*2009 Ill. App. LEXIS 1322, **

JERRY **HOSTENY,** Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION **COMMISSION** and ANNING JOHNSON CO., Defendants-Appellees.

No. 1-08-3238WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, WORKERS' COMPENSATION **COMMISSION** DIVISION

2009 Ill. App. LEXIS 1322

December 29, 2009, Filed

SUBSEQUENT HISTORY: Released for Publication February 18, 2010.

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. Nos. 08-L-50118, 08-L-50119. Honorable Susan J. McDunn, Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that confirmed a ruling of defendant Illinois Workers' Compensation **Commission,** which reversed an arbitrator's ruling that awarded petitioner employee medical expenses, temporary total disability benefits, and permanent partial disability benefits for injuries he allegedly sustained on two dates while working for respondent employer. The employee appealed.

OVERVIEW: The employee filed three applications for benefits under the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2004) for injuries he allegedly sustained while working for the employer as a journeyman painter. The injuries allegedly involved picking up a ladder. However, he did not report the injury to his employer until approximately 15 weeks after his first injury and seven weeks after his second injury despite having previously filed an unrelated workers' compensation claim. An arbitrator determined after a hearing that he sustained compensable accidents on two of the three dates alleged. The **Commission** reversed. On judicial review, the trial court confirmed the **Commission's** decision. The appellate court found the employee failed to prove the injuries "arose out of" and "in the course of" his employment on the two dates. In thus found that the **Commission's** decision was not against the manifest weight of the evidence, as 820 ILCS 305/2 required him to prove both of those factors, but his testimony in that regard was severely undermined because of his delay in reporting the injuries despite the fact that he had previous experience in filing a workers' compensation claim.

OUTCOME: The appellate court affirmed the trial court's judgment.

CORE TERMS: claimant, neck, arbitrator, pain, ladder, symptoms, work-related, shoulder, arm, medical records, credibility, responded, carrying, supervisor, conversation, cervical, group insurance, chiropractor, soreness, lifting, hurt, burden of proving, compensable, disability, painting, credibly, manifest, intake, doctor, times

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Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Clear Error Review
Workers' Compensation & SSDI > Compensability > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation

HN1 An injury is compensable under the Workers' Compensation Act only if it "arises out of" and "in the course of" one's employment. 820 ILCS 305/2 (2004). Both elements must be present at the time of the employee's injury in order to justify compensation, and it is the employee's burden to establish these elements by a preponderance of the evidence. The determination of whether an injury arose out of and in the course of one's employment is generally a question of fact. In resolving questions of fact, it is within the province of the **Commission** to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. A reviewing court will not overturn the decision of the **Commission** regarding whether an injury arose out of and in the course of employment unless the **Commission's** decision is found to be contrary to the manifest weight of the evidence. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction

Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review

HN2 When the **Commission** reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and the **Commission** is not bound by an arbitrator's findings. More Like This Headnote

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

HN3 To be compensable, an injury must both "arise out of" and "in the course of" one's employment. 820 ILCS 305/2 (2004). The "in the course of" element refers to the time, place, and circumstances under which the accident occurred. An injury is said to "arise out of" one's employment when there is a causal connection between the employment and the injury; that is, the origin or cause of the injury must be some risk connected with the claimant's employment. Typically, an injury arises out of one's employment if at the time of the occurrence, the claimant was performing acts the employer instructed the claimant to perform, acts incidental to the claimant's assigned duties, or acts which the claimant had a common law or statutory duty to perform. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Clear Error Review
Workers' Compensation & SSDI > Benefit Determinations > General Overview

HN4 Although an employee's testimony about an alleged accident might be sufficient, standing alone, to justify an award of benefits under the Workers' Compensation Act, it is not enough where consideration of all facts and circumstances demonstrate that the manifest weight of the evidence is against it. More Like This Headnote

COUNSEL: For Appellant: Cullen, Haskins, Nicholson & Menchetti, P.C., Chicago, IL.

For Appellee: Rusin, Maciorowski & Friedman, Ltd., Chicago, IL.

JUDGES: Honorable John T. McCullough, P. J., concurs, Honorable Thomas E. Hoffman, J., concurs, Honorable Donald C. Hudson, J., Honorable William E. Holdridge, J., concurs and Honorable James K. Donovan, J., partially dissents. 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, Jerry **Hosteny,** filed three applications for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)) for injuries he allegedly sustained while in the employ of respondent, Arming Johnson Co. Following a hearing, the arbitrator determined that claimant sustained compensable accidents on two of the three alleged accident dates. The arbitrator awarded claimant medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits. Respondent appealed, **[*2]** and the Illinois Workers' Compensation **Commission (Commission)** reversed. On judicial review, the circuit court of Cook County confirmed. Before this court, claimant challenges the **Commission's** findings that he failed to sustain his burden of proving compensable injuries arising out of and in the course of his employment on June 4, 2004, and August 2, 2004. For the reasons that follow, we affirm.

I. BACKGROUND

Claimant filed three applications for adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq.* (West 2004)) for injuries he allegedly sustained while in the employ of respondent on June 4, 2004 (No. 04 WC 59684), August 2, 2004 (No. 04 WC 59685), and September 15, 2004 (No. 04 WC 59686). The cases were consolidated for hearing before an arbitrator. The following evidence was presented at the arbitration hearing.

Claimant, a journeyman painter, was hired by respondent on March 3, 2004. In June 2004, claimant was assigned as the foreman at the Sunrise Assisted Living (Sunrise) job site. According to claimant, on June 4, 2004, while at Sunrise, he was carrying a 32-foot long ladder "throughout the day" while painting window lintels. Claimant stated that while lifting the ladder, **[*3]** he heard a "popping sound" in the back of his neck. Feeling no pain, claimant finished the day. Claimant stated that upon returning home that evening, he still felt no pain. The next morning, a Saturday, claimant awoke with posterior neck pain and soreness. He returned to work the following Monday, noting that when he was working he had no symptoms. Claimant explained that it was only while relaxing at night or trying to sleep that he experienced soreness. Claimant stated that in the weeks that followed, the pain began radiating into his arm.

Claimant testified that his boss, Robert Cascio, would be present at his job site in person three times per week and that Cascio would contact claimant via walkie-talkie and/or telephone three to five times per day. Nevertheless, claimant admitted that he did not immediately tell anyone at work about his injury and that he did not immediately seek medical assistance. According to claimant, however, on July 13, 2004, he told Cascio that "[his] neck and [his] back was sore [*sic*]" and, other than noting he was going to see a chiropractor for his condition, that was "the end of the conversation."

On July 15, 2004, claimant treated with his chiropractor, **[*4]** Dr. Jack Gamble, for the first time after June 4, 2004. At that time, claimant presented his group insurance card for treatment. Dr. Gamble's initial report notes complaints of left-sided neck pain and soreness radiating into the left shoulder and left upper arm. Although Dr. Gamble's report does not reference a work injury, claimant testified that he told Dr. Gamble that he hurt himself at work lifting a 32-foot ladder. After July 15, 2004, claimant saw Dr. Gamble on July 16, July 20, July 22, July 27, and July 29, 2004, with complaints similar to those raised during his initial visit. None of the office notes from these visits reflects that claimant reported a work accident or that his pain was brought on by work activities, and claimant

continued to work regular duty during Dr. Gamble's treatment. Claimant testified that the therapy administered by Dr. Gamble provided "very little" relief.

Regarding the second alleged accident date, claimant testified that on August 2, 2004, he again picked up the 32-foot ladder while working at Sunrise and felt pain in the back of his neck. Claimant explained that the June accident differed from the August accident in that with the former he "felt **[*5]** a pop, no pain" whereas with the latter he "felt a pain." After the August incident, claimant continued to work that day, explaining that he "took it easy" and that the pain "went away." However, claimant testified that the pain in his neck soon spread to his left shoulder and left arm. Claimant also described cramping in the left arm and hand, and he stated that "everything started to increase in strength" and that the neck pain was "deeper." Nevertheless, claimant worked regular duty from August 2, 2004, through September 22, 2004, explaining that he only had symptoms while at home resting or trying to sleep.

Claimant admitted that at no time in June, July, or August 2004 did he ever complete an accident report. Claimant testified that he reported a work injury to Cascio on the afternoon of September 15, 2004, after he got home from work, and that Cascio suggested that respondent "frowned" upon workers' compensation claims. Claimant stated that he knew "exactly" what Cascio was telling him.

Claimant testified that on September 17, 2004, two days after speaking with Cascio, he sought treatment with Dr. John Fielder, his primary care provider. Claimant complained of soreness in the left **[*6]** arm and neck with forearm cramps, noting that his symptoms had been present since July. A separate notation in Dr. Fielder's note stated "painting since March," but no specific work injury or accident is referenced. Claimant was referred for a September 21, 2004, cervical MRI and a September 24, 2004, EMG/NCV. According to claimant, Dr. Fielder called him on September 22, 2004, with the results of the MRI, noting that the film showed a disc protrusion at C5-6, a mild disc bulge at C6-7, and a pinched nerve. Dr. Fielder issued a slip authorizing claimant off work beginning September 22, 2004. Claimant testified that he immediately called Cascio and was told that he did not need to complete any paperwork before leaving work. Claimant testified that later the same day he called Cascio again because he could not obtain treatment without authorization, explaining that Cascio may have misunderstood him. When Cascio asked what he meant, claimant responded that he got hurt at work. Cascio replied, "You did? When did it happen?" Claimant responded that it was on June 4, 2004, and August 2, 2004.

The EMG/NCV showed advanced left carpal tunnel syndrome, but reflected no evidence of radiculopathy, **[*7]** and claimant was referred to pain specialist Dr. Maunak Rana. Claimant saw Dr. Rana on September 28, 2004, noting a recent history of cervical spine pain radiating down his left upper extremity with occasional numbness in the forearm and first three fingers. Claimant told Dr. Rana that he was injured on June 4, 2004, and August 2, 2004, while "carrying a 32-foot ladder at work throughout the day and fe[eling] discomfort." Claimant related that "staying busy and moving helps him and when he is lying in bed and in idle positions, his symptoms are worsened." Dr. Rana, diagnosed cervical radiculitis, facet syndrome, a herniated cervical disc, and myofascial pain. Dr. Rana recommended various injections. During his consultation with Dr Rana, claimant asked Dr. Rana "whether or not his accident caused his pain or whether this would be a pre-existing condition." Dr. Rana responded that he was unable to answer that inquiry, and he referred claimant to Dr. Fielder who could compare claimant's condition before and after the accidents.

On October 5, 2004, claimant called Dr. Rana regarding the results of his EMG/NCV. Claimant questioned how that test failed to indicate radiculopathy given the **[*8]** MRI results. Dr. Rana told claimant to speak to Dr. Chulsoo Kim, who performed the EMG/NCV, "to find out whether this is an acute or chronic condition, since it is specifically not dictated as to that effect and to ask him about the fact that there is no evidence of any cervical radiculopathy present, given the findings on MRI." Dr. Rana also told claimant to contact Dr. Fielder about what his next options would be. During the call, claimant also told Dr. Rana that Dr. Fielder indicated that Dr. Rana should fill out his disability form. Dr. Rana told claimant that he only met him after his accident and thus was unable to comment as to the degree of disability he had, suggesting that he contact Dr. Fielder to determine how his health changed after this particular injury. One of Dr. Fielder's progress notes references a telephone call from claimant's wife, who called from the office of claimant's attorney on October 5, 2004. During the call, claimant's wife related that Dr. Rana did not note a pinched nerve on the EMG. At that time, claimant was referred to neurologist, Dr. Mohamed Ghumra. Claimant stated that Dr. Fielder has since, at claimant's request, opined claimant's surgical condition **[*9]** was work-related on an October 14, 2004, temporary disability form.

Dr. Ghumra's October 12, 2004, report notes, per the history from claimant and his wife:

> "[I]t appears that [claimant] was carrying a 32-feet [*sic*] ladder at work and has been working on his regular schedule. On 06/04/04 and the subsequent day and 08/02/04, he had two separate work-related injuries. He states that he injured his neck and started experiencing some pain radiating down to his left shoulder and all the way down to his hand. His hand also started becoming numb and tingly."

Dr. Ghumra noted that despite treatment, including visits to a chiropractor and epidural injections, claimant still complained of persistent pain and radicular-like symptoms. Dr. Ghumra diagnosed cervical radiculopathy based on claimant's symptoms and the MRI results, noting that if continued treatment with Dr. Rana failed, he should see a neurosurgeon.

Claimant continued to treat with Dr. Rana into 2005 before seeking treatment with Dr. James Fister. Prior to presenting for an evaluation with Dr. Fister, claimant dropped off various films and records for review. Upon reviewing these documents, Dr. Fister indicated that if claimant has left-sided **[*10]** C6 radicular symptoms and if his symptoms are bad enough that he wants surgery, "then he is a candidate for C5-6 anterior cervical discectomy and fusion" After a review of Dr. Rana's records, Dr. Fister stated that "[a]pparently [claimant] was asking [Dr. Rana] whether his symptoms were due to his accident or pre-existing so we have workcomp issues involved here." Dr. Fister physically examined claimant on February 9, 2005. Dr. Fister's intake form from February 9, 2005, noted an injury/accident of "June & August 2004" while "lifting 32 [foot] ladder at work." Claimant reported to Dr. Fister primarily left-sided pain of the shoulder, scapula, and arm. Claimant reported that the first time he noticed an abnormality was "probably in June 2004 when he was at work as a painter and he turned his neck and felt a sudden crack or pop in the neck and then gradually after that he developed these symptoms going down the left upper extremity." Dr. Fister diagnosed a disc herniation on the left side at C5-6 and recommended surgery.

Seeking another opinion, claimant saw Dr. Antonio Yuk on February 14, 2005. The intake form from Dr. Yuk's office indicates the date and location of injury as "June 2004 **[*11]** worksite," with further explanation stating "June 2004 lifted 32 foot ladder throughout day. Felt crack/pop in neck resulting in soreness, pain, cramping, numbness in left arm/hand, shoulder blade [and] neck." A separate note in a different handwriting on the intake form states "reported to boss in September." According to Dr. Yuk's report, claimant stated:

> "[He was] carr[ying] a 32 foot ladder all day long in June of 2004. He felt a 'pop' in the neck and noticed soreness in the neck later. Steadily, he felt that he had pain running down his left arm. He also describes discomfort in the left shoulder blade. He initially thought that he simply pulled a muscle. His symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September."

Dr. Yuk diagnosed C5-6 disc herniation. Dr. Yuk noted that "according to the history that I have, [claimant] did not have a significant neck problem until he carried a 32 foot ladder all day in June of 2004."

On March 15, 2005, Dr. Yuk performed an anterior discectomy and fusion at C5-6. Dr. Yuk released claimant to restricted duty on or about June 8, 2005, with a 30 pound **[*12]** weight limit. Claimant returned to work on June 20, 2005, and worked for a period of time before being temporarily laid off for three weeks. Thereafter, claimant again returned to work before being laid off again in September 2005. Claimant remained off work through the October 13, 2005, arbitration hearing. Claimant applied for and was receiving unemployment, retroactive to September 11, 2005. Claimant testified that he had no neck or shoulder problems prior to June 4, 2004, and has not been involved in any non-work related accidents since. Claimant related that when he is not working he is in "constant" pain, which he described as "pinching" in the back of his neck and across the shoulder blades.

Respondent's section 12 (see 820 ILCS 305/12 (West 2004)) examining physician, Dr. Marshall Matz, saw claimant on May 13, 2005. At that time, claimant reported carrying a 32-foot ladder on June 4, 2004, throughout the day as he was paining multiple windows, when he felt and heard an audible "crack" in his neck. Claimant reported no further symptoms that day except for a "little bit of pain in back of the neck going down into the left arm by that night." Dr. Matz noted claimant "is a vague **[*13]** historian and difficult to pin down as to the timing of many of his symptoms, which he in general is of the recollection that over time, his symptoms got worse. He believes that it was sometime in June and/or July that he began to have cramping pain about his neck and left arm." Dr. Matz's notes further reflect that "[o]n August 2, 2004, [claimant] was again painting and using a ladder when he alleges more pain in back of his neck. By September of last year, his pain was described as 'more intense and cramping,' so he called [Dr. Fielder]." Dr. Matz examined claimant and reviewed his medical records and films. Dr. Matz opined that the medical records "clearly raise issues as to the onset of symptoms being related to some sort of work related trauma," noting that only in the latter treatment records are there references to two occurrences at work. Ultimately, Dr. Matz concluded that claimant had a left-sided disc herniation at C5, but that this condition was not causally related to his employment "[b]ased on the lack of a contemporaneous history of neck complaints or injury" in the medical records.

On cross-examination, claimant was asked whether he visited Dr. Fielder on July 22, 2004, **[*14]** and August 25, 2004. Claimant responded that he was "not aware of that." Claimant was also asked whether he was aware of the fact that the records from Dr. Fielder for those two dates do not record any history of an accident. Claimant responded that he "saw [Dr. Fielder] on September 17th, [and] told him [he] hurt [him]selflifting a ladder at work." Regarding the lack of history of a work accident in Dr. Fielder's September 17, 2004, report, claimant stated that he "can't write for [the doctor]." Regarding Dr. Yuk's February 10, 2005, physician's intake sheet and his February 14, 2005, report, which indicated claimant did not report the injury to respondent until September 2004, claimant stated: "I'm not aware of that. I told every doctor I hurt myself at work. I told Bob Cascio 3 times."

Claimant also testified on cross-examination that he previously pursued a workers' compensation claim with an accident date of October 3, 2000. Relative to the October 3, 2000, claim, when claimant saw his physician on October 17, 2000, he gave a history of an accident at work on October 3, 2000. Claimant acknowledged that he was off work for a period of 24 weeks for that incident and that he was awarded **[*15]** PPD benefits based on a 40% loss of use of the right leg. Claimant testified that he could not recall receiving a company handbook upon hire by respondent. Claimant also admitted that he did not testify as to any specific event occurring on September 15, 2004, at work.

Robert Cascio, respondent's painting field superintendent, testified that claimant received a company handbook and saw a safety video when he was hired in March 2004. The handbook and the video instruct workers to immediately notify a supervisor of any work-related accident and to complete an accident report. Cascio agreed that claimant was assigned to work at the Sunrise job site in June 2004. Cascio testified that he (Cascio) would be at that job site at least 3 times a week from June through September 2004, sometimes daily, for 30 to 60 minutes at a time. In addition, Cascio would communicate with claimant at least three times daily via two-way radio in the morning, noon, and evening.

Despite this regular contact, Cascio indicated that claimant never advised him of or complained of any neck or shoulder condition between June 4 and September 14, 2004. In fact, Cascio stated that claimant worked full duty and carried **[*16]** out all aspects of his job during that time. Cascio testified that he had no knowledge from any source of claimant being hurt at work prior to a September 22, 2004, conversation with claimant. Moreover, Cascio denied that claimant ever called him on July 13, 2004, to indicate his neck and shoulder were hurting. According to a note Cascio took on September 22, 2004, claimant called him the morning of Wednesday, September 15, 2004, stating that he had some arm problems and was going to see a doctor. At that time, claimant gave no indication the condition was related to a work accident. Claimant worked on September 16th and 17th, and next discussed his medical condition with Cascio on September 22, 2004. On that date, claimant said his doctor called and told him he had a herniated disc and was to stop working immediately. Claimant asked if any paperwork needed to be filled out, and Cascio responded in the negative. Claimant called back later that afternoon and said his doctor "could not proceed" without paperwork. Cascio asked claimant what type of paperwork he was talking about, and claimant indicated that Cascio had apparently misunderstood him and that it involved a work-related incident. **[*17]** Cascio testified that was the first time he was notified of any alleged work-related incident. When he asked claimant when he had been hurt, claimant indicated that "it must have happened while carrying a 32 [foot] ladder while working [at the Sunrise job site]." When Cascio asked claimant if he felt anything or if a specific incident had occurred, claimant said, "[n]o, but it must have been when I was carrying that 32-foot ladder." Based on claimant's account, Cascio indicated that he did not believe that the condition was work related, but he gave the information to respondent's insurer to make the determination. Cascio could not recall if claimant provided a specific accident date. Cascio explained that he did not complete an accident report because he "was not notified of an accident." When Cascio discussed the situation with his supervisor, Gerry Ginter, Ginter asked Cascio if there had been a documented accident, date of accident, or accident report, and when Cascio told him no, Ginter suggested to Cascio that claimant contact his union's group insurance. However, Cascio denied telling claimant not to report his condition as work related or to process the claim through group **[*18]** insurance.

The arbitrator issued a separate decision for each of the three applications for adjustment of claim filed by claimant. With respect to the June 4, 2004, accident date, the arbitrator concluded that claimant sustained his burden of proving an accident that arose out of and in the course of his employment with respondent. The arbitrator found that claimant "credibly testified" regarding the events surrounding that accident and that his account was "substantiated" by the histories in claimant's medical records. In particular, the arbitrator noted that claimant sought treatment with Dr. Gamble with respect to his neck and left shoulder, claimant testified that he

had no prior condition involving his neck and shoulder, and the medical records of Drs. Fielder and Fister support claimant's account. The arbitrator further determined that claimant "credibly testified" that on July 13, 2004, he told his supervisor that he was feeling neck and shoulder pain and that he was going to see a chiropractor. The arbitrator noted that claimant sought medical treatment involving his condition two days later and that claimant testified that his supervisor told him to process his medical bills **[*19]** through his group insurance.

