

NOTICE

Decision filed 03/31/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

Workers' Compensation
Commission Division
FILED: March 31, 2011

No. 1-09-3310WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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

OSGOOD INDUSTRIES, INC.,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellant,)	COOK COUNTY
)	
v.)	No. 09 L 50636
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <u>et al.</u> ,)	
(PAUL BOLE,)	HONORABLE
)	SANJAY T. TAILOR,
Appellee).)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices McCullough, Hudson, and Stewart concurred in the judgment.
Justice Holdridge dissented from the judgment.

O R D E R

HELD: That the Illinois Workers' Compensation erred when it adopted the arbitrator's ruling which permitted the taking of a deposition after the start of the arbitration hearing.

Osgood Industries, Inc. (Osgood) appeals from an order of the Circuit Court of Cook County, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which awarded the claimant, Paul Bole, benefits pursuant to the Workers's Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2004)) for injuries he allegedly received on April 12, 2004. For the reasons which follow, we reverse the judgment of the circuit court, vacate the decision of the Commission and remand the matter back to the Commission for further proceedings.

The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on February 21, 2008, April 9, 2008, and June 8, 2008.

The claimant, who had worked with Osgood for 14 years, was a senior service technician, a position in which he would build machines, install them, and teach others how to operate and service them. The position required him to kneel, lift 50- to 60-pound items, climb ladders, and sometimes crawl, and his workdays lasted anywhere between 8 and 16 hours.

On April 12, 2004, as he was installing a freezer, he stood up and "felt like somebody took a razor blade and cut [his] leg in half." Medical records indicate that Dr. Robert Hall administered a steroid injection to the claimant's right knee on May 13. On May 27, Dr. Hall determined that the claimant had suffered a torn medial meniscus of the right knee. The claimant continued to work until June 30, 2004, and he underwent an

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arthroscopy, debridement of patellofermoral joint, and medial meniscectomy to repair the meniscus tear in his right knee on July 2, 2004.

In a post-operative note, dated July 6, 2004, Dr. Hall stated that the claimant reported "mild pain" in his right knee. A physical therapist's report, dated July 14, 2004, indicated that the claimant was reporting constant right-knee pain that increased with walking and climbing. According to records from his physical therapist, the claimant reported on July 30 that his pain was decreasing but that he experienced "significant pain" when climbing stairs, and he reported on August 18 that his "pain levels [were] decreasing." In an August 30, treatment note, Dr. Hall stated that the claimant was "feeling much better" and was ready to return to work. The claimant returned to work on August 31, 2004, but he performed only light duty, which he described as "sitting and checking out the machine" and "tell[ing] [others] what to do."

A September 20, 2004, treatment note by Dr. Hall states that the claimant had "been doing quite a bit of work" and was having "increasing discomfort in the medial side" of his right knee. An October 21, 2004, note from Dr. Hall states that the claimant reported that a previous steroid injection to his right knee "lasted about a month and then his pain returned."

On December 22, 2004, Dr. Hall noted that the claimant's previous surgeries did not relieve his right knee pain and that

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the claimant may have "re[-]torn his meniscus." In his testimony, the claimant denied sustaining any separate injuries in the latter part of 2004:

"Q. Now the issue has come up *** about whether *** you had an accident in September of '04.

A. No. The only thing that ever happened --

Q. Did you or did you not have an accident in September of '04?

A. No.

Q. Okay.

Did you or did you not have an accident in December of '04?

A. No.

Q. Okay.

Now those two dates have been mentioned repeatedly in Dr. Levin's report as being accident dates that you told him that you had.

Is that true?

A. No.

Q. Did he ever ask you?

A. No. He just kept throwing dates at me, like when I was off of work, and that was it."

The claimant also explained that he worked continuously through September and December 2004 and did not take any time off until February 2005. He confirmed on cross examination that he

suffered only one injury to his right knee.

In a January 21, 2005, note following the claimant's having an MRI scan of his right knee, Dr. Hall indicated that the claimant had suffered "an oblique tear of the posterior horn of the medial meniscus though there was not much medial meniscus to tear based on [the claimant's] recent meniscectomy."

On February 14, 2005, at Osgood's request, the claimant underwent a medical examination by Dr. Jay Levin. In his summary of his examination, Levin stated that the claimant reported feeling "99% better" two months after his July 2004 surgery. Levin further said that the claimant "state[d] that he had a new injury in September of 2004. Levin's letter relayed the claimant's description of the September 2004 injury:

"In September of 2004 he was rebuilding the bottom of a machine. When he got up off of his hands and knees he felt a 'rip' again in his right knee."

In his report, Levin opined that the claimant's need for further right-knee surgery was attributable to the September 2004 injury, not the April 2004 injury. Levin's later reports, which relied on new interviews and examinations of the claimant, repeated his earlier statements that the claimant described a distinct second injury suffered in late 2004 and that the claimant's right knee had almost recovered prior to that second injury.

Dr. Hall's medical report admitting the claimant for a second arthroscopy and medial meniscectomy of the right knee on

February 25, 2005, stated that the claimant's pain returned after his July 2004 operation and that an MRI revealed a "re-tear of the *** medial meniscus."

After his February surgery, the claimant did not return to work until October 10, 2005, and, in the intervening period, he continued to pursue treatment for his right knee. A March 10, 2005, report from his physical therapist indicated that the claimant "report[ed] re[-]injuring his knee at work while kneeling down, he felt a ripping sensation." On March 21, the claimant reported to his physical therapist that he had seen no improvement in his right-knee pain. Likewise, records created by his physical therapist on April 8, and May 2, 2005, state that the claimant reported "continued pain in the right knee with activity."

A June 1, 2005, report from his physical therapist stated that the claimant's pain levels "continue[d] to increase." On August 4, 2005, the claimant underwent a partial knee replacement to address his progressive right-knee pain.

The claimant testified that he worked from October 2005 through June 9, 2006, but did not work after that date.

On August 17, 2006, the claimant again saw Dr. Levin, who concurred with other medical opinions that the claimant required a total right-knee replacement. On September 7, the claimant underwent a total right-knee replacement. His medical records indicate that he continued to have difficulties, including

infections, in his right knee after the surgery.

The claimant testified that, near his last day of work, he noticed that his left knee began to hurt; he attributed this pain to his compensating for the problems with his right knee. Records from Dr. Hall and Dr. Levin indicate that they reached the same conclusion as to the cause of the pain in the claimant's left knee. The claimant testified that he eventually had surgery on his left knee, first on May 15, 2007, to attempt to repair his meniscus, and again on October 16, 2007, to replace his left knee.

A report from the claimant's September 20, 2007, visit to Dr. Levin, states that the claimant reported having "almost completely recovered" two months after his April 2004 injury, before sustaining a second injury in September 2004. The report indicates that the claimant reported feeling a " 'ripping' " in his right knee in September or December 2004, and, in his report, Levin attributes the claimant's need for further medical intervention, including intervention for the claimant's left knee, to the September or December 2004 accident.

In his testimony, the claimant challenged the claims contained in Levin's September 20, 2007, report. He said he had "no idea" where Levin got the idea that a second injury took place. The claimant explained that "[t]here was no" second injury and that, instead, his first injury "kept progressively getting worse." The claimant also denied that he had nearly

healed shortly after April 2004 injury; he said that, in fact, he "was always hurting, and it just kept *** getting worse and worse and worse."

During the hearing, after the claimant reaffirmed that he had suffered only one injury, he and his counsel agreed to dismiss his application based on a December 2004 injury and instead stand on the application alleging the April 2004 injury.

Also during the hearing, the claimant attempted to present a letter Dr. Hall had prepared to describe the claimant's condition. The arbitrator sustained an objection to the exhibit on the ground that it was prepared in preparation for litigation.

After both sides rested their cases, the following exchange took place:

"THE ARBITRATOR: [Counsel for the claimant], do you wish to take any depositions or are we closing proofs today?"

[CLAIMANT'S COUNSEL]: With regard to Dr. Hall, his treating record and letter which you wouldn't let me put in, I ask leave to take his deposition.

[OSGOOD'S COUNSEL]: And I would object to that. As I had told [counsel] previously, whether he had objections to the Dr. Levin reports so we could take his deposition -- he said, no I don't. ***

I informed him of my objection to Dr. Hall's narrative report[,] and depositions would have been able to have been completed prior to trial.

THE ARBITRATOR: Well, your objection is noted. It's his case in [chief]. He has a right to take a deposition. Let me give you a status date."

On April 9, 2008, the arbitration hearing resumed, apparently for a ruling on the claimant's motion for a an order allowing him to depose witnesses, and the following colloquy took place:

"[OSGOOD'S COUNSEL]: My objection, as I stated also at the trial, was that counsel learned of this issue in September 2007 and had ample time to put together reports regarding these issues and knew of my objections to his reports prior to the date of the trial and stated that he would be proceeding anyway regardless of my objections. He was well aware that I was objecting based upon hearsay on the narrative reports, and, therefore, we proceeded to trial.

