the **utilization review** physicians or Section 12 examiner. Part of the reason the Arbitrator assigned greater weight to Dr. Schiffman's opinion was because the **utilization review** physicians did not examine Petitioner. That the **utilization review** physicians did not examine Petitioner should not diminish the value of that process as nothing in the Workers' Compensation Act indicates that **utilization review** is any less valid or trustworthy because there is no actual physical examination of the claimant **[*20]** as part of the review process. Furthermore, while it is true that the Section 12 examiner, Dr. Hoepfner, examined Petitioner prior to Dr. Schiffman's recommendation of the pinning procedure and, therefore, did not comment on its necessity, he did clearly state she needed no further treatment. At that time Dr. Schiffman concurred with Dr. Hoepfner as he felt her condition had plateaued and imposed permanent restrictions pursuant to her functional capacities evaluation. Petitioner subsequently presented with subjective complaints of pain for which Dr. Schiffman prescribed a thumb splint which would simulate a fusion. As shown by the video surveillance Petitioner did not always wear the splint. Dr. Schiffman's decision to proceed with the pinning procedure is based solely on Petitioner's subjective complaints of pain -- complaints not borne out by the 2008 video surveillance. Both the Arbitrator and the Majority found Petitioner to be credible; however, the basis for that finding is not set forth with much detail, if any. Mention is made of the vocational rehabilitation records and a review of those records shows th at Petitioner was not overly motivated to try and return to work. She **[*21]** was actively involved in her children's home and school activities and volunteered in both school and community groups. In Petitioner's eyes rehabilitation efforts needed to be scheduled around those other activities and commitments. Additionally, it is clearly documented that she wanted to be with her children over the summer months and was "responsible" for several family members who had health issues. As her rehabilitation responsibilities increased, her willingness to participate/motivation became increasingly suspect. It is also during this time that Petitioner's subjective complaints of pain surface. In light of these records, the surveillance video, and the absence of an objective medical basis for the pinning procedure, it should not have been awarded pursuant to Section 8(a). For this reason, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Cumulative Injuries
Workers' Compensation & SSDI > Social Security Disability Insurance > Overpayments

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "utilization review" and date(geq (04/01/2009) and leq (12/01/2009)) (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, December 24, 2009 - 8:25 AM EST

*2009 Ill. Wrk. Comp. LEXIS 1111, **

JOSE LOERA, PETITIONER, v. CENTRALIA CORRECTIONAL CENTER, RESPONDENT.

NO: 07WC46176 09 IWCC 1236

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF CLINTON

2009 Ill. Wrk. Comp. LEXIS 1111

November 19, 2009

CORE TERMS: overtime, average weekly wage, arbitrator, team, correctional, mandated, temporary total disability, work overtime, calculations, mandatory, year preceding, roll call, tactical, parties stipulated, receive credit, shortage, surgery, earnings, yielding, straight, partial disability, physical therapy, disputed issues, recommended, volunteered, estimated, permanent, seniority, modified, manpower

JUDGES: Yolaine Dauphin; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of wage calculations, benefit rates and the nature and extent of Petitioner's disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that all of Petitioner's overtime should be included in the average weekly wage calculations. We disagree.

Petitioner testified that generally overtime for correctional officers such as himself was available "every day on every shift" Correctional officers who wished to work overtime put their names on a voluntary overtime list. Because of personnel shortage, if not enough officers signed up, "people get mandated." Correctional officers with the lowest seniority are mandated first. Petitioner was in the middle of the seniority rankings. He estimated that Respondent would have to call approximately 30 correctional officers before requiring him to work overtime.

Petitioner further testified that **[*2]** during the year preceding the injury, he volunteered for overtime "99 percent" of the time. Approximately half of his requests for overtime were granted. Petitioner estimated that he was mandated to work overtime "one percent" of the time. Petitioner also worked approximately four hours of overtime a month in connection with his tactical team work.

On cross-examination, Petitioner explained although he was not required to join the tactical team, he had to participate in two two-hour practices a month to stay on the team. He further testified that a 15-minute roll call before the shift was mandatory and considered overtime. Petitioner clarified that his regular workday was seven and a half hours, corresponding to a 37.5 hour workweek. At the close of the testimony, the parties stipulated that Petitioner's base average weekly wage, excluding overtime, was $ 997.87.

It is well established that "those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week" should not be included in the average weekly wage calculations. **[*3]** See **Airborne Express,** Inc. v. Workers' Compensation Comm'n, 372 Ill. App. 3d 549, 554 (2007). Respondent concedes that roll call pay in the sum of $ 33.26 a week n1 and one percent of Petitioner's overtime pay in the sum of $ 2.44 a week should be included in the average weekly wage calculations, yielding an average weekly wage of $ 1,033.57. We find that the rest of Petitioner's overtime wages is not includable in the average weekly wage calculations.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Petitioner's straight-rate hourly wage was $ 26.61 ($ 997.87 / 37.5 hours). The roll call pay adds up to 1.25 hours a week (15 min. x 5 days), yielding $ 33.26 in additional weekly compensation at the straight rate.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 24, 2008, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 689.05 per week for a period of 48 4/7 weeks, from February 16, **[*4]** 2007, through January 21, 2008, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 619.97 per week for a period of 150 weeks, as provided in § 8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to the extent of 30 percent of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: NOV 19 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jennifer Teague**, arbitrator of the Commission, in the city of **Collinsville (from Carlyle docket)**, on **March 3, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked **[*5]** below, and attaches those findings to this document.

DISPUTED ISSUES
G. What were the petitioner's earnings?
L. What is the nature and extent of the injury?

FINDING

. On **February 15, 2007**, the respondent **Centralia Correctional Center *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 59,934.21**; the average weekly wage was **$ 1,152.58**.

. At the time of injury, the petitioner was **32** years of age, ***married*** with **1** children under 18.

. Necessary medical services ***have in part*** been provided by the respondent.

. To date **$ 26,984.83** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 768.39**/week for **48 2/7** weeks, from **February 16, 2007** through **January [*6] 21, 2008**, which is the period of temporary total disability for which compensation is payable. Respondent shall receive credit for all amounts previously paid.

. The respondent shall pay the petitioner the sum of **$ 619.97**/week for a further period of **150** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **30% permanent partial disability to the body as a whole**.

. The respondent shall pay the petitioner compensation that has accrued from **February 15, 2007** through **March 3, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the medical bills set forth in Petitioner's Exhibit 2 in accordance with the provisions set forth in the Medical Fee Schedule. Respondent shall receive credit for all amount previously paid.

. The respondent shall pay **$ N/A** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay **$ N/A** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay **$ N/A** in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within **[*7]** 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 1.31% shall accrue from the date listed below to the day before the date of payment however, if an employee's appeal results in either no change or a decrease in thi award, interest shall not accrue.

Signature of arbitrator

March 18, 2008

Date

MAR 24 2008

The Arbitrator hereby makes the following Findings of Fact:

The parties stipulated Petitioner sustained a compensable accident on February 15, 2007, while working as a correctional officer for Respondent. On that date, there was an ice storm and Petitioner slipped in the parking lot and fell hard landing on his low back. Prior to this injury, Petitioner was working full duty without restriction and had no prior care or treatment to his lumbar spine.

On February 16, 2007, Petitioner saw his family physician the next day who took him off work and recommended a MRI. This MRI showed a large annular tear at L5-S1 and a smaller one at L4-5. Petitioner was referred to Dr. Allan **[*8]** Froehling, an orthopedic surgeon in Mt. Vernon, who tried physical therapy, oral steroids and epidural injections, all of which did not help. Petitioner continued to experience constant severe pain, worse with walking, bending, lifting and prolonged sifting.

Dr. Froehling referred Petitioner to a board certified spine specialist, Dr. Matthew Gornet, who first saw Petitioner on August 13, 2007. He took the history of the accident and noted the prior medical treatment. His exam was positive for abnormal gait, along with decreased reflexes and sensation. Straight leg raising was positive at 45 degrees. Dr. Gornet reviewed the MRI's and agreed with the diagnosis of structural defects at L4-5 and L5-S1. Dr. Gornet believed Petitioner was a surgical candidate, continued him off work and recommended a new MRI scan.

At a follow up visit on October 1, 2007, he reviewed the new MRI scan which showed annular tears at L4-5 and L5-S1. Because Petitioner was no better, Dr. Gornet scheduled surgery. This was done on October 16, 2007 in the form of an anterior decompression at L4-5 and L5-S1 along with a two level disc replacement at those same levels.

Following surgery, Petitioner reported significant **[*9]** improvement. He underwent a brief course of physical therapy and was released to return to work on January 22, 2008.

Respondent did not have Petitioner examined.

Despite the successful outcome from surgery, Petitioner still had a stabbing pain in his thigh which came and went. He has to be more careful in what he lifts and how he moves. He has significantly curtailed his weight lifting. Petitioner testified that his flexibility is limited and that he has given up, at least for the time being, being on the TACT team since he does not feel that he can do the work.

Lastly, Petitioner testified he worked a significant amount of overtime. He explained that because Respondent had failed to hire any new correctional officers in the past two years, and numerous older correctional officers had retired, there was a severe shortage of manpower. His unrebutted testimony established that any officer could work overtime on any day on any shift. The procedure for obtaining overtime was that he either notified his supervisor or wrote his name down in a black book. His testimony established that while the decision to sign up for overtime was an individual one, if enough individuals did not sign **[*10]** up, overtime was then mandated. In short, it is mandatory that overtime be worked by a number of individuals or the prison would shut down, however the decision to sign up was an individual one.

Petitioner produced all his pay stubs from one year prior to the date of the accident. Respondent produced a witness who explained Respondent's wage statements.

Therefore, the Arbitrator concludes:

1. The Arbitrator finds that during the year preceding the accident, the Petitioner produced records showing a gross yearly salary of $ 64,163.99. This figure represents the total amount earned from February 15, 2006 to February 15, 2007. Petitioners base pay for that same time period was $ 51,474.63. This includes his shift differential. Total overtime earned was $ 12,689.36. Two-thirds of this yields a figure of $ 8,459.58. Petitioner's yearly earnings during the year preceding the accident were then $ 59,934.21.

> Petitioner testified to a situation created by Respondent where overtime was mandatory for someone to work but voluntary for an individual. It is mandatory that somebody works overtime because if nobody works overtime the facility shuts down. By failing to hire enough **[*11]** officers and creating a severe manpower shortage, the Respondent has created a situation where it is necessary for many people to work overtime but characterizes the overtime as voluntary. There are times that individuals get mandated, however because enough individuals volunteer, Petitioner has not been mandated regularly.
>
> Based on Petitioner's credible testimony, the Arbitrator finds that the overtime hours worked are to be included in his average weekly wage. Petitioner's average weekly wage is therefore 1,152.58.

2. The parties stipulated Petitioner was paid Temporary Total Disability benefits based on an average weekly wage of $ 846.69. Respondent agreed to a higher average weekly wage at the time of Arbitration; however this wage still creates an underpayment of Temporary Total Disability benefits.

> Respondent shall pay Petitioner Temporary Total Disability benefits of $ 768.39 per week for 48 4/7 weeks from January 16, 2007 to January 22, 2008 which is the period of Temporary Total Disability for which compensation is payable. Respondent shall receive credit for all amounts previously paid.

3. As a result of the accident of February 15, 2007, Petitioner sustained 30% **[*12]** permanent partial disability to the body as a whole.

DISSENTBY: MOLLY C. MASON

DISSENT: I respectfully disagree with the majority's wage recalculation. I would have modified the Arbitrator's Decision by factoring in the overtime earnings that Petitioner derived from his roll call attendance and tactical team training. Petitioner testified, without contradiction, that he was required to attend two practice sessions per month in order to remain on Respondent's tactical team. T. 35. The fact that Petitioner volunteered to be on the team should not preclude him from claiming the mandatory overtime associated with that service. The team met a necessary function inside Respondent's correctional facility. Respondent relied on team members such as Petitioner to restrain unruly inmates and handle medical emergencies. T. 24-25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > **IL Workers' Compensation Decisions**
Terms: **"airborne express" and date(geq (05/01/2009) and leq (12/01/2009))** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, December 24, 2009 - 8:41 AM EST

*2009 Ill. Wrk. Comp. LEXIS 457, *; 9 IWCC 0469*

CARRIE BOND, PETITIONER, v. PPG, RESPONDENT.

NO. 03 WC 50367, 05 WC 26469

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MACON

2009 Ill. Wrk. Comp. LEXIS 457; 9 IWCC 0469

May 15, 2009

CORE TERMS: overtime, pain, elbow, arbitrator, right shoulder, neck, shoulder, cervical, recommended, symptom, right arm, impingement, causally, glass, ulnar, diagnosed, regular, radiculopathy, underwent, spine, upper extremity, mandatory, trauma, temporary total disability, physical therapy, arthroscopy, neuropathy, injection, container, syndrome

JUDGES: Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent; whether Petitioner's condition of ill-being is causally related to the injury; the reasonableness or necessity of medical, surgical or hospital bills or services; Petitioner's average weekly wage; and the nature and extent of the injury; and being advised of the facts and law, the Commission affirms and adopts the Arbitrator's decision with respect to claim number 03 WC 50367, which is attached hereto and made a part hereof and reverses the Arbitrator's decision with respect to claim number 05 WC 26469, as stated below.

FINDINGS OF FACT

Petitioner began working for Respondent on April 8, 1974. Since that time, Petitioner held a number of different positions, including general laborer, employee on the process floor in the glass department, employee in the container department, and coater operator. Since 1999, Petitioner has worked as a coater processor. Petitioner testified **[*2]** that the coater process position involves placing glass containers on the line and removing them. She performed this task manually for smaller glass containers, and used a machine for larger containers. As a coater processor, Petitioner performed six hours of manual labor during an eight-hour shift. Petitioner offered no further evidence regarding her work activities.

Both Petitioner and Respondent's Human Resources Director, Judy Lewkowski, testified regarding Respondent's overtime policy. Employees who are interested in working overtime sign up on an overtime sheet. When Respondent wants employees to work additional hours due to increased production needs or absenteeism, a supervisor calls the employees on the overtime sheet, offering the overtime hours to the most senior employees first. If no employees listed on the overtime sheet voluntarily accept the overtime assignment, the supervisor then contacts the least senior employee on the overtime sheet and "forces" the least senior employee to work the available overtime. If this least senior employee refuses to work the forced overtime, Respondent will discipline that employee. If an employee on the overtime list refuses voluntary **[*3]** overtime opportunities for six months, Respondent will remove his or her name from the list and no longer contact that employee with overtime opportunities. Respondent never offers voluntary overtime or forces an employee to work mandatory overtime if that employee has not signed up on the overtime sheet. Only an employee who agrees to work overtime assignments by signing up on the overtime sheet can be forced to work overtime hours.

Petitioner has thirty years of seniority. Her normal work week is forty hours per week. Petitioner testified that she works overtime about twice a week. She admitted that she volunteers regularly for overtime, but testified that she does not accept overtime hours every time Respondent offers them.

03 WC 50367

On July 4, 2003, Petitioner was removing containers from the line using a forklift. When Petitioner exited the forklift, she slipped on some powder on the floor and struck her right arm on a steel brace. Petitioner filed an Application for Adjustment of Claim for this incident on October 17, 2003, and was assigned claim number 03 WC 50367. Respondent does not dispute that Petitioner sustained an accident that arose out of and in the course of **[*4]** her employment with Respondent on this date.

Petitioner first sought treatment with Respondent's company doctor, Dr. Often, on July 8, 2003. Petitioner gave a history of falling on a beam on July 4, 2003, and striking her right medial elbow. She complained of tingling in the ulnar aspect of the right forearm and right fourth and fifth digits, as well as soreness in her left upper extremity and low back. Dr. Often diagnosed Petitioner with a right elbow contusion, and discharged her to return to her regular duties.

Petitioner returned to Dr. Otten on September 12, 2003, complaining of right arm pain, swelling, and burning below the elbow, as well as right shoulder pain. Petitioner described intermittent symptoms for the past three or four years, which have increased since the July 4, 2003, accident. Dr. Often diagnosed Petitioner with right arm pain and "non-occupational cervical spine degenerative changes." He released Petitioner to regular work, and recommended that she follow up with her primary physician for "non-occupational" conditioning.

Petitioner saw Respondent's Section 12 examiner Dr. Brustein on October 13, 2004. During the exam, Petitioner complained of elbow pain, Stiffness, **[*5]** slight numbness, and tingling. She also complained of occasional neck pain. Dr. Brustein noted right elbow and upper extremity pain, which he attributed to cubital tunnel syndrome or the July 4, 2003, accident. He stated, "Given the patient's history and physical it does seem that her elbow symptoms are related to the fall on July 4, 2003, as there is no obvious other explanation that the patient gave me today." Dr. Brustein did not relate Petitioner's complaints of neck pain to the July 4, 2003, accident or Petitioner's work activities.

05 WC 50367

Petitioner filed a second Application for Adjustment of Claim on June 16, 2005. Petitioner listed an accident date of November 2, 2004, as a result of "repetitive trauma" to the neck and right upper extremity.

Petitioner sought treatment with Dr. Fletcher, formerly Respondent's company doctor, on November 2, 2004. During this visit, Petitioner complained of shoulder and neck pain radiating down the right upper extremity. Dr. Fletcher diagnosed Petitioner with shoulder impingement and right cervical radiculopathy. He recommended that Petitioner undergo physical therapy and electrodiagnostic studies with Dr. Trudeau. He released Petitioner **[*6]** to return to her regular duties, and recommended a job sight assessment to determine any changes in the ergonomic aspects of Petitioner's job duties. He noted, "This specialist does believe, based on the history that I know, that the condition is causal [sic] related to her employment." Dr. Fletcher did not indicate whether he related Petitioner's shoulder condition, cervical condition, or both to her employment.

Petitioner underwent a cervical MRI on November 3, 2004, which revealed localized, relatively severe degenerative change at the C5-6 level suggesting the possibility of post-traumatic arthritis, and mild spinal stenosis at the C5-6 level secondary to a left paracentral subligamentous disc herniation.

Petitioner underwent electrodiagnostic studies with Dr. Trudeau on November 9, 2004. During the consultation with Dr. Trudeau, Petitioner specified that she injured not only her right elbow, but also her neck and right shoulder when she fell on July 4, 2008. The studies revealed right C6 radiculopathy. Dr. Trudeau recommended epidural steroid injections at C6, a referral to a pain specialist, and an evaluation with a spine specialist.

On November 11, 2004, Petitioner sought treatment **[*7]** from orthopedist Dr. Kefalas. She complained of right shoulder pain, elbow pain, and neck pain radiating into her right arm since July 3, 2003. Dr. Kefalas diagnosed Petitioner with C5-6 cervical spondylosis, right shoulder impingement syndrome, and right medical epicondylitis. In Dr. Kefalas's opinion, the majority of Petitioner's symptoms emanated from the cervical spine.

Petitioner saw neurosurgeon Dr. Dold on December 6, 2004. She complained of right arm and shoulder pain, and neck pain starting in her forearm and progressing to her shoulder since July 2004. Dr. Dold inferred from Petitioner's complaints that her neck pain had largely resolved, but that she still has some right forearm discomfort. His impression was neck and right arm pain. Petitioner returned to Dr. Dold on December 22, 2004 complaining again of neck and right forearm pain aggravated by increased activity. Dr. Dold noted that diagnostic studies revealed degenerative changes at C5-6, possible radiculopathy, shoulder pathology, and ulnar nerve entrapment. He recommended that Petitioner continue her normal activities but use common sense precautions.

Petitioner saw Dr. Fletcher again on December 27, 2004. Dr. Fletcher **[*8]** noted three different clinical problems. First, Petitioner has foraminal narrowing, as diagnosed by Dr. Dold, which Dr. Fletcher felt explained Petitioner's cervical radicular complaints. Second, the electrodiagnostic studies with Dr. Trudeau confirmed bilateral radiculopathy and ulnar neuropathy. Finally, Dr. Fletcher mentioned Petitioner's right shoulder, but noted that she exhibited "better range of motion," and "no impingement." He also noted, "I do believe that her work can contribute to her problem." Dr. Fletcher did not indicate which of the three specific diagnoses he attributed to Petitioner's work activities.

When Petitioner returned to Dr. Fletcher's office on January 24, 2005, he diagnosed Petitioner with shoulder impingement, ulnar neuropathy, and C5-6 degeneration with some radiculopathy. He opined, "Based on my experience and knowledge of her job activities, and also because of the aging process, I expect that with time she'll become more symptomatic and probably require surgical intervention." Dr. Fletcher did not indicate which of Petitioner's symptoms was related to her job activities, or which were related to the aging process, other than classifying her cervical **[*9]** condition as "C5-6 degeneration."

On March 22, 2005, Dr. Fletcher took Petitioner off work due to neck pain. He ordered updated electrodiagnostic studies with Dr. Trudeau, and recommended that Petitioner undergo a right cubital tunnel release. On March 29, 2005, Petitioner underwent additional electrodiagnostic testing, which revealed an improving C6 radiculopathy that showed evidence of reinnervation. On March 30, 2005, Dr. Kefalas stated that Petitioner's symptoms were secondary to impingement syndrome.

On April 4, 2005, Dr. Fletcher noted that Petitioner's condition had improved while she was off work. He again diagnosed Petitioner with shoulder impingement, cervical radiculopathy, and ulnar neuropathy and noted, "I believe at the least the impingement and the ulnar neuropathy. are related to her work activities." Dr. Fletcher did not relate Petitioner's cervical condition to her work activities.

On May 31, 2005, Dr Kefalas noted that Petitioner's ongoing symptoms of discomfort in the neck with occasional achiness in the right shoulder and elbow were likely multifactorial. He further noted his concern that Petitioner suffered an underlying C6 radiculitis. He recommended that Petitioner **[*10]** undergo right shoulder arthroscopy.

First, Petitioner underwent a series of therapeutic cervical injections administered by Dr. Furry at St. Mary's Pain Center. On August 11, 2005, Dr. Kefalas recommended that Petitioner continue with her regular work duties and continue treatment as needed. However, Petitioner returned to Dr. Kefalas complaining of right shoulder pain and a return of symptoms on November 14, 2005. Petitioner denied any neck pain, and reported that her elbow pain had improved. Dr. Kefalas therefore found Petitioner's shoulder, neck, and elbow pain to be secondary to right shoulder impingement syndrome. After Petitioner failed to respond to additional

injections, Dr. Kefalas performed a right shoulder arthroscopy with decompression surgery on March 30, 2006, and postoperatively diagnosed Petitioner with right shoulder impingement syndrome, and a partial thickness and supraspinatus tear in the right shoulder. He released Petitioner to return to work on May 25, 2006, and declared Petitioner to be at maximum medical improvement as it related to her right shoulder on August 21, 2006. Dr. Fletcher subsequently released Petitioner to full duty on August 28, 2006.

Petitioner **[*11]** saw Respondent's Section 12 examiner Dr. Thomas Sutter on February 22, 2006. He noted an injury date of July 4, 2003, diagnosed Petitioner with a right elbow contusion, partial tear of the rotator cuff, and neck strain. He noted that Petitioner's right elbow and neck pain had resolved. In his opinion, Petitioner's elbow injury was causally related to the July 4, 2003, accident, which exacerbated the condition of Petitioner's shoulder. He further noted, "I do not believe the neck injury is related to that injury."

Petitioner transferred to the yard labor pool in 2006. In this position, Petitioner works in whatever department needs additional help on any particular day. Petitioner reported to the company infirmary for aspirin or heat therapy to address swelling in her shoulder in November 2996 and January 2007. On February 16, 2007, Petitioner reported to the company infirmary complaining of popping and soreness in her shoulder on February 16, 2007. Petitioner testified that this popping increases with her job, depending on the motions required. Petitioner still experiences swelling in her arm. Petitioner treats her symptoms with Celebrex, Flexeril, Naproxen, ice or heat.

At the hearing, **[*12]** Petitioner submitted correspondence between the president of Petitioner's union and Respondent. These letters listed a number of grievances related to overtime, but bear no indication whether the grievants had volunteered to work overtime by signing up on the overtime list, or any other details relevant to the proceedings before the Commission.

Both parties submitted Petitioner's wage statements into evidence. These statements show the letters "or' hand-written next to some pay dates. They also indicate that Petitioner received overtime pay, but do not indicate the dates that Petitioner worked overtime. These statements do not indicate whether Petitioner was forced to work overtime or accepted available overtime hours voluntarily.

CONCLUSIONS OF LAW

03 WC 50367

Regarding claim number 03 WC 50367, relating to Petitioner's undisputed accident of July 3, 2004, the Commission affirms and adopts the Arbitrator's findings that Petitioner's condition of ill being as it relates to her right elbow and right shower are causally connected to the undisputed July 4, 2003, accident.

The Commission finds that Petitioner is entitled to compensation for temporary total disability for a period **[*13]** of 2-4/7 weeks commencing on March 30, 2006, and ending on April 16, 2006. This period of temporary total disability corresponds to the Petitioner's right shoulder arthroscopy and decompression, and subsequent recovery. The Commission finds that Petitioner's condition of ill-being as it relates to her shoulder is causally connected to the July 3, 2004, accident. In so finding, the Commission relies on the April 4, 2005, note of Dr. Fletcher, in which he notes, "I believe at the least the impingement and the ulnar neuropathy are related to her work activities." The Commission further relies on the opinion of Respondent's Section 12 examiner Dr. Thomas Sutter, who noted on February 22, 2006, that Petitioner's elbow injury was causally related to the July 4, 2003, accident, which exacerbated the condition of Petitioner's shoulder.

The Commission further affirms and adopts the Arbitrator's findings as they relate to medical expenses. The Commission finds that although Petitioner complained of cervical pain throughout her course of treatment, Petitioner's primary complaints related to the condition of her right elbow or right shoulder. The Commission finds that any diagnostic studies Petitioner **[*14]** underwent relating to her cervical spine were necessary for the diagnosis and treatment of her work related injuries to the extent that these studies enabled Petitioner's treating physicians to conclude that Petitioner's cervical symptoms were unrelated to the July 4, 2003, accident.

The Commission specifically affirms and adopts the Arbitrator's decisions with respect to Petitioner's average weekly wage. Overtime is excluded from the calculation of a claimant's average weekly wage unless the claimant is required to work overtime as a condition of her employment, or the overtime hours are part of the claimant's consistent weekly schedule. **Airborne Express,** Inc. v. Ill. Workers' Comp. Comm'n, 372 Ill. App. 3d 549, 554 (1st Dist. 2007). The Commission finds that Respondent adhered to a voluntary overtime policy, in that only employees who voluntarily "signed up" to work overtime were ever contacted with overtime opportunities. As such, only employees who volunteered to work overtime could be "forced" to do so. The Commission finds Petitioner's evidence of overtime-related grievances to be unpersuasive, because this evidence failed to show whether the grievants **[*15]** had agreed to be contacted with overtime opportunities. Similarly, the Commission finds Petitioner's pay records to be unpersuasive evidence of mandatory overtime. Although these records indicate that Petitioner worked a significant number of overtime hours, the records themselves indicate neither the dates that Petitioner worked, nor whether the overtime was "forced" or voluntary. The Commission therefore finds that overtime was not mandatory, and therefore properly excluded from Petitioner's average weekly wage.

05 WC 26469

Regarding claim number 05 WC 26469, the Commission reverses the Arbitrator's decision, and fords that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on November 2, 2004.

The Commission finds that Petitioner failed to present any evidence to demonstrate the manner and means in which her work duties contributed to her alleged repetitive trauma. Petitioner testified to a long and varied work history with Respondent. From 1999, Petitioner has worked as a "coater processor," which, according to Petitioner, requires her to put glass on the line and take glass off the line. Petitioner **[*16]** provided no further details relating to her work activities. By merely offering cursory testimony lacking in any specifics about her work activities, Petitioner failed to meet her burden of proof.

The Commission further finds that Petitioner failed to prove that her condition of ill being as it relates to her neck is causally connected to her work activity. The records indicate that Petitioner chose November 2, 2004, as the manifestation date for her alleged injuries due to repetitive trauma because on that date, Dr. Fletcher stated, "This specialist does believe, based on the history that I know, that the condition is causal [sic] related to her employment." However, Dr. Fletcher failed to specify which specific condition he related to Petitioner's employment. When presented with similar symptoms on September 12, 2003, Dr. Often specifically categorized Petitioner's neck pain as "non-occupational." Later, on April 4, 2005, Dr. Fletcher specifically excluded Petitioner's neck pain from his causal connection opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator for claim number 03 WC 50367 filed November 15, 2007, is hereby affirmed and adopted as it **[*17]** relates to Petitioner's right ann. The award for permanent disability based on a claimed neck injury is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator in claim number 05 WC 26469 is reversed and Petitioner's claim for compensation therein is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 445.33 per week for a period of 4-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 400.80 per week for a period of 82.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 35% of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 25,556.83 for medical expenses under §8(a) of the Act. Respondent is entitled to a credit under §8(j) for medical expenses paid in the amount of $ 17,694.79.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit **[*18]** for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 34,600.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: MAY 15 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party.

The matter was heard by the Honorable Ruth. White, arbitrator of the Industrial Commission, in the city of Decatur, on April 23, 2007, May 21, 2007 and September 24, 2007. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues indicated below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent? (05 WC 26469 only)
[*19] E. Was timely notice of the accident given to the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
G. What were the petitioner's earnings?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for Temporary Total Disability?
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On July 4, 2003 and November 2, 2004, the respondent *was* operating under and subject to the provisions of the Act.

. On these dates, an employee-employer relationship *did* exist between the petitioner and respondent.

. On these dates, the petitioner *did* sustain injuries that arose out of and in the course of employment.

. Timely notice of these accidents *was* given to the respondent.

. In the years preceding the injuries, the petitioner earned $ 34,736.00; the average weekly wage was $ 668.00.

. At the time of these injuries, the petitioner was 48 and 49 years of age, *married* with one child under 18.

. Necessary medical services have partially been provided by the respondent.

. To date, $ 1,193.14 **[*20]** has been paid by the respondent on account of these injuries as temporary total disability benefits. An additional $ 434.28 has been paid under a group, nonoccupational disability plan for which Respondent is entitled to credit under Section 8(j) of the Act.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 445.33 /week for 4 and 4/7 weeks, from March 22, 2005 through April 4, 2005, and from March 30, 2006 through April 16, 2006, which are the periods of Temporary Total Disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 400.80 /week for a further period of 107.25 weeks, as provided in Sections 8 (d-2) and 8(e) of the Act, because the injuries sustained caused permanent and complete loss of use of the right arm to the extent of 35% thereof (82.25 weeks) and of Petitioner as a whole to the extent of 5% thereof (25 weeks).

. The respondent shall pay the petitioner compensation that has accrued from November 2, 2004.

. The respondent shall pay the further sum of $ 25,556.83 for necessary medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any amounts **[*21]** paid on the awarded bills by Respondent either directly or through a group policy that falls within the purview of Section 8(j) of the Act. To the extent that 8(j) credit exists, Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments pursuant to Section 8(j) of the Act.

. Petition for Penalties and Fees is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest 3.62% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Ruth W. White

Signature of arbitrator

November 13, 2007

Date

Nov 15 2007

In support of the arbitrator's decision relating to "C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?" [*22] the arbitrator finds the following facts:

This issue is disputed only for the November 2, 2004 injury (05 WC 26469).

On April 8, 1974, the Petitioner became employed by PPG. Initially, she was hired in the General Yard Labor pool where she performed shoveling and sweeping duties. Thereafter, Petitioner was promoted to the Glass section of the plant where she physically took glass off the line and packed it into a container. In 1982, Petitioner was transferred to the Container Unit where she held that job until September, 1994. Petitioner testified that she would physically pound penny nails into the containers using a hammer and a hatchet until nail guns were implemented. Petitioner primarily used her right hand and arm, and she is right hand dominant. She would perform these duties at least five hours out of the eight hour day. In September, 1994, Petitioner was transferred to the Coater department where she held two jobs, including Operator and Coater Processor. Petitioner testified that she performed a great deal of ratcheting of different sized bolts. In 2000, Petitioner was assigned to the Processing unit where she performed several jobs, including operating a forklift, physically **[*23]** placing glass onto the line, physically removing glass off the line, sitting in a booth and inspecting glass and relieving other workers on the line.

On July 4, 2003, Petitioner was caused to slip and fall in an area where powder had been disbursed on the floor causing the floor to be slippery. Petitioner slid and fell backwards and struck her right elbow on the upender brace and immediately felt pain in her elbow. Petitioner's Exhibit no. 1 contains the incident reports. Petitioner reported her injury to the first aid department. On 07/07/03, Petitioner left a message with Respondent's Nurse Johnson that she needed an appointment to see the company physician due to numbness in her right elbow and fingers from the injury on July 4, 2003. (Px. # 2) The fact of this accident is not disputed.

On July 8, 2003, Petitioner was seen by Dr. Carl Otten, the company physician at DMH Corporate Health Services. Petitioner provided a history of falling on a beam on 7/4/03, striking the right medial elbow and had continued complaints of tingling in the ulnar aspect of the right forearm and right fourth and fifth digits. Petitioner also stated that she was sore in the low back and left upper extremity. **[*24]** (Px. # 3). Dr. Often discharged Petitioner to return to her regular work.

Petitioner testified that she continued to experience pain to her neck, elbow and right arm. Petitioner spoke with Nurse Johnson and stated that her right arm continued to bother her, and her right shoulder woke her up at night due to pain. (Px. # 2).

Petitioner returned to Dr. Otten at DMH Corporate Health on September 12, 2003 and noted pain in the right arm below the elbow with swelling and burning. Petitioner further noted pain to the shoulder and the index finger. Petitioner stated that she felt intermittent symptoms in the right shoulder for the past 3-4 years, which were worse since the 7/4/03 injury. Dr. Otten diagnosed her with right arm pain-non-occupational and cervical spine degenerative changes and released her to regular duty.

Petitioner testified that she continued to have problems and scheduled an appointment to see Dr. David Fletcher, the former company physician on 11/19/03. Dr. Fletcher's records are marked as Petitioner's Exhibit # 4. Following Dr. Fletcher's examination and review of electrical studies, he opined that, "At this point it appears that she (Petitioner) does have a elbow (sic) **[*25]** and some right cubital tunnel which would be related to the traumatic event from July 2003." Dr. Fletcher prescribed Vitamin B6, an anti-inflammatory and some iontophoresis. some right cubital tunnel which would be related to the traumatic event from July 2003." Dr. Fletcher prescribed Vitamin B6, an anti-inflammatory and some iontophoresis.