With respect to the August 2, 2004, accident date, the arbitrator also concluded that claimant sustained his burden of proving an accident which arose out of and in the course of his employment with respondent. Again, the arbitrator found that claimant "credibly testified" regarding the events surrounding that accident and that his account was "substantiated" by the histories in claimant's medical records. The arbitrator classified the injury of August 2, 2004, as an "intervening accident," which was the cause of claimant's current state of ill-being. The arbitrator further determined that claimant "credibly testified" that on September 15, 2004, he told his supervisor that he injured his neck, shoulder, and left arm, and that he wanted to see a physician. In support, the arbitrator noted that claimant sought medical treatment involving his condition two days later and that claimant testified that his supervisor told him to process his medical bills through his group insurance.

The arbitrator determined that claimant failed to prove that he sustained a compensable injury on September 15, 2004. In particular, the arbitrator noted that on cross-examination, **[*20]** claimant admitted that he did not suffer a new accident on that date. The arbitrator therefore found that claimant is not entitled to medical expenses, TTD, or a permanency award with respect to this alleged injury. However, with respect to the other two claims, the arbitrator awarded reasonable and necessary medical expenses, 38-4/7 weeks of TTD, and 200 weeks of PPD, representing 40% loss of use of a person as a whole. Thereafter, respondent appealed the arbitrator's findings with respect to the accident dates of June 4, 2004, and August 2, 2004.

In two separate decisions, a majority of the **Commission** reversed. The **Commission** found that claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment on June 4, 2004, or August 2, 2004. The **Commission** noted that claimant's medical records do not disclose any evidence of a work-related injury on June 4, 2004, or August 2, 2004, until September 28, 2004. In addition, the **Commission** noted that while claimant contacted his supervisor in mid-July 2004 to report a sore neck and back, claimant admitted that he did not indicate that his condition was work related. The **Commission** determined that **[*21]** claimant did not inform respondent that he was injured at work until September 22, 2004, more than three months after the initial incident. Furthermore, when claimant did inform respondent, he offered only speculation as to the occurrence of the accidents instead of relating them to specific incidents. The **Commission** concluded that claimant did not claim his neck condition was work related until after he was told that he had a pinched nerve and had to be off work. As such, the **Commission** found that claimant's testimony was not credible and it denied benefits. Commissioner DeMunno dissented. He would have affirmed and adopted the arbitrator's decision in its entirety.

Thereafter, claimant appealed the **Commission's** decisions. The appeals were consolidated for review before the circuit court of Cook County. Following oral arguments, the trial court confirmed the decisions of the **Commission** on the basis that they were not against the manifest weight of the evidence. Respondent then filed the appeal before us.

II. ANALYSIS

On appeal, claimant argues that the **Commission's** finding that, based on a lack of credibility, he failed to prove that he sustained an accident on either June 4, 2004, or **[*22]** August 2, 2004, is contrary to law. The purpose of the Act is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989). HN1 An injury is compensable under the Act only if it "arises out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2004). Both elements must be present at the time of the employee's injury in order to justify compensation, and it is the employee's burden to establish these elements by a preponderance of the evidence. *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1226, 738 N.E.2d 955, 250 Ill. Dec. 486 (2000). The determination of whether an injury arose out of and in the course of one's employment is generally a question of fact. *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 847, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996). In resolving questions of fact, it is within the province of the **Commission** to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Ghere*, 278 Ill. App. 3d at 847. We will not overturn the decision of the **Commission** regarding whether an injury arose **[*23]** out of and in the course of employment unless the **Commission's** decision is found to be contrary to the manifest weight of the evidence. *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 277-78, 711 N.E.2d 1129, 238 Ill. Dec. 468 (1999). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 539, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007).

Prior to addressing the merits of claimant's argument, we find it necessary to discuss claimant's suggestion that we abandon the deferential standard of review outlined above in favor of a stricter standard when the **Commission's** credibility findings are contrary to those of the arbitrator. In *Cook v. Industrial Comm'n*, 176 Ill. App. 3d 545, 552, 531 N.E.2d 379, 126 Ill. Dec. 84 (1988), this court stated that "in cases where the **Commission** has rejected the arbitrator's factual findings without receiving any new evidence, [the reviewing court applies] an extra degree of scrutiny to the record in determining whether there is sufficient support for the **Commission's** decision." *Cook*, 176 Ill. App. 3d at 552. However, this holding has since been repudiated in almost every reported case that has cited it. See *Boatman v. Industrial Comm'n*, 256 Ill. App. 3d 1070, 1071, 628 N.E.2d 829, 195 Ill. Dec. 365 (1993) **[*24]** (noting that *Cook* has been rejected "as an incorrect statement of the law"); *J & J Transmissions v. Industrial Comm'n*, 243 Ill. App. 3d 692, 700, 612 N.E.2d 877, 184 Ill. Dec. 1 (1993) (holding that *Cook* "is not an accurate statement of the law"); *Hartsfield v. Industrial Comm'n*, 241 Ill. App. 3d 1055, 1060, 610 N.E.2d 702, 182 Ill. Dec. 833 (1993) ("The statement in *Cook* regarding an extra degree of scrutiny is not a standard of review recognized by this court"); *Wagner Castings Co. v. Industrial Comm'n*, 241 Ill. App. 3d 584, 594, 609 N.E.2d 397, 182 Ill. Dec. 90, 182 Ill. Dec. 94 (1993)(declining the employer's invitation to give an extra degree of scrutiny to the **Commission's** decision where the **Commission** overturned the arbitrator's decision without hearing any new evidence); *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779, 788, 601 N.E.2d 1339, 176 Ill. Dec. 641 (1992) (same); *Dillon v. Industrial Comm'n*, 195 Ill. App. 3d 599, 607, 552 N.E.2d 1082, 142 Ill. Dec. 341 (1990) ("Regardless of whether the **Commission** hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's finding") Moreover, our supreme court has consistently held that HN2 when the **Commission** reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and that the **Commission** is not bound **[*25]** by the arbitrator's findings. See, *e.g.*, *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989); *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 386, 418 N.E.2d 717, 49 Ill. Dec. 697 (1981).

Claimant directs us to our recent decision in *S & H Floor Covering, Inc. v. Industrial Comm'n*, 373 Ill. App. 3d 259, 268, 870 N.E.2d

821, 312 Ill. Dec. 377 (2007). However, *S & H Floor Covering* did not resurrect the extra-degree-of-scrutiny standard referenced in *Cook*. In *S & H Floor Covering*, the employer urged us to reconsider precedent that the **Commission** is not required to give deference to the arbitrator's findings regarding credibility. We responded that it "may very well be time to reconsider the **Commission's** prerogative to determine credibility regardless of the arbitrator's decision." *S & H Floor Covering*, 373 Ill. App. 3d at 267. We then reviewed *Cook* and referenced the cases departing from that decision before concluding that we would "consider giving credence" to *Cook*. *S & H Floor Covering*, 373 Ill. App. 3d at 268. However, we did not actually determine the viability of *Cook's* extra-degree-of-scrutiny standard as it was unnecessary for **[*26]** us to do so. *S & H Floor Covering*, 373 Ill. App. 3d at 268. In any event, as the overwhelming weight of authority cited above suggests, *Cook* is a misstatement of the appropriate standard of review. Accordingly, we decline to apply to this case the extra-degree-of-scrutiny referenced in *Cook*.

As noted above, HN3 to be compensable, an injury must both "arise out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2004); *Rodin*, 316 Ill. App. 3d at 1226. The "in the course of" element refers to the time, place, and circumstances under which the accident occurred. *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 575, 720 N.E.2d 275, 241 Ill. Dec. 820 (1999). An injury is said to "arise out of" one's employment when there is a causal connection between the employment and the injury; that is, the origin or cause of the injury must be some risk connected with the claimant's employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 921, 161 Ill. Dec. 275 (1991). Typically, an injury arises out of one's employment if at the time of the occurrence, the claimant was performing acts the employer instructed the claimant to perform, acts incidental to the claimant's assigned duties, or acts which the claimant had a common **[*27]** law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989).

In this case, the arbitrator found that claimant "credibly testified" regarding the events surrounding the June 4, 2004, and August 2, 2004, accidents, and therefore awarded claimant benefits. A majority of the **Commission,** however, disagreed, concluding that claimant's testimony regarding the accidents lacked credibility and that he therefore failed to sustain his burden of proving that his injuries arose out of and in the course of his employment. Claimant insists that the **Commission's** finding that he lacked credibility is contrary to law. According to claimant, the evidence upon which the **Commission** relied is insufficient to support a finding that his testimony was not credible. Claimant further asserts that his testimony was "uncontradicted." As such, he maintains that the **Commission,** as the trier of fact, was without discretion to discount his testimony unless it was impeached, contradicted by positive testimony or circumstances, or found to be inherently improbable. See *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85, 430 N.E.2d 1126, 58 Ill. Dec. 875 (1988). We disagree.

We find that there was sufficient factual **[*28]** evidence in the record to support the **Commission's** decisions. HN4 Although an employee's testimony about an alleged accident might be sufficient, standing alone, to justify an award of benefits under the Act, it is not enough where consideration of *all* facts and circumstances demonstrate that the manifest weight of the evidence is against it. *Caterpillar Tractor Co. v. Industrial Comm'n*, 83 Ill. 2d 213, 218, 414 N.E.2d 740, 46 Ill. Dec. 687 (1980). As we observe below, portions of claimant's testimony were contradicted by the record. Significantly, claimant's medical records contemporaneous to June 4, 2004, and August 2, 2004, do not reference claimant reporting a work injury. Following the alleged injury of June 4, 2004, claimant did not seek medical treatment for almost six weeks. When claimant finally saw his chiropractor, Dr. Gamble, on July 15, 2004, Dr. Gamble's progress notes do not mention a work injury. Claimant saw Dr. Gamble on five additional dates in July, but the progress notes for those dates do not mention any link to a work-related accident either. While claimant insists that he reported a work-related injury to Dr. Gamble, it is curious that, despite having had prior experience with the workers' compensation **[*29]** system, claimant did not request Dr. Gamble to process his treatment as a workers' compensation claim. Further, while claimant testified that Cascio told him to process his claim under group insurance, the record reflects that this information was related to claimant, if ever, in September 2004, two months after his treatment with Dr. Gamble.

The record also reflects that claimant contacted his primary-care physician, Dr. Fielder, on July 22, 2004, and August 25, 2004, yet made no mention of any work-related injury. Claimant saw Dr. Fielder on September 17, 2004, but Dr. Fielder's notes of that date do not reference any specific incident involving claimant carrying or lifting a ladder or being injured while performing work activities. In fact, the only reference to work in Dr. Fielder's notes is a vague comment that claimant had been "painting since March." On September 22, 2004, after reviewing some diagnostic films, Dr. Fielder issued an off-work slip. However, it was not until September 28, 2004, six days later, that claimant's medical records indicate that he reported an accident at work when he treated with Dr. Rana. The **Commission** could easily find that given claimant's prior **[*30]** experience with the workers' compensation system, the delay in reporting the alleged accidents to his employer and physicians belie the veracity of his testimony.

The **Commission** also pointed to other evidence that reflected upon the lack of claimant's credibility. The **Commission** noted that claimant and Cascio were in frequent contact, both in person and via two-way radio. Given the frequency of contact, claimant would have had many opportunities to report a work-related accident to his employer. Yet, according to Cascio, he first became aware of claimant's allegation of an injury at work on September 22, 2004, more than 15 weeks after the alleged June 2004 incident and more than seven weeks after the alleged August 2004 incident. Cascio's testimony that he was not informed by claimant of a possible work-related injury until September 2004, is supported by the intake form claimant completed for Dr. Yuk.

Moreover, when claimant finally told Cascio that he believed that his condition was work related, claimant was unable to link his condition to a specific incident at work. Notably, when Cascio asked claimant if he felt anything or if a specific incident had occurred, claimant responded, **[*31]** "[n]o, but it *must have been* when I was carrying that 32-foot ladder." (Emphasis added.) Claimant's conversation with Cascio is inconsistent with his testimony at the arbitration hearing, where he expressly stated that while lifting a ladder on June 4, 2004, he heard a "popping sound" and while lifting a ladder on August 2, 2004, he felt pain. Claimant did testify to a conversation with Cascio on July 13, 2004. Claimant alleged that during that conversation, he told Cascio that he was going to see a chiropractor because his neck and back were sore. Cascio denied that any such conversation took place. However, even if it did, the details of the conversation do not support a finding that claimant told Cascio that his condition was *work related*. In fact, claimant admitted at the arbitration hearing that all he reported to Cascio was that his neck and back were sore and nothing more.

In short, while there was no witness testimony that an accident did not occur on either June 4, 2004, or August 2, 2004, there was other evidence in the record inconsistent with claimant's testimony that he sustained a work-related injury on either of those dates. In particular, that evidence indicates that: **[*32]** (1) claimant did not report a work-related accident to any of his medical providers until September 28, 2008; (2) despite his experience with the workers' compensation system, claimant processed his initial treatment using a group insurance card; (3) claimant did not report a work-related accident to respondent until September 22, 2008; and (4) when claimant informed respondent that his condition was work related, he was unable to link the condition to a specific date. As we stated previously, in resolving questions of fact, it is within the province of the **Commission** to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Ghere*, 278 Ill. App. 3d at 847. In this case, the **Commission,** after considering the conflicting evidence, determined that claimant

failed to sustain his burden of proving that his injuries arose out of and in the course of his employment. Based on the record before us, we cannot say that an opposite conclusion is clearly apparent.

III. CONCLUSION

The **Commission's** findings that claimant failed to prove by a prepon derance of the credible evidence that he sustained **[*33]** accidental injuries arising out of or in the course of his employment with claimant on June 4, 2004, or August 2, 2004, are not contrary to the manifest weight of the evidence. Accordingly, we affirm the judgment of the circuit court of Cook County, which confirmed the decisions of the **Commission.**

Affirmed.

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

*2007 Ill. Wrk. Comp. LEXIS 1201, *; 7 IWCC 1108*

JERRY **HOSTENY,** PETITIONER, v. ARMING JOHNSON CO., RESPONDENT,

NO: 04 WC 59685

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2007 Ill. Wrk. Comp. LEXIS 1201; 7 IWCC 1108

August 17, 2007

CORE TERMS: neck, pain, ladder, symptoms, foot, cervical, shoulder, arm, carrying, soreness, notice, pop, painting, lifting, doctor, recommended, pound, hurt, supervisor, cramping, painter, temporary total disability, returned to work, contemporaneous, radiculopathy, injections, paperwork, nerve, group insurance, discectomy

JUDGES: Nancy Lindsay; Dennis R. Ruth

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Galicia finding that Petitioner sustained accidental injury arising out of and in the course of his employment on August 2, 2004 and was entitled to 38-4/7 weeks of temporary total disability (TTD), medical expenses totaling $ 86,418.40 and that he sustained the permanent loss of 40% of the person as a whole. The issues on Review are accident, notice, causation, TTD, medical expenses and permanency. For the reasons set forth below, the Commission, after considering the entire record, reverses the Arbitrator's Decision, finding that Petitioner failed to prove he sustained accidental injury arising out of and in the course of his employment on August 2, 2004 and vacates all awarded benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a journeyman painter, was working as a foreman at Respondent's "Sunrise" job site on June 4, 2004. He testified he was carrying a 32 foot ladder "throughout the day" while painting window lintels and heard a pop in his neck while lifting the ladder that afternoon, but felt no pain immediately or later that evening. The next morning, a Saturday, **[*2]** he awoke with posterior neck pain and soreness. He returned to work the following Monday and had no symptoms, noting: "when I was working I was fine. When I was in - - at night relaxing or trying to sleep, that's when I had soreness." He testified that the pain began radiating into his arm a couple of weeks after June 4, 2004. On July 13, 2004 he told his superintendent, Robert Cascio, that his neck and back were sore and, other than noting he was going to see a chiropractor for his back, that was the end of the conversation. He first sought treatment with a chiropractor, Dr. Gamble, on July 15, 2004, almost six weeks after the alleged date of accident. Dr. Gamble's initial report notes complaints of left-sided neck pain and soreness radiating into the left shoulder and upper arm, but nothing is noted about a work injury. Petitioner visited Dr. Gamble five more times through July 29, 2004 with similar complaints, and none of his reports reflect that Petitioner reported a work accident or that his pain was brought on by work activities. On July 22, 2004 Dr. Gamble recommended cervical and thoracic MRIs. Petitioner continued to work regular duty. (Tr. 12-24, 54-58, 63-64; Px1; Rx2). **[*3]**

2. On August 2, 2004, Petitioner testified he picked up the 32 foot ladder while working and again felt posterior neck pain. He testified: "in June 2004 I felt a pop, no pain. This I felt a pain this time around [sic]." After this latter incident he said he "took it easy. It went away", and he continued to work that day. After the August 2, 2004 incident his neck, left shoulder and left arm pain, with cramping in the left arm and hand, started to increase in strength, and the neck pain "was more a deeper pain", but he continued to work regular duty until September 22, 2004. He agreed he never completed an accident report between his initial June 4, 2004 accident and August 2004. Petitioner testified that he reported a work injury to Cascio on the afternoon of September 15, 2004 after he got home from work, and that Cascio told him Respondent frowned upon workers' compensation claims, noting Cascio "ended the conversation and took control of it ... He stopped me from talking." He testified that Cascio would be present at Petitioner's job site in person three times per week, and that he would also keep in contact with him via walkie-talkie and/or phone three to five times per week. **[*4]** He also agreed he never reported the June 4, 2004 incident to Cascio between prior to July 13, 2004. (Tr. 24-28, 45-49, 54-58).

3. Petitioner continued to work full duty, noting he only had symptoms while at home resting or trying to sleep. Petitioner next sought treatment on September 17, 2004 with Dr. Fiedler, his primary care provider, complaining of soreness in the left arm and neck with forearm cramps, noting symptoms had been present since July. A separate notation in the report stated "painting since March." No specific work injury or accident was reported. He was referred for a September 21, 2004 cervical MRI and September 24, 2004 EMG/NCV. Following the MRI, Dr. Fiedler called Petitioner on September 22, 2004 noting it showed a cervical disc and a pinched nerve and that he should be off work. Petitioner testified he reported this to Cascio and was told he didn't need to complete any paperwork

before leaving work. On cross-examination, Petitioner testified he called Cascio back because he couldn't get treatment without authorization, indicating Cascio may have misunderstood him. When Cascio asked what he meant, Petitioner said he told him he got hurt at work, at which point **[*5]** Cascio replied, "You did? When did it happen?" Petitioner responded that he wasn't sure, but that it must have happened while moving the ladder at the Sunrise job on June 4th and August 2<nd.> (Tr. 28-32, 64-66; Px2; Rx3; Rx4; Rx6).

4. When the EMG/NCV reflected no evidence of radiculopathy, but rather marked and advanced left carpal tunnel syndrome, Petitioner was then referred to pain specialist Dr. Rana. Petitioner saw Dr. Rana on September 28, 2004 noting a recent history of neck pain into the left arm with occasional numbness in the forearm and first three fingers. Dr. Rana's report notes Petitioner "states that he was carrying a 32 foot ladder at work throughout the day and felt discomfort. He states he was injured on 6/4/04 and 8/2/04. He states that staying busy and moving helps him and when he is lying in bed and in idle positions, his symptoms are worsened." Dr. Rana diagnosed cervical radiculitis, facet syndrome and a herniated cervical disc and recommended various injections. He noted Petitioner "asked me if I could answer whether or not his accident caused his pain or whether this would be a preexisting condition and I told him I was not able to answer that and I would **[*6]** suggest he contact [Dr. Fiedler] as his medical doctor to see what he was like before he injured himself and to compare how he is right now." Following receipt of the EMG/NCV results, and Petitioner's questions of how it could have indicated no radiculopathy given the MRI results, Dr. Rana during an October 5, 2004 phone call told Petitioner to speak to Dr. Kim, who performed the EMG/NCV, and to "ask him whether this is an acute or chronic condition, since it is specifically not dictated as to that effect and to ask him about the fact that there is no evidence of any cervical radiculopathy present, given the findings on MRI." He also told Petitioner to contact Dr. Fiedler about what his next options would be. Petitioner told Dr. Rana that Dr. Fiedler said that Rana should fill out his disability form, and Rana told Petitioner that he only met him after his accident and thus was unable to comment as to the degree of disability he had, suggesting he contact Dr. Fiedler to determine how his health changed after this particular injury. A Dr. Fiedler note of a phone call from Petitioner from his attorney's office on October 5, 2004 notes Dr. Rana's report that the EMG did not reflect a **[*7]** pinched nerve, and Petitioner was referred to neurologist Dr. Ghumra. (Tr. 32-34; Px2; Px4; Rx4; Rx5; Rx6; Rx7).