And now the reason for the bifurcation, as I understand it, is that he stated he would need to take the depositions to get his evidence in. However, he knew that at the time of trial and had time to do that prior to the trial."

In response, the claimant's counsel argued that the excluded report from Hall had been represented to him as a medical record. The claimant's counsel further argued that "[t]he rules, 7030.60, regarding depositions, subsection (f), give [the arbitrator] the opportunity and the right to order a deposition" pursuant to an

oral request.

The arbitrator granted the claimant's request:

"Being that [Osgood] had valid evidentiary objections and I sustained those objections, consequently, [the claimant] has no recourse but to take a deposition to perfect his claim and present his evidence."

When the arbitration hearing resumed on June 8, 2010, Dr. Hall's deposition testimony was admitted into evidence over Osgood's continued objection. In the deposition, Hall recounted his treatment of the claimant, including a description of the procedures he had performed. Hall recalled that the claimant showed improvement during the August 4 and August 30 visits following his July 2004 surgery. Hall said, as the claimant's medical records indicated, that, by September 20, the claimant "was having increasing discomfort in the right knee ***, having worked apparently an extended period of time." Hall said that he treated the claimant with an injection into his knee, which the claimant later told him helped for approximately one month. On December 22, 2004, the claimant "still had pain in his knee," and, Hall said, later tests revealed a torn miniscus. Hall described the progression from a partial to a total right-knee replacement, and he agreed that the claimant's disease throughout the process had been "continuous and unrelenting" since April 2004. Hall also described his treatment of the claimant's left knee, and he said it was "conceivable" (a term he defined as

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"possible, more likely than not, perhaps" or "probable") that the left-knee problems related to the claimant's April 2004 right-knee injury. Hall stated that nothing in his notes indicated that the claimant had suffered a second right-knee injury in late 2004.

Following the hearing, which was held pursuant to section 19(b) of the Act, the arbitrator found that the claimant's April 12, 2004, injury left him temporarily disabled. In his written findings, the arbitrator concluded as follows:

"The arbitrator adopts the opinions of Dr. Hall, as expressed in his deposition, that [the claimant's] present condition *** [in both knees] [is] causally related to the accident on April 12, 2004. Further, the arbitrator finds that there is only one accident, and that occurred on April 12, 2004."

The arbitrator awarded the claimant temporary total disability (TTD) benefits for a total of 145 4/7 weeks, from the periods of June 30, 2004, through August 31, 2004; February 24, 2005, through October 10, 2004; and June 9, 2008, through June 10, 2008. The arbitrator further ordered Osgood to pay \$266,076.55 in the claimant's medical expenses, less \$209,127.98 already paid.

Osgood filed a petition for review of the arbitrator's decision with the Commission. In a decision with one commissioner dissenting, the Commission adopted the arbitrator's

decision with one correction as to the date of the claimant's disability.

Osgood filed a petition for judicial review of the Commission's decision to the Circuit Court on Cook County. The circuit court which confirmed the Commission's decision, and this appeal followed.

Osgood first argues that the Commission erred when it upheld the arbitrator's decision to allow the claimant to depose Dr. Hall after the start of the arbitration hearing. As Osgood observes in its brief, section 7030.60 of the regulations adopted by the Commission governs the timing of evidence depositions. See 50 Ill. Adm. Code §7030.60 (2008). Section 7030.60 provides as follows, in pertinent part:

"(a) *** Evidence depositions of any witness may be taken after the hearing begins only upon order of the Arbitrator or Commissioner, for good cause shown. Except as provided in subsection (f) below, such [application by either party for a deposition] shall be in writing and shall contain [specific information itemized by the rule].

* * *

(b) The time for taking depositions *** shall be on a date set not less than ten (10) days after the issuance [of the order allowing the deposition].

* * *

(d) Except as provided in subsection (f) below, notice

of the issuance of the [order] shall be given in sufficient time so that the receipt of such copy of the [order] shall not be less than ten (10) days before the date set for the taking of the deposition. ***

* * *

(f) Exceptions

1) Provided, however, where it is shown that complying with the time requirements prescribed herein, the party seeking the [deposition] may be deprived of evidence sought to be obtained by the deposition, that the Arbitrator or Commissioner *** may, in his discretion:

A) on notice and hearing before trial waive such requirements, or

B) permit a party to present an oral application [for deposition] immediately before or during trial and, after due consideration of such application and any objections thereto that may be orally raised by the opposite party, rule upon the application." 50 Ill. Adm. Code §7030.60 (2008).

Osgood argues that the arbitrator erred when it allowed the late deposition of Dr. Hall without articulating "good cause" for doing so, as described in subsection (a). The claimant counters that, under his interpretation of the above regulation, subsection (f) allowed the arbitrator to grant an oral request for a late deposition without a "good cause" finding. Although

subsection (a) states that requests for depositions after the start of a hearing may be granted only upon a showing of good cause, the claimant seems to argue that subsection (f) creates an exception to all of subsection (a)'s requirements. The parties thus call upon us to interpret section 7030.60.

A court will interpret an administrative regulation in the same manner as it would interpret a statute. *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 391, 556 N.E.2d 236 (1990). Thus, our primary aim in construing a regulation is to give effect to the drafters' intent, and the best indicator of that intent is the plain and ordinary meaning of the whole regulation. *Nolan v. Hillard*, 309 Ill. App. 3d 129, 722 N.E.2d 736 (1999); *Malinkowski v. Cook County Sheriff's Merit Bd.*, 395 Ill. App. 3d 317, 322, 917 N.E. 2d 1148 (2009).

As a whole, section 7030.60 states that parties may take depositions only upon application and permission from the arbitrator or the Commission; the regulation delineates procedures to ensure that opposing parties have ample notice of, and opportunity to object to, requests for depositions. Thus, subsection (a) requires that applications be in writing and contain certain information, subsection (c) requires that the application be served on opposing parties (and that parties receive five days to object), and subsection (d) requires that an order allowing a deposition be issued at least ten days before the deposition. Each of these requirements is prefaced with the

qualification, "[e]xcept as provided in subsection (f)," a qualification that appears in the regulation only before these three requirements. Thus, read as a whole, section 7030.60 strongly indicates that subsection (f) was created as an exception to only the three above timing and notice requirements otherwise imposed by the regulation.

The language of subsection (f) comports with this view. It states that it applies "where it is shown that by complying with the time requirements prescribed herein"--a phrase we interpret to refer to the above-described requirements from subsections (a), (c), and (d)--"the party seeking [an order allowing a deposition] may be deprived of the evidence sought to be obtained by the deposition."

This understanding of subsection (f) strongly undermines the claimant's position that subsection (f) excuses subsection (a)'s "good cause" requirement. Our reading of the purpose of subsection (f), discussed above, tells us that it is limited to alleviating the above-described timing and notice requirements, not any other requirements contained in the regulation. Indeed, as noted above, before each of those above-described requirements, and nowhere else, the regulation specifically references subsection (f). These specific references indicate that the reach of subsection (f) is limited to those provisions that incorporate it.

Further, even if we were to set aside our reading of the

purpose underlying subsection (f), we would conclude that its plain language precludes its application to this case. As noted above, subsection (f) begins by stating that it applies "where it is shown that by complying with the time requirements prescribed herein, the party seeking [an order allowing a deposition] may be deprived of the evidence sought to be obtained by the deposition." 50 Ill. Adm. Code §7030.60(f). The claimant did not argue to the arbitrator, and does not argue on appeal, that the timing and notice requirements of the regulation caused his inability to present Dr. Hall's opinions. Rather, the claimant identified his impediment as the arbitrator's excluding other evidence of Hall's opinions. Subsection (f) is not triggered unless the proponent of evidence makes a showing that compliance with the time and notice requirements would deprive him of evidence, and the claimant made no such showing here. He attributed his potential deprivation of evidence to the arbitrator's exclusion of Dr. Hall's written report, not to the regulation's timing requirements. Accordingly, the claimant did nothing to trigger the exception provided in subsection (f).

To urge the opposite result, the claimant relies on the portion of subsection (f) pertaining to oral requests for deposition made during trial. That portion provides that, once subsection (f) is triggered, an arbitrator or the Commission may permit an oral request for deposition "before or during trial and, after due consideration of such application and any

objections ***, rule upon the application." 50 Ill. Adm. Code §7030.60(f)(1)(B) (2008). However, we have held above that the claimant did not trigger subsection (f), so this provision does not apply. Further, under our reading, subsection (f) will excuse only the timing and procedural requirements that subsection (f) normally excuses. A party proceeding under this provision must still satisfy the regulation's general "good cause" requirement for late depositions. In sum, we disagree with the claimant that subsection (f) excuses the "good cause" showing that subsection (a) requires for any party requesting a deposition after the start of a hearing.

The claimant bases his entire argument on this issue on his interpretation of the regulation: he makes no argument that there was actually a showing of "good cause" that would satisfy section 7030.60(a). Further, our review of the record reveals no showing of good cause. When he granted the claimant's request for a deposition after the start of the hearing, the arbitrator neither used the term "good cause" nor articulated any reason that could be considered "good cause" for allowing a late deposition. In fact, the only reason the arbitrator articulated was the circular reason that would be true in the case of any potential evidence: were the evidence not allowed, its proponent would be precluded from presenting it.