Dr. Fletcher referred Petitioner to Hills' Medicine & Occupational Orthopedic Clinic for physical therapy that commenced on November 20, 2003. The Hills' Sports Medicine Records are marked as Petitioner's Exhibit # 11. Petitioner performed physical therapy primarily for her right elbow through December 8, 2003. Petitioner testified the physical therapy helped some, but she continued to be symptomatic in her right elbow.

On November 6, 2003, Petitioner underwent electrical studies by Dr. Rana Mahmood. (Px. # 15). Dr. Mahmood opined that Petitioner had an abnormal study due to slowing of the ulnar nerve in its course through the cubital tunnel on the right side. (Px. # 15).

Respondent referred Petitioner to Dr. Marshall Brustein for a Section 12 Independent Medical Examination on October 13, 2004. (Px.

5). Petitioner presented to Dr. Brustein **[*26]** with symptoms of right elbow pain and stiffness and occasional neck pain. Dr. Brustein opined that Petitioner had right elbow and upper extremity pain that may in fact be due to the cubital tunnel syndrome or an injury to the elbow itself. Dr. Brustein further stated, "Given the patient's history and physical it does seem that her elbow symptoms are related to the fall on 07-04-03 as there is no obvious other explanation that the patient gave to me today." Dr. Brustein recommended an MRI.

On November 3, 2004, MRIs of the cervical spine and right shoulder were taken that revealed severe degenerative changes at the C5-6 level that would suggest possibility of post-traumatic arthritis and mild spinal stenosis at the C5-6 level secondary to a left paracentral subligamentous disc herniation. The MRI of the shoulder revealed a partial tear of the rotator cuff tendon and other findings strongly suggestive of a shoulder impingement syndrome. (Px. # 12).

Petitioner returned to Dr. Fletcher on November 2, 2004, for shoulder pain, neck pain and radiation down the right upper extremity. (Px. # 4). Dr. Fletcher's examination was consistent with impingement with limited motion of the shoulder and **[*27]** right cervical radiculopathy. Dr. Fletcher ordered additional electrical studies by Dr. Trudeau and physical therapy. Dr. Fletcher returned Petitioner to regular work and recommended a job site assessment to see if there had been any change in the ergonomic aspects since he last reviewed the job. Dr. Fletcher opined that based on the history that be knew, that the condition was causally related to her employment.

The arbitrator finds that Petitioner suffered a repetitive trauma injury with manifestation date of November 2, 2004.

In support of the arbitrator's decision relating to "E. Was timely notice of the accident given to the respondent?" the arbitrator finds the following facts:

The findings of fact stated above are adopted and incorporated by reference here.

Respondent agreed that notice was given of both accidents as it relates to the elbow condition. This appears to be a causal connection dispute rather than a true notice issue. Respondent had notice of both accidents.

In support of the arbitrator's decision relating to "F. Is the petitioner's present condition of ill-being causally related to the injury?" the arbitrator finds the following facts:

The findings of fact **[*28]** stated above are adopted and incorporated by reference here.

On November 9, 2004, Petitioner underwent electrical studies by Dr. Edward Trudeau that were positive for right C6 radiculopathy, mild in electroneurophysiologic testing terms and ulnar neuropathy at the right elbow, mild in electroneurophysiologic testing terms.

Dr. Fletcher referred Petitioner to Dr. John Kefalas, an orthopedic surgeon for diagnosis and treatment of her right upper extremity injuries on 11/11/04. Dr. Kefalas' records are marked as Petitioner's Exhibit # 7. During that office visit, Dr. Kefalas opined that the majority of the Petitioner's symptoms were emanating from the cervical spine, and he would wait until Petitioner was seen by Dr. Dold for further evaluation.

Following the Trudeau electrical studies, Dr. Fletcher referred Petitioner to Dr. Oliver Dold, a neurosurgeon. Dr. Dold's records are marked as Petitioner's Exhibit # 13. Dr. Dold examined Petitioner on December 6, 2004. Petitioner provided a history of initially having troubles with her right arm in August, 2002 when she was pushing some glass over and jerked. Petitioner recovered in approximately one month, and in July of 2003, she slipped **[*29]** and hit her elbow on a steel beam. Since July of 2004, Petitioner has been complaining of neck and right arm pain with the neck pain radiating radiating through her right shoulder with discomfort also in the right forearm. Dr. Dold ordered additional x-rays and reviewed past EMG and nerve conduction study reports. Neurologically, Dr. Dold did not recommend surgical intervention and suggested Petitioner continue with Dr. Fletcher's rehabilitation program.

Petitioner followed up with Dr. Fletcher on December 7, 2004. Dr. Fletcher stated that he expected patient to get worse and would require some intervention, and that her work can contribute to her problems. (Px. # 4). During his office visit of March 22, 2005, Dr. Fletcher recommended that Petitioner restart physical therapy, prescribed a Medrol Dosepak and began the process of a referral for the right cubital tunnel release. In his office note of April 4, 2005, Dr. Fletcher opined, "I believe at the least the impingement and the ulnar neuropathy are related to her work activities." (Px. # 4).

On March 30, 2005, Petitioner returned to Dr. Kefalas with continuing pain in the right shoulder with some improvement from physical therapy. **[*30]** Dr. Kefalas recommended an injection in the right glenohumeral joint that was deferred by Petitioner. In his office note of May 31, 2005, Dr. Kefalas wrote that he suspected the symptoms were multifactorial and that Petitioner could have an underlying C6 radiculitis as per the MRI scan. Dr. Kefalas recommended nerve blocks, and if the nerve blocks did not help, he then would consider a right shoulder arthroscopy. (Px. # 7).

Dr. Kefalas referred Petitioner to the St. Mary's Pain Center. The St. Mary's Pain Center records are marked as Petitioner's Exhibit # 10. Dr. John Furry initially saw Petitioner on June 8, 2005 and recommended transforaminal epidural steroid injections at C6 on the right side. Petitioner underwent injections on June 9, 2005, June 24, 2005, July 13, 2005 and August 4, 2005. Following the September 8, 2005 office visit, Dr. Furry noted that Petitioner was much improved, and he discharged her from his care.

Petitioner returned to Dr. Kefalas on January 9, 2006, with right shoulder symptoms having returned. Dr. Kefalas recommended a right shoulder arthroscopy with decompression since Petitioner had failed all non-operative treatment. (Px. # 7).

Prior to approval of **[*31]** Dr. Kefalas' recommended surgery, Petitioner was required to undergo a Section 12 evaluation by Dr. Thomas Sutter at the request of the Respondent. Dr. Sutter's report is marked as Petitioner's Exhibit # 19. Dr. Sutter's diagnoses included contusion of the right elbow, partial tear of the right rotator cuff and neck strain. He further noted that any symptom magnification was absent, and Petitioner's complaints were consistent with the objective findings. With respect to causation, Dr. Sutter stated within a reasonable degree of medical certainty that the aforementioned primary diagnosis was causally related to the injury, and specifically, the elbow injury was causally related to the trauma of July 4, 2003, and the shoulder injury was exacerbated by the July 4, 2003 trauma. Dr. Sutter did not believe that the neck injury was related to that injury. Dr. Sutter recommended that Petitioner undergo the arthroscopy, and based upon the diagnostic findings, Dr. Kefalas perform a repair or place Petitioner at MMI if the results were normal.

On March 30, 2006, Dr. Kefalas performed a right shoulder arthroscopy with arthroscopic subacromial decompression and shaving of the right partial thickness **[*32]** of the rotator cuff. (Px. # 8). Petitioner continued to see Dr. Kefalas following her surgery until August 21, 2006 when she was declared at maximum medical improvement and allowed to return to regular duty work. (Px. # 7). Petitioner did return to Dr. Kefalas on March 28, 2007, with pain over the right lateral epicondyle and occasional achiness in the shoulder requiring ice during the day. Dr. Kefalas stated that Petitioner's shoulder had stabilized, but she had right lateral and medial epicondylitis. (Px. # 7). On April 25, 2007, Dr. Kefalas saw Petitioner one last time, and she continued to suffer from right lateral and medial epicondylitis. Dr. Kefalas offered an injection that was deferred, and he recommended continued use of a counter force brace, Naproxen, and stretching exercises. Dr. Kefalas returned Petitioner to regular duty work. (Px. # 24).

The PPG First Aid records are marked as Petitioner's Exhibit # 20. Petitioner was seen on October 6, 2006 with pain in her right shoulder. On November 27, 2006, she felt a popping in her right shoulder and neck area. On January 18, 2007, she noted shoulder pain, and on January 30, 2007, she requested an ice pack. On February 16, 2007, **[*33]** Petitioner returned to the first aid station complaining of a catch in her right shoulder. She was provided Bio-freeze.

The Arbitrator finds that the injuries to Petitioner's right elbow and right shoulder are causally connected to the single episode trauma of July 4, 2003; and that her condition of ill-being in the cervical spine, the right elbow and right shoulder were aggravated by the repetitive trauma from her work, site with an accident date of November 2, 2004.

In support of the arbitrator's decision relating to "G. What were the petitioner's earnings?" the arbitrator finds the following facts:

The parties were subject to a collective bargaining agreement between PPG Industries and United Steelworkers of America. Under Article 16, that collective bargaining agreement did established that the normal work week shall consist of eight-hour days and the normal work week shall be forty (40) hours. Judy Lewkowski, the Human Resource Director, testified that employees have the ability to sign up for overtime and accept same. She testified that mandatory overtime did occur but it was rare, especially in the petitioner's department as a Line Processor. The petitioner testified that **[*34]** some of her overtime was mandatory, and an attempt was made to establish through records, what was or was not mandatory. The records in question were quite voluminous and difficult to interpret, with the Arbitrator eventually ruling that those records could not go into evidence. The records dealing with overtime were kept on two difficult sets of documents and were, to say the least, very confusing. Neither the petitioner nor the Respondent proved exactly what percentage of overtime was mandatory. The petitioner and Respondent's testimony on that issue was limited to what they specifically recall. The evidence on this issue was limited to the recollections of the witnesses.

The Arbitrator finds that regardless of how much, if any, overtime was mandatory, that under the current case of **Airborne Express** v Illinois Workers' Compensation Commission, 05 L 50965, Appellate Court Case No. 1-06-1960WC, that unless the petitioner can establish that overtime was a condition of her employment, that the hours of overtime were consistent each week and that the overtime hours were required as part of her regular employment, her claim for overtime must fail. In this case, her number of hours **[*35]** were varied, the Union contract provided that the regular work week was forty (40) hours, and that there was no testimony or evidence that the petitioner was required to work overtime as a condition of her employment.

The Arbitrator finds that Petitioner's average weekly wage was $ 668.80, consistent with the union contract and with the holding in **Airborne Express**.

In support of the arbitrator's decision relating to " J. Were the medical services that were provided to petitioner reasonable and necessary?" the arbitrator finds the following facts:

The findings of fact stated above are adopted and incorporated by reference here.

Petitioner's Exhibit # 17 is a list of medical expenses with accompanying medical bills. Aside from the payments made by worker's compensation, there remains $ 25,556.83 not paid by workers' compensation. The accompanying itemized bills reflect partial payments by BlueCross/BlueShield, the Petitioner's group insurer through her employment. Petitioner's Exhibit 36 sets forth a charge of $ 94.00 for the 4/25/07 Kefalas office visit. The Arbitrator orders the Respondent to pay the sum of $ 25,462.83 for the aforementioned medical expenses. The Respondents **[*36]** provided a Section 8(j) credit for any medical expenses paid by BlueCross/BlueShield with the Respondent holding Petitioner safe and harmless for any subrogation claim made by BlueCross/BlueShield.

In support of the arbitrator's decision relating to "K What amount of compensation is due for temporary total disability?" the arbitrator finds the following facts:

The findings of fact stated above are adopted and incorporated by reference here.

The Petitioner testified that she was off work for the period from March 22, 2005 through April 4, 2005. Dr. Fletcher has provided off work slips for Respondent starting on March 22, 2005 through April 4, 2005. (Px. # 4). Petitioner underwent surgery on March 30, 2006 and was seen on April 10, 2006 by Dr. Kefalas who released her to return to work with no use of the right arm. Petitioner testified that she returned to work on April 17, 2006.

In support of the arbitrator's decision relating to "What is the nature and extent of the injury?" the arbitrator finds the following facts:

The findings of fact stated above are adopted and incorporated by reference here..

Petitioner testified that she continues to experience symptomatology in her **[*37]** right elbow that is documented by Dr. Kefalas' records, in her right shoulder that is documented by the first aid plant records and continued problems with her neck.

In support of the arbitrator's decision relating to " M. Should penalties or fees be imposed upon the respondent?" the arbitrator finds the following facts:

The findings of fact stated above are adopted and incorporated by reference here.

Legitimate issues of liability are in disputed regarding the causal connection of the shoulder and cervical spine conditions in addition to the fact of the November 2, 2004 accident. Penalties are denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > **IL Workers' Compensation Decisions**
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Date/Time: Thursday, December 24, 2009 - 8:54 AM EST

U.S. Equal Employment Opportunity Commission

PRESS RELEASE
9-29-09

SEARS, ROEBUCK TO PAY $6.2 MILLION FOR DISABILITY BIAS

Federal Court Approves Largest Monetary Amount Ever in Single EEOC ADA Suit; Employees Allegedly Terminated Based on Inflexible Workers' Compensation Leave Exhaustion Policy

CHICAGO - The U.S. Equal Employment Opportunity Commission (EEOC) today announced the entry of a record-setting consent decree resolving a class lawsuit against Sears, Roebuck and Co. (Sears) under the Americans With Disabilities Act (ADA) for $6.2 million and significant remedial relief.

The consent decree, approved this morning by Federal District Judge Wayne Andersen, represents the largest ADA settlement in a single lawsuit in EEOC history. The EEOC's suit alleged that Sears maintained an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, in violation of the ADA.

"The facts of this case showed that, nearly twenty years after the enactment of the ADA, the rights of individuals with disabilities are still in jeopardy," said Commission Acting Chairman Stuart J. Ishimaru. "At the same time, this record settlement sends the strongest possible message that the EEOC will use its enforcement authority boldly to protect those rights and advance equal employment opportunities for individuals with disabilities."

EEOC Chicago District Director John Rowe, who supervised the agency's administrative investigation preceding the lawsuit, said that the case arose from a charge of discrimination filed with the EEOC by a former Sears service technician, John Bava. According to Rowe, Bava was injured on the job, took workers' compensation leave, and, although remaining disabled by the injuries, repeatedly attempted to return to work. Sears, Rowe said, "Could never see its way clear to provide Bava with a reasonable accommodation which would have put him back to work and, instead, fired him when his leave expired."

Regional Attorney John Hendrickson of the EEOC Chicago District Office said pre-trial discovery in the lawsuit revealed that hundreds of other employees who had taken workers' compensation leave were also terminated by Sears without seriously considering reasonable accommodations to return them to work while they were on leave, or seriously considering whether a brief extension of their leave would make their return possible.

"The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over," Hendrickson said. "Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. Today's consent decree is a bright line marker of that reality."

In addition to providing monetary relief, the three-year consent decree includes an injunction against violation of the ADA and retaliation. It requires, in addition, that Sears will amend its workers' compensation leave policy, provide written reports to the EEOC detailing its workers' compensation practices' compliance with the ADA, train its employees regarding the ADA, and post a notice of the decree at all Sears locations.

According to Greg Gochanour, EEOC supervisory trial attorney in Chicago, "This is not merely a garden variety so-called 'cost of litigation' settlement. We discovered well over a hundred former employees who wanted to return to work with an accommodation, but were terminated by Sears - and some of them found it out when their discount cards were rejected while shopping at Sears. We believe Sears' decision to accept this decree makes good sense."

The lawsuit, filed in November 2004, was assigned to Federal District Court Judge Wayne Andersen of the Northern District of Illinois and Magistrate Judge Susan Cox, and is captioned *EEOC v. Sears Roebuck & Co.*, N.D. Ill. No. 04 C 7282. Today's decree is dated September 29, 2009. The court will hold a final hearing,

currently slated for approximately February 2010, at which time the court will make a final determination as to the fairness of the individual distributions from the $6.2 million settlement fund.

The EEOC litigation team has included, in addition to Hendrickson and Gochanour, Chicago trial attorneys Aaron DeCamp, Ethan Cohen, Deborah Hamilton and Laurie Elkin.

The EEOC enforces federal laws prohibiting discrimination in employment. Further information about the Commission is available on its web site at www.eeoc.gov.

*917 N.E.2d 122; 2009 Ill. App. LEXIS 960, *;*
29 I.E.R. Cas. (BNA) 1465

FRED W. **GRABS** and RUDOLPH FRANCEK, Plaintiffs-Appellees, v. **SAFEWAY,** INC., and DOMINICK'S FINER FOODS, LLC., Defendants-Appellants.

No. 1-08-3007

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

917 N.E.2d 122; 2009 Ill. App. LEXIS 960; 29 I.E.R. Cas. (BNA) 1465

September 30, 2009, Decided

SUBSEQUENT HISTORY: Released for Publication November 17, 2009.

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. Honorable Allen S. Goldberg, Judge Presiding.
Grabs v. **Safeway,** Inc., 2009 Ill. App. LEXIS 434 (Ill. App. Ct. 1st Dist., June 17, 2009)

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) granted summary judgment to plaintiff employees on their retaliatory discharge claim filed against defendant employers. It then certified for interlocutory appeal the question about the extent to which employers could rely on an independent medical examiner's opinion that an employee could return to work in terminating the employee under the employer's attendance policy.

OVERVIEW: The employees sued their employers alleging the employees discharges were in retaliation for filing claims pursuant to the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006). The employers maintained that they terminated them under its attendance policy after obtaining an opinion from an independent medical examiner (IME) that the employees could return to work without restrictions, and the employees failed to do so. The trial court eventually entered summary judgment in favor of the employees. It then certified a question for appeal about whether the employers could rely solely on the IME opinion to terminate the employees where an opinion also existed from the employee's doctor that the employees should not return to work. The appellate court found that an employer in that situation, charged with retaliatory discharge pursuant to 820 ILCS 305/4(h) (2006), could not rely solely on the IME's opinion since a question of fact existed for Illinois Workers' Compensation Commission about whether the employee could return to work. It also added that the employee still had to show the termination was causally related to the employee's pursuit of his rights under the Act.

OUTCOME: The appellate court found an employer in a retaliatory discharge case faced with conflicting opinions from an employee's doctor and an employer's independent medical examiner (IME) could not rely solely on an IME in terminating an employee for not returning to work or failing to call in absences. It also found an employee had to meet his burden of proof to show the discharge was caused by exercising his rights under the Workers' Compensation Act.

CORE TERMS: retaliatory discharge, return to work, attendance, compensation claim, summary judgment, discharged, absenteeism, arbitrator, element of causation, retaliation, discharging, terminated, coding, per se rule, cause of action, doctor, causally, workers' compensation, returning to work, termination, disputed, medical opinions, treating physicians', compensable injury, nonpretextual, terminate, personnel, punitive, advice, Compensation Act

LEXISNEXIS® HEADNOTES Hide

Labor & Employment Law > Employment Relationships > At-Will Employment > Exceptions > Public Policy
Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge

HN1 The general rule in Illinois is that an at-will employee may be discharged by the employer at any time and for any reason. However, a limited exception exists for a plaintiff terminated for pursuing workers' compensation benefits. Recognizing a cause of action based on the tort of retaliatory discharge is necessary to insure that the public policy underlying the enactment of the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006) (Act), is not frustrated. Discharges are considered retaliatory when they violate a clear mandate of public policy, and an employer may not present the employee with a choice between his job and his legal entitlement to compensation under the Act. More Like This Headnote

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge

HN2 See 820 ILCS 305/4(h) (2006).

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge
HN3 820 ILCS 305/4(h) (2006) plainly prohibits a retaliatory discharge for the exercise of workers' compensation rights. More Like This Headnote

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge
HN4 To state a cause of action for retaliatory discharge, a plaintiff must show that: (1) he was an employee of a defendant before or at the time of the injury; (2) he exercised some right granted by the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006) (Act) and (3) his discharge was causally related to the exercise of his rights under the Act. The element of causation is not met if the employer has a valid, nonpretextual basis for discharging the employee. More Like This Headnote

JUDGES: JUSTICE QUINN delivered the opinion of the court. MURPHY, P.J., and THEIS, J., concur.

OPINION BY: QUINN

OPINION

MODIFIED UPON REHEARING

JUSTICE QUINN delivered the opinion of the court:

Plaintiffs filed a joint complaint against their former employer, defendant Dominick's Finer Foods, LLC, and its parent company, **Safeway,** Inc. (collectively Dominick's or defendants), alleging their discharge was in retaliation for filing claims pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). Dominick's maintained that it terminated plaintiffs' employment pursuant to its neutrally applied attendance policy after Dominick's obtained an opinion from an independent medical examiner (IME) that plaintiffs could return to work without restrictions and plaintiffs failed to come to work or call in their absences for three days in a row. The circuit court denied plaintiffs' motion for summary judgment on their claims, but subsequently granted plaintiffs' motion to reconsider and entered summary judgment in favor of plaintiffs. The circuit court then granted defendants' motion for interlocutory appeal pursuant **[*2]** to Supreme Court Rule 308 (155 Ill. 2d R. 308). On October 21, 2008, the circuit court certified the following question for interlocutory appeal:

> "Does the Workers' Compensation Act give the Illinois Workers Compensation Commission the exclusive authority to determine whether an injured employee may return to work, such that when an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, the employer may not rely upon the IME opinion to terminate the employee under the employer's attendance policy for failing to return to work, before the Commission has adjudicated the pending dispute over the conflicting medical opinions?"

Defendants timely filed an application for leave to appeal on November 3, 2008, and this court allowed the application on November 26, 2008.

For the following reasons, we find that when an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, an employer may not rely solely on an IME in terminating an employee for failing to return to work or for failing to call in his absences. We decline to find that a *per se* standard exists to recover for a workers' compensation retaliatory **[*3]** discharge claim; rather, an employee must meet his burden of proof to show that his discharge was causally related to the exercise of his rights under the Act.

I. BACKGROUND

Plaintiffs were both employed by defendants and worked at a Dominick's store in Cook County, Illinois. On March 4, 2005, **Grabs** was injured while at work at Dominick's and **Grabs** filed a workers' compensation claim on that date. Dominick's initially approved the claim and paid **Grabs'** medical bills and temporary total disability benefits. On March 16, 2006, **Grabs'** physician, Dr. Sweeney, recommended that **Grabs** remain off work. On March 25, 2006, **Grabs** visited Dr. Bernstein, an IME, and Dr. Bernstein determined that **Grabs'** injury was not work related and that he could return to work with no restrictions. **Grabs** decided to follow his physician's advice, Dr. Sweeney, and remained off work.

Francek alleged that he suffered work injuries on May 28, 2005, and January 9, 2006. Francek filed four workers' compensation claims, the last two of which he alleged led to his discharge. Dominick's denied these last two claims and requested that Francek submit to an independent medical examination, which was performed by Dr. Papierski. **[*4]** Dr. Papierski determined that the injury was not work related and released Francek to work immediately with no restrictions. Around this same time, Francek was also examined by his personal physician, Dr. Bartucci, who recommended that Francek remain off work. Francek followed the advice of Dr. Bartucci and remained off work.

Dominick's had a no-fault attendance policy, in which an employee may be terminated for job abandonment if he does not come in to work or call in his absences for three days in a row (*i.e.*, attendance coding "Code 10-No Call/No-Show"). Following the opinions of the IMEs, Dominick's changed plaintiffs' attendance coding from work related injury, which did not require them to call in their absences, to require plaintiffs to return to work or call in their absences. On June 14, 2006, when **Grabs** did not return to work or call in his absence, Dominick's no-fault attendance policy began running. When **Grabs** did not report to the office or call in his absences on June 15 or 16, Dominick's terminated his employment in accordance with its attendance policy. Similarly, on June 19, 2006, when Francek failed to return to work or call in his absence, Dominick's began the tolling **[*5]** of its attendance policy. After Francek failed to come into work or call in his absences on June 20 and 21, Dominick's terminated his employment.

Plaintiffs filed claims against defendants alleging retaliatory discharge. On May 2, 2008, the circuit court denied plaintiffs' motions for summary judgment on their claims and granted defendants' motion for severance of the trials.

On July 7, 2008, the Illinois Workers' Compensation Commission (Commission) issued its final decisions with respect to plaintiffs'

petitions for an emergency hearing by an arbitrator, filed pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)), to resolve the dispute whether plaintiffs were capable of returning to work. In its decision, the Commission adopted the findings of the arbitrator of the Commission. The arbitrator accepted the findings of plaintiffs' personal physicians, Drs. Sweeney and Bartucci, and found defendants' IMEs unpersuasive. The arbitrator determined that plaintiffs' injuries were caused by accidents that arose out of and in the course of their employment with defendants. Specifically, **Grabs** was injured on March 4, 2005, as he was twisting and moving a 10-pound box. Francek **[*6]** was injured on January 9, 2006, as he was moving boxes above shoulder height. The arbitrator noted that at the time of its decision, plaintiffs were both being treated by their physicians, who had not released plaintiffs to work. Accordingly, the arbitrator found that plaintiffs were exercising their rights, pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), to follow their physicians' advice and not return to full duty work. The arbitrator stated that, pursuant to section 8(a), plaintiffs could ignore an IME recommendation that contradicted their treating physicians' advice. The arbitrator also found that, pursuant to sections 18 and 19 of the Act (820 ILCS 305/18, 19 (West 2006)), the resolution of the medical dispute over whether plaintiffs could return to work was for the Commission to resolve. At the time defendants terminated plaintiffs' employment, plaintiffs had pending petitions for an immediate hearing on the issue of whether each was capable of returning to work, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)). The arbitrator also determined that the IME opinions, used by defendants to change plaintiffs' attendance coding to require **[*7]** them to return to work or call in their absences, were created as part of defendants' workers' compensation defense to plaintiffs' claims for temporary total weekly compensation and medical care prescribed by their physicians. The arbitrator concluded that defendants were obligated to pay plaintiffs for temporary total disability benefits and medical services and prospective medical care.

On September 19, 2008, in an eight-page written order, the circuit court granted plaintiffs' motion to reconsider, in part, and granted plaintiffs' motion for summary judgment on the issue of liability. The circuit court denied plaintiffs' motion to reconsider its ruling granting defendants' motion for separate trials on damages. In its order, the circuit court found that plaintiffs had a right to follow their treating doctors' advice and not return to work until the Commission resolved the conflicting medical opinions. The circuit court noted that while plaintiffs had a petition pending before the Commission to determine the issue of whether plaintiffs were capable of returning to work, defendants used the IME reports to change plaintiffs' attendance coding to "Code 10-No Call/No-Show." While plaintiffs **[*8]** had no previous duty to call in absences, the new coding required plaintiffs to do so. After **Grabs** and Francek failed to call in three days in a row, defendants terminated them pursuant to Dominick's attendance policy. The circuit court found that the fact that the attendance policy was "neutral," in that it was applied in the same manner to all employees did not shield defendants under the "nonpretextual" exception to plaintiffs' retaliatory discharge claim where the application of the policy was improper and in violation of the Act. The circuit court concluded that because the change in coding was in response to the IME reports, which were disputed by plaintiffs' treating physicians and should have been resolved by the Commission prior to any action by defendants, plaintiffs' discharge was directly and proximately related to their claims for benefits under the Act, and summary judgment in their favor was proper. In reaching its determination, the circuit court relied on this court's decision in Clark v. Owens-Brockway Glass Container, Inc., 297 Ill. App. 3d 694, 697 N.E.2d 743, 232 Ill. Dec. 1 (1998). All parties on appeal assert that the circuit court applied essentially a *per se* standard to find that plaintiffs' **[*9]** discharge was causally related to the improper denial of their right to follow their treating physicians' orders while their claims were pending before the Commission. On October 21, 2008, the circuit court granted defendants' motion for interlocutory appeal and certified the above question.

II. ANALYSIS

*HN1*The general rule in Illinois is that an at-will employee may be discharged by the employer at any time and for any reason. [1] Buckner v. Atlantic Plant Maintenance, Inc., 182 Ill. 2d 12, 17-18, 694 N.E.2d 565, 230 Ill. Dec. 596 (1998). However, our supreme court recognized a limited exception to this rule in Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978), when it determined that a plaintiff who was terminated for pursuing workers' compensation benefits could bring an action for retaliatory discharge against the former employer. After examining the history of the Act, our supreme court held that a cause of action based on the tort of retaliatory discharge was necessary to insure that the public policy underlying the enactment of the Act was not frustrated. Kelsay, 74 Ill. 2d at 182-85. Discharges are considered retaliatory when they violate a "clear mandate of public policy," and an employer "may not present the employee **[*10]** with a choice between his job and his legal entitlement to compensation" under the Act. Hartlein v. Illinois Power Co., 151 Ill. 2d 142, 160,166, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992).

FOOTNOTES

1 While plaintiffs were union members, the union contract was not involved in this case.

The Act specifically provides that *HN2*"[i]t shall be unlawful for any employer *** to discharge *** an employee because of the exercise of his or her rights or remedies granted to him or her by this Act." 820 ILCS 305/4(h) (West 2006); Smith v. Waukegan Park District, 231 Ill. 2d 111, 119, 896 N.E.2d 232, 324 Ill. Dec. 446 (2008). Therefore, as our supreme court has explained, "*HN3*section 4(h) plainly prohibits a retaliatory discharge for the exercise of workers' compensation rights." Smith, 231 Ill. 2d at 119.

*HN4*To state a cause of action for retaliatory discharge, plaintiffs must show that: (1) they were employees of defendants before or at the time of the injury; (2) they exercised some right granted by the Act (820 ILCS 305/1 *et seq.* (West 2006)); and (3) their discharge was causally related to the exercise of their rights under the Act. Clark, 297 Ill. App. 3d at 697. The element of causation is not met if the employer has a valid, nonpretextual basis for discharging the employee. Hartlein v. Illinois Power Co., 151 Ill. 2d 142, 160, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992).

In **[*11]** the present case, both parties agree that **Grabs** and Francek were employees of Dominick's at the time of their injuries and that they exercised their rights to benefits under the Act. Therefore, the sole issue before the circuit court was whether plaintiffs' discharge was causally related to the exercise of their rights under the Act. In its September 19, 2008, order, the circuit court determined that, as a matter of law, plaintiffs' discharge was causally related to the improper denial of their right to follow their treating physicians' orders while their claims were pending before the Commission.

On appeal, defendants contend that the circuit court improperly entered summary judgment in plaintiffs' favor because causation is a material fact for a jury and that this court should answer the certified question in the negative. Plaintiffs maintain that this court should answer the certified question in the affirmative based on the reasoning set forth by the Fifth District of this court in Clark, 297 Ill. App. 3d 694, 697 N.E.2d 743, 232 Ill. Dec. 1, and Hollowell v. Wilder Corp. of Delaware, 318 Ill. App. 3d 984, 743 N.E.2d 707, 252 Ill. Dec. 839 (2001).

In Clark, an employee injured her back at work and the employer began paying temporary total disability **[*12]** payments to the employee while she was off work and participating in a physical therapy/work-hardening program as prescribed by her physician. Clark, 297 Ill. App. 3d at 696. The employer believed that the employee was malingering and receiving unwarranted workers' compensation benefits, so the employer hired a private investigator to monitor her. After the employer reviewed the private investigator's videotaped surveillance of the employee mowing her lawn, the employer fired the employee for fraudulent misrepresentation and conduct in connection with her claims for workers' compensation. Clark, 297 Ill. App. 3d at 696. The employee brought an action to recover damages for retaliatory discharge. The Fifth District of this court affirmed the circuit court's grant of summary judgment in the employee's favor and the jury's award of more that $ 150,000 in damages.

In affirming the grant of summary judgment, the Clark court did not establish a *per se* rule to recover for retaliatory discharge. Rather, the court explained that a claimant must show, *inter alia*, that "his or her discharge was causally related to the exercise of rights under the Act." Clark, 297 Ill. App. 3d at 697. In Clark, **[*13]** the employer admitted that the employee's discharge was connected to her workers' compensation claim because the employer thought that the employee was malingering and collecting benefits to which she was not entitled. Clark, 297 Ill. App. 3d at 698. As a result, the Clark court held that the entry of summary judgment in favor of the employee was proper because her discharge was directly and proximately related to her claim for benefits. Clark, 297 Ill. App. 3d at 698. In discussing the entry of summary judgment in that case, the Clark court stated, "We wish to be clear on this point. An employer may not discharge an employee on the basis of a dispute about the extent or duration of a compensable injury. An employer that fails to heed this rule subjects itself to a retaliatory discharge action under Kelsay." Clark, 297 Ill. App. 3d at 699. However, the Clark court noted: "This does not mean that an employer may never discharge an employee who has filed for benefits under the Act. An employer may discharge an injured employee who has filed a workers' compensation claim as long as the reason for the discharge is wholly unrelated to the employee's claim for benefits under the Workers' **[*14]** Compensation Act." Clark, 297 Ill. App. 3d at 698.

In Hollowell, the plaintiff filed a complaint against his former employer alleging that his discharge was in retaliation to his filing a workers' compensation claim. The employee was employed as a farm laborer and injured his back while riding a tractor over a ditch in the fields. The employee was subsequently ordered by his physician not to return to work until he completed a physical therapy/work-hardening program. Hollowell, 318 Ill. App. 3d at 986. The employee filed a workers' compensation action and the employer's workers' compensation carrier requested that the employee receive an independent medical examination. The IME concluded that the employee's tractor accident aggravated a preexisting condition and that the employee could return to work immediately. Hollowell, 318 Ill. App. 3d at 986. The employee's manager visited the employee's residence and informed him that he was required to return to work immediately or face the consequence of being fired. The employee stated that he could not return under his physician's orders to finish the physical therapy program before returning to work. The employee was then fired. Hollowell, 318 Ill. App. 3d at 986. **[*15]** Following a trial, the jury rendered judgment in favor of the employee, which included an award of $ 50,000 in punitive damages. Hollowell, 318 Ill. App. 3d at 990.

On review, the Fifth District of this court affirmed the jury's award of punitive damages against the employer. Hollowell, 318 Ill. App. 3d at 989. The Hollowell court determined that punitive damages were warranted based on the facts of that case, where the employee presented evidence that his manager harassed and verbally abused him, and pressured the employee to violate his physician-ordered work restrictions. Hollowell, 318 Ill. App. 3d at 989. The Hollowell court explained that "[a]n employer cannot unilaterally rely on one physician's favorable diagnosis while at the same time dismissing another physician's unfavorable diagnosis. To do so would give an employer the ability to rely on its own medical evaluation as a reason to demand that employees return to work, even when that evaluation conflicts with that of the employee's physician." Hollowell, 318 Ill. App. 3d at 988-89.