5. Dr. Ghumra's October 12, 2004 report notes, per the history from Petitioner and his wife, it "appears that he was carrying a 32 foot ladder at work and has been working on his regular schedule. On 6/4/04 and the subsequent day and 8/2/04, he had two separate work-related injuries. He states that he injured his neck and started experiencing some pain radiating down to his left shoulder and all the way down to his hand. His hand also started becoming numb and tingly." Despite treatment, including multiple injections, Petitioner still complained of persistent pain and radicular-like symptoms. While his neurological examination appeared to be within normal limits, Dr. Ghumra diagnosed cervical radiculopathy based on Petitioner's symptoms and the MRI results, noting that if continued treatment with Dr. Rana failed he should see a neurosurgeon. (Px2; Rx8).

6. Petitioner continued to treat with Dr. Rana into 2005 before seeking treatment with Dr. Fister on January 26, 2005. Noting the MRI findings, Dr. Fister indicated that if Petitioner had left-sided C6 radicular symptoms **[*8]** that were bad enough that he wanted surgery, he recommended a C5/6 discectomy and fusion. After a review of Dr. Rana's records Dr. Fister stated that "apparently the patient was asking the pain clinic doctor whether his symptoms were due to his accident or preexisting so we have workcomp issues involved here." Petitioner contacted Dr. Fiedler, as he wanted a second opinion, noting he wanted to see Dr. Yuk. Petitioner, however, first returned to Dr. Fister on February 9, 2005, and the report from that date notes that Petitioner indicated the first time he noticed an abnormality was "probably in June 2004 when he was at work as a painter and he turned his neck and felt a sudden crack or pop in the neck and then gradually after that he developed these symptoms going down the left upper extremity." Dr. Fister's intake form from the same date noted an injury/accident of "June & August 2004" and "lifting 32 foot ladder at work." (Tr. 34-42, 69-70; Px2; Px4; Px7; Rx6).

7. Petitioner saw Dr. Yuk on February 14, 2005, and his report states Petitioner "felt a 'pop' in the neck and noticed soreness in the neck later. Steadily, he felt that he had pain running down his left arm. He also describes **[*9]** discomfort in the left shoulder blade. He initially thought that he simply pulled a muscle. His symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September." Dr. Yuk noted that "according to the history I have, [Petitioner] did not have a significant neck problem until he carried a 32 foot ladder all day in 6/04 . . .", and that "the cervical herniated disc is the result of this work injury." The intake form for Dr. Yuk indicated a date and location of injury as "June 2004 worksite", with further explanation stating "June 2004 lifted 32 foot ladder throughout day. Felt crack/pop in neck resulting in soreness, pain, cramping, numbness in left arm/hand, shoulder blade & neck." A separate note in a different handwriting states "reported it to boss in September." (Tr. 34-42, 69-70; Px2; Px5; Px6; Rx12).

8. On March 15, 2005 Petitioner underwent a C5/6 discectomy and fusion with Dr. Yuk and was subsequently released to restricted duty on or about June 8, 2005 with a 30 pound weight limit. After returning to work on June 20, 2005 Petitioner worked for a period of time before being temporarily laid **[*10]** off, and then was laid off again in September 2005 and remained off work through the October 13, 2005 arbitration hearing. He applied for and was receiving unemployment, retroactive to September 11, 2005. Petitioner testified he had no neck or shoulder problems prior to June 4, 2004, and has not been involved in any non-work related accidents since. (Tr. 34-42, 69-72; Px5; Px6).

9. Respondent's Section 12 examining physician, Dr. Matz, saw Petitioner in May 2005, reporting a history of carrying a 32 foot ladder on June 4, 2004 throughout the day as he was painting multiple windows, feeling and hearing an audible "crack" in his neck, but having no further symptoms that day, except for a "little bit of pain in back of the neck going down into the left arm by that night." He noted Petitioner "is a vague historian and difficult to pin down as to the timing of many of his symptoms, which he in general is of the recollection that over time, his symptoms got worse. He believes that it was sometime in June and/or July that he began to have cramping pain about his neck and left arm." Then "on 8/2/04, [Petitioner] was again painting and using a ladder when he alleges more pain in back of his **[*11]** neck. By September of last year, his pain was described as 'more intense and cramping', so he called [Dr. Fiedler]." Dr. Matz opined that Petitioner's cervical herniation was not causally related to his employment based on the lack of a contemporaneous history of neck complains or injury in the medical records. (Rx10; Rx11).

10. Petitioner testified he didn't recall being diagnosed with bilateral carpal tunnel in January 2003. He also didn't recall telling Dr. Fiedler in February, 2004 that he was off work and had been remodeling his home, though he stated "I could have been", but that any such work would have essentially involved painting. He didn't recall when he stopped doing this remodeling, just mat he wasn't doing it in May or June 2004. (Tr. 49-54).

11. Petitioner testified that he told Dr. Gamble on July 15, 2004 that he hurt himself at work lifting the 32 foot ladder, but agreed he provided his group insurance card at that visit. Regarding the lack of a history of a work accident in Dr. Fiedler's July 22nd and August 25th reports, he testified: "I saw him on September 17th, told him I hurt myself lifting a ladder at work", noting "I can't write for [the

doctor]." Regarding **[*12]** Dr. Yuk's February 10, 2005 physician's intake sheet and his February 14, 2005 report, which indicated Petitioner didn't report the injury to Respondent until September 2004, Petitioner stated: "I'm not aware of that. I told every doctor I hurt myself at work. I told Cascio 3 times." Again, as to whether he first reported a work injury to Cascio in September 2004, Petitioner testified: "I told him I hurt myself. I was sore in my neck and back. The second time I told him on September 15th that I hurt myself, and then September 22nd in the afternoon was another time." (Tr. 58-66).

12. Petitioner agreed he called Dr. Fiedler from his attorney's office on October 5, 2004 and asked if his pinched nerve was related to work. Dr. Fiedler told him he couldn't give him an opinion and that he should call Dr. Rana. Petitioner then called Dr. Rana from his attorney's office and asked him to complete a disability form. Dr. Rana told him he couldn't do it and that Petitioner needed to see Dr. Feidler, his family doctor, for such an opinion. Petitioner stated that Dr. Fiedler has since, at Petitioner's request, opined Petitioner's surgical condition was work-related on an October 14, 2004 temporary **[*13]** disability form by checking off a "work related" box. (Tr. 66-69; Px2A).

13. Robert Cascio, Respondent's painting field supervisor, testified that Petitioner received a company handbook and saw a safety video when he was hired in March 2003, which indicate a supervisor is to be immediately notified of a work accident and an accident report is to be completed. He denied ever telling Petitioner not to report his condition as work related but instead to go through group insurance. He agreed that Petitioner was assigned to work at the Sunrise site in June 2004. Cascio testified he would be at that job site at least 3 times a week from June through September 2004, sometimes daily, for l/2 to 1 hour at a time, and he would also communicate with Petitioner at least three times daily via walkie-talkie in the morning, noon and evening. (Tr. 74-84).

14. Cascio indicated Petitioner never advised him of or complained of any neck or shoulder condition or any work injury between June 4 and September 14, 2004, and that Petitioner-worked full duty and carried out all aspects of his job in that time. He never informed Cascio of a June or August 2004 job injury despite seeing and/or talking to Petitioner **[*14]** daily, and Cascio had no knowledge from any source of Petitioner being hurt at work on June 4 or August 2, 2004 prior to the September 22, 2004 conversation. Cascio denied that Petitioner ever called him on July 13, 2004 to indicate his neck and shoulder were hurting. Pursuant to Cascio's contemporaneous notes from September 22, 2004 (Rx15), Petitioner called him in the morning on September 15, 2004 (a Wednesday) saying he had some arm problems and was going to see a doctor, but gave no indication it was related to a work accident. Petitioner worked on September 16th and 17<th,> and next discussed his medical condition with Cascio on September 22, 2004, when Petitioner said his doctor called and told him he had a herniated disc and pinched nerve and was to stop working immediately. Petitioner asked if any paperwork needed to be filled out and Cascio told him no. Petitioner called back later that afternoon and said his doctor needed paperwork completed prior to being able to treat him. Cascio asked Petitioner what type of paperwork he was talking about, and Petitioner indicated that Cascio had apparently misunderstood him and that it involved a work related incident. Cascio testified **[*15]** this was the first time he was notified of any alleged work related incident. When he asked Petitioner when he'd been hurt, Petitioner indicated it was at the Sunrise job while carrying a 32 foot ladder, and Cascio agreed Petitioner may have used a ladder on that job at that time. When he asked Petitioner if he felt anything or if a specific incident had occurred, Petitioner said "no, but it must have been when I was carrying that 32 foot ladder." Upon questioning, Petitioner indicated he did not have any pain at the time he carried the ladder, and based on this and the lack of documentation of it, Cascio indicated he didn't believe the condition was work related, but he gave the information to Respondent's insurer to make the determination. He didn't complete an accident report because he "was not notified of an accident." Cascio could not recall if Petitioner provided a specific accident date. When Cascio discussed the situation with his supervisor, Gerry Ginter. Ginter asked Cascio if there had been a documented accident, date of accident or accident report, and when Cascio told him no Ginter suggested to Cascio that Petitioner contact his union's group insurance. (Tr. 84-94, 99-103, **[*16]** 101-110; Rx15).

The Commission finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on August 2, 2004. As was the case with regard to the case involving his alleged June 4, 2004 accident, Petitioner's contemporaneous medical records do not disclose any evidence of the reporting by Petitioner of a work injury. Petitioner already had sought treatment for neck and left arm pain on July 15, 2004 with Dr. Gamble, and continued to have the same complaints through his last visit with Gamble on July 29, 2004. Other than a vague note of "painting since March", nothing in the contemporaneous records of Dr. Fiedler, the first doctor Petitioner sought treatment with after Dr. Gamble, reflect any specific incident involving Petitioner carrying or lifting a ladder or being injured while performing work activities. The first time a specific history is noted in the medical records regarding carrying a ladder was the September 28, 2004 report of Dr. Rana.

Petitioner testified that in June 2004 he felt a pop but had no pain and that he subsequently had no pain at work but rather only while he was at home at night while relaxing or **[*17]** trying to sleep. Meanwhile he testified that on August 2, 2004 he felt pain but he then "took it easy. It went away", and he subsequently continued to work full duty through September 22, 2004. Further, Petitioner appears to have initially told Cascio on September 22, 2004 that he was alleging a work accident, and indicated that while he didn't recall a specific incident, his neck injury "must have" occurred at work while working, at the Sunrise job. Additionally, this report to Cascio only came after Petitioner underwent an MRI and learned that he had a pinched nerve in his neck and was being taken off of work. He had continued working regular duty up until that point. The Commission finds the testimony of Robert Cascio, that Petitioner never reported a work related accident to him until September 22, 2004 despite the fact that they spoke several times a day, to be credible, as this is also supported by the contemporaneous notes he took (Rx15). The Commission finds Petitioner did not credibly testify to any specific work accident on August 2, 2004 and therefore find he has failed to prove he sustained accidental injury on that date. Therefore, all benefit awards of the Arbitrator **[*18]** related to this date are hereby vacated.

The Commission also notes Petitioner testified he initially reported neck and back soreness to his supervisor, Robert Cascio, on July 13, 2004, and continued to complain of the same symptoms to Dr. Gamble through July 29, 2004. As such, it appears that even if such an August 2, 2004 incident occurred, at most it was a temporary aggravation of his preexisting neck pain.

IT IS THEREFORE ORDERED BY THE COMMISSION that the January 4, 2006 Decision of the Arbitrator is reversed and all benefits awarded are hereby vacated.

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

DATED: AUG 17, 2007

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 October 13, 2005. After reviewing all of the evidence **[*19]** presented, the Arbitrator hereby makes findings on the disputed issues circled 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?
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?
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 08/02/04, the Respondent Anning Johnson Co. *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 $ 67.038.40; the average **[*20]** weekly wage was $ 1289.20

. At the time of injury, the petitioner was 42 years of age, *married* with 2 children under 18.

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

. To date, $ 60.661.87 in medical services and $ 13.456.71 in short-term disability benefits pursuant to Section 8(j) has been paid by the respondent on account of this injury.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 859.47 /week for 38 and 4/7 weeks, from September 22, 2004 through June 19, 2005, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 567.87 /week for a further period of 200 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a permanent disability to the extent of 40% loss of use of person as a whole.

. The respondent shall pay the further sum of $ $ 86.418.40 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(1) of the Act. **[*21]**

. The respondent shall pay $ 0 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 of 4.26% shall accrue from the date listed below to the day before they 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

12-30-05

Date

JAN 04 2006

ATTACHMENT TO ARBITRATION DECISION

Findings of Fact:

Petitioner, Jerry **Hosteny,** has worked for Aiming Johnson for approximately six months as journeyman painter and crew foreman which requires that he conduct normal painting activities along with supervisory duties. Petitioner has worked as a painter **[*22]** for twenty one years. Petitioner is 5 foot 11 inches and weighs 215 pounds.

On June 4, 2004, Petitioner was working on a project at the Sunrise Assisted Living painting windows when he was carrying a 32 foot fiberglass ladder. Petitioner testified that upon lifting the ladder he heard a "pop" in the back of his neck but did not feel immediate

pain in that area. Petitioner continued to work the rest of the day and went home. He indicated that he did not feel any pain in the neck area until he woke up the next morning, which was a Saturday. He returned to work the following Monday despite the pain. He indicated that his work activities seemed to alleviate his symptoms temporarily so he did not seek medical treatment right away. However, when he would arrive home and rest, he began to notice soreness in his neck.

On July 13, 2004, Petitioner testified that he spoke with his superintendent, Robert Cascio, inside the building at Sunrise Assisted Living and told him that he had been feeling pain in his neck recently and was going to seek the help of a chiropractor. Petitioner indicated that Mr. Cascio did not respond to his comment.

On July 15, 2004, Petitioner sought medical treatment **[*23]** with a chiropractor, Jack Gamble of Gamble Chiropractic Clinic. On that date, Dr. Gamble noted "pain and soreness on the left side of the neck that radiates into the top of the left shoulder and left upper arm." (PX. 1, pg. 9). Petitioner received chiropractic attention from Dr. Gamble on five occasions during the month of July. (PX. 1, pg. 11). Petitioner indicated that he told Dr. Gamble about his incident at work. Dr. Gamble noted that Petitioner did not feel pain or symptoms while working and recommended Petitioner undergo and MRI of the cervical and thoracic spine. (PX. 1, pg. 11). Petitioner last visit with Dr. Gamble was on July 29, 2004. He testified that the therapy received at Gamble provided little relief to his neck and shoulder. Petitioner continued to work full duty as a painter during this period.

On August 2, 2004, Petitioner was working at the location at Sunrise Assisted Living when he lifted the same 32 foot fiberglass ladder. Petitioner indicated that this instance was different than that of June 4, 2004 because he felt immediate pain in his neck. Immediately following the incident, Petitioner rested before he continued to work the rest of the day. He continued **[*24]** to work full duty throughout August and the beginning of September noting that, as before, his work activities alleviated his symptoms temporarily. However, when he would come home after work and rest, he would notice pain in his neck and cramping in his left arm.

On September 15, 20041, Petitioner called Mr. Cascio to tell him that he had injured his neck, shoulder and left arm and wanted to see a doctor. Petitioner testified that Mr. Cascio told him that when he injured himself at work, he ran his bills through his group insurance.

Following that conversation, Petitioner called his primary physician, Dr. John Fiedler, and made an appointment for September 17, 2004. On September 17, 2004, Dr. Fielder took a history of "41 year old male since July symptoms present. Left forearm cramping/bicep/shoulder area." He also noted that Petitioner had been "painting since March" and recommended an MRI and EMG. (PX. 2, pg. 38).

On September 21, 2004, an MRI of the cervical spine was performed at Regional Diagnostics and revealed a "large, left paramedian disc protrusion at C5-6 narrowing the lateral recess and neural foramen with significant impingement of the left C6 nerve root and moderate **[*25]** compression of the left side of the cervical spinal cord." (PX. 2, pg. 31). On September 22, 2004, Dr. Fiedler placed Petitioner off work until he received an evaluation. (PX. 2, pg. 69). Petitioner testified that he was working that day until he received a phone cal from Dr. Fiedler instructing him to not work. Petitioner then called Mr? Cascio to inform him that he would be going home. Petitioner asked Mr. Cascio if there was any paperwork to fill out and Mr. Cascio said there was not.

On September 24, 2004, an EMG was performed by Dr. Kim Chulsoo at Sherman Hospital, which was interpreted at the time to reveal marked left median neuropathy at the wrist level, consistent with carpal tunnel syndrome and no evidence of radiculopathy. (PX. 2, pg. 29).

Dr. Fiedler referred Petitioner to Dr. Maunak Rana, a neurologist with the Illinois Pain Treatment Institute, who evaluated Petitioner on September 28, 2004. Dr. Rana took a history of "carrying 32-foot ladder at work throughout the day and felt discomfort. He states he was injured n June 4, 2004 and August 2, 2004." (PX. 4, pg. 15). He reviewed the MRI films and diagnosed Petitioner with cervical radiculitis and cervical disc herniation, **[*26]** and cervical facet syndrome. (PX. 4, pg. 16). He went on to recommend a cervical epidural steroid injections in addition to facet injections. (PX. 4, pg. 16). Dr. Rana deferred any causation opinion to Dr. Fiedler "to see what he was like before he injured himself and to compare how he is right now." (PX. 4, pg. 16).

On October 12, 2004, the EMG was interpreted by Dr. Mohamed K. Ghumra, a neurologist, per the referral of Dr. Fiedler. Dr. Ghumra disagreed with the interpretations of Dr. Kim and indicated that Petitioner's symptoms were consistent with cervical radiculopathy. He deferred treatment to Dr. Rana. (PX. 1, pg. 74-76).

Dr. Rana performed epidural injections on October 12, 2004, November 12, 2004 and January 11, 2005. In addition he performed two left sided medial branch blocks, one on December 3, 2003 and another on December 21, 2004. (PX. 4). On January 11, 2005, Dr. Rana recommended that Petitioner see a spine surgeon should he feel no improvement with the injections and blocks. (PX. 4, pg. 4).

On January 26, 2005, upon the referral of Dr. Fiedler, Petitioner was evaluated by a spine surgeon, Dr. James Fister. (PX. 7, pg. 9). Dr. Fister noted a history of "the first time **[*27]** he notice any abnormality was probably in June 2004 when he was at work as a painter and turned his neck and felt a sudden crack or pop I the neck and then gradually after that he developed these symptoms going down the left upper extremity." (PX. 7, pg. 8). After reviewing the medical records, MRI films, and x-rays, Dr. Fister recommended Petitioner undergo an anterior cervical discectomy and fusion, but noted that Petitioner was to see a second opinion by Dr. Antonio Yuk first. (PX. 7, pg. 6).

On February 14, 2005, Petitioner was evaluated by Dr. Antonio Yuk, a neurosurgeon. Dr. Yuk noted a history of "a 42 year-old man who carried a 32 foot ladder all day long in June of 2004. He felt a 'pop' in the neck and noticed soreness in the neck later... [h]is symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September." (PX. 5, pg. 37). He further documented that "the patient did not have a significant neck problem until he carried a 32 foot long ladder all day in June 2004." (PX. 5, pg. 38). Dr. Yuk reviewed the MRI and the EMG and noted that Petitioner had obvious radicular signs and symptoms **[*28]** which correlate with the MRI. He recommended Petitioner undergo a cervical discectomy and fusion. (PX. 5 pg; 37).

After being cleared by Dr. Fiedler preoperatively, Dr. Yuk performed an anterior discectomy and fusion at C5-6 at Centegra Memorial Medical Center. He was assisted by Dr. Basudeb Saha. (PX. 6, pg. 12). Petitioner followed up with Dr. Yuk on several occasions before April 28, 2005, when Dr. Yuk recommended Petitioner begin physical therapy. (PX. 5, pg. 43). On June 8, 2005, Dr. Yuk released Petitioner to return to work in a light duty capacity, lifting no more than thirty pounds. (PX. 5, pg. 59). Petitioner has not returned to see Dr. Yuk since, but calls in for check ups once a month. Dr. Yuk has not lifted the 30-pound restriction.

On May 13, 2005, Petitioner was examined by Dr. Marshall Mate at the request of respondent. Dr Matz opined that based on the lack of any contemporaneous history of neck complaints or injury, there existed no causal connection between Petitioner's work activities and his current state of ill-being. He believed surgery was appropriate but believed the visits to the Pain Clinic were excessive. (RX. 1).

On June 20, 2005, Petitioner returned to **[*29]** work for the Respondent within his restrictions. He worked for a period of six weeks and was laid off for three weeks following. He then returned to work for two more weeks but has not been working since September 9, 2005. Since that time, Petitioner has been receiving unemployment compensation at the rate of $ 466.00 per week. Petitioner has been looking for work within his trade by contacting the respondent at least two times per week and by contacting the business agent of his union. Petitioner recently received a telephone call from Mr. Cascio indicating that work was available for him! Petitioner indicated that he called Mr. Cascio and left him a message on his voicemail but has not heard back from him.