By allowing a deposition after the start of a hearing without requiring any showing of good cause, the arbitrator

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violated section 7030.60. The Commission repeated that mistake when it adopted the arbitrator's ruling. Since there was no showing of good cause, section 7030.60 mandated that the claimant's request for a late deposition be denied. The arbitrator and the Commission thus erred in allowing the late deposition.

The arbitrator's, and the Commission's, decision relied heavily on Dr. Hall's deposition testimony. We therefore cannot uphold their rulings on the basis that Dr. Hall's improperly allowed deposition testimony did not affect the outcome of the hearing. As Osgood requests, we must remand this matter to the Commission for new findings that do not rely on the Hall deposition.

Because we remand this matter for findings, we do not reach Osgood's second argument, that the Commission's findings regarding the claimant's purported second injury were against the manifest weight of the evidence.

Based upon the foregoing analysis, we reverse the judgment of the circuit court, vacate the decision of the Commission, and remand the cause to the Commission for further proceedings consistent with the holdings contained herein.

Circuit court reversed, Commission decision vacated, and remanded to the Commission.

JUSTICE HOLDRIDGE, dissenting:

I respectfully dissent. Evidentiary rulings of the

Commission will not be disturbed on review absent an abuse of discretion. Mobil Oil Corporation v. Industrial Comm'n, 327 Ill. App. 3d 778, 782 (2002). Moreover, the Commission's decisions regarding "good cause" have generally been subject to an abuse of discretion standard of review. See Interlake Steel, Inc. v. Industrial Comm'n, 130 Ill. App. 3d 269 (1985). An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission. Certified Testing, Inc. v. Industrial Comm'n, 367 Ill. App. 3d 938, 947 (2006). The question at issue in the instant matter, therefore, is whether the Commission's decision to allow Dr. Hall's deposition was an abuse of discretion. The majority would find that the Commission abused its discretion by: (1) failing to articulate a specific finding of "good cause" for allowing the deposition; and (2) by supporting its ruling by stating that the reason for allowing Dr. Hall's deposition was the fact that the claimant was precluded from presenting Dr. Hall's written narrative report based upon a sustained hearsay objection. I do not agree with either basis for finding that the Commission's evidentiary ruling was an abuse of discretion.

The fact that the Commission did not articulate a specific finding of good cause does not mean that no reasonable person would take the view adopted by the Commission. More simply put, as long as it appears from the record that the Commission had good cause for allowing Dr. Hall's deposition, we should not find

that the Commission abused its discretion in allowing the deposition to be taken. Moreover, it appears from the record that the need for Dr. Hall's deposition arose only after the second application for adjustment of claim was dismissed as a result of the claimant's clearly unexpected testimony disavowing any knowledge of a second accident. The record established that the employer had switched workers' compensation insurance carriers effective July 31, 2007, and that the employer's counsel on the first claim had indicated that she had no concern regarding an accident alleged to have occurred after that date. Although it is not entirely clear how the abrupt dismissal of the second claim impacted upon the claimant's theory regarding causation for the first claim, it would not be unreasonable for the Commission to find that the unanticipated withdrawal of the second claim at hearing was good cause to allow the Commission's evidentiary ruling regarding Dr. Hall's deposition to stand.


As I would affirm the Commission's evidentiary ruling on Dr. Hall's deposition, I would find that the Commission's award of benefits, based largely upon Dr. Hall's deposition testimony, was not against the manifest weight of the evidence. I would, therefore, affirm the Commission's decision.

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
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NO: 05WC 42185

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

9 IWCC 429; 2009 Ill. Wrk. Comp. LEXIS 493

May 1, 2009

CORE TERMS: knee, right knee, pain, medial, surgery, tear, arbitrator, meniscus, doctor, underwent, physical therapy, walking, deposition, scheduled, pharmacy, temporary total disability, left knee, diagnosed, arthroplasty, arthroscopy, return to work, x-ray, meniscectomy, replacement, prescribed, antibiotics, discomfort, infection, effusion, therapy

JUDGES: Molly C. Mason; Yolaine Dauphin**OPINION: [*1]****DECISION AND OPINION ON REVIEW**

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical care, permanent disability, § 19(k) and § 19(l) penalties, § 16 attorney fees, and procedural issues, and being advised of the facts and law, affirms, adopts and corrects the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, the Commission corrects an internal inconsistency in the Decision of the Arbitrator and otherwise affirms and adopts the Decision. The order section of the Decision lists three periods of awarded temporary total disability benefits. The last period **[*2]** is incorrectly described as June 9, 2008 through June 10, 2008. The correct period is June 9, 2006 through June 10, 2008, as reflected on page eleven of the narrative section of

the Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 30, 2008 is hereby affirmed, adopted and corrected.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$ 64,600.00. The probable cost of the record to be filed as return [*3] to Summons is the sum of \$ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Dated: MAY 1 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph V. Prieto**, arbitrator of the Commission, in the city of **Chicago**, on **2-21-08, 4-9-08 & 6-10-08**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

- 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. Should [*4] penalties or fees be imposed upon the respondent?

FINDINGS

- . On **4-12-04**, the respondent **Osgood Industries 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 **\$ 33,913.37**; the average weekly wage was **\$ 652.18**.
- . At the time of injury, the petitioner was **52** years of age, **married** with **0** children under 18.
- . Necessary medical services **have not** been provided by the respondent.
- . To date, **\$ 55,764.90** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **\$ 434.79** /week for **145 4/7** weeks, from **6-30-04, 2-24-05, 6-9-08** through **8-31-04, 10-10-05, 6-10-08**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the **[*5]** petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay **\$ 266,076.55 less previously paid amount of \$ 209,127.98** for medical services, as provided in Section 8(a) of the Act.

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

. The respondent shall pay **\$ 0** in penalties, as provided in Section 19(i) 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 an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed **[*6]** below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

7-29-08

Date

JUL 30 2008

Statement of Facts

Petitioner worked for Osgood Industries for 13 to 14 years as a senior service technician. (T9-10) His job duties included machining parts, which means that he builds the machines, goes out to locations to install them and then teaches people how to run and service the machines. (T11) Petitioner kneels and picks up parts weighing 50 to 60 pounds. (T11) As part of his job, petitioner travels to install these machines. (T13) Petitioner works mostly alone, but there is someone, who schedules his assignments that petitioner described as "kind of" his supervisor. (T15) Petitioner mentioned a Donald Isher as also kind of his supervisor since he is the head of the "service tech guys". (T15)

Petitioner testified that on April 12, 2004 he was in the process of installing a machine and working on his hands and knees. (T17) When he *stood up* petitioner stated it "felt like somebody took a razor blade and cut my leg in half." (T17) Records from April 13, 2004 [*7] with Dr. Jablonowski note petitioner stood up from a kneeling position and "felt a rip in the right knee." (Px10) On examination, petitioner had a considerable amount of pain with stressing of the medial ligaments. (Px10) Petitioner was returned to work provided he avoid kneeling and should do minimal climbing and squatting. The doctor scheduled an MRI. (Px10) Petitioner underwent an MRI in Florida on April 18, 2004; which showed moderate knee joint effusion and mild degenerative narrowing of the medial knee joint department. There was no evidence of a tear involving the menisci or the cruciate ligament and normal patellofemoral and lateral knee joint compartment. (Px13)

On May 10, 2004 petitioner was referred to Dr. Hall and Dr. Elstrom. (Px10) Petitioner filled out a history for Dr. Hall on May 13, 2004 and stated that his injury occurred "*when getting up*." (Px5) Petitioner further stated he continued to work and then went to the Northern Illinois Medical Center the next day. (T17, Px 10) At Northern Illinois medical Center petitioner was diagnosed with a sprain and rule out cartilage injury. (Px10) Petitioner was to return for treatment but was noted to be out of town until [*8] May 8, 2004. (Px10) When petitioner saw Dr. Hall on May 13, 2004, he complained of pain on the medial side and pain while walking causing a limp. The doctor noted petitioner's MRI scan from Florida was negative for a meniscus tear. (Px5 and 13) Petitioner was injected in the knee and another MRI was scheduled. (Px13) On May 27, 2004 Dr. Hall interpreted a tear of the medial meniscus pursuant to the repeat MRI. Petitioner was very tender of the medial joint line and was scheduled for arthroscopy and medial meniscectomy for July 2, 2007. (Px5 and 13).