After relying on its reasoning in Clark, the Hollowell court stressed that it was not saying, and did not say in Clark, that a fraudulent workers' **[*16]** compensation claim is not a justification for termination. "However, when there is a dispute between an independent medical examiner and an employee's physician with no evidence of fraud, the employer cannot discharge the employee on the basis of suspected laziness or malingering. It is for the Industrial Commission to settle disputes such as this where there are conflicting medical opinions." Hollowell, 318 Ill. App. 3d at 989. Accordingly, the Fifth District of this court determined that, where there is a dispute between an IME and an employee's physician, the employer cannot rely solely on the IME to discharge an employee. However, the Hollowell court did not establish a *per se* rule, but, rather determined that the evidence supported the jury's punitive damages award in that case. Hollowell, 318 Ill. App. 3d at 989.

Plaintiffs also rely on our supreme court's opinion in Smith, 231 Ill. 2d 111, 896 N.E.2d 232, 324 Ill. Dec. 446, in support of a *per se* rule of retaliatory discharge. In Smith, our supreme court explained that "section 4(h) [of the Act] plainly prohibits a retaliatory discharge for the exercise of workers' compensation rights." Smith, 231 Ill. 2d at 119; 820 ILCS 305/4(h) (West 2006). However, other than **[*17]** stating the general law with respect to retaliatory discharge, our supreme court's holding in Smith is inapplicable. In Smith, our supreme court determined that the defendant park district was not immune under the Local Governmental and Environmental Employees Tort Immunity Act (745 ILCS 10/2-109 (West 2002)) against claims of retaliatory discharge for exercising workers' compensation rights. Smith, 231 Ill. 2d at 119. Our supreme court's decision in Smith does not support establishing a *per se* retaliatory discharge rule. Rather, our supreme court analyzed the disputed facts and determined that the dismissal of the plaintiff's retaliatory discharge claim, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2002)), was improper in that case. Smith, 231 Ill. 2d at 121.

In the instant case, both **Grabs** and Francek presented orders from their treating physicians which conflicted with the IME determinations that they could return to work. At the time of their discharge, **Grabs** and Francek also had pending petitions, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)), for an immediate hearing before an arbitrator to resolve the dispute **[*18]** between plaintiffs' physicians and the IME regarding whether each was capable of returning to work. Defendants admit that they relied on the IME opinions to change plaintiffs' attendance coding and require that plaintiffs come to work or call in absences. [2]

FOOTNOTES

2 Defendants also admitted that they did not communicate this change in policy requiring plaintiffs to call in absences to either of the plaintiffs; rather, they notified plaintiffs' union.

In a petition for rehearing, plaintiffs argued that the defendants' admission that they relied on the IME opinions to change plaintiffs' attendance coding to require that plaintiffs come to work or call in their absences, amounts to a concession that defendants' reliance on the IME opinions constituted a proximate cause of plaintiffs' discharge. Citing Nolan v. Weil-McLain, 233 Ill. 2d 416, 910 N.E.2d

549, 331 Ill. Dec. 140 (2009), plaintiffs argue that the undisputed facts in the present case constitute proximate cause under either the "but for" standard or the "substantial cause" standard: "'But for' **Safeway's** illegal use of its IME opinions to change the plaintiffs' attendance status from 'work related absences' to 'personal absences' under **Safeway's** attendance policy, plaintiffs **[*19]** would not have been fired. The facts also meet the 'substantial cause' standard: **Safeway's** admitted illegal use of the IME opinions was a 'substantial cause' for the firing."

In their answer to the petition for rehearing, defendants responded, "Under the Pattern Jury Instruction, plaintiffs must prove they were discharged 'because of' the exercise of their rights under the Act. IPI 250.02 (West 2009). They must also prove that their exercise of rights was 'a proximate cause'" of their termination.

Consistent with our answer to the certified question, in order to recover for workers' compensation retaliatory discharge, plaintiffs were required to show that defendants relied on the IME opinions in discharging plaintiffs, such that the termination was causally related to their exercising a right or remedy granted to them by the Act. 820 ILCS 305/4(b), 8(a) (West 2006). Consequently, if the change of plaintiffs' attendance coding was made based solely on the IME opinions, and defendants terminated plaintiffs for failing to return to work or for failing to call in their absences, entry of summary judgment for plaintiffs would be appropriate. We do not decide this issue as this case is before **[*20]** us pursuant to Supreme Court Rule 308. See Brookbank v. Olson, 389 Ill. App. 3d 683, 685, 907 N.E.2d 426, 329 Ill. Dec. 835 (2009) (this court's review is generally limited to the question certified by the trial court). We note that the petition for rehearing and answer focused almost entirely on the issue of proximate cause - an issue which was only briefly discussed in the parties' initial briefs.

Defendants rely upon our supreme court's decision in Hartlein v. Illinois Power Co., 151 Ill. 2d 142, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992), in support of their contention that defendants had the right to discharge plaintiffs for failing to return to work. In Hartlein, our supreme court stated that "Illinois law does not obligate an employer to retain an at-will employee who is medically unable to return to his assigned position" and "[A]n employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury." Hartlein, 151 Ill. 2d at 160. In Hartlein , our supreme court explained that a valid claim of retaliatory discharge requires, *inter alia*, a showing that an employee has been discharged in retaliation for the employee's activities. Hartlein, 151 Ill. 2d at 160. Our supreme court also noted that "[t]he element **[*21]** of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee." Hartlein, 151 Ill. 2d at 160. With respect to the element of causation, "the ultimate issue to be decided is the employer's motive in discharging the employee." Hartlein, 151 Ill. 2d at 163.

In Hartlein, it was undisputed that the employee's work-related injury prevented him from ever returning to his former position within the company and the company had no available positions which the employee was capable of performing. Hartlein, 151 Ill. 2d at 163-64. Our supreme court held that no improper motive on the employer's part was shown and, therefore, the evidence did not reveal that the employee was retaliatorily discharged. Hartlein, 151 Ill. 2d at 166-67. As a result, the Hartlein court concluded that the grant of a preliminary injunction was improper in that case. Hartlein, 151 Ill. 2d at 167.

Here, by contrast, the issue of whether plaintiffs were capable of returning to work was disputed. Unlike the situation in Hartlein, defendants in this case did not have the right to terminate plaintiffs for failing to return to work or for failing to call in their absences based **[*22]** solely on the IME determinations that plaintiffs were capable of returning to work where the IME opinions were disputed by plaintiffs' physicians. Rather, due to the conflicting medical evidence in this case, the determination regarding plaintiffs' ability to return to work could only have been made by the Commission. 820 ILCS 305/18 (West 2006) ("All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except otherwise provided, be determined by the Commission"); see also Hollowell, 318 Ill. App. 3d at 988-89 (the Commission is to settle disputes where there are conflicting medical opinions). However, plaintiffs were still obligated to establish the element of causation in support of their retaliatory discharge claims. Hartlein, 151 Ill. 2d at 163. If defendants had a valid basis, which was not pretextual, for discharging plaintiffs, then the element of causation is not met. Hartlein, 151 Ill. 2d at 160. **[*23]** However, if the plaintiffs can show that they were discharged in retaliation for exercising their rights under the Act, then plaintiffs can establish a claim for retaliatory discharge and the grant of summary judgment may be appropriate.

In Clemons v. Mechanical Devices Co., 184 Ill. 2d 328, 704 N.E.2d 403, 235 Ill. Dec. 54 (1998), our supreme court, interpreting Hartlein, explained that in retaliatory discharge cases, an employer is not required to come forward with an explanation for an employee's discharge, and "it remains plaintiff's burden to prove the elements of the cause of action." Clemons, 184 Ill. 2d at 336. However, "if an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met." Clemons, 184 Ill. 2d at 336.

In Clemons, the employer chose to assert a defense to the employee's cause of action for retaliatory discharge. The employer maintained that the employee was discharged, not in retaliation for filing a workers' compensation claim, but because of a dispute over the payment of his wages. The employee argued that the employer's stated reason for the discharge was a violation **[*24]** of the Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 1994)) and that an employer may not contest the causation element of the tort of retaliatory discharge by proffering an illegal defense. Clemons, 184 Ill. 2d at 336. In rejecting the employee's argument, our supreme court explained:

> "The burden remains on the plaintiff to establish the elements of his cause of action, which here involved the discrete claim that the defendant wrongfully discharged plaintiff in retaliation for seeking recovery under the Workers' Compensation Act. If the trier of fact rejects plaintiff's evidence, or instead accepts defendant's proffered reason for the termination, then plaintiff has failed to meet his burden of proof. In any event, we do not believe that a defendant is limited in the defense it may offer to a plaintiff's claim of retaliatory discharge, or that the allegedly illegal nature of its defense somehow relieves plaintiff of his burden of establishing the elements of his cause of action. Other remedies may exist for the other violation, but the burden still rests on plaintiff to prove the elements of the action he has pleaded." Clemons, 184 Ill. 2d at 336-37.

Our supreme court **[*25]** further stated that cases brought for retaliatory discharge predicated on an employee's filing of a worker's compensation claim are reviewed using traditional tort analysis. Clemons, 184 Ill. 2d at 339. Accordingly, our supreme court has made clear that a plaintiff bears the burden of establishing the elements of his cause of action for retaliatory discharge, including the element of causation. We therefore find no reason to create a *per se* rule of retaliatory discharge in this case.

Defendants also rely on the Second District of this court's determination in Paz v. Commonwealth Edison, 314 Ill. App. 3d 591, 732 N.E.2d 696, 247 Ill. Dec. 641 (2000), to support their argument against a *per se* rule of retaliatory discharge. Defendants argue that

under Paz, discharging an employee for absenteeism when the employee's physician disputes the employee's ability to return to work presents a factual question for a jury on the issue of causation.

In Paz, on August 16, 1989, the plaintiff was an employee of Commonwealth Edison (ComEd) who was injured on the job. For two years, the employee on occasion returned to work part time and performed light-duty tasks. The employee was paid workers' compensation benefits and medical expenses. **[*26]** The employee and ComEd eventually settled on total workers' compensation benefits of $ 115,000, which was approved by the Commission. Paz, 314 Ill. App. 3d at 593. During this period, the employee was examined by several doctors, including his personal physician and a doctor employed by ComEd. These doctors disputed the employee's ability to work. On November 7, 1991, the employee was examined by a doctor employed by ComEd and the parties disputed whether that doctor at that time released the employee to work full time. The employee did not report to work on November 7, 1991, and the employee was terminated that day. Paz, 314 Ill. App. 3d at 593. The employee filed suit alleging retaliatory discharge and the jury returned a verdict in ComEd's favor. Paz, 314 Ill. App. 3d at 593-94.

The Second District of this court held that the jury's determination that the employee's discharge was not causally related to his exercise of rights under the Act was not against the manifest weight of the evidence. Paz, 314 Ill. App. 3d at 594-95. The Paz majority opinion noted that the employee was discharged more than two years after he was injured and began receiving benefits under the Act; he had not **[*27]** reported to work for approximately five months at the time of his firing; and he did not report to work on November 7, 1991, the date on which ComEd discharged him after determining that he could not or would not do full-time work. Paz, 314 Ill. App. 3d at 595. The Paz majority explained that ComEd only had eight-hour-a-day restricted-duty work available and the employee refused to work eight hours a day. Paz, 314 Ill. App. 3d at 595.

In upholding the jury's verdict, the Paz majority rejected the employee and dissent's reliance on Clark, 297 Ill. App. 3d 694, 697 N.E.2d 743, 232 Ill. Dec. 1. The Paz majority stated:

> "Plaintiff and the dissent would have this court take the Clark holding that an employee may not be discharged 'on the basis of a dispute about the extent or duration of a compensable injury' (Clark, 297 Ill. App. 3d at 699) to mean that any time an employee is unable to return to work or refused to return because his personal physician advises against it the employer cannot do anything about it, as this would involve a dispute about the extent or duration of the employee's injury. This is not the law, and we will not make it so. Plaintiff and the dissent attempt to take a factual issue (the dispute over **[*28]** plaintiff's ability to work eight-hour days) and turn it into a question of law inuring to the benefit of the plaintiff. The evidence against the employer in Clark was *undisputed*. Such is not the case here. To that extent, Clark is inapplicable and distinguishable." (Emphasis in original.) Paz, 314 Ill. App. 3d at 596.

The Paz majority explained that the appellate court in Clark found as undisputed the fact that the employee was discharged because the employer believed that her claim for benefits was exaggerated; whereas, in Paz, the dispute over the employee's ability to return to full-time employment was just one fact to be considered by the fact finder. Paz, 314 Ill. App. 3d at 595-96. The Paz majority concluded that "[w]hether the plaintiff's discharge was retaliation for exercising his rights under the Act or whether the discharge was ComEd's lawful termination of an employee unable to fulfill his duties is a question of fact to be decided after viewing *all* the evidence." *Paz*, 314 Ill. App. 3d at 596.

As in Paz, defendants in this case disputed plaintiffs' allegations that their discharge was in retaliation for filing their workers' compensation claims. The present case is distinguishable **[*29]** from Clark, where the employer admitted that the employee's discharge was connected to her workers' compensation claim because the employer thought that the employee was malingering (Clark, 297 Ill. App. 3d at 698), and Hollowell, where the appellate court determined that the evidence supported the jury's punitive damages award in that case. Hollowell, 318 Ill. App. 3d at 989. Here, it appears that the circuit court went beyond these cases and applied a *per se* rule of retaliatory discharge rather than examining whether defendants relied solely on the IME opinions to terminate plaintiffs or whether defendants had a valid, nonpretextual basis for discharging plaintiffs. As our supreme court has explained, "[t]he burden remains on the plaintiff to establish the elements of his cause of action," which here involved the claim that defendants wrongfully discharged plaintiffs in retaliation for seeking recovery under the Act. See Clemons, 184 Ill. 2d at 336-37.

In determining whether a plaintiff has established the element of causation for retaliatory discharge, this court has explained "[t]hat an employer may discharge an employee at will for any reason or for no reason 'is still the law **[*30]** in Illinois, except when the discharge violates a clearly mandated public policy.'" Marin v. American Meat Packing Co., 204 Ill. App. 3d 302, 308, 562 N.E.2d 282, 149 Ill. Dec. 818 (1990), quoting Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 88 Ill. Dec. 628 (1985). In Marin, this court held that the verdict in favor of an employee on his retaliatory discharge claim was against the manifest weight of the evidence, thereby entitling the employer to a new trial. In Marin, this court determined that, contrary to the employee's claim, there was evidence that the employer attempted to restore the employee to active employment after his injury where the employer provided the employee with an extra 10 days to return to work after notice from the employee's doctor that he could return to work. Marin, 204 Ill. App. 3d at 308. This court also noted that the employer ultimately terminated the employee for absenteeism and there was no evidence that the supervisor responsible for firing the employee knew of the employee's workers' compensation claim. Marin, 204 Ill. App. 3d at 308. Accordingly, this court explained that "[t]he causality element, therefore, requires more than a discharge in connection with filing a claim." Marin, 204 Ill. App. 3d at 308.

In **[*31]** Finnerty v. Personnel Board of the City of Chicago, 303 Ill. App. 3d 1, 707 N.E.2d 600, 236 Ill. Dec. 473 (1999), this court discussed the role of the Commission with respect to the review of the city personnel board's decision to discharge the plaintiff-employee for violating the city's personnel rules. This court explained that it is the role of the Commission to decide whether the former city employee was injured, whether the injury was work-related, the extent of the injury and whether any disability was involved. Finnerty, 303 Ill. App. 3d at 6. However, this court determined that the city's personnel board was the proper forum to determine whether the employee should have been discharged for violating the city's personnel rules by his excessive absenteeism and failure to call in advance when he was going to be absent from work. Finnerty, 303 Ill. App. 3d at 6. This court rejected the employee's argument that the mere filing of a workers' compensation claim operated as a stay of any administrative proceeding regarding his discharge until the resolution of the workers' compensation claim. Finnerty, 303 Ill. App. 3d at 7. In doing so, this court noted that there is no such provision in the Act and the plaintiff failed **[*32]** to cite case law in support of this contention. This court explained that "plaintiff's pending workers' compensation claim did not shield him from having to comply with the City's personnel rules" regarding employee absenteeism. Finnerty, 303 Ill. App. 3d at 8. "It is well settled in Illinois that an employer may fire an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury." Finnerty, 303 Ill. App. 3d at 8. This court concluded that "just as an employer may fire an at-will employee for excessive absenteeism, *** so too can an employer terminate a contractual employee for being absent without leave, when the employment agreement, as here, specifically states that

just cause for termination includes such absenteeism." Finnerty, 303 Ill. App. 3d at 8.

In Siekierka v. United Steel Deck, Inc., 373 Ill. App. 3d 214, 868 N.E.2d 374, 311 Ill. Dec. 374 (2007), this court determined that summary judgment in the employer's favor was not appropriate where a genuine issue of material fact existed as to any causal connection between the employee's termination and the filing of his workers' compensation claim. This court noted that "[t]he ultimate issue concerning the element of causation is **[*33]** the employer's motive in discharging the employee." Siekierka, 373 Ill. App. 3d at 221. This court explained that the element of causation is not met if the employer has a "'valid basis, which is not pretextual, for discharging the employee.'" Siekierka, 373 Ill. App. 3d at 222, quoting Hartlein, 151 Ill. 2d at 160. For example, "an employer may terminate an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury." Siekierka, 373 Ill. App. 3d at 222. However, the mere existence of a valid or sufficient reason does not defeat a retaliatory discharge claim. Siekierka, 373 Ill. App. 3d at 222. Furthermore, "despite an ostensibly neutral absenteeism policy, where the actual purpose and effect of the scheme penalize employees for filing workers' compensation claims, the employer's action may in fact be retaliatory." Siekierka, 373 Ill. App. 3d at 222.

In Siekierka, this court noted that the employer chose to come forward with a valid nonpretextual basis for terminating the employee, namely, his failure to return from authorized leave. However, there was also evidence to support an inference that the employer's insurer set in motion a process, by refusing **[*34]** to accommodate the employee's surgery, that made it impossible for the employee to return to work within the time granted to him by the employer. Siekierka, 373 Ill. App. 3d at 222. This court therefore concluded that there was a genuine issue of material fact as to whether there exists a causal nexus between the employee's discharge and the exercise of his rights under the Act. Siekierka, 373 Ill. App. 3d at 223.

In the present case, it appears that the circuit court applied a *per se* rule of retaliatory discharge instead of considering whether there was a genuine issue of material fact as to the element of causation that would preclude summary judgment. While it would be improper for defendants to change plaintiffs' attendance coding and then discharge plaintiffs solely based on the IME opinions where it is the role of the Commission to determine the extent of plaintiffs' injuries, we decline to apply a *per se* rule of retaliatory discharge. Rather, cases brought for retaliatory discharge predicated on an employee's filing of a worker's compensation claim are reviewed using traditional tort analysis. See Clemons, 184 Ill. 2d at 339. It therefore remains the plaintiffs' burden to establish **[*35]** the elements of their cause of action, which involved the claim that defendants wrongfully discharged plaintiffs in retaliation for exercising a right or remedy granted to them under the Act.

Certified question answered.

MURPHY, P.J., and THEIS, J., concur.

*2009 Ill. Wrk. Comp. LEXIS 386, *; 9 IWCC 0374*

CHRISTEEN KITCHEN, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO: 89 WC 38354

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 386; 9 IWCC 0374

April 16, 2009

CORE TERMS: lift, modification, exterior, stair, second floor, chair lift, first floor, wheelchair, bid, recommended, contractors, mechanical, interior, residing, housing, bedroom, summons, expert evidence, Illinois Workers' Compensation Act, totally disabled, fire department, additionally, permanently, requesting, emergency, elevator, remodel, minutes

JUDGES: Mario Basurto; David L. Gore; James F. DeMunno

OPINION: [*1]

DECISION AND OPINION ON SECTION 8(A) PETITION

Petitioner filed a Petition under Section 8(a) of the Illinois Workers' Compensation Act requesting an additional home modification after prior home modifications were allowed under a previously filed November 30, 2005 Section 8(a) Petition and after a finding that Petitioner is permanently and totally disabled. The sole issue on Review is whether Petitioner is entitled to additional home modification consisting specifically of an instillation of an outside chair lift or whether Petitioner is entitled to alternative appropriate housing. The Commission, after reviewing the entire record, is denying Petitioner's Petition under Section 8(a) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On March 17, 1993 Petitioner was found to be permanently and totally disabled due to a work related failed back syndrome and chronic pain condition superimposed on unrelated multiple sclerosis (M.S.) and interstitial cystitis conditions.

2. On November 30, 2005 Petitioner filed a Section 8(a) Petition requesting home modifications. Said Petition was granted. Bids were solicited by Accessible Living LTD and Galaxie Home **[*2]** Improvement and the bid was ultimately awarded to Accessible Living. In accordance with the proposal by Accessible Living, Petitioner's home underwent home modifications in the form of a ramp to the front door, an overhaul of the kitchen, bathroom and bedroom, placement of an indoor chair lift which traverses from the first floor to the second floor, and so forth. According to Mr. Kurylo, an employee by Accessible Living, Ltd, at that time of the home modification, neither Accessible Living's nor Galaxie Home's contractors recommended the outside lift and the city code did not call for one either. Galaxie Home's proposal did recommend a three story interior elevator. Instead of putting in a three story elevator Petitioner's washer/dryer were relocated to the main floor from the basement and an interior chair lift was installed from the first floor to the second floor. Galaxie Home also recommended an extra wide patio door be placed on the second floor. This was not done and there is no further explanation as to why this was recommended.

3. Petitioner currently resides in a bi-level house with six stairs leading up to the bedrooms. It appears that she at one time lived with her husband **[*3]** and she now lives alone. Petitioner testified that she has a speed dial setting on her bedroom phone which allows her to push one button to summons the fire department/public safety. She also testified that she was having problems with her stair lift but currently it is working. While the lift was out of commission, she could still use it in an emergency. During this time she was able to make it up the stairs on her own.

4. Mr. Kurylo testified that he is employee by Accessible Living, Ltd. and his company performed the first remodel of Petitioner's home. Mr. Kurylo reviewed documents from the Chicago Fire Department and he agreed that the response time report showed that it took on average four minutes for the fire department to respond and six and a half minutes for a city ambulance to respond. Petitioner didn't testify to being confined in a wheelchair and Mr. Kurylo never saw Petitioner is a wheelchair. However, he did acknowledge that at times Petitioner couldn't stand up and walk over to sign off on the paperwork. He stated that Petitioner's MS provides her with good and bad days. Mr. Kurlo testified that while the exterior lift would provide piece of mind to the Petitioner **[*4]** if there was a fire, it could also be problematic in terms of mechanical/maintenance issues.

5. Currently, Petitioner is seeking an additional home modification in the form of a second floor exterior chair lift after testifying about problems incurred with the interior stair lift and questions of personal security if a fire were to occur on the first floor which would preclude her from exiting from the first floor. In the alternative, Petitioner is seeking alternative appropriate housing.

6. Mr. Kurylo testified that his company drafted a proposal for an exterior chair lift for the Petitioner upon Petitioner's requests but he

believes that said lift is not reasonable and necessary.

The Supreme Court has held that the appropriate standard of review for whether an expense constitutes a necessary medical or rehabilitative expense under Section 8(a) of the Illinois Workers' Compensation Act is ordinarily a question of fact which is normally determined by the Commission upon reviewing the evidence (David Cole v. Lois Byrd, 167 Ill. 2d 128 (1995)). Only unusual cases warrant the extraordinary relief of a home modification. Said cases must be established **[*5]** by sufficient and competent medical and/or expert evidence that the requests of a modification to relieve the injured worker of the effect of his/her injuries is within the ambit of the Workers' Compensation statute. See Zephyr v. Industrial Commission, 215 Ill. App.3d 669 (1991) in which the Arbitrator adopted the testimony of architects over Respondent's insurance carrier's expert that a home remodel was necessary and **Beelman** Trucking v. Illinois Workers' Compensation Commission, 381 Ill. App.3d (2009) indicating that there was overwhelming competent evidence from Petitioner's doctor, an occupational therapist, a rehabilitation consultant that a voice activated computer and environmental control system were appropriate appliances that would benefit a wheelchair bound claimant by providing him some control over his household environment, allow him to access information and to communicate online and to have communication for safety and security reasons. It was deemed that said modifications would allow him to benefit both physically and psychologically.

Based on the above set of facts and the Illinois case law, the Commission finds that Petitioner **[*6]** failed to provide sufficient medical/expert evidence to support the claim that an exterior second story lift is reasonable and necessary under Section 8(a) of the Act. More specifically the Commission finds that said lift was not initially proposed by the contractors who bid on the prior modification. There was no evidence submitted to show that the City of Chicago's code requires an outside lift. While Petitioner testified that she previously had problems with the stair lift, Petitioner testified that her stair lift is currently working. Mr. Kurlo indicated that while the stair lift is subject to mechanical problems the exterior second floor lift would additionally be subject to weather related issues as well as mechanical problems. Currently, there is no evidence in the record that Petitioner is wheelchair bound. Petitioner also currently has access via her telephone to immediately summons emergency help while she is on the second floor. The only thing that appears to have changed is that Petitioner is currently residing alone and her husband is not residing with her. No further explanation was provided as to whether her husband died or whether there was a divorce or some other **[*7]** situation arose. Most importantly, Petitioner didn't present any evidence via an expert or medical personnel as to the need for the exterior lift. The Illinois Courts have ruled that home modifications should be performed under only unusual circumstances. Again, said modifications were previously made to Petitioner's home and at that time it was deemed by either of the specialty contractors that there was a need for an outside lift. With the exception of Petitioner's husband no longer residing with her, there appears to be no radical change in Petitioner's condition from the time of the prior Section 8(a) hearing that would warrant the need for an exterior lift. Additionally, the Commission finds that there is no need to order Respondent to obtain and provide alternative appropriate housing for the Petitioner. For all of these reasons, the Commission denies Petitioner's Section 8(a) Petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) Petition is hereby denied.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore **[*8]** and deposited with the Office of the Secretary of the Commission.

DATED: APR 16 2009

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort

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*2009 Ill. Wrk. Comp. LEXIS 897, **

RICARDO ESTRADA, PETITIONER, v. COMPLETE TEMPORARY LABOR, RESPONDENT.

NO: 08WC31145

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF LAKE

2009 Ill. Wrk. Comp. LEXIS 897

August 19, 2009

CORE TERMS: arbitrator, continuance, temporary total disability, claimant, permanent disability, temporary, underwent, notice, petitioner testified, subpoena, reopen, therapy, lumbar, modifies, statutory authority, written request, left knee, chiropractor, spine, prescribed, translated, provider, ankle, pain, hip, workers' compensation, total compensation, light duty, attachment, knee

JUDGES: Molly C. Mason; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, § 19(k) and § 19(l) penaltie, § 16 attorney fees, whether light duty was offered to Petitioner, Respondent's request for medical records, and denial of request for continuance, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, the Commission clarifies and modifies the Decision of the Arbitrator and denies Respondent's Motion to Set Aside 19(b) Award Pursuant **[*2]** to Section 19(f).

The Commission finds that the Arbitrator did not abuse his discretion in denying Respondent's request for a continuance of the 19(b) hearing. While certain matters relating to this request were discussed off the record, the transcript makes it clear that Respondent's counsel requested a continuance because she perceived a difference between the sets of records that she and Petitioner's counsel received from the Spine Institute of Waukegan. Later in the hearing, she clarified that the records she received, pursuant to a subpoena issued on October 30, 2008, included a multi-page history form that Petitioner completed at the doctor's office on June 23, 2008. The pre-printed sections of this form are in Spanish, as are most of Petitioner's handwritten responses. Respondent's counsel expressed concern because this form was not included in the records from the same provider that Petitioner's counsel had given her prior to the hearing. Petitioner's counsel also expressed concern about the form going into evidence because it had not been translated. T. 33-36. In the Commission's view, the Arbitrator addressed both parties' concerns when he allowed the form to be translated, **[*3]** line by line, by the same interpreter who translated Petitioner's testimony. T. 49-60. The Commission also notes that, ultimately, the parties agreed to submit one, consolidated set of records from the Spine Institute of Waukegan, with that set, marked as both PX 2 and RX 4, including the form.

Respondent's Petition for Review incorporates an attachment which lists three specific issues for the Commission's consideration. Two of these issues relate to the matters discussed above:

> 2. Whether after request for medical records by Respondent, Petitioner, willfully or otherwise, failed to provide all relevant medical records, as required by Section 8(a) of the Illinois Workers' Compensation Act and Jones v. Industrial Commission, 227 Ill.App.3d 161, 59 N.E.2d 33 (2nd Dist. 1992).
>
> 3. Whether the Arbitrator's decision to require Respondent to proceed to hearing after the Arbitrator learned of Petitioner's failure to provide Respondent with relevant medical records was in error.

This statement of issues further clarifies that Respondent sought a continuance because it perceived Petitioner as 1) having an obligation to provide it with complete **[*4]** copies of his medical records; and 2) having failed to meet that obligation. That perception is faulty. Nothing in the Act, the Rules or the relevant case law imposes such an obligation on a claimant in a workers' compensation matter. Other than in Section 19(b-1) claims, there is no discovery in workers' compensation, except to the extent that a claimant seeking an expedited Section 19(b) hearing is required to file a Petition providing information relating to accident and notice and listing his medical providers. The claimant in the instant case fulfilled that requirement and identified the Spine Institute of Waukegan as one of his providers. The Commission notes that the 19(b) Petition that Petitioner filed in the instant case (PX 4) went

unanswered. After Respondent received this Petition, it issued a subpoena to the Spine Institute of Waukegan. It was not required to limit the scope of the subpoena to records relating to the accident but it did so. RX 4. The records that Respondent received pursuant to its subpoena contained specific references to treatment that Petitioner underwent for his lumbar spine and knee (two body parts he alleged to have injured in the June 20, 2008 **[*5]** work accident) before June 20, 2008 but Respondent's counsel did not specifically cross-examine Petitioner about this treatment. Respondent's counsel could have asked Petitioner about the lumbar spine X-rays he underwent on June 10, 2008 or the fact that he had already undergone two weeks of knee therapy, as reflected in the history form, but did not do so.

Respondent was afforded an opportunity to explore, via subpoena and cross-examination, any relevant treatment that Petitioner underwent before the June 20, 2008 accident. Respondent's election to limit that exploration was a trial strategy.

The Commission modifies the Decision of the Arbitrator by vacating the award of penalties and fees. In the Commission's view, Respondent had an objectively reasonable basis for disputing this claim independent of any issues relating to the treatment Petitioner underwent before the accident. The accident occurred on a Friday and was unwitnessed. Petitioner acknowledged that he worked the next day yet made no report of his injuries until Monday, June 23rd. Given these circumstances, the Commission does not find an award of penalties and fees to be appropriate.

Finally, the Commission denies Respondent's **[*6]** Motion to Set Aside 19(b) Arbitration Award. Although documents attached to the Motion make it clear that Respondent was in possession of information relevant to its allegations by at least May of 2009, Respondent did not file the Motion until July 2, 2009, less than two weeks before the oral arguments scheduled in its pending review. Respondent also issued a Notice setting the Motion for hearing after said arguments. The Commission elected to take the motion with the pending review and informed the parties of this election well in advance of the arguments. Respondent did not raise an objection to this arrangement and counsel for both parties touched on issues raised in the motion when arguments were held in connection with the pending review on July 14, 2009.

Respondent's Motion alleges fraud on the part of Petitioner. It incorporates medical records not contained in the arbitration transcript. While the Commission is concerned about any allegation of fraud, it cannot venture outside the record and has no power to set aside the Decision of the Arbitrator. The Supreme and Appellate Courts have repeatedly made it clear that fraud is not a basis for extending the Commission's authority **[*7]** and that Section 19(f) allows recall of a decision "in only one instance, i.e., to correct clerical or computational errors." **Smalley Steel** Ring Company v. Illinois Workers' Compensation Commission, 386 Ill.App.3d 993, 996 (2nd Dist. 2008). The Circuit Court is the appropriate forum for Respondent's allegations. Ming Auto Body v. Industrial Commission, 387 Ill.App.3d 244 (2008).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 298.67 per week for a period of 21-4/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 9,571.81 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards of § 19(k) and § 19(l) penalties and § 16 attorney fees are hereby vacated.

IT IS FURTHER ORDERED **[*8]** BY THE COMMISSION that the Respondent's Motion to Set Aside 19(b) Arbitration Award Pursuant to 19(f) is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 16,100.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

[*9] DATED: AUG 19 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, arbitrator of the Commission, in the city of **Waukegan**, on **November 20, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked and in bold below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On **June 20, 2008**, the respondent **Complete Temporary Labor *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship **[*10]** ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 23,296.00**; the average weekly wage was **$ 448.00**.

. At the time of injury, the petitioner was **27** years of age, ***single*** with **two** children under 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, **$ 0.00** has been paid by the respondent for TDD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 298.67** /week for **21 4/7** weeks, from **June 23, 2008** through **November 20, 2008**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay **$ 9,571.81** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall **[*11]** pay **$ 8,007.28** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay **$ 4,530.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay **$ 1,601.48** in attorneys' fees, as provided in Section 16 of the Act.

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 15, 2008

Date

JAN 12 2009

The petitioner testified that on June 20, 2008, while **[*12]** performing the regular duties of his employment with the respondent, he was coming down a ladder when he slipped, caught his left leg in the ladder, twisted and fell. The petitioner testified that this incident occurred on a Friday morning, and his supervisor, Marner Rivera, was not at work as Mr. Rivera was on vacation. On June 23, 2008, the petitioner gave notice of his injury to the supervisor Marner Rivera. This was after he had seen Chiropractor Kelly Worth at Spine Institute of Waukegan.

The petitioner saw Chiropractor Kelly Worth on June 23, 2008 and he gave a history of injuring his left knee, left hip and left ankle at work on June 20, 2008. He was placed on restrictions of no lifting greater than 25 pounds, no excessive squatting, no prolong standing. He was to wear a knee brace and was prescribed therapy.

The petitioner testified that he took those restrictions to Mr. Rivera on June 23, 2008 and was not offered work within his restrictions.

On August 7, 2008, Dr. Worth noted that the petitioner's condition was worsening and that pain in the left ankle and left hip was causing discomfort in the right leg. At that point in time the chiropractor's impression was possible derangement **[*13]** of the medial meniscus with sprain of the medical collateral ligament of the left knee, inflammation and swelling of the left ankle and sciatica. Dr. Worth prescribed an MRI and EMG as well as continued physical therapy. An EMG was performed on August 8, 2008 and was reported to reveal left S1 nerve root radiculopathy, and bilateral root compression or irritation at L5. An MRI of the lumbar spine was then prescribed. The MRI was performed on October 8, 2008 and was reported to reveal pathology of the L5-S1 level where there was moderate diffuse disc bulge and left paramedian disc protrusion.

