*11 IWCC 967; 2011 Ill. Wrk. Comp. LEXIS 973, **

LINDA LANDREY, PETITIONER, v. FILTRATION GROUP, RESPONDENT.

NO: 09WC 03324

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

11 IWCC 967; 2011 Ill. Wrk. Comp. LEXIS 973

September 29, 2011

CORE TERMS: claimant, thumb, arbitrator, pain, box, right arm, doctor, notice, surgery, patient, right shoulder, tunnel, causal connection, pound, bilateral, job duties, causation, lifting, carpal tunnel syndrome, arthritis, shoulder, repetitive, rotator, cuff, carpal, basilar, symptoms, tear, nursing, arm

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission corrects and modifies the Decision of the Arbitrator.

The Commission corrects the order section of the Decision to reflect an accident date of August 1, 2008, as amended at trial. T. 5-6.

The name of Respondent's production supervisor is misspelled at various points in the Decision. The correct spelling is "Blane Erwin."

The Commission modifies the Decision of the Arbitrator by deleting the Arbitrator's findings concerning notice and inserting the following text:

> "Petitioner testified she left work early due to right arm pain on a day in late July 2008. At that point, Petitioner had 'only two days to go' before she would have **[*2]** been eligible to receive a month-end attendance-related bonus. By leaving early, she forfeited the bonus. Before leaving, she went to the office of her supervisor, Blane Erwin, and told Erwin she was 'going home because [her] arm hurt so bad.' Petitioner sought treatment with Dr. Anwar thereafter. Petitioner did not offer Dr. Anwar's office notes into evidence. However, it appears that Dr. Coe had access to these notes when he conducted his records review on behalf of Respondent.
>
> Under cross-examination, Petitioner clarified she told Erwin in July or August she believed her right arm pain stemmed from work.
>
> Erwin testified in an inconsistent fashion concerning notice and other issues. Erwin claimed the workers he supervised were well aware of Respondent's policy concerning the reporting of injuries yet was unable to say whether Respondent addressed this policy during employee orientation. Erwin claimed to have no awareness of Petitioner having a work-related condition as of November 2008 yet, when asked what Petitioner's "injury" was as of that month, replied, "sore shoulder." Erwin did not recall Petitioner missing any time from work in August of 2008. The records in evidence reflect **[*3]** that Dr. Anwar admitted Petitioner to Silver Cross Hospital on August 1, 2008, primarily for treatment of abdominal pain, with the doctor also noting Petitioner was scheduled to undergo an MRI due to 'a suspicion of right shoulder rotator cuff tear.' Petitioner testified she remained in the hospital for a number of weeks and it seems unlikely Erwin would not recall her lengthy absence from work.
>
> Based on the foregoing, the Arbitrator assigns greater weight to Petitioner's testimony and finds that Petitioner provided Respondent with proper notice of her repetitive trauma injury."

The Arbitrator awarded medical expenses totaling $ 58,264.96, subject to the fee schedule. The Commission further modifies the Decision of the Arbitrator by reducing the medical award to $ 55,943.96. The Commission declines to award the $ 2,321.00 expense associated with Petitioner's right upper extremity MRI of October 13, 2008, because, according to Petitioner's treating orthopedic surgeon, Dr. Murphy, this MRI was done to investigate a nonwork-related humeral lipoma.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 249.75 per week **[*4]** for a period of 11.429 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 225.00 per week for a period of 88.55 weeks, as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the loss of use of Petitioner's right arm to the extent of 35%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 55,943.96 for medical expenses under § 8(a) of the Act and subject to the medical fee schedule.

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 $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the **[*5]** Office of the Secretary of the Commission.

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 **HENNESSY**, Arbitrator of the Commission, in the city of **JOLIET**, on **7-28-10 & 9-30-10**. 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 Petitioner's employment by Respondent?
E. Was timely notice of the accident given to Respondent?
F. Is Petitioner's current condition of ill-being causally related to the injury?
J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. What temporary benefits are in dispute?

TTD

L. What is the nature and extent of the injury?

FINDINGS

On **8-1-10,** Respondent ***was*** operating under and subject to the provisions of the **[*6]** Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **19,500.00;** the average weekly wage was $ **375.00.**

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ for other benefits, for a total credit of $ **0**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Respondent is liable to Petitioner for unpaid temporary total disability benefits totaling 11.429 weeks at rate of $ 249.75 per week for a total of $ 2,954.39.

Respondent **[*7]** *is liable for all reasonable and necessary medical bills related to treatment of Petitioner's condition totaling $ 58,264.96, pursuant to the Act's fee schedule provision. Respondent claimed no credit for any bills paid.*

Petitioner is awarded 35% loss of use of her right arm pursuant to the Act. This totals 88.55 weeks of permanency or $ 19,923.75, based on Petitioner's average weekly wage of $ 375.00.

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

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

Signature of Arbitrator

11-13-2010

Date

FINDINGS OF FACT

Petitioner, Linda Landrey, first began working for Respondent, Filtration Group, in October, 2007. Filtration Group is located **[*8]** on Washington Street in Joliet, IL and is involved in making filters for various products. On the date arbitration, Petitioner testified her position was a packer. As such, she would take furnace filters off of a conveyor belt, inspect the filters, pack them in a box, feed the boxes through a tape machine and then stack them on a pallet. She indicated that she would do this job manually using both arms.

Ms. Landrey indicated that she worked in the same position as of July, 2008. She testifed that she was working 12 hour days, 4 days a week. At that time her supervisor was Blaine Erwin. Petitioner described her job duties in great detail. She indicated that sometimes there would be 16 or 36 boxes on a skid, depending on their sizes. She would pack one box per minute and typically 60 boxes every hour. She described that some of the filters were small and some were larger. When packed in a box, the smaller filter boxes would weigh between 5 and 10 pounds and the heavier boxes would weigh between 15 and 19 pounds. Petitioner indicated that some days she would work with big boxes and some days she would work with small boxes. This was all based on the orders that the company was filling. **[*9]** Each pallet would contain between 16 and 32 boxes. The pallets with 16 boxes would have the big boxes and the pallets with 32 boxes would have the smaller boxes. Ms. Landrey testified that she was right handed and that she stacked all of the boxes by hand. She stacked the boxes as high as she could reach. Oftentimes, this would require her to lift above shoulder level. She indicated that during any

working hour, approximately half the time she would be lifting these boxes above shoulder level. Petitioner described filling 5 to 10 pallets per hour depending if she was working with the big or the small boxes. She further indicated she had no mechanical assistance with filling the boxes or stacking the pallets. She also indicated that the only time anyone helped her with these duties was in the summer of 2008. Ms. Landrey indicated these were her job duties all day, every day.

By June of 2008, Petitioner noticed that her right arm was problematic. Though she was not sure if her problems began in June or July 2008, she described the symptoms in her right arm as being achy, throbbing, and hard to lift and that sometimes she would have numbness in her fingers. She noticed problems stacking **[*10]** the boxes. Despite this, Petitioner described not missing work because Respondent's employees were entitled to a $ 25 bonus for any week that they did not miss work time. Petitioner indicated she worked as long as she could despite her condition. She had no hobbies outside of work wherein she used her upper extremities. She indicated that she was not involved with sports.

Petitioner testified that towards the end of July, 2008 she went home early with pain in her right arm. She indicated that she spoke with her supervisor, Mr. Irwin, in Respondent's office and indicated that her right arm was hurting her. Following this, Petitioner reported that she went to Silver Cross Hospital on approximately July 21, 2008 because she was having pain in her right arm. She testified that her primary problem on that date was a bout of abdominal pain. However, the records reflect she had right arm complaints as well. (P6) She was then admitted and stayed in the hospital for a long period of time primarily for abdominal pain. She indicated that she continued to have right shoulder pain at that time and reported it to the doctor. After being released from the hospital, she called her primary physician, **[*11]** Dr. Anwar a few days later and was referred to Dr. Michael Murphy.

On October 3, 2008, Petitioner presented to Dr. Michael Murphy at Will County Medical Associates. She reported her right shoulder pain and testified that she could not lift her arm and that she had tears in her eyes when she raised her right arm above shoulder level. She told Dr. Murphy that her job involved lifting. She testified that by that point in time she had constant pain in her right shoulder, she could not lift her arm and she had weakness in her right hand. On her initial examination date, Dr. Murphy examined Petitioner and gave a diagnosis of right side rotator cuff tear. He further indicated that she should undergo physical therapy. Petitioner reported that she underwent physical therapy and received injections for her shoulder condition, though they did not help her symptoms.

Petitioner indicated that she underwent surgery on December 9, 2008. That was carried out by Mr. Murphy. (P4) She testified that she told Lydia and Blaine at Filtration Group about the surgery. Following surgery, Petitioner was taken off of work and did not receive workers' compensation benefits. She testified that she used her group **[*12]** insurance for treatment. Petitioner then underwent a course of physical therapy that helped her condition. Petitioner further testified that the only money she received while off of work was $ 62.00 a week for a little less than three months.

Petitioner was released back to light duty work on March 5, 2009. She was fully released by April of 2009. Following her release to work, Petitioner testified that she had been working full duty since that point in time. At hearing, Petitioner testified that her right arm tires easily and that she gets some pain in the arm in damp weather. She testified that the surgery helped her condition but her arm is not what it used to be. She further noted that she has stiffness in the right arm.

CONCLUSION OF LAW

PETITIONER'S RIGHT SHOULDER CONDITION AROSE OUT OF AND IN THE COURSE OF HER JOB ACTIVITIES. PETITIONER'S RIGHT SHOULDER CONDITION IS CAUSALLY RELATED TO HER JOB DUITES WITH RESPONDENT.

During hearing, Petitioner described her job duties in great detail. Notably, she described lifting boxes numerous times throughout the course of a work day. In fact, she indicated that she carried out her packing and stacking duties all day throughout **[*13]** a 10-12 hour work day during summer, 2008. She further indicated that during June or July of 2008, she noticed severe symptoms in her right shoulder.

Petitioner's testimony regarding her job duties was corroborated by her supervisor Mr. Blaine Erwin. Mr. Erwin offered his testimony on the date of arbitration. After indicating that he heard Petitioner's testimony regarding her job duties, he acknowledged that those duties were her primary duties but added that she also would label boxes and clean up at the end of the shift. Though he indicated that Petitioner was not packing and lifting every minute of every day, he concurred with her testimony that she mostly packed and stacked. Respondent offered no further evidence or testimony to dispute Petitioner's job duties. In fact, Respondent's Exhibit 2 further supports Petition's testimony in this regard. In the job description report provided by Respondent, a number of duties and functions are indicated. (R2) Notably, number 4 indicates that part of an assembler's duties is to perform repetitive tasks. Furthermore, physical requirements indicate that Petitioner's position requires regular lifting about to 10 pounds, frequently lifting **[*14]** or moving up to 20 pounds and occasionally lifting up to 50 pounds.

Regarding causation, Petitioner offered the testimony of her treating physician Dr. Michael Murphy. Dr. Murphy gave his testimony via evidence deposition on January 20, 2010. (P2) Dr. Murphy testified that he is an orthopedic surgeon and his practice is made up of treating musculoskeletal problems including shoulders, knees, joints and hips. He indicated that he first treated Ms. Landrey in October 3, 2008. (P2) Petitioner was referred to his practice by Dr. Anwar. (P2) His initial examination states, "Ms. Landrey was complaining of right shoulder pain for three months. She lifts heavy boxes at work on a daily basis and that her pain is constant. She had difficulty raising her arm up all the way." (P4 & P2 at 7) At that time, following his examination, he indicated that he believed he had a rotator cuff tear. (P2 at 8) The doctor testified that Petitioner underwent a right arm MRI on October 11, 2008. (P2 at 9) After reviewing the MRI, Dr. Murphy indicated that Petitioner had a full tear of the rotator cuff, disc bulging and narrowing at the neck and lipoma of the shoulder. (P2 at 10) After he prescribed physical therapy, **[*15]** Dr. Murphy indicated that he performed surgery on Ms. Landrey on December 9, 2008. (P2 at 12) He indicated that the procedure was an arthroscopic rotator cuff repair. (P2 at 12) The doctor last saw Petitioner in June, 2009, although he had released her to full duty in April, 2009. (P4)

Dr. Murphy was posed a lengthy hypothetical involving Petitioner's job duties. Included were facts supported by Petitioner at hearing including her job duties involving packing and lifting numerous boxes per hour. Further, the question indicated that Petitioner lifted above her head, carrying out these job duties four days a week for 10-12 hours per day. (P2 at 17) Dr. Murphy was then asked if he believed these job duties either aggravated, caused or contributed to Ms. Landry's right arm condition as well as the need for surgery. (P2 at 18-19) The doctor testified that these are the types of activities that would or could cause or aggravate her right arm condition. (P2 at 19) He further explained that repetitive activity is a cause for a rotator cuff tear. (P2 at 22) The doctor said lifting heavy boxes could cause a rotator cuff tear. (P2 at 22)

To dispute Dr. Murphy's testimony, Respondent offered **[*16]** a report authored by Dr. Jeffrey Coe. (R1) Notably, the face of Dr. Coe's report indicates that he is board certified in occupational medicine. (R1) There is no indication that is board certified in orthopedic medicine or practices orthopedic medicine. (R1) In fact, there is no indication that Dr. Coe even treats patients. (R1) Regardless, Dr. Coe did not exam Ms. Landrey. (R1) In response to Mr. Powalisz, Respondent's counsel, Dr. Coe indicated in his June 30, 2010 report that he recently reviewed medical records regarding the care of Ms. Linda Landrey. (R1) At the conclusion of his report, Dr. Coe offered a number of opinions. lie indicated that Ms. Landrey suffered from right shoulder acromioclavicular degenerative arthritis and a degenerative rotator cuff tear. (R1 at 4) He further indicated that there is no causally relationship between Ms. Landrey's work as an

assembler at the Filtration Group and her condition of right shoulder arthritis and rotator cuff tearing. (R1) He finally indicated that Ms. Landrey's prognosis is excellent. (R1 at 4)

As the Arbitrator can see, Dr. Coe gave no basis for any of those opinions. (R1) Despite indicating that Ms. Landrey suffered from a degenerative **[*17]** rotator cuff tear, there is no evidence to support this. None of the medical evidence submitted or any of the testimony submitted supports this conclusion. In fact, Ms. Landrey testified that she never had right arm problems prior to working for Filtration Group. She further indicated that she had no hobbies outside of work wherein she used her right arm extensively. Even if she had a degenerative condition in her right shoulder as Dr. Coe opined, there is no evidence to demonstrate that Ms. Landrey had any problems with this condition. All the evidence offered would indicate that even if she had this condition, she was asymptomatic prior to the date of accident. Finally, Dr. Coe only opines that there is no causal relationship between Ms. Landrey's work activities and her right shoulder condition. Again, he gives no support to this conclusion.