The Petitioner underwent another MRI on May 21, 2004; this one showed fraying of the articulating surfaces in the free edge of the medial meniscus with mild intrasubstance intermediate signal seen within the posterior horn and body suggestive of myxoid degeneration. (Px5 and 13)

Petitioner returned to see Dr. Hall on May 27, 2004. (Px5) Dr. Hall recommended surgery in the form of an arthroscopy and medial meniscectomy. (Px5)

The admission consultation with Northern Illinois Medical Center/Centegra from June 30, 2004 stated petitioner had had problems with is right knee ever since getting out of a freezer on April 12, 2004. (Px5) Since [*9] then petitioner complained of pain on the medial side of the knee with caused limping. The right knee lacked three degrees of full extension and flexed to 120. Petitioner had pain directly over the medial joint line to palpation. (Px5) Petitioner was diagnosed with internal derangement of the right knee with medial meniscal tear. (Px5) The admission consultation with Dr. Bangash diagnosed petitioner with degenerative disc disease and arthritis. Petitioner's diagnosis was persistent right knee pain secondary to probable medial meniscus tear. (Px5 and 6) The operative report from July 2, 2004 noted petitioner was diagnosed with chondromalacia patellae and tear of the medial meniscus right knee. (Px5 and 6) Petitioner underwent arthroscopy, debridement of patellofemoral joint and medial meniscectomy right knee. (Px5 and 6)

After the surgery petitioner returned to see Dr. Hall on July 6, 2004. (Px5 and 13) Petitioner had mild pain and was to begin physical therapy. On July 14, 2004 petitioner returned to Dr. Hall and told the doctor he would begin therapy today. Petitioner's range of motion went from 0 to 90 and the doctor noted some weakness in the quadriceps muscle. (Px5 and 13) [*10] By August 4, 2004 petitioner's range of motion went from 0 to 120 and he had some tenderness over the anterior aspect of the knee where the portals were located. Otherwise petitioner was "doing well." (Px5 and 13) Petitioner was to continue therapy and stay off work. Petitioner returned to see Dr. Hall on August 30, 2004. (Px5 and 13) The doctor's notes state "he is feeling much better at this juncture and ready to RTW." (Px5 and 13) On examination petitioner's range of motion was 0-120 and there was no swelling or tissue edema about the

knee. Petitioner was walking full weight bearing and had no limp. Petitioner was to continue range of motion and strengthening exercise and return for a follow up in two months. He was released to return to work August 31, 2004 no restrictions are listed. (Px5 and 13)

Petitioner said when he went back to work for Respondent he did not perform the same type of work because he says was on light duty. (T22) Petitioner said he was in Florida when he returned to work and was telling "them what to do while they were building the machine for me." (T22) Petitioner testified he was sitting in a chair telling them what to do. (P22) The medical records show [*11] petitioner called Dr. Hall September 2, 2004 and told the doctor he was working as well as bending and squatting and having pain in the knee. (Px5) Petitioner requested pain medication and he was prescribed Vicodin. (Px5 and 13) On September 20, 2004 petitioner returned to Dr. Hall and said he had been doing "quite a bit of work lately" and had "increased discomfort in the medial side of the knee." (Px5 and 13) Examination showed extend to 0 and flex to 120. There was tenderness over the medial joint line. Petitioner was injected with DepoMedrol and Xylocaine into the right knee. (Px5 and 13)

Petitioner stated that Dr. Levin's report from September 9, 2007 was inaccurate because petitioner never told Dr. Levin about second injury. (T47) Petitioner replied "Oh, about the September injury. There was no injury. My injury kept progressively getting worse ever since day one of my surgery--I mean, my injury." (T47) Petitioner stated he has no idea where Dr. Levin got the information about a second injury. (T48) Petitioner insisted he did not tell him about a second injury. (T48)

Petitioner returned to see Dr. Hall on October 21, 2004. (Px5 and 13) Petitioner said the steroid injection [*12] into his right knee helped for about a month and then the pain returned. Petitioner said the pain was located at the medial side. Examination showed no effusion and extend to 0 flex to 110. Petitioner was walking with a mild limp and his knee was stable for both cruciate and collateral ligament examination. (Px5 and 13) Petitioner received another injection and was discharged from care. (Px5 and 13)

Petitioner returned on December 22, 2004 to see Dr. Hall. (Px5 and 13) The doctor stated petitioner's surgery did not help him and the pain continued on the medial side. On examination petitioner had no effusion of the right knee and could extend 0 and flex to 125 degrees. He had pain along the medial joint line and the knee was stable to provocative examination. (Px5 and 13) The doctor stated petitioner would be scheduled for another MRI of the right knee as he may have return his medial meniscus. (Px5 and 13)

On January 19, 2005 petitioner underwent another MRI of his right knee. (Px5 and 13) A tear of the posterior horn of the medial meniscus without decompression into the meniscal cyst was noted as well as a small joint effusion and patellofemoral chondromalacia. (Px5 and 13) Petitioner [*13] returned to see Dr. Hall on January 21, 2005 and Dr. Hall stated the updated MRI showed an oblique tear of the posterior horn of the medial meniscus though there was not much medial meniscus to tear based on his recent meniscectomy. (Px5 and 13) Petitioner was scheduled for another surgery. (Px5 and 13)

Petitioner said he continued to work until February 25, 2005 when he underwent another surgery. (T23) The consultation of admission with Dr. Hall on February 25, 2005 stated petitioner had a right knee arthroscopy and medial meniscectomy on July 2, 2004. (Px5 and 6) "His pain returned on the medial side and a recent MRI showed a re-tear of the previously subtotally resected medial meniscus." (Px5) The right knee could be extended 0 degrees and flexed to 120 degrees, there was tenderness along the medial joint line. (Px5 and 6) The diagnosis was internal derangement right knee with medial meniscal tear superimposed on early degenerative changes. (Px5 and 6) Dr. Bangash also consulted with petitioner on February 24, 2005. Petitioner is noted to have progressive right knee pain. (Px6) Petitioner was noted to have discomfort walking and standing. (Px6) The operative report from this [*14] surgery diagnosed petitioner with tear medial meniscus right knee. (Px6) The right knee was examined and could flex from 0 to 125 degrees. During the operation grade I or II

chondromalacia of the tibial plateau and a flap tear of the medial meniscus was found. (Px6)

Petitioner saw Dr. Hall again on February 28, 2005. (Px5) Petitioner was prescribed physical therapy. (Px5) The initial physical therapy evaluation from March 10, 2005 includes a history, which states "Pt had previous medial meniscectomy. He reports re injuring his knee at work while kneeling down, he felt a ripping sensation." (Px5)

When asked, at arbitration, whether he had another accident petitioner replied "No. The only thing that ever happened...". (T23) Upon which he was cut off by his attorney asking the next question "Did you or did you not have an accident in September '04." Petitioner answered "No." (T23) Petitioner also denied having any accident in December '04. (T23) However, petitioner had filed and signed two applications with the Illinois Workers Compensation Commission. (Rx 6 and 7) One application signed by petitioner on July 8, 2005 stated on or about 4/12/2004 he suffered a right knee/leg injury "when [*15] standing up from setting a machine." (Rx 6) The second application also signed by petitioner on July 8, 2005 stated he again injured himself on or about December 12, 2004 "while kneeling down at work." (Rx7) This second application was dismissed at trial after petitioner testified that he never informed anyone of a second accident at work. (T79)

Dr. Levin first examined petitioner on February 14, 2005. (Rx5) Petitioner told the doctor he was 99% better after his July 2, 2004 surgery. Dr. Levin's report notes "Petitioner states he had a new injury in September 2004. Prior to this, he was felling well. The day before the injury he was able to do all of his basic functions. In September 2004 he was rebuilding the bottom of a machine. When he got up off his hands and knees he felt a 'rip' again in his right knee. He finished the rest of the day and called Workers Compensation the following day to get authorization to see Dr. Hall. He saw Dr. Hall and received a shot of CORTISONE in his right knee." (Rx5) Dr. Levin also reviewed the Mill's from April 16, 2004, May 21, 2004 and January 19, 2005. (Rx5) Dr. Levin noted the MRI from January 19, 2005 showed "enlargement of the previous right [*16] medial meniscal tear and a large knee effusion." (Rx5) Due to the described additional accident from December 2004, Dr. Levin diagnosed petitioner with a "recurrent right knee Medial Meniscal Tear." (Rx5) Dr. Levin stated the current tear was not related to April 12, 2004, but instead to the September/December 2004 injury. (Rx5) Dr. Levin found petitioner was at maximum medical improvement referable to the April 12, 2004 injury with no permanent damage. (Rx5) At trial petitioner said he never told Dr. Levin about a second accident. (T24) Petitioner's attorney questioned his client about a carpal navicular bone injury in the left hand, which petitioner stated he could not remember when that happened. (T26) Petitioner then stated he believed this wrist injury is what he was mentioning when he stated that something else happened when he went back to work September 2004. (T73) The medical records show that the fracture of petitioner's navicular bone for the left wrist occurred on July 30, 2003. (Px6)

Petitioner saw Dr. Hall again on March 21, 2005. (Px5 and 13) His range of motion was 0-120. There was tissue edema about the knee and quadriceps weakness but no effusion. Petitioner was [*17] prescribed to continue physical therapy. Dr. Hall stated petitioner was not ready to return to work "There was some question of light duty but he says there is none available in his line of work." (Px5 and 13) Target date for return to work was listed at April 25, 2005. (Px5 and 13)