Petitioner denied having any problems with respect to his neck, left arm and shoulder prior to the work accidents. He also denied ever having reinjured himself subsequently. Currently, he notices pain in the form of pinching in his shoulder blades when he is working. Dr. Yuk's last note of August 11, 2005 indicates that Petitioner was suffering from the same symptoms and since he had started work, he was feeling more constant aching in his neck. (PX. 5, pg. 53).

On cross-examination **[*30]** Petitioner admitted that he did not suffer a new accident on September 15, 2004., He also testified that while on June 4, 2004 he was working alone, on August 2, 2004, he was working along side six or eight other workers. He admitted to having being diagnosed with carpal tunnel syndrome in 2000 with respect to his right wrist. He indicated that the mechanism of his accident in August was similar to that sustained in June, but that after August, the pain in his neck and shoulder were more intense.

Robert Cascio testified at hearing and indicated that at no time did Petitioner report to him that he sustained an accident at work. He further testified that at no time during Petitioner's employment with respondent, did Petitioner make complaints regarding his neck, back or shoulder. Cascio testified that he would recall because whenever he receives such a complaint or report, he immediately documents it and fills out the required forms for the insurance company, namely a report of injury.

Cascio confirmed that Petitioner's job duties would require that he carry a 32-foot ladder on occasion. He did not recall if he was on the job site at Sunrise on the alleged dates of accident.

Cascio **[*31]** stated that when he spoke with Petitioner on September 22, 2004 he did not indicate a work accident. Nevertheless, respondent's exhibit, which is a memorandum drafted by Cascio, indicates that Petitioner told him that he believed his neck problems were attributable to a work accident. Petitioner gave no specific date of accident. Despite this, Cascio did not fill out the usual paperwork for a work injury as he perceived the claim "does not fall under workman comp" and advised Petitioner to put his treatment through his group health insurance. (RX. 2).

Mr. Cascio testified that the respondent currently employs petitioner. While petitioner has been laid off recently, it was because business was slow, but the respondent is willing to accommodate his restrictions of no lifting more than 30 pounds. He will contact him in the event an opportunity arises for Petitioner.

Conclusions of Law:

With respect to issue (C), whether an accident occurred that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds as follows:

Petitioner credibly testified that on August 2, 2004 upon lifting the ladder he felt pain in his neck. Although, **[*32]** Petitioner had sustained a similar accident on June 4, 2004, Petitioner indicated that this instance was different than that the previous accident because he felt immediate pain in his neck. This account is substantiated by the histories in the medical records. Petitioner continued to work full duty throughout August and the beginning of September noting that, as before, his work activities alleviated his symptoms temporarily. However, when he would come home after work and rest, he would notice pain in his neck and cramping in his left arm. He therefore sought treatment with his primary physician on September 17, 2004.

With respect to issue (E), whether timely notice of the accident was given to the respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner credibly testified that on September 15, 2004, he told his superintendent, Robert Cascio, that he had injured his neck, shoulder and left arm and wanted to see a doctor. Petitioner testified that Mr. Cascio told him that when he injured himself at work, he ran his bills through his group insurance. This is supported by the fact that Petitioner sought medical treatment involving this condition two **[*33]** days afterward. (PX. 2, pg. 38).

Even assuming, as respondent contends, that Petitioner notified Mr. Cascio of his accident on September 22, 2004 and not September 15, 2004, it is of no consequence since Section 8(j) clearly states that where an injured employee receives benefits from his group plan which is contributed wholly or partially by the employer, "the period of time for giving notice of accidental injury... does not commence to run until the termination of such payments." 820 ILCS 305/8(j)1. Petitioner testified that a large portion of his medical expenses were covered by his union group health plan. Mr. Cascio testified that the respondent contributes partially to this plan. Bills submitted into evidence indicate that medical expenses were paid by Petitioner's group plan as late as May of 2005. (PX. 13). Therefore, there exists no issue of notice.

With respect to issue (F), whether the petitioner's present condition of ill-being causally is related to the injury, the Arbitrator finds as follows:

Petitioner testified that on August 2, 2004, Petitioner was working at the location **[*34]** at Sunrise Assisted Living when he lifted the same 32-foot fiberglass ladder. Petitioner indicated that this instance was different than that of June 4, 2004 because he felt immediate pain in his neck. He indicated that the mechanism of his accident in August was similar to that sustained in June, but that after August, the pain in his neck and shoulder were more intense. It was the August 2004 accident, which precipitated Petitioner's treatment with Dr. Fiedler and eventual surgery with Dr. Yuk. Accordingly, the Arbitrator finds that there existed an intervening accident on August 2, 2004, which is the cause of Petitioner's current state of ill being. Petitioner denied having any problems with respect to his neck, left arm and shoulder prior to the work accident of June 2004 and he also denied ever having reinjured himself subsequent to his accident of August 2, 2004.

The Arbitrator relies on the medical records of Petitioner's treating doctors, which associate Petitioner's current diagnosis to his work injuries. On September 28, 2004, Dr. Rana took a history of "carrying 32-foot ladder at work throughout the day and felt discomfort. He states he was injured n June 4, 2004 and August **[*35]** 2, 2004." (PX. 4, pg. 15). While Dr. Rana deferred any causation opinion to Dr. Fiedler he did so because Dr. Fiedler would be in a better position "to see what he was like before he injured himself and to compare how he is right now." (PX. 4, pg. 16). The medical records of Petitoner's personal physician, Dr. Fiedler, support this by showing no prior history of neck or shoulder problems. On January 26, 2005, Petitioner was evaluated by a spine surgeon, Dr. James Fister who noted a history of "the first time he notice any abnormality was probably in June 2004 when he was at work as a painter and turned his neck and felt a sudden crack or pop I the neck and then gradually after that he developed these symptoms going down the left upper extremity." (PX. 7, pg. 8). On February 14, 2005, Dr. Antonio Yuk, a neurosurgeon, evaluated Petitioner and noted a history of "a 42 year-old man who carried a 32 foot ladder all day long in June of 2004. He felt a 'pop' in the neck and noticed soreness in the neck later... [h]is symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September." (PX. 5, pg. 37). He **[*36]** further documented that the patient did not have a significant neck problem until he carried a 32 foot long ladder all day in June 2004." (PX. 5,pg.38).

With respect to issues (J), whether the medical services that were provided to petitioner were reasonable and necessary and (K), whether the respondent is due any credit, the Arbitrator finds as follows.

Petitioner submitted into evidence bills consisting of the following:

PROVIDER	AMOUNT	EXHIBIT
John Fiedler	$ 1,050.00	8
Antonio Yuk, M.D.	$ 16,536.00	9
Maunak Rana, M.D.	$ 21,459.00	10
James Fister, M.D.	$ 815.00	11
Sherman Hospital	$ 474.40	12
Centegra Memorial Medical	$ 25,206.00	13
Basudeb Saha, M.D	$ 16,311.00	14
Regional Diagnostics	$ 1,400.00	15
Mohamed K. Ghumra	$ 307.00	16
Fox Valley Neurology P.C.	$ 760.00	17
Town Square Anesthesia	$ 2,100.00	18
TOTAL	$ 86,418.40	

Given the Arbitrator's finding with respect to accident and causation, the Arbitrator further finds that Respondent is liable to Petitioner for medical expenses amounting to $ 86,418.40.

Respondent claims a credit pursuant to Section 8(j) for amounts paid by group as demonstrated in the bills submitted by Petitioner. Therefore Respondent shall have **[*37]** credit for payments made to Elgin Internal Medicine (Fiedler) in the amount of $ 1,015.10 (PX. 8), Illinois Pain Treatment Institute (Rana) in the amount of $ 16,100.90 (PX. 10), Sherman Hospital in the amount of $ 462.58 (PX. 12), Memorial Medical Center in the amount of $ 24,195.89 (PX. 13), Basudeb Saha, M.D. in the amount of $ 16,185.10 (PX. 14), Regional Diagnostics in the amount of $ 1318.80 (PX. 15), Dr. Ghumra in the amount of $ 279.50 (PX. 16), and Town Square Anesthesia in the amount of $ 1,104.00 (PX. 18); for a total' 8(j) credit of $ 60,661.87. Respondent shall keep Petitioenr safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such a credit.

With respect to issue (K) what amount of compensation is due for temporary total (usability, the Arbitrator finds as follows:

Petitioner has been off work since September 22, 2004, when Dr. Fielder place him at total disability. On June 20, 2004, Petitioner returned to work for the Respondent within his restrictions of no lift more than 30 pounds, respondent shall pay the petitioner Temporary Total Disability benefits for 38 and 4/7 weeks, from September 22, **[*38]** 2004 through June 19, 2005. Respondent shall receive a credit for $ 13,456.71 received from a short-term disability plan, as stipulated by the parties.

With respect to issue (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

Petitioner has returned to work for responden t within his restrictions of no lifting more than 30 pounds. While he was laid off for a period, Mr. Cascio indicated that it was because of business demands and not because petitioner's restrictions could not be accommodated. Respondent is willing to accommodate his restrictions of no lifting more than 30 pounds. He will contact him in the event an opportunity arises for Petitioner. Petitioner has not been working since September 9, 2005. Since that time, Petitioner has been receiving unemployment compensation at the rate of $ 466.00 per week. Petitioner has been looking for work within his trade by contacting the respondent at least two times per week and by contacting the business agent of his union. Currently, he notices pain in the form of pinching in his shoulder blades when he is working. Dr. Yuk's last note of August 11, 2005 indicates that Petitioner was suffering from **[*39]** the same symptoms and since he had started work, he was feeling more constant aching in his neck. (PX. 5, pg. 53). The Arbitrator finds that Petitioner is permanently disabled to the extent of 40% loss of use of man as a whole.

DISSENTBY: JAMES F. DEMUNNO

DISSENT: I respectfully dissent from the Majority's Decision and would have affirmed and adopted the Arbitrator's Decision in its entirety as it is well-reasoned and supported by the evidence in the record.

Legal Topics:

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

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

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

Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

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*2007 Ill. Wrk. Comp. LEXIS 1202, *; 7 IWCC 1109*

JERRY **HOSTENY,** PETITIONER, v. ARMING JOHNSON CO., RESPONDENT.

NO: 04 WC 59684

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2007 Ill. Wrk. Comp. LEXIS 1202; 7 IWCC 1109

August 17, 2007

CORE TERMS: neck, pain, ladder, symptoms, cervical, shoulder, foot, arm, carrying, pop, painting, temporary total disability, recommended, soreness, lifting, doctor, hurt, supervisor, radiculopathy, injections, paperwork, cramping, painter, feeling, notice, nerve, contemporaneous, chiropractor, work-related, discectomy

JUDGES: Nancy Lindsay; Dennis R. Ruth

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Gallcia finding that Petitioner sustained accidental injury arising out of and in the course of his employment on June 4, 2004 but that any benefits Petitioner may have been entitled to were causally related to an intervening accident that occurred on August 2, 2004, which was the subject of consolidated case number 05 WC 59685. The issues on Review are accident, notice, causation, temporary total disability (TTD), medical expenses and permanency. For the reasons set forth below, the Commission, after considering the entire record, reverses the Arbitrator's Decision, finding that Petitioner failed to prove he sustained accidental injury arising out of and in the course of his employment on June 4, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a journeyman painter, was working as a foreman at Respondent's "Sunrise" job site on June 4, 2004. He testified he was carrying a 32 foot ladder "throughout the day" while painting window lintels and heard a pop in his neck while lifting the ladder that afternoon, but felt no pain immediately or later that evening. The next morning, **[*2]** a Saturday, he awoke with posterior neck pain and soreness. He returned to work the following Monday and had no symptoms, noting: "when I was working I was fine. When I was in - - at night relaxing or trying to sleep, that's when I had soreness." He testified that the pain began radiating into his arm a couple of weeks after June 4, 2004. On July 13, 2004 he told his superintendent, Robert Cascio, that his neck and back were sore and, other than noting he was going to see a chiropractor for his back, that was the end of the conversation. He first sought treatment with a chiropractor, Dr. Gamble, on July 15, 2004, almost six weeks after the alleged date of accident. Dr. Gamble's initial report notes complaints of left-sided neck pain and soreness radiating into the left shoulder and upper arm, but nothing is noted about a work injury. Petitioner visited Dr. Gamble five more times through July 29, 2004 with similar complaints, and none of his reports reflect that Petitioner reported a work accident or that his pain was brought on by work activities. On July 22, 2004 Dr. Gamble recommended cervical and thoracic MRIs. Petitioner continued to work regular duty. (Tr. 12-24, 54-58, 63-64; **[*3]** Pxl; Rx2).

2. On August 2, 2004, Petitioner testified he picked up the 32 foot ladder while working and again felt posterior neck pain. He testified: "in June 2004 I felt a pop, no pain. This I felt a pain this time around [sic]." After this latter incident he said he "took it easy. It went away", and he continued to work that day. After the August 2, 2004 incident his neck, left shoulder and left arm pain, with cramping in the left arm and hand, started to increase in strength, and the neck pain "was more a deeper pain", but he continued to work regular duty until September 22, 2004. He agreed he never completed an accident report between his initial June 4, 2004 accident and August 2004. Petitioner testified that he reported a work injury to Cascio on the afternoon of September 15, 2004 after he got home from work, and that Cascio told him Respondent frowned upon workers' compensation claims, noting Cascio "ended the conversation and took control of it ... He stopped me from talking." He testified that Cascio would be present at Petitioner's job site in person three times per week, and that he would also keep in contact with him via walkie-talkie and/or phone three to five times **[*4]** per week. He also agreed he never reported the June 4, 2004 incident to Cascio between prior to July 13, 2004. (Tr. 24-28, 45-49, 54-58).

3. Petitioner continued to work full duty, noting he only had symptoms while at home resting or trying to sleep. Petitioner next sought treatment on September 17, 2004 with Dr. Fiedler, his primary care provider, complaining of soreness in the left arm and neck with forearm cramps, noting symptoms had been present since July. A separate notation in the report stated "painting since March." No specific work injury or accident was reported. He was referred for a September 21, 2004 cervical MRI and September 24, 2004 EMG/NCV. Following the MRI, Dr. Fiedler called Petitioner on September 22, 2004 noting it showed a cervical disc and a pinched nerve and that he should be off work. Petitioner testified he reported this to Cascio and was told he didn't need to complete any paperwork

before leaving work. On cross-examination, Petitioner testified he called Cascio back because he couldn't get treatment without authorization, indicating Cascio may have misunderstood him. When Cascio asked what he meant, Petitioner said he told him he got hurt at work, at **[*5]** which point Cascio replied, "You did? When did it happen?" Petitioner responded that he wasn't sure, but that it must have happened while moving the ladder at the Sunrise job on June 4th and August 2nd. (Tr. 28-32, 64-66; Px2; Rx3; Rx4; Rx6).

4. When the EMG/NCV reflected no evidence of radiculopathy, but rather marked and advanced left carpal tunnel syndrome, Petitioner was then referred to pain specialist Dr. Rana. Petitioner saw Dr. Rana on September 28, 2004 noting a recent history of neck pain into the left arm with occasional numbness in the forearm and first three fingers. Dr. Rana's report notes Petitioner "states that he was carrying a 32 foot ladder at work throughout the day and felt discomfort. He states he was injured on 6/4/04 and 8/2/04. He states that staying busy and moving helps him and when he is lying in bed and in idle positions, his symptoms are worsened." Dr. Rana diagnosed cervical radiculitis, facet syndrome and a herniated cervical disc and recommended various injections. He noted Petitioner "asked me if I could answer whether or not his accident caused his pain or whether this would be a preexisting condition and I told him I was not able to answer that and **[*6]** I would suggest he contact [Dr. Fiedler] as his medical doctor to see what he was like before he injured himself and to compare how he is right now." Following receipt of the EMG/NCV results, and Petitioner's questions of how it could have indicated no radiculopathy given the MRI results, Dr. Rana during an October 5, 2004 phone call told Petitioner to speak to Dr. Kim, who performed the EMG/NCV, and to "ask him whether this is an acute or chronic condition, since it is specifically not dictated as to that effect and to ask him about the fact that there is no evidence of any cervical radiculopathy present, given the findings on MRI." He also told Petitioner to contact Dr. Fiedler about what his next options would be. Petitioner told Dr. Rana that Dr. Fiedler said that Rana should fill out his disability form, and Rana told Petitioner that he only met him after his accident and thus was unable to comment as to the degree of disability he had, suggesting he contact Dr. Fiedler to determine how his health changed after this particular injury. A Dr. Fiedler note of a phone call from Petitioner from his attorney's office on October 5, 2004 notes Dr. Rana's report that the EMG did not reflect **[*7]** a pinched nerve, and Petitioner was referred to neurologist Dr. Ghumra. (Tr. 32-34; Px2; Px4; Rx4; Rx5; Rx6; Rx7).

5. Dr. Ghumra's October 12, 2004 report notes, per the history from Petitioner and his wife, it "appears that he was carrying a 32 foot ladder at work and has been working on his regular schedule. On 6/4/04 and the subsequent day and 8/2/04, he had two separate work-related injuries. He states that he injured his neck and started experiencing some pain radiating down to his left shoulder and all the way down to his hand. His hand also started becoming numb and tingly." Despite treatment, including multiple injections, Petitioner still complained of persistent pain and radicular-like symptoms. While his neurological examination appeared to be within normal limits, Dr. Ghumra diagnosed cervical radiculopathy based on Petitioner's symptoms and the MRI results, noting that if continued treatment with Dr. Rana failed he should see a neurosurgeon. (Px2; Rx8).

6. Petitioner continued to treat with Dr. Rana into 2005 before seeking treatment with Dr. Fister on January 26, 2005. Noting the MRI findings, Dr. Fister indicated that if Petitioner had left-sided C6 radicular symptoms **[*8]** that were bad enough that he wanted surgery, he recommended a C5/6 discectomy and fusion. After a review of Dr. Rana's records Dr. Fister stated that "apparently the patient was asking the pain clinic doctor whether his symptoms were due to his accident or preexisting so we have workcomp issues involved here." Petitioner contacted Dr. Fiedler, as he wanted a second opinion, noting he wanted to see Dr. Yuk. Petitioner, however, first returned to Dr. Fister on February 9, 2005, and the report from that date notes that Petitioner indicated the first time he noticed an abnormality was "probably in June 2004 when he was at work as a painter and he turned his neck and felt a sudden crack or pop in the neck and then gradually after that he developed these symptoms going down the left upper extremity." Dr. Fister's intake form from the same date noted an injury/accident of "June & August 2004" and "lifting 32 foot ladder at work." (Tr. 34-42, 69-70; Px2; Px4; Px7; Rx6).

7. Petitioner saw Dr. Yuk on February 14, 2005, and his report states Petitioner "felt a 'pop' in the neck and noticed soreness in the neck later. Steadily, he felt that he had pain running down his left arm. He also describes **[*9]** discomfort in the left shoulder blade. He initially thought that he simply pulled a muscle. His symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September." Dr. Yuk noted that "according to the history I have, [Petitioner] did not have a significant neck problem until he carried a 32 foot ladder all day in 6/04 ...", and that "the cervical herniated disc is the result of this work injury." The intake form for Dr. Yuk indicated a date and location of injury as "June 2004 worksite", with further explanation stating "June 2004 lifted 32 foot ladder throughout day. Felt crack/pop in neck resulting in soreness, pain, cramping, numbness in left arm/hand, shoulder blade & neck." A separate note in a different handwriting states "reported it to boss in September." (Tr. 34-42, 69-70; Px2; Px5; Px6; Rx12).

8. On March 15, 2005 Petitioner underwent a C5/6 discectomy and fusion with Dr. Yuk and was subsequently released to restricted duty on or about June 8, 2005 with a 30 pound weight limit. After returning to work on June 20, 2005 Petitioner worked for a period of time before being temporarily laid **[*10]** off, and then was laid off again in September 2005 and remained off work through the October 13, 2005 arbitration hearing. He applied for and was receiving unemployment, retroactive to September 11, 2005. Petitioner testified he had no neck or shoulder problems prior to June 4, 2004, and has not been involved in any non-work related accidents since. (Tr. 34-42, 69-72; Px5; Px6).

9. Respondent's Section 12 examining physician, Dr. Matz, saw Petitioner in May 2005, reporting a history of carrying a 32 foot ladder on June 4, 2004 throughout the day as he was painting multiple windows, feeling and hearing an audible "crack" in his neck, but having no further symptoms that day, except for a "little bit of pain in back of the neck going down into the left arm by that night." He noted Petitioner "is a vague historian and difficult to pin down as to the timing of many of his symptoms, which he in general is of the recollection that over time, his symptoms got worse. He believes that it was sometime in June and/or July that he began to have cramping pain about his neck and left arm." Then "on 8/2/04, [Petitioner] was again painting and using a ladder when he alleges more pain in back of his **[*11]** neck. By September of last year, his pain was described as 'more intense and cramping', so he called [Dr. Fiedler]." Dr. Matz opined that Petitioner's cervical herniation was not causally related to his employment based on the lack of a contemporaneous history of neck complains or injury in the medical records. (Rx 10; Rx 11).