Based on the foregoing, the Arbitrator finds that Petitioner's right arm condition and subsequent surgery arose out of and in the course of her employment with Respondent. Petitioner testified credibly regarding her job duties and indicated problems with her right arm only after carrying out her job duties. Further, based on the above, the **[*18]** Arbitrator finds that Petitioner's right shoulder injury and need for subsequent repair is causally related to her job duties as of August I, 2008. The Arbitrator specifically finds that the testimony of Dr. Murphy to be more credible then that of Dr. Coe. This is based on the fact that Dr. Murphy actually examined Petitioner and gave reasons for his opinions. On the other hand, Dr. Coe only reviewed medical records, never treated Petitioner and never offered support to his conclusions.

PETITIONER GAVE PROPER NOTICE OF HER ACCIDENT PURSUANT TO THE ILLINOIS WORKERS' COMPENSATION ACT.

As indicated above, Petitioner testified that she told Mr. Erwin her shoulder was hurting in approximately late July, 2008. She further indicated on re-direct examination that she told the Respondent several months before her surgery that he should condition was not due to old age but due to excessive lifting at work.

To dispute notice, Petitioner offered the testimony of Mr. Erwin, Petitioner's supervisor at the time of accident. Mr. Irwin testified that in Summer, 2008, Petitioner never informed him of a workers' compensation injury. In fact, he indicated he was not informed of any claim until **[*19]** November or December, 2008. He went on to testify that he never recalled Petitioner missing any work in August, 2008. Though Mr. Irwin did not appear to be purposely dishonest, his testimony is not supported by the evidence submitted. As Ms. Landry testified, Petitioner's exhibit 6 demonstrates that she had a host of medical issues, including the right shoulder, when she went to the Silver Cross Emergency Room. (P6) The records further demonstrate that Petitioner was admitted to the hospital on August 1, 2008. (P6) Petitioner testified that she was in the hospital for a long period of time. During this period, she missed time from work. This is in direct contrast to Mr. Irwin's testimony that he never remembered Petitioner missing time from work. Clearly, as demonstrated by this, Mr. Erwin's credibility is in question based on his ability to remember events in 2008.

Finally, Mr. Erwin testified to his knowledge of work place injury reporting at Respondent. He indicated that protocol was for the employee to report immediately and go to human resources. However, he candidly testified that he did not know how much of the protocol, if any, was addressed with employees at orientation. **[*20]** In fact, he indicated he could not say if workers' compensation was even brought up with employees. Though he indicated his first knowledge of Petitioner's injury was in January, 2009, Petitioner testified that she told Mr. Erwin and Respondent of her right arm injury. The failure of filling out an accident report was not the fault of Petitioner.

For the reasons discussed above as well as based on the greater weight of the evidence, the

Arbitrator finds that Petitioner gave proper notice of her accident pursuant to the Act.

PETITIONER'S AVERAGE WEEKLY WAS $ 375.00 ON THE DATE OF ACCIDENT.

The only evidence offered regarding Petitioner's wages was through her testimony at hearing. Petitioner testified that in Summer, 2008, she made between $ 8.65 and $ 8.70 per hour at that she was working 4 days per week between 10-12 hours per day. Respondent offered no evidence to support their contention of wages at $ 340.00 per week.

Based on the greater weight of the evidence, the Arbitrator finds Petitioner's wages at the time of accident were $ 375.00 per week.

RESPONDENT IS LIABLE FOR PETITIONER'S TEMPORARY TOTAL DISABILITY PERIOD FROM DECEMBER 9, 2008 TO MARCH 5, 2009.

Given **[*21]** the Arbitrator's findings regarding accident, causation and notice, the Respondent is liable for Petitioner's TTD period. Dr. Murphy addressed Petitioner's off work period during his evidence deposition. The doctor indicated that he performed surgery on Ms. Landrey's right arm on December 9, 2008. (P2 at 14) He indicated that after the surgery, Petitioner would not be picking her arm up manually. (P2 at 14) Ms. Landrey confirmed at hearing that she was taken off of work by Dr. Murphy after the surgery and that she received no workers' compensation benefits from the Respondent. Dr. Murphy's note dated January 12, 2009 indicates that Petitioner continued on restrictions of left hand work only and if none, off work. (P3) Petitioner further testified that she returned to light duty work on March 5, 2009 and has worked full time for Respondent since.

Petitioner's temporary total disability is supported by the opinions of Dr. Coe as well. As discussed. Dr. Coe gave his opinions pursuant to Section 12 of the Act. Though Dr. Coe disagreed with causation, he indicated that Petitioner was able to return to full duty only after her last examination by Dr. Murphy on April 3, 2009. (R1) The doctor **[*22]** further noted that April 3, 2009 was Petitioner's maximum medical improvement date. (R1) As discussed, Petitioner indicated she was off work until March 5, 2009 without any workers' compensation benefits.

Based on the greater weight of the evidence, the Arbitrator awards Petitioner temporary total disability benefits for the period from December 9, 2008 to March 5, 2009.

PETITIONER'S MEDICAL TREATMENT WAS BOTH REASONABLE AND NECESSARY PURSUANT TO THE ACT.

Given the Arbitrator's findings regarding accident, causation and notice, Respondent is liable for payment of Petitioner's medical treatment. Petitioner submitted her medical bills related to treatment of her shoulder condition into evidence. As demonstrated by Petitioner's exhibit 1, the bills total $ 58,264.96. The only evidence offered regarding the reasonableness and necessity of treatment was Dr. Murphy's testimony. During his deposition, the doctor was posed the question, "do you find that her (Ms. Landrey's) treatment was both reasonable and necessary for her right shoulder condition?" (P2 at 20) To this he answered, "Yes, based on the fact that I tried to treat her conservatively and that failed and she had no other **[*23]** option than surgical management." (P2 at 20) This is further confirmed by Dr. Coe who noted that Ms. Landrey's prognosis after surgery was "excellent." (R1)

Based on the greater weight of the evidence, the Arbitrator finds Petitioner's treatment of her right shoulder condition to be reasonable and necessary and awards Petitioner payment of all medical bills totaling $ 56,264.96. Payment of medical bills shall be pursuant to the Act's fee schedule.

PETITIONER'S RIGHT SHOULDER CONDITION HAS RESULTED IN 35% LOSS OF USE

OF HER RIGHT ARM.

Given the Arbitrator's findings regarding accident, causation and notice, Respondent is liable for permanency related to Petitioner's right arm condition. As indicated, Dr. Murphy performed an arthroscopic rotator cuff repair and acromioplasty for treatment of Petitioner's work related injury on December 9, 2008. (P3) Despite her return to work, Petitioner testified that she continues to notice symptoms in her shoulder. She indicated that her arm gets tired easy and she notices that when the weather is damp, her shoulder hurts. She also notices that her shoulder rotation is sometimes limited by stiffness in damp weather.

Based on the above, the **[*24]** Arbitrator awards Petitioner 35% loss of use of her arm pursuant to the Act.

DR. MURPHY'S TESTIMONY SHOULD NOT BE BARRED BASED ON RESPONDENT'S OBJECTION PURSUANT TO GHERE v. INDUSTRIAL COMMISSION.

Throughout Dr. Murphy's deposition testimony, Respondent raised objections to the doctor's opinions based on **Ghere** v. Industrial Commission, 278 Ill.App.3d 840 (1996). However, based on both Homebrite Ace Hardware v. Industrial Commission, 351 Ill.App. 3d 333 (2004) and Kishwaukee Community Hospital v. Industrial Commission, 828 N.E. 2d 283 (2nd Dist. 2005), **Ghere** does not apply to the testimony at bar. Presently, Respondent has Dr. Murphy's records and this was sufficient enough to put Respondent on notice that the doctor would testify to a number of issues, including causation and Petitioner's work restrictions.

Based on the above, the Arbitrator admits all of Dr. Murphy's testimony regarding his treatment and recommendations regarding Petitioner's right shoulder condition.

No. 2-04-0512WC

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Illinois Workers' **[*25]** Compensation Commission Division

KISHWAUKEE COMMUNITY HOSPITAL, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Lesley Bonney, Appellee).

Appeal from the Circuit Court of De Kalb County.

No. 03--MR--202

Honorable Kurt Klein, Judge, Presiding.

JUSTICE GOLDENHERSH delivered the opinion of the court:

Claimant, Lesley Bonney, sought benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2000)) for repetitive trauma injuries she allegedly sustained while employed as a nursing assistant by Kishwaukee Community Hospital, the employer. The arbitrator concluded that claimant sustained accidental injuries arising out of and in the course of her employment and that timely notice was given. The arbitrator awarded temporary total disability (TTD) from January 25, 2001, through October 31, 2002, for a total of 91 6/7 weeks at a rate of $ 250.99 per week, and $ 4,461 in outstanding medical bills, which included all outstanding medical bills except for a bill in the amount of $ 153.80 due Dr. Thomas Adkins for services related to treatment for claimant's left cubital tunnel syndrome. On review, the Illinois

Industrial **[*26]** Commission (Commission) n1 affirmed the decision of the arbitrator with modifications. The Commission found that claimant sustained an accidental injury on January 24, 2001, and that a causal connection exists between the accident and claimant's bilateral carpal tunnel syndrome and bilateral basilar joint arthritis, but that no causal connection exists between the accident and claimant's left cubital tunnel condition. The Commission agreed with the arbitrator that the employer was not responsible for the $ 153.80 bill from Dr. Adkins, and further found that the employer was not responsible for another bill in the amount of $ 184 for an EMG, as it, too, related to claimant's left cubital tunnel condition. The Commission denied claimant's request for penalties and attorney fees. The circuit court of De Kalb County confirmed the Commission in its entirety. The issues raised by the employer on appeal are: (1) whether claimant sustained repetitive trauma injuries to her right thumb and left thumb arising out of and in the course of her employment; (2) whether the Commission erred in overruling the employer's objection to Dr. Steven Glasgow's causation testimony, which was based on **Ghere** v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046 (1996); **[*27]** (3) whether the Commission's decision finding that claimant's bilateral carpal tunnel condition arose out of and in the course of her employment is against the manifest weight of the evidence or error as a matter of law; and (4) whether the Commission's award of TTD is in error. We affirm.

FACTS

Claimant, age 55 at the time of the hearing, began working for the employer as a nursing assistant in 1969 and worked continuously in that capacity until January 24, 2001. Claimant testified she is 5 feet 2 inches tall and weighs 112 pounds. While working for the employer, claimant was often assigned elderly patients who had suffered strokes and were without use of their limbs or were alcoholics. Many of her patients were combative. They normally weighed between 150 and 250 pounds. Claimant's duties included changing sheets, bathing patients, moving patients from beds to chairs and commodes, and pushing patients on gurneys. She was assigned approximately six patients per shift.

Shelly Johnson, who is employed by the employer as an employee health nurse and occupational coordinator, corroborated claimant's testimony that claimant's job required her to lift patients in excess of 200 pounds, **[*28]** many of whom were stroke victims or combative.

On January 24, 2001, claimant reported to the employer's emergency room after discovering she could no longer button patients' gowns and experiencing stiffness, tingling, and soreness in both her hands. According to claimant, she began experiencing symptoms in her left hand six or seven months prior to January 24, 2001. The symptoms in her right hand started later. At the emergency room, claimant was diagnosed with chronic bilateral wrist pain with probable bilateral carpal tunnel syndrome. Claimant was ordered not to lift over five pounds, making her unable to work.

An accident report was admitted into evidence. It was signed by claimant on February 10, 2001. In the report, claimant set forth that her injuries occurred while lifting, pulling, and pushing patients, and her symptoms existed for approximately one year, with the symptoms getting progressively worse. She indicated that the pain in her hands kept her up at night and described the area of injury as both wrists.

After claimant's emergency room visit, she followed up with Dr. Glasgow and his partner, Dr. Taizoon Baxamusa. Dr. Glasgow is an orthopedic surgeon who is "fellowship **[*29]** trained in sports medicine." Dr. Baxamusa is an orthopedic surgeon who is a fellowship-trained hand specialist.

Dr. Glasgow first examined claimant on February 8, 2001, at which time he diagnosed claimant as suffering from bilateral carpal tunnel syndrome. Dr. Glasgow next saw claimant on February 22, 2001, after which he added to his diagnosis that claimant was also suffering from mild carpometacarpal degenerative joint disease in the left thumb based on a positive grind test to the left thumb. Dr. Glasgow determined that claimant had a compressive neuropathy of the

ulnar nerve at the right elbow, which is commonly referred to as cubital tunnel syndrome. Ultimately, Dr. Glasgow recommended carpal tunnel release surgeries to claimant's right and left hands. Claimant underwent a left carpal tunnel release on March 21, 2001, and a right carpal tunnel release on June 13, 2001.

Dr. Glasgow testified that claimant's left and right carpal tunnel conditions both resolved following surgeries, but as of August 13, 2001, claimant continued to have problems with her left hand. Dr. Glasgow recommended surgery to the left carpometacarpal joint and referred claimant to Dr. Baxamusa. Dr. Glasgow **[*30]** opined that there was causal connection between the accident in question and claimant's bilateral carpal tunnel syndrome and her left thumb condition. With regard to the first carpometacarpal joint, Dr. Glasgow specifically stated that the condition was severe. He also stated that claimant's work as a nursing assistant for the number of years she did it at least aggravated the situation, if not caused it.

Dr. Baxamusa examined claimant on August 27, 2001, and found evidence of left thumb basilar joint arthritis, as well as basilar joint arthritis in the right thumb, but to a lesser extent. On December 10, 2001, Dr. Baxamusa performed left thumb basilar joint arthroplasty on claimant. On April 16, 2002, Dr. Baxamusa restricted claimant to lifting no more than 10 pounds and ordered work hardening. On August 2, 2002, Dr. Baxamusa noted that claimant was getting stronger but was now experiencing numbness and tingling in her ring and small fingers. Dr. Baxamusa last examined claimant on August 19, 2002. His examination showed weakness in claimant's ulnar nerve, which is indicative of cubital tunnel syndrome. Claimant later underwent left elbow surgery, which the Commission determined **[*31]** was unrelated to employment. Dr. Baxamusa did not offer an opinion on causal connection with regard to carpal tunnel, but focused on claimant's thumbs. He specifically opined that if claimant was doing a lot of pinching, loading, and gripping with her thumb, those activities would exacerbate basilar joint arthritis.

Dr. John Ruder testified for the employer. He is board certified in plastic surgery, reconstructive surgery, general surgery, and surgery for the hands and upper extremities. He has performed numerous carpal tunnel surgeries in his practice, as well as some surgeries involving the carpometacarpal joint of the thumb. Dr. Ruder examined claimant's medical records and her job duties. He found no causal connection between claimant's carpal tunnel syndrome and her job, and no causal connection between her job and her thumb condition. He agreed that no one knew exactly what caused claimant's thumb condition, and said that it could have been caused by something as simple as turning a doorknob or pinching a key. On cross-examination, Dr. Ruder admitted that if a person's job involved repetitive lifting of 200-pound patients, then such activities could lead to carpal tunnel syndrome **[*32]** and exacerbation of bilateral joint arthritis. He did not believe that claimant's duties required her to perform the type of. repetitive, forceful activities necessary to cause carpal tunnel or bilateral joint arthritis.