By April 11, 2005 Dr. Hall noted that petitioner could not go back to work due to the awkward positions in squatting that petitioner has to assume. (Px5 and 13) "He feels there is no light duty in what he does." (Px5 and 13) Petitioner remained diffusely tender about the knee. He stated he still had pain with stain as well as getting up from a sitting position. Petitioner was continued on Vicodin and was kept off work. (Px5 and 13)

On May 2, 2005 petitioner returned to Dr. Hall complaining of a great deal of discomfort to the medial side of the right knee. Petitioner received an injection of the right knee and was told to continue range of motion and strengthening exercises. Dr. Hall stated petitioner may be a

candidate for unicondylar arthroplasty. It was also noted petitioner was off work not only for the knee, but for ongoing problems with his left wrist. (Px5 and 13) By May 16, 2005 petitioner was [*18] walking with a limp and continued off work (Px5 and 13) Dr. Hall re-reviewed the pictures taken at the arthroscopy and noticed some roughening of the tibia and femur. Petitioner was diagnosed with early osteoarthritis. (Px5 and 13) By June 2, 2005 petitioner returned complaining "bitterly" of pain in the right knee. (Px5 and 13) In August 2005 petitioner underwent Physical Therapy with Healthtrends. (Px13)

In Dr. Levin's second report dated July 21, 2005, the doctor reiterated that petitioner's condition of ill being was from the subsequent September 2004 accident described to him by petitioner. (Px33) Dr. Levin also now stated that the medial compartment arthritis following arthroscopy and an injury could be related to either the April 12 or the September 2004 injury. (Px33)

On August 10, 2005 petitioner followed up with Dr. Hall. Petitioner was noted to be "bitterly complaining" of pain since the day of the surgery. He received Vicodin. (Px12)

Petitioner then underwent another surgery on August 4, 2005. (Px6) The operative report is incomplete in the records. (PX6) The admission consultation with Dr. Bangash noted petitioner complained of worsening right knee pain and that he [*19] had been scheduled for right knee arthroscopy and unicondylar arthroplasty of the right knee. Petitioner was noted to be in no acute distress except for pain in the right knee with walking weight bearing. (Px6) Petitioner was also diagnosed with left knee arthrosis. (Px6) The admission consultation from Dr. Hall on August 4, 2005 noted that petitioner was injured in a work related accident and subsequently had two knee arthroscopies which did not improve his condition. He was diagnosed with right knee osteoarthritis right knee due to work related injury. (Px6)

By September 1, 2005 petitioner was continuing physical therapy but was still taking Vicodin for pain. He was kept off work. Petitioner used a cane to ambulate (Px13) At his September 15, 2005 appointment with Dr. Hall, petitioner complained of pain over the medial side of the knee which was improving. Petitioner had difficulty with his stamina, such as with climbing stairs and standing for any length of time. The doctor reiterated that there was no light duty available for petitioner. (Px13)

Petitioner was returned to work on October 10, 2005 by Dr. Hall with restrictions. (T27 and Px13) November 4, 2005, when petitioner returned [*20] to see Dr. Hall, he still complained of persistent pain in the knee. He was noted to be working 12-15 hours and was able to stand for about one hour and then needed a rest. He had trouble squatting and with stair use. (Px13) Petitioner was continued on Vicodin. (Px13)

When petitioner followed up with Dr. Hall on February 27, 2006 he stated his pre-operative pain was completely gone. Now he described an "ill-defined pressure type of discomfort within the area." (Px13) At petitioner's request he was prescribed more Vicodin. (Px13) By May 1 2006 petitioner returned to see Dr. Hall stating that he worked 12 to 18 hours a day and that, while he still had soreness in the knee, it was not as bad as it was prior to his operation. Petitioner was walking with a mild limp. X-rays taken showed no loosening. (Px13)

On June 3, 2006 petitioner returned to Dr. Hall and the doctor noted petitioner was still having pain on the medial side of the knee at the end of the work day. X-rays taken that day now showed a radiolucent line within the tibial component. Dr. Hall felt this was suggestive of loosening. Petitioner was to continue activities as tolerated. (Px13) Petitioner was placed on Vicodin at [*21] his request and Dr. Hall stated he would see if the prosthesis could be revised, if not, petitioner would need a total knee replacement. (Px13) At his June 12, 2006 appointment petitioner continued to complain of pain and he was scheduled for a revision surgery. (Px13)

Petitioner stated he continued to work until June 9, 2006. (T30) He then went off work again

and received temporary total disability until September 26, 2007. (T32) Dr. Levin examined petitioner again on August 17, 2006 and agreed to additional surgery. (Rx5)

Petitioner said his left knee began hurting in June 2006. (T35) Petitioner stated the use of the cane for the right knee made his left knee get worse. (T36) Petitioner stated his right knee became infected during treatment and he was prescribed antibiotics. (T42) He then became allergic to the antibiotics and said he was switched to other antibiotics which he still takes. (T45) Petitioner stated he thought the first bill for hospitalization due to the allergic reaction to the antibiotics was not paid. (T45) He was not sure about the bill for the second hospitalization as a result of his allergic reaction. (T45)

On September 7, 2006 petitioner underwent another **[*22]** surgery for his right knee to repair a loose component. (Px6) Petitioner underwent a revision unicndylar arthroplasty to the total right knee arthroplasty. The surgery was performed because petitioner had painful unicndylar arthroplasty right knee medial side. (Px6) The surgeon found loosening of the tibial component. (Px6)

On September 22, 2006 petitioner saw Dr. Hall who noted petitioner's wound was dry and healing, but had some erythema and so petitioner's sutures should to be kept in one more week (Px13)

On September 27, 2006, petitioner returned to see Dr. Hall. (Px13) Petitioner had developed small little pustulates within the proximal portion of the wound (Px13)Dr. Hall felt he had a superficial wound infection. (Px13) Petitioner was placed on Clindamycin IV. (Px13) The next day petitioner returned and was referred to Dr. Hafiz to be admitted for IV Vancomycin. Petitioner was walking with crutches and Dr. Hafiz felt the treatment for the infection should be aggressive before it potentially spread to include the total knee replacement. (Px13).

Petitioner consulted with Dr. Elstrom on September 28, 2006. (Px6) There was a question of infection and petitioner received antibiotics. **[*23]** Cultures were negative after 24 hours. Petitioner was admitted to Northern Illinois Medical Center for treatment of the apparent infection. His diagnosis was cellulitis of the right knee arthroplasty wound with no evidence of deep infection. (Px6) Additional notes from Northern Illinois Medical Center from September 29, 2006 state petitioner had been doing well until one week prior when he developed pain, warmth, redness and drainage and decreased motion in the right knee (Px13) Petitioner was admitted to the hospital from September 28, 2006 to October 2, 2006. (Px13)

Petitioner returned to see Dr. Hall on October 4, 2006. He had been on Vancomycin for 6 weeks and at this appointment petitioner's range of motion was 0-110 degrees. (Px13) By October 18, 2006 range of motion was 0-100 degrees and petitioner complained of pain that had not gotten better since the surgery. (Px13) He felt unstable and was unwilling to place full weight on his right knee. Petitioner was to continue therapy and continue his IV antibiotics for another 6 weeks. (Px13) On October 23, 2006 petitioner requested more pain medication. The doctor found out petitioner was already getting pain medication from Dr. **[*24]** Hafiz. Petitioner was cautioned regrading addiction issues. (Px13)

Petitioner returned to see Dr. Hall on January 2, 2007. (Px13) Petitioner described unrelenting pain in his right knee that was worse than it was before surgery. Petitioner said he preferred to sit and rest instead of stand and walk, therefore "he is desirous of an electric scooter and a prescription was written for him today." (Px13) Dr. Hall also spoke with petitioner about his prolonged use of Vicodin and petitioner scoffed at the idea of addiction. Dr. Hall stated "he was insistent upon continuing with the Vicodin in which I prescribed 7.5mg QID. He would prefer however to take 10mg 6 times a day as would do better for his pain." (Px13)

On January 29, 2007 petitioner returned to see Dr. Levin. (Rx5) In that examination Dr. Levin specifically stated he would not recommend petitioner have a motorized scooter as progressive strengthening with walking activity would be beneficial for him. (Rx5) Based on this Respondent

denied authorization for the motorized scooter.