10. Petitioner testified he didn't recall being diagnosed with bilateral carpal tunnel in January 2003. He also didn't recall telling Dr. Fiedler in February, 2004 that he was off work and had been remodeling his home, though he stated "I could have been", but that any such work would have essentially involved painting. He didn't recall when he stopped doing this remodeling, just that he wasn't doing it in May or June 2004. (Tr. 49-54).

11. Petitioner testified that he told Dr. Gamble on July 15, 2004 that he hurt himself at work lifting the 32 foot ladder, but agreed he provided his group insurance card at that visit. Regarding the lack of a history of a work accident in Dr. Fiedler's July 22nd and August 25th reports, he testified: "I saw him on September 17th, told him I hurt myself lifting a ladder at work", noting "I can't write for [the

doctor]." Regarding **[*12]** Dr. Yuk's February 10, 2005 physician's intake sheet and his February 14, 2005 report, which indicated Petitioner didn't report the injury to Respondent until September 2004, Petitioner stated: "I'm not aware of that. I told every doctor I hurt myself at work. I told Cascio 3 times." Again, as to whether he first reported a work injury to Cascio in September 2004, Petitioner testified: "I told him I hurt myself. I was sore in my neck and back. The second time I told him on September 15th that I hurt myself, and then September 22nd in the afternoon was another time." (Tr. 58-66).

12. Petitioner agreed he called Dr. Fiedler from his attorney's office on October 5, 2004 and asked if his pinched nerve was related to work. Dr. Fiedler told him he couldn't give him an opinion and that he should call Dr. Rana. Petitioner then called Dr. Rana from his attorney's office and asked him to complete a disability form. Dr. Rana told him he couldn't do it and that Petitioner needed to see Dr. Feidler, his family doctor, for such an opinion. Petitioner stated that Dr. Fiedler has since, at Petitioner's request, opined Petitioner's surgical condition was work-related on an October 14, 2004 temporary **[*13]** disability form by checking off a "work related" box. (Tr. 66-69; Px2A).

13. Robert Cascio, Respondent's painting field supervisor, testified that Petitioner received a company handbook and saw a safety video when he was hired in March 2003, which indicate a supervisor is to be immediately notified of a work accident and an accident report is to be completed. He denied ever telling Petitioner not to report his condition as work related but instead to go through group insurance. He agreed that Petitioner was assigned to work at the Sunrise site in June 2004. Cascio testified he would be at that job site at least 3 times a week from June through September 2004, sometimes daily, for Vi to 1 hour at a time, and he would also communicate with Petitioner at least three times daily via walkie-talkie in the morning, noon and evening. (Tr. 74-84).

14. Cascio indicated Petitioner never advised him of or complained of any neck or shoulder condition or any work injury between June 4 and September 14, 2004, and that Petitioner worked full duty and carried out all aspects of his job in that time. He never informed Cascio of a June or August 2004 job injury despite seeing and/or talking to Petitioner **[*14]** daily, and Cascio had no knowledge from any source of Petitioner being hurt at work on June 4 or August 2, 2004 prior to the September 22, 2004 conversation. Cascio denied that Petitioner ever called him on July 13, 2004 to indicate his neck and shoulder were hurting. Pursuant to Cascio's contemporaneous notes from September 22, 2004 (Rxl5), Petitioner called him in the morning on September 15, 2004 (a Wednesday) saying he had some arm problems and was going to see a doctor, but gave no indication it was related to a work accident. Petitioner worked on September 16th and 17th, and next discussed his medical condition with Cascio on September 22, 2004, when Petitioner said his doctor called and told him he had a herniated disc and pinched nerve and was to stop working immediately. Petitioner asked if any paperwork needed to be filled out and Cascio told him no. Petitioner called back later that afternoon and said his doctor needed paperwork completed prior to being able to treat him. Cascio asked Petitioner what type of paperwork he was talking about, and Petitioner indicated that Cascio had apparently misunderstood him and that it involved a work related incident. Cascio testified **[*15]** this was the first time he was notified of any alleged work related incident. When he asked Petitioner when he'd been hurt, Petitioner indicated it was at the Sunrise job while carrying a 32 foot ladder, and Cascio agreed Petitioner may have used a ladder on that job at that time. When he asked Petitioner if he felt anything or if a specific incident had occurred, Petitioner said "no, but it must have been when I was carrying that 32 foot ladder." Upon questioning, Petitioner indicated he did not have any pain at the time he carried the ladder, and based on this and the lack of documentation of it, Cascio indicated he didn't believe the condition was work related, but he gave the information to Respondent's insurer to make the determination. He didn't complete an accident report because he "was not notified of an accident." Cascio could not recall if Petitioner provided a specific accident date. When Cascio discussed the situation with his supervisor, Gerry Ginter. Ginter asked Cascio if there had been a documented accident, date of accident or accident report, and when Cascio told him no Ginter suggested to Cascio that Petitioner contact his union's group insurance. (Tr. 84-94, 99-103, **[*16]** 101-110; Rxl5).

The Commission finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 4, 2004. Petitioner testified to feeling and hearing some type of pop in his neck on that date while carrying a ladder, but that he had no symptoms at all until awakening the next morning on a weekend off day. He also testified that he had no pain while working after that date, but rather only while he was at home and resting. He testified he didn't notify his supervisor until July 13, 2004; however he also agreed that at that time all he reported was that his neck and back were sore and nothing more. Based on the testimony of both Petitioner and his supervisor, Robert Cascio, it appears Petitioner first alleged that his condition was work-related on September 22, 2004, over three months after the initial alleged injury. Further, Cascio indicated that when Petitioner first indicated a work accident, Petitioner told him it "must have" occurred while carrying the ladder on the Sunrise job, as opposed to relating a specific incident. The Commission finds the testimony of Robert Cascio, that Petitioner never reported a work-related **[*17]** accident to him until September 22, 2004 despite the fact that they spoke several times a day, to be credible, as this is also supported by the contemporaneous notes he took (Rxl5). Petitioner's report to Cascio, indicating that he "must have" injured himself lifting the ladder, is inconsistent with his testimony of hearing a specific "pop" in his neck.

Petitioner continued to work full duty on and after June 4, 2004 and did not seek any treatment until July 15, 2004. The report of Dr. Gamble from that date, as well as the five subsequent reports from July 2004, reflect nothing regarding a work injury. In fact, other than a vague note of "painting since March", nothing in the contemporaneous records of Dr. Fiedler, the second doctor Petitioner sought treatment with, reflect any specific incident involving Petitioner carrying or lifting a ladder or feeling or hearing a pop in his neck. The first time a specific history is noted in the medical records regarding carrying a ladder was the September 28, 2004 report of Dr. Rana. Thus, it appears to the Commission that Petitioner did not claim his neck condition was work-related until after he was told he had a pinched nerve and had to be **[*18]** off work. Based on the above noted evidence, the Commission finds that Petitioner's testimony regarding the alleged June 4, 2004 accident was-not credible, and his claim for any benefits related to this alleged accident are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the January 4, 2006 Decision of the Arbitrator is reversed.

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

DATED: AUG 17 2007

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 October 13, 2005. 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

C. Did an accident occur that arose out of and in the course of the **[*19]** ***petitioner's employment by the respondent?***

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?

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 06/04/2004, the Respondent Anning Johnson Co. *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 $ 67.038.40; the average weekly wage was $ 1289.20.

. At the time of injury, the petitioner was 42 years of age, *married* with 2 children under 18.

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

. To date, $ 0 has been **[*20]** paid by the respondent on account of this injury.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 859.47 /week for 0 weeks, from n/a through n/a, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 550.47 /week for a further period of 0 weeks, as provided in Section 8 of the Act, because the injuries sustained caused ("the Arbitrator defers to its decision in 04WC059685 as there existed an intervening accident on August 2, 2004).

. The respondent shall pay the petitioner compensation that has accrued from n/a through n/a, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ 0 for necessary medical services, as provided in Section 8(a) of the Act.

. The fespondent 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(1) 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 a bar to subsequent hearing and determination of **[*21]** 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 of 4.26% 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 or Arbitrator

12-30-05

Date

JAN 04 2006

ATTACHMENT TO ARBITRATION DECISION

Findings of Fact:

Petitioner, Jerry **Hosteny,** has worked for Anning Johnson for approximately six months as journeyman painter and crew foreman which requires that he conduct normal painting activities along with supervisory duties. Petitioner has worked as a painter for twenty one years. Petitioner is 5 foot 11 inches and weighs 215 pounds.

On June 4, 2004, Petitioner was working on a project at the Sunrise Assisted Living painting windows **[*22]** when he was carrying a 32 foot fiberglass ladder. Petitioner testified that upon lifting the ladder he heard a "pop" in the back of his neck but did not feel immediate pain in that area. Petitioner continued to work the rest of the day and went home. He indicated that he did not feel any pain in the neck area until he woke up the next morning, which was a Saturday. He returned to work the following Monday despite the pain. He indicated that his work activities seemed to alleviate his symptoms temporarily so he did not seek medical treatment right away. However, when he would arrive home and rest, he began to notice soreness in his neck.

On July 13, 2004, Petitioner testified that he spoke with his superintendent, Robert Cascio, inside the building at Sunrise Assisted Living and told him that he had been feeling pain in his neck recently and was going to seek the help of a chiropractor. Petitioner indicated that Mr. Cascio did not respond to his comment.

On July 15, 2004 Petitioner sought medical treatment with a chiropractor, Jack Gamble of Gamble Chiropractic Clinic. On that date, Dr. Gamble noted "pain and soreness on the left side of the neck that radiates into the top of the left **[*23]** shoulder and left upper arm." (PX. 1, pg. 9). Petitioner received chiropractic attention from Dr. Gamble on five occasions during the month of July. (PX. 1, pg. 11). Petitioner indicated that he told Dr. Gamble about his incident at work. Dr. Gamble noted that Petitioner did not feel pain or symptoms while working and recommended Petitioner undergo and MRI of the cervical and thoracic spine. (PX. 1, pg. 11). Petitioner last visit with Dr. Gamble was on July 29, 2004. He testified that the therapy received at Gamble provided little relief to his neck and shoulder. Petitioner continued to work full duty as a painter during this period.

On August 2, 2004, Petitioner was working at the location at Sunrise Assisted Living when he lifted the same 32 foot fiberglass ladder. Petitioner indicated that this instance was different than that of June 4, 2004 because he felt immediate painin his neck. Immediately following the incident, Petitioner rested before he continued to work the rest of the day. He continued to work full duty throughout August and the beginning of September noting that, as before, his work activities alleviated his symptoms temporarily. However, when he would come home after **[*24]** work and rest, he would notice pain in his neck and cramping in his left arm.

On September 15, 2004, Petitioner called Mr. Cascio to tell him that he had injured his neck, shoulder and left arm and wanted to see a doctor. Petitioner testified that Mr. Cascio told him that when he injured himself at work, he ran his bills through his group insurance.

Following that conversation, Petitioner called his primary physician, Dr. John Fiedler, and made an appointment for September 17, 2004. On September 17, 2004, Dr. Fielder took a history of "41 year old male since July symptoms present. Left forearm cramping/bicep/shoulder area." He also noted that Petitioner had been "painting since March" and recommended an MRI and EMG. (PX. 2, pg. 38).

On September 21, 2004, an MRI of the cervical spine was performed at Regional Diagnostics and revealed a "large, left paramedian disc protrusion at C5-6 narrowing the lateral recess and neural foramen with significant impingement of the left C6 nerve root and moderate compression of the left side of the cervical spinal cord." (PX. 2, pg. 31). On September 22, 2004, Dr. Fiedler placed Petitioner off work until he received an evaluation. (PX. 2, pg. 69). **[*25]** Petitioner testified that he was working that day until he received a phone cal from Dr. Fiedler instructing him to not work. Petitioner then called Mr. Cascio to inform him that he would be going home. Petitioner asked Mr. Cascio if there was any paperwork to fill out and Mr. Cascio said there was not.

On September 24, 2004, an EMG was performed by Dr. Kim Chulsoo at Sherman Hospital, which was interpreted at the time to reveal marked left median neuropathy at the wrist level, consistent with carpal tunnel syndrome and no evidence of radiculopathy. (PX. 2, pg. 29).

Dr. Fiedler referred Petitioner to Dr. Maunak Rana, a neurologist with the Illinois Pain Treatment Institute, who evaluated Petitioner on September 28, 2004. Dr. Rana took a history of "carrying 32-foot ladder at work throughout the day and felt discomfort. He states he was injured n June 4, 2004 and August 2, 2004." (PX. 4, pg. 15). He reviewed the MRI films and diagnosed Petitioner with cervical radiculitis and cervical disc herniation, and cervical facet syndrome. (PX. 4, pg. 16). He went on to recommend a cervical epidural steroid injections in addition to facet injections. (PX. 4, pg. 16). Dr. Rana deferred any causation **[*26]** opinion to Dr. Fiedler "to see what he was like before he injured himself and to compare how he is right now." (PX. 4, pg. 16).

On October 12, 2004, the EMG was interpreted by Dr. Mohamed K. Ghumra, a neurologist, per the referral of Dr. Fiedler. Dr. Ghumra disagreed with the interpretations of Dr. Kim and indicated that Petitioner's symptoms were consistent with cervical radiculopathy. He deferred treatment to Dr. Rana. (PX. 1, pg. 74-76).

Dr. Rana performed epidural injections on October 12, 2004, November 12, 2004 and January 11, 2005. In addition he performed two left sided medial branch blocks, one on December 3, 2003 and another on December 21, 2004. (PX. 4). On January 11, 2005, Dr. Rana recommended that Petitioner see a spine surgeon should he feel no improvement with the injections and blocks. (PX. 4, pg. 4).

On January 26, 2005, upon the referral of Dr. Fiedler, Petitioner was evaluated by a spine surgeon, Dr. James Fister. (PX. 7, pg. 9). Dr. Fister noted a history of "the first time he notice any abnormality was probably in June 2004 when he was at work as a painter and turned his neck and felt a sudden crack or pop I the neck and then gradually after that he developed **[*27]** these symptoms going down the left upper extremity." (PX. 7, pg. 8). After reviewing the medical records, MRI films, and x-rays, Dr. Fister recommended Petitioner undergo an anterior cervical discectomy and fusion, but noted that Petitioner was to see a second opinion by Dr. Antonio Yuk first. (PX. 7, pg. 6).

On February 14, 2005, Petitioner was evaluated by Dr. Antonio Yuk, a neurosurgeon. Dr. Yuk noted a history of "a 42 year-old man who carried a 32 foot ladder all day long in June of 2004. He felt a 'pop' in the neck and noticed soreness in the neck later...[h]is symptoms lingered until it was further aggravated when he carried that same ladder again. He finally reported the problem to his supervisor in September." (PX. 5, pg. 37). He further documented that "the patient did not have a significant neck problem until he carried a 32 foot long ladder all day in June 2004." (PX. 5, pg. 38). Dr. Yuk reviewed the MRI and the EMG and noted that Petitioner

had obvious radicular signs and symptoms which correlate with the MRI. He recommended Petitioner undergo a cervical discectomy and fusion. (PX. 5, pg. 37).

After being cleared by Dr. Fiedler preoperatively, Dr. Yuk performed an anterior **[*28]** discectomy and fusion at C5-6 at Centegra Memorial Medical Center. He was assisted by Dr. Basudeb Saha. (PX. 6, pg. 12). Petitioner followed up with Dr. Yuk on several occasions before April 28, 2005, when Dr. Yuk recommended Petitioner begin physical therapy. (PX. 5, pg. 43). On June 8, 2005, Dr. Yuk released Petitioner to return to work in a light duty capacity, lifting no more than thirty pounds. (PX. 5, pg. 59). Petitioner has not returned to see Dr. Yuk since, but calls in for check ups dnce a month. Dr. Yuk has not lifted the 30-pound restriction.

On May 13, 2005, Petitioner was examined by Dr. Marshall Matz at the request of respondent. Dr Mate opined that based on the lack of any contemporaneous history of neck complaints or injury, there existed no causal connection between Petitioner's work activities and his current state of ill-being. He belived surgery was appropriate but believed the visits to the Pain Clinic were excessive. (RX. 1).

On June 20, 2005, Petitioner returned to work for the Respondent within his restrictions. He worked for a period of six weeks and was laid off for three weeks following. He then returned to work for two more weeks but has not been working **[*29]** since September 9, 2005. Since that time, Petitioner has been receiving unemployment compensation at the rate of $ 466.00 per week. Petitioner has been looking for work within his trade by contacting the respondent at least two times per week and by contacting the business agentf his union. Petitioner recently received a telephone call from Mr. Cascio indicating that work was available for him. Petitioner indicated that he called Mr. Cascio and left him a message on his voicemail but has not heard back from him.

Petitioner denied having any problems with respect to his neck, left arm and shoulder prior to the work accidents. He also denied ever having reinjured himself subsequently. Currently, he notices pain in the form of pinching in his shoulder blades when he is working. Dr. Yuk's last note of August 11, 2005 indicates that Petitioner was suffering from the same symptoms and since he had started work, he was feeling more constant aching in his neck. (PX. 5, pg. 53).

On cross-examination Petitioner admitted that he did not suffer a new accident on September 15, 2004. He also testified that while on June 4, 2004 he was working alone, on August 2, 2004, he was working along side **[*30]** six or eight other workers. He admitted to having being diagnosed with carpal tunnel syndrome in 2000 with respect to his right wrist. He indicated that the mechanism of his accident in August was similar to that sustained in June, but that after August, the pain in his neck and shoulder were more intense.

Robert Cascio testified at hearing and indicated that at no time did Petitioner report to him that he sustained an accident at work. He further testified that at no time during Petitioner's employment with respondent, did Petitioner make complaints regarding his neck, back or shoulder. Cascio testified that he would recall because whenever he receives such a complaint or report, he immediately documents it and fills out the required forms for the insurance company, namely a report of injury.

Cascio confirmed that Petitioner's job duties would require that he carry a 32-foot ladder on occasion. He did not recall if he was on the job site at Sunrise on the alleged dates of accident.

Cascio stated that when he spoke with Petitioner on September 22, 2004 he did not indicate a work accident. Nevertheless, respondent's exhibit, which is a memorandum drafted by Cascio, indicates that Petitioner **[*31]** told him that he believed his neck problems were attributable to a work accident. Petitioner gave no specific date of accident. Despite this, Cascio did not fill out the usual paperwork for a work injury as he perceived the claim "does not fall under workman comp" and advised Petitioner to put his treatment through his group health insurance. (RX. 2).

Conclusions of Law:

With respect to issue (C), whether an accident occurred that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds as follows:

Petitioner credibly testified that on June 4, 2004 upon lifting the ladder he heard a "pop" in the back of his neck but did not feel immediate pain in that area. This account is substantiated by the histories in the medical records. Petitioner sought treatment with Jack Gamble D.C., with respect to his neck and left shoulder. Petitioner testified that he had no prior condition involving his neck and shoulder. The medical records of Dr. Fiedler and Dr. Fister support this.

With respect to issue (E), whether timely notice of the accident was given to the respondent, the Arbitrator finds as follows:

The Arbitrator finds **[*32]** that Petitioner credibly testified that on July 13, 2004, he told his superintendent, Robert Cascio, that he was feeling neck and shoulder pain and that he was going to see a chiropractor. This is supported by the fact that Petitioner sought medical treatment involving this condition two days afterward. (PX. 1).

With respect to issue (F), whether the petitioner's present condition of ill-being causally is related to the injury, the Arbitrator finds as follows:

Petitioner testified that on August 2, 2004, Petitioner was working at the location at Sunrise Assisted Living when he lifted the same 32 foot fiberglass ladder. Petitioner indicated that this instance was different than that of June 4, 2004 because he felt immediate pain in his neck. He indicated that the mechanism of his accident in August was similar to that sustained in June, but that after August, the pain in his neck and shoulder were more intense. Accordingly, the Arbitrator finds that there existed an intervening accident on August 2, 2004, which is the cause of Petitioner's current state of ill-being and hereby defers to its decision in 04WC059685 regarding permanency, temporary total disability benefits and **[*33]** medical benefits beyond August 2, 2004.

With respect to issues (J), whether the medical services that were provided to petitioner were reasonable and necessary and (K), whether the respondent is due any credit, the Arbitrator finds as follows.

Petitioner does not seek payment for medical services rendered before August 2, 2004 and therefore award $ 0.00 with respect to medical expenses. The issue of credit is nonexistent.

With respect to issue (K) what amount of compensation is due for temporary total disability, the Arbitrator finds as follows:

Petitioner does not seek temporary total disability benefits before August 2, 2004 and therefore award $ 0.00 with respect to temporary total disability benefits.

With respect to issue (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

As stated above, the Arbitrator finds that there existed an intervening accident on August 2, 2004, which is the cause of Petitioner's current state of ill-being and hereby defers to its decision in 04WC059685 regarding nature and extent of Petitioner's condition.

DISSENTBY: JAMES. S. DEMUNNO

DISSENT: I respectfully dissent from the Majority's Decision and would have affirmed **[*34]** and adopted the Arbitrator's Decision in its entirety as it is well-reasoned and supported by the evidence in the record.