ANALYSIS

I

The first issue raised by the employer is whether claimant sustained repetitive trauma injuries to her right and left thumbs arising out of and in the course of her employment. The employer argues that claimant failed to show that her right thumb condition manifested itself on January 24, 2001, the date the Commission found that all of claimant's conditions manifested themselves. Employer points out that no mention was made of an injury to claimant's right thumb until August 29, 2001, when Dr. Baxamusa set forth that there was evidence, to a milder extent, on the right thumb, which was less symptomatic. At that time, Dr. Baxamusa noted a one-year history of basilar thumb pain and crepitus on the left thumb, but made no mention of any complaints of right thumb pain. Employer argues that claimant did not start noticing symptoms in her right thumb until November 29, 2001, and, therefore, the right thumb condition cannot be connected back to claimant's employment, **[*33]** which ended on January 24, 2001.

Employer further argues that because the Commission found January 24, 2001, to be the manifestation date for all of claimant's various conditions, including the right thumb, it was impossible for claimant to provide notice of her right thumb condition, as she did not complain of the condition until August 29, 2001, or have symptoms until November 29, 2001. As to the left thumb, the employer maintains that claimant failed to prove causal connection. Employer insists that the Commission's finding of causal connection between claimant's work activities and her right thumb and her left thumb conditions was against the manifest weight of the evidence and erroneous as a matter of law.

It is the function of the Commission to resolve disputed questions of fact, including those of causal connection, to decide which of the conflicting medical views is to be accepted, and to judge the credibility of the witnesses and draw permissible inferences from the evidence. Dexheimer v. Industrial Comm'n, 202 Ill. App. 3d 437, 442, 559 N.E.2d 1034, 1037 (1990). A reviewing court is not to discard the findings of the Commission **[*34]** merely because different inferences could be drawn from the same evidence. Dexheimer, 202 Ill. App. 3d at 443, 559 N.E.2d at 1037. The Commission's decision should be set aside only if it is against the manifest weight of the evidence. Gust K. Newberg Construction v. Industrial Comm'n, 230 Ill. App. 3d 96, 111, 594 N.E.2d 758, 768 (1992). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Dolce v. Industrial Comm'n, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175, 178 (1996).

Here, claimant worked as a nursing assistant for the employer for over 30 years. She started experiencing pain in her hands and wrists long before she sought treatment at the employer's emergency room. On January 24, 2001, claimant was forced to go to the emergency room because she could no longer button patients' gowns. She gave a history of experiencing pain, numbness, and tingling in both her hands for six or seven months prior to the date in question. Claimant was diagnosed with bilateral carpal tunnel syndrome **[*35]** by Dr. Glasgow. After he started treating claimant, it became apparent to Dr. Glasgow that claimant's condition was more severe.

Dr. Glasgow noted arthritic changes in claimant's left first carpometacarpal joint after X rays were taken on February 8, 2001. On February 22, 2001, Dr. Glasgow performed a more detailed examination and noted a positive grind test at the right first carpometacarpal and carpal tunnel joints. He specifically noted that in addition to carpal tunnel syndrome, claimant was also suffering from mild carpometacarpal degenerative joint disease in the left thumb. Dr. Glasgow found it difficult to discern where all of claimant's pain and dysfunction was coming from. After treating her for bilateral carpal tunnel syndrome by performing releases on both her right and left wrists, Dr. Glasgow referred claimant to Dr. Baxamusa to deal with claimant's carpometacarpal degenerative joint disease.

Dr. Baxamusa first examined claimant on August 27, 2001, at which time he noted a prominent arthritic appearance and positive crepitus in grind testing in claimant's left thumb carpometacarpal metacarpal joint, and noted the same, but to a lesser extent, on the right thumb. We **[*36]** agree with claimant that she . should not be denied compensation because the physicians did not immediately recognize the extent of her injuries. It is common for physicians to formulate ongoing and more definitive diagnoses and recommendations after subsequent examinations and treatment. With regard to the issue of notice, we point out that the purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident. Gano Electric Contracting v. Industrial Comm'n, 260 Ill. App. 3d 92, 95, 631 N.E.2d 724, 727 (1994). The notice requirement is met if the employer possesses known facts related to the accident within 45 days, and a claim is barred only if no notice whatsoever is given. Gano, 260 Ill. App. 3d at 96, 631 N.E.2d at 727. Our General Assembly has mandated a liberal construction of the notice requirement, and, therefore, if some notice has been given, even if inaccurate or defective, the employer must show that it has been unduly prejudiced. Gano, 260 Ill. App. 3d at 96, 631 N.E.2d at 727.

In the instant case, **[*37]** claimant went to the employer's emergency room on January 24, 2001, complaining of pain in both of her hands. She filled out an accident report on February 10, 2001, in which she notified the employer that she had been experiencing pain in both her wrists. The Commission determined that claimant gave timely notice. The fact that claimant did not specifically state she was experiencing pain in her thumbs does not mean that she did not give proper notice of her injuries. The employer was in no way prejudiced by claimant's lack of the term "thumb." Claimant was off work as of January 24, 2001, at which time the employer was made aware of the pain in claimant's hands.

As to whether claimant's injuries are the result of a work- related accident arising out of and in the course of her employment, claimant testified that her job required her to engage in heavy and repetitive lifting activities consisting of moving large and immobile patients. Shelly Johnson corroborated claimant's testimony in this regard. Even the employer's expert, Dr. Ruder, agreed that repetitive forceful activities can lead to the onset of basilar joint arthritis. Dr. Baxamusa opined that claimant's basilar joint arthritis **[*38]** may have been exacerbated by her activities as a nursing assistant. Claimant's activities required her to change sheets, assist patients with dressing, including buttoning and unbuttoning gowns, and similar activities that require the pinching and grasping motions that lead to basilar joint arthritis.

Weighing all the evidence, the Commission found a causal connection between claimant's employment and her right and left thumb conditions. Whether an injury arises out of and in the course of a claimant's employment is a question of fact for the Commission. Beattie v. Industrial Comm'n, 276 Ill. App. 3d 446, 449, 657 N.E.2d 1196, 1199 (1995). The fact that a work-related accident may aggravate or accelerate a preexisting condition does not mean that the employee is not entitled to benefits, so long as the work-related accident was a factor contributing to the disability. Newberg Construction, 230 Ill. App. 3d at 111, 594 N.E.2d at 768. The Commission's decisions with regard to the right and left thumbs cannot be said to be against the manifest weight of the evidence.

II

The second issue raised **[*39]** by the employer is whether the Commission erred in overruling its objection to Dr. Glasgow's causation testimony, which was based upon **Ghere** v. Industrial Comm'n, 278 Ill. App. 3d 840, 663 N.E.2d 1046 (1996), because no report was issued notifying the employer as to what Dr. Glasgow's opinions would be on the issue of causal connection. The employer contends that claimant's attorney's letter notifying the employer's attorney that Dr. Glasgow would render opinions regarding causal connection was too broad.

In **Ghere**, the employee died of a heart attack while working for the employer. The employee's doctor testified that while he treated the employee on several occasions, he never treated the employee for heart problems. The arbitrator sustained the employer's objection to the doctor's testimony regarding whether the employee's work activities or environment could or might have precipitated his heart attack, because the opinions were not furnished to the employer 48 hours prior to the hearing, in violation of section 12 of the Act (820 ILCS 305/12 (West 1994)). On appeal, the **Ghere** court **[*40]** found that the doctor's causation opinion would have gone beyond the contents of his medical records, because there was no mention of causation in the records or that the doctor ever treated the employee for a heart condition. Because there was nothing in the records to put the employer on notice that the doctor had an opinion regarding causation that the employer could have requested, the arbitrator's exclusion of such testimony was upheld. **Ghere**, 278 Ill. App. 3d at 846, 663 N.E.2d at 1046.

Contrary to **Ghere**, in the instant case, Dr. Glasgow's records contain details about his treatment of claimant's bilateral carpal tunnel syndrome and basilar joint arthritis, making the instant case more akin to Homebrite Ace Hardware v. Industrial Comm'n, 351 Ill. App. 3d 333, 814 N.E.2d 126 (2004). In Homebrite this court found that the employee's doctor could testify as to causation of the employee's neck injury, even though no medical report was tendered to the employer notifying the employer that the doctor would testify about the issue. We pointed

out that in **Ghere**, the doctor had never **[*41]** treated the employee's heart condition, whereas in Homebrite, the doctor did treat the employee for his neck problems, and the doctor's records contained details about such treatment and the employee's neck complaints. Accordingly, the records put the employer on notice that the doctor might testify as to a causal relationship between the neck condition and the employee's work accident. Homebrite, 351 Ill. App. 3d at 339, 814 N.E.2d at 132.

Likewise, in the instant case, the employer could not have been surprised by Dr. Glasgow's opinions regarding causation, especially in light of the fact that claimant's attorney even provided the employer's attorney with a letter indicating that he intended to inquire into the issue of causal connection with regard to both the bilateral carpal tunnel and basilar joint arthritis conditions. The fact that Dr. Glasgow did not render an opinion regarding claimant's right thumb condition, even though the letter stated he would, does not change our determination. Relying on Homebrite, we find there was no error in allowing Dr. Glasgow to offer opinion testimony regarding causation.

III

The third **[*42]** issue raised by the employer is whether the Commission's finding that claimant's bilateral carpal tunnel condition arose out of and in the course of her employment is against the manifest weight of the evidence or error as a matter of law. The employer argues that Dr. Glasgow's opinion regarding carpal tunnel was not well taken, because Dr. Glasgow did not know the details of claimant's job. The employer asserts that the opinion of Dr. Ruder is more convincing because Dr. Ruder obtained a detailed understanding of claimant's work activities and did not find that her activities were necessarily prolonged, forceful, or repetitive as to cause carpal tunnel syndrome.

Dr. Glasgow testified that claimant's bilateral carpal tunnel syndrome was a direct result of claimant's working as a nursing assistant for a prolonged number of years. He pointed out the repetitive nature of the tasks performed by a nursing assistant. He testified that a nursing assistant would be required to perform numerous pushing and pulling tasks. Dr. Ruder, the employer's own expert, admitted that prolonged use of the hands in a forceful manner, such as would be required to manipulate patients over the course of a **[*43]** 30-year career as a nursing assistant, could cause carpal tunnel syndrome, as evidenced by the following colloquy between Dr. Ruder and claimant's attorney:

"Q. Prolonged, forceful use would include lifting patients, say, in excess of 200 pounds, rotating them, pulling them up out of wheelchairs, or in to beds, using weight belts or straps in order to assist getting patients in and out of bath tubs, those types of activities, couldn't it?

A. It could, yes.

Q. And so prolonged, forceful use of that type in manipulating patients over a course of 30 plus years, might, indeed, lead to the development of carpal-tunnel syndrome?

A. Correct.

Q. And if this particular patient, Lesley Bonney, was engaged in those activities over a period of 30-plus years, in terms of patient manipulation, then she might have been subject to the prolonged, forceful use that you describe in terms of the development of her carpal-tunnel syndrome bilaterally?

A. Yes.

Q. And, therefore, if that were the case, the need for surgery would relate to the prolonged forceful use that gave rise to the symptomatology of the carpal-tunnel syndrome, correct?

A. Correct."

Under these circumstances, we cannot say the **[*44]** Commission's decision is not supported by the evidence.

As previously discussed, it is the Commission's function to resolve disputed questions of fact, including causal connection, and to decide which of the conflicting views should be accepted. Weighing the evidence here, the Commission found a causal connection between claimant's bilateral carpal tunnel syndrome and claimant's employment as a nursing assistant over the course of the previous 30 years.

The Commission obviously found claimant's testimony regarding the nature of her job and Shelly Johnson's corroboration of that testimony more credible than Dr. Ruder's testimony regarding the nature of claimant's duties. After reviewing all the evidence, we cannot say the Commission's decision is not supported by the evidence.

IV

The last issue raised by the employer is whether the Commission erred in its award of TTD. The employer argues that, at most, claimant is entitled to TTD benefits only up to August 19, 2002, as it can be inferred from Dr. Baxamusa's testimony that claimant's left thumb condition was resolved to the extent that the weight restriction would have been upgraded to at least 25 pounds, a weight restriction the **[*45]** employer could have accommodated. The employer insists that after that date, claimant was off work due to her left elbow condition, a condition for which the employer is not responsible.

The issues of whether an employee is temporarily totally disabled, as well as the period of such disability, are questions of fact for the Commission, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence. Sorenson v. Industrial Comm'n, 281 Ill. App. 3d 373, 384-85, 666 N.E.2d 713, 720-21 (1996). Here, we cannot say the Commission's decision is against the manifest weight of the evidence.

Medical records reveal that claimant was authorized off work as of January 24, 2001, when she was told not to lift over five pounds. Claimant did not return to work after that date, because of increasing symptoms and the continued imposition of weight restrictions. Shelly Johnson, the employer's own employee health nurse, testified that the hospital could not accommodate a 10-pound restriction. Johnson testified that the minimum weight restriction that could be accommodated by the employer is 25 pounds. The employer's **[*46]** contention that as of August 19, 2002, claimant's left thumb condition resolved to the point that the weight restriction could have been upgraded to 25 pounds is speculative and not based on the record presented here. Accordingly, the Commission's findings with respect to the award of and the length of TTD benefits are not against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of De Kalb County is hereby affirmed.

Affirmed.

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

1. Effective January 1, 2005, the name of the Industrial Commission was changed to the "Illinois Workers' Compensation Commission." However, because the Industrial Commission was named as such when the instant cause was originally filed, we will use this name for purposes of consistency.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully dissent.

At the time of arbitration Petitioner's attorney amended the date of accident to August 1, 2008. Except for a minor correction regarding the date of accident as reflected in the order section of the Decision, the Majority has adopted and affirmed the Arbitrator's findings on accident. Absent from those findings is any discussion **[*47]** of how Petitioner's condition/accident "manifested itself" on August 1, 2008. The only significance to that date is that it corresponds with Petitioner's admission to Silver Cross Hospital for abdominal pain. (PX 6) The medical history taken at Silver Cross states Petitioner has been recently treated for chronic back pain, arthritis, and a "suspicion of right shoulder rotator cuff tear." Petitioner sought no treatment for her shoulder when she presented at Silver Cross. There is no mention of Petitioner's work activities or any explanation provided as to the cause of Petitioner's chronic back pain, arthritis, and suspected rotator cuff tear. Nothing contained in the record for that admission show how Petitioner's right shoulder condition and its causal relationship to Petitioner's employment was plainly apparent to reasonable person on that particular date.

Furthermore, there is no credible evidence in the record establishing Petitioner's alleged accident arose out of and in the course of her employment with Respondent or that her right shoulder condition is causally related to her job duties for Respondent. Dr. Murphy may have been Petitioner's treating physician but Petitioner related **[*48]** little, if any, information to him concerning her job duties and his causation opinion was based upon an inaccurate hypothetical which, inter alia, included an erroneous reference to treatment to Petitioner's shoulder on July 23, 2008, at Silver Cross. Dr. Murphy's opinion is unpersuasive. In addition, there are missing records of Dr. Anwar, the physician who initially saw Petitioner for her right shoulder complaints. Absent these records, there is no corroboration for Petitioner's testimony as to the events of July, 2008. This evidence was certainly within Petitioner's ability to obtain and Petitioner's failure to introduce them in support of her claim suggests they would not have supported it.