On October 29, 2008, Dr. Castellanos of Spine Institute of Waukegan raised the petitioner's restrictions to 50 pounds. The petitioner testified that he advised the respondent of those restrictions and was not offered work within those restrictions. Those restrictions continue through November 20, 2008. The notes of the petitioner's last visit of November 6, 2008 indicate that the petitioner still had complaints of pain in the left knee and that his left hip pain was probably emanating from the low back. He was to continue on with his therapy.

The arbitrator notes that the respondent failed to **[*14]** offer any credible evidence that the petitioner has in fact been offered any light duty work by the respondent at any time from June 23, 2008 through the date of hearing of November 20, 2008.

Based upon the testimony of the petitioner, it is the finding of the arbitrator that petitioner sustained accidental injuries on June 20, 2008 and that the treatment rendered by Spine Institute of Waukegan is reasonable, necessary and related to the June 20, 2008 injury. This finding is also based upon respondent and petitioner's Joint Exhibit No. 2. It is the finding of the arbitrator that petitioner is entitled to temporary total disability benefits from June 23, 2008 through November 20, 2008. This finding is based upon the medical records contained in Joint Exhibit No. 2 as well as the testimony of the petitioner. The arbitrator notes that the respondent failed to prove that the respondent provided the petitioner with work within his restrictions or that the petitioner reached maximum medical improvement.

The medical expenses contained in Petitioner's Exhibit 3 total $ 13,273.87. Based upon the Medical Fee Schedule contained in the Act, the medical bills for Center for Neurodiagnostic are **[*15]** reduced to $ 1,387.88. The medical expenses for treatment rendered by Illinois Institute of Waukegan are reduced pursuant to the Medical Fee Schedule to $ 8,183.93. Therefore the respondent shall pay to the petitioner medical expenses in the amount of $ 9,571.81 pursuant to Section 8(a) of the Act. It is the finding of the arbitrator that the medical bills of $ 9,571.81 are reasonable, necessary and related to the petitioner's injury of June 20, 2008. Respondent shall receive no credit for any payments that it has made as no payments were claimed made nor evidence offered.

It is the arbitrator's finding that the respondent shall pay penalties pursuant to Section 19(l) in the amount of $ 30.00 per day. There are 151 days from June 23, 2008 through November 20, 2008 and therefore the 19(l) penalties totals $ 4,530.00. This finding is based upon the fact that the respondent has not produced any credible evidence which would explain why the respondent refused to pay temporary total disability benefits.

Based upon the totality of the evidence it is the finding of the arbitrator that the respondent's failure to pay medical expenses and temporary total disability benefits is unreasonable **[*16]** and vexatious and comes under the purview of Section 19(k). Therefore, the respondent shall pay 50 percent of the temporary total disability benefits and medical expenses that are awarded. The 19(k) penalties total $ 8,007.28. The respondent shall further pay to petitioner's attorney attorney's fees in the amount of $ 1,601.48 pursuant to Section 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of Temporary Total Disability, medical benefits, or compensation for a permanent disability, if any.

DISSENTBY: YOLAINE DAUPHIN

DISSENT: I cannot join the majority opinion because I believe the Arbitrator erred in denying Respondent's request for a continuance, and the matter should be remanded to the Arbitrator to reopen proofs.

At the outset of the arbitration hearing in this matter, Respondent asked for a continuance because it believed "information regarding the extent of the medical records has been withheld from us." The Arbitrator denied Respondent's request. After the Arbitrator's decision awarding compensation was filed, Respondent timely filed a petition for review, challenging the Arbitrator's denial of a continuance. During the pendency **[*17]** of this matter on review, Respondent filed a motion to set aside the Arbitrator's award on the basis of fraud.

In affirming the Arbitrator's denial of Respondent's request for a continuance, the majority makes light of the inconsistencies in Petitioner's testimony, even though the accident was unwitnessed. The majority also glosses over Petitioner's attempts to minimize his prior treatment. Lastly, the majority relies on **Smalley Steel** Ring, a case which is clearly distinguishable.

In **Smalley Steel** Ring, the arbitrator denied the employer's request for a continuance to obtain verification of the claimant's identity, even though the employer asserted that the claimant provided a social security number belonging to a person who died in 2003. Unlike in the instant case, the employer did not appeal the arbitrator's decision awarding compensation. Rather, the employer filed an emergency motion to recall the arbitrator's decision and reopen proofs. The arbitrator granted the employer's motion and, after hearing additional evidence in the matter, filed a second decision finding that the claimant lied and gave false testimony at the initial arbitration hearing and denying his claim. **[*18]** On review, the Commission found that the arbitrator lacked jurisdiction to recall his first decision, reopen proofs and file a new decision denying the claim. The appellate court affirmed the Commission's decision, explaining that, in the absence of a clerical error, the arbitrator did not have statutory authority to recall his decision, *and the decision became final because neither party filed a petition for review within 30 days after its receipt*. Although the appellate court noted that the employer could seek recourse for the claimant's fraudulent conduct in the circuit court, the court found the Act deficient in failing to give the arbitrator statutory authority to act after being presented with evidence of fraud, and called upon the legislature to remedy the deficiency.

Unlike in **Smalley Steel** Ring, the Commission has jurisdiction in the instant case to remedy the Arbitrator's denial of a continuance because Respondent *filed a petition for review contesting the Arbitrator's ruling*. Given the allegations of fraud in this matter and the hurdles to vacating an award procured by fraud, I believe that it would behoove the Commission to vacate the Arbitrator's award and **[*19]** reopen proofs to allow Respondent to obtain all pertinent medical records. The majority focuses unduly on what it assumes to be Respondent's trial strategy, rather than focusing on a very real possibility that Petitioner is perpetrating fraud. It bears pointing out that the evidence of fraud in cases where the arbitrator denied a request for a continuance is always going to be weak because the record is not sufficiently developed as a result. It is the Commission's responsibility to maintain the integrity of its decisions by promptly acting on the allegations of fraud at the point where it has statutory authority to do so.

I therefore respectfully dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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*2009 Ill. App. LEXIS 1046, **

LENNY SZAREK, INC., Plaintiff-Appellant, v. THE WORKERS' COMPENSATION COMMISSION, (Daniel Rub, Defendant-Appellee).

No. 03-08-0530WC

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, ILLINOIS WORKERS' COMPENSATION COMMISSION DIVISION

2009 Ill. App. LEXIS 1046

September 15, 2009, Submitted
October 20, 2009, Filed

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Grundy County. No 07--MR--29. Honorable Robert C. Marsaglia, Judge, Presiding.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff claimant filed an application for adjustment of claim under the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2002), against respondent employer. The Workers' Compensation Commission awarded benefits as well as fees and penalties under 820 ILCS 305/16 and 305/19(k) (2002). The Circuit Court of Grundy County (Illinois) confirmed the Commission's decision. Respondent appealed.

OVERVIEW: The claimant fell through a hole in the second story of a hou se in which he was working. He tested positive for marijuana and cocaine metabolites. The court held that the arbitrator was not required to recuse herself because respondent had filed a civil action against her seeking to enjoin her from sitting as an arbitrator. Ill. Admin. Code tit. 50, § 7030.30 required a showing of actual bias. Even if respondent was correct in applying an appearance of impropriety standard, the weight of authority held that pending litigation between an adjudicator and a party was not a per se basis for disqualification. Next, even if the Commission did err in its rulings pertaining to cross-examination, the alleged errors would not have altered the result of the proceedings. The Commission properly found that the claimant's injuries were caused by his employment. But for the existence of the hole, the claimant could not have fallen through it. As such, even if marijuana impairment was a contributing cause of the claimant's injury, it was not the sole cause. Finally, it was error to award penalties and fees. A reasonable person could have concluded that the claimant was not entitled to benefits.

OUTCOME: The court reversed the part of the decision that confirmed the award of penalties and fees. It otherwise affirmed the trial court's decision.

CORE TERMS: claimant, marijuana, intoxication, arbitrator, intoxicated, disqualification, cross-examination, impaired, respondent's arguments, sole cause, adjudicator, hole, impairment, manifest, floor, opined, insurance carrier, cross-examine, opening, case law, pending litigation, course of employment, attorney fees, res judicata, metabolites, disqualify, cocaine, alcohol, exposed, recuse

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Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 An appellate court will not disturb a decision of the Workers' Compensation Commission on a factual matter unless the decision is contrary to the manifest weight of the evidence. A decision is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly apparent. It is for the Commission to resolve conflicts in the evidence, draw reasonable inferences from the evidence, and assess the credibility of the witnesses. Questions of law, however, are subject to de novo review. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN2 Whether a request for recusal should have been granted is reviewed using the abuse-of-discretion standard. More Like This Headnote

Governments > Local Governments > Administrative Boards
Governments > State & Territorial Governments > General Overview

HN3 The Lobbyist Registration Act, 25 ILCS 5170/1 et seq. (2008), prohibits any person registered under it, or their spouse, from serving on a board, commission, authority, or task force authorized or created by state law. 25 ILCS 170/3.1 (2008). More Like This Headnote

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata

HN4 For the doctrine of res judicata to apply, the following elements must exist: (1) a court of competent jurisdiction renders a judgment on the merits; (2) an identity exists between the causes of action; and (3) there exists an identity of parties or their privies. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Personal Bias

HN5 An adjudicator must recuse himself or herself where an appearance of bias exists. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Personal Bias

HN6 See Ill. Sup. Ct. R. 63(c).

Governments > Courts > Rule Application & Interpretation

Governments > Legislation > General Overview

Workers' Compensation & SSDI > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

HN7 The Code and Supreme Court Rules do not apply to workers' compensation proceedings where the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2002), or the Workers' Compensation Commission's rules regulate the area or topic. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

HN8 See Ill. Admin. Code tit. 50, § 7030.30.

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Impropriety

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Personal Bias

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

HN9 Ill. Admin. Code tit. 50, § 7030.30 does not contain language similar to the supreme court's admonition in Ill. Sup. Ct. R. 63(c) that a judge must recuse where his or her impartiality might reasonably be questioned. Therefore, the supreme court's rule, by its plain language, contemplates the consideration of the appearance of impropriety. The Workers' Compensation Commission's rule, conversely, does not include similar language. Hence, the Commission requires a showing of actual bias, or, as the Commission puts it, that the adjudicator is "financially or otherwise interested in the outcome of any litigation" (§ 7030.30). More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > General Overview

HN10 Numerous courts recognize the potential for a party to manipulate the course of litigation and frustrate the orderly administration of justice by filing a suit against a judge simply to disqualify the judge. The disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking. If a court were to hold as a matter of law that a party can obtain a disqualification of a sitting judge merely by filing suit against him, the orderly administration of judicial proceedings would be severely hampered and thwarted. Thus, the mere fact that such litigation is pending will not generally require recusal. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > General Overview

HN11 The weight of authority across the nation holds that pending litigation between an adjudicator and a party is not a per se basis for disqualification. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Evidence > Procedural Considerations > Burdens of Proof > General Overview

HN12 An appellant bears the burden of demonstrating reversible error on appeal. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Abuse of Discretion

HN13 Limitations upon the scope and extent of cross-examination are within the discretion of the Workers' Compensation Commission. An appellate court will disturb a discretionary decision of the Commission only if it abuses that discretion. An abuse of discretion occurs only if no reasonable person would adopt the position of the Commission. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Evidence > Testimony > Examination > Cross-Examination > Collateral Matters

Evidence > Testimony > Examination > Cross-Examination > Scope

HN14 The scope of cross-examination is limited to matters covered during direct examination. It also may include matters affecting the credibility of a witness. However, impeachment on a collateral matter is generally disfavored. Cross-examination regarding irrelevant matters is improper, and questions designed to harass, annoy or humiliate a witness should not be tolerated. In order to warrant reversing the decision of a lower tribunal, the appellant must show that he or she was prejudiced by the trial court's decision. Additionally, where the evidence supporting the decision of the lower tribunal is overwhelming or the evidence would have been cumulative with other evidence, an error in limiting the scope of cross-examination may be deemed harmless. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN15 An injury is compensable under the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2002), only if it arose out of and occurred in the course of employment. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Injuries > Intoxication

HN16 There are two ways in which an employer can successfully make out an intoxication defense: First, an employee, though in the course of his employment, will be denied recovery if his intoxication is the cause of the injury--that is, if the injury arose out of the intoxication rather than out of the employment. Second, excessive intoxication may constitute a departure from the course of employment, and an employee who is injured in that condition does not sustain an injury in the course of his employment. Under the latter rationale, intoxication of a sufficient degree is viewed as an abandonment of employment, or a departure from employment. More Like This Headnote

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Courts > Judicial Precedents

HN17 The Illinois Court of Appeals cannot overrule the Illinois Supreme Court. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN18 An injury arises out of the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation

HN19 A claimant is not required to prove that employment was the sole or principal cause, but only that the employment was a causative factor. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN20 See 820 ILCS 305/19(1) (2002).

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN21 See 820 ILCS 305/16 (2002).

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

HN22 See 820 ILCS 3051/9(k) (2002).

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

HN23 Both 820 ILCS 305/16 (2002) and 820 ILCS 3051/19(k) (2002) allow for additional awards to a claimant where an employer has been guilty of unreasonable or vexatious delay, and they apply under similar circumstances. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN24 Generally, a good faith challenge to liability will not result in fees or penalties being imposed. To avoid the imposition of penalties and fees, an employer must show that the facts in its possession would have lead a reasonable person to believe that a claimant is not entitled to prevail under the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2002). An honest, though flawed, belief is not enough to escape liability. The burden is on the employer to show that any delay in paying benefits is reasonable. This issue presents a factual question to which the manifest-weight standard of review applies. A finding is contrary to the manifest weight of the evidence where an opposite conclusion is clearly apparent. More Like This Headnote

COUNSEL: For **Lenny Szarek,** Inc., Appellant: Mr. Jeffrey Corso, Cooney Corso, LLC, Lisle, IL.

For Daniel Rub, Appellee: Mr. Ronald W. Cobb, Lusak and Cobb, Chicago, IL.

JUDGES: JUSTICE HUDSON delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and DONOVAN, JJ, concur.

OPINION BY: HUDSON

OPINION

JUSTICE HUDSON delivered the opinion of the court:

Claimant, Daniel Rub, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2002)) alleging he sustained injuries while in the employ of **Lenny Szarek,** Inc. (respondent). Claimant, a third-year apprentice was injured when he fell through a hole in the second-story floor of a house at which he was working. Following the incident, claimant tested positive for the presence of both marijuana and cocaine metabolites. On this basis, respondent denied the claim. The Commission--adopting the decision of the arbitrator--awarded benefits and penalties under the Act. Respondent brought this timely appeal.

On appeal, respondent raises several issues. First, **[*2]** it contends that the arbitrator should have recused herself due to litigation

pending between the arbitrator and respondent. Second, it argues that its cross-examination of claimant was improperly restricted. Third, it contests the Commission's findings that claimant's injury arose out of and occurred in the course of his employment and, in a related argument, it asks that we adopt a new standard for assessing marijuana intoxication. Fourth, it alleges error in the Commission's decision to impose penalties and fees under sections 16 and 19(k) of the Act (820 ILCS 305/16, 19(k) (West 2002)). As we find none of respondent's arguments well taken, we affirm.

BACKGROUND

Claimant, a 21-year old apprentice carpenter, was employed by respondent. On July 2, 2001, he and Mark Fashingbauer, a journeyman carpenter, were framing the exterior walls on the second floor of a new house. There was a nine foot by nine foot opening in the center of the floor. An orange line had been painted around the opening, but no guard rails had been erected. At about 9 a.m., claimant had snapped a chalk line and was reeling in the line. Fashingbauer turned away to do something else. He then heard a noise, looked back, **[*3]** and saw claimant fall into the opening in the floor. Claimant fell to the basement. He was transported by ambulance to Mercy Hospital. Claimant's only recollection of the fall is that he was "screaming" and that he "thought he was going to die." Claimant suffers from paraplegia as a result of the accident.

Fashingbauer testified that he did not observe anything unusual about claimant when he arrived for work on the day of the accident. Claimant did not stumble or slur his words. Nothing about claimant's appearance indicated that he was intoxicated or impaired. Fashingbauer added that claimant appeared mentally sharp and followed directions. Rick Pellegrini, claimant's supervisor, stated that there were no noticeable signs that claimant had consumed alcohol or drugs. Claimant testified that he had not consumed any drug-except caffeine in his coffee--on the day of the accident or the previous day and further that he was not intoxicated.

At the hospital, claimant was given a urinalysis test. The test showed the presence of marijuana and cocaine metabolites. A gas chromatography analysis showed levels of 274 nanograms per milliliter (ng/ml) of cannibinoids and 536 ng/ml of cocaine in claimant's **[*4]** urine. Claimant admitted a history of substance abuse to a hospital social worker, but denied recent use. Respondent retained Dr. Jerrold Leikin to review claimant's medical records. Leikin is a medical toxicologist and a certified medical review officer. According to Leikin, a medical review officer "evaluates drug testing for occupational purposes." He also is a professor at Rush Medical College and the Feinberg School of Medicine. As Leikin's opinions are key to respondent's intoxication defense, we will set out his testimony with some detail.

Leikin testified that claimant's medical records revealed positive tests for both marijuana and cocaine. Leikin stated that a level of 15 ng/ml was considered a positive result in quantitative screening and that claimant's test revealed a level of about 18 times above that point. Leikin opined that claimant's test results were "consistent with impairment due to marijuana." Moreover, such results were indicative of "proximal use." For Leikin, marijuana impairment results in "[p]erceptual abnormalities, specifically visual, coordination problems, impaired judgment, [and] increased reaction time." "Some visual acuity deficits" would occur, such **[*5]** as an impaired ability to judge distance. Leikin further testified that a result of 100 ng/ml would be indicative of impairment within the previous 24 hours. Leikin ultimately opined, *inter alia*, that the reason claimant "*might or could* have mistakenly stepped into the stairway opening and fell two stories through it was from an impaired visual response caused by marijuana intoxication." (Emphasis supplied.) He also opined that the reason claimant "*might or could* have mistakenly stepped into the stairway opening and fell two stories through it was from an impaired cognitive response caused by marijuana intoxication." (Emphasis supplied.) Additionally, he opined that claimant was at "a greater degree of risk for injury in his work setting due to marijuana impairment" "[a]s opposed to if there was no marijuana on board." Leikin testified that it is sometimes difficult for a person not familiar with marijuana intoxication to recognize its symptoms, as they are "very subtle." An intoxicated person might be able to "function at a certain level without detection." He did not "believe that [such a person would] be working in a sense of maximum safety." He added that an intoxicated person "may **[*6]** be able to perform the task, but [he did not] believe they can perform it safely."

During cross-examination, Leikin acknowledged that, though he believed claimant used marijuana within a few hours before the incident, claimant could have, as an "absolute outside" time frame, used marijuana as early as 1.5 days prior to the incident. Leikin agreed that other factors, such as hydration and the length of time since the claimant had urinated, could impact upon the concentration of cannibinoid metabolites in claimant's bladder. Leikin characterized the former as a major factor and the latter as a minor factor. He also pointed out that medical records indicated that claimant's level of hydration was normal at the time he was admitted to the hospital. Also, the amount of adipose tissue could have an impact in certain individuals, depending on patterns of past marijuana use. Leikin acknowledged that, outside of the urinalysis results and the subsequent diagnosis of substance abuse, nothing in claimant's medical records indicated he was intoxicated when he entered the emergency room. He stated, however, that an emergency room physician would not be expected to record marijuana intoxication. **[*7]** Leikin testified that one would normally experience a level of intoxication of which one was cognizant for 6 to 10 hours, but an individual could remain impaired for considerably longer. Leikin admitted that, while he could call claimant's intoxication "significant," he could not quantify it. Leikin further acknowledged that he could not state claimant's intoxication was the only causal factor in the accident. Dr. James O'Donnell, a pharmacologist, testified on claimant's behalf; however, neither the Commission nor the arbitrator relied upon his testimony. One of O'Donnell's reports indicates that claimant's attorney advised O'Donnell that claimant had used marijuana on the afternoon before the fall.

The arbitrator found claimant had sustained an injury arising out of and occurring in the course of his employment. She awarded claimant $ 445.85 per week for the rest of his life for the "permanent and complete loss of both feet." See 820 ILCS 305/8(e)(18) (West 2000). She also ordered respondent to pay $ 217,099.15 for reasonable and necessary medical expenses. 820 ILCS 305/8(a) (West 2000). Finally, the arbitrator imposed penalties of $ 152,784.17 under section 19(k) of the Act (820 ILCS 305/19(k) **[*8]** (West 2000)) and attorney fees of $ 61,113.69 (820 ILCS 305/16 (West 2000)). She did not impose section 19(l) penalties (820 ILCS 305/198(l) (West 2000)). In the course of so ordering, the arbitrator rejected respondent's intoxication defense. She cited the testimony of Fashingbauer and Pellegrini's statement regarding claimant not appearing to be intoxicated on the day of the accident. She also noted that Leikin could not testify that claimant's use of marijuana was the sole or main cause of claimant's fall. Additionally, she noted that Leikin was opining that claimant had been exposed to marijuana sometime within the last day and one-half preceding the fall.

The Commission adopted the decision of the arbitrator. It noted that Leikin only opined that claimant's fall "might or could" have been due to his marijuana use. Further, though Leikin opined claimant was at an increased risk of an accident as a result of using marijuana, he could not state "intoxication and impairment were the only factors in the accident." Additionally, the Commission reiterated that Leikin could not state that claimant's consumption of marijuana was the only cause of the accident and that he could not rule **[*9]** out employment related factors (namely, the hole in the floor). It also found respondent's motion to disqualify the arbitrator due to her husband's employment as a lobbyist barred by *res judicata*, and it rejected respondent's complaints about

certain evidentiary matters, which we will address later. One commissioner dissented from the imposition of penalties. The Circuit Court of Grundy County confirmed the Commission's decision, and this appeal followed.

B. ANALYSIS

Respondent raises several issues on appeal. We will address them in the order they are presented in respondent's brief In resolving these issues, the following standards apply. HN1 We will not disturb a decision of the Commission on a factual matter unless the decision is contrary to the manifest weight of the evidence. Westin Hotel v. Industrial Comm'n, 372 Ill. App. 3d 527, 542, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). A decision is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly apparent. University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72, 303 Ill. Dec. 174 (2006). It is for the Commission "to **[*10]** resolve conflicts in the evidence, draw reasonable inferences from the evidence, and assess the credibility of the witnesses." Edward Hines Precision Components v. Industrial Comm'n 356 Ill. App. 3d 186, 196, 825 N.E.2d 773, 292 Ill. Dec. 185 (2005). Questions of law, however, are subject to *de novo* review. Beelman Trucking v. Workers' Compensation Comm'n, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 330 Ill. Dec. 796 (2009). With these standards in mind, we now turn to respondent's arguments.

1. WHETHER THE ARBITRATOR SHOULD HAVE RECUSED HERSELF

Respondent first contests the Commission's affirmance of the arbitrator's decision not to recuse herself HN2 Whether a request for recusal should have been granted is reviewed using the abuse-of-discretion standard. Barth v. State Farm Fire & Casualty Co., 228 Ill. 2d 163, 175, 886 N.E.2d 976, 319 Ill. Dec. 852 (2008). Respondent points out that there is pending litigation between it and the arbitrator who presided over the hearing in this case. Respondent has filed a civil action seeking to enjoin the arbitrator from sitting as an arbitrator in accordance with the Lobbyist Registration Act (25 ILCS 5170/1 *et seq*. (West 2008)). HN3 That statute prohibits any person registered under it, or their spouse, from serving "on a board, commission, authority, or task **[*11]** force authorized or created by State law." 25 ILCS 170/3.1 (West 2008). According to respondent, the arbitrator's husband is a registered lobbyist.

Before proceeding to the merits of this issue, we note that the Commission ruled that prior litigation where respondent raised this issue was *res judicata*. HN4 For the doctrine of *res judicata* to apply, the following elements must exist: (I) a court of competent jurisdiction renders a judgment on the merits; (2) an identity exists between the causes of action; and (3) there exists an identity of parties or their privies. *Hudson v. Chicago*, 228 Ill. 2d 462, 470, 889 N.E.2d 210, 321 Ill. Dec. 306 (2008). Since Rub was not a party to the prior proceedings, *res judicata*, by definition, cold not apply. Perhaps the doctrine of collateral estoppel, which does not require an identity of parties, would serve as a similar bar. *See* Gumma v. White, 216 Ill. 2d 23, 38, 833 N.E.2d 834, 295 Ill. Dec. 628 (2005). In any event, we will address the merits of respondent's argument.

Respondent relies upon the familiar principle that HN5 an adjudicator must recuse himself or herself where an appearance of bias exists. See Business & Professional People for the Public Interest v. Barnich, 244 Ill. App. 3d 291, 296-97, 614 N.E.2d 341, 185 Ill. Dec. 207 (1993). As a preliminary **[*12]** matter, we must determine whether that principle applies in a proceeding under the Act. Respondent cites no cases from the Workers' Compensation Commission applying this standard. *Judicial* disqualification is governed by Supreme Court Rule 63(C). 210 Ill. 2d R. 63(C). That rule reads, in pertinent part, HN6 "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where *** the judge has a personal bias or prejudice concerning a party or a party's lawyer." However, HN7 "[t]he Code and Supreme Court Rules do not apply to workers' compensation proceedings where the Act or the Commission's rules regulate the area or topic." Preston v. Industrial Comm'n, 332 Ill. App. 3d 708, 712, 773 N.E.2d 1183, 266 Ill. Dec. 113 (2002). The Commission has promulgated a rule regarding the disqualification of commissioners and arbitrators. See 50 Ill. Adm. Code § 7030.30. This rule states:

> HN8 "a) No Arbitrator or Commissioner financially or otherwise interested in the outcome of any litigation, or any question connected therewith, shall participate in any manner in the adjudication of said cause, including the hearing of settlement contracts **[*13]** for lump sum petitions.
>
> b) Examples of instances where disqualification by an Arbitrator or Commissioner should occur include, but are not limited to the following:
>
> 1) he or she has personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2) he or she served as an attorney in the matter in controversy;
>
> 3) he or she is a material witness concerning the matter;
>
> 4) he or she was, within the preceding two years, associated in the practice of law with any law firm or attorney currently representing any party in the controversy;
>
> 5) he or she was, within the preceding two years, employed by any party to the proceeding or any insurance carrier, service or adjustment company, medical or rehabilitation provider, labor organization or investigative service involved in the claim;
>
> 6) he or she or his or her spouse, or a person within the third degree of relationship (pursuant to the civil law system) to either of them, or the spouse of such person:
>
> A) is a party to the proceeding, or an officer, director or trustee of a party;
>
> B) is acting as an attorney in the proceeding;
>
> C) is **[*14]** known by the Arbitrator or Commissioner to have a substantial financial interest in the subject matter in controversy;
>
> D) is to the Arbitrator's or Commissioner's knowledge likely to be a material witness in the proceeding;
>
> 7) he or she negotiated for employment with a party, a party's attorney or insurance carrier or service or

adjustment company, in a matter in which the Arbitrator or Commissioner is presiding or participating in an adjudicative capacity." 50 Ill. Adm. Code § 7030.30.

Though the Commission's rule is similar to Supreme Court Rule 63(C), there are some key differences. Notably, HN9 the Commission's rule does not contain language similar to the supreme court's admonition that a judge must recuse where his or her "impartiality might reasonably be questioned." Therefore, the supreme court's rule, by its plain language, contemplates the consideration of the appearance of impropriety. The Commission's rule, conversely, does not include similar language. Hence, the Commission requires a showing of actual bias, or, as the Commission puts it, that the adjudicator is "financially or otherwise interested in the outcome of any litigation" (50 Ill. Adm. Code § 7030.30). Respondent does **[*15]** not address this difference in the law governing proceedings under the Act. Parenthetically, we are unsure why the Commission's rule does not embody a standard similar to that of set forth by the supreme court. Unless there is some compelling reason of which we are unaware, it would seem to us the better practice would be to more closely follow the supreme court on this issue.

Moreover, assuming *arguendo* that respondent is correct in applying the appearance-of-impropriety standard, respondent provides no case law whatsoever addressing whether pending litigation between a party and an adjudicator mandates the adjudicator's recusal. The case law we have located is generally not favorable to respondent's position. HN10 Numerous courts recognize the potential for a party to manipulate the course of litigation and frustrate the orderly administration of justice by filing a suit against a judge simply to disqualify the judge. See *In re Allied-Signal Inc.*, 891 F. 2d 967, 970 (1st Cir. 1989) ("T]he disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification **[*16]** of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking" (emphasis in original)); *Smith v. Smith*, 115 Ariz. 299, 303, 564 P. 2d 1266, 1270 (1977) ("[I]f we were to hold as a matter of law that a party can obtain a disqualification of a sitting judge merely by filing suit against him, the orderly administration of judicial proceedings would be severely hampered and thwarted"). Thus, the mere fact that such litigation is pending will not generally require recusal. *Callahan v. State*, 712 S.W. 2d 25, 26 -27 (Mo. App. 1986) ("We do not believe the mere fact [the judge] was named as a defendant in a separate civil suit in federal court required him to disqualify himself for cause. The reason for this 'rule is to prevent "judge-shopping" by litigants.'" *Jemzura v. Public Service Comm'n*, 961 F. Supp. 406, 411 (N.D. N.Y., 1997).

HN11 The weight of authority across this nation holds that pending litigation between an adjudicator and a party is not a per se basis for disqualification. In *United States v. Grismore*, 564 F. 2d 929, 933 (10th Cir. 1977), the Tenth Circuit Federal Court of Appeals held that" [a] judge is not disqualified **[*17]** merely because a litigant sues or threatens to sue him." Similarly, the supreme court of Ohio observed that "the fact that a judge may be an adverse party in another case will not by itself automatically result in disqualification." *In re Disqualification of Hunter*, 36 Ohio St. 3d 607, 608, 522 N.E.2d 461 (1988). In *Untied States v. Watson*, 1 F. 3d 733, 735 (8th Cir. 1993), the Eight Circuit rejected a due process challenge where a litigant complained that there was pending litigation between the presiding judge and him. A federal district court sitting in Georgia rejected the notion that "a litigant unhappy with a trial judge's ruling in a prior case can force the judge to recuse himself from future cases by simply bringing a civil action against him." *Fowler v. United States*, 699 F. Supp. 925, 928 (M.D. Ga. 1988); see also *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("It *is* clear that a judge is not disqualified under 28 U.S.C. § 455 (or under 28 U.S.C. § 144 for that matter) merely because a litigant sues or threatens to sue him" (emphasis in original); *United States v. Taylor*, 569 F. 2d 448, 450 (7th Cir. 1978). The Delaware supreme court has also observed that "[t]he mere fact **[*18]** that a judge is an adverse party in another proceeding will not, by itself, result in automatic disqualification." *Los v. Los*, 595 A. 2d 381, 385 (Del. 1991).

Accordingly, we are compelled to reject respondent's argument. As HN12 the appellant, respondent bears the burden of demonstrating reversible error on appeal. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173, 890 N.E.2d 1220, 322 Ill. Dec. 301 (2008). Respondent has not addressed the salient features of workers' compensation law with regard to this issue nor has it provided any authority mandating the disqualification of an adjudicator when litigation is pending between the adjudicator and a party. Indeed, the case law that exists overwhelmingly contradicts respondent's position.

2. CROSS-EXAMINATION

Respondent complains of three rulings of the Commission that pertained to its cross examination of two of claimant's witness--claimant himself and James O'Donnell, claimant's expert witness. Respondent argues that it should have been permitted to cross-examine claimant regarding his use of marijuana on the day of and the day before the accident. It further contends it should have been allowed to cross-examine claimant regarding his past experiences **[*19]** with marijuana, particularly the "effects he experiences" when using it. Finally, it asserts it should have been permitted to cross-examine O'Donnell regarding a purported admission by claimant that he used marijuana the day before the accident. HN13 Limitations upon the scope and extent of cross-examination are within the discretion of the Commission. *Johns-Manville Products Corp. v. Industrial Comm'n*, 78 Ill. 2d 171, 181, 399 N.E.2d 606, 35 Ill. Dec. 540 (1979). We will disturb a discretionary decision of the Commission only if it abuses that discretion. *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 413, 911 N.E.2d 1042, 331 Ill. Dec. 812 (June 9, 2009). An abuse of discretion occurs only if no reasonable person would adopt the position of the Commission. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).

HN14 The scope of cross-examination is limited to matters covered during direct-examination. *Lee v. Grand Trunk Western R. Co.*, 143 Ill. App. 3d 500, 518, 492 N.E.2d 1364, 97 Ill. Dec. 491 (1986). It also may include matters affecting the credibility of a witness. *Carter v. Azaran*, 332 Ill. App. 3d 948, 956, 774 N.E.2d 400, 266 Ill. Dec. 294 (2002). However, impeachment on a collateral matter is generally disfavored. See *Edens View Realty & Investment, Inc. v. Heritage Enterprises, Inc.*, 87 Ill. App. 3d 480, 490-91, 408 N.E.2d 1069, 42 Ill. Dec. 360 (1980). **[*20]** Cross-examination regarding irrelevant matters is improper (see *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 916-17, 864 N.E.2d 897, 309 Ill. Dec. 656 (2007)), and questions "designed to harass, annoy or humiliate a witness should not be tolerated" (*People v. Baugh*, 358 Ill. App. 3d 718, 739, 832 N.E.2d 903, 295 Ill. Dec. 453 (2005)). In order to warrant reversing the decision of a lower tribunal, the appellant must show that he or she was prejudiced by the trial court's decision. *Norman v. American National Fire Insurance Co.*, 198 Ill. App. 3d 269, 295, 555 N.E.2d 1087, 144 Ill. Dec. 568 (1990). Additionally, where the evidence supporting the decision of the lower tribunal is overwhelming or the evidence would have been cumulative with other evidence, an error in limiting the scope of cross-examination may be deemed harmless. *People v. Rainone*, 176 Ill. App. 3d 35, 41, 530 N.E.2d 1026, 125 Ill. Dec. 617 (1988).

Respondent first points to the arbitrator's refusal to allow it to cross-examine claimant regarding whether he used marijuana on the day of or before the accident. On direct, claimant testified that he had not done so. Initially, we question the relevance of whether claimant used marijuana the day before the accident. Leikin testified that claimant used marijuana within the previous 1.5 days prior

to the accident, **[*21]** and he could not state that marijuana intoxication was the sole cause of the accident. Moreover, the observations of Fashingbauer and Pellegrini refute the notion that claimant was so intoxicated as to have abandoned his employment, even if respondent could establish claimant used marijuana on the previous day. Additionally, even if he had used marijuana on the day of the accident, no evidence in the record establishes that such use, if it happened, would have been the sole cause of the accident. Further, to the extent that Leikin testified to the time frame of claimant's alleged usage, such cross-examination would have been cumulative as well. In short, we see no reasonable probability that, had respondent established the point it here seeks to make or had it undermined claimant's testimony to the contrary, a different result would have followed.