Legal Topics:

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

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

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*2010 Ill. App. LEXIS 161, **

R & D **THIEL,** a Division of Carpenter Contractors of America, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (**MANUEL ROBLEDO,** Appellee).

No. 1-08-3666WC

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

2010 Ill. App. LEXIS 161

February 9, 2010, Filed

SUBSEQUENT HISTORY: Released for Publication March 30, 2010.

PRIOR HISTORY: [*1]
APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 07 L 50571. HONORABLE ELMER TOLMAIRE, III, JUDGE PRESIDING.

DISPOSITION: Affirmed and remanded to the Commission.

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that confirmed a decision of the Commission that awarded benefits under the Workers' Compensation Act, 820 ILCS 305/1 et seq., to appellee employee. Appellant employer appealed.

OVERVIEW: The employee worked for the employer as a laborer. While doing so, he allegedly fell several feet from a ladder and suffered pain in his back almost immediately. He saw a doctor one day later. An MRI taken of his lumbar spine revealed a central protrusion on the vertebrae and a small annular tear within the disk. On a follow-up visit, the doctor noted a potential right knee problem from the fall at work that had been masked by the low back pain. The employee continued to obtain medical treatment and saw other doctors as well. An arbitrator found that the employee sustained a work-related accident resulting in soft-tissue injuries to his low back. She declined to find a causal relation between the fall and the right knee injury. She awarded damages accordingly. The Commission modified the arbitrator's decision and found that the employee established a causal connection between his lumbar spine abnormalities, a right knee fracture, and a possible meniscal tear, and awarded workers' compensation benefits. The trial court affirmed. The appellate court found that the Commission's decision, modifying the decision of the arbitrator, was not against the manifest weight of the evidence.

OUTCOME: The appellate court affirmed the trial court's judgment and remanded the case to the Commission for further proceedings.

CORE TERMS: claimant's, pain, knee, right knee, lumbar, arbitrator, tear, fracture, spine, low-back, credibility, chiropractic, disk, injection, opined, annular, surgery, epidural, manifest, osteochondral, recommended, protrusion, doctor, medial, patella, arbitrator's decision, causal relationship, soft-tissue, meniscal, light-duty

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

HN1 When the Commission gives its reasons for making credibility findings contrary to those made by the arbitrator, a reviewing court's inquiry on review is whether the findings are against the manifest weight of the evidence. Whether a reviewing court might have reached the same conclusion is not the test of whether the Commission's determination is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. More Like This Headnote

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Workers' Compensation & SSDI > Administrative Proceedings > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN2 In a workers' compensation case, a claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, as is the extent of his disability, and the reasonableness and necessity of medical expenses. In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Clear Error Review

HN3 The Commission's determinations on questions of fact will not be disturbed on review unless they are against the manifest weight of the evidence; that is to say, unless an opposite conclusion is clearly apparent. More Like This Headnote

COUNSEL: For Appellant(s): Maciorowski, Sackmann & Ulrich, of Chicago. J. Sackmann & J. Garrison of counsel. Chicago, IL.

For Appellee(s): Goldstein, Bender & Romanoff. Richard H. Victor, of counsel. Chicago, IL.

JUDGES: Honorable Thomas E. Hoffman, J., with Honorable John T. McCullough, P.J., Honorable Donald C. Hudson, J., Honorable William E. Holdridge, J., and Honorable James K. Donovan, J., concur. JUSTICE HOFFMAN delivered the opinion of the court.

OPINION BY: Thomas E. Hoffman

OPINION

JUSTICE HOFFMAN delivered the opinion of the court:

R&D **Thiel,** a Division of Carpenter Contractors of America, (R&D) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, **Manuel Robledo,** benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)). For the reasons which follow, we affirm the judgment of the circuit court and remand the matter back to the Commission for further proceedings.

The following factual recitation is taken from the evidence presented **[*2]** at the arbitration hearing.

The claimant was employed by R&D as a laborer. The claimant testified that, on January 5, 2004, he fell from a ladder while he was working for R&D. According to the claimant, he fell 12 feet and landed on his right side. He stated that he felt pain in his back immediately.

On January 6, 2004, the claimant sought treatment from Dr. Cavazos, a chiropractor. Dr. Cavazos' records reflect that the claimant complained of low-back pain and contain a history of the claimant having fallen nine feet while working on the day before. X-rays of the claimant's lumbar spine and right hip taken January 7, 2004, on orders of Dr. Cavazos were negative. In a letter dated January 7, 2004, Dr. Cavazos wrote that, when seen, the claimant complained of severe to moderate low-back pain and some sciatica as a result of an eight foot fall onto a basement floor which occurred on January 5, 2004. Dr. Cavazos estimated that the claimant would be unable to work for a period from two to four weeks and would require therapy.

The claimant returned to see Dr. Cavazos on January 9, 2004. The doctor's notes of that visit state that the claimant had improved 20%. Dr. Cavazos recommended that the **[*3]** claimant have an MRI of his lumbar spine which the claimant had that same day. Dr. John Aikenhead, also a chiropractor, interpreted the scan. According to Dr. Aikenhead, the MRI of the claimant's lumbar spine revealed a central protrusion at L4-L5, effacing the thecal sac with a small annular tear within the disk. In a letter dated January 17, 2004, Dr. Cavazos noted that the claimant was still complaining of low-back pain with right radiculopathy. He described the claimant's L4-L5 disk protrusion as "recent in nature and not pre-existing." The doctor continued the claimant's off-work status and estimated that he would be totally disabled to another four to six weeks.

The claimant next saw Dr. Cavazos on January 20, 2004. In his notes of that visit, Dr. Cavazos wrote that the claimant had a potential right knee problem from a fall at work which had been masked by severe low-back pain and right sciatica.

On January 27, 2004, the claimant was examined by Dr. Charles Mercier, an orthopaedic surgeon, at the request of R&D. Dr. Mercier testified that, when he examined the claimant on that date, his complaints were limited to low- and mid-back pain. The claimant made no mention of any right **[*4]** knee problems. Nevertheless, Dr. Mercier examined the claimant's right knee and found nothing abnormal. Dr. Mercier diagnosed an acute lumbosacral strain and found that the claimant was capable of light-duty work with lifting and bending restrictions. He reviewed the MRI of the claimant's lumbar spine and found no evidence of nerve root impingement. According to Dr. Mercier, the small lumbar disk protrusion at L4-L5 and the annular tear were incidental to degenerative findings, and he did not believe that the claimant's fall at work aggravated the condition. He opined that 12 chiropractic treatments or physical therapy sessions would be sufficient and that the claimant should be able to return to his regular work duties within six weeks following his injury.

When Dr. Cavazos examined the claimant of January 28, 2004, he noted that the claimant had an internal derangement of the right knee and recommended that he undergo an MRI of the knee. The claimant had the recommended MRI the following day, January 29, 2004. Dr. Aikenhead interpreted that MRI as showing mild bone edema of the medial facet of the patella, suggesting a "questionable" contusion or transchondral fracture of the medial **[*5]** facet of the patella and minimal edema near the femoral attachment, which "suggested" a slight strain of the anterior cruciate ligament. Dr. Aikenhead described the medial and lateral menisci and the medial and lateral collateral ligament complexes as normal. Dr. Cavazos testified that the claimant's back and knee conditions were both causally connected to his fall at work on January 5, 2004.

The claimant continued to receive chiropractic care from Dr. Cavazos. Dr. Cavazos referred the claimant to Dr. Howard Freedberg, an orthopaedic surgeon, whom the claimant saw for the first time on February 5, 2004. In a letter dated that same day, Dr. Freedberg wrote that the claimant complained of pain in his right lower back, radiating to his hamstrings, thigh, and knee. X-rays of the claimant's knee revealed a "questionable" defect of the central area on the lateral projection. Dr. Freedberg also reviewed the MRI of the claimant's lumbar spine. He diagnosed a herniated L4-L5 disk with radiculopathy, right traumatic retropatellar pain syndrome, and an osteochondral fracture. Dr. Freedberg prescribed a Shield's brace and Celebrex, authorized the claimant to remain off of work, and referred him **[*6]** back to Dr. Cavazos for additional treatment.

The claimant was again seen by Dr. Freedberg on February 19, 2004. At that time, Dr. Freedberg diagnosed low-back pain and right

knee traumatic retropatellar syndrome. He injected the claimant's right knee and sent him back to Dr. Cavazos for an aggressive strengthening program.

The claimant saw Dr. Cavazos on February 25, 2004. The doctor's records of that visit reflect that the claimant had full range of motion in his back and only minimal complaints.

The claimant next saw Dr. Freedberg on March 15, 2004. The claimant reported that his right knee was bothering him significantly. The doctor noted that the injection which he administered at the claimant's last visit had only relieved his knee pain for two days. On examination of the claimant's right knee, Dr. Freedberg found negative apprehension, very little joint line tenderness, stable ligaments, and good tracking. He also found extensor mechanism problems and felt that there was an obvious osteochondral fracture of the medial facet and recommended arthroscopic surgery with debridement of the osteochondral-fracture fragment.

When Dr. Freedberg last saw the claimant on April 15, 2004, he **[*7]** noted that the claimant's MRI shows an osteochondral fracture of the patella, and he again recommended surgery.

In a letter to R&D's insurance carrier dated April 21, 2004, Dr. Cavazos wrote that the claimant was still off of work and awaiting knee surgery. He reported that the claimant's sciatica was improving.

On May 18, 2004, the claimant was again examined by Dr. Mercier at the request of R&D. Dr. Mercier testified that it was at this second examination that the claimant first mentioned any knee problems. On examination of the claimant's right knee, Dr. Mercier found no swelling, no pain over the posterior medial joint line, pain with crepitation with patellar compression, full range of motion with subpatellar crepitation, and media instability. Based upon the lack of any positive knee findings at the time of his initial examination, the claimant's failure to report any knee complaints when he first saw him on January 27, 2004, and the 15-day interval between the claimant's work injury and the first notation in any medical record of knee pain, Dr. Mercier opined that the claimant's knee complaints are not related to his work injury on January 5, 2004. According to Dr. Mercier, if **[*8]** the claimant had sustained a fracture or other osteochondral injury to his right knee when he fell at work, he would have been aware of it immediately. He also testified that the claimant's low-back pain would not have masked his knee problems, especially if he had sustained structural damage to the knee at the time of his fall. He was of the opinion that, although some bone edema or bleeding in the patella is consistent with a stress fracture, those same conditions could also be the result of a degenerative process in the claimant's knee. Dr. Mercier also opined that the claimant was not a candidate for either arthroscopic surgery or epidural steroid injections. Dr. Mercier testified that, as of the date of his examination, the claimant had reached maximum medical improvement (MMI) with respect to both his back and knee and could have resumed full-duty work.

On referral from Dr. Cavazos, the claimant was examined by Dr. David Montella, an orthopaedic surgeon, on June 24, 2004. The doctor's notes reflect that the claimant complained of low-back pain extending down his right leg and right-knee pain with some swelling and giving way. Dr. Montella testified that the claimant denied any **[*9]** locking, catching or popping in his right knee. On examination, Dr. Montella detected an antalgic gait and limited lumbar flexion and extension. He also noted lumbar spasms, negative tension signs, and a mild knee effusion with tenderness about the patella and joint lines. However, he testified that the tests which he performed for ligament instability which produced negative results have limited sensitivity. Dr. Montella interpreted the claimant's MRI scans as showing a questionable chondral fracture of the right knee and a central protrusion at L4-L5 with an annular tear. Dr. Montella prescribed lumbar epidural injections, right knee surgery, and continued chiropractic care. He also recommended that the claimant remain off of work due his severe and debilitating conditions. However, at the claimant's request, Dr. Montella released the claimant to return to full-duty work on July 9, 2004.

When he saw the claimant on August 12, 2004, Dr. Montella noted that his examination findings remained unchanged, and he continued to recommend epidural injections and knee surgery. Noting that the claimant wanted to attempt to work, Dr. Montella authorized him to return to light-duty work with a **[*10]** 40-pound lifting limitation and a restriction against excessive turning, twisting, bending, sitting, or standing. However, Dr. Montella advised the claimant that he might be required to cease working in the event that his symptoms worsened.

The claimant testified that he presented his supervisor with the restrictions imposed by Dr. Montella, and R&D provided him with light-duty work. However, he complained to Dr. Montella of neck pain and headaches on October 22, 2004, which were not work-injury related and asked Dr. Montella to authorize him to remain off of work due to his back and knee pain. Dr. Montella complied with the request.

Dr. Montella's notes indicate that there was no change in the claimant's physical condition when he saw him in August, September, October, and December of 2004, and February of 2005. However, Dr. Montella's diagnosis changed over that period from a knee fracture and an L4-L5 annular tear on June 24, 2004; to back and knee pain on August 12, 2004; to neck pain with headache and low-back pain, right knee pain, cervical and lumbar discogenic pain, and a right knee meniscal tear on October 22, 2004; to back and radiating leg pain and lumbar disk injury on December **[*11]** 23, 2004; to back pain and lumbar discogenic pain leading to radiculitis on February 9, 2005.

Dr. Montella's February 9, 2005, notes state that the claimant had "no profound or progressive neurologic impairment" and "knee pain consistent with inter-articular pathology." Although he believed that a lumbar fusion was an option of last resort, Dr. Montella continued to recommend therapy, chiropractic treatment, epidural injections and arthroscopic surgery, and he authorized the claimant to remain off of work.

When Dr. Montella examined the claimant in April, June and August of 2005 and in March and April of 2006, there was again no change in his physical findings. Dr. Montella testified that the claimant has a disk herniation with radicular irritation and an annular tear which is causing back pain and is leading to nerve irritation. He stated that the claimant's knee and low-back injuries are causally related to his work accident; although, he conceded that the MRI of the claimant's knee showed no evidence of a meniscal tear.

At R&D's request, the claimant was examined on March 17, 2006, by Dr. Alexander Ghanayem. In his report of that examination, the doctor recorded the history given him **[*12]** by the claimant of having fallen 10 to 12 feet from a ladder while working and landing on his back and right side. The claimant complained of back pain, neck pain, pain in his right buttock, and pain in his posterior thigh to his calf. Dr. Ghanayem noted the results of his physical examination of the claimant, and the medical records which he reviewed, including the MRI of the claimant's lumbar spine. According to Dr. Ghanayem, the MRI appeared normal. He found no evidence of an annular tear. He did detect evidence of some thickening of the annulus at L4-L5, but found the condition to be appropriate for an individual of the claimant's age and not of traumatic origin. Based upon the mechanism of the claimant's injury, his examination of

the claimant, and his review of the claimant's medical records, Dr. Ghanayem opined that the claimant had sustained soft-tissue injuries to his back, right buttock, and thigh. He found no evidence that the claimant sustained a disk herniation that would result in any permanent injury. Dr. Ghanayem was also of the opinion that the claimant had reached MMI, and that he was capable of returning to full-duty work. Although he opined that chiropractic care **[*13]** two to three times per month for one or two months was appropriate for the claimant's injuries, he characterized the chiropractic care that the claimant received over a two-year period as "inappropriate and not medically necessary."

When deposed on November 10, 2005, Dr. Cavazos testified that he had seen the claimant 131 times since January 6, 2004. He stated that most of the therapy which he administered was for the claimant's back rather than his knee.

The claimant testified at the arbitration hearing held in May of 2006, that he had seen Dr. Cavazos more than 140 times since his injury on January 5, 2004, and that the treatments helped him "a little."

R&D had the records of Drs. Cavazos and Montella along with their depositions reviewed by Dr. Lawrence Humberstone, a chiropractor. In his report, Dr. Humberstone opined that it would be "atypical" for a transchondral fracture of the knee to produce intermittent pain almost one month after the injury occurred. He wrote that the first 12 chiropractic visits to Dr. Cavazos were necessary, reasonable, and related to the claimant's work accident. However, he fixed January 30, 2004, as the date when the claimant had reached MMI for purposes **[*14]** of chiropractic treatment. Dr. Humberstone did not believe that the records supported the amount of chiropractic care that the claimant received, and he found no evidence that the claimant received any real benefit from the treatments. Dr. Humberstone also opined that none of the claimant's knee related care was either reasonable or related to his injury at work.

The claimant acknowledged that he did not mention any right knee pain when he first saw Dr. Cavazos and that he first complained of right knee problems when he saw Dr. Cavazos on January 20, 2004. The claimant also admitted that, although R&D still had light-duty work available, he had not contacted R&D or looked for alternative work since October 22, 2004.

Following the hearing held pursuant to section 19 (b) of the Act (820 ILCS 305/19 (b) (West 2004)), the arbitrator found that the claimant sustained a work-related accident on January 5, 2004, resulting in soft-tissue injuries to his low back. The arbitrator awarded the claimant 26 6/7 weeks of temporary total disability benefits under section 8 (b) of the Act (820 ILCS 305/8 (b) (West 2004)) and ordered R&D to pay $ 8,070.50 for necessary medical services provided to the **[*15]** claimant pursuant to section 8(a) of the Act (820 ILCS 305/8 (a) (West 2004)), limiting the amount due Dr. Cavazos to $ 5,275. R&D was granted a credit of $ 3,659.32 pursuant to section 8(j) of the Act (820 ILCS 305/8 (j) (West 2004)). After concluding that the credibility of both the claimant and Dr. Montella, was in serious question, the arbitrator declined to find any causal relationship between the claimant's work-related accident and his current condition of ill-being. As a consequence, she declined to order R&D to pay for any prospective epidural injections or a right knee arthroscopy.

The claimant filed a petition for review of the arbitrator's decision before the Commission. The Commission modified the arbitrator's decision, finding that the claimant met his burden of establishing a causal connection between his accident on January 5, 2004, and his current condition of ill-being, specifically his lumbar spine abnormalities, his right knee osteochondral fracture, and a possible meniscal tear. Finding that R&D had paid Dr. Cavazos $ 5,480, the Commission increased the sum which R&D was ordered to pay for necessary medical services provided to the claimant to $ 8,275.50. The Commission **[*16]** ordered R&D to authorize and pay for epidural injections and a diagnostic arthroscopy of the claimant's right knee. In addition to the $ 3,659.32 section 8(j) credit awarded by the arbitrator, the Commission awarded R&D an additional credit in the sum of $ 5,480 for the payments made to Dr. Cavazos. In all other respects, the Commission affirmed the arbitrator's decision and remanded the matter back to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Thereafter, R&D sought judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

In urging reversal of the judgment of the circuit court, R&D argues that the Commission's decision finding a causal relationship between the claimant's accident at work on January 5, 2004, and the current condition of ill being of his lumbar spine and right knee is against the manifest weight of the evidence. In a dependent argument, R&D contends that the Commission's award of prospective medical expenses is also against the manifest weight of the evidence. In support of its arguments, **[*17]** R&D relies upon the causation opinions of Drs. Mercier, Ghanayem and Humberstone. According to R&D, the Commission "cherry picked" through Dr. Mercier's testimony and ignored significant portions of his opinions. R&D also asserts Dr. Montella's records and opinions "strain the limits of credibility," pointing to his frequent changes in diagnoses despite the claimant's unchanging physical examinations, and it concludes that the Commission's findings "defy logic" and are both "nonsensical and inconsistent."

Ignoring the hyperbole, we will address R&D's arguments along with its invitation for us to apply an "extra degree of scrutiny" in cases such as this where the Commission rejects the credibility findings of an arbitrator.

In *S&H Floor Covering, Inc. v. Workers' Compensation Comm'n.*, 373 Ill. App. 3d 259, 267, 870 N.E.2d 821, 312 Ill. Dec. 377 (2007), responding to "more than a few cases where the Commission has made credibility findings contrary to those of the arbitrator," this court opined that "[i]t may very well be time to reconsider the Commission's prerogative to determine credibility regardless of the arbitrator's decision." However, recognizing, as we must, that the Commission exercises original **[*18]** jurisdiction and is not bound by an arbitrator's findings (See *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989); *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984)), we are, nevertheless, faced with the obligation of determining whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence. A resolution of the question can only rest upon the reasons given by the Commission for the variance. When the Commission gives no reasons for a contrary credibility determination, its decision may be lacking in findings which make meaningful judicial review possible; and, in such cases, the appropriate remedy is to remand the matter back to the Commission with directions to make the necessary findings. See *Reinhardt v. Board of Elections of Alton Community Unit School District No. 11*, 61 Ill. 2d 101, 103-04, 329 N.E.2d 218 (1975); *Illinois Campaign for Political Reform v. Illinois State Board of Elections*, 382 Ill. App. 3d 51, 63, 886 N.E.2d 1220, 320 Ill. Dec. 151 (2008). However, HN1 when, as in this case, the Commission **[*19]** gives its reasons for making credibility findings contrary to those made by the arbitrator, our inquiry on review is whether the findings are against the manifest weight of the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). Whether this court might have reached the same conclusion is not the test of whether the Commission's determination is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination.

Benson v. Industrial Comm'n, 91 Ill. 2d 445, 450, 440 N.E.2d 90, 64 Ill. Dec. 538 (1982).