There is also the issue of notice. I disagree with the Arbitrator's credibility determination and the Majority has stricken the Arbitrator's findings on notice altogether, preferring instead to substitute its findings as those of the Arbitrator's which seems improper. I would have found Mr. Erwin's testimony credible and relied upon it to conclude timely notice was not given.

Finally, I disagree with the Majority's finding that Dr. Coe had access to Dr. Anwar's notes when he conducted **[*49]** his records review on behalf of Respondent. Such a finding is pure speculation as nothing in Dr. Coe's report indicates he reviewed records of Dr. Anwar.

Petitioner failed to prove she sustained a repetitive trauma accident that arose out of and in the course of her employment with Respondent, failed to prove causation, and failed to prove timely notice. I would have reversed the Arbitrator's Decision and denied Petitioner's claim on the basis of accident, causal connection, and notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **ghere** (Suggest Terms for My Search)
View: Full

Date/Time: Tuesday, January 10, 2012 - 9:24 AM EST

In

*2011 Ill. Wrk. Comp. LEXIS 779, **

JOHN M. FOLDER, PETITIONER, v. SACHS ELECTRIC COMPANY, RESPONDENT.

NO. 07WC 18392

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF PEORIA

2011 Ill. Wrk. Comp. LEXIS 779; 11IWCC0694

July 15, 2011

CORE TERMS: hip, pain, recommended, surgery, deposition, injections, surgeon, lumbar, physical therapy, testing, notice, authorize, referral, symptom, return to work, temporary total disability, modifies, recommendation, treating, epidural, groin, temporary, benefits paid, pre-existing, arthroplasty, replacement, bilateral, diagnosed, opined, axial

JUDGES: Daniel R. Donohoo; Thomas J. Tyrrell

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical expenses, temporary total disability and penalties and fees, and being advised of the facts and law, modifies the May 4, 2010, Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission notes that the Respondent took exception to the issues of accident and notice in its Petition for Review. The Commission finds it does not have jurisdiction to consider these issues as findings of accident and notice were made at an earlier 19(b) hearing on May 23, 2007. Petitioner need not give **[*2]** additional notice of injury to the hip as it relates to this accident. The arbitration decision was entered on July 5, 2007 and was not appealed.

After considering the entire record, the Commission modifies the Arbitrator's Decision with respect to the order of prospective medical treatment. The Arbitrator found that Respondent shall authorize the treatment recommended by Dr. Smucker and referral to a spine surgeon for consideration of surgery. In his Findings of Fact, the Arbitrator found Respondent should authorize and pay for the injections recommended by Dr. Smucker and continued physical therapy. Further, "If Dr. Smucker decides to refer Petitioner to a surgeon for further testing or evaluation, Respondent must authorize reasonable visits, testing and consultation". Physical therapy was ordered by Dr. Smucker on April 24, 2009 for the low back along with the left total hip arthroplasty, which was performed by Dr. Williams on June 25, 2009 (PX2). Dr. Smucker opined in his July 6, 2009 note that Petitioner had axial low back pain with some radicular symptoms to his legs due to lumbar degenerative disc disease and facet arthropathy and that the radicular symptoms may be helped with **[*3]** lumbar epidural steroid injections (PX2). Dr. Smucker further stated in his August 19, 2009 letter that he recommended lumbar epidural steroid injections for Petitioner's back and leg symptoms (PX10). Dr. Smucker further opined in his September 7, 2009 letter that Petitioner's complaints and his recommended course of treatment are related to the March 31, 2007 work injury (PX11). Dr. Smucker provided testimony in a supplemental evidence deposition on November 12, 2009. In that deposition, Dr. Smucker opined that possibly a lumbar discography or fusion would be warranted if Petitioner was a surgical candidate but he did not make a referral to a back surgeon (PX9, P13). The Commission finds that Dr. Smucker still has a standing recommendation for physical therapy made on April 24, 2009 as well as a recommendation for lumbar injections made on August 19, 2009. There are no other current medical recommendations for further testing or evaluation of Petitioner in order to relieve Petitioner from the effects of his work injury. It is premature for the Commission to award further testing or treatment. Further, ordering Respondent to pay for treatment on the possible prospective recommendations **[*4]** of one doctor, Dr. Smucker, denies Respondent its right to present medical evidence regarding the reasonableness and necessity of that future proposed treatment. For the forgoing reasons, the Commission modifies the Arbitrator's award of prospective medical expenses by vacating the portion of the Arbitrator's award concerning referral to a spine surgeon for consideration of surgery and any visits and testing by such surgeon and further finds Respondent shall authorize the treatment recommended by Dr. Smucker including spinal injections and physical therapy for the low back.

The Commission also modifies the Arbitrator's Award of temporary total disability. The Arbitrator awarded in his Decision of May 4, 2010, benefits of $ 1,219.25 per week for 151 2/7 weeks for the period April 1, 2007 through February 25, 2010, the date of hearing, with a credit to Respondent in the amount of $ 94,834.00 for benefits paid. The Arbitrator found Petitioner has not been allowed to return to work by his treating physicians and Dr. King was unable to place any date on which Petitioner could work. Petitioner had previously been awarded temporary total disability on this claim in the arbitration decision **[*5]** of July 5, 2007 for the period April 1, 2007 through the date of hearing, May 23, 2007, a total of 7 4/7 weeks. The July 5, 2007 decision was not appealed. The Petitioner stipulated at the February 25, 2010 hearing that Respondent paid appropriate TTD through November 10, 2008 (T.9). Respondent claims on the Request for Hearing form that Petitioner was disabled from April 1, 2007 through November 10, 2008, and for that period of time Respondent paid $ 94,834.10 in benefits (AX1). The Commission modifies the Arbitrator's award of TTD and finds Petitioner was temporarily totally disabled for the period of May 24, 2007, through the date of hearing, February 25, 2010 a period of 144 weeks. The Commission further finds Respondent is entitled to a credit for benefits paid for the period of May 24, 2007 through November 10, 2008, 76 4/7 weeks at $ 1,219.25 per week. Therefore, the total amount of TTD awarded by the Commission is $ 175,572.00 less a credit to Respondent of $ 93,359.19 for a total remaining balance of $ 82,212.81.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 4, 2010, is hereby modified **[*6]** as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 1,219.25 per week for a period of 144 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act. Respondent is to receive a credit under § 8(j) of the Act for $ 93,359.19.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 149,066.11 for medical expenses contained in PX12 subject to the medical fee schedule. Respondent shall be given a credit for $ 21,081.33 for medical benefits paid under the Act. Respondent is also ordered to pay for prospective medical care in the form of treatment recommended by Dr. Smucker including spinal injections and physical therapy for the low back.

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 a credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent **[*7]** 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.

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

ATTACHMENT:

Arbitration Decision

19(b)

John Mark Folder
Employee/Petitioner

v.

Sachs Electric Company
Employer/Respondent

Case # **07** WC **18392**

Consolidated cases:

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 **Stephen Mathis,** Arbitrator of the Commission, in the city of **Peoria,** on **February 25, 2010.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings **[*8]** on the disputed issues checked below, and attaches those findings to this document.

Disputed Issues
C. X Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
E. X Was timely notice of the accident given to Respondent?

F. X Is Petitioner's current condition of ill-being causally related to the injury?
J. X Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. X Is Petitioner entitled to any prospective medical care?
L. X What temporary benefits are in dispute?
X TTD
M. X Should penalties or fees be imposed upon Respondent?

Findings

On the date of accident, **March 31, 2007,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being **[*9]** ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **95,101.76;** the average weekly wage was $ **1,828.88.**

On the date of accident, Petitioner was **47** years of age, **single** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Order

Respondent shall pay Petitioner temporary total disability benefits of $ **1,219.25/week** for **151 2/7** weeks, commencing **April 1, 2007** through **February 25, 2010,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $ **94,834.00** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $ **149,066.11,** as provided in Section 8(a) of the Act. Respondent shall be given credit for $ **21,081.33** for medical benefits paid under the Act.

Respondent shall authorize the treatment recommended by Dr. Smucker and referral to a spine surgeon for consideration of surgery.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits **[*10]** or compensation for a temporary or permanent disability, if any.

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

Statement of Interest rate If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a

decrease in this award, interest shall not accrue.

The Arbitrator hereby makes the following findings of fact and conclusions of law on all disputed issues:

This matter was hear on a 19b petitioner by Arbitrator Neva Neal on May 23, 2007. Arb. Neal issued a decision dated July 5, 2007, in which she found that the Petitioner did sustain an injury on March 31, 2007, found Respondent liable for TTD from the accident date to the date of trial, and ordered Respondent to pay medical bills that had been incurred for treatment. That decision was not appealed by either party and represents the **[*11]** law of the case. Respondent paid TTD until December 2008 and stopped when Petitioner was referred for treatment of his hips to Dr. Williams. Respondent contends any treatment to Petitioner's hips is unrelated to the accident of March 31, 2007, and that Petitioner should have been cured of his back injury by the date on which it stopped TTD payments.

C. Accident

E. Notice

F. Causal Connection

Respondent contends that because Petitioner did not have complaints about his hips soon after the March 31 accident, he cannot show that his hip treatment is related to his work incident. It is true that Petitioner did not use the word hips when describing his pain. His description was of low back, groin and buttock pain. He testified at arbitration that he also pointed to the outside of his buttock area when describing his pain to the doctors he saw in the first months after his injury. Doctors initially diagnosed and treated a low back condition. Mr. Folder first saw a medical doctor, Michael Markley, on April 10, 2007. Dr. Markley reported that Petitioner had low back pain, pain in the right side lumbar area, numbness extending to the toes of his left foot and weakness in his legs. He ordered **[*12]** an MRI. (Pet. Ex. 1, first trial). Dr. Markley also ordered physical therapy and eventually referred Petitioner to Dr. Smucker.

On April 24, 2007, the physical therapist at Mason District Hospital found Petitioner complaining of severe back pain, numbness and tingling in the toes and pain into the right leg anterior and right hip. (Pet. Ex. 3, first trial). The therapist's assessment on that date found pain radiating into the right buttock and right groin area. This history is significant because treating and examining physicians state that groin pain is a symptom of hip problems.

Petitioner first saw Dr. Smucker on May 30, 2007, and commenced a treatment program that continued until he referred Mr. Folder to Dr. Williams in December 2007. During his course of treatment Dr. Smucker prescribed physical therapy and epidural injections for Petitioner's back condition. At no time did Dr. Smucker release Petitioner to return to work. (Pet. Ex. 7, p.11). Dr. Smucker saw Petitioner on December 28, 2007, and found no change in his back condition.

Dr. Williams diagnosed hip osteoarthritis and performed bilateral hip arthroplasty. He first suspected hip involvement after a new MRI he ordered **[*13]** in December 2007 failed to show back pathology which would explain Petitioner's complaints. (Pet. Ex. 8, p. 10). Regardless of the condition shown on xrays, he said it is the patient's level of pain which is the most important consideration in ordering surgery. (Pet. Ex. 8, p. 11). He first ordered four weeks of physical therapy and only after than failed to improve Mr. Folder's condition he recommended surgery. He concluded that the incident of March 31, 2007, at work aggravated the degeneration in Mr. Folder's hips. (Pet. Ex. 8, p. 14).

Since the first diagnosis of hip pathology and the need for treatment occurred during the course of his back treatment, Petitioner's notice requirement is satisfied by Dr. Williams' reports and records. Petitioner gave notice of the facts of his injury and the first 19b hearing established accident and notice. Separate notice of the newly diagnosed extent of injury is not a

requirement under the Act.

After Dr. Williams surgically replaced his right hip, Mr. Folder returned to Dr. Smucker on April 24, 2009. (Pet. Ex. 9, p. 4). He ordered more physical therapy for back complaints and expected to order a new back MRI after Mr. Folder had his second **[*14]** hip replacement. Dr. Smucker described Petitioner as having chronic axial low back pain. On June 5 Petitioner was complaining of increased pain in his low back with pain radiating into his legs. He was scheduled for second hip surgery on June 25. (Pet. Ex. 9. p. 6.).

On July 6 he recommended lumbar epidural injections for nerve pain and referral to a surgeon.

On cross examination Dr. Smucker reiterated that Petitioner was never cleared to return to his prior employment during the two years he was under treatment. (Pet. Ex. 9, p.26). Dr. Smucker agreed that Petitioner's symptoms are subjective and cannot be verified by any imaging study. He also said that he had no reason to doubt the accuracy of Petitioner's reports to him during the two years of treatment.

Respondent had a Section 12 examination by Dr. David King on October 13, 2008. He opined that Petitioner simply had pre-existing degenerative disease of both his back and hips that was unrelated to his work accident. He said Petitioner did not need any restrictions based on his back condition. (Resp. Ex. 4, p. 14). Prior to his deposition Dr. King produced a report dated September 3, 2008, and October 13, 2008. (Resp. Ex. 2 and **[*15]** 3). In his September 3 report Dr. King said that Petitioner had suffered a lumbar sprain with a pre-existing degenerative disc condition. He said Petitioner should have been able to return to work after the conservative care he received. (Resp. Ex. 2, p. 4). Dr. King also said the work incident did not "significantly exacerbate" his hip condition. (Resp. Ex. 2, p. 4). He did agree with other treating physicians that Mr. Folder needed hip replacement surgery. Following his physical examination of Petitioner on October 13, 2008, Dr. King authored another report which also contained a review of a lumber MRI taken 12/20/07. (Resp. Ex. 3, p. 3). He noted the MRI showed "moderate" degenerative joint disease. In his September 3, 2008, report, Dr. King said that same MRI showed "minor" degenerative disc disease. (Resp. Ex. 2, p. 3).

Dr. King was deposed on February 12, 2009, and February 1, 2010. In his first deposition Dr. King stated that he had been in practice post-training about 1 year and 2 months. (Resp. Ex. 4, p.25). He agreed that Dr. Smucker's record from his first visit with Petitioner on May 30, 2007, has a history of right groin pain and that history was consistent with Petitioner's **[*16]** hip complaints. (Resp. Ex. 4, p. 28). He also agreed that Petitioner was treated solely for his back complaints for a period of time until he was referred to Dr. Williams who diagnosed his hip condition. He also agreed that the same incident which causes back symptoms could also cause the onset of hip pain when there is pre-existing osteoarthritis (Resp. Ex. 4, p. 31) and that hip pain is one essential requirement for hip replacement surgery. (Resp. Ex. 4, p. 27). Dr. King also stated that Petitioner did not report groin pain until May 30, 2007, when he saw Dr. Smucker. (Resp. Ex. 4, p. 33). That conclusion is contradicted by the medical records from Mason District Hospital dated April 24, 2007.