Respondent also argues that it should have been allowed to question claimant generally on his admitted past marijuana use to establish whether he was sufficiently familiar with the drug's effects to testify that he was not intoxicated at the time of the accident. It is undisputed that respondent was engaged in his job (winding in a chalk line). **[*22]** It is not apparent to us how, if we assume claimant was intoxicated, that would alter the result of the case in light of Leikin's failure to opine marijuana use was the sole cause of the accident. Respondent had to demonstrate not only that claimant was intoxicated, but that marijuana use was the sole cause of the accident or that claimant departed from the scope of his employment. See *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill. App. 3d 882, 887-88, 612 N.E.2d 989, 184 Ill. Dec. 113 (1993). In other words, we see no prejudice to respondent here.

Finally, respondent complains that it was denied the opportunity to cross-examine O'Donnell regarding a statement claimant's attorney made to O'Donnell regarding claimant using marijuana on the afternoon before the accident. We fail to see the relevance of this testimony. Even if true, nothing exists in the record to support the proposition that such usage could have been the sole cause of the accident or that it would have rendered claimant so intoxicated that he had abandoned his employment.

In sum, the alleged errors of which respondent complains would not have altered the result to the proceedings. As such, respondent has failed to show that they were prejudicial to **[*23]** it. We therefore reject respondent's arguments on this point.

3. CAUSATION

Respondent argues that claimant did not prove his injuries were caused by his employment. HN15 An injury is compensable under the Act only if it arose out of and occurred in the course of employment. *Rotberg v. Industrial Comm'n*, 361 Ill. App. 3d 673, 679, 838 N.E.2d 55, 297 Ill. Dec. 568 (2005). Respondent contends claimant's alleged marijuana intoxication makes these findings impossible. In *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 481, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989), our supreme court articulated HN16 two ways in which an employer could successfully make out an intoxication defense:

> "First, an employee, though in the course of his employment, will be denied recovery if his intoxication is the cause of the injury--that is, if the injury arose out of the intoxication rather than out of the employment. Second, excessive intoxication may constitute a departure from the course of employment, and an employee who is injured in that condition does not sustain an injury in the course of his employment. Under the latter rationale, intoxication of a sufficient degree is viewed as an abandonment of employment, or a departure from employment."

As a preliminary matter, respondent asks **[*24]** that we abandon these standards and adopt a new test for an intoxication defense based on marijuana usage that is not as demanding upon an employer. It suggests that "if scientific evidence establishes that [the employee was] marijuana impaired at the time of the accident, recovery should be denied altogether."

Initially, we note that *Paganelis* is a supreme court case. HN17 We, of course, cannot overrule the supreme court. *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 744, 742 N.E.2d 858, 252 Ill. Dec. 320 (2000). Moreover, we do not find respondent's position persuasive. The law regarding the defense of intoxication is not new or novel. See *District 141, International Ass'n of Machinists & Aerospace Workers v. Industrial Comm'n*, 79 Ill. 2d 544, 557-58, 404 N.E.2d 787, 39 Ill. Dec. 196 (1980). It is embodied in Professor Larson's respected treatise. See *Paganelis*, 132 Ill. 2d at 480-81, quoting 1 A A. Larson, The Law of Workers' Compensation § 34.00, at 6-64 (1985)

Ultimately, we believe that changes such as those advocated by respondent should come from the legislature rather than the courts. Respondent points to some policy considerations in support of its position. For example, it suggests that the current standard "runs counter to the public **[*25]** policy of Illinois" in that the state and employers in this state spend large sums of money to prevent drug use in the workplace. The court system is simply not well suited to address an issue such as this. *Charles v. Seigfried*, 165 Ill. 2d 482, 493, 651 N.E.2d 154, 209 Ill. Dec. 226 (1995) ("The General Assembly, by its very nature, has a superior ability to gather and synthesize data pertinent to the issue. It is free to solicit information and advice from the many public and private organizations that may be impacted. Moreover, it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved"). Accordingly, we reject respondent's request to rewrite the law regarding marijuana intoxication. Indeed, since the case law that embodies it comes from the supreme court, we could not grant respondent's request even if we were so inclined. We will therefore apply existing law to respondent's arguments regarding causation.

Respondent first contends that claimant's injuries did not occur in the course of employment. Respondent cites *Paganelis*, 132 Ill. 2d 468, 548 N.E.2d 1033, 139 Ill. Dec. 477, and *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995), two cases where the claimants' high **[*26]** blood-alcohol contents were given great weight in denying compensation under the Act. We find these cases distinguishable in that they involve alcohol rather than marijuana. The testing for these two substances is simply different. Respondent points to nothing to suggest that the same inferences should flow form the presence of alcohol in the blood and the presence of marijuana metabolites in the urine. The statements of two of respondent's employees regarding claimant's condition prior to the accident--which the Commission expressly relied upon--clearly establishes that claimant was performing his job prior to and at the time of his injuries. Respondent asserts that the testimony of these witnesses is "clearly untrue in light of the two urine tests." We disagree. As Leikin acknowledged, the test results indicated that usage could have occurred up to 1.5 days before the accident. Respondent also asserts that "[o]ne can reasonably infer" that Fashingbauer believed claimant to have been intoxicated from his refusal to state why claimant "walked right into that hole." Perhaps this is so, but the Commission, which is the trier of fact, apparently did not draw this inference. We cannot **[*27]** say it is so compelling that the Commission was required to draw it. At the very least, given the state of the record, we cannot say that a conclusion opposite to the one drawn by the Commission is clearly apparent, so its decision is not against the manifest weight of the evidence. *University of Illinois*, 365 Ill. App. 3d at 910. Finally, respondent cites *Sekora v. Industrial Comm'n*, 198 Ill. App. 3d 584, 590, 556 N.E.2d 285, 144 Ill. Dec. 818 (1990), for the proposition that "if an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the course of employment unless the employer had knowledge of or acquiesced in such unreasonable conduct." *Sekora*, however, does not involve intoxication. Hence, *Paganelis* and *Parro*, which specifically address that

issue, are controlling.

Respondent also argues that claimant's injuries did not arise out of his employment. It is well established that HN18"an injury arises out of the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed." *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 911, 851 N.E.2d 72, 303 Ill. Dec. 174 (2006). We have little trouble **[*28]** concluding that an open hole in a floor is not something to which the general public is typically exposed. Nevertheless, respondent argues that claimant had "managed to safely negotiate [similar holes] on more than one dozen homes prior to the accident." Respondent continues, "The causative agent of his fall was not the hole, but rather his impaired depth perception, reaction time" [*sic*] and judgment caused by his marijuana intoxicated state." Respondent concludes, "As such, the finding that [claimant's] accident was caused by anything other than his marijuana-induced state is against the manifest weight of the evidence." We disagree. Ample evidence supports the Commission's decision. Notably, but-for the existence of the hole, claimant could not have fallen through it. *Cf. O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416-17, 729 N.E.2d 523, 246 Ill. Dec. 150 (2000) (holding a but-for relationship to a condition of employment was sufficient to find an injury arose out of employment). As such, even if marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause. Under *Paganelis*, it would have to be the sole cause to prevent claimant from recovering under **[*29]** the Act. *Paganelis*, 132 Ill. 2d at 481. As it is of ten stated, HN19"A claimant is not required to prove that employment was the sole or principle cause, but only that the employment was a causative factor." *Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920, 926, 732 N.E.2d 603, 247 Ill. Dec. 548 (2000). We cannot say that the Commission's decision that claimant met that standard is contrary to the manifest weight of the evidence.

4. PENALTIES AND ATTORNEY FEES

Finally, respondent contests the Commission's decision to award penalties under section 19(k) of the Act and attorney fees under section 16 of the Act (820 ILCS 305/16, 19(k) (West 2002). The Commission did not award penalties under section 19(l) (820 ILCS 305/19(l) (West 2002). As an initial matter, respondent argues that the Commission's failure to award penalties under section 19(l) makes further awards of fees and penalties improper since section 19(l) requires a lower standard of proof than the two sections relied on by the Commission. See *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 806, 829 N.E.2d 810, 293 Ill. Dec. 885 (2005). We would find this argument persuasive if the Commission had found that penalties under section 19(l) were inappropriate. However, respondent **[*30]** points to no such finding. We will not speculate on the reason they were not awarded. Indeed, as claimant points out, at the time he was injured, section 19(l) read: HN20"In case the employer or his insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of weekly compensation benefits due to an injured employee *during the period of temporary total disability* the arbitrator or the Commission shall allow the employee additional compensation." (Emphasis added.) 820 ILCS 305/19(l)(West 2002). Claimant points out that he was never granted temporary total disability. In any event, absent affirmative inconsistent findings, we find respondent's argument unpersuasive. We will now turn to the two statutory provisions pursuant to which the Commission made its awards.

Section 16 provides, in relevant part:

HN21"Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable **[*31]** or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16 (West 2002). Similarly, section 19 (k) states:

HN22"In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay." 820 ILCS 305/19(k) (West 2002). HN23"Both sections allow for additional awards to a claimant where an employer has been guilty of unreasonable or vexatious delay, and they apply under similar **[*32]** circumstances (*USF Holland, Inc.*, 357 Ill. App. 3d at 805).

HN24"Generally, a good faith challenge to liability will not result in fees or penalties being imposed. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 253 Ill. Dec. 930 (2001). To avoid the imposition of penalties and fees, an employer must show that the facts in its possession would have lead a reasonable person to believe that a claimant is not entitled to prevail under the Act. *Cook County v. Industrial Comm'n*, 160 Ill. App. 3d 825, 830, 513 N.E.2d 870, 112 Ill. Dec. 261 (1987). An honest, though flawed, belief is not enough to escape liability. *Cook County*, 160 Ill. App. 3d at 830. The burden is on the employer to show that any delay in paying benefits is reasonable. *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145, 190 Ill. Dec. 276 (1993). This issue presents a factual question to which the manifest-weight standard of review applies. *Matlock*, 321 Ill. App. 3d at 173. A finding is contrary to the manifest weight of the evidence where an opposite conclusion is clearly apparent. *Ameritech Services, Inc. v. Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203, 904 N.E.2d 1122, 328 Ill. Dec. 612 (2009). After carefully reviewing the record, we disagree with the Commission and find that an opposite conclusion **[*33]** to the one at which it arrived is clearly entailed in the evidence.

Respondent argues that the facts available to it justified its denial of benefits to claimant. We agree. It points to claimant's urine tests that revealed what it terms "severe marijuana intoxication" and Leikin's opinions that were derived from them. Respondent also contends that it was entitled to rely on *Paganelis* and *Parro*. Those cases are distinguishable in that they involved alcohol rather than marijuana; however, since we had not articulated this distinction with any degree of detail in the past, respondent was not unreasonable in seeking to analogize the present situation to those cases.

In sum, a reasonable person in possession of the facts available to respondent could have concluded that claimant was not entitled to benefits under the Act. In any event, we do hold that an opposite conclusion to that drawn by the Commission is clearly apparent. Accordingly, the Commission decision to award penalties and fees was erroneous given the state of the record in this case.

III. CONCLUSION

In light of the foregoing, the decision of the circuit court of Grundy County confirming the decision of the Workers' Compensation

[*34] Commission is affirmed in part and reversed in part.

Affirmed in part and reversed in part.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and DONOVAN, JJ, concur.

*2009 Ill. Wrk. Comp. LEXIS 1026, **

JOHN QUERIO, PETITIONER, v. CITY OF JOLIET STREET DEPARTMENT AND ALEXI GIANNOULIAS, ET AL., RESPONDENT.

NO: 07 WC 2167 09 IWCC 1057

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

2009 Ill. Wrk. Comp. LEXIS 1026

October 20, 2009

CORE TERMS: doctor, arbitrator, surgery, pain, fracture, spondylolisthesis, feet, medical evidence, spondylolysis, totally disabled, films, temporary total disability, tractor, lumbar, jumped, causal connection, total disability, permanently, epidural, symptoms, spine, causative, scan, pre-existing, permanent, opined, exam, jump, claimant, radiculopathy

JUDGES: Paul W. Rink; Barbara A. Sherman; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 31, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the *Rate Adjustment Fund*, as provided in Section 8(g) of the Act.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, **[*2]** payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 20 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **LEO HENNESSY**, arbitrator of the Commission, in the city of **JOLIET**, on **11/12/2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?
N. Is the respondent due any credit?

FINDINGS

. On **11/14/2006**, the respondent **CITY OF JOLIET STREET DEPARTMENT *was*** operating under and subject to the provisions of the Act. **[*3]** was operating under and

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **67,334.28**; the average weekly wage was $ **1,294.89**

. At the time of injury, the petitioner was **45** years of age, ***married*** with **2** children under 18.

. Necessary medical services ***have*** been provided by the respondent.

. To date $ **8,533.60** has been paid by the respondent for TTD and/or maintenance benefits, additionally respondent paid a 5% man as a whole advance of $ 15,499.25.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **863.26**/week for **61 1/7** weeks, from **11/15/06** through **1/23/2007 and 03/27/07 through 03/18/08**, which is the period of temporary total disability for which compensation is payable.

commencing 3/19/08

. The respondent shall pay the petitioner the sum of $ **863.26**/week for a further period of **life [*4]** weeks, as provided in Section **8 (f)** of the Act, because the injuries sustained caused **the total and permanent disability of petitioner**.

. The respondent shall pay the petitioner compensation that has accrued from **11/15/06** through **11/12/08**, and shall pay the remainder of the award, if any, in weekly payments.

. The pondent shall pay the further sum of $ 222,684.01 for necessary medical services, representing $ 230,217.01 less $ 7,533.00 paid by or credited to respondent toward said bills, in addition, the bills shall draw statutory interest as set forth in the award.

. The respondent shall pay $ in penalties, as provided in Section 19(k) of the Act

. The respondent shall pay $ in penalties, as provided in Section 19(l) of the Act

. The respondent shall pay $ in attorneys' fees, as provided in Section 16 of the Act

. Respondent shall have an 8(j) credit of $ 123,419.49.

RULES REGARDING APPEAL Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF [*5] INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

12-20-08

Date

DEC 31 2008

ADDENDUM TO ARBITRATOR'S DECISION

IN SUPPORT OF THE ARBITRATOR'S DECISION regarding "F" (Causal Connection), the Arbitrator makes the following findings and conclusions:

Petitioner, a 45 year old operator II for the City Street Department, performed mostly highway and road maintenance and snow removal. From time to time he would operate the heavy machinery as operator II. Moreover, there would be times when Petitioner would do heavy work such as jack hammering. Mr. Suppan of the Respondent's Human Resource Department described the job as medium, with the caveat that from time to time heavier duties would be performed.

Petitioner's past medical history is significant for an L3 through L5 laminectomy with decompression and microforaminotomies performed June 30, 2003 by Dr. John Brayton (Pet's. Ex. # 2). A pre-surgical **[*6]** MRI performed May 19, 2003, interpretered by a Dr. David Granato showed a right lateral disc protrusion at L4-5 causing asymmetry of the right neural foramen, and two level facet hypertrophy with mild central canal narrowing at L4-5, no spondylolysis or spondylolisthesis was noted in the report. Also importantly, the post-surgical MRI of November 11, 2003 (Pet's. Ex. # 3) interpreted by Dr. Rafia Saleem, showed post-surgical findings, but again, no spondylolysis or spondylolisthesis. Petitioner testified his back had been doing well since that time,

In addition to the prior back surgery, Petitioner was also stricken with Parkinson's disease, which was diagnosed in the late 90's. It kept him off work from approximately April of 2005 through September of 2006, following a brain stimulator implant at Rush Medical Center in approximately March of 2005. The doctor at Rush had released Petitioner for full duties from his Parkinson's, and Petitioner returned to full duties on October 2, 2006.

While Petitioner was off for his Parkinson's, he had applied for a promotion from operator I to operator II, evidencing he intended to return to his duties, and the Respondent gave him the promotion. **[*7]**

On November 14, 2006, Petitioner reported for work at 6:00 a.m. and was given three tickets for clean up. The first two were to clean alleys which were blocked by fallen trees, and this was done with a group of five and four pieces of equipment Petitioner's unit was 25 feet long. He went to the third assignment, which was to clean up a closed side street, which looked like a country road with a six foot drainage ditch on one side. Petitioner was using a caterpillar 920 loader, and with its air brakes leaking it rolled into the ditch so that it sat on the frame of the loader. Petitioner called for a bobcat but a road grader was sent instead. While attempting to pull out the unit, it started to tip, so Petitioner jumped out the left hand side, which would have been a distance of 8 to 10 feet, maybe 12 and his right foot slipped in the process. However, he was able to land on his heels and then fall on his back. He testified he also twisted his back in the process. Petitioner neither before nor after this accident ever had any other impact injuries to his low back.

Petitioner's testimony was corroborated not only by his description, including that on the initial report (Resp. Ex. # 1), **[*8]** but as well as by three co-workers (Resp. Ex. # 8). Noteworthy is that all the descriptions appear to describe what happened to the equipment and the fact that Petitioner had to jump, and none attempted to describe the manner in which he landed after jumping, nor the mechanism of injury.

Significant is the initial history taken at Silver Cross Hospital Emergency Room (Pet's. Ex. # 4 p. 2). Petitioner advised of the earlier laminectomy done at another facility, that he had not been needing any back medicine for sometime, that he sees a neurologist at Rush for Parkinson's disease and has a stimulator in place. He further stated he was at work where he lost his balance and fell on his back while twisting also as well. He came into the emergency room with severe back pain. Thus it is clear that Petitioner told the emergency room physician while in severe pain that he fell on his back and twisted it as well, as contained in the history and physical examination record.

After the emergency room Petitioner called the City, who advised him to go to the company doctor, MedWorks. Petitioner was seen there November 20, 2006. He gave the history, except that the mechanism of injury is limited **[*9]** to that the patient jumped off the loader, landing on his feet, approximately 8 feet, and when doing so he hurt his back. The record is silent as to whether he also landed on his back, as was set forth in the emergency room records. The history also notes that the pain was on the left side of the low back (Pet's. Ex. # 5, p. 2). On exam, the doctor noted the patient walks stiffly, has an antalgic gait, pain level at a 5, positive left sided low back tenderness, positive left sided straight leg raising, tenderness when seated, and decreased range of motion. The diagnosis was lumbar strain, subluxation of L4 and L5, and status post surgery in lumbosacral spine (*id.* p. 3). Petitioner was restricted to essentially sedentary work and referred to a spine surgeon, Dr. Boscardin (*id.* p. 4). Petitioner had to return two days later, 11/22/06, noting that the stiffness in the low back was worse, and going from sitting or kneeling to standing increases the pain.

Petitioner first saw Dr. Boscardin of Parkview Musculoskeletal Institute on December 4, 2006 (Pet's. Ex. 6, p. 3). This would have been approximately three weeks after the accident. The history again shows Petitioner jumping 8 **[*10]** to 10 feet off a tipping mechanical tractor and since that time pain and spasms in the low back. No description of how he landed is included in that history either. He told the doctor of the prior surgery and the doctor noted: "based on his history, he had no trouble whatsoever and was doing quite well following that surgery. He also has a diagnosis of Parkinson's." Petitioner brought his CT Scan with him, and Dr. Boscardin had X-rays taken at his facility on that date. The doctor noted "a bit of a tension sign on the left side." He also noted some decreased range of motion and absent Achilles reflex. He felt the Parkinson's might have influenced the neurological exam. His impression was "most likely an activation of some low grade lumbar radiculopathy ["sic"] associated with this spondylolisthesis. Whether this spondylolisthesis was there prior to this accident remains uncertain. Review of previous films may help us answer that question. Based on his history one has to assume that this injury has contributed or had a causal relation to his present complaints." The doctor noted that obtaining the old films would be helpful to answer the question.

For treatment, the doctor stated "I **[*11]** feel that this gentlemen's treatment really involves living with his symptoms, trying an epidural or surgery. Obviously we want to try simple things first." Thus Dr. Boscardin found surgery to be a consideration at the initial visit, but started Petitioner with shots (Pet's. Ex. 6, p. 3). Petitioner then had two epidurals, on December 20, 2006, (*id.* p. 5) and January 9, 2007 (*id.* p. 7). He returned to Dr. Boscardin, January 3, 2007, and the doctor again noted that he was treating Petitioner for a resolving lumbar radiculopathy. The doctor noted he had responded well to the two epidurals, had residual discomfort, and felt that the series of epidurals should be completed. The doctor noted that at that point the neurological exam had improved, and: "he feels he is ready to go back to work. I agree. We are allowing him to go back to work full duty on a trial basis but we will schedule him for the third epidural." The doctor also felt that Petitioner had not reached maximum medical improvement (*id.* p. 8). Thus, consistent with Petitioner's testimony it was Petitioner who was the motivating force to try and get back to work.

On February 1, 2007, Petitioner had the third injection **[*12]** (*id.* p. 9). It should be noted that page 1 of Petitioner's Exhibit 6 is the exact same report of procedure as the report on page 9 of February 1, 2007, except it is dated February 1, 2006. Since Petitioner had never seen Dr. Boscardin until after this injury, and the notes do appear identical, it is clear that February 1, "2006" is a typographical error on page 1, and that the shot was performed February 1, 2007.

Petitioner testified that on Tuesday, February 6th, he was doing some snow plowing, it was storming so overtime was anticipated, and at approximately 2:30 his back symptoms increased and he had to go home with the approval of his foreman, Frank Jadron. He had been hoping for overtime as being off for his Parkinson's had left him strapped. Petitioner returned to Dr. Boscardin on February 10, 2007, with the same history, that he had gone through a series of epidurals and "was basically doing reasonably well until Tuesday, when he was required to do some shoveling, plowing, riding on the tractor and this appeared to aggravate his left side of low back. No other injury." On exam the doctor noted some paraspinal spasms on the left side with a marked area of tenderness, and **[*13]** he ordered another injection done that day. The doctor continued him on the medication, wanted to see him back in 4 to 6 weeks, and noted: "this does appear to be just an aggravation of a pre-existing condition." He also gave Petitioner some Ambien for sleep (*id.* p. 10). While there was some cross examination as to whether Petitioner should have filed an additional accident report, it is clear that to a lay person simply performing one's job duties of riding on a snow plowing type piece of equipment, where he was in treatment for the exact same condition, that such riding would not constitute an accident or new injury, and it is also clear that Dr. Boscardin agreed. At that visit Dr. Boscardin felt Petitioner could continue to do his job.

Petitioner returned to Dr. Boscardin on March 15, 2007 (*id.* p. 13). This was almost exactly in the middle of the four to six weeks when Dr. Boscardin had wanted Petitioner to return. On exam Dr. Boscardin noted a markedly positive tension sign on the let, some slight weakness of the dorsiflexor of the foot, and a tingling sensation, noting the gentlemen appears in some significant distress, and noting that he appears to have a recurrent left **[*14]** sided lumbar radiculopathy. He switched his medication, took him off work and requested a new CT Scan. The doctor felt it could be re-injury or a new injury documented February 10, 2007 (*id.* p. 13).

In the interim, Petitioner attempted to use marijuana to sleep and alleviate some of his back pain, as although he loved his job and knew he was putting it at risk, the pain was that bad by his testimony. On March 5, 2007 he was given a random drug test which was

positive for marijuana and he was subsequently suspended, and also required to attend a drug rehab program (Resp. Ex. 4, p. 1). The suspension ended March 26, 2007, so that by the time Petitioner saw Dr. Boscardin on March 29, 2007, his suspension was over.

While the Arbitrator has noted the Petitioner's use of marijuana, the issue in this case is basically medical causation, as established by the condition of Petitioner before and after the accident, the chain of events, and the medical evidence.

On March 29, 2007, Petitioner did return to Dr. Boscardin (Pet's. Ex. 6, p. 14). The doctor noted that Petitioner could not have an MRI due to the Parkinson's stimulator. The doctor obtained the recent CT Scan he had ordered, as **[*15]** well as flexion and extension films which he described as showing significant displacement The doctor also noted in the history of that date that he was provided not only the operative report but films pre and post surgery: "which clearly do not show any signs of this spondylotic defect with offset They were films generated in November 2003, which clearly do not show that." He went on to state that he had assumed the findings were something John had for sometime, which responded to his treatment and had come under control with no need to do anything further.

He went on to state: "now that John has provided me with all this material, it appears that his symptoms clearly are related to jumping off of this tractor and his symptoms started in November 2006." (*id.* p. 14) The doctor ordered a work-up, and Petitioner returned May 17, 2007 (*id.* p. 18). The doctor noted that Petitioner's previous surgery was done to address prior problems, as Petitioner testified, and noted: "he related to me that he jumped off the truck 8 - 10 feet, certainly that may be a competent cause to lead to this fracture of the pars and further progression with his offset." The doctor wanted to review all **[*16]** the materials to render a complete opinion, awaiting a decision of the insurance company in that regard, and this is the last office note and visit to Dr. Boscardin (*id.* p. 18).

Shortly before this visit, Petitioner had a CT Myelogram by Dr. Dhesi on May 10, 2007 at Health Benefits Pain Management (Pet's. Ex. # 11). Dr. Boscardin had referred Petitioner to Dr. Mekhail, his associate for surgery (Pet's. Ex. 6, p. 20). But Petitioner chose instead to use a spine surgeon of his own choice and went to Dr. Mark Lorenz at Hinsdale Orthopedics (Pet's. Ex. # 7). Petitioner testified he had brought the 2003 pre and post surgical films to Dr. Boscardin in December, and was disappointed the doctor did not compare them until March. Had he known he had a new condition, he may not have requested to return to work in January.

Petitioner had surgery August 3, 2007 by Dr. Lorenz (Pet's. Ex. 12, pp. 66 - 68), which was done with a co-surgeon, Dr. Stanley Fronczak (Pet's. Ex. 12B). A post-operative diagnosis was L4-L5 lumbar spondylolysis with L4-L5 spondylolisthesis, as well as two level spinal instability and discogenic back pain with radiculopathy, for which a two level fusion was done with rods **[*17]** and screws (*id.*, both reports).

Dr. Lorenz testified by evidence deposition (Pet's. Ex. 16). Dr. Lorenz defined a spondylolysis as a fracture of a weakened vertebra (*id.* p. 9) and that a spondylolisthesis was a slippage of the vertebra that is due to shearing forces acting on the segment which is abnormal. It is a pathologic sign and it loads the disc abnormally. It causes foraminal and spinal stenosis and irritation of the nerve root, and back pain (*id.* p. 7). Dr. Lorenz opined that the patient's low back pain and radicular complaints began from a state of good health and normal function on the date that he jumped approximately 10 feet where he was subsequently found to have a spondylolysis and spondylolisthesis and developed lower back pain and lower extremity pain.

Dr. Lorenz agreed with Dr. Boscardin that the jump of 10 feet is a competent cause of producing a spondylolysis or fractured vertebra, or aggravating the condition of spondylolisthesis and producing his symptoms (*id.* p. 9). Dr. Lorenz, as the surgeon who actually observed Petitioner's spine in surgery, opined that it was likely that the fracture occurred at the time when Petitioner did the jump, although **[*18]** it was possible that he may have had it before and it was asymptomatic, and didn't know it until it was loosened up by the traumatic event, and then it became painful (*id.* p. 9). Dr. Lorenz noted when someone has a twisting and loading that occurs on a spine, as might happen in a fall, it is a competent cause to cause fractures of all kinds. Among those fractures would be a fracture in the pars, which is exactly what he showed. Beside that, this kind of single traumatic event of significance can cause previously scarred tissue that is relatively stable to become lose, mobile, and secondary inflammatory in growth and pain production, based not only on the doctor's opinion but on the NIOSH review of the data base showing that falls and loading are highly correlated to low back injuries of workers (*id.* p. 10).

Dr. Lorenz was given a hypothetical which assumed the medical history in this case, including the incident, Petitioner's request to return to work January 23, 2007, following improvement, and then February 10th, returning with the history of increased symptoms following plowing and riding while shoveling, on a tractor, and Dr. Lorenz opined that those facts were quite consistent **[*19]** with his findings (*id.* p. 12). He explained that when a patient has a condition such as segmental instability secondary to a spine fracture and a listhesis with a previous surgery and has a traumatic event and develops back pain, than at times some physical therapy, injections, those sorts of things could temporarily improve his condition. Dr. Lorenz was surprised that Petitioner was sent back to be exposed to lifting, torquing and vibrational exposure, which are all competent causes to aggravate and worsen the condition and are highly associated with low back pain. Dr. Lorenz also stated that a spondylolysis is typically an acute fracture when it happens and it is not possible for it to occur over time (Pet's. Ex. 16 p. 32). Petitioner's presentation was the type the doctor would expect to see if someone jumped 10 feet off a tractor, but normally you don't see that problem and the problem requires a traumatic event of some sort, or prolonged fatigue fractures or some kind of force (*id.* pp. 30-31).

At surgery, Dr. Lorenz found that Petitioner had a fracture at the L5 pars. He had a very hyper mobile L4 segment. He also had a recurrence of stenosis at L4-5 and L5-S1 which is **[*20]** a narrowing of the spinal canal (*id.* p. 17). Dr. Lorenz opined that a fall as such Petitioner had in November of 2006 can make bad conditions symptomatic as well (*id.* p. 18). Dr. Lorenz also noted that the Parkinson's had no impact on his back issue (*id.* p. 37), other than he could not properly be rehabbed. (*id.* p. 39).

The only additional medical evidence was the Section 12 examination and report from Dr. Kern Singh (Resp. Ex. 10, page references will be to the fax page numbers at the top right, which begin with the first page being page 2). The crux of Dr. Singh's opinions are that Petitioner suffered only a lumbar muscular strain during his work related injuries (*id.* p. 4), and that the other conditions were pre-existing.

Before seeing the Petitioner, Dr. Singh had already done a records review (*id.* pp. 6 - 9). In what Dr. Singh describes as the "independent medical record review," he describes the accident as the employee attempted to back the tractor into a ditch, and he felt the tractor was going to tip over, so he jumped to the ground. No such history appears in any of the medical records, but rather clearly the records (Pet's. Ex. # 5 p. 2) show that **[*21]** the Petitioner was being pulled out from a ditch when his equipment began to tip and he jumped. It does appear from a misinterpretation of the person who filled out the accident report for Petitioner, that he was backing (Resp. Ex. # 1), but Dr. Singh does not list this as a record he reviewed (Resp. Ex. 10, pp. 6-7).

Further, Dr. Singh suggests that Petitioner had been previously diagnosed with L4-5 spondylolisthesis before his work related injury. However, Dr. Boscardin's office note of March 29, 2007 or May 17, 2007 suggests otherwise. Further, Dr. Singh sets forth the records he reviewed (Resp. Ex. 10, pp. 6-7), and all these records are records which were after Petitioner's accident of November 14, 2006. Thus he did not have the benefit of the pre-accident films, as did Drs. Boscardin and Lorenz (*id.* pp 6-7).

Dr. Singh's opinion also ignores that when Petitioner first saw Dr. Boscardin he not only had back pain, but left sided groin pain, which ultimately wound up traveling down his left leg. This type of left-sided groin pain is hardly something caused by a lumbar strain.

Further, all Petitioners' previous treatment, as noted by Dr. Boscardin and Dr. Lorenz was for a low **[*22]** back/right-sided presentation. Dr. Singh at number 20 of his record review (*id.* p. 7) appears to review a Functional Capacity Evaluation and Discharge Summary, yet a review of that document, (Pet's. Ex. 14, p. 56), as well as Petitioner's testimony show that no Functional Capacity Evaluation was ever performed, but rather simply this was a Discharge Summary which noted that while Petitioner could lift, he had tightness in the low back, standing and ambulation tolerance limits, and the therapist noted he was unable to perform "at occupational PDL." The therapist also noted that Petitioner had begun "to objectively plateau," and therapist concurred with discharging Petitioner at that time.

Dr. Singh further indicates at page 8 that a CT Scan which predates the injury shows the pre-existing spondylolisthesis, yet his list of things reviewed shows the scan to have occurred after the accident. Finally, neither report of Dr. Singh even mentions the spondylolysis, which is the acute fracture Dr. Lorenz eyeballed at surgery.

The leading case on causal connection is *Sisbro v. Industrial Commission*, 207 Ill. 2d 193, 797 N.E. 2d 665 (2003). The **[*23]** Court noted that employers take their employees as they find them. When their physical structures, diseased or not, give way under the stress of their usual tasks, it is an accident arising out of and in the course of employment. Even though an employee has a pre-existing condition which may make him more vulnerable to injury, recovery will not be denied as long as it can be shown that employment was also a causative factor. Where an employee is suddenly disabled as a result of performance of his duties, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health. Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor. In *National Lock -- Hardware v. Jeter*, 166 Ill. App. 3d 601, 520 N.E. 2d 43 (1987), the Industrial Commission Division noted where the testimony and records support the inference that whatever the back condition existed prior to the accident, either that condition was aggravated, or a new back condition resulted, then there is a causal connection. Causal connection may be established by **[*24]** showing relatively good health up to the date of injury, following which ability to work and physical condition deteriorated, *Board of Education City of Chicago v. Industrial Commission*, 96 Ill. 2d 239 449 N.E. 2d 839 (1983) or by chain of events, *Darling v. Industrial Commission*, 176 Ill. App. 186, 193, 530 N.E. 2d 1135 (1988); *Budlove v. Cook County Sheriff Police*, 04 I.I.C. 0887 (2004); or by the medical evidence.

Based on Petitioner's relatively good health regarding his low back prior to the accident, noting that his previous problems were low back and right-sided, based on his ability to perform significant work including significant overtime, albeit for a period of only approximately six weeks, before this accident, the chain of events, and the medical opinions of both Drs. Boscardin and Lorenz that a jump of 10 feet was a competent cause for what was new pathology which clearly Petitioner did not have three years earlier, the Arbitrator chooses to adopt the opinions of Drs. Boscardin and Lorenz that the jump of approximately 10 feet was a competent cause **[*25]** to produce the fracture and the spondylolysis and spondylolisthesis. The Arbitrator finds no significance to Petitioner's release, at his own request, January 23, 2007, to attempt what Dr. Boscardin clearly described as only a trial of full duties, based on the fact that neither Petitioner nor the doctor at that time were aware of the additional conditions which he sustained, which were discovered in March of 2007.