In this case, the arbitrator, relying upon the opinion of Dr. Ghanayem, concluded that the claimant sustained only a soft-tissue injury to his low-back as a result of his fall at work on January 5, 2005, and, although he also injured his right knee when he fell, he failed to prove that he sustained any permanent injury to the knee or was in need of any surgery. The arbitrator found Dr. Ghanayem's opinions more credible that those of Drs. Cavazos and Montella. In coming to her conclusions, the arbitrator also rejected the opinions of Drs. Freedberg and Montella as to **[*20]** the nature and extent of the claimant's knee injury because their opinions are not supported by the MRI of the claimant's knee. She found Dr. Montella's opinions less than credible due to his frequent changes in diagnoses.

In contrast, the Commission found that the claimant proved that he sustained an L4-L5 disk protrusion and annular tear as well as an osteochondral patellar fracture and possible meniscal tear of the right knee as a result of his work-related fall. In arriving at its decision, the Commission relied upon the consistency of the claimant's descriptions of the mechanism of his injury; the MRI's of the claimant's lumbar spine and right knee; the opinions of Drs. Freedberg, Montella and Cavazos; and the concessions made by Dr. Mercier in his deposition. The Commission noted that Dr. Mercier conceded that the MRI of the claimant's lumbar spine showed a central disk protrusion at L4-L5 and a small annular tear in contrast to Dr. Ghanayem's opinion that the claimant suffered only soft-tissue injuries. Contrary to the arbitrator's finding that Dr. Freedberg's opinion was not supported by either the claimant's MRI or his own examination of the right knee, the Commission observed **[*21]** that Dr. Freedberg based his opinions not only on a review of the claimant's MRI, but also on a review of multiple x-rays which he had ordered. As to the opinions of Dr. Humberstone, the Commission noted that he never examined the claimant. Finally, relying upon the recommendations of Drs. Freedberg, Montella, and Mercier, the Commission ordered R&D to authorize and pay for epidural injections to the claimant's lumbar spine and a right knee arthroscopy.

HN2 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette*, 79 Ill. 2d at 253. Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission (*Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 N.E.2d 954, 78 Ill. Dec. 120 (1984)), as is the extent of his disability (*Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607, 37 Ill. Dec. 605 (1980)) and the reasonableness and necessity of medical expenses (*F & B Manufacturing Co. V. Industrial Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill. Dec. 173 (2001)). In resolving such issues, it is the function of the Commission to decide **[*22]** questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253.

HN3 The Commission's determinations on questions of fact will not be disturbed on review unless they are against the manifest weight of the evidence; that is to say, unless an opposite conclusion is clearly apparent. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987).

As the trier of fact, exercising original jurisdiction, the Commission resolved the issues of the nature and extent of the claimant's injuries and the reasonableness and necessity of his prospective medical expenses, as well as the question of whether a causal relationship exists between the claimant's condition of ill-being and his fall at work on January 5, 2004. Although in some respects contrary to the findings of the arbitrator, we cannot say based upon the record before us that the Commission's decision is contrary to the manifest weight of the evidence.

Based upon the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision, and we remand the matter back to the Commission for further proceedings.

Affirmed **[*23]** and remanded to the Commission.

MCCULLOUGH, P.J., and HUDSON, HOLDRIDGE, and DONOVAN, JJ., concur.

*2007 Ill. Wrk. Comp. LEXIS 918, *; 7 IWCC 0555*

MANUEL ROBLEDO, PETITIONER, v. R & D **THIEL** CONSTRUCTION, INC., RESPONDENT.

No. 04WC4443

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

2007 Ill. Wrk. Comp. LEXIS 918; 7 IWCC 0555

June 5, 2007

CORE TERMS: pain, knee, right knee, tear, fracture, lumbar, medial, chiropractic, recommended, injection, doctor, spine, arthroscopy, epidural, patient, osteochondral, protrusion, meniscal, annular, surgery, opined, symptoms, deposition, carrier, ladder, light duty, right side, recommendation, maximum, undergo

JUDGES: Susan O. Pigott; James F. DeMunno; Nancy Lindsay

OPINION: [*1]

ORDER

On May 22, 2007 Respondent filed a Motion to Recall Decision of Commission for Correction of Clerical Error or Error in Computation pursuant to Section 19(f) of the Act.

Upon consideration of said Motion the Commission is of the opinion that the Commission's Decision and Opinion on Review dated May 10, 2007 should be recalled due clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 10, 2007 is hereby recalled and a Corrected Decision and Opinion on Review issued simultaneously. The parties should return their original decisions dated May 10, 2007 to Commissioner Susan O. Pigott.

Dated: JUN 5 2007

CORRECTED DECISION AND OPINION ON REVIEW

Petitioner appeals the Decision of Arbitrator Kinnaman in this 19(b) and 8(a) matter finding that Petitioner and Respondent had an employment relationship on January 5, 2004, that Petitioner sustained accidental injuries on January 5, 2004 arising out of and in the course of his employment, that Petitioner established causation but only as to soft tissue low back and right knee injuries, that Petitioner was temporarily totally disabled from January 5, 2004 through July **[*2]** 12, 2004, a period of 26 6/7 weeks, with Respondent receiving credit for the $ 16,322.15 I paid prior to arbitration (Arb. Exh.1) that Petitioner is entitled to $ 8,070.50 in reasonable and necessary medical expenses, that Petitioner is not entitled to prospective care in the form of epidural injections or a right knee arthroscopy and that Respondent is entitled to Section 8(j) credit in the amount of $ 3,659.32, with Respondent holding Petitioner harmless against any claim for reimbursement.

The issues on review are causal connection, temporary total disability, medical and prospective care.

After considering the entire record, the Commission modifies the Decision of the Arbitrator by finding that Petitioner established a causal connection between the accident and the lumbar spine disc abnormalities shown on MRI as well as the right knee osteochondral fracture and possible meniscal tear, that Petitioner is entitled to $ 8,275.50 in reasonable and necessary medical expenses, with Respondent receiving credit for $ 5,480.00 it paid to Dr. Davazos (PX 3), and that Respondent is ordered to authorize and pay for epidural injections and a diagnostic arthroscopy of the right knee. All else **[*3]** is otherwise affirmed, for the reasons set forth below. The Commission remands this case to the Arbitrator for further proceedings for a determination of an additional 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 33-year-old laborer, testified through an interpreter. He indicated that he first became associated with Respondent in 2002, when he spoke with "Larry", a supervisor for Respondent. It was after this conversation that he began working for Respondent. The Commission notes that Respondent did not file a cross-review from the Arbitrator's finding of an employment relationship.

2. Petitioner testified that he fell from a ladder while working for Respondent on January 5, 2004. He fell a distance of twelve feet and landed on his right side. T. 12. He testified that he felt back pain immediately after the accident and that he began experiencing right knee pain about two weeks later. T. 13.

3. Petitioner **[*4]** first sought medical treatment on January 6, 2004, when he consulted Dr. Cavazos, a chiropractor. A health history form dated January 6, 2004 reflects that Petitioner had fallen nine feet at work the day before and that he had informed his boss of the accident. A diagram also dated January 6, 2004 reflects that Petitioner complained of lower back pain. On examination, Dr. Cavazos noted positive straight leg raising at 30 degrees bilaterally. Lumbar spine and right hip X-rays taken on January 7, 2004 were negative. PX 6. Dr. Cavazos wrote to Respondent on January 7th and indicated that Petitioner complained of "severe to moderate low back pain and some right sciatica" secondary to an 8-foot fall onto a basement floor. The doctor noted that the fall occurred at 8:30 AM on January 5th and that Petitioner continued working thereafter until 10:30 AM, when he stopped due to pain. The doctor estimated that Petitioner would be totally disabled for two to four weeks. He also indicated that therapy was "medically necessary". PX 3.

4. Petitioner returned to Dr. Cavazos on January 9, 2004, at which time the doctor noted 20% improvement. At the doctor's recommendation, Petitioner underwent a lumbar **[*5]** spine MRI that day. T. 14. John Aikenhead, D.C. interpreted this MRI as showing a central protrusion at L4-5 effacing the thecal sac with a small annular tear within the disc. PX 3. When Dr. Cavazos sent a second letter to Respondent on January 17, 2004 he described the disc protrusion as "recent in nature and not pre-existing". He described Petitioner as improving but still complaining of low back pain with right radiculopathy. He projected another four to six weeks of total disability. PX 3.

5. Dr. Cavazos' hand written note of January 20, 2004 reflects a "potential rt knee problem from fall at work, previously masked by severe LBP and rt sciatica". On examination, he noted medial knee pain and a positive McMurray test. On January 28, 2004 he indicated that Petitioner had a potential internal derangement of the right knee. He recommended a right knee MRI. On January 29, 2004, Dr. Aikenhead interpreted the right knee MRI as showing a "questionable contusion/transchondral fracture of the medial facet of the patella" and a "suggested slight strain of the anterior cruciate ligament". He described the medial and lateral menisci and the medial and lateral collateral ligament complexes **[*6]** as normal. He explained that the medial facet injury should be suspected "due to the patient's history of fall". The history section of the MRI report reflects that Petitioner fell from a ladder at work on January 6, 2004. PX 3.

6. On February 5, 2004 Petitioner saw Dr. Howard Freedberg, an orthopedic surgeon, at the referral of Dr. Cavazos. T. 14-15. In his letter of the same date, "Dr. Freedberg indicated that Petitioner had given a history of falling ten feet from a ladder, landing on his back and right side. Petitioner complained of pain in his right lower back radiating to his hamstrings, thigh and knee. He denied any prior history of back problems. The knee pain was noted to be in the medial joint line area, with giving way. Petitioner denied prior knee injuries. On examination of the back, Dr. Freedberg noted a positive tension sign to the right side and no gross neurological deficits. On examination of the knee, he noted tenderness at the medial femoral epicondyle, a full range of motion, no effusion, a positive apprehension test and positive medial facet tenderness. He took knee X-rays in various positions and noted "a questionable defect of the central area" on the lateral **[*7]** projection. The radiology reports are not in evidence. He reviewed the lumbar spine MRI and noted the protrusion at L4-5. He diagnosed an L4-5 herniated disc with radiculopathy, right traumatic retropatellar pain syndrome and an osteochondral fracture. He placed Petitioner in a Shield's brace and prescribed Celebrex. He kept Petitioner off work and referred him back to Dr. Cavazos for additional care. PX 5. Petitioner resumed seeing Dr. Cavazos thereafter. PX 3.

7. On February 19, 2004 Dr. Freedberg diagnosed low back pain and "right knee traumatic retropatellar syndrome". He injected Petitioner's knee and sent Petitioner back to Dr. Cavazos for an aggressive strengthening program. At the next visit, on March 15, 2004, Dr. Freedberg noted that the injection had relieved Petitioner's knee pain for only two days. On examination of the knee, he noted "extensor mechanism problems as far as the medial facet", a negative apprehension test and "very little joint line tenderness". He diagnosed "right knee osteochondral fracture of the medial facet" and recommended arthroscopic surgery with debridement of the osteochondral fracture fragment. He described the fracture fragment as "obvious". **[*8]** On April 15, 2004 he indicated that "the MRI shows the osteochondral fracture of the patella" and recommended an arthroscopy, micro-fracture and a possible osteochondral transport allograft. On May 27, 2004 he noted that workers' compensation had not yet made a decision concerning the proposed surgery. He again diagnosed a right patellar osteochondral fracture and expressed frustration with the delay in securing surgical approval. PX 3.

8. Dr. Cavazos' records reflect that he wrote to Respondent and its workers' compensation carrier on April 21, 2004 and noted that Petitioner was still off work and awaiting knee surgery. He described Petitioner's sciatica as improving. A handwritten note dated June 10, 2004 reflects that the knee surgery was to take place on June 16th and was apparently going to be paid for by the group carrier. The surgery did not proceed as scheduled. On June 23, 2004 Dr. Cavazos provided Petitioner with the business cards of two other orthopedic surgeons, Drs. Lopez and Dr. Montella. PX 3. T. 14-15.

Dr. Cavazos' chart also contains a draft from Respondent dated June 29, 2004, paying the doctor $ 5,480.00 for the care he provided from January 6 to March 23, 2004. **[*9]** Respondent's carrier, Martin Boyer, subsequently informed Dr. Cavazos in writing that it would not pay any of his additional charges "based on the opinion of our physician advisors". PX 3.

9. Petitioner testified that he first saw Dr. Montella on June 24, 2004. The doctor's note of that date sets forth a history of the work fall and reflects that Petitioner complained of lower back pain extending down his right leg and activity-related right knee pain with swelling and some giving way. The doctor described Petitioner's past medical history as unremarkable. He noted an antalgic gait and limited lumbar flexion and extension. He also noted lumbar spasm, negative tension signs and a mild knee effusion with "tenderness diffusely about the patella and joint lines". He interpreted the previous right knee MRI as showing a "questionable chondral fracture" and the lumbar spine MRI as showing a central protrusion at L4-5 with an annular tear. He continued to keep Petitioner off work and recommended epidural injections, therapy and continued chiropractic care. He released Petitioner to full duty on July 9, 2004. RX 1. His office note of July 9th is not in evidence. He noted no improvement in **[*10]** Petitioner's back or knee on August 12, 2004 and described his examination findings as unchanged. He recommended epidural injections and arthroscopic knee surgery. He noted that Petitioner "wishes to attempt to participate at work" and released him to light duty with a 40-lb. lifting restriction and no excessive turning, twisting, bending, sitting or standing. He again told Petitioner that he might need to discontinue working if his symptoms worsened. On September 20, 2004 he continued the previous work restrictions and again recommended therapy, chiropractic care, epidural injections and arthroscopic surgery. On October 22, 2004 he noted that Petitioner was complaining of neck pain and headaches as well as back and knee pain. He described Petitioner's knee pain as consistent with a meniscal tear. He found it "unreasonable for [Petitioner] to work in any capacity". On December 23, 2004 he continued to keep Petitioner off work and noted he was awaiting approval for the injections and surgery. PX 7.

On January 13, 2005 Dr. Cavazos wrote to Respondent and its carrier again and indicated that Petitioner had made an unsuccessful attempt to resume full duty. PX 3.

On February 9, 2005 Dr. **[*11]** Montella described Petitioner as having "no profound or progressive neurologic impairment" and "knee pain consistent with intra-articular pathology". He described a lumbar fusion as a last resort. He kept Petitioner off work and again recommended therapy, chiropractic care, epidural injections and an arthroscopy. PX 7.

Petitioner continued seeing Dr. Montella thereafter and remained off work and under his care at the time of the May 19, 2006 19(b) hearing. T. 15-16. PX 8.

On April 13, 2006, approximately a month before the hearing, Dr. Cavazos wrote to Respondent and its carrier again and noted that Petitioner remained off work and under care at Dr. Montella's recommendation. He also noted that Petitioner was experiencing bowel and bladder dysfunction, "specifically loss of control". PX 4.

10. Petitioner testified that he was off work from January 6 to July 12, 2004 and from October 22, 2004 to date. T. 19. He further testified that he experienced a great deal of back and knee pain while working between July 13 and October 21, 2004. T. 19. He denied having any injuries to his back or right knee after the January 5, 2004 work accident. T. 19. He testified that he experiences pain when **[*12]** walking, bending, using stairs or standing or sitting for extended periods. Sometimes his pain extends up to his right shoulder or down to both feet. T. 20. He takes pain medication prescribed by Dr. Montella and this medication helps a little. T. 21.

Under cross-examination, Petitioner acknowledged that he provided Respondent with a false Social Security number. T. 22. He testified that he completed a history form when he first saw Dr. Cavazos. The doctor did not help him complete the form but did ask him about his complaints. T. 25-26. He acknowledged that he did not mention his right knee when he first saw Dr. Cavazos. T. 28. When he saw Dr. Mercier for examination purposes on January 27, 2004 he told the doctor that he had place an object between his legs in order to be able to sleep due to knee pain. He also complained to Dr. Mercier about back pain. T. 38. He first mentioned his knee pain to Dr. Cavazos on January 20, 2004. T. 36. He acknowledged that he reported improvement of his back pain to Dr. Cavazos on several occasions thereafter. He still had back pain as of April 21, 2004, however. He never told Dr. Cavazos that his back was completely fine. T. 45. Sometime after June **[*13]** 24, 2004 he asked Dr. Montella for a "return to work note". At that point he felt he could resume full duty. After Dr. Montella imposed work restrictions he presented those restrictions to his supervisor and Respondent provided him with light duty. T. 50-51. At his request, Dr. Montella continued the restrictions on September 20, 2004. T. 51-52. On October 22, 2004 he told Dr. Montella that he had neck pain and headaches. He acknowledged that these complaints were not related to his work accident. He asked the doctor to take him off work due to his back and knee pain and the doctor complied. At that point Respondent still had light duty available. T. 54. He has not contacted Respondent or looked for alternative work since October 22, 2004. T. 55. On "good" days he helps his wife cut the grass or wash the dishes. He occasionally does grocery shopping but does not carry any heavy bags. He plays soccer with his children but kicks the ball with his left foot. T. 57. His son weighs 35 pounds and he "maybe" lifted his children if they fell. T. 57. His doctors have not restricted his non-work activities. T. 57. Since January 2005 he has told Drs. Cavazos and Montella that he does not have **[*14]** knee pain. T. 59. Dr. Cavazos gave him various lawyers' cards and he selected one firm to represent him. T. 64. He has seen Dr. Cavazos more than 140 times since January 2004. The treatment that Drs. Cavazos and Montella have provided has not changed since January 2004. T. 66.

On redirect, Petitioner testified that Dr. Cavazos' chiropractic care has helped him "a little". T. 67. His pain increased while he was working between July and October of 2004. T. 68. His pain varies and in any given week there are a couple of days when he feels better. T. 69.

11. Petitioner offered a letter dated November 23, 2005 from the health and welfare fund indicating that it had paid $ 9,089.02 in disability benefits and $ 3,659.32 in medical benefits. PX 1.

12. Petitioner also offered Dr. Montella's evidence deposition. This deposition was taken on March 17, 2005. Dr. Montella's Curriculum Vitae reflects that he did a spinal surgery fellowship at the University of Minnesota in 1997 and that he became board certified in orthopedic surgery in 2000.

Dr. Montella testified that he typically reviews a patient's MRI films. Petitioner's MRI reports showed a chondral fracture of the knee and an L4-5 disc injury. **[*15]** PX 9 at 7-8. He opined that these conditions stemmed from Petitioner's work injury. PX 9 at 8. He typically pursues conservative care before recommending surgery. PX 9 at 9. His October 22, 2004 note describes Petitioner's right knee condition as a meniscal tear but the note should say "possible meniscal tear". Petitioner has a chondral or internal knee injury and "it would be more fully defined with arthroscopic surgery". PX 9 at 13-14. Petitioner's clinical symptoms are consistent with a meniscal tear. PX 9 at 14-15. If Petitioner does not undergo the recommended epidural injections and arthroscopy he will continue to have complaints. PX 9 at 15-16.

Under cross-examination, Dr. Montella acknowledged that he did not have any of Petitioner's hospital records or any of Dr. Cavazos' records predating February 26, 2004. PX 9 at 18. When he first saw Petitioner on June 24, 2004 Petitioner denied locking, catching and popping in his knee. These symptoms are "maybe" indicative of a meniscal problem. PX 9 at 19. It is his understanding that Petitioner's knee problems started "within a reasonable time frame" of his accident. This time frame varies from person to person and can be "days to **[*16]** weeks". If a person injures two body parts he may focus on the more painful injury and try to ignore the other one. PX 9 at 19. In Petitioner's case, two weeks to a couple of months would be a reasonable period for the knee complaints to surface. PX 9 at 20. He acknowledged that there is nothing in the literature to support this; it's a "matter of common sense". PX 9 at 20-21. Petitioner's patella seemed to track "a little bit lateral". This could be due to a chondral injury, an effusion, ligament instability or a malalignment. PX 9 at 26-27. The tests he did for ligament instability were negative but these tests have limited sensitivity. PX 9 at 27. It is more likely than not that he saw Petitioner's MRI scans and X-rays but he cannot say this with certainty. PX 9 at 28. A chiropractor read both of the MRI scans. There is nothing in the knee MRI report which is suggestive of a meniscal tear. PX 9 at 29. He recalled Petitioner attempting to return to work, getting worse and then being taken off work again. The findings he made on February 5, 2005 were similar to those he made on August 12, 2004. PX 9 at 32. On July 9, 2004 he released Petitioner to full duty with the caveat that he **[*17]** should return if his symptoms increased. PX 9 at 35-36. RX 1. On September 20, 2004 he released Petitioner to work with a 40-lb. lifting restriction. PX 9 at 38-39. RX 3. The neck pain and headaches that Petitioner complained of on October 22, 2004 were not related to his work injury. PX 9 at 39-40. He recommended an arthroscopy in June 2004 but, in his view, a patient should not have surgery just to have it or even based on his examination findings. A patient should base his decision to undergo surgery on how he is feeling. PX 9 at 42-43. "By and large", he imposed restrictions on October 22, 2004 because Petitioner said he could not work and not because of any new findings. PX 9 at 45. Petitioner does not have a disc herniation but does have a disc with an annular tear. This tear is causing back pain and leading to nerve irritation. PX 9 at 51-52. He found Petitioner's radiating leg pain to be consistent with his central disc protrusion effacing the thecal sac. PX 9 at 52. He then modified his previous testimony and indicated that Petitioner does have a clinical presentation of a disc herniation with radicular irritation. PX 9 at 53-54. He viewed

Petitioner as having made a good **[*18]** faith effort to resume working. If a patient reports increased symptoms after making this kind of effort "it's time to go up to the next step of the ladder, which would be surgery or injections". PX 9 at 59. He would order a functional capacity evaluation for a patient who had run out of treatment options. PX 9 at 61. If a patient's knee doesn't hurt, he should not undergo knee surgery. PX 9 at 62. Since Petitioner felt that chiropractic care was helping him he recommended that Petitioner continue that care. PX 9 at 63. If Petitioner had simply indicated that work was giving him "aches and pains" he would have told Petitioner to continue working. PX 9 at 65.