During the course of his deposition on February 12, 2009, Dr. King was asked to look at treating physician records he had never seen in preparing his reports and which was not used in formulating any of his opinions in the reports. Petitioner objected to the line of questions that asked Dr. King to review new records and offer opinions on matters not disclosed in his two reports. ***Ghere*** *v. Industrial Commission,* 278 Ill.App.3d 840, 215 Ill.Dec. 532 (4th Dist. 1996) **[*17]** and *Certified Testing v. Industrial Commission,* 367 Ill.App.3d 938, 305 Ill.Dec. 797 (4th Dist. 2006) both point out that the Section 12 requirement that an examination report be tendered to the opponent at least 48 hours before hearing is to prevent unfair surprise. Since a physician's deposition takes the place of in-person testimony at a hearing, only that information revealed 48 hours before the deposition meets the requirements of Section 12. Therefore, I sustain the objection to all questions in the February 12 deposition based on records not considered by Dr. King when he wrote his reports that pre-date the deposition.

Without the support for his testimony provided by medical records first considered during the deposition, and based on Dr. King's admission on cross-examination that an incident of the type sustained by Petitioner could have aggravated his pre-existing condition to the point it required treatment, I do not rely on Dr. King's conclusions in his 2009 deposition.

Dr. King's second deposition was in 2010. It followed his report dated December 15, 2009, in which he concluded that neither Petitioner's back or hip condition **[*18]** was directly related to his work injury. His diagnosis was chronic lumbar degenerative joint disease and bilateral hip degenerative joint disease. He agreed that the bilateral hip replacements were necessary, but that back surgery is not necessary for Petitioner's axial back pain. He also agreed that Dr. Smucker's recommended epidural or facet injections could be appropriate and would defer to physicians who perform those procedures to determine if they are necessary for Mr. Folder. Dr. Smucker has already concluded they are appropriate and he is a physician who performs those procedures.

It appears that at best Dr. King's disagreements are limited to causal relationship and not the appropriateness of treatment that has happened or which is recommended. Since no treating physician has yet recommended back surgery, it is premature to reach Dr. King's opinion that it is not necessary.

Although Dr. King concludes that the work accident was not a cause of Petitioner's need for treatment, he did admit that the incident Petitioner described could aggravate lumbar disc disease and could initiate hip pain that was eventually treated with surgery. He also agreed that Mr. Folder reported increased **[*19]** pain after his lifting incident to his treating physicians and he had no reason to doubt Mr. Folder's reports. Dr. King also said he felt Petitioner was at MMI, but could not put a date on when Petitioner reached that point. (Resp. Ex. 5, p. 15). He agrees Petitioner's axial back pain has not resolved. He agrees that there is no evidence that Petitioner had such significant hip pain that he was a candidate for hip arthroplasty before his work injury. (Resp. Ex. 5, p. 17). He cannot rule out an annular tear as the cause of Petitioner's back pain and testing to determine whether he has a tear is appropriate in this case. (Resp. Ex. 5, p. 20). Dr. Smucker recommended referral to a surgeon who would determine if Mr. Folder should have tests to confirm or rule out an annular tear.

Considering all the medical evidence I find that Mr. Folder's back condition as it exists now is related to his injury of March 31, 2007, and that Respondent should approve additional treatment recommendations of Dr. Smucker. I also find that referral to a surgeon is appropriate since even Dr. King agrees that further testing is needed to see if back surgery is a reasonable course of treatment. Since Dr. King **[*20]** agrees that an incident such as suffered by Petitioner could cause the onset of hip pain that triggered the need for surgery, that Petitioner had no record of significant hip pain before his work injury, and because there are histories that reflect hip symptoms shortly after the work incident, I find that his hip condition and need for treatment are causally related to the injury of March 31, 2007.

J. Medical

K. Prospective medical

For the reasons set out above I find that Petitioner is entitled to payment of all medical bills shown on Pet. Ex. 12. Respondent is entitled to credit for the amounts it has already paid. I also find that Respondent should authorize and pay for the injections recommended by Dr. Smucker and the continued physical therapy. If Dr. Smucker decides to refer Petitioner to a surgeon for further testing or evaluation, Respondent must authorize reasonable visits, testing and consultation. It is premature to determine if Respondent should authorize back surgery.

L. TTD

Petitioner has never been allowed to return to work. Even though Dr. King thought he was at MMI, he could not say when that occurred and failed to place any date on when Petitioner could work. **[*21]** His opinions on return to work did not consider the period of disability from bilateral hip arthroplasty so I will rely on the opinions of treating physicians who have not allowed any return to work. Petitioner has been disabled from April 1, 2007, to the date of hearing.

M. Penalties

I decline to find that Respondent's conduct justifies penalities.

DISSENTBY: KEVIN W. LAMBORN

DISSENT: I respectfully dissent from the decision of the majority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

*2011 Ill. Wrk. Comp. LEXIS 500, **

ROBERT JACHNA, PETITIONER, v. ALLIANCE FIRE PROTECTION, RESPONDENT.

NO: 06WC 13170

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

2011 Ill. Wrk. Comp. LEXIS 500; 11IWCC 0337

May 9, 2011

CORE TERMS: knee, right knee, left knee, surgery, meniscus, tear, medial, sprinkler, replacement, ladder, pain, degenerative, fitter, arthroscopic surgery, osteoarthritis, superintendent, pipe, adjuster, talked, truck, temporary, job description, cross-examination, arthroscopy, injection, twisting, notice, aggravated, deposition, harmless

JUDGES: Molly C. Mason; Daniel R. Donohoo

OPINION: [*1]

CORRECTED DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission corrects the Decision of the Arbitrator.

In the second paragraph on page 1 of the Decision, the Arbitrator indicated that Petitioner "was asked to give a recorded statement to Deborah Ness, an adjuster." Petitioner testified that he was asked to give a statement to adjuster Deborah Ness and that he believed **[*2]** the statement was recorded. T. 23-24.

In the fifth sentence from the bottom of page 1, the Commission changes the date "May 27, 2007" to "May 27, 2004."

In paragraph 3, near the bottom of page 8, the Arbitrator stated that Petitioner gave timely notice of his accident to his superintendent, Gordon Driscoll, and Respondent's adjuster, Deborah Ness. The Commission corrects this sentence to reflect that Petitioner gave timely notice of his accident to his superintendent, Gordon Driscoll. Petitioner never identified the date on which he gave a statement to Ness.

In the section of the Decision labeled "findings", the Arbitrator found that Respondent was entitled to a "credit of $ 0 for TTD." The Request for Hearing Form (Arb. Exh. 1) reflects that the parties stipulated Respondent paid $ 10,274.86 in temporary total disability benefits. Based on this stipulation, which the Commission views as binding, and noting that Petitioner raised no objection to the Motion for a Corrected Decision filed by Respondent on April 21, 2011, the Commission corrects the Decision of the Arbitrator by finding that Respondent is entitled to credit in the amount of $ 10,274.86 in temporary total disability benefits. **[*3]**

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 25, 2010 is hereby corrected and otherwise affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 968.00 per week for a period of 12-3/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent is also entitled to a credit of $ 10,274.86 for temporary total disability benefits it paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent **[*4]** pay to Petitioner the sum of $ 3,190.50 for medical expenses under § 8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $ 28, 766.26 under § 8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

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

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION 19(b)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The **[*5]** matter was heard by the Honorable **J. Kinnaman,** Arbitrator of the Commission, in the city of **Geneva, IL,** on **4/12/2010.** 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 Petitioner's employment by Respondent?

E. Was timely notice of the accident given to Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. What temporary benefits are in dispute?

TTD

FINDINGS

On the date of accident, **3/19/2004,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to **[*6]** Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **75,504.00;** the average weekly wage was $ **1,452.00.**

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **0.**

Respondent is entitled to a credit of $ **28,766.26** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 968.00/week for 12-3/7 weeks, commencing 8/23/2004 through 11/17/2004, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $ 3,190.50, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $ 28,766.26 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services **[*7]** for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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

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

Signature of Arbitrator

May 18, 2010

Date

Petitioner testified that in March, 2004, he was a sprinkler fitter and drove a service truck for Respondent. He had been working as a union sprinkler fitter since 1972 and retired March 15, 2007. Petitioner's job was to install fire pumps and sprinklers. He used scissors lifts **[*8]** and ladders to reach the ceilings and upper walls of offices and warehouses where he installed these pumps and sprinklers. He also used a power machine weighing 25 lbs. to cut or groove pipe and chain saws and come alongs as well as hand tools. The fire pumps weighed from 400 to 1,000 lbs. Main pipes are normally 25 ft. long but are sometimes cut in half. You need 2 people to carry it on their shoulders up a ladder. Lines arc about 25 lbs. each. You also carry them up. Petitioner worked an 8 hour day, 40 hours a week. He estimated he was up and down ladders 45% of his time. Most of his time was on a ladder unless he was cutting pipe. PX 11 is a job description for pipe sprinklers in his union and is accurate. It lists the tools used by sprinkler fitters and says they spend 30% of their time walking or standing and 70% on ladders or scaffolds. They may be required to twist, stoop, bend, squat, kneel, climb stairs, lift over head or walk on uneven surfaces. The process of installing pipe is described with an estimate this task is done 80 to 125 times a day.

Petitioner testified that on March 19, 2004 he was installing a sprinkler in an outlet mall store. It was cold. He slipped and **[*9]** fell on ice and twisted his leg. He notified Gordy Driscoll, his superintendent and a working foreman. He went to his family doctor because his leg was swelling. He notified his employer and was asked to give a recorded statement to Deborah Ness, an adjuster.

On cross-examination, Petitioner testified working on a service truck meant going out to do service on sprinklers where required. But on March 19, 2004 he was installing new construction. He was using a power lift that day so he didn't have to be on a ladder. When he's on the truck, part of the time is driving between jobs. He would average 8 sprinkler heads a day. For each sprinkler head you have to go up a ladder and measure, then come down to get a hanger. He would shoot the hanger or clamp it to a bar joist and then take the pipe up for installation. While doing the installation, he's standing on the ladder. There are multiple up and down trips for 8 sprinkler heads a day. He testified he hadn't installed any fire pumps in the last 4 years

and couldn't recall how many mains he installed. He had treatment for his left knee with Dr. Bunta in 1987 or 1988. He also had a right knee injury and treated with Dr. Lieber and then **[*10]** Dr. Breslow in 2001. He didn't think he had injections to the left knee in 2001. On March 19, 2004 he was inside a cold building. He was climbing onto a lift at the time. He reported it right away because he was noticing a lot of pain. He told Gordy. He completed an accident report over the phone with someone from the office. If the records say this was on May 27, 2007, that may be right. But he still told Gordy. On re-direct examination, Petitioner testified there wasn't much difference between working on a service truck and working new construction. On the truck he doesn't have to use the power machine. But he has to empty the truck and haul materials to the job while on new construction, it's all delivered.

Petitioner testified his family doctor referred him to Dr. Breslow. Petitioner had prior problems with both knees. He saw Dr. Bunta for his left knee in 1988 and had arthroscopic surgery on his right knee in 2001. On cross-examination he identified his family doctor as Dr. Tiempstra and testified he went to him for the sole purpose of his left leg problems. Dr. Tiepstra's records show Petitioner complained of a painful left knee on Nov. 12, 1987; x-rays were normal. An MRI **[*11]** of his right knee done March 31, 2001, showed osteoarthrosis of the medial compartment with degeneration of the medial meniscus and a radial tear of the mid zone associated with significant effusion. A lab workup was ordered on March 27, 2004. Petitioner saw the doctor on April 5, 2004 but the record indicates "not sure of reason for coming." On May 3, 2004 he returned for a follow-up on bloodwork. The notes are mostly illegible, but indicate he "sees ortho tomorrow." RX1.

RX2 is the Jan. 21, 1988 report of Dr. Bunta. It relates an injury to Petitioner's left knee on Dec. 1, 1987 while working in a crawl space. Dr. Bunta diagnosed a torn medial meniscus based on his physical exam and thought there may also have been an injury to the ligaments. Petitioner was a candidate for arthroscopic surgery which was to be scheduled in the future.

The records of the DuPage Medical Group show Petitioner was seen for right knee pain on June 5, 2001. The note shows surgery 4/9 followed by a shot. Petitioner complained of right knee pain on three subsequent visits, including one with an illegible date, one on July 3, 2001 and one on Aug. 6, 2001. When Dr. Breslow saw Petitioner on May 4, 2004, he **[*12]** wrote that he had last seen Petitioner in the office on Feb. 21, 2002 when he was being treated for right knee osteoarthritis. He had been in an unloader brace and underwent Synvisc injections. He still had intermittent pain on the right. He had a new complaint of the left knee. "He has an atraumatic onset of sharp aching sensation." Following his examination, Dr. Breslow thought it possible Petitioner had a left knee meniscal tear and ordered an MRI. It was done May 12, 2004 and showed a complex tear of the medial meniscus involving the middle third and likely the anterior third. There were degenerative changes in the lateral meniscus. Dr. Breslow saw Petitioner again on May 25, 2004 and they reviewed the MRI. Petitioner had previously had the right side "scoped...and was really displeased with the result after that." He wanted to avoid surgery. He was given an injection. He was seen again on Aug. 17, 2004 for a preoperative visit. Surgery was done Aug. 23, 2004. PX4. In the History and Physical Examination report prior to surgery, Dr. Breslow wrote that Petitioner "...injured his knee at work and had onset of sharp aching pain in his knee at the medial joint line." The post-operative **[*13]** diagnoses were left knee medial and lateral meniscus tears and grade 3 chondromalacia of the trochlea and medial femoral condyle. PX2. Petitioner continued to work until the date of his left knee surgery, Aug. 23, 2004. ARBX1.

Dr. Breslow testified about his treatment of Petitioner. The Aug. 23, 2004 surgery consisted of an arthroscopy of the left knee with partial medial lateral meniscectomies. Petitioner underwent post-operative physical therapy (PT) and was released to light to medium level work on Oct. 26, 2004, based on an FCE. Petitioner returned with complaints of persistent pain in the left knee and a series of Supartz injections was recommended. He was discharged on March 22, 2005 to return as necessary, although he still had some achiness in the left knee. The left knee was injected with cortisone on Nov. 15, 2005 and March 21, 2006. On June 13, 2006, both knees were injected and Dr. Breslow's diagnosis was bilateral osteoarthritis. Both knees were

injected on Aug. 29, 2006, Nov. 7, 2006 and Jan. 16, 2007. At that visit Dr. Breslow discussed the need for total replacement of both knee joints (TKR). He performed a right TKR on April 23, 2007. Petitioner developed cardiac **[*14]** problems in June 2007. When he returned to Dr. Breslow Nov. 7, 2007, a left TKR was recommended but not done because of the heart condition. Petitioner continued to have left knee injections. PX9. A left TKR was finally done on Jan. 14, 2010 by Dr. Gordon. He had been undergoing post-operative PT and had not been released from care at the time of Dr. Breslow's most recent testimony, April 8, 2010. PX10.

Petitioner testified he discussed his knee problems with his superintendent, Pat McGovern, in Nov. 2005. Petitioner told McGovern his legs were aching and that he had to get another shot. He testified he talked to McGovern again shortly after the Jan. 16, 2007 appointment with Dr. Breslow when bilateral TKR surgery was discussed. He told McGovern he was going to have his knee replaced due to the pain. McGovern suggested Petitioner retire, although Petitioner talked to him about coming back to work.