The significance of the release for the trial of duties is that Petitioner truly wanted to return to duties, which could include overtime, yet his condition would not allow him to do so and manifested itself when he tried. There was no gap in treatment between return to work and being taken off work in March, 2007. Moreover, with Dr. Singh claiming a pre-existing condition which both Dr. Boscardin and Lorenz specifically noted was not evidenced, and with Dr. Singh lacking the films from the earlier surgery, both before and after, which were reviewed by both Dr. Boscardin and Lorenz, this Arbitrator opts to not follow or adopt any findings or opinions of Dr. Singh in this particular matter.

Additionally, the Arbitrator notes that Dr. Singh's exact opinion on causal connection **[*26]** was: "I do not believe that the sole cause of this is the work injury of November 14, 2006." Being a doctor who can carefully chose his words, the rule of Sisbro applies, that even assuming the truth of Dr. Singh's opinion, the accident need not be the sole cause, or even the principle cause, as long as it is a contributing causative factor, which the Arbitrator so finds.

IN SUPPORT OF THE ARBITRATOR'S DECISION regarding "K" (Temporary Total Disability) the Arbitrator makes the following findings and conclusions:

The parties do not dispute that Petitioner was temporary totally disabled from November 15, 2006 through January 23, 2007, which was 10 weeks. Dr. Boscardin took Petitioner off work March 15, 2007 (Pet's. Ex. # 6) and Dr. Lorenz continued Petitioner off work (Pet's. Ex. # 7) to the surgery of August 3, 2007, until March 18, 2008 when Dr. Lorenz found maximum medical improvement and Petitioner to be permanently and totally disabled (Pet's. Ex. # 7A p. 2). The Law on Temporary Total Disability is that Petitioner is entitled to temporary total disability until his condition stabilizes to the extent that it can. Clearly from the first time Petitioner saw Dr. Boscardin surgery **[*27]** was a consideration, and Petitioner was off under doctor's orders from March 15, 2007 through the time of maximum medical improvement of March 18, 2008, which is a period of an additional 52 2/7 weeks beyond the initial 10-week period of lost time. However because Petitioner was suspended through March 26, 2007, see **Interstate Scaffolding** v. Illinois Workers' Compensation Commission, No. 3-07-0801 WC (10/20/08), TTD is awarded for November 15, 2006 through January 23, 2007 (10 weeks) and March 27, 2007 (the day following the end of the suspension) through March 18, 2008 (51 1/7 weeks).

IN SUPPORT OF THE ARBITRATOR'S DECISION regarding "L" (Nature and Extent of the Injury) the Arbitrator makes the following findings and conclusions:

See Arbitrator's findings regarding "F" (Casual Connection).

Dr. Lorenz, the treating spinal surgeon, testified that in his opinion Petitioner was permanently and totally disabled from any activities

in a competitive 40 hour work place, as a 40 hour work week was going to be tough on him because Petitioner has had two significant surgeries in the lower back with an inability to be able to rehab properly through a work conditioning program secondary to the **[*28]** other complication, the Parkinson's (Pet's. Ex. 16 p. 20). Even in the case of a sedentary job, Petitioner would in Dr. Lorenz's opinion not be able to do it for a 40-hour work week (*id.* p. 21) (Pet's. Ex. 7A, p2). Dr. Lorenz has released Petitioner to no kind of work whatsoever, which is what he told him the last time he saw him (*id.* p. 21). Dr. Lorenz noted even without the Parkinson's he would be inclined to restrict an otherwise healthy person much more, having had a second, significant surgery, than someone who had a first time surgery (*id.* p. 42). While the twist was the Parkinson's, Dr. Lorenz testified that he wouldn't have been talking about this case all together if he hadn't fallen and didn't have another back surgery (*id.* p. 44). Dr. Lorenz has restricted Petitioner to permanent and total disability (Pet's. Ex. # 7A, p. 2) and has not prescribed any vocational rehabilitation (Pet's. Ex. 16 p. 54).

Regarding Petitioner's employment situation, he was placed on Illinois Municipal Retirement Fund Benefits which, due to the pendency of the workers' compensation claim, Mr. Suppan described as a pittance. Mr. Suppan also testified that the Municipal Retirement **[*29]** Fund will only find a person permanently disabled if they are unable to do any type of work whatsoever. Following being placed on permanent total disability, Petitioner was terminated from the City and there was no longer any job available (Resp. Ex. 4, p. 2), although the City never had light duty anyway (Pets. Ex. 15). While Petitioner has two years of college, it was in the field of therapeutic recreation and he is dyslexic. He even needed help from someone at the City to fill out the accident report form which he signed (Resp. Ex. # 1). His entire work career was basically that of a laborer.

In *Ceco v. Industrial Commission*, 95 Ill. 2d 278, 286-287, 447 N.E. 2d 842 (1983), the Supreme Court held that an employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. The Claimant need not be reduced to total physical incapacity. Rather, a person is totally disabled when he is Incapable of performing services except those for which there is no reasonably stable market. Conversely, an employee is not entitled to total and permanent disability compensation **[*30]** if he is qualified for a capable of obtaining gainful employment without serious risk to his health or life. In determining a claimant's employment potential, his age, training, education and experience should be taken into account.

In that case, an examining physician testified Petitioner was permanently and totally disabled, although he could perform some light duty on a part-time basis. This testimony is very similar to that in the case at bar, except herein it was from Dr. Mark Lorenz, and the doctor who performed the two level fusion with hardware on Petitioner and followed him thereafter. There, as here, Respondent's Section 12 examining doctor offered a conflicting opinion. That case also had other conflicting medical evidence. The Supreme Court upheld the decision of the Commission and Will County Circuit Court that Petitioner was permanently and totally disabled, based on the medical evidence. See *Cole v. Illinois Valley Paving Co.*, 08 I.W.C.C. 0898 (2008), where the Commission found that because the medical evidence supported permanent and total disability, there was no need to consider any vocational evidence. In the case at bar, the Petitioner **[*31]** was 45 years old, flunked out of college because he was dyslexic, needed a co-worker at the City to fill out the accident form him, had a Parkinson's condition which included a brain stimulator which, in and of itself allowed him work, and had been a laborer his entire career.

In *Federal Marine Terminals v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 1117,864 N.E. 2d 838 (2007) the Appellate Court, Workers' Compensation Commission Division, noted that there were three ways a claimant can establish permanent and total disability, namely: "by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; or by demonstrating that, because of his age, training, education, experience and condition, there are no jobs available for a person in his circumstances. (citation omitted) 371 Ill. App. 3d at 1129. The Court also noted, citing *A.M.T.C. of Illinois v. Industrial Commission*, 77 Ill. 2d 482, 489, 397 N.E. 804 (1979) that Claimant also has to establish the unavailability of employment to a person in such circumstances if he is not obviously **[*32]** unemployable or there is no medical evidence to support a claim of total disability. In the case at bar there is medical evidence by the testimony of Dr. Lorenz, which the Arbitrator finds persuasive and adopts. With his age, training, education which, while including two years in junior college, was mostly for sports purposes, and his work history which is positive in that he worked for employers for longer periods, but knowing that they were limited to laboring jobs, and taking into account Petitioner's back condition this Arbitrator finds him to be unemployable, even had medical evidence in that regard been lacking, which in this case it was not. In fact, his treating doctor found him permanently and totally disabled at the exact time he found him at maximum medical improvement, and put the same in writing (Pet's. Ex. # 7A p. 2).

Petitioner testified, and Respondent did not dispute, that it (the Respondent) has not offered Petitioner any type of vocational assessment or vocational rehabilitation. This also evidences permanent and total disability since there was no attempt to comply with Rule 7110.70. *Searcy v. Gully Transportation*; 07 I.W.C.C. 1401. **[*33]** While Dr. Singh opined, at least initially, that Petitioner could return to medium work, clearly both by Respondents job description (Resp. Ex. # 3) and the testimony of Mr. Suppan Respondents duties would at least on occasion require work beyond the medium level. While Dr. Singh did opine as to some "work ability," the Arbitrator notes his opinion was rather late in the game, only being rendered October 22, 2008. With Dr. Lorenz's deposition having been taken May 7, 2008, Respondent was clearly in a position to offer vocational rehabilitation if it felt Petitioner could return to gainful employment. Petitioner's Exhibit 15 showed, and Mr. Suppan agreed, there was no light duty available. The Arbitrator agrees with Dr. Lorenz that in light of Petitioner's two back surgeries, the second of which was a two level fusion with rods and screws, Petitioner's problems with having to alternate sitting and standing, which the Arbitrator observed at Trial, Petitioner's Parkinson's which limited his recovery, and Petitioner's dyslexia, it is only stating the obvious that Petitioner's is permanently and totally disabled and that no stable labor market exists for Petitioner, and the Arbitrator **[*34]** so finds.

IN SUPPORT OF THE ARBITRATOR'S DECISION regarding "J" (Medical) and "N" (Credit) the Arbitrator notes that Petitioner introduced bills in the total sum of $ 230,217.01. Toward that sum, the workers' compensation department of the City paid $ 7,533.00 ($ 3,862.66 paid and $ 3,870.34 written off) and Respondent shall have credit therefore, so the total medical awarded is $ 222,684.01. In addition, Respondents self-insured Blue Cross and Blue Shield plan paid $ 123,419.49 and Respondent shall have credit for that sum. Dr. Lorenz requested statutory interest at his deposition since the schedule reduces his bill (Pet's. Ex. 10, p. 23). The bills of Dr. Lorenz in the amount of the schedule, being $ 37,655.59, less the Blue Cross payment of $ 3,151.80, plus Dr. Fronczak's bill as a co-surgeon, which was less than the scheduled amount, in the sum of $ 35,907.61, which are included in the aforesaid sums, are awarded and in addition said bills shall draw interest at the rate of 1% per month from July 7, 2008 being 60 days from when bills were presented at the deposition of Dr. Lorenz, as provided in Section 8.2(d) of the Act as amended 11/16/2005. The other bill balances shall draw **[*35]** interest at the same rate from January 12, 2009, which is 60 days after those bills were presented at Trial. The Arbitrator notes that said bills were not objected to, but Respondent was denying causal connection which was addressed in that part of the award. The Arbitrator notes that Drs. Boscardin and Lorenz both felt surgery was reasonable and necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Preexisting Conditions

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > **IL Workers' Compensation Decisions**
Terms: **"interstate scaffolding"** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, December 22, 2009 - 4:19 PM EST

*2009 Ill. Wrk. Comp. LEXIS 839, **

LEONA MOODY, PETITIONER, v. ST. BERNARD HOSPITAL, RESPONDENT.

NO: 01 WC 54171 09 IWCC 294

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 839

August 28, 2009

CORE TERMS: pain, right shoulder, prescribed, physical therapy, shoulder, arbitrator, right hand, surgery, lbs, wrist, leg, treating, doctor, causal connection, ill-being, temporary total disability, patient, lumbar, opined, minutes, lift, therapy, symptoms, scrub nurse, stenosis, rotator, operating room, loss of use, underwent, causally

JUDGES: Paul W. Rink; Molly C. Mason

OPINION: [*1]

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability benefits and permanency and being advised of the facts and law, modifies the Decision of the Arbitrator as to the awards for TTD and permanency and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the case cited by the Arbitrator, Schmidgall v. Industrial Commission, 268 Ill.App.3d 845, 644 N.E.2d 1206, 1994 Ill.App.3d 845, 644 N.E.2d 1206, (4th Dist. 1994) is not applicable to the case at bar as the claimant in Schmidgall was removed from the workforce by his treating physician due to his work related injuries. In the case at bar, the Commission finds that Petitioner intended to resign before her May 25, 2001 accidental injuries as she informed Respondent on May 16, 2001 that she was voluntarily retiring from her job effective June 22, 2001. The Commission **[*2]** finds that Petitioner is not entitled to collect TTD benefits after June 22, 2001, the date upon which she voluntarily removed herself from the work force for reasons unrelated to her injury. However, the Commission also notes that Petitioner's May 25, 2001 work related accident caused her to lose time from work, until June 22, 2001, and Petitioner is entitled to receive TTD benefits for this time period. See, **Interstate Scaffolding**, Inc. v. Workers' Compensation Commission, 896 N.E.2d 1132, 2008 Ill.App.Lexis 1017, 324 Ill.Dec.913 (3rd Dist. 2008). The Commission finds that Petitioner is entitled to an award of 4-1/7 weeks of TTD benefits from May 25, 2001, the date of her accidental work related injuries, through June 22, 2001, the effective date of her retirement.

The Commission finds that Petitioner established a causal connection between her work related injuries and her condition of ill-being in her low back but bases this finding on the fact that the physical therapy Petitioner underwent in early 2002 for her shoulder injury aggravated her condition of ill-being in her low back. The Commission modifies the Arbitrator's award of permanency **[*3]** for the injury to Petitioner's low back and finds Petitioner is entitled to an award of 15% loss of use of man as a whole under § 8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 408.77 per week for a period of 4-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 367.89 per week for a period of 216.5 weeks, as provided in § 8(d)2 and § 8(e) of the Act, for the reason that the injuries sustained caused a permanent 15% loss of use of man as a whole, 40% loss of use of Petitioner's right arm and 25% loss of use of Petitioner's right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 40,146.72 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause **[*4]** to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: AUG 28 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party.

The matter was heard by the Honorable **Gilberto Galicia**, arbitrator of the Commission, in the city of **Chicago**, on **January 11, 2007**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

[*5] . On **May 25, 2001**, the respondent **St. Bernard Hospital *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **31,883.80**; the average weekly wage was $ **613.15**.

. At the time of injury, the petitioner was **65** years of age, ***married*** with **0** children under 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, $ **19,386.44** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **408.77**/week for **64 4/7** weeks, from **May 25, 2001** through **August 21, 2002** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **367.89**/week for a further period of **291.50 [*6]** weeks, as provided in Section **8(e) and Section 8(d)2** of the Act, because the injuries sustained caused **permanent injuries of 40% right arm, 25% right hand, and 30% man as a whole.**

. The respondent shall pay the petitioner compensation that has accrued from **5/25/01** through **1/11/07**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **40,146.72** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.71% shall accrue from the date listed below to the day before the date of payment; **[*7]** however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

August 15, 2007

Date

AUG 16 2007

FINDINGS OF FACT

Petitioner testified that on May 25, 2001, she was employed as a Scrub Tech for Respondent, St. Bernard Hospital. She had been working for Respondent for approximately 15 years. Petitioner is 5'10"tall, weighs about 230 pounds, and is right handed. Petitioner testified that her job duties as a scrub tech consisted of passing surgical instruments to doctors during various surgical procedures. She would assist doctors during neurosurgical and eye surgeries; during these operations, she would be required to stand and pass instruments for 7-9 hours straight without breaks. Sometimes, Petitioner would perform more than one surgery in a day and she would be on her feet passing instruments for 16-18 hours. She was also required to pull cases and equipment prior to the surgeries; the orthopedic cases weigh between 10-15 lbs and the neurosurgical cases can weight approximately 20 lbs. She had to pick up and

transport patients as a part of her job duties. Prior to working as a scrub tech at St. Bernard **[*8]** Hospital, she worked as a scrub tech for Woodlawn Hospital for 23 years.

PRE-OCCURRENCE FACTS

Petitioner testified to one prior injury on January 31, 1999 when she slipped and fell in the St. Bernard Hospital parking lot and injured her lower back. She received medical treatment with Dr. Chmell at Michael Reese Hospital and physical therapy for three months, but returned to work in a full duty capacity on March 21, 1999. Petitioner testified that she did not receive any follow-up care from any doctors between March 23, 1999 and May 24, 2001. Furthermore, Petitioner testified that she was able to perform her full duty work activities between March 23, 1999 and May 24, 2001. Petitioner testified that when she went to work on May 25, 2001, that her condition of health was very good. Petitioner has not injured any part of her body since May 25, 2001.

OCCURRENCE FACTS

Petitioner testified that on May 25, 2001, she was working as scrub tech for St. Bernard Hospital. On that date, Petitioner was walking down the operating room corridor to relieve a nurse in room 2. As she walked down the hallway, she noticed a maintenance man, and she said, "I'm going to pass you." As she walked past him, **[*9]** the man mopped in front of her feet and tripped Petitioner on the mop. Petitioner fell forward onto a recovery room cart and fell to the concrete floor. Petitioner testified that immediately after the incident, she felt pain in her right shoulder, right arm, and burning in her left leg

POST-OCCURRENCE FACTS

Petitioner received medical attention immediately at St. Bernard Hospital Emergency Room; they prescribed x-rays of Petitioner's right shoulder and right humerus and gave Petitioner an arm sling. (Resp. Ex. 13). They told Petitioner to take Tylenol or Motrin, and to call employee health for follow up treatment. (Resp. Ex. 13). Petitioner did follow up at employee health, the St. Bernard Hospital and Health Care Center/Outpatient Wellness Center, on May 29, 2001. Petitioner was taken off work and referred her to an orthopedic evaluation with Dr. O'Young. (Resp. Ex. 13).

Petitioner saw Dr. O'Young on May 30, 2001; he examined her right shoulder, both knees and her left leg, and prescribed another shoulder x-ray which was performed at St. Bernard on May 30, 2001. He also prescribed physical therapy. (Resp. Ex. 13).

Petitioner had the physical therapy performed at St. Bernard Hospital **[*10]** Out-Patient Therapy from June 1, 2001 - July 10, 2001. (Resp. Ex. 13). Petitioner testified that roughly 3 weeks into physical therapy, she began to feel a funny sensation in her buttock and pain through her lower left side and buttock. She also felt pain and swelling in her right shoulder during the physical therapy.

Petitioner next saw Dr. Chmell, who was now located at Little Company of Mary Hospital, on July 9, 2001. Dr. Chmell examined her right shoulder, right arm and wrist, and low back. He also prescribed a wrist brace and additional tests. He prescribed an EMG for her right hand and wrist, an MRI for her right shoulder, and an MRI for her low back. (Pet. Ex. 3). Petitioner testified that in July 2001 she was suffering from unbearable and severe shoulder pain as well as low back pain that was radiating down her leg.

Petitioner's MRI of her right shoulder was performed at Southwest Hospitals MRI center on July 13, 2001; the MRI demonstrated an "impingement related anatomy" and "findings consistent with a complete rotator tear." (Pet. Ex. 5). Petitioner's EMG/NCS for her right hand and wrist was performed at Little Company of Mary Hospital on August 1, 2001; the EMG/Nerve Conduction **[*11]** Study was "suggestive of a severe right median sensory and motor compressive mononeuropathy across the carpal tunnel with evidence of demyelination, clinically consistent with and advanced carpal tunnel syndrome." (Pet. Ex. 3).

At that time, Petitioner also consulted her family doctor, Dr. Jane Vogelmann. Dr. Vogelmann referred Petitioner to an orthopedic surgeon, Dr. Nuber, at Northwestern Orthopaedic Institute. Petitioner first saw Dr. Nuber on August 21, 2001. Dr. Nuber examined her, reviewed the MRI of her right shoulder, prescribed ex-rays, and recommended surgery to Petitioner's right shoulder. (Pet. Ex. 5).

During September 2001, Petitioner also continued to follow up with Dr. Chmell and he prescribed surgery for her right shoulder and right wrist. (Pet. Ex. 3). He also prescribed physical therapy for her low back. (Pet. Ex. 3).

On October 18, 2001, Dr. Nuber performed an arthroscopy, debridement of humeral head, debridement of stump of biceps, subacromial decompression, co-planing of distal clavicle and arthroscopic rotator cuff repair using arthrex bio-corkscrew anchors on Petitioner's right shoulder at Northwestern Memorial Hospital. (Pet. Ex. 6). Dr. Nuber noted that Petitioner **[*12]** had a rotator cuff tear that was crescent in nature and measured about 2 to 3 cm long. (Pet. Ex. 6).

In November 2001, Petitioner attended physical therapy for her right shoulder and low back at Little Company of Mary Hospital (Pet. Ex. 3,4); this therapy continued from 11/19/01 - 3/6/02. (Pet. Ex. 3,4). Dr. Chmell also prescribed lumbar epidural injections at Little Company of Mary Hospital. (Pet. Ex. 3).

Petitioner testified that during November and December 2001, her right hand became very painful and swollen to the point that it was difficult to hold anything. During that time, her back pain also became unbearable while she was in physical therapy. Petitioner's medical records indicate that during that time she suffered from swelling and numbness in her right hand (Pet. Ex. 3, pp. 7, 8), and pain with movement of the wrist (Pet. Ex. 5). The records also demonstrate that she had severe low back pain and buttock pain which radiated down her legs. (Pet. Ex. 3, p.4).

Petitioner had two lumbar epidural steroid injections performed at Little Company of Mary Hospital. (Pet. Ex. 3). In December 2001, Dr. Nuber, prescribed additional physical therapy for Petitioner's shoulder. (Pet. Ex. **[*13]** 5). He also referred Petitioner to Dr. Nagle for evaluation of her right wrist and hand. (Pet. Ex. 5).

Petitioner first saw Dr. Daniel Nagle on January 29, 2002. Dr. Nagle examined her and then prescribed surgery to her right wrist. (Pet. Ex. 7). On March 11, 2002, Dr. Nagle performed an attempted "endoscopic", converted to "open", carpal tunnel release at Northwestern Memorial Hospital. (Pet. Ex. 6). Dr. Nagle prescribed a splint and physical therapy for her right hand/wrist after surgery. (Pet. Ex. 7).

Petitioner testified that around March 2002 she noticed a painful and funny sensation down her legs. Petitioner also testified to incontinent at that time. Her medical records demonstrate an increase in back pain radiating into her buttocks, thighs, and both legs,

as well as more proximally in the spine. (Pet. Ex. 3). In March 2002, Dr. Chmell prescribed continued physical therapy and a repeat MRI for her low back (Pet. Ex. 3), and Dr. Nuber prescribed continued rehabilitation for her shoulder. (Pet. Ex. 5). During March and April 2002, Petitioner was attending physical therapy for her right wrist, right shoulder, and low back. Petitioner testified that while she was continuing her **[*14]** physical therapy, the pain in her back and down her legs was getting worse.

Petitioner also testified to the types of physical activities, that she was performing in physical therapy. She testified to overhead reaching activities and weight lifting during physical therapy. She also demonstrated the activities of overhead pulling, operating a pulley on the wall, using a machine to perform a rowing motion, and using her fingers to "walk the wall."

Petitioner's repeat lumbar MRI as prescribed by Dr. Chmell, was performed at Holy Cross Hospital on March 27, 2002. This MRI report states, "history of being tripped and hurt her back; complaining of low back pains and pain radiating down in both legs." (Pet. Ex. 3, Resp. Ex. 10). This MRI further demonstrates, "Severe degenerative disc disease of lumbar spine, particularly level of L2-3, L3-4 discs with associated marked spurring. Associated marked degenerative facet with bony hypertrophy, both contributing to severe bony spinal canal and bony foraminal stenosis, with marked compression of the lumbar thecal sac circumferentially." (Pet. Ex. 3, Resp. Ex. 10).

In April 2002, Dr. Chmell advised Petitioner to seek a neurosurgical consultation, **[*15]** and suggested that Petitioner required low back surgery. (Pet. Ex. 3). Dr. Chmell also prescribed additional physical therapy for Petitioner's low back. (Pet. Ex. 3).

Dr. Jane Vogelmann referred Petitioner to Dr. Micheal Haak, a neurosurgeon, at the Northwestern Medical Faculty Foundation. Petitioner first saw Dr. Haak on May 9, 2002. (Pet. Ex. 8). Dr. Haak examined Petitioner and recommended work restrictions: to not lift more than about 10 lbs., to not sit or stand for longer than about 30 minutes. (Pet. Ex. 8). He also prescribed physical therapy and an epidural injection. (Pet. Ex. 8). In May 2002, Dr. Nuber prescribed additional physical therapy for Petitioner's right shoulder. (Pet. Ex. 5). Petitioner had the bilateral L5 transforaminal epidural steroid injections performed on May 31, 2002, as prescribed by Dr. Haik.

In June 2002, Dr. Haak recommended an FCE, and prescribed additional Bextra and Ultracet (Pet Ex. 8). Petitioner had the FCE performed at Healthsouth on July 15, 2002. (Pet. Ex. 5, p. 8). The functional testing results of the FCE revealed a "light category of work as demonstrated by an occasional floor to knuckle lift of 0 lbs., knuckle to shoulder lift of 10 lbs., **[*16]** shoulder to overhead lift of 0 lbs, and carry of 10 lbs. 100 feet w/pivoting. The client also demonstrated the ability to lift 3 lbs from knuckle to shoulder level frequently and carry 10 lbs. on a frequent basis." (Pet. Ex. 5, P. 38) Furthermore the FCE indicated "Perceived abilities include: sitting 20 minutes, standing 25 minutes, walking 25 minutes, driving - minutes, and lifting 10 lbs. (Pet. Ex. 5, p. 39).

On August 29, 2002, Dr. Haak prescribed light duty restrictions based upon the FCE, and prescribed that Petitioner would not be able to return to being an operating room technician and nurse. (Pet. Ex. 8). Dr. Haak also recommended that Petitioner continue with a home exercise program and prescribed Skelaxin. (Pet. Ex. 8). Petitioner also followed up with Dr. Nuber in October 2002. (Pet. Ex. 5).

Petitioner later was referred by Dr. Vogelmann to Dr. Javad Hekmat-panah, a professor of neurosurgery at the University of Chicago. The first time Petitioner saw Dr. Hekmat-panah was on February 7, 2003. (Pet. Ex. 9). Around February 2003, Petitioner testified that she had continued, excruciating, and shocking back pain that radiated down both legs. She testified that when she would **[*17]** raise her left leg, she felt a shocking pain. She also testified that she continued to be incontinent. Her medical records from the initial visit indicate, "[H]er back pain has increased and it is now to the point that she is not able to walk a block without pain. She said that in the middle of the night, she gets up because of the sharp shooting pain in her back and she cannot lie on a flat surface. She also cannot hold her urine for too long." (Pet. Ex, 9). Dr. Hekmat-panah examined her, reviewed her two MRI's from 1999 and 2001, and prescribed surgery. (Pet. Ex. 9). He also prescribed new MRI scans of the lumbar region, and prescribed flexion and extension x-rays of the lumbar region. (Pet. Ex. 9). The new lumbar MRI was performed at University of Chicago on February 19, 2003. (Pet. Ex. 9).On April 17, 2003, Dr. Hekmat-panah performed the bilateral laminectomy, medial facetectomy, foraminotomy at the level of L2, L3, L4, and L5; on Petitioner's lumbar spine. (Pet. Ex. 9).

After Petitioner's back surgery, Petitioner testified that the shocking pain in her lower back disappeared, and her leg pain Somewhat improved, however she did still have burning in her inner leg and left lower **[*18]** back. Dr. Hekmat-panah examined Petitioner, and prescribed physical therapy, but stopped the therapy when Petitioner complained of back stiffness. (Pet. EX. 9). He also told Petitioner to walk more often.

Petitioner testified that this has been an embarrassing and humiliating experience. She testified that she presently has burning in her low back and legs from sitting. She still has problems holding her urine and often urinates in her clothes. She testified that if she has to reach to hang her coat or clothes, she gets a tingling in the tip of her right shoulder. Her right shoulder and clavicle area still swells with excessive use. When she tries to pick up laundry, her right shoulder aches and pops. Petitioner feels totally restricted. She only can drive short distances because she gets a cramp in her right leg. Her doctor prescribed a cane that she uses to walk; she uses this cane at home as well as outside the home. She tries not to use her right hand and has learned to use her left hand as much as she can. She sometimes feels tingling in her right thumb. Her husband assists with her activities of daily living. He helps her to get dressed and puts on her shoes and her stockings **[*19]** for her. Also, she is unable to reach behind her back to fasten her bra because of her right shoulder. She is hoping to go to Mayo clinic for any additional treatment so she can get some normality in her life.

Michele Zielinsky, the medical staff coordinator of St. Bernard Hospital testified on January 11, 2007. She testified that she had reviewed the July 15, 2002 FCE and that St. Bernard Hospital has jobs within light duty restrictions. She further testified that Petitioner would be unable to return to her previous job as a scrub nurse.

Dr. Scott Kale testified on August 8, 2006 at his evidence deposition. He examined the Petitioner on August 24, 2005 at the request of Petitioner's attorney. Dr. Kale testified that Petitioner injured her lower back at her place of work on 1/31/99, but the pain and any dysfunction that resulted from that injury resolved sufficiently that she returned to work at full duty. (Pet Ex. 15, p.13, In. 10-16). Petitioner then re-injured her back on May 25, 2001 and in addition injured her right wrist and right shoulder on that date. (Pet. Ex. 15, p. 13). Petitioner required surgery to her right wrist, right shoulder and low back and has continued pain in **[*20]** those three areas, shoulder, back, and hand with associated functional abnormalities including weakness and clumsiness. (Pet. Ex. 15, p.13). Dr. Kale opined that the abnormalities described in her right shoulder and right hand are directly related to the May 25, 2001 injury as is their care and treatment thereafter. (Pet. Ex. 15, p.14). Dr. Kale further opined that Petitioner's low back injury of May 25, 2001 is related to that injury, but that it represents an aggravation of her pre-existing condition as opposed to a progressive dysfunction of a previously abnormal back. (Pet Ex.15, p.14). Dr. Kale testified that the May 25, 2001 aggravation caused her to require orthopedic

care and ultimately surgery as on April 17, 2003 she underwent a bilateral laminectomy and foraminal expansion from L-2 to L-5 performed at the University of Chicago by Dr. Hekmatpanah. (Pet Ex. 15, p.9). Furthermore, Dr. Kale testified that the back, right wrist, right shoulder abnormalities including pain and dysfunction are directly related to her May 25, 2001 accident and are permanent (Pet. Ex. 15, p.14)

Dr. Ghanayem testified on November 20, 2006 at his evidence deposition. Dr. Ghanayem examined the Petitioner **[*21]** on two occasions at the request of the Respondent, first on August 7, 2002 and then on July 12, 2006. Dr. Ghanayem opined that Petitioner had radiographic evidence of lumbar stenosis, but the stenosis was a degenerative problem. (Resp. Ex. 1, p. 36). Dr. Ghanayem testified that Petitioner's low back problems were not related to her May 25th, 2001 accident. (Resp. Ex. 1, p. 28) Dr. Ghanayem testified that with regards to her back and allegedly hurting her back while doing shoulder exercises, that the exercises she demonstrated could not cause an aggravation of preexisting spinal stenosis. (Resp. Ex. 1, p. 9) Dr. Ghanayem testified that he has no opinions with regard to Petitioner's shoulder and hand. (Resp. Ex. 1, p. 9)

CONCLUSIONS OF LAW

With regard to issue "F," whether the Petitioner's present condition of ill-being causally related to the injury, the Arbitrator concludes the following:

A clear causal connection exists between Petitioner's right shoulder and right hand injuries and her May 25, 2001 accident. All treating medical records support this causal connection. Dr. Chmell's records indicate, Petitioner "fell at St. Bernard Hospital in the operating room corridor on **[*22]** May 25, 2001 and injured her right shoulder primarily but also her right wrist and hand." (Pet. Ex. 3) His records further state, Petitioner "presents with right shoulder, upper arm, forearm pain and right hand and finger numbness following a May 25, 2001 fall onto her right shoulder. (Pet. Ex. 3) Dr. Nagle's records also indicate that the "patient had no carpal tunnel symptoms prior to the injury of May 25, 2001. She also fell onto her right upper extremity and subsequently developed a carpal tunnel syndrome on the right side. This carpal tunnel syndrome is electrodiagnostically proven. I have opined previously that it is my opinion based on this patient's history that her carpal tunnel syndrome is causally connected to the injury of May 25, 2001." (Pet. Ex. 7)

Dr. Ghanayem gave no opinion regarding Petitioner's shoulder or arm. Dr. Kale testified that there is a direct relationship between the injury of May 25, 2001 and her right hand, wrist, and shoulder; Dr. Kale opined that prior to May 25, 2001, Petitioner had no symptoms and following the trauma on May 25, 2001, she did have symptoms. Dr. Kale opined that the May 25, 2001 injury to her right wrist/hand and right shoulder is **[*23]** a competent cause of her complaints. (Pet. Ex. 15, p.16). This testimony is undisputed and supported by of the treating medical records. (Pet. Ex. 1, p. 8).

The one causal connection issue seemingly in dispute relates to Petitioner's low back. The Arbitrator finds that Petitioner's present condition of ill-being of her low back is related to her May 25, 2001 accident, and not related to her prior injury in 1999. Petitioner testified to one prior injury on January 31, 1999 when she slipped and fell in the St. Bernard Hopital parking lot and injured her lower back. After this injury, Petitioner was able to return to full duty work on March 23, 1999, after a three-month period of conservative care. Furthermore, Petitioner testified that she worked full duty, had no low back pain or symptoms, and received no medical treatment to her low back, from March 23, 1999 until the May 25, 2001 accident. Petitioner testified that when she went to work on May 25, 2001, that her condition of health was very good. Petitioner did not injure any part of her body since May 25, 2001.

Dr. Kale testified that there is no causal relationship between Petitioner's January 31, 1999 accident and her condition **[*24]** of ill-being in relation to her low back; Dr. Kale opined that there was an intervening accident on May 25, 2001 which is the direct cause for Petitioner's current condition. (Pet. Ex. 15, p.15). The treating medical records also support a causal connection between Petitioner's low back injury and her accident of May 25, 2001. The medical records from Little Company of Mary indicate that the Petitioner had "complaints of low back pain and buttock pain which radiates predominantly towards her tight leg and knee. More recently she has had complaints of additional pain occurring in the left leg occasionally. The patient has recently had a right shoulder repair of her rotator cuff as well and all of these complaints and injuries have resulted from a fall that she sustained in an operating room working as a nurse in May 2001." (Pet. Ex. 4) Dr. Chmell's records from December 17, 2001 indicate:

> "After the fall in the operating room she was taken to the out patient department and then referred to emergency room at St. Bernard Hospital - referred to Dr. O'Young. At that time, the presumptive diagnoses were contusions to her shoulder and low back. I do believe that her present diagnoses are **[*25]** causally related to the injuries of that fall. These conditions are and continue to be disabling for patient." (Pet. Ex. 3)

These treating records contain opinions that Petitioner's low back condition and radicular complaints are related to her May 25, 2001 injury.