On March 5, 2007 petitioner returned to see Dr. Hall. (Px13) he had improved minimally. The doctor noted petitioner was still had a lot of spasm and **[*25]** petitioner said he could only walk 5 to 10 minutes before he needed to sit down. Petitioner still had quite a bit of spasm and ecchymosis in the calf region, which Dr. Hall noted was the greatest difficulty at this juncture. Petitioner was continuing his antibiotics. (Px13) The doctor stated that "with regard to his work related left knee injury he had not yet had approval for his MRI scan." (Px13) Petitioner had left medial knee pain which occasionally radiated laterally. (Px13) Petitioner was to continue physical therapy and Vicodin. (Px13)

On March 19, 2007 petitioner was again seen by Dr. Levin for examination of his left knee. (Rx5) Dr. Levin notes petitioner had a work related injury from April 12, 2004, but he did not mention the September/December 2004 injury. Dr. Levin felt the altered gait from the right knee could cause internal derangement of the left knee. (Rx5) Dr. Levin agreed to take an MRI of petitioner's left knee. (Rx5)

On March 23, 2007 petitioner underwent an MRI of the left knee. (Px12) It showed a tear of the posterior horn of the medial meniscus and a mild MCL sprain. (Px12)

On April 11, 2007 petitioner returned to see Dr. Hall and complained that his **[*26]** right knee pain had worsened. (Px13) Petitioner said he was only able to walk 5 minutes or less due to pain. (Px13) Petitioner felt his right leg was useless. (Px13) Dr. Hall stated "to that degree we ordered an electric scooter for him but it has not yet been authorized. It appears that he will need it." (Px13) Petitioner was also scheduled for surgery on his left leg as his March 2007 MRI showed a tear of the posterior horn of the medial meniscus. (Px13)

On April 13, 2007 petitioner underwent surgery for an umbilical hernia. (Px6) Dr. Levin's report from April 24, 2007 stated that the doctor would agree to petitioner's surgery for the left knee. (Rx5)

On May 18, 2007 petitioner underwent another arthroscopy and medial meniscectomy as well as debridement of patellofemoral joint left knee due to another medial meniscus tear and chondromalacia for the femoral trochlea grade IV joint left knee. (Px6) The pre-operative consultation report from Dr. Bangash noted that petitioner presented himself for progressive worsening of left knee pain. Petitioner had left knee positive tenderness in the medial aspect with no clear cut effusion at this point. (Px6) Petitioner was diagnosed with internal **[*27]** derangement of the left knee with medial meniscal tear. (Px6)

Petitioner followed up with Dr. Hall on May 21, 2007. Petitioner was to begin physical therapy again. (Px13) By May 29, 2007 petitioner was walking on crutches. (Px13) There was again concern of an infection. Dr. Hafiz was noted to have placed petitioner on 6 months of Levaquin. (Px13)

On June 11, 2007 petitioner returned to see Dr. Hall. (Px12) Petitioner stated his pain was worse than before the most recent surgery. He felt there was bone rubbing on bone. He was noted to have quite a bit of discomfort with ambulation especially on the medial side of the knee. The wound was dry and healing well. (Px12) On July 2, 2007 petitioner said he felt like he did prior to the most recent surgery. He now had diffuse tenderness throughout the knee. Petitioner said he felt pain with each step along with grinding, popping and snapping. He again stated he felt bone on bone. Petitioner was to undergo therapy and continue his medications. (Px12) He was kept off work and the doctor thought he may need a total knee replacement. (Px12) By July 23, 2007 petitioner returned with complaints of pain in both the right and left knee. Dr. Hall **[*28]** stated he could not explain petitioner's current knee pain. The doctor thought maybe petitioner had an underlying indolent infection but there was no clinical or x-ray evidence of this. Petitioner was to continue therapy and be off work. Petitioner wanted a left total knee replacement and Dr. Hall stated he would write a letter recommending that. (Px12)

By September 17, 2007 petitioner continued complaining of pain and instability walking. (Px12) Petitioner told the doctor that he was scheduled for an IME on September 27, 2007. Petitioner was tentatively scheduled for a left total knee replacement on October 17, 2007. (Px12)

The physical therapy progress note from September 17, 2007 noted that petitioner said the pain was getting progressively worse. (Px12) Pain was reported as a stabbing sensation and petitioner continued to complain of pain with all weight bearing activities. (Px12) Petitioner was using bilateral straight canes at that time. (Px12)

Dr. Levin examined petitioner on September 20, 2007. (Rx5) Petitioner again reiterated the additional injury September 2004. (Rx5) Petitioner stated his left knee problems did not occur until after the use of assistive devices after [*29] the September 2004 accident. (Rx5) Dr. Levin clarified again that petitioner first informed of a September/December 2004 accident and Dr. Levin stated as in his report from February 14, 2005 that petitioner's current symptoms and subsequent surgeries were as a result of the described September/December 2004 accident. (Rx5) Respondent subsequently provided correspondence informing petitioner that additional benefits would be denied as coverage for One Beacon was found to have ended August 1, 2004.

On October 4, 2007 Dr. Levin examined the actual diagnostics and inter-operative films from petitioner's left knee surgery. (Rx5) Dr. Levin opined that a total left knee arthroplasty would not be appropriate. (Rx5). On October 16, 2007 petitioner underwent a left total knee arthroplasty.

On October 26, 2007 petitioner followed up with Dr. Hall. (Px12) Petitioner was on crutches and his range of motion was from 10 to 113 degrees. His wounds were dry and healing. (Px12) On November 12, 2007 petitioner was referred back to McHenry County Physical Therapy (Px12) Petitioner complained his pain was still constant. (Px12) By November 23, 2007 petitioner returned complaining of "severe nerve damage" [*30] which the doctor said translated into skin sensitivity for which petitioner was using Lipoderm patches. Petitioner would continue with therapy and try to move to a cane for ambulation. (Px12) By December 26, 2007 petitioner was to have a Doppler study to rule out deep vein thrombosis. (Px12) Physical therapy note from McHenry County Physical Therapy noted petitioner had undergone 16 sessions of physical therapy and while his range of motion has improved, his weight bearing, function and strength were limited by pain. (Px12) The medical bills from McHenry County Physical Therapy show that the total charges as of trial were \$ 77,525.50 with \$ 52,937.48 paid and \$ 14,873.55 adjusted. The statement lists \$ 10,090.47 outstanding. (Px12)

Dr. Hall wrote prescriptions for a power mobility device on June 1, 2007 and February 8, 2008. (Px23) Petitioner placed a notation from an unknown source for a Hoverlift to transport the scooter alleged cost \$ 1,995.00 and a swing away for convenience at \$ 395.00 into evidence at trial. The scooter itself is listed as costing \$ 2,695.00. (Px23)

Petitioner became a Social Security Disability insurance recipient on approximately February 21, 2007. (T53) [*31] Petitioner testified he receives \$ 1,362.00 per month from Social Security. (T54) While receiving temporary total disability, petitioner said he received \$ 506.00 per week. (T54) Petitioner stated both Medicare and Aetna (petitioner's work insurance) was paying for the most recent left knee surgery from October 2007. (T61) Petitioner stated Medicare was not paying for the motorized scooter because the injury was work related. (T63) Petitioner stated he drove to the Commission for the trial, but had to stop several times to stretch his legs because they hurt so badly. (T65)

Northern Illinois Medical Center shows \$ 12,795.54 still outstanding in medical bills. \$ 23,492.81 was paid by workers compensation.

Petitioner submitted numerous medical bills.