Patrick McGovern is Respondent's service superintendent. He is responsible for scheduling manpower and coordinating jobs. He is familiar with the job duties of the people under him and knows Petitioner, who worked for him for at least 5 years. He agreed fitters did 1 head per hour for **[*15]** 8 heads per day. He doesn't recall Petitioner reporting an accident, but knew he was having knee problems. He described the service job. He also knew Petitioner was working at the outlet mall for Gordy, who is no longer with Respondent. On cross-examination, McGovern testified sprinkler fitting is heavy work on a daily basis. Petitioner was trustworthy, honest and a hard worker. Service workers go up and down ladders during the day, for about 40% of their time. He reviewed PX11, the job description, and agreed it was accurate. Petitioner talked about his knee problems and McGovern knew he had problems with his knees. He doesn't recall if Petitioner told him he was going to have his knees replaced. Asked if he ever had a conversation with Petitioner about having knee surgery and wanting to return to work, McGovern said "I never said he should retire at all." If Petitioner got hurt at the outlet mall, McGovern was not who he would have talked to. On re-direct examination, McGovern again looked at PX11 and said that where it says 70% of time on ladders and scaffolds, he'd say that's a bit high. It did not mention draining and filling pipes.

David Curran is Respondent's Director of Risk **[*16]** Management and Safety. He oversees all insurance and safety maners, including workers' compensation claims. He's also involved in training and all site-specific safety programs. Respondent uses MedCor for workers' compensation reporting. It's a medical triage company in McHenry. If an employee thinks he's injured he calls MedCor. They will ask an employee where he is and direct him to the nearest medical facility. All claims are to be reported by the end of the day by talking to MedCor. This policy went into effect in 2004. When they rolled out MedCor, they put the announcement in employee paychecks and put the reporting policy in trucks. They also provided stickers for phones. Petitioner was at all safety meetings. Curran was aware of Petitioner's claim through his first report of injury. Levin depX4a is the Form 45 for March 19, 2004. It was created on May 27, 2004 by Ann Thompson. She would create a report when a worker called the office to report a claim. He is sure he had several conversations with Petitioner about his claim, but doesn't remember details of any conversation. Petitioner never told him about a right knee injury. He became aware of the right knee claim 60 days before **[*17]** trial and investigated it. He couldn't find any record anywhere for a right knee injury. On cross-examination, Curran testified he is aware Petitioner is alleging a date of accident of March 19, 2004. He heard McGovern testify. He was not aware that Gordy was Petitioner's foreman before today. Deborah Ness is with the insurance company. Before today he wasn't aware that she took a recorded statement, but it's expected that she would have talked to Petitioner. He didn't have the recorded statement with him at trial. Dan Minnich was the nurse case manager assigned to Petitioner's file. He reports to the claims adjuster. Curran gets Minnich's reports. He did not know Dr. Breslow thought Petitioner's condition was work related. Respondent doesn't get any notification of work related injuries except through MedCor. On redirect, Curran testified MedCor came in in April, 2004.

On rebuttal, Petitioner testified he never heard of MedCor before this. When he talked to Gordy and told him he was injured, he wasn't told to call MedCor. Deborah Ness didn't tell him to call MedCor. He never saw RX4a before trial. Ann Thompson is in Respondent's office. She did not tell him to call MedCor. He knew **[*18]** he had to give notice but felt he was doing that when he called the superintendent and talked to Pat McGovern about his right knee.

In his deposition on Sept. 24, 2009, Dr. Breslow was asked "And when he originally came to you, he came to you as a result of a work injury that occurred on March...." Respondent objected that the question was leading. The objection was sustained. PX9, 17-18. The question was restated, an objection was again made and sustained. PX9, 18. Dr. Breslow was then asked "And is it your opinion that the need for his total knee replacement is a result of his work activities as a sprinkler fitter?" The objection was sustained. PX9, 19. Dr. Breslow testified without objection that the operative evaluation of Aug. 23, 2004 showed Petitioner had degenerative changes and required a meniscectomy "...that would promote further wearing away of the surface cartilage with those activities at work." PX9, 20. Dr. Breslow was asked whether his opinions regarding the left knee were the same with regard to the right knee and answered "he did have surgery on that knee as well." PX9, 20. He was then asked if the work activities could contribute to and cause the degenerative changes **[*19]** that resulted in the right knee replacement of Aug. 2007. Respondent made a **Ghere** objection, because the application in 06WC13170 related only to the left knee and based on a letter of June 25, 2009 stating that Dr. Breslow would testify only regarding the left knee. The objection was sustained and the answer stricken. PX9, 22-3. On cross-examination, Dr. Breslow testified Petitioner reported a work-related accident to him at the preoperative evaluation of Aug. 17, 2004. He confirmed that the May 4, 2004 entry says Petitioner had an "atraumatic onset of sharp aching sensation medial joint line of his left knee." PX9, 25. He testified "atraumatic" means without trauma. Based on the initial history he took of May 4, 2004, Dr. Breslow was asked if he believed Petitioner tore his meniscus due to something that occurred at work. Because of the discrepancy between the history and physical at the office and the one at the hospital, Dr. Breslow did not know the answer to that question. In order to provide an accurate opinion on causation for the right knee condition, the doctor said it would be helpful to have records of Petitioner's prior treatment, but he was not given them. At surgery **[*20]** on Aug. 23, 2004, he found a complex degenerative tear of Petitioner's left medial meniscus extending from the juncture of the body of the anterior horn all the way to the posterior horn. That did not mean the tear was not the result of recent trauma, but it was pretty shredded. That can occur over a long period of time but also as an acute event. If Dr. Bunta had diagnosed a tear of the medial meniscus of the left knee on Jan. 21, 1988 and Petitioner had not had surgery following that diagnosis, it would be the same tear Dr. Breslow saw in Aug. 2004. Petitioner reported a right knee surgery, but no left knee surgery and nothing in his examination lead Dr. Breslow to believe there had been a prior left knee surgery. A positive McMurray's test, meaning a palpable click in the knee with certain movements; increased pain with direct palpation over the medial surface; and an inability to completely extend or flex the knee are all clinical indications of a torn meniscus. Effusion of the knee is a possible indication of a torn meniscus. The grade 3 chondromalacia of the medial femoral condyle and the trochlea found at surgery in Aug. 2004 were not the result of recent trauma. It is the **[*21]** progression of that degenerative condition of the medial femoral condyle that is leading Dr. Breslow to recommend a left knee replacement now. PX9.

Petitioner filed his application in 09WC42560, alleging a right knee injury, on Oct. 13, 2009. ARBX4.

Dr. Breslow's deposition resumed on April 8, 2010. He testified that in the period after the right TKR surgery, he had never seen any evidence of a loosening of the knee replacement at the tibia on the cement mantle. A left TKR was done Jan. 14, 2010 by Dr. Gordon. Petitioner was diagnosed with degenerative osteoarthritis of both knees and that was why he did the surgery. Dr. Breslow reviewed the records of DuPage Medical Group, where he previously practiced, from 2000 to 2007. Nothing in those records changed his opinion about the effect of his work activities on the need for bilateral TKRs. Dr. Breslow agreed with Respondent's attorney that it

was his impression that the job duties listed in the job description of a sprinkler fitter could have aggravated Petitioner's knee condition leading to a TKR. When asked which of the activities was aggravating the condition, Dr. Breslow testified "...the twisting at work and the initial injury **[*22]** was a twisting activity that tore his meniscus.... Thereby, requiring arthroscopy. And the combination of the meniscus tear, by him losing some of his meniscus promoted the arthritis to progress." PX10, 49. This was in the left knee. The arthritis can progress by itself but these aggressive activities can cause the progression to be more rapid or symptomatic. The meniscus tear by itself is what accelerates the condition. As far as the right knee, any one of the physical activities in the job description can aggravate an arthritic knee, make it more painful. After reviewing his own records of his treatment of Petitioner, specifically the note of Feb. 21, 2002, Dr. Breslow testified Petitioner was a candidate for a right knee replacement at that time. He did not recall when Petitioner first became a candidate for a left TKR. On re-direct examination, Dr. Breslow reviewed the history in the Feb. 21, 2002 office note indicating Petitioner was very active, was up and down ladders and was beating up his knee on a regular basis. Bending over, lifting and carrying pipe are also activities that could contribute to the degenerative osteoarthritis he treated. PX10.

Respondent retained Dr. Mark **[*23]** Levin as its sec. 12 examiner. He testified by deposition on Jan. 6, 2010. Dr. Levin first examined Petitioner on July 19, 2004. His report shows a history of an accident on March 19, 2004 in which he slipped and twisted his left knee. RX3, dep.X3. He described his symptoms and reported his right knee arthroscopy but no prior history for his left knee. Based on Petitioner's history, his examination of the left knee and his review of the medical records, Dr. Levin diagnosed a medial meniscus tear and that arthroscopic surgery of the left knee was appropriate. Assuming the accident occurred as described, he couldn't rule out at least an aggravation of a problem with the knee. His opinion was based strictly on there being no prior episode. Dr. Levin did another report on Sept. 22, 2004 after reviewing the intra-operative photographs of Petitioner's left knee arthroscopy and the operative report. His opinion changed. The operative findings showed a degenerative meniscal tear which was chronic and longstanding and would have had to predate an injury in March 2004. The findings are seen in the general population and in patients with normal, progressive degenerative arthritis from an age-related **[*24]** condition. The twist to Petitioner's knee would be a temporary aggravation of a pre-existing meniscal tear. The surgery should have resolved his symptoms back to his pre-injury status. Dr. Levin saw Petitioner again on May 11, 2009. Petitioner was retired. He had undergone a right knee replacement and also had cardiac problems. He reported that his right knee problems were from a different work injury and not related to the left knee work injury. Based on the history, his examination, x-rays and the records he reviewed, Dr. Levin concluded Petitioner's left knee conditions were related to the typical osteoarthritis seen in a patient his age. He thought Petitioner had reached MMI for any work-related condition of the left knee by March 22, 2005 when he was released to follow-up as needed. Based on the operative findings in 2004, one would anticipate that, irrespective of his reported work injury, Petitioner would have that type of knee on the dates he was seen in 2009. As an arthroscopist who does a lot of these, and the significant pre-existing arthritis to the knee, Dr. Levin opined that "...typically patients within the next one to two years will have progression of that and go **[*25]** on and need a knee replacement." RX3, 21. Petitioner went longer than that. He reviewed the job description for a sprinkle fitter and opined there was no evidence his work duties at all caused any need for a TKR. He thought the job activities did not put extreme, excessive stress on the knee any more than daily activities. At this point in Dr. Levin's deposition, Respondent's counsel stated that he was going to ask questions regarding Petitioner's right knee condition without knowing the Arbitrator's rulings on his objection at Dr. Breslow's deposition. He was "...asking these questions without waiving that prior objection and will withdraw the questions regarding the right knee if my objection is sustained." RX3, 24. Petitioner's counsel responded that he was not waiving or withdrawing any response to that objection. At his examination on Oct. 29, 2009, Petitioner complained of increasing right knee pain following his right TKR due to overuse of the right knee. X-rays showed some lucency at the tip of the tibial component on his right TKR suggesting loosening of the knee replacement which may be one of the causes of his right knee pain. Based on his examination and review of the records, **[*26]** Dr. Levin opined Petitioner's right knee had no relationship to his reported

injury of March 2004. He further opined there was no evidence Petitioner's right knee condition had been caused by any duties at worked based on the job description. On cross-examination, Dr. Levin testified he had no criticism of any of the treatment offered Petitioner for either his left or right knee. He thought the surgeries done or planned were appropriate. He had no criticism of Dr. Breslow who he thought seemed like a fine doctor. Dr. Levin thought any twisting of the knee, at work or off work, would put Petitioner at risk of aggravating his underlying degenerative condition. The only history given by Petitioner of twisting his left knee was the incident of March 2004. He testified Petitioner's pathology is not from repetitive trauma or a work-related condition. His pathology is related to typical aging osteoarthritis. Now knowing the intra-operative findings, that condition was not caused or aggravated by the activities of a union sprinkler fitter over many years. There was a previous diagnosis of a torn medial meniscus but no prior diagnosis of a lateral meniscus problem. Again, the intra-operative **[*27]** photographs correspond with the natural history of patients and confirm that this has been a typical aging, osteoarthritis condition on both sides. He has no record of any complaints about the left knee by Petitioner in the 5 years before 2004. Petitioner successfully worked until his surgery in 2004. Dr. Levin could not point to any medical record documenting that Petitioner was pain free after his left knee surgery; he still had achiness of his left knee from time to time when released by his doctor in March 2005. Although there are instances where you have to favor one side over the other and there can be some symptoms from that, he does not believe that applies to Petitioner. On re-direct examination, Dr. Levin opined there was no evidence of any overuse due to work-related activities that have caused Petitioner's pain. RX3.

Following the close of proofs the parties agreed as follows: The related medical bills submitted in both cases have been paid with one exception, that being the bill from Accelerated Rehabilitation for the dates of March 18, 2010 through April 5, 2010. Some of the bills for the left knee conditions (case # 06 WC 13170) were paid by the Respondent's Workers **[*28]** Compensation administrator; specifically the Edward Hospital bills for the initial surgery (left knee arthroscopy) and preoperative testing. The dates of service for these bills were August 23, 2004 and August 16, 2004 respectively. The remaining related medical bills were paid by the Petitioner's group health insurance, Local 281 Health and Welfare Fund. If the Respondent is found liable for the Petitioner's knee replacements the parties would stipulate as follows: In case # 06 WC 13170 for the left knee, the Respondent is entitled to a credit under Section 8(j) of $ 28,766.26, for which the Respondent would have to hold the Petitioner harmless pursuant to Section 8(j) of the Act. The Petitioner would also be entitled to receive from the Respondent $ 1,608.79 for out of pocket expenses for medical. Finally, the amount due for the unpaid balance on the bill from Accelerated Rehabilitation that would be owed per the Fee Schedule (dates of service 3/18/10 through 4/5/10) is $ 1,581.71. In case # 09 WC 42560 for the right knee, the Respondent is entitled to a credit under Section 8(j) of $ 19,780.34, for which the Respondent would have to hold the Petitioner harmless pursuant to Section **[*29]** 8(j) of the Act. The Petitioner would also be entitled to receive from the Respondent $ 127.78 for out of pocket medical expenses. The therapy charges from Edward Hospital for dates of service March 26, 2005 through May 10, 2005 are not related. ARBX1.