On redirect, Dr. Montella testified that he has previously seen other radiographic reports from Dr. Alkenhead, the chiropractor who interpreted Petitioner's MRI scans. He had no problem with these reports. He has never detected any positive Waddell signs in Petitioner. Petitioner's behavior was consistent while he was being examined and even when he was unaware that he was being examined. PX 9 at 68. He does not use the term "Waddell" in his reports because he does not think that anyone knows what this term means. In formulating **[*19]** his opinions, he did not have to know exactly what Petitioner was doing on the job. PX 9 at 68.

Under re-cross, Dr. Montella indicated that he advises patients to work through aches and pains when resuming work or non-work activities. That is part of the healing process. If, however, a patient's pain worsens with such activities he should not be performing them. PX 9 at 68-70.

13. Petitioner also offered the evidence deposition of Dr. Cavazos. This deposition was taken on November 10, 2005. Dr. Cavazos testified that he is a licensed chiropractor and that he has been in practice for seventeen years. PX 10 at 4. At the initial visit on January 6, 2004 Petitioner told him that he was on an 8-foot ladder installing a staircase when the ladder fell over, causing him to fall and land on his right side on a concrete floor. PX 10 at 5. On initial examination, Petitioner had increased lower back pain with coughing or sneezing. This is a good indication of a space-occupying lesion. Petitioner also had a positive nerve tension test. Petitioner's examination was consistent with his complaints. PX 10 at 6-7. Petitioner denied any prior back or knee problems. Petitioner came to his office within **[*20]** twenty-four hours of his accident and he felt that Petitioner's complaints were due to his fall. PX 10 at 8. The lumbar spine MRI showed a central protrusion. This could have caused bilateral leg complaints but Petitioner only had right leg complaints. Petitioner also had an annular tear, or rent in the disc, "which shows that it is not old". PX 10 at 9. Petitioner, complained of right leg pain from the beginning. The sciatic nerve goes through the back of the knee. Later, on January 20, 2004, he was able to identify a specific right knee problem and found a positive right medial McMurray's. PX 10 at 10-11. The positive McMurray's indicated that there was something wrong with the medial compartment of Petitioner's knee. The knee MRI findings were consistent with Petitioner's complaints. PX 10 at 12. In his opinion, based on Petitioner's denial of prior knee problems, the MRI and the acute examination findings, the knee injury was caused by the work fall. PX 10 at 14. He explained that "when you have a great deal of back and sciatic pain going through the knee you can overlook a specific local knee problem". PX 10 at 15. He initially referred Petitioner to Dr. Freedberg. Later, because **[*21]** Petitioner wanted a second opinion, he referred him to Dr. Montella. PX 10 at 14-16. There was a break in his own care between June and late October of 2004. PX 10 at 17. Petitioner's knee "seems like it has stabilized" but he still has days where he has more medial compartment pain. PX 10 at 21. He will continue treating Petitioner as long as Petitioner remains under Dr. Montella's care. PX 10 at 23. His treatment was necessitated by the accident. He characterized his charges as customary based on the fact that most carriers pay 100% of the bills he submits. Martin Boyer paid some of his charges but there is an outstanding balance in the amount of $ 14,150. PX 10 at 24-25.

Under cross-examination, Dr. Cavazos acknowledged that his initial report does not specifically mention knee pain. PX 10 at 30. The pain diagram dated January 13, 2004 reflects that Petitioner complained of pain in the back of his knee. This pain would not be necessarily inconsistent with pain in the medial area of the knee. PX 10 at 32, 34. He admitted that when he saw Petitioner on January 17, 2004, after only six visits, he projected that Petitioner would be released to full duty in four to six weeks. PX 10 **[*22]** at 35. He also admitted that he has seen Petitioner 131 times since January 6, 2004. PX 10 at 35. In his opinion, based on the history, Petitioner's lumbar spine MRI was specific for an annular tear that had occurred during the preceding week. PX 10 at 38. Radiologists who looked at this MRI, without knowing any history, could narrow the outset of the tear down to about three months. PX 10 at 39. A transchondral fracture is a fracture of part of the cartilage of the kneecap. PX 10 at 39-40. Most of the therapy he administered was for Petitioner's back rather than his knee. PX 10 at 40. As of March 23, 2004 Petitioner had essentially a full range of back motion and his gait had improved. PX 10 at 47. There is no set number of chiropractic visits for any particular diagnosis. It's based on how the patient responds. PX 10 at 56-57. When he estimated, on January 17, 2004, that Petitioner would resume full duty in four to six weeks, no specialist had seen Petitioner yet. Drs. Freedberg and Montella would have the "upper authority" in Petitioner's care. PX 10 at 58. In May 2004 the workers' compensation carrier informed him that it would not pay for any more care based on Dr. Mercier's independent **[*23]** medical examination. There was an interruption in care at that point. PX 10 at 62. On examination, Dr. Mercier noted forward flexion to only 45 degrees. PX 10 at 53. Petitioner had good and bad days with better range of motion on the good days. PX 10 at 65. He found no evidence of reduced sensation or atrophy. PX 10 at 67-68. As of March 2005 Petitioner was at 90% of maximum medical improvement but he continued treating him at Dr. Montella's recommendation. PX 10 at 85-86. He was unfamiliar with the term "Waddell" but did perform tests to determine whether Petitioner's range of motion was genuine. PX 10 at 96. He has treated at least a dozen other individuals who are clients of Petitioner's law firm. He referred Petitioner to this firm because Petitioner was not happy with his original attorney. PX 10 at 99. He relies on various orthopedic surgeons, including Drs. Montella, Lopez, Freedberg and Papierski. PX 10 at 99.

14. Respondent offered Dr. Montella' s full duty release dated July 9, 2004 (RX 1) and his light duty releases dated August 12 (RX 2) and September 20, 2004 (RX 3).

15. Respondent also offered a record review report dated February 9, 2006 from Lawrence Humberstone, D.C. **[*24]** Dr. Humberstone indicated that he did not examine Petitioner but that he did review his medical records, along with the depositions of Drs. Cavazos and Montella. He assumed that Petitioner went to the Emergency Room after his fall. He indicated that if Petitioner indeed sustained a transchondral fracture he would have experienced "some immediate knee pain". He opined that Dr. Cavazos' records offer "very little insight into [Petitioner's] actual complaints on any given day and the handwriting is virtually illegible". He found no knee-related complaints until January 20, 2004. In his opinion, "it would be atypical for a transchondral fracture to produce this type of intermittent knee pain almost a month after the injury had occurred". In his view, the records did not support the amount of chiropractic care provided and there was no evidence that Petitioner was deriving real benefit from the care. He deemed the first twelve chiropractic sessions to be reasonable, necessary and related to the work accident. He identified January 30, 2004 as the date of maximum medical improvement for chiropractic care as related to the work injury. He also opined that none of the knee- related care was **[*25]** reasonable or related to the injury. RX 4.

16. Respondent also offered the evidence deposition of Charles Mercier, M.D. This deposition was taken on May 9, 2005. Dr. Mercier testified that he became board certified in orthopedic surgery in 1978. He treats patients with knee and back problems. RX 5 at 5. He first examined Petitioner on January 27, 2004, at which time he reviewed Dr. Cavazos' initial notes and the lumbar spine MRI film and

report. He found the film to be of diagnostic quality. He testified that Petitioner complained of constant-lower and mid-back pain extending down his right log into his knee. Petitioner also complained of "pins and needles" in his lower back. He performed straight leg raising in the supine and seated positions. The results were contradictory and non-anatomical. His impression was "acute lumbosacral strain by history". He found Petitioner capable of light work and recommended lifting and bending-related restrictions. He interpreted the lumbar spine MRI as showing a "small central disc protrusion at L4-5 that just touched the thecal sac and did not cause any significant neural impingement". The protrusion "certainly did not cause any nerve root impingement". **[*26]** He acknowledged that "there was a question of a small annular tear at the same level". In general, he has no objection to chiropractic care but such care should not go on forever. The consensus is that, whether it's chiropractic care or physical therapy, twelve visits is enough and should be followed by a good home exercise program. RX 5 at 16. He also opined that a patient can generally resume Working around six weeks after a muscle ligamentous strain. RX 5 at 16-17.

Dr. Mercier testified that he next examined Petitioner on May 18, 2004, at which time he also reviewed the right knee MRI and Dr. Freedberg's March 2004 report. When he saw Petitioner on January 27, 2004 Petitioner did not inform him that he was scheduled to undergo a knee MRI two days later. He opined that "any problems with the right knee are not related to the work injury". RX 5 at 18. Petitioner again complained of lower back and radiating right leg pain. He also complained of increased right knee pain with walking along with swelling and weakness of the right knee. RX 5 at 19. When he examined Petitioner's right knee he noted no swelling, no pain over the posterior medial joint line, pain with crepitation with patellar **[*27]** compression, painful but full range of motion with subpatellar crepitation and grade one medial instability with a positive end-stop at zero and twenty degrees on both sides. The pivot shift and Lachman tests were negative in both knees. RX 5 at 20-21. On examination of the back he noted that forward flexion was to 30 to 45 degrees with reversal of the lordotic curve. RX 5 at 21. Straight leg raising was again done in two positions and was again contradictory. RX 5 at 22. He acknowledged that the right knee MRI showed some bone edema "which could be consistent with a stress fracture associated with the patella". He indicated, however, that this edema could also be consistent with degeneration. He thought that the individual who interpreted the knee MRI "took a leap in stating that this may be an osteochondral injury based on the fact that [Petitioner] fell on his knee". If Petitioner had sustained a fracture or other osteochondral injury when he fell he would have been aware of it immediately. This is why he did not find causation as to the knee. RX 5 at 25. As of May 17, 2004 Petitioner had reached maximum medical improvement with respect to both his back and knee and could have **[*28]** resumed full duty. RX 5 at 26-27. Petitioner had decreased sensation to pinprick in his entire right leg and this was "definitely a non-anatomical finding". RX 5 at 27. Based on the fact that Petitioner had two out of five positive Waddell signs he concluded that Petitioner "was willing to falsify information on his clinical exam". RX 5 at 29.

Under cross-examination, Dr. Mercier indicated that he could not recall whether Petitioner spoke Spanish or English but that his two secretaries are bilingual and were present for both examinations. RX 5 at 29. At the first examination, Petitioner did say that he had pain radiating to his right knee but did not complain of right knee pain. There is a difference. RX 5 at 30. The small central disc protrusion and small annular tear could be degenerative in nature. They would not cause radicular pain or require surgery but they could cause low back pain "in the appropriate setting". RX 5 at 33. He did not think that the fall aggravated either of these conditions. He found epidural injections to be a reasonable course of care for Petitioner. RX 5 at 31. Setting aside the issue of causation, he would have no objection to someone performing an arthroscopy **[*29]** on Petitioner's knee. RX 5 at 33. He disagreed with Dr. Cavazos' opinion that Petitioner's back and sciatic pain masked his right knee pain. He opined that people with severe low back pain can "very easily distinguish" that pain from pain caused by other injuries. RX 5 at 35. He has no psychological training and no way of knowing whether Petitioner was lying to him. RX 5 at 36-37.

On redirect, Dr. Mercier testified that a person can have objective findings on MRI and yet no symptoms. RX 5 at 38. He would not have prescribed epidurals for Petitioner but, "In somebody who was appropriate", he would have done so. If Petitioner had been experiencing right knee pain at the time of the first examination he presumably would have mentioned it. RX 5 at 40.

The Commission notes that Dr. Mercier's two reports are attached to his deposition transcript: In his first report, dated January 27, 2004, he recommended that Petitioner avoid repetitive bending at the waist and lifting over fifteen to twenty pounds. He anticipated that Petitioner would reach maximum medical improvement in one or two weeks. In his second report, dated May 17, 2004, he indicated that Petitioner told him he had complained **[*30]** of right knee pain from the outset but that Dr. Cavazos had told" him that this pain was coming from a nerve in his back. He noted that the right knee measured 15 n3/4 inches while the left knee measured 15 5/8 inches. He took three knee X-rays with patellar views.

17. Respondent also offered Dr. Ghanayem's Section 12 examination report of March 17, 2006. The history reflects that Petitioner fell ten to twelve feet from a ladder and landed on his back and right side. Petitioner related that he developed back pain, right buttock pain and posterior thigh to calf pain along with neck pain which had since gone away. On examination, Dr. Ghanayem noted a normal gait, twenty degrees of extension, sixty degrees of flexion and some low back pain with axial compression of the head, truncal rotation through the knees and distraction through the shoulders. The lower extremity neurologic examination was normal and tension signs were negative for radicular pain.

Dr. Ghanayem reviewed the lumbar spine MRI and found it to be normal. He noted no annular tears but did detect some thickening of the annulus at L4-5. He found this thickening to be appropriate for Petitioner's age and not traumatic in **[*31]** origin. Based on the mechanism of injury, he opined that Petitioner sustained soft tissue injuries to his back, right buttock and thigh. He also opined that chiropractic care would be reasonable for these injuries "on the order of two to three times a week for a month and, if that is effective, that can be repeated for a second month". The total duration of chiropractic care should not have exceeded two months, or twenty-four visits. He characterized the daily care that had gone on for two years as "clearly inappropriate and not medically reasonable". He found that Petitioner had achieved maximum medical improvement and was capable of full duty. He indicated that Petitioner did not have a disc herniation that would have resulted in any permanency. RX 6.

18. As stated at the outset, the Arbitrator found that Petitioner established causation but only as to soft tissue back and right knee injuries. The Arbitrator questioned Dr. Freedberg's finding of an "obvious osteochondral fracture fragment" and stated that this was not supported by the doctor's own examination or the right knee MRI. The Commission views the evidence differently. Dr. Freedberg's records reflect that he based his diagnosis **[*32]** not only on his review of the previous MRI but also on the multiple X-rays he ordered. The Commission also notes that Dr. Freedberg described a "questionable defect on the lateral projection". PX 5. The Commission further notes that Respondent's first examining physician, Dr. Mercier, admitted that Petitioner's right knee MRI abnormality could be consistent with a patellar stress fracture and that it would be reasonable for Petitioner to undergo a right knee arthroscopy. RX 5 at 39-40. While Dr. Mercier opined that the MRI abnormality could also be indicative of degeneration, Petitioner's negative left knee examination calls that opinion into question. The Arbitrator also found that "Dr. Montella admitted that his diagnosis of a meniscal tear was unsupported by the MRI". Again, the Commission views the evidence differently. While the doctor conceded that the right knee MRI did not show evidence of a meniscal tear, he found Petitioner's clinical presentation to be consistent

with such a tear. He also explained that Petitioner's chondral injury could only be more specifically described via a diagnostic arthroscopy. The Arbitrator stated that Petitioner did not testify to current knee **[*33]** complaints but Petitioner indicated that he kicks a soccer ball only with his left foot, that he avoids carrying heavy items and that he feels "more pain" in his right knee with exertion. T. 57-58. The Arbitrator elected to rely on Dr. Ghanayem's assessment of Petitioner's back condition as a "soft tissue injury" but the Commission notes that Respondent's original examiner, Dr. Mercier, conceded that the lumbar spine MRI showed a central disc protrusion and small annular tear. RX 5 at 16.

Based on the mechanism of Petitioner's injury (with Petitioner consistently describing falling at least eight feet and landing on his right side on a hard surface), the lumbar spine and right knee MRI reports, the opinions of Drs. Freedberg and Montella and the concessions made by Dr. Mercier, the Commission modifies the Decision of the Arbitrator and finds that Petitioner established causation as to the L4-5 disc protrusion and annular tear as well as the osteochondral patellar fracture and possible meniscal tear of the right knee. Consistent with this finding, and in reliance on the treatment recommendations of Drs. Freedberg, Montella and Mercier, the Commission further modifies the Decision of **[*34]** the Arbitrator by ordering Respondent to authorize and pay for the lumbar spine epidural injections and right knee diagnostic arthroscopy.

The Arbitrator awarded $ 8,070.50 in medical expenses. This award included a Vision Diagnostics MRI bill of $ 500.00, Dr. Freedberg's outstanding bill of $ 1,737.50, a Midwest Sports Medicine bill of $ 558.00 and $ 5,275.00 of Dr. Cavazos' charges. The Arbitrator limited Dr. Cavazos to $ 5,275.00 based on Dr. Ghanayem's opinion that it would have been reasonable for Petitioner to undergo a maximum of two months of chiropractic care. On review, Petitioner asks the Commission to increase the medical award to $ 16,945.50, including Dr. Cavazos' outstanding charges of $ 14,150.00. The Commission recognizes that Dr. Cavazos, a chiropractor, deferred to Dr. Montella, an orthopedic surgeon, and that he resumed treating Petitioner in October 2004 based on Dr. Montella's recommendation. Nevertheless, the record supports the conclusion that Dr. Cavazos' care was of excessive duration and of little benefit to Petitioner. The Commission modifies the Decision of the Arbitrator by increasing the medical award from $ 8,070.50 to $ 8,275.50, noting that Respondent **[*35]** paid Dr. Cavazos $ 5,480.00 on June 29, 2004. PX 3. In the Commission's view, a paid medical bill is presumed to be reasonable. Respondent is entitled to credit for its $ 5,480.00 payment.

The Commission declines to award temporary total disability benefits from October 22, 2004 through May 19, 2006 (the date of hearing), as requested by Petitioner. Petitioner acknowledged that Respondent accommodated Dr. Montella's restrictions after August 12, 2004, that Dr. Montella took him off work on October 22, 2004 at his own request, that Respondent still had light duty available at that point and that he has not contacted Respondent or sought alternative employment since October 22, 2004. T. 54.

The Commission otherwise affirms the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 652.86 per week from January 5, 2004 through July 12, 2004, a period of 26 6/7 weeks, that being the period of temporary total incapacity for work under Section 8(b) of the Act, with Respondent receiving credit for the $ 16,322.15 in benefits it paid prior to arbitration pursuant to the parties' stipulation. Arb. Exh. 1.

IT IS FURTHER ORDERED BY **[*36]** THE COMMISSION that Respondent pay $ 8,275.50 in reasonable and necessary medical expenses pursuant to Section 8(a) of the Act, less $ 5,480.00 Respondent paid to Dr. Cavazos for which Respondent is receiving a credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the epidural injections and right knee arthroscopy recommended by Dr. Montella.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to Section 8(j) credit in the amount of $ 3,659.32 but shall hold Petitioner harmless for any claim for reimbursement for payments made on the awarded medical bills.

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 without the filing of such a written request or 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 Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit **[*37]** for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court is hereby fixed at the sum of $ 500.00. 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 therefore and deposited with the Office of the Secretary of the Commission.

DATED: JUN 5 2007

CONCURBY: SUSAN O. PIGOTT

DISSENTBY: SUSAN O. PIGOTT

DISSENT: I agree with all aspects of the majority's decision other than its refusal to award additional temporary total disability benefits from October 22, 2004 through the date of hearing. The record supports the conclusion that Petitioner made a good faith attempt to resume his laborer duties in the summer of 2004 and that this attempt caused his symptoms to increase. Petitioner testified that he asked Dr. Montella to release him to work in early July 2004 because his benefits had been terminated (presumably based on Dr. Mercier's re-examination) and he had no income. T. 49. This was after Dr. Freedberg had recommended a right knee arthroscopy and Respondent had apparently refused to authorize same. **[*38]** PX 5. Petitioner also testified that his condition worsened after he resumed working (T. 19) and Dr. Montella found his complaints to be consistent. Dr. Montella saw Petitioner over an extended period and was in a better position than Respondent's examiners to evaluate his credibility. While it is true that Petitioner reported substantial improvement at times, he explained that his back and knee symptoms varied from day to day based on his activity level.

The majority's denial of additional temporary total disability benefits is also inconsistent with its award of prospective care. On

October 22, 2004, and thereafter, Dr. Montella found it unreasonable for Petitioner to work in any capacity and prescribed epidural injections and a diagnostic arthroscopy. Respondent's original examiner, Dr. Mercier, agreed with both of these treatment recommendations. RX 5 at 31, 33. The fact that Respondent accommodated Petitioner's restrictions after August 12, 2004 and still had light duty available when Dr. Montella again took Petitioner off work on October 22, 2004 has no bearing on Petitioner's entitlement to additional benefits.