1. 12/29/05 Northern Illinois Medical Center Chest x-ray paid by Aetna \$ 192.75

2. 6/3/2006 Dr. Bangash Diagnoses: Backache, C.O.P.D. Osteoarthritis, hypertension office visit \$ 85.00; Co pay \$ 15.00; \$ 70.00 alleged outstanding.
3. 10/16/06 Dr. Bangash Chronic Cough, cellulitis and Upper Right Extremity U.R.I.
4. 10/16/07 Anesthesia Associates of Crystal Valley and Northern Illinois Medical Center \$ 4,356.00- denied pursuant to EVES [*32] September 20, 2007.
5. 9/28/06 to 10/2/06 Northern Illinois Medical Center; bill review allowance \$ 6067.06 PPO reduction \$ 530.36 Recommended allowance from Fair Isaac Co.- \$ 5,536.70. Also listed \$ 6,513.75 Bill review reduction \$ 446.69 All paid by Workers compensation.
6. 5/13/04 to 6/11/04 Dr. Elstrom: Charges for treatment from total \$ 61,186.50; there were payments of \$ 43,539.99 with adjustments of \$ 13,789.04. This would leave a remaining amount of \$ 3,857.47, however the listed remaining amount due is listed as \$ 4,233.47
7. 10/26/07 Dr. Elstrom \$ 122.00
8. 10/16/07 to 10/30/07 Dr. Bangash and Northern Illinois Medical Center- total of \$ 36,288.35 - credit to HFN PPO Ins. Plan appears to have paid \$ 11,018.17 so \$ 25,270.18 appears to remain outstanding.
9. 10/12/07 McHenry Radiologists \$ 45.00
10. 11/15/07 Injured workers pharmacy \$ 69.60 for Ibuprofen; Hydrocodone \$ 100.55
11. Dr. Elstrom 11/21/2007-\$ 136.00
12. Dr. Elstrom 10/13/07- 409.00
13. Dr. Elstrom 11/12/07- \$ 277.00
14. Dr. Elstrom 11/16/07- \$ 136.00
15. Dr. Elstrom 11/19/07- \$ 136.00
16. 5/13/04 to 4/10/08 Summary of bills with Dr. Elstrom - includes bills paid by Medicare- establishing what paid by Medicare [*33] and what still outstanding appears virtually impossible- outstanding balance is listed as \$ 1,384.18. Payments from Medicare begin 12/26/07 (Px24).
17. 1/24/08 Injured workers pharmacy \$ 1,322.69 for medications Limbrel, requip, lyrica, lidoderm
18. 1/18/08 183.80 medications- hydrocodone and cyclobenzaprine
19. 10/30/07 Injured workers pharmacy \$ 100.55 - hydrocodone
20. 10/29/07 Injured workers pharmacy \$ 251.19- zolpidem tartrate
21. 10/26/07 Injured workers pharmacy \$ 1,269.96 requip, Limbrel, cyclobenzaprine
22. 10/26/07- Injured workers pharmacy- Ibuprofen \$ 69.60
23. 10/25/07 Injured workers pharmacy-Levaquin \$ 685.97
24. 10/24/07- Injured workers pharmacy - Lyrica and Lovenox- \$ 2,814.83
25. 10/19/07- Injured Workers Pharmacy- \$ 871.18- Lovenox
26. 11/09/07- Injured workers pharmacy Levaquin \$ 1,594.60
27. 11/23/07- Injured workers pharmacy - Zolpidem tartrate
28. 11/26/07 Injured workers pharmacy - Lidoderm \$ 757.08
29. 11/27/07 Injured workers pharmacy- Hydrocodone \$ 62.75
30. Lake/McHenry Pathology Associates 9/28/06; 9/29/06; 10/2/06; 10/01/06 total due \$ 137.00-paid by WC
31. Lake/McHenry Pathology Associates 9/7/06; 9/8/06; 9/9/06; 9/10/06; 9/11/06 \$ 170.00 paid by WC
32. 10/16/07 Lake/McHenry Pathology Ass/Northern Illinois Medical Center - \$ 255.00
33. 9/28/07 Walgreen's \$ 10.00 Hydrocodone
34. 10/19/07 Walgreen's Lovenox \$ 56.05.
35. 11/25/06 Chest x-ray - Northern Illinois Medical Center- \$ 208 00- hand written note alleges chest pain due to allergic reaction - discounted balance to \$ 156.00 2/07.
36. 11/12/06 Northern Illinois Medical Center- 88.25 Fair Isaac stated allowed only \$ 67.07 pursuant to fee schedule.

37. 4/13/07 Northern Illinois Medical Center- Dr. Saha - payment by Aetna \$ 4,672.43 adjustment of \$ 2920.32 alleged outstanding \$ 300.00
38. 11/25/06 Northern Illinois Medical Center- \$ 208.00 chest x-ray.
39. 5/18/07 Northern Illinois Medical Center- payment HFN PPO Ins \$ 8,731,81 adjustment of \$ 1,812.82 - total bill \$ 12,085.50- alleged remaining amount \$ 1,540.87
40. 2/25/05 Northern Illinois Medical Center - Aetna paid \$ 2,362.54 and adjustment of \$ 1,563.71 - total charges \$ 4,226.25 - alleged remaining- this is for the left wrist treatment and unrelated to this claim.
41. Moraine Emergency Physical- \$ 267.00 only a notice of creditor- does not tell us at all what this is for.
42. 11/25/06 McHenry Radiologists Dr. Conti \$ 45.00 [*35] with Dr. Shah
43. 11/07/07 Metro Infectious disease - Dr. Hafiz- \$ 105.00.
44. 10/16/07 McHenry Radiologists- \$ 38.00

The records from Dr. Bangash include a summary of medical charges that show charges that total \$ 3,890.00 for treatment from 5/24/04 to 5/19/07. Of that PPO paid \$ 2,810.15 with adjustments of \$ 935.39. There is an alleged remaining balance of \$ 126.46.

Correspondence from petitioner's attorney on August 21, 2007 listed the two claim files 05 WC 42185 and 05 WC 42186. (Px30) A letter dated September 5, 2007 again lists accident dates of 1/12/04 and 4/12/04. (Px28) In September 2007 petitioner's attorney was forwarding correspondence to the attention of Respondent's attorney Nadine Neue. A letter from petitioner's attorney to Ms. Neue date September 18, 2007 lists accident dates of 1/12/04 and 4/12/04. (Px29) Petitioner's attorney was then informed that there was a coverage issue as Dr. Levin had informed petitioner's current condition was due to the second filed accident from December 12, 2004 and that One Beacon did not have coverage for this period. Petitioner's attorney immediately sent correspondence to Zenith Insurance who denied the claim. Ganan and Shapiro [*36] were hired to represent Osgood Industries for Zenith. One of many letters requesting payment was provided to Ganan and Shapiro February 11, 2008. (Px25)

Respondent presented police records from the McHenry County Sheriff's Office. (Rx3) As of January 16, 2008 petitioner was listed as an Illinois Sex Offender. (Rx 4).

Dr. Levin's last report is dated February 20, 2008 and clarifies that petitioner told him about the second accident from September/December 2004. (Rx5)

Petitioner did not provide narrative reports of Dr. Hall or a vocational report until right before the trial February 21, 2008. Respondent objected to both the narrative report of Dr. Hall, Dr. Mash (co-respondent IME) and Susan Entenberg. The depositions of Dr. Hall and Susan Entenberg were allowed as the Arbitrator stated petitioner had no other recourse to enable him to enter the reports into evidence. The depositions were completed by dedimus with the objection of Respondent noted.

At his deposition, Dr. Hall stated that after petitioner was returned to work on August 31, 2004 he returned with increasing discomfort of the right knee "having worked apparently an extended period of time." (Px33 p.10) Dr. Hall stated [*37] petitioner had re-torn his medial meniscus as shown on the MRI from January 19, 2005. (px33 p.12)

When discussing the surgery from July 2005 petitioner's attorney stated: "Q: And is this all considered a natural progression of the disease process that he was suffering from?" A: it can progress in this manner." (Px33 16-17) Dr. Hall informed petitioner then returned to work again October 10, 2005 and when he saw petitioner again on November 4, 2005 petitioner was working 12 to 15 hour days. (Px33 p.19) Petitioner stated he had trouble with squatting and stair use at that time. (Px33 p.19) When Dr. Hall saw petitioner in December 2005 he was still

noted to be working long hours. (Px33 p.20) Dr. Hall stated that on February 5, 2007 petitioner complained of pain in the left knee and informed that he had been favoring the right and therefore doing a lot of work on the left knee. (Px33 p.25) Again when discussing causal connection petitioner's attorney stated "Q: Now, Doctor, do you have an opinion as to whether or not you could relate the injury to the left knee to the original injury of 4/12/04? A: That's conceivable." (Px33 p.27) "Now would you say that this is something that could [*38] be considered as part and parcel of the total injury picture? A: Yes." (Px33 p.28) Dr. Hall stated that petitioner's theory that his left leg was related to overuse due to favoring of the right was "conceivable" he also stated other possible causes of petitioner's knee problem could be "a separate knee injury or degeneration." (Px33 p.29)

When asked whether the right knee accelerated problem with petitioner's left knee, Dr. Hall stated that he felt "it brought it forward, yes, more quickly, if that is what you are suggesting." (Px33 p.30) Dr. Hall stated that when he then saw petitioner July 2007 both knees showed relatively good motion and he could not really explain the continued pain in the right knee because the x-rays looked good. (Px33 p.31) Dr. Hall noted petitioner "was desirous of a total knee of a left sided total knee arthroplasty." (Px33 p.31-32) Petitioner's attorney asked "Q: Okay Dokey. Now Doctor, this left knee replacement - total knee replacement, is that part of the ongoing disease process that is all associated with the original accident of 4/12/04? A: Yes. Q: And the reason for that opinion? A: Well he had a - he had a tear of the meniscus. He had some underlying [*39] degenerative changes within the knee. It appears that-as I mentioned, it's conceivable, he could have injured the knee at the time of the April incident. And then simply took its natural course as it did in the right knee, aggravated the fact that he had to do quite a bit of work on that leg, given the issue of this right knee." (Px33 p.33-34) Dr. Hall stated he was not sure whether petitioner would need yet another surgery on the right knee and therefore only tentatively stated that October 2008 could be petitioner's maximum medical improvement date. (Px33 p.35-36) Dr. Hall stated petitioner would not be able to do a lot of climbing, squatting or lifting. He felt petitioner could complete sedentary work at the time of the deposition April 2008. (Px33 p.36)