The Arbitrator concludes:

> 1. In 06WC13170 (DOA 3/19/2004), Petitioner sustained a compensable injury to his left knee when he slipped on ice and twisted his left leg while installing a sprinkler system. This is based on Petitioner's credible testimony describing the accident. His testimony that he reported his accident to his superintendent, Gordon Driscoll, was uncontradicted and prompted Respondent's adjuster to interview him about the event. Respondent did not offer the audio tape of that interview or the testimony of the adjuster and the Arbitrator infers that evidence would have supported Petitioner. Gordon Driscoll did not testify, but Patrick McGovern testified he was no longer employed by Respondent so the Arbitrator draws no inference from his absence.
> 2. In 09WC42560 (DOA 3/15/2007), Petitioner failed to prove he sustained a

compensable accident. Petitioner retired on March 15, 2007 and underwent a right TKR on April 23, **[*30]** 2007. He argued that the nature of his work as a sprinkler fitter aggravated his pre-existing right knee arthritic condition, for which he underwent arthroscopic surgery and injections in 2001. Dr. Breslow testified Petitioner was a candidate for a right TKR as of Feb. 25, 2002, years before the alleged accident date. There is no evidence Petitioner's work hastened the need for surgery. According to Dr. Levin, a TKR can be expected two years after an arthroscopy for a condition such as Petitioner's. But Petitioner did not have his right TKR for another 5 years. There is no evidence Petitioner had any symptoms or needed any treatment to his right knee between Feb. 25, 2002 and April 23, 2007 because of his work that he would not have had anyway. All other issues regarding this claim are moot.

3. In 06WC13170 (DOA 3/19/2004), Petitioner gave timely notice of his accident to his superintendent, Gordon Driscoll, and Respondent's adjuster, Deborah Ness. This is based on his credible testimony which was not contradicted. Patrick McGovern testified that he knew Petitioner to be honest and trustworthy. Respondent's current system for reporting accidents, described by Mike Curran, went into **[*31]** effect in April, 2004, after this accident. In any event, notice to a supervisor is sufficient under the Act.

4. In 06WC13170 (DOA 3/19/2004), Petitioner aggravated his pre-existing left knee medial meniscus tear, resulting in his need for arthroscopic surgery on Aug. 23, 2004 and leading to his left knee TKR on Jan. 14, 2010. This is based on the testimony of Dr. Levin who agreed that if the accident occurred, the Aug. 23, 2004 surgery was causally connected. Dr. Breslow testified that it was the combination of the twisting and the loss of some of the meniscus with that first arthroscopic surgery that accelerated the need for the left TKR.

5. In 06WC13170 (DOA 3/19/2004), Petitioner was temporarily totally disabled commencing Aug. 23, 2004 a through Nov. 17, 2004, a period of 12-3/7 weeks. He was off work for arthroscopic surgery to his left knee during this time.

6. In 06WC13170 (DOA 3/19/2004), Petitioner is entitled to $ 3,190.50 in medical expenses pursuant to sec. 8(a) and 8.2 of the Act as follows: $ 1,608.79 for out of pocket medical expenses; and $ 1,581.71 for the unpaid balance on the bill from Accelerated Rehabilitation (dates of service 3/18/10 through 4/5/10).

Respondent **[*32]** is entitled to a credit under Section 8(j) of $ 28,766.26, for which the Respondent shall hold Petitioner harmless pursuant to Section 8(j) of the Act. This is based on the stipulation of the parties and Dr. Breslow's credible testimony regarding his treatment. Dr. Levin agreed the treatment relating to Petitioner's left leg was appropriate although he did not think it was related to a work injury.

DISSENTBY: KEVIN W. LAMBORN

DISSENT: I respectfully dissent from the decision of the majority. I would find Petitioner failed to prove his current state of ill being is causally related to the accident of March 19, 2004. A thorough review of the record details no medical evidence to support the theory that a twisting injury on this day caused or aggravated his condition of ill being, specifically a degenerative meniscal tear. Petitioner's treating physician Dr. Breslow indicates that the tear he operated on in 2004 was a tear Petitioner sustained in 1987. Dr Breslow further indicates that it was this tear and subsequent surgery which led to Petitioner's ongoing arthritic degeneration and ultimately the need for a total knee replacement. Given the testimony of Dr. Breslow and Respondent's IME Dr. Levin it **[*33]** is clear that Petitioner's need for arthroscopic surgery was occasioned by a meniscal tear occurring in 1987, this leading to Petitioner's ongoing development of osteoarthritis and eventual total knee replacement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **ghere** (Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 26, 2012 - 8:10 AM EST

*2011 Ill. Wrk. Comp. LEXIS 393, **

JOHN HENTON, PETITIONER, v. O'REILLY AUTO PARTS, RESPONDENT.

NO: 09WC 48793

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF SANGAMON

2011 Ill. Wrk. Comp. LEXIS 393; 11IWCC 0326

April 1, 2011

CORE TERMS: tunnel, cubital, arbitrator, syndrome, carpal tunnel syndrome, store manager, symptoms, carpal, deposition, bilateral, counter, repetitive, hearsay, boxes, auto parts, fee schedule, aggravate, provider, surgery, unpaid, doctor, ulnar, nerve, arm, accidental injury, written request, job duties, arbitration, manager, documentation

JUDGES: Yolaine Dauphin; Molly C. Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2010, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, **[*2]** 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 $ 5,500.00. 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 therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

Consolidated cases: **N/A**

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 **Jeffery Tobin,** arbitrator of the Commission, in the city of **Springfield,** on **July 8, 2010.** After reviewing all of the evidence presented, **[*3]** 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 Petitioner's employment by Respondent?

F. Is 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? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

O. Other **Evidence, Admissibility of Respondent's Section 12 deposition transcript, report and DVD.**

FINDINGS

On **November 11, 2009,** Respondent **O'Reilly Auto Parts *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 **$ 48,679.80;** the average weekly wage was **$ 936.15.**

On the date of accident, Petitioner was **[*4]** **30** years of age, *married* with **1** child under 18.

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit for **$ 0** for TTD, **$ 0** for TPD, **$ 0** for maintenance, and **$ 0** for other benefits,
for a total credit of **$ 0.**

Respondent is entitled to a credit of **$ 0** under Section 8(j) of the Act.

ORDER

The respondent shall pay $ **$ 5,373.00** for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8 (j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

In no instance shall this award be **[*5]** a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Respondent shall authorize the surgeries recommended by Dr. Mark Greatting including bilateral carpal and cubital tunnel releases.

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

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

Signature of arbitrator

9/9/10

Date

The Arbitrator finds the following facts:

On November 11, 2009 the Petitioner was employed by Respondent as a 'counter person'. Petitioner had been employed as a counter person for only two weeks prior to November 11, 2009. Prior to his assignment as a 'counter person', Petitioner **[*6]** was employed by Respondent as its Store Manager and had been employed as the Store Manager since approximately December of 2004.

Petitioner was hired by the Respondent in August of 2004 and employed initially as an Assistant Store Manager. Petitioner worked as an Assistant Store Manager for approximately four months.

Petitioner stated that, as an Assistant Store Manager, he worked forty hours per week and his job involved selling, both in wholesale and retail, auto parts to customers. Petitioner testified the items he would carry by hand weighed anywhere from two ounces to sixty pounds and he would have to lift and carry the parts to the counter, or from the counter to the warehouse, where he would re-package the parts in totes and pack them on pallets for return to the warehouse.

Petitioner described that the parts were packaged in different types of packaging, such as blister

packs and boxes, and he would have to grasp parts in blister packs with his fingers and carry boxes with his hands. Petitioner described that very often he would have to go to the shelves and take a number of boxes off of the shelf which he would hold in his hand and stack up his left hand and arm. Petitioner **[*7]** also described that many of the boxes he would have to lift weighed at least thirty pounds and the store sold a lot of brake rotors and brake pads which were heavier and bulkier.

Petitioner also described having to input information into a computer either to look up products in the computer or to perform inventory. Petitioner testified he would type and also use the ten key keypad on the right hand side of the computer keyboard. Petitioner testified he typed approximately three hours a day.

Petitioner testified that when he became a manager, the number of hours he worked increased from forty hours a week to sixty-five to seventy hours a week as his job would also require him to go out to wholesale commercial customers. Petitioner testified that, except for the last year he worked, the amount of sales in his store increased every year. Petitioner testified that as the Store Manager he performed the same activities as an Assistant Store Manager in the handling of auto parts, but had to perform a lot more computer work. Petitioner also noted that as a manager he had to count deposits three times a day and count the money in the safe by hand.

Petitioner testified he first had problems **[*8]** with his right hand in 2000 and sought treatment from Dr. Stuart Yaffe. Petitioner described that he had an EMG and was diagnosed with mild, right carpal tunnel syndrome and was provided a brace by Dr. Yaffe which he wore for about six months and his symptoms went away.

Petitioner testified that while employed by the Respondent, he would also work on family vehicles occasionally and also do some outside bodywork. Petitioner estimated that the most time he might spend in a week in such outside work would be from two to four hours.

The Respondent offered records of Petitioner's purchases of items from the Respondent apparently in support of its argument that the Petitioner performed a great deal of outside work. The documents do not support this inference. Petitioner reviewed the same and his testimony confirms that most of the purchases were for items that were not for any mechanic work at all. However, for those purchases that do relate to auto parts, Petitioner testified credibly that the parts to work on his own vehicle, his family member's vehicles, and occasionally some bodywork. More importantly, the receipt documents establish that Petitioner's general mechanic work was infrequent **[*9]** and any work involving bodywork was even more infrequent. The Arbitrator further notes that Petitioner did not hide from Respondent that he performed outside work on his own car or family members' cars or had the side work.

Petitioner testified that around December of 2008 he noted problems in his hands and noted that all of his fingers would go numb and tingle and he had a pain in his wrist that would go up into his forearms. Petitioner testified he told his district manager in the Spring of 2009 about his symptoms and suspected he might have carpal tunnel syndrome. Petitioner's condition continued to worsen. Petitioner testified he did not pursue any treatment of his condition at that time because that part of the season through the summer was a busier time for work. Petitioner testified that after his demotion to a counter helper he was able to concentrate more on his health and less on the performance of the store and did first seek treatment on November 11, 2009. (P.X. 3)

Petitioner filled out an incident report on November 11, 2009 and discussed his condition with his new supervisor and store manager, Chris Pheiler. Petitioner told Mr. Pheiler he had problems with his hands **[*10]** due to keying and his work activities. Mr. Pheiler advised Petitioner he had problems with his hands as well. Petitioner was sent for a drug test. Mr. Pheiler was called by the Respondent as a witness and testified that the Petitioner's description of his job activities was accurate.

Petitioner returned to Dr. Yaffe on November 11, 2009 and described his work activities. (P.X.3)

Dr. Yaffe diagnosed the Petitioner with possible bilateral carpal tunnel syndrome and referred the Petitioner to Dr. Edward Trudeau for electrodiagnostic studies. (P.X.3)

Petitioner was seen by Dr. Trudeau on November 18, 2009. (P.X.4) Petitioner described his work activities to Dr. Trudeau. The EMG/nerve conduction velocity study was positive for bilateral median neuropathies at the wrists, moderately severe to severe on the right side, and moderately severe on the left side in electroneurophysiological testing terms. Dr. Trudeau also noted bilateral ulnar neuropathies at the elbows or bilateral cubital tunnel syndrome which was mild and neurapractic on either side, right essentially equal to left in electrophysiological testing terms. (P.X.4)

Petitioner was referred by Dr. Trudeau to Dr. Mark Greatting. Petitioner **[*11]** requested referral to Dr. Greatting because his sister had surgery with Dr. Greatting and had an excellent result.

Petitioner was examined by Dr. Greatting on December 30, 2009. (P.X.3) Petitioner filled out a patient history form advising Dr. Greatting his occupation was in retail and he worked for the Respondent. Petitioner described in detail his work activities to Dr. Greatting. On examination, Dr. Greatting noted the Petitioner had positive Tinel's over his right cubital tunnel radiating in the ulnar nerve distribution and positive elbow flexion test over his left cubital tunnel radiating in the ulnar nerve distribution. (P.X.3) Dr. Greatting also noted the Petitioner had a positive Tinel's and Phalen's and compression test over both carpal tunnels. (P.X.3) Dr. Greatting diagnosed the Petitioner with shoulder joint pain, carpal tunnel syndrome and cubital tunnel syndrome bilaterally and felt that the Petitioner's work activities had caused or contributed to the development of his problems. (P.X.3) Dr. Greatting recommended an anterior submuscular transposition of the right ulnar nerve and release of the right carpal tunnel followed by the same procedure on the left six weeks **[*12]** later. (P.X.3)

The Petitioner also advised Dr. Greatting that since being transferred to the counter work, even though he was working fewer hours, he felt he was using his arms more for repetitive type activities and felt his symptoms were worse over the past month. (P.X.3)

Dr. Greatting testified to a reasonable degree of medical certainty that the work activities described to him by the Petitioner contributed to his bilateral carpal tunnel syndrome and cubital tunnel syndrome. (P.X.8, p.9-10, 27) Dr. Greatting felt that the activities that the Petitioner described, including using the computer with keyboarding and stocking, pulling parts, unloading pallets, and opening boxes would require repetitive activities with his elbows, wrists, and hands. (P.X.8, p. 10) Dr. Greatting also based his opinion on the fact that the Petitioner advised that his symptoms were worse while he was doing his work activities. (P.X.8, p.10)

Dr. Greatting further testified that, if the Petitioner had a mild right carpal tunnel syndrome eight to ten years prior, his work activities for the Respondent could have aggravated the condition to the point where it has become symptomatic enough to require surgery. **[*13]** (P.X.8, p.29)

Dr. Greatting keeps up with current medical news and testing of this type of condition. (P.X.8, p.12)

Dr. Greatting testified there were other causes for carpal tunnel syndrome but Petitioner did not have any conditions or diseases which might pre-dispose him to develop carpal tunnel syndrome or cubital tunnel syndrome. (P.X.8, p.11) Dr. Greatting did not believe Petitioner's height or weight could be a contributing factor to the development of his cubital tunnel syndrome. (P.X.8, p.16)

Dr. Greatting stated there was no specific number of repetitions that an individual would have to perform in order to develop carpal tunnel or cubital tunnel syndrome. (P.X.8, p.12)

Dr. Greatting was familiar with NIOSH standards and felt they might be able to predict if a person might develop carpal or cubital tunnel. However, it was Dr. Greatting's understanding

that the NIOSH standards established that high force, high frequency, or repetitive jobs were more likely to cause problems. (P.X.8, p.12-13) Dr. Greatting was of the opinion that the NIOSH standards did not at all support the opinion that the Petitioner's conditions were not related to his work activities. (P.X.8, p.13) Dr. **[*14]** Greatting explained that the NIOSH standards state the conditions are more likely with certain activities to cause the problem but that does not mean that a lesser activity could not cause the problem. (P.X.8, p.13)

Dr. Greatting testified there is a significant degree of variability from person to person as to the amount of repetitious activity that might bring about carpal tunnel or cubital tunnel syndrome. (P.X.8, p.13)

Dr. Greatting stated there was not a minimum amount of keystrokes a person would have to perform every hour in order for the key-stroking to either cause or aggravate a carpal tunnel syndrome or cubital tunnel syndrome. (P.X.8, p.17) Dr. Greatting agreed that auto body repair with the use of power tools could cause or aggravate both carpal tunnel and cubital tunnel syndrome if the activity was done on a regular basis. (P.X.8, p.22) Dr. Greatting testified that, if the auto body repair activities were done on a once a month or once a week basis, he could not say that it would aggravate or contribute to carpal tunnel or cubital tunnel syndrome. (P.X.8, p.23)

Petitioner was examined by Dr. Evan Crandall at the request of the Respondent for a Section 12 evaluation. **[*15]** Dr. Crandall issued a report of his opinions and the same was provided to Petitioner's counsel. Dr. Crandall's opinions were based upon NIOSH and OSHA standards and guidelines. The Respondent failed to provide the Petitioner with the documents upon which Dr. Crandall relied prior to the deposition scheduled by agreement of the parties. Prior to the beginning of the deposition and the doctor's testimony, Petitioner's counsel withdrew his agreement to proceed with the deposition because the documents were not provided to the Petitioner. The Respondent chose to proceed with the deposition without Petitioner's counsel's presence and offered the same into evidence attaching a copy of a CD containing the documents from NIOSH and OSHA that Dr. Crandall provided to Respondent's counsel prior to the deposition and upon which Dr. Crandall relied in forming his opinions.

Respondent's counsel chose to proceed to hearing rather than reschedule Dr. Crandall's deposition after providing the Petitioner with the CD provided by Dr. Crandall.

Petitioner's counsel objected to the admission of the report prepared by Dr. Crandall on the basis that it was hearsay, objected to the deposition transcript of **[*16]** Dr. Crandall based upon hearsay and foundation, and objected to the admission of the NIOSH and OSHA standards on the basis that no foundation was laid and the documents were hearsay.

A report of a Section 12 examiner must be disclosed to the opposing party 48 hours in advance of the hearing. ***Ghere*** *v. Industrial Commission, 278 Ill.App.3d 840, 845, 663 N.E.2d 1046, 215 Ill.Dec. 532 (1996)* Respondent did so in the present case.

Respondent contends that *Diana Spilker v. Illinois Workers' Compensation Commission (6 IWCC 757, 2006 Ill.Wrk.Comp. Lexis 753)* entitled the Respondent to offer the evidence deposition, narrative report and supporting documents into evidence notwithstanding Petitioner's counsel withdrawal of his agreement to proceed and his hearsay objections. Respondent claims that Petitioner's counsel's late withdrawal of his agreement to proceed was unreasonable under the circumstances.

After considering the facts in the present case, the Arbitrator finds that there was no evidence presented that Petitioner properly subpoened the records of Section 12 examiner Crandall. The Petitioner's **[*17]** late withdrawl of the agreement to take the deposition was not reasonable. The Arbitrator sustains the Petitioner's objection the the admission of the NIOSH and OSHA standards, the CD and Dr. Crandall's report as being hearsay documents. However, Dr. Crandall is permitted to render opinions per his deposition testimony based upon his reasonable reliance upon those documents. It is noted that, contrary to *Spilker,* the documents here at issue were

not privileged but Petitioner had not properly subpoened same. There is no discovery to be demanded in workers compensation practice in Illinois. The Arbitrator's ruling regarding the circumstances of this case may have been different had the documentation in question been properly subpoened.

Dr. Greatting had a good understanding of Petitioner's job duties and history. He considered body mass index and the NIOSH and OSHA standards. His opinions are reasonable and persuasive under the circumstances of this case and are therefore given greater weight than Dr. Crandall's. Dr. Crandall provided no reasonable explanation as to why Petitioner's symptoms seemed to be worse after performing his job duties.

The Petitioner submitted his related **[*18]** medical expenses incurred to date as Petitioner's Exhibit 5.

Springfield Clinic, 11/11/09-6/16/10	$ 335.00
Dr. Edward Trudeau, 11/18/09	$ 3,980.00
St. John's Hospital, 11/18/09	$ 1,058.00
Total:	$ 5,373.00

The Arbitrator concludes as follows:

1. The Petitioner sustained accidental injury to his hands and arms on November 11, 2009 as a result of the repetitive activity required of his employment.
2. The Arbitrator finds Petitioner's bilateral carpal and cubital tunnel syndrome was causally related to the accident of November 11, 2009 and adopts the opinions of Dr. Mark Greatting in support thereof.
3. The Respondent shall authorize the bilateral carpal tunnel and cubital tunnel surgeries recommended by Dr. Greatting.
4. The respondent shall pay $ 5,373.00 for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard **[*19]** to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.
5. The Arbitrator sustains the Petitioner's objection regarding Dr. Crandall in part and overrules same regarding the deposition testimony and opinions contained therein as more fully set forth in the findings.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision affirming and adopting the Arbitrator's Decision finding that Petitioner sustained accidental injury to his hands and arms on November 11, 2009, as a result of repetitive activity required of his employment. It appears that the Arbitrator's Decision is Petitioner's proposed decision as it mirrors Petitioner's Response to Respondent's Statement of Exceptions and Supporting Brief in many respects and contains several similar errors. For example, Petitioner had not been employed as Respondent's store manager since December of 2004. It was May of 2005. (T. 22) Additionally, Petitioner did not testify he worked as an assistant store manager for approximately four months; he testified **[*20]** it was nine months (T. 21). Furthermore, the Decision of the Majority and the Arbitrator overlooks certain discrepancies in the record which undermine the finding of accident

and causal connection:

1. Missing from the Decision is any mention of the history Petitioner provided to Dr. Yaffe when initially seen by him - ie., that "He does work at a computer keyboard most of the day." (Simply untrue.)

2. Missing from the Decision is any discussion of Dr. Trudeau's notation that Petitioner has "calluses on his palms and distal digits and obviously uses his hands a lot". He went on to note that the clinical appearance of Petitioner's hands certainly looks as if Petitioner had been using them for gripping activities. (Had Petitioner associated these calluses with his job duties for Respondent one would have expected him to have testified about it during arbitration. His silence on the subject is problematic.)

3. The Majority has also failed to address the discrepancies in the histories provided to Dr. Greatting. There are three notes from Petitioner's initial visit with Dr. Greatting. In the first note, Petitioner told Dr. Greatting his symptoms occurred 1 1/2 years earlier and came **[*21]** on gradually. In the second note, Petitioner attributed his complaints to switching to counter work with increasing symptoms (however, at arbitration he testified otherwise) and, in the third note, Petitioner told Dr. Greatting he had worn a splint for two years and denied any outside interests or hobbies.

Petitioner's testimony at arbitration is not corroborated by Dr. Greatting's records. In fact, during his deposition, Dr. Greatting essentially abandons giving a causation opinion based upon his knowledge of Petitioner's job relying, instead, on a more generic and vague history provided by Petitioner that "his job for Respondent made his symptoms worse." Because Petitioner said it was so, Dr. Greatting opined it was so. Dr. Greatting offered no real opinion as to why Petitioner's work would have caused or contributed to Petitioner's condition. As such, his opinions were conclusionary and speculative and merely based upon Petitioner having told him so. However, Petitioner wasn't honest and forthright with Dr. Greatting having failed to acknowledge outside activities and pursuits and having failed to give him an accurate description of his job. Petitioner did auto body work, **[*22]** towing, and mechanical repairs on the side. Common knowledge suggests these are more hand-intensive activities than what Petitioner did for Respondent and more inclined to create calluses, such as those observed by Dr. Trudeau. Dr. Greatting even concurred these activities were more likely to cause or aggravate carpal tunnel syndrome and cubital tunnel syndrome than Petitioner's jobs for Respondent. It is also interesting that Dr. Greatting never took Petitioner off work or restricted his work duties for Respondent; yet, he found a causal relationship between the two.

While the Arbitrator made a credibility finding (see Arbitrator's Decision, p.3, para. 4), that credibility finding is identical to the one included in Petitioner's Statement of the Facts (p. 3, Petitioner's Brief). As such, that finding is suspect and overshadowed by the larger credibility issue stemming from the timing of Petitioner's demotion and the pursuit of the instant claim. Petitioner was demoted on November 3, 2009. He saw Dr. Yaffe on November 11, 2009. He retained counsel and signed his Application for Adjustment of Claim on November 12, 2009. While Petitioner testified he was worried about "fixing himself" **[*23]** during this time, his actions suggest he was looking for a legal remedy over that of a medical remedy.

The issue is whether Petitioner's job for Respondent caused or aggravated his conditions of bilateral carpal tunnel syndrome and cubital tunnel syndrome. Petitioner failed to meet his burden of proof on this issue. Petitioner gave different histories to different doctors and even different histories to the same doctor. Dr. Greatting did not have a complete and comprehensive understanding of what Petitioner did in his job for Respondent. In the end, he simply relied on Petitioner's statement that his symptoms bothered him at work. Illinois is not a positional risk

state. However, to affirm the Arbitrator's Decision herein is to, essentially, find liability based upon just that. It is not enough to base liability for a repetitive trauma injury on an employee's belief that his symptoms are worse at work, especially when, as here, the treating doctor's knowledge of the employee's work is so limited. For these reasons, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **ghere** (Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 26, 2012 - 8:16 AM EST

*2011 Ill. Wrk. Comp. LEXIS 186, **

STEVEN J. KRAJEWSKI, PETITIONER, v. CHARLES E. SHOMO & ASSOC., RESPONDENT,

NO: 05WC 50209

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2011 Ill. Wrk. Comp. LEXIS 186; 11IWCC 0172

February 18, 2011

CORE TERMS: pain, arbitrator, lifting, chiropractic, countertop, medical treatment, carpenter, lumbar, right leg, chiropractor, stone, heavy, unemployment, consultation, repetitive, patient, notice, layoff, temporary total disability, burden of proof, failed to meet, handwritten, installing, cabinets, surgery, waiting, hired, disk, def, unemployment compensation

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 26, 2010 is hereby affirmed and adopted.

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

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

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

ATTACHMENT

CORRECTED DECISION

[*2] 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 **Richard A. Peterson,** arbitrator of the Commission, in the city of **Chicago,** on **February 3 and March 5, 2009.** 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

A. Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. Was there an employee-employer relationship?

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

D. What was the date of the accident?

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?

[*3] L. What is the nature and extent of the injury?

M. Should penalties or fees be imposed upon the respondent?

N. Is the respondent due any credit?

FINDINGS

. On **July 8, 2005,** the respondent, **Charles E. Shomo & Assoc., *was*** operating under and subject to the provisions of the Act.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

. On this date, an employee-employer relationship [O>***did<O] did not*** exist between the petitioner and respondent.

. On this date, the petitioner ***did not*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was not*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **25,504.48;** the average weekly wage was $ **1,289.71.**

. At the time of injury, the petitioner was **41** years of age, ***single*** with **-0-** children under 18.

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

. To date, $ **14,980.37** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary **[*4]** total disability benefits of $ **n/a**/week for **-0-** weeks, from **n/a,** through **n/a,** as Petitioner failed to meet his burden of proof to establish that an accident did occur on March 28, 2005, that arose out of and in the course of Petitioner's employment by Respondent.

. The respondent shall pay the petitioner the sum of $ **n/a**/week for a further period of **-0-** weeks, as provided in Section **n/a** of the Act, because Petitioner failed to meet his burden of proof to establish that an accident did occur on March 28, 2005, that arose out of and in the course of Petitioner's employment by Respondent.

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

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

. The respondent shall pay $ **-0- [*5]** in attorneys' fees, as provided in Section 16 of the Act.

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

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

Signature of arbitrator

[O>**December 17, 2005**<O]

January 21, 2010

Date

FINDINGS OF FACT

This cause came to be heard on the petitioner's Motion for Hearing on February 3, 2009 in Chicago, IL. Both parties were duly represented by counsel. Petitioner has filed two separate claims regarding his alleged injury, one alleging a specific traumatic injury, decided in this case, 05WC050209, and the other alleging repetitive trauma, decided in companion case,

07WC023301. Petitioner, Steven Krajewski, and Greg Ireland testified on **[*6]** behalf of Petitioner, and Kenneth W. Wolf, Jr. testified-on behalf of Respondent on that date. Proofs were closed on February 3, 2009. However, Petitioner filed a Motion to Reopen Proofs to Amend Application on March 4, 2009, whereupon a hearing was had on the record on March 5, 2009 with both parties being duly represented by counsel. Proofs were then closed again on March 5, 2009.

On or about March 31, 2005, Petitioner was working for Respondent, where he was earning approximately $ 1,289.71 per week at that time. He was hired in 1991 as a carpenter. His duties included installing laboratory furniture, which consisted of a lot of heavy lifting of steel cabinets, stone countertops and butcher block countertops. Mr. Wolf testified that Respondent was engaged in the business of designing, selling and installing research laboratory cabinets and countertops (T. 71). Mr. Wolf testified his company hired union carpenters to perform this work (T. 71).

Petitioner admitted that he received chiropractic care at McParland in the years prior to the alleged accident of March 31, 2005 (T. 31). Petitioner admitted, under cross-examination, that even though he testified that his pain never went away, **[*7]** he did not receive medical treatment in April, May and June of 2005 (T. 38).

On or about March 31, 2005, while working for Respondent at Corn Products, he was lifting heavy items or stone countertops, while installing laboratories, steel cabinets, stone countertops, as well as butcher block countertops, when he felt pain in his back. He claimed that he immediately reported the injury to his supervisor, Greg Ireland, the foreman with whom he was working on this job, as was required by company policy (RX1). Mr. Ireland did not recall anything unusual occurring while working with Petitioner around March 31, 2005 (T. 64). Mr. Ireland told him to "take it easy". He worked his full work day despite the pain. He did not know whether Mr. Ireland filled out an incident report or advised anyone else from Respondent as to his complaints. He was also working with Chris Whitencollar, who was also a supervisor, and mentioned the fact that he had back pain to him as well. Tim Caninal was also working with him. Under cross-examination, Mr. Wolf testified that Greg Ireland was not a foreman working for Respondent in March of 2005 (T. 82-83). Mr. Wolf testified that the only foreman working around **[*8]** that time was Chris Whitencollar (T. 83). Petitioner explained that they would pick up piles of stone that was located on the ground on the side of the building, they would then put it in Mr. Ireland's van, and then they would distribute it from building to building.

After performing his repetitive daily work activities of heavy lifting, he would experience back pain many times prior to his alleged injury on or about March 31, 2005. Previously, he would go to a chiropractor, such as Dr. McParland, get adjustments, and the pain would usually subside. He never had any previous MRIs while seeing the chiropractor. After the alleged lifting incident on or about March 31, 2005, he was laid off and he was waiting to be called back to work. He filed for unemployment benefits on or about May 1, 2005 and received unemployment benefits through June 25, 2005 (RX2). Petitioner admitted that he received unemployment compensation from March 28, 2005 through June 25, 2005 (T. 32) Mr. Wolf testified that due to work slow-downs, he was forced to layoff Petitioner and other union carpenters (T. 76-77). Mr. Wolf agreed that Petitioner's last day of work was March 28, 2005 (RX 2; RX4;T.78; 88-89). This **[*9]** was supported by the unemployment compensation notice, which indicated Petitioner's last day of work was March 28, 2005 (RX2). This was further supported by the payroll record admitted into evidence showing the last day of work for Petitioner was March 28, 2005 (RX4). That payroll record showed Petitioner and Mr. Wolf both working the full day on the same project (RX4).

Petitioner testified that he did not seek immediate medical treatment (T. 21). Petitioner explained that he thought his back pain would improve since he was not working (T. 21). Petitioner eventually sought medical treatment on July 5, 2005 (T. 21). On that day, Petitioner treated at McParland Chiropractic (T. 21, PX1). The records of McParland Chiropractic included a