Furthermore, Petitions testified that her she began to notice her low back pain while in physical therapy and that the activities in physical therapy seemed to worsen her back pain. These opinions are documented throughout the medical records. Dr. Chmell's records from April 15, 2002 also state, "rehab for the right shoulder which involved overhead reaching and weight lifting has lead to an increase in her back and leg pain." (Pet. Ex. 3) On March 4, 2002, Dr. Chmell's records state, "weights in therapy for her right shoulder have injured further her low back - caused increased back pain. ... Her low back condition is particularly challenging. She did have prior low back problems but recovered from them and now with this repeat injury she has gone in the other direction with further deterioration." (Pet. Ex. 3) Her physical therapy notes also document increased low back pain when lifting; her Little Company of Mary Physical **[*26]** Therapy Discharge Summary states, "low back pain - patient continues to complain of low back pain that rates 4/10 on pain scale but increases to 6/10 w/ upper extremity reaching. (Pet. Ex. 4) The Arbitrator notes that although Petitioner began to notice her back problems during the physical therapy activities, that the medical records support a finding that the cause of her back problems was not the physical therapy activity itself, but the fall on May 25, 2001.

Dr. Kale opined that there is a direct relationship between Petitioner's accident of May 25, 2001 and the condition of ill-being that he found related to her low back; the basis for that opinion is the acknowledgment of a capacity to work from January 31, 1999 to May 25, 2001 and then an incapacity to work after May 25, 2001 associated with back pain. (Pet. Ex. 15, p. 16) Dr. Kale testified that the

Petitioner developed back complaints following what he believes to be a reasonable timeframe after the accident. (Pet. Ex. 15, p.31).

Dr. Kale testified that spinal stenosis can be made worse or aggravated or exacerbated by trauma. (Pet. Ex. 15, p.34). Dr. Kale opined that Petitioner's low back injury of May 25, 2001 is related **[*27]** to that injury, but that it represents an aggravation of her pre-existing condition as opposed to a progressive dysfunction of a previously abnormal back. (Pet. Ex. 15, p.14). Dr. Kale testified that Petitioner's symptoms of spinal stenosis were aggravated after the May 25, 2001 accident. (Pet. Ex. 15, p. 42)

The Arbitrator has read the deposition of Dr. Ghanayem and concludes that his opinions are unpersuasive. Dr. Ghanayem was asked academic questions which he was unwilling to answer. His answers were unresponsive, evasive, argumentative, and generally unhelpful to the truth finding process; thereby exhibiting bias. The Arbitrator finds that the evidence supports a finding of a causal connection between Petitioner's May 25, 2001 accident and the condition of ill-being of her right shoulder, right hand, and low back.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary, the Arbitrator concludes the following:

All treating medical records, (Pet. Ex. 1-9), support a finding as to the reasonableness and necessity of medical care rendered as well as liability therefore. Dr. Kale testified that Petitioner's medical treatment as **[*28]** contained in her medical records and throughout her history was reasonable and necessary. (Pet. Ex. 15, p.20). Dr. Kale further testified to the reasonableness and necessity of the bills entered into evidence via stipulation by the parties. (Pet. Ex. 15, pp.21 and 28). Accordingly, the Arbitrator concludes that the medical treatment that Petitioner received constitutes reasonable and necessary care. Respondent is responsible for and shall pay to the Petitioner the sum of $ 40,146.72 for outstanding unpaid medical bills. (Pet. Ex. 10-13).

With regard to issue "K", the amount of compensation is due for Temporary Total Disability, the Arbitrator concludes the following:

The Arbitrator finds that Petitioner is entitled to 64 6/7 weeks of Temporary Total Disability. Temporary total disability has been defined as that condition which exists from the time an injury incapacitates an employee for work until such time as he is as far recovered or restored as the character of the injury will permit. Brinkmann v. Industrial Commission, 82 Ill. 2d 462, 467, 413 N.E. 2d 390, 392, 45 Ill. Dec. 912 (1980). To prove a temporary total **[*29]** disability claim, the employee must show not only that he did not work but that he also was unable to work. Schmidgall v. Industrial Commission, 268 Ill. App. 3d 845, 848, 644 N.E. 2d 1206, 206 Ill. Dec. 153 (4th Dist. 1994). The medical records (Pet. Ex. 1-8), establish that her treating doctors had Petitioner off work until at least August 21, 2002. Petitioner is entitled to Temporary Total Disability for that period in which her doctors determined that she was incapacitated.

Although the Petitioner testified that she retired from her job at St. Bernard on June 22, 2001, the fact that Petitioner retired does not preclude a finding that the Petitioner was temporarily and totally disabled during that period of time. In Schmigdall v. Industrial Commission, the Court held that the Commission improperly concluded temporary total disability benefits automatically terminated on the date of the claimant's retirement. Schmigdall, 268 Ill. App. 3d at 849 (4th Dist. 1995). In Schmigdall, the court extended the payment of Temporary Total **[*30]** Disability benefits past the date of retirement until claimant was as far recovered as his injuries would permit Id. The Court held claimant did not voluntarily remove himself from the work force, rather, it was his doctor. Id. The Court stated that the receiving of retirement benefits did not mean claimant had been released to return to work Id. Therefore, in accordance with Schmigdall, Petitioner's Temporary Total Disability benefits were rightfully extended after the date of resignation while her treating doctors prescribed Petitioner off work.

Furthermore, although Petitioner retired from St. Bernard Hospital, she testified that she was not planning on retiring overall. Petitioner testified that she had planned to work elsewhere and assist with eye cases. However, based on the totality of Petitioner's injuries, she was unable to return to work as a scrub nurse. The Arbitrator concludes that the Petitioner has proven by a preponderance of the evidence that she was temporarily and totally disabled from May 25, 2001 through August 21, 2002 and entitled to TTD benefits during that period of time.

With regard to issue "L", the nature and extent of the injury, the [*31] Arbitrator concludes the following:

Based on the medical records, the testimony of the Petitioner, and deposition testimony of the Section 12 examining doctors, the Arbitrator finds that Petitioner has extensive permanent partial disability to her right shoulder, right hand, and lower back. Dr. Kale further that the present condition of ill-being to Petitioner's right wrist, right shoulder, and low back are all permanent in nature. (Pet. Ex. 15, p.19).

With regards to Petitioner's right shoulder, Dr. Nuber performed an arthroscopy, debridement of humeral head, debridement of stump of biceps, subacromial decompression, co-planing of distal clavicle and arthroscopic rotator cuff repair using arthrex bio-corkscrew anchors on Petitioner's right shoulder at Northwestern Memorial Hospital. (Pet. Ex. 6). Dr. Nuber noted that Petitioner had a rotator cuff tear that was crescent in nature and measured about 2 to 3 cm long. (Pet. Ex. 6).

After the surgery, Petitioner testified that she has some residual problems with her right shoulder. Petitioner testified that when she tries to pick up laundry, her right shoulder aches and pops. Her right shoulder and clavicle area still swells with excessive **[*32]** use. She testified that if she has to reach to hang her coat or clothes, she gets a tingling in the tip of her right shoulder. She also testified to pain in the shoulder and that she is unable to reach behind her back to fasten her bra. (Pet. Ex. 5).

Dr. Kale's physical exam showed, "the range of motion of her right shoulder was lacking 25 degrees at elevation and lacked 10 degrees of internal and external rotation." (Pet. Ex. 15, p.11). "The range of motion of her right shoulder, which was the shoulder injured on the May 25, 2001 accident is abnormal and is consistent with the degree of injury she experienced in the shoulder and then subsequent surgery." (Pet. Ex. 15, p.12) Based on Dr. Kale's exam, as well as Dr. Nuber's treating records, (Pet. Ex. 5), the Arbitrator determines that Petitioner is entitled to 40% loss of use of Petitioner's right arm.

With regards to Petitioner's right hand, Petitioner's EMG/Nerve Conduction Study was suggestive of a severe right median sensory and motor compressive mononeuropathy across the carpal, tunnel with evidence of demyelination, clinically consistent with and advanced carpal tunnel syndrome. Dr. Nagle performed an attempted endoscopic convicted **[*33]** to open, carpal tunnel release at Northwestern Memorial Hospital. (Pet. Ex. 6). Petitioner testified to residual pain and problems from this injury, Petitioner testified that she tries net to use her right hand and has learned to use her left hand as much as she can. She sometimes feels tingling in her right thumb. Dr. Kale indicated that Petitioner claims that she is "unable to engtige in fine motion with respect to her right hand or

overhead motion with respect to her right shoulder, in deference to both carpal tunnel and to rotator cuff disease respectively." (Pet. Ex. 15, p.8) Dr. Kale's examination indicates that Petitioner has "persistent numbness in distribution of the median nerve of the right hand," (Pet. Ex. 15, p.10). Furthermore, Dr. Kale's, physical exam demonstrated, "reduction in strength in the right hand and clumsiness in her right hand with respect to fine motion, but normal in her left hand." (Pet. Ex. 15, p.11) Based on Dr. Kale's exam, as well as Dr. Nagle's treating records, (Pet. Ex. 6), the Arbitrator determines that Petitioner is entitled to 25% loss of use of Petitioner's right hand.

With regards to Petitioner's low back, Petitioner underwent a bilateral **[*34]** laminectomy, medial facetectomy, foraminotomy at the levels of L2, L3, L4, and L5 Petitioner testified that she presently has burning in her low back and legs from sitting. She still has problems holding her urine and often urinates in her clothes. Her husband assists with her activities of daily living. He helps her to get dressed and puts on her shoes and her stockings for her. Dr. Kale indicated that Petitioner is "unable to stand, walk, or weight-bear for prolonged periods of time in direct relation to her low back pain." (Pet. Ex. 15, p. 8). Dr. Kale testified that Petitioner had complaints of "low back pain on a constant basis and associated with intermittent radiation of pain into the right or left lower extremity." (Pet. Ex. 15, p. 9). Dr. Kale's physical exam indicated an abnormal range of motion of the lumbar spine, and weakness in her lower extremities. (Pet. Ex. 15, p.12)

Petitioner testified that prior to her injury of May 25, 2001, as a scrub nurse, she used to be able to work on special surgical cases for more than 8 hours without breaking. She testified that she would be required to stand and pass instruments for 7-9 hours straight without breaks. Sometimes, Petitioner **[*35]** would perform more than one surgery in a day and she would be on her feet passing instruments for 16-18 hours. Petitioner testified that she was also required to pull cases and equipment prior to the surgeries; the orthopedic cases weigh between 10-15 lbs and the neurosurgical cases can weight approximately 20 lbs. Petitioner was also required to pick up and transport patients as a part of her job duties. The FCE's Occupational history indicates that the most physically demanding task of Petitioner's job involved assisting members of the surgical team in moving and transporting patients. (Pet. Ex. 5).

Petitioner had the FCE performed at Healthsouth on July 15, 2002. (Pet. Ex. 5, p. 38). The functional testing results of the FCE revealed a "light category of work as demonstrated by an occasional floor to knuckle lift of 0 lbs., knuckle to shoulder lift of 10 lbs., shoulder to overhead lift of 0 lbs, and carry of 10 lbs. 100 feet w/pivoting. The client also demonstrated the ability to lift 3 lbs from knuckle to shoulder level frequently and carry 10 lbs. on a frequent basis." (Pet. Ex. 5, p. 38). The results of this evaluation indicate that Petitioner was working to maximum abilities. **[*36]** Furthermore the FCE indicated "Perceived abilities include: sitting 20 minutes, standing 25 minutes, walking 25 minutes, driving - minutes, and lifting 10 lbs. (Pet. Ex. 5, p. 38).

Petitioner's treating doctors and both IME's opine that Petitioner cannot return to her employment as a scrub nurse. Dr. Haak indicated on August 29, 2002, "her described work as an operating room technician and nurse would probably not be possible given that she must also participate with moving sets as well as helping patients on and off the gurneys and beds." (Pet. Ex. 8), Dr. Kale opined that Petitioner; cannot return to work as a scrub nurse based on the totality of her injuries. He indicated that:

> It's a job that requires standing. It's a job that requires manual dexterity in the process of delivering instruments or other materials to the surgeons. My physical examination demonstrated that she has difficulty with standing, has difficulty with the facil use of her right upper extremity including her hand and shoulder. So she would not be reliable for passing instruments or standing for prolonged periods of time. (Pet. Ex. 15, p.17)

Dr. Kale further testified that Petitioner's inability to return **[*37]** to work as a scrub nurse is solely related to her injures from the May 25, 2001 accident. (Pet. Ex. 15, p.30, In. 18-24). Dr. Ghanayem testified at his deposition that on July 12, 2006, he noted Petitioner had some residuals from her lumbar stenosis surgery in the way of some bladder dysfunction and residual leg symptoms. He also noted on that date that Petitioner is now at a point in her life where she is fairly debilitated and has multiple medical problems that may translate into a medical disability from her returning back to work. (Pet. Ex. 1, p. 52) Based on the Petitioner's testimony, Dr. Kale's exam, the treating medical records, (Pet. Ex. 3, 4, 8, 9), and pre-surgical FCE results indicating Petitioner can only perform in a light duty capacity and is unable to perform her usual and customary occupation as a scrub nurse, the Arbitrator determines that Petitioner is entitled to 30% loss of use of person as a whole with regards to her low back.

CONCURBY: NANCY LINDSAY

DISSENTBY: NANCY LINDSAY

DISSENT: While I concur with the Majority regarding its decision on temporary total disability benefits, I respectfully disagree with its findings on causal connection between Petitioner's work injury and her low back complaints. **[*38]** In so finding, the Majority has determined that "the physical therapy Petitioner underwent in early 2002 for her shoulder injury aggravated her condition of ill-being in her low back". This finding, however, is contrary to the manifest weight of the evidence. Petitioner did not aggravate her low back condition at that time. Petitioner was already treating for her low back condition and had been doing so since July 30, 2001. Nevertheless, the evidence fails to support a finding of causal connection.

The initial emergency room records do not record any low back complaints nor did Petitioner denote any low back complaints on the anatomic drawing. The accident report fails to indicate any low back complaints. At arbitration, Petitioner testified that after her accident on May 25, 2001, she underwent physical therapy. Petitioner further testified that she had undergone about three weeks of therapy for her right shoulder when she began to notice new complaints of pain in her back, lower left side, and buttock. T. 31-33, 79-80. She testified that she told both the therapist and Dr. O'Young about her complaints. However, neither Dr. O'Young's nor the physical therapist's notes corroborate **[*39]** Petitioner's testimony. Petitioner further testified that by the time she saw Dr. Chmell in July of 2001, she was experiencing almost unbearable hand pain and lower back pain. Petitioner then underwent shoulder surgery in October of 2001, which was followed-up by a round of therapy for her low back and shoulder. During that therapy in late 2001 and early 2002 Petitioner testified that her back was in almost unbearable pain. Thus, any complaints she experienced in her low back during therapy in the Spring of 2002 were simply a continuation of these already existing symptoms and complaints and not a new aggravation. However, Petitioner's testimony as to when those symptoms began still isn't credible.

Between July 30, 2001, and the date of arbitration, Petitioner gave inconsistent histories as to how and when her back complaints began. To some doctors, she attributed her low back complaints to her fall at work. To others, such as Dr. O'Young, she mentioned a window incident. When admitted for surgery in May of 2003, a ten year history of low back problems is noted. Then, at trial, she

relates it to her first round of physical therapy post-accident. The objective medical evidence in this **[*40]** record fails to corroborate Petitioner's testimony. The inconsistencies in her testimony and the histories provided to the various physicians undermine her credibility.

In addition to credibility problems with Petitioner's testimony, none of the Petitioner's physicians rendered credible opinions on causal connection. While Dr. Kale testified that the accident on May 25, 2001, was the direct cause of Petitioner's low back condition, the history Petitioner provided to him is inconsistent with her arbitration testimony. Dr. Chmell's records from December 17, 2001, contain a causal connection opinion; however, it, too, is based upon incorrect information. Dr. Kale was under the opinion that Petitioner's back complaints began within weeks of the accident. A review of the medical records clearly shows that is not the case. Dr. Chmell's opinion is based upon the information Petitioner gave him during a visit when she specifically indicated she wished to clarify the record on which of her problems were causally related to the accident and she provided the doctor with incorrect information. Contrary to what Dr. Chmell recorded from Petitioner on that day, Dr. O'Young never diagnosed Petitioner **[*41]** with a low back contusion. Furthermore, Dr. Chmell never independently reviewed Dr. O'Young's records to determine the accuracy of Petitioner's new history. Petitioner has the burden of proving that her current condition of ill-being in her low back is causally related to her work injury. Such a finding must be based upon credible evidence. Petitioner failed to meet her burden of proof on the causation issue between her work accident and her low back condition. For these reasons, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **"interstate scaffolding"** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, December 22, 2009 - 4:18 PM EST

*2009 Ill. Wrk. Comp. LEXIS 345, *; 9 IWCC 0332*

DOUGLAS WATTS, PETITIONER, v. INGALLS MEMORIAL HOSPITAL, RESPONDENT.

NO: 08WC27512 09 IWCC 332

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 345; 9 IWCC 0332

April 7, 2009

CORE TERMS: arbitrator, terminated, temporary total disability, termination, wonders, physical therapy, written request, right shoulder, offensive, surgery, permanent disability, temporary, notice, amount of compensation, present condition, disputed issues, medical care, reprehensible, inclusive, ill-being, troubling, disabling, causally, happened, relieved, shoulder, unpaid, accrue, admit

JUDGES: Molly C. Mason; Yolaine Dauphin; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of the extent of temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, and in reliance on **Interstate Scaffolding,** Inc. v. IWCC, 385 Ill.App.3d 1040 (3rd Dist. 2008), the Commission affirms and adopts the Decision of the Arbitrator. The Commission acknowledges that the Illinois Supreme Court very recently (March 25, 2009) allowed a petition for leave to appeal in **Interstate Scaffolding** but views the case as controlling law as of this writing.

IT IS **[*2]** THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 6, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Dated: APR 7 2009

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application* **[*3]** *for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Lammie**, arbitrator of the Commission, in the city of **Chicago**, on **October 7, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the were the petitioner's age at the time of the accident?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On **March 28, 2008**, the respondent **Ingalls Memorial Hospital *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the **[*4]** petitioner earned $ **21,174.40**; the average weekly wage was $ **407.20**

. At the time of injury, the petitioner was **41** years of age, **single** with **1** children under 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, $ **542.92** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **271.47**/week for **2** weeks, from **5/6/08** through **5/19/08 inclusive**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **See narrative** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

. In no instance shall this award be **[*5]** a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue froth the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

November 5, 2008

Date

Findings of Fact, and Conclusions of Law

In regard to issue F: "Is the petitioner's present condition of ill-being causally related to the injury?", the Arbitrator makes the following findings:

The petitioner's present condition of the ill-being is causally related to the injury. In support of that finding, the Arbitrator notes the following testimony and evidence.

The **[*6]** testimony of the petitioner is that prior to March 28, 2008, he had no problem with his right shoulder. On that date, he testified that while mopping for the respondent, his mop got stuck. In an effort to free it, he felt a "pop" or "snap" in his right shoulder. He immediately received care and treatment at the respondent's Occupational Health Department (PX 1). The medical records in evidence refer to the incident at work on March 28, 2008 (PX 1, 2, 4, 5, 6, and 8). The respondent's witnesses who testified at the hearing, and the respondent's exhibits, did not offer any contrary evidence in this regard.

In regard to issue J: "Were the medical services that were provided to the petitioner reasonable and necessary?", the Arbitrator makes the following findings:

The medical services that were provided to the petitioner were reasonable and necessary. In support of that finding, the Arbitrator notes the following testimony and evidence.

The petitioner testified that he received medical care and treatment for his shoulder injury from orthopedic surgeon Daniel T. Weber at Integrity Orthopedics. This care and treatment provided by Dr. Weber began on April 18, 2008, and the petitioner's **[*7]** last visit with the doctor prior to the hearing was August 27, 2008. The testimony of the petitioner is supported by the records from Integrity Orthopedics (PX 2). There remains a claimed balance due Dr. Weber in the sum of $ 105.00 (PX 3).

The petitioner has further testified that he underwent shoulder surgery at Ingalls hospital on May 6, 2008. Surgery was performed by Dr. Weber. The petitioner's testimony in this regard is supported by the records of Dr. Weber (PX 2) and the records from Ingalls hospital (PX 6). The claimed unpaid bill for the petitioner's right shoulder surgery from the hospital is the sum of $ 15,997.48 (PX 7).

The petitioner has also testified that he received physical therapy at Ingalls hospital from April 3, 2008 to October 2, 2008. The petitioner's testimony as to physical therapy is supported by the records from Ingalls physical therapy department (PX 8). The unpaid balance claimed for physical therapy at Ingalls is the sum of $ 1,264.00 (PX 9).

However, it was stipulated at the time of the trial that if any of the claimed bills have been paid by the respondent, in whole or in part, then the respondent shall receive credit for such payments so that there **[*8]** is no double recovery. The respondent has advised by means of its proposed findings that payments have in fact been made in full.

Documentation of that should be provided to the petitioner, and if there are any unpaid balances remaining, payment should be made to the petitioner, pursuant to the fee schedule or agreement.

In regard to issue K: "What amount of compensation is due for Temporary Total Disability?", the Arbitrator makes the following findings:

The petitioner was temporarily, totally disabled for 2 weeks, representing the period of May 6, 2008 through May 19, 2008 inclusive. In support of that finding, the Arbitrator notes the following testimony and evidence.

The period of TTD noted above is not in dispute, and by stipulation, has been paid. The period of TTD claimed, and in dispute, begins with June 21, 2008 and runs through the date of trial (October 7, 2008).

The petitioner was terminated on June 20, 2008, allegedly for good cause. Therefore, in light of the recent case of **Interstate Scaffolding** v. the Industrial Commission IllDec , IllAp3 , NE2nd , 3-07-0801 WC (2008) decided by the Illinois Appellate Court, **[*9]** the Arbitrator feels that he has no choice but to deny the petitioner's claim for TTD benefits beginning with June 21, 2008. In support of that finding, the Arbitrator notes the following testimony and evidence.

There are several troubling aspects to this case. The Arbitrator acknowledges that the petitioner does admit that he said the thing claimed, however, not in those exact words. He also claims it was all a misunderstanding. But even if he did what the respondent claims, one wonders whether that behavior rises to the level that warrants immediate termination, or whether this was merely a convenient situation for the respondent. The comment was reported on June 12th, but the petitioner was not confronted about it until June 16th. Then, after the respondent's people conferred with "legal", the petitioner was terminated on June 20th.

As reprehensible as the claimed statement was, it was addressed to Susan Greiss, who admitted on cross examination that she did not feel harassed by it. It was not until she reported the comment to Lori Ohern, the alleged subject of the comment, that offense was taken. Surely, the petitioner did not intend for Ms. Ohern to hear whatever it was **[*10]** he said. He maintains it was not even about her. One then wonders why Nurse Greiss told Ms. Ohern about this, but did not report it to her supervisors first, especially since she claims this was not the first time the petitioner acted in an offensive manner (which was denied . by the petitioner). One also wonders why the petitioner felt comfortable making that statement to Ms. Greiss. If his version of the incident was correct, there is ample reason for Ms. Greiss to be less than truthful about what actually happened.

In any event, even if the petitioner's version is correct, what he said is still reprehensible. The petitioner should have been subjected to some form of discipline.

But there was no damage to property here as in **Interstate Scaffolding.** There was no harmful or offensive touching. There was no threatening or intimidating behavior. There was no assault. Without meaning to minimize what happened, it was offensive language, not conduct, and all parties agree it was not aimed directly at Ms. Ohern. If Ms. Greiss had not repeated it to her, there would have been no offense taken by Ms. Ohern.

Susan Klosak testified for the respondent regarding expectations of the **[*11]** employees' behavior, standards of service, respect, etc. There was also testimony that ordinarily, a person would first be warned orally and/or in writing. There were steps to the disciplinary proceedings. However, if the behavior was really egregious, they could jump to immediate termination as they did here. It was admitted that the petitioner worked for the respondent for about six years, and was a good employee without any problems until this occurrence. One then wonders why he was not then given a warning and/or a suspension without pay instead of being immediately terminated.

On the other hand, the petitioner did not fight the termination. He merely accepted it. He could have disagreed and filed a grievance. He did not. One also wonders why not. The respondent argues it shows that the petitioner admits his guilt. The Arbitrator refuses to go that far. There are several other interpretations. But the petitioner's silence is troubling.

In any event, after the termination the respondent declined to pay TTD benefits on the argument that the petitioner had taken himself out of the work force through his own behavior. This matter came to be heard on that issue.

The Arbitrator has **[*12]** closely read and considered the **Interstate Scaffolding** (supra) case, which was decided 3-2, and the Arbitrator would prefer more information as suggested in Justice Dixon's dissent. Would a similar employee who was not on light-duty have been terminated under the same circumstances, without one of the less severe steps being taken first? This case was tried before **Interstate Scaffolding** was published, and so there is no evidence in the record about that. But the majority decision does not require it in any event. In the absence of that, however, it is possible that the respondent merely took advantage of the situation, terminated the petitioner, and cut off their liability for future TTD benefits.

In any event, the Arbitrator has no jurisdiction to resolve employment disputes. He is not empowered by the **Interstate Scaffolding** case to make inquiries along those lines, because apparently it is not considered relevant. As indicated above, the Arbitrator then feels he has no choice but to follow the Court's lead.

The respondent is relieved of it's obligation to pay TTD after the termination of the petitioner's employment for cause. Buy they are not relieved of their **[*13]** obligation to provide medical care.

In regard to issue L: "Should penalties or fees be imposed upon the respondent?", the Arbitrator makes the following findings:

Penalties and fees shall not be imposed upon the respondent. In support of that finding, the Arbitrator notes the following testimony and evidence.

The respondent's position was that the petitioner took himself out of the workforce by being terminated for cause while on light duty.

There was a reasonable basis for the respondent to adopt that position, and their position has now been vindicated by the **Interstate Scaffolding** case.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **"interstate scaffolding"** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, December 22, 2009 - 4:17 PM EST

*2009 Ill. Wrk. Comp. LEXIS 303, **

ONIS BAIZE, PETITIONER, v. ISAACSON CONSTRUCTION, RESPONDENT.

NO: 05WC33182 09 IWCC 293

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCLEAN

2009 Ill. Wrk. Comp. LEXIS 303

March 30, 2009

CORE TERMS: elbow, ankle, pain, deposition, leg, tailgate, temporary total disability, accident report, undisputed, truck, overtime, medical treatment, causally, physical therapy, symptoms, doctor, admissibility, opinion evidence, connected, treating, opined, radiculopathy, herniation, nerve, surgery, physical examination, great deal, left leg, cross-examination, mandatory

JUDGES: Yolaine Dauphin; Nancy Lindsay; Molly Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the parties herein and due notice given, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, benefit rates, temporary total disability and admissibility of Dr. Stroink's opinion, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical expenses or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

Petitioner's Testimony

Petitioner, a 52 year old truck driver at the time of the accident, testified that he injured his right elbow, left ankle, back and left leg at work on April 5, 2005. Petitioner described the accident on April 5, 2005, as follows:

> "I raised the [truck] bed and I dumped the gravel out and it's 3/8 chips **[*2]** wet, so we have to bang the tailgate to get the rest of the gravel out ***. So I banged my [right] elbow and knocked--
>
> ***
>
> Q. When you were knocked to the ground, how did you land?
>
> A. My left ankle give [*sic*] way and I landed on my back."

Petitioner noticed pain in his elbow and low back. The pain in his back radiated down to the ankle. Petitioner finished his shift. The following day, he reported the accident to his supervisor, Steve Clark, and filled out "most" of the accident report, describing the injury to his elbow, but not his back. He explained that he did not fully complete the accident report because Mr. Clark was ill.

Petitioner continued to work on regular duty even though he felt a great deal of pain in his ankle and back. He spoke with Mr. Clark about seeing a company doctor, but Mr. Clark failed to arrange that. Also, Petitioner spoke with Jan Carlson in the insurance office, who advised him to see his own doctor.

Petitioner's employment with Respondent ended on June 8, 2005, after he refused to drive an "unsafe" truck. The very same day, he was offered and accepted a job with another employer, Price Trucking.

On June 16, 2005, Petitioner began treating with **[*3]** Dr. Lawrence Li. Petitioner made an initial appointment with Dr. Li at least a couple of weeks before June 16, 2005. During the first visit, Petitioner told Dr. Li that he had pain in his elbow, back, buttocks and ankle. When Petitioner attended physical therapy, he also reported back and leg pain. After Dr. Li took him off work on July 12, 2005, Petitioner took the off work slip to his former attorney, who advised him to update the accident report. Petitioner followed the advice and added a back injury to the accident report.

In August of 2005, Dr. Li referred Petitioner to Dr. Won Heum Jhee, who in turn referred Petitioner to Dr. Emilio Nardone, a neurosurgeon. On October 17, 2005, Petitioner was examined by Dr. Stephen Pineda at the request of Respondent's workers' compensation carrier. After the examination, Respondent's workers' compensation carrier denied authorization to see Dr. Nardone. On December 13, 2005, Petitioner consulted Dr. Ann Stroink, [1] who recommended back **[*4]** surgery and referred Petitioner to Dr. Jhee for pain management. On March 1, 2005, Petitioner underwent back surgery. After undergoing physical therapy, Petitioner was released to work on June 6, 2006.

Shortly after being released to work, Petitioner was offered a part-time job as a janitor. After Petitioner worked a few hours, his supervisor terminated him, stating that he could not perform the job. Petitioner explained that he felt a great deal of pain when he tried to perform the job. Petitioner last saw Dr. Jhee on August 14, 2007, and scheduled a follow-up appointment.

Petitioner testified regarding his current condition that he is in a great deal of pain most of the day. He can perform some house chores, like doing the laundry, but takes breaks. Petitioner lies down to relieve the pain and rests every few hours. Petitioner still has pain in his elbow and ankle, and weakness in his leg.

Regarding his average weekly wage, Petitioner testified that his hourly wage with Respondent was $ 11.00, and he worked a great deal of overtime. He explained that he regularly worked overtime in order to complete his job duties. He elaborated that in the morning, Respondent assigned him a number **[*5]** of runs. After completing the runs, Petitioner readied his truck for the following day and completed paperwork. He typically worked 11 to 12 hours a day, five days a week. Occasionally, he worked half a day on Saturday. During the winter months, Petitioner worked significantly less because of the weather.

On cross-examination, Petitioner conceded that after June 8, 2005, he worked for Price Trucking without any restrictions for five or six weeks at an hourly wage of $ 15.00. He worked full-time hours, plus overtime. Further, Petitioner conceded that between April 5, 2005, and June 8, 2005, he did not see a doctor and worked for Respondent without restrictions. Petitioner explained that he did so because he was afraid of losing his job. After Petitioner left Respondent's employ, he filed an OSHA grievance articulating his concerns about the condition of the truck.

Petitioner reiterated that he did not fully complete the initial accident report because Mr. Clark took it from him before he finished. Petitioner explained that Mr. Clark felt ill and wanted to leave. Petitioner agreed that he completed the second incident report on July 22, 2005.

Lastly, Petitioner was questioned about **[*6]** a surveillance videotape of him taken September 30, 2005. He acknowledged that the tape depicted him lifting and carrying some things.

On redirect examination, Petitioner testified that after the accident, his elbow hurt a great deal. The pain in his back and leg worsened over time. Regarding the surveillance footage, he explained that he carried half a case of Pepsi and a "fake" brass bed weighing 15 pounds. The surveillance photographs were admitted into evidence at arbitration.

TESTIMONY OF RESPONDENT'S WITNESSES

Dennis Backlund

Mr. Backlund, another truck driver with Respondent, testified that on April 5, 2005, Petitioner stated that he bumped his elbow, but did not mention any other injury.

On cross-examination, Mr. Backlund testified that he worked ten to 12 hours a day in order to get his work done, and stated that most other drivers did the same.

On redirect examination, Mr. Backlund denied that overtime was mandatory. The following colloquy then occurred:

> "Q. Are they going to fire you or reprimand in any way if you refuse to work overtime?
>
> A. Not yet."

On recross examination, Mr. Backlund agreed that if he wanted to work an eight-hour day, he generally had to ask **[*7]** permission ahead of time.

Steve Clark

Mr. Clark, supervisor of truck drivers, testified that at the end of the day on April 5, 2005, Petitioner stated he hurt his elbow slamming a tailgate. Mr. Clark gave to Petitioner an incident report form and left the office. When he came back, the form was filled out. Mr. Clark denied taking the report out of Petitioner's hand and walking away. When Mr. Clark discussed the accident with Petitioner on April 5 or April 6, 2005, Petitioner did not mention injuring his back, leg or ankle. On two more occasions, Mr. Clark followed up with Petitioner regarding his injuries. Two days after the accident, Mr. Clark asked Petitioner how his arm was doing. Petitioner responded that his arm was sore, but felt well enough to drive. He did not ask to see the company doctor and did not mention any other complaints. Approximately two weeks after the accident, Mr. Clark spoke with Petitioner again. Petitioner stated that he did not think he needed to see a doctor and did not mention any problems with his back, leg or ankle. Mr. Clark confirmed that after the accident, Petitioner continued to work on regular duty, including overtime "when available," and did **[*8]** not take any time off work. Mr. Clark denied that overtime was mandatory and stated that employees may refuse to work overtime without adverse employment consequences.

Regarding the circumstances surrounding the end of Petitioner's employment with Respondent on June 8, 2005, Mr. Clark testified that Petitioner quit after refusing to drive a truck he did not like. Mr. Clark denied that Petitioner told him the truck was unsafe. Further, Mr. Clark testified that OSHA, which investigated Petitioner's complaint, did not find the truck unsafe.

Brian Reckers

Mr. Reckers, who did estimating and billing work for Respondent and occasionally handled secretarial duties, testified regarding the second incident report:

> "A month or two after [Petitioner] quit [Respondent's employ], he called the office and I talked to him. He needed to change his story. He said that he didn't--something in the capacity he didn't fill out his report correctly or completely first time, so he needed to fill out a new report and change some things."

After speaking with Petitioner, Mr. Reckers left a new incident report form with the receptionist for Petitioner to pick up.

Todd Isaacson

Mr. Isaacson, Respondent's **[*9]** current owner, testified that his father owned the company in April of 2005. Mr. Isaacson testified consistently with Mr. Clark that on June 8, 2005, Petitioner refused to drive a truck and quit his employment with Respondent. Also, Mr. Isaacson denied that overtime was mandatory and stated that there were no adverse employment consequences for refusing to work overtime.

On cross-examination, Mr. Isaacson testified that it usually took Petitioner 12 hours to complete his work for the day. He confirmed that if an employee wished to work an eight hour day, he needed to make a request in advance.

Accident Reports and "Injury Report Confirmation"

Respondent introduced into evidence an accident report dated April 6, 2005, and amended report dated July 22, 2005. In the initial report, Petitioner stated that a tailgate hit his arm and elbow, injuring them. He mentioned no other injuries. In the amended report, Petitioner stated that he injured his right arm and elbow, left ankle and leg, and low back. He explained that a tailgate struck his right arm and elbow, knocking him to the ground. Further, Petitioner stated that his first report was not complete and was taken from him before **[*10]** he was done.

Also, Respondent introduced into evidence an "Injury Report Confirmation" signed by Mr. Reckers on behalf of Respondent. In the document, Respondent acknowledged the injury to Petitioner's elbow was work-related. Mr. Reckers completed the report after an inquiry from Dr. Li's office, and faxed it to Dr. Li's office on June 22, 2005.

Wage Records

Both parties introduced into evidence wage records from Respondent, which are consistent with Petitioner's testimony.

Medical Records

The intake records from Dr. Li's office show that on June 16, 2005, Petitioner reported suffering an injury to his right elbow and left ankle approximately 1 month earlier, and explained that he twisted his left ankle when a 600-pound tailgate hit his right elbow. Petitioner complained that the pain from the ankle radiated up to his buttocks. In an intake questionnaire, also dated June 16, 2005, Petitioner reported injuring his right elbow, left leg and ankle, *and back*, in May of 2005, giving the following description of accident: "Tailgate hit [elbow] knocked to ground twisting leg + ankle (left)." Petitioner was examined by Dr. Li's physician's assistant, who noted that he sought treatment **[*11]** for injuries to his right elbow and left ankle and gave a history of 600-pound tailgate striking him in the right elbow and causing him to fall down. Petitioner explained that he twisted his ankle when he fell. On physical examination, Petitioner's low back was nontender. Straight leg raise test was negative. X-rays of the ankle showed an avulsion fracture fragment distal to the distal fibula. X-rays of the elbow and left foot were negative. Petitioner was prescribed physical therapy for his ankle.

The initial physical therapy reports dated July 11, 2005, reflect that Petitioner gave a history of trailer tailgate striking his right elbow and causing him to fall and injure his left ankle. Petitioner's chief complaint was left ankle "sprain." However, Petitioner also stated the pain from his left foot and ankle radiated upward to his buttock. In the initial evaluation, the physical therapist noted that Petitioner complained of pain from his back down to his ankle and reported his back "catches" unexpectedly throughout the day. Petitioner also mentioned having difficulty straightening his back from a bent position.

On July 12, 2005, Dr. Li took Petitioner off work "until follow up in **[*12]** 3wks." On July 14, 2005, Petitioner reported that his elbow felt much better, but he still had significant problems with his ankle. Dr. Li did not record any back complaints. On August 4, 2005, Petitioner reported no improvement in his elbow and ankle pain. Dr. Li's physician's assistant noted, "He is also having worsening back pain since having his accident at work. He has had no evaluation for this." On physical examination, Petitioner had a full range of motion in his elbow and no significant tenderness. Tinel's test of the elbow was positive. Examination of the ankle was unremarkable. Examination of the left foot revealed mild tenderness with palpation of the posterior and lateral aspects of the calcaneus and in the proximal fifth metatarsal region. Petitioner was referred to Dr. Jhee for evaluation of his back pain. Dr. Li took Petitioner off work "until next appointment on 8/15/05." On August 15, 2005, Dr. Li noted that an EMG performed August 8, 2005, showed no cubital tunnel syndrome. Dr. Li took Petitioner off work until August 17, 2005. An MRI performed August 17, 2005, showed "[s]ignificant degenerative disc disease at L4-L5 and L5-S1 level. In particular there is a moderate **[*13]** sized left paracentral disc herniation at L5-S1 level which narrows the left lateral recess and may clinically translate into left S1 radiculopathy."

Petitioner began treating with Dr. Jhee on August 16, 2005. In his initial evaluation report, Dr. Jhee noted the following history:

> "The patient states that he hit the tailgate of the truck with his right elbow on 4/05/05 and at the time he fell to the ground and landed on his back. Since then he has been suffering from right elbow pain as well as low back pain. Currently the low back pain is rather constant. It is about 8-9/10 on pain scale. It frequently radiates to the left lower extremity.

> This is also associated with tingling and numbness sensation of the left lower extremity, mostly around the ankle and foot area. *** The patient also states that he twisted his left ankle and every time he walks he feels as if he is stepping on a rock."

Dr. Jhee noted that an EMG showed no evidence of right elbow pathology. On physical examination, Petitioner had moderate tenderness in the left SI joint. SI joint movements were consistently limited on the left side. Mild tenderness was also noted in the left gluteal region. Straight leg raise **[*14]** test was negative. Left ankle jerk was absent. Calf circumference on the left was an inch less than on the right. Dr. Jhee diagnosed status post lumbosacral strain, left S1 radiculopathy, left SI joint dysfunction, and status post contusion of the right elbow. An EMG performed August 23, 2005, showed moderately advanced left S1 radiculopathy.

On December 13, 2005, Petitioner saw Dr. Stroink and was also examined by a resident, Dr. Solomon. Petitioner complained to Dr. Solomon of low back pain radiating down the left leg to the toes, and gave a history of injury at work on April 5, 2005. He stated that a tailgate of a semi truck struck his right elbow, causing him to fall and land on his back. He reported that initially he had low back pain without radiculopathy, but later developed radicular symptoms in the left leg. On physical examination, Petitioner had a positive straight leg raise test on the left. Dr. Solomon noted left gastrocnemius atrophy. Dr. Stroink diagnosed a large left-sided disc herniation at L5-S1 and recommended surgery. A repeat MRI performed February 24, 2006, showed significant degenerative disc disease at L4-L5 and L5-S1 levels; left lateral recess stenosis at **[*15]** L5-S1 due to a moderate sized disc herniation, which impinged on the left lateral recess and left S1 nerve root sleeve; and mild bilateral lateral recess stenosis at L4-5. On March 1, 2006, Dr. Stroink performed a microdiscectomy and removal of a large osteophyte at L5-S1. Postoperatively, she diagnosed a left S1 radiculopathy secondary to left-sided disc herniation at L5-S1. Petitioner's postoperative recovery was uneventful. An MRI performed March 30, 2006, showed no recurrent disc herniation. On April 11, 2006, Petitioner reported a marked improvement in left leg pain, but still complained of persistent ache in his leg. Dr. Stroink referred Petitioner for pain management, and kept him off work through April 25, 2006.

Dr. Jhee provided pain management and prescribed physical therapy. A physical therapy discharge summary dated July 25, 2006, indicates that Petitioner underwent physical therapy from May 8, 2006, through June 20, 2006. Thereafter, Petitioner cancelled five appointments due to illness. The physical therapist stated that Petitioner did not progress due to pain and did not meet any long term goals. During his postoperative course of treatment with Dr. Jhee, Petitioner **[*16]** did not demonstrate gross pathology on physical examination, although he reported his back pain remained unchanged or became worse and complained of radicular symptoms. On July 10, 2006, Petitioner reported to Dr. Jhee that he attempted to work two hours a day for three days doing minor janitorial work. After working for three days, Petitioner "couldn't tolerate this." He stated that he was applying for Social Security Disability benefits. Dr. Jhee kept Petitioner off work until September 5, 2006, when he recommended that Petitioner try a sedentary job. In an EMG report dated May 11, 2007, Dr. Jhee stated, "It seems to be very unlikely that this patient is having active and ongoing left S1 radiculopathy; there are negative needle EMG findings in proximal muscles innervated by S1 nerve root." On July 17, 2007, Dr. Thee modified Petitioner's restrictions to no lifting over 20 pounds; no frequent bending or twisting at the waist; and no overtime work. On August 14, 2007, Petitioner reported constant low back pain, which he rated an eight on a ten-point scale, with radiation to the left leg. He told Dr. Jhee that he might be able to find a job if he was allowed to lie down frequently **[*17]** to stretch his back muscles. Dr. Jhee modified Petitioner's restrictions accordingly.

Medical Bills

Petitioner introduced into evidence his medical bills and fee schedule calculations showing medical expenses in the sum of $ 35,458.00 calculated pursuant to the fee schedule, where applicable. Also, Petitioner showed that he paid the sum of $ 462.32 for prescription medication. Respondent interposed no objection.

Deposition Testimony

Dr. Jhee, a physical rehabilitation and electrodiagnostic specialist, testified via evidence deposition on November 1, 2005. Dr. Jhee confirmed that he saw Petitioner on a referral from Dr. Li. An EMG performed August 8, 2005, did not show any compression neuropathy of the ulnar nerve at the elbow. On August 16, 2005, Petitioner "came back for back problem." Dr. Thee took Petitioner off work for four weeks. Thereafter, Dr. Jhee focused on treating Petitioner's back condition. Regarding the atrophy in Petitioner's left calf muscles, Dr. Jhee opined that it took "[p]robably several weeks to months" for the atrophy to develop. Further, Dr. Thee opined that Petitioner suffered from "moderate degree of pinching of the nerve, which was S-1, and *** sizeable **[*18]** radiculopathy." When presented with a hypothetical consistent with Petitioner's testimony, Dr. Jhee opined that Petitioner's back condition could be causally connected to the accident of April 5, 2005.

On cross-examination, Dr. Jhee equivocated that it "could be" that Petitioner's back condition was not causally connected to the accident.

Dr. Li, a board certified orthopedic surgeon, testified via evidence deposition on December 2, 2005. Dr. Li first saw Petitioner on June 16, 2005. Petitioner stated that he sought treatment for pain in his right elbow and left ankle, and gave a history consistent with his testimony. Dr. Li opined that Petitioner's elbow and ankle conditions could be causally connected to the accident on April 5, 2005. He did not render an opinion regarding the cause of Petitioner's back condition. The following colloquy then occurred:

> "Q. Symptomatic degenerative disc disease of the low back can be triggered by trauma or stresses that put additional loads on the low back?
>
> A. Yes.
>
> Q. If trauma or those stresses that put the load on the low back are to be causally related, do you have on opinion as to the time limit in which they must occur for them to be even a **[*19]** possibility?
>
> A. I would say in that case that it should be within anywhere from three to five days.

> Q. And if someone has low back degenerative disc disease complaints in the range of three to four months later, that would be outside what you would include as the time period you would expect to see trauma causing symptoms to occur?
>
> A. Right."

On cross-examination, Dr. Li acknowledged that on June 16, 2005, his physician's assistant examined Petitioner's back. Dr. Li thought that his physician's assistant was "just being thorough" because Dr. Li did not treat back problems. Regarding Petitioner's ankle injury, Dr. Li explained that an avulsion fracture of the ankle is treated like an ankle sprain. Dr. Li did not think he took Petitioner off work on June 16, 2005. Lastly, Dr. Li stated that after August 15, 2005, Petitioner did not need any further treatment for his elbow or ankle conditions. Dr. Li did not see Petitioner after that date.

Dr. Pineda, an orthopedic and spine surgeon and Respondent's section 12 examiner, testified via evidence deposition on December 5, 2005. Dr. Pineda examined Petitioner on October 17, 2005. Petitioner gave a history consistent with his testimony. On **[*20]** physical examination, amongst other things, Petitioner had a grade II weakness in his left leg, which would have precluded him from walking normally. However, he showed no trouble walking during the examination. Dr. Pineda therefore noted a discrepancy between Petitioner's cooperation with the examination and his actual ability. Physical examination of the back, elbow and ankle was otherwise grossly normal. Regarding Petitioner's back condition, Dr. Pineda stated that Petitioner reported the pain in his back began two months after the accident. Dr. Pineda agreed with Dr. Li that if the accident aggravated Petitioner's underlying degenerative condition, Petitioner would have developed symptoms within three to five days after the accident. Dr. Pineda therefore opined that Petitioner's back condition was not causally connected to the accident. Lastly, Dr. Pineda opined that the injury to Petitioner's elbow was a contusion and the injury to his ankle was a strain.

Dr. Stroink, a board certified neurosurgeon, testified via evidence deposition on June 13, 2007. Dr. Stroink explained that during the surgery, she removed a "chronic" disc herniation and a "superimposed *** subacute" disc herniation. **[*21]** Dr. Stroink opined that Petitioner's back condition and need for surgery were causally connected to the accident of April 5, 2005.

On cross-examination, when asked to explain a delay in the onset of Petitioner's back symptoms, Dr. Stroink responded:

> "[I]t's not uncommon, and, make sure that we understand each other, it is common for patients to have some back pain and then extrude the disk out sometime later. I mean, because usually what happens is the disk gets injured first, it leads to back pain, and then at some point it escapes the confines of the disk space itself and then starts to herniate and smash into a nerve root, and that's when the leg symptoms come on. So--
>
> Q. Mechanically speaking, if someone is going to have an acute herniated disk, you would expect the symptoms to be sooner rather than later, certainly days, not weeks to months; is that right?
>
> A. I am not sure that's correct, either. I think that the symptoms of leg pain occur with the compression of the nerve root.
>
> Q. *** If this guy really did have a hard disk and then he had another injury to that that would cause a soft disk on top of a hard, don't you think the symptoms would start a little bit sooner rather **[*22]** than--assuming that the history to Pineda is correct?
>
> A. I still can't agree with what your conjectures are."

Respondent objected to the admission of Dr. Stroink's opinions into evidence at arbitration on the basis that she rendered them after three depositions in this matter had already been taken. In support, Respondent cited to the Commission's Decision in Marks v. ACME Industries, Inc., 02 IIC 0892. Petitioner responded that Dr. Stroink did not begin to treat him until December 13, 2005, after the depositions of Drs. Jhee, Li and Pineda had already been taken. The Arbitrator overruled Respondent's objection, explaining in his Decision, "[B]arring the testimony of a treating physician who only began treating Petitioner after the deposition process had commenced would present an absurd result that would invite abuse by both Petitioner's [*sic*] and Respondents."

DISCUSSION

The Arbitrator found that only Petitioner's elbow condition is causally connected to the accident on April 5, 2005. Petitioner asks the Commission to find that the back and ankle conditions are also causally connected to the accident, and award temporary total disability compensation and medical expenses **[*23]** accordingly.

On cross-appeal, Respondent contends that the Arbitrator erred in admitting Dr. Stroink's opinions into evidence. Once again, Respondent relies on Marks. The Commission notes that during the pendency of this matter on review, the appellate court issued a decision in City of Chicago v. Workers' Compensation Comm'n, No. 1-07-2850WC (Ill. App. December 23, 2008), overruling Marks. The appellate court explained:

> "Given this court's prior determination that the purpose of section 12 [of the Act] is to prevent surprise medical testimony at the arbitration hearing, the Commission's ruling in Marks that the 'hearing' referred to in Section 12 is the treating physician's deposition is completely at odds with this court's statement [in Ghere v. Industrial Comm'n, 278 Ill. App. 3d 840 (1996)] of the purpose of Section 12." City of Chicago, slip op. at 5-6.

The court emphasized that the focus in ruling on a section 12 objection must be on whether the objecting party was surprised by the medical testimony or report. Here, Respondent claims no surprise, and none is evident from the record. Accordingly, we affirm the Arbitrator's **[*24]** ruling to admit Dr. Stroink's deposition testimony into evidence.

Turning to the issue of causal connection, we note that counsel for Respondent admitted at oral argument that the ankle injury was causally connected to the accident. Conceding liability for the ankle injury, in turn, connects the back injury to the accident. The medical records from Dr. Li and physical therapy reports dated July 11, 2005, corroborate Petitioner's testimony regarding the mechanism of the injury and document his back complaints.

As noted, Petitioner testified that a tailgate struck his elbow, causing him to twist his ankle and land on his back. Petitioner continued to work on regular duty even though he felt a great deal of pain in his ankle and back. In late May or early June, he called to schedule an appointment with Dr. Li. On June 16, 2005, Petitioner reported to Dr. Li's staff that he sustained injuries to his right elbow and left ankle. He stated that he twisted his left ankle when a 600-pound tailgate hit his right elbow. Petitioner complained that the pain from the ankle radiated up to his buttocks. In an intake questionnaire, also dated June 16, 2005, Petitioner reported injuring his right elbow, **[*25]** left leg and ankle, *and back*, giving the following description of accident: "Tailgate hit [elbow] *knocked to ground* twisting leg + ankle (left)." (Emphasis added.) Petitioner was examined by Dr. Li's physician's assistant, who noted a history of 600-pound tailgate striking Petitioner in the right elbow and *causing him to fall down*. Petitioner gave the same history to the physical therapist on July 11, 2005. In addition to complaining of symptoms in his ankle, Petitioner complained of pain from his back down to his ankle and reported his back "catches" unexpectedly throughout the day. Petitioner mentioned having difficulty straightening his back from a bent position. Also, he stated the pain from his left foot and ankle radiated upward to his buttock. Additionally, we note that Respondent introduced into evidence a letter from its workers' compensation carrier dated July 28, 2005, denying benefits for any treatment not related to Petitioner's right elbow. The letter mentions that the claims adjuster took a recorded statement from Petitioner on July 13, 2005. It is not unreasonable to infer that Respondent would have introduced the statement into evidence had it been favorable **[*26]** to Respondent's position. We find that Petitioner proved he suffered a fall on the job, which caused injury to his low back.

Next, we consider the issue of temporary total disability compensation. The Arbitrator did not award temporary total disability benefits. Petitioner asks the Commission to award temporary total disability benefits in connection with his elbow condition from July 12, 2005, through August 15, 2005, and in connection with his back condition from December 13, 2005, through the date of the arbitration hearing on September 24, 2007. Respondent contends that Petitioner is not entitled to temporary total disability benefits because he voluntarily resigned from his employment on June 8, 2005.

We note that after resigning from his employment with Respondent, Petitioner immediately began to work for Price Trucking. Petitioner's resignation has no effect on his right to receive temporary total disability benefits because he did not remove himself from the workforce. *Cf.* **Interstate Scaffolding,** Inc. v. Workers' Compensation Comm'n, 3-07-0801WC (Ill. App. October 20, 2008).

We find that the record supports Petitioner's claim for temporary total disability benefits **[*27]** in connection with his back condition from December 13, 2005, through the date of the arbitration hearing on September 24, 2007. However, we decline to award temporary total disability benefits in connection with the elbow condition. We note that when Petitioner sought treatment with Dr. Li, his primary complaint was his ankle, not his elbow, and Dr. Li ordered physical therapy for the ankle. An EMG of the elbow did not show cubital tunnel syndrome or ulnar nerve pathology. Dr. Jhee thought that Petitioner merely sustained an elbow contusion. Similarly, Dr. Li opined that the ankle injury was treated like a sprain. We do not find that Petitioner's elbow or ankle condition interfered with the performance of his job duties on or after July 12, 2005. We agree with the Arbitrator's calculation of Petitioner's average weekly wage and find that the corresponding rate of temporary total disability compensation is $ 350.67 per week.

Lastly, we award medical expenses in the sum of $ 35,920.32.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 10, 2007, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY **[*28]** THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 350.67 per week for a period of 93 weeks, from December 13, 2005, through September 24, 2007, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical expenses or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 35,920.32 for medical expense's under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION **[*29]** that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 68,600.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: MAR 30 2009

ATTACHMENT:

ILLINOIS WORKERS COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Robert Falcioni Arbitrator of the Industrial Commission, at the City of Bloomington, Illinois, on 9/14/07 and 9/24/07. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues

circled below, and attaches those findings to this document.

DISPUTED ISSUES
(F). If the petitioner's present condition of ill-being causally related to the injury?
(G). What were [*30] the Petitioner's earnings?
(J) Were the medical services that were provided to Petitioner reasonable and necessary?
(K) What amount of compensation is due for Temporary Total Disability?
(N). Other The admissibility of Dr. Stroink's opinion evidence

FINDINGS

. On 4/05/2005 the respondent, Isaacson Construction Company *was or* operating under and subject to the provisions of the Illinois Workers' Compensation Act.

. On this date, an employee-employer relationship *did or* exist between the petitioner and the respondent.

. On this date, the petitioner *did or* sustain accidental injury that arose out of and in the course of the employment.

. Timely notice of this accident *was or* given to the respondent herein.

. In the year preceding the injury, the petitioner earned $ 17,639.15; the average weekly wage was $ 526.01 per week.

.

. At the time of the injury, the petitioner was 52 years of age, *single or* with 0 children under 18.

. Necessary medical services *or have not* been provided by the respondent.

. To date, $ 0.00 has been paid on account of this injury.

ORDER

. The respondent shall pay the petitioner temporary total disability **[*31]** benefits of $ 0 per week for 0 weeks, from N/A through N/A , as provided in Section 8(b) of the Act
. The Respondent shall pay $ 6400.00 for medical services, as provided in Section 8(a) of the Act and receive credit for all sums previously paid hereunder.
. The respondent shall pay $ 0 in penalties, as provided in Section 19(k) of the Act.
. The respondent shall pay $ 0 in penalties, as provided in Section 19(l) of the Act.
. The respondent shall pay $ 0 in penalties, as provided in Section 16 of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a *Petition for Review* is filed within 30 days after the receipt of this Decision, and a review is perfected in accordance with the Act and Rules, then this Decision shall be entered as a Decision of the Commission.

STATEMENT OF INTEREST RATE If this award is review by the Commission, interest of 4.09% shall accrue from the date listed below to the day before the date of payment; however, if an employee's Appeal results in **[*32]** either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

October 4, 2007

Date

OCT 10 2007

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner testified that he injured himself on April 5, 2005 when the tailgate of the dump truck he unloaded struck him on the right forearm, causing him to fall to the ground and in the process injuring his low back, right elbow, and left ankle. Certain facts in this highly disputed case are undisputed, those as set forth below.

It is undisputed that on the date of the alleged accident, Petitioner filled out an accident report form that stated only that the tailgate had struck his right forearm and that the only injury he had sustained was to the right forearm. No mention is made on this form of Petitioner's alleged fall, nor of any injury to his low back or left ankle.

It is undisputed that, for 70 days after the injury alleged occurred, Petitioner received no medical treatment for any condition - for 10 weeks, he received no treatment for a right elbow condition, a left ankle condition, and/or a lower back condition.

It is also undisputed that, for those 70 days, Petitioner continued to work his **[*33]** regular job, full duty, with no restrictions. It is also undisputed that Petitioner was working as a truck driver, and each witness that testified regarding the nature of truck driving testified that this was a heavy job.

It is also undisputed that on 6-8-05, approximately two months after the injury to the elbow occurred, Petitioner stopped working for Isaacson Construction Company. It is also undisputed that beginning on the next day, 6-9-05, Petitioner immediately started working for a different employer, Price Trucking Company. It is undisputed that Petitioner continued working for Price Trucking Company for a period of approximately 7 weeks, through 7-13-05. It is undisputed that while Petitioner was working for Price Trucking he had no restrictions pertaining to his elbow, ankle or lower back.

It is undisputed that Petitioner's medical treatment began on 6-16-05, although there is a dispute as to precisely why Petitioner presented to receive treatment, and precisely what body part or parts Petitioner presented to receive treatment for. Petitioner did treat with Dr. Li on 6-16-05, the treatment was authorized. At that time, the employee stated that the injury occurred when he **[*34]** was struck in the elbow by a tail gate, and that caused him to fall down. He told the doctor that he twisted his left ankle and he had swelling in the left foot and right elbow. The hand written intake form that Petitioner filled out at this time indicated that Petitioner had right elbow, left ankle and back pain. The written treatment note does not reference a back condition in any way, shape or form. Dr. Li diagnoses an elbow contusion and an ankle contusion, there is no diagnosis of a lower back condition. In fact, the report of Dr. Li of that date appears to specifically rule out a lower back condition, stating that the lower back was examined, it was non-tender, straight leg raising was negative bilaterally, and Petitioner's neurovascular exam was intact.

Petitioner nevertheless contends that he reported a lower back injury on the date of occurrence, and that he went to the doctor primarily to receive treatment for a lower back condition. Petitioner claims that his lower back condition was symptomatic beginning with the date of accident, and that it grew progressively worse over time. Petitioner testified that his back condition was debilitating, but that he nevertheless continued **[*35]** to work for more than 10 weeks with Isaacson and then more than 7 weeks with Price. He contends that he went to Dr. Li primarily because of a lower back condition, but this is not borne out by Petitioner's conduct or the medical records of Dr. Li.

Petitioner testified that he specifically told his employer that he injured his lower back on the date of accident, and that his employer prevented him from filing a correct accident report. Petitioner's testimony was to the effect that the employer rushed him through the incident report process, and that the employer would not provide him with information when he consistently asked the employer for information.

The employer, through its witnesses, specifically disputed those contentions.

First, Dennis Backlund a fellow truck driver, testified that he met with Petitioner in the yard shortly after the incident occurred, on the date of accident. Backlund testified that Petitioner directly told him that he injured his elbow, and that Petitioner did not mention any other body parts. Backlund testified that Petitioner told him that he only hurt his elbow, and that he told Petitioner that he should report same, and receive treatment if necessary.

[*36] It is undisputed that Petitioner reported the injury to his supervisor, Steve Clark, on the day after the date of accident. Steve Clark testified that Petitioner told him that he injured his elbow, and that no other body parts were mentioned at all. Steve Clark testified that he provided Petitioner with the appropriate accident report form, and put Petitioner under no pressure at all from the stand point of completing same. Steve Clark testified that he was not present when Petitioner actually completed the form, and the form was left, in completed fashion, in Steve's work area. On the other hand, Petitioner testified that Steve Clark literally snatched the accident report form from Petitioner's hand, before Petitioner had an opportunity to complete same. However an examination of the accident report shows that it was completed and signed by Petitioner. There is no evidence, such as blank spaces or unfinished sentences, in the report, to indicate that it wasn't an unfinished state when it reached the possession of Respondent. Petitioner contends that he repeatedly asked Steve Clark how to fill the form out, and how to seek medical treatment. Steve Clark's testimony was directly opposite. **[*37]** He testified that Petitioner took the form, completed it on his own time, and then left the form on Steve Clark's desk. Contrary to Petitioner, Steve Clark testified that Petitioner never once asked a single question about the accident report form. Rather, the report form was simply left on his desk, and Steve Clark then turned the form over to the owner of the company, Todd Isaacson.

Steve Clark testified that he followed up with Petitioner on two occasions thereafter, to see if Petitioner was going to obtain medical treatment. Clark testified that a day or two after the injury, he asked Petitioner how the elbow was, and Petitioner responded that the elbow was fine. About 10 days to two weeks thereafter, Steve Clark again approach Petitioner asking him how the elbow was, and Petitioner responded again that it was fine and that he was not going to be seeking medical treatment. Steve Clark noted that Petitioner was working his regular job, full duty, and complaint free at that time.

Clark testified that contrary to Petitioner's testimony, Petitioner never approached him about receiving medical treatment, or about any questions that Petitioner had about the accident report form.

[*38] Again, it is noteworthy in the context of this testimony by both witnesses, to note that incident report form appears complete on its face, and the incident report form clearly indicates that Petitioner stated that the injury was limited to his elbow. The first incident report form Petitioner completed contained no reference to an ankle or a lower back.

It is also undisputed that on 6-8-05, Petitioner's employment with the company ended, and the employment with the company ended before Petitioner presented to receive medical treatment. Petitioner's employment with the company also ended while Petitioner was under no restrictions, and he was working full duty. It is also undisputed that immediately after leaving Isaacson's employment, Petitioner took a very similar job with a different company, again working full duty, no restrictions, for an additional 7 weeks.

It is disputed why Petitioner left Isaacson's employ with Petitioner suggesting that he was fired, but Isaacson's witnesses and the employment records show that Petitioner in fact refused a job assignment, and that Petitioner walked off the job, submitting what appears to be a letter of resignation. Again, it is undisputed **[*39]** that Petitioner was not treating, and he was working his regular job when his job terminated. It should also be noted that Petitioner's medical treatment began after he resigned his employment, more than two months after the date of accident.

More than one month after Petitioner resigned his employment with Isaacson, and shortly after Petitioner left the employment of Price, Petitioner returned to Respondent Isaacson premises to change the incident report and was allowed to do so by Respondent.

Those were the only changes on the incident report, otherwise it was literally word for word the same.

After Petitioner completed a second incident report, he did not have much by way of treatment to the ankle or the elbow; it appears that those conditions had resolved.

After Petitioner stopped working for Price, he never worked again. Dr. Stroink and Dr. Jhee both kept Petitioner off work after his back surgery, stating that Petitioner may never drive a truck.

It is noted that Dr. Li, the doctor that first saw Petitioner in June of 2005, 70 days after the injury, specifically stated at his deposition that if Petitioner had injured his back the way he claims, Dr. Li would have expected **[*40]** that the back complaints would start in 3 to 5 days. Dr. Li noted that Petitioner's back complaints did not start within 3 to 5 days, they apparently started more than 70 days thereafter. Dr. Li also testified that his assistant did examine Petitioner's lower back, and there were no findings concerning same. Dr. Li also admitted that as of the first date of medical treatment, there was no diagnosis on Petitioner's lower back.

Respondent had Petitioner examined by Dr. Pineda for IME. In Dr. Pineda's opinion, Petitioner's back condition was not causally-related, for many of the factual reasons set forth above. However, from a medical and common-sensical perspective, Dr. Pineda basically agreed with Dr. Li, that if Petitioner's back complaints had been related to this injury, he would have expressed complaints within several days of the injury, not several months. Dr. Pineda also testified that if had Petitioner injured his lower back as he claimed, he most would have received medical treatment within a few days, not withstanding Petitioner's argument that he was stone-walled regarding the treatment issue. Dr. Pineda testified that Petitioner's actions in continuing to work for more **[*41]** than 120 days spoke much louder than his words at trial, the bottom line in Dr. Pineda's opinion was that if Petitioner had hurt his back the way he claimed, he would not have been able to work the job that he actually worked. Dr. Pineda also testified, and his IME report clearly reflects, that Petitioner directly told him that his back complaints began in June or July of 2005, and not in April of 2005. Petitioner denied same at trial.

The physical therapy records introduced at arbitration also seem to suggest that Petitioner initially wanted to receive treatment on his elbow, and only later did the treatment begin to focus on the lower back.

It should also be noted that the deposition of Dr. Jhee was taken on 11-1-05. The deposition of Dr. Li was taken on 12-2-05, and the deposition of Dr. Pineda was taken on 12-5-05.

The IME report of Dr. Pineda was on paper as of 10-17-05, before any of these depositions were taken.

It should also be noted that the attorney that tried the case for Petitioner was not Petitioner's first attorney, it was Petitioner's second attorney. Petitioner discharged his first attorney, and then the second attorney was retained sometime later, after all three **[*42]** depositions had already been taken.

F. Is the petitioner's present condition of ill-being causally related to the injury?

The Arbitrator incorporates by reference thereto the findings set forth above. The Arbitrator further notes that the real issue between the parties is whether the back condition is related.

The Arbitrator is aware that Petitioner is claiming that from the date of the accident alleged herein, he complained of a lower back condition, but that does not appear to be true. It does appear to the Arbitrator that Petitioner subsequently changed his story to include a lower back condition. It is also clear from the first medical record, the Dr. Li report dated 6-16-05, that Petitioner did not have a lower back condition at that time. He was not diagnosed with a lower back condition, and in fact, by all accounts, the lower back was examined and it was objectively normal.

The Arbitrator is aware that Petitioner is claiming that he consistently complained of lower back problems, and that he brought this to the attention of his supervisors at that time. However, that is disputed by the employer, and the Arbitrator notes that several different witnesses testified for **[*43]** the employer, the Arbitrator notes that in the first accident report that petitioner completed on the date of the accident, he makes no note of either a low back or ankle injury. Petitioner then worked for 70 days, in a very hard truck driving job, before ever receiving medical treatment. The Arbitrator also notes that Petitioner worked 7 weeks beyond that for a different employer in an identical capacity. It is the Arbitrator's finding that the facts in this case most closely comport with the Respondent's theory, and therefore finds that no causal connection exists between the accident alleged herein and either the Petitioner's low back or left ankle injuries, but does exist as to the right elbow injury.

G. What were petitioner's earnings?

The issue between the parties is whether Petitioner's overtime earnings should be included in the calculation of wages. The Arbitrator notes that the case law in this area centers on the question of whether the overtime earnings were mandatory. Petitioner testified that overtime was mandatory.

Respondent produced four different witnesses to testify that overtime was not mandatory. All four witnesses testified that if Petitioner chose not to **[*44]** work overtime, he did not have to, and there would be no adverse employment consequences.

The Arbitrator finds Petitioner's testimony on the issue of overtime far more credible than that of Respondent's witnesses, who, if believed, would lead to the conclusion that Petitioner could have walked off the job at any time after his eight hour day ended. It is noted that Petitioner did not work overtime consistently, but constantly

Based on Petitioner's straight time, the Arbitrator finds that Petitioner's earnings herein were $ 17,639.15, and that his average weekly wage was $ 526.01.

J. Were the medical services that were provided to Petitioner reasonable?

> The Arbitrator, based on the findings set forth in section (F) above, awards medical bills only for the treatment rendered to Petitioner's right elbow. These bills were incurred with Orthopedic and Sports Medicine Medical Center in the amount of $ 640.00

K. What amount of compensation is due for temporary total disability?

Based on the findings above, the Arbitrator denies Petitioner's claim for TTD benefits.

N. The admissibility of Dr. Stroink's opinion evidence

The Arbitrator finds and concludes that Dr. Stroink's **[*45]** opinion evidence here is admissible. The Arbitrator notes that Respondent did not object to the admissibility of Dr. Stroink's medical records, they are freely admissible. It is noted that Petitioner's new attorney obtained narrative opinion from Dr. Stroink, the back surgeon, long after all three depositions had been taken, including the deposition of two treaters. Respondent's attorney at trial objected to the admissibility of Dr. Stroink's narrative report, and the admissibility of Dr. Stroink's deposition, on the grounds that the opinion evidence from Dr. Stroink was adduced long after the depositions had been taken, and frankly, long after the depositions had already been completed. Respondent's attorney objected to the admissibility of Dr. Stroink's opinion evidence based on the case of *Marks vs. Acme Industries*, 94 WC 1119 (02 IIC 892). In the *Marks* case, the Industrial Commission decided that the taking of any evidence deposition constitutes the start of trial and the taking of any evidence deposition basically stands for the proposition that no additional opinion evidence can be adduced after a trial has started. It is very clear that Petitioner had not even **[*46]** treated with Dr. Stroink when these depositions had already been taken and completed, including the depositions of two of Petitioner's treating doctors. Respondent contends that based on the case law, the opinion evidence of Dr. Stroink must be barred here, because that opinion evidence was adduced long after the trial had already started. Respondent did not object to the admissibility of Dr. Stroink's medical records, they are freely admissible. However, barring the testimony of a treating physician who only began treating Petitioner after the deposition process had commenced would present an absurd result that would invite abuse by both Petitioner's and Respondents. Therefore the Arbitrator finds that the opinions of Dr. Stroink are admissible herein, and are admitted.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

n1 The letterhead on Dr. Stroink's reports indicates that she is in the same practice as Dr. Nardone.