Dr. Hall clarified that when he stated something was conceivable, it was possible. (Px33 p.52) Dr. Hall admitted that he repaired his torn medical meniscus on July 2, 2004 and then returned petitioner to work. Dr. Hall stated petitioner did tell him that light duty work was not available at petitioner's place of work. (Px33 p.52-53) Dr. Hall admitted a new tear was found on the MRI from January 19, 2005. (Px33 p.54) Dr. Hall admitted [*40] without the new tear he would not have scheduled petitioner for a new surgery on February 25, 2005. (Px33 p.54-55) Dr. Hall admitted petitioner's return to work after August 31, 2004 probably aggravated his condition. (Px33 p.56) Dr. Hall noted the physical therapy notation from March 10, 2005 described another accident after petitioner had the initial surgery July 2, 2004. (Px33 p.56) Dr. Hall again agreed that petitioner returning to work October 10, 2005 would have aggravated his condition. (Px33 p.58) Dr. Hall felt the long hours petitioner worked after October 10, 2005 contributed to the loosening of the tibial compartment found June 6, 2006. (Px33 p.59) Dr. Hall agreed that the long hours and return to work after October 10, 2005 resulted in the need for revision surgery September 7, 2006. (Px33 p.59)

Dr. Hall verified that the new tear seen on the MRI from January 19, 2005 was a "new tear that was generated after my--between the time the MRI was performed and his previous arthroscopy." (Px33 p.64) Dr. Hall agreed that after the surgery July 2, 2004 there was no tear of the medical meniscus and therefore he clarified that as he had stated before the new tear would have had [*41] to have occurred after the July 2, 2004 surgery. (Px33 p.65)

During her deposition, Susan Entenberg stated she met with petitioner just once on February 9, 2008. (Px34) Ms. Entenberg was mistaken in that she believed petitioner had not received workers compensation benefits since June 2007. (Px34 p.6) Ms. Entenberg stated that at the time of her evaluation of petitioner on February 9, 2008 he would not be able to return to work as a service technician and that he was not a candidate for vocational rehabilitation since a stable labor market did not exist for him. (Px34 p.7) She based her opinions on the lack of a

release to return to work by petitioner's treating physicians at the time of her meeting with petitioner. (Px34 p.8) She did state that depending on petitioner's future treatment he could be a candidate for vocational rehabilitation at a future date. (Px34 p.10) It was established that Ms. Entenberg's opinions were based on incomplete records as she had no medical records showing a return to work for petitioner in 2004. (Px34 p.17-18) Ms. Entenberg admitted that currently any vocational plan or evaluation would be premature because petitioner was still undergoing medical [*42] treatment; therefore her opinions are of little weight. (Px34 p.18-19)

Petitioner was paid temporary total disability benefits until September 28, 2007. (Rx1)
Respondent paid for medical treatment until September 28, 2007. (Rx1)

Findings

In support of C and E. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent? the Arbitrator finds the following:

Petitioner testified that while in the process of standing up he felt a tear in his knee on April 12, 2004. Petitioner provided verbal notice of an injury within the appropriate 45 days listed in the Illinois Workers Compensation Act. Based upon the unrefuted testimony of the petitioner, the Arbitrator finds that a compensable accident occurred on April 12, 2004.

In support of F. Is the petitioner's present condition of ill-being causally related to the injury? the Arbitrator finds the following:

The arbitrator adopts the opinions of Dr. Hall, as expressed in his deposition, that petitioner's present condition of ill-being regarding both his right and left knees to be causally related to the accident on April 12, 2004. Further, the arbitrator finds that there is only [*43] one accident, and that occurred on April 12, 2004. The arbitrator concludes that petitioner's subsequent surgeries to his right and left knees before and after September 2007, are all causally related as a worsening progression of the original injury sustained on April 12, 2004.

In support of J. Were the medical services that were provided to petitioner reasonable and necessary? The Arbitrator finds the following:

Based upon the evidence, the arbitrator awards payment of all the medical bills submitted which petitioner claims totals \$ 266,076.55. Further, any bills incurred after February 1, 2006 are to be paid pursuant to the fee schedule contained in the recent amendments to the Illinois Workers' Compensation Act. Respondent is to receive credit for payments made towards medical bills paid in the amount of \$ 209,127.98.

In support of K. What amount of compensation is due for temporary total disability? The Arbitrator finds the following:

Respondent paid \$ 55,764.90 in temporary total disability. The arbitrator awards 145 4/7 weeks of TTD for the periods of: 6-30-04 through 8-31-04; 2-24-05 through 10-10-05; and 6-9-06 through 6-10-08 (the date proofs were closed).

[*44] In support of L. Should penalties or fees be imposed upon the respondent? the Arbitrator finds the following:

The arbitrator denies petitioner's request for penalties and attorney's fees on the basis that it was not unreasonable for Respondent to rely upon the causal connection opinions of Dr. Levin, base upon the questionable possibility of petitioner having sustained a subsequent accident. Nor was it unreasonable for Respondent to base their defense of this claim upon the theory of there being a subsequent accident, especially in light of the fact that petitioner did not dismiss their second claim until mid-trial of this claim. Penalties, therefore, are not appropriate in this case.

In support of L. Additional medical treatment under section 8(a). The Arbitrator finds the following:

The arbitrator finds that Respondent shall pay for the continued treatment ordered by Dr. Hall, and awards payment for a mobility device as prescribed by Dr. Hall.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision affirming and adopting the Arbitrator's Decision finding that Petitioner's current condition in both of his knees is related to the accident on April 12, 2004. More [*45] specifically, I disagree with the finding of only one accident. Petitioner filed two applications for adjustment of claim against Respondent. One alleged an accident date of April 12, 2004; the other claimed an accident date of December 12, 2004. It is undisputed that Petitioner underwent surgery on July 2, 2004 after which he returned to work. On September 20, 2004 Petitioner returned to Dr. Hall (his surgeon). Dr. Hall's note indicates Petitioner had been doing a lot of work and had been experiencing increasing discomfort in the medial side of his knee. Dr. Hall injected Petitioner's knee. On October 21, 2004, Dr. Hall re-examined Petitioner, noted that his pain had returned and that he was walking with a limp. He, again, injected his knee. When Dr. Hall re-examined Petitioner in December of 2004, he ordered an MRI. It revealed a tear of the posterior horn of the medial meniscus. An examination pursuant to Section 12 was conducted with Dr. Levin on February 14, 2005. During that examination Petitioner related a second injury in September of 2004 when he was again at work on his hands and knees and stood up experiencing a "rip" in his right knee. He told Dr. Levin that he then went [*46] to Dr. Hall. Surgery was performed in February of 2005 followed by physical therapy. At the initial physical therapy visit on March 10, 2005, Petitioner reported having "reinjured" his knee at work. Petitioner was re-examined by Dr. Levin on September 20, 2007. During that examination Petitioner again referred to a second accident and indicated he thought it occurred in September of 2004. Petitioner set both claims for hearing on the same day. During direct examination, Petitioner was asked about whether or not he had an accident in September of 2004. His attorney cut him off from providing the explanation he was giving. He was specifically asked whether he had an accident in September of 2004 or December of 2004 and denied either. He further tried to diminish the impact of his statements to Dr. Levin by testifying that Dr. Levin was confusing him. Petitioner offered no explanation for his representations during the earlier examination with Dr. Levin. At the end of Petitioner's testimony, Petitioner's attorney voluntarily dismissed the second accident claim.

Petitioner's testimony at arbitration is not supported by the medical records. After his first knee surgery, Petitioner was [*47] returned to full duty as of August 30, 2004. Based upon the subsequent MRI (clearly showing a re-injury to Petitioner's medial meniscus) and Petitioner's admissions to Dr. Levin and the physical therapist regarding a new injury, it is clear that a second injury occurred in September of 2004. In finding that no second accident occurred, the Majority is placing more weight on the inconsistent testimony and actions of a convicted felon than the admissions found in the objective medical records - admissions clearly consistent with Petitioner's filing of a second claim and contrary to Petitioner's testimony. The Majority's finding of causation and the accident of April 12, 2004, should be reversed.


In addition to reversing the causation finding, I would have also found that the Arbitrator erroneously issued a *dedimus potestatum* for the evidence deposition of Dr. Hall after the arbitration hearing had been concluded. While Commission Rules allow for depositions to be taken after a hearing has started, Section 7030.60 of those Rules requires that "good cause" be found. In allowing the deposition the Arbitrator found that "petitioner has no recourse but to take a deposition to perfect his [*48] claim and present his evidence". T.A.p.6 (4/9/08 hearing). In my opinion, this fails to establish "good cause".


Petitioner filed both claims on September 26, 2005. Both claimed injuries to Petitioner's right


leg/knee. Petitioner set his cases for trial on February 21, 2008. By September 20, 2007 (the date of Dr. Levin's Section 12 examination report) Petitioner was certainly aware of Respondent's causation defense stemming from the alleged second accident. Despite this notice, Petitioner did not tender any causation evidence to the 2004 accident until the hearing on February 21, 2008 when Petitioner offered a February 20, 2008 letter from Dr. Hall into evidence. The letter was properly rejected thereby prompting the request for leave to depose Dr. Hall. Petitioner had the burden of proof on causation. Petitioner, as the foregoing shows, had ample time prior to arbitration to obtain an opinion and provide it to Respondent or, alternatively, take the deposition of Dr. Hall. Clearly, it should have been done prior to the start of the hearing and not after the conclusion of all the evidence. For these reasons, I dissent.


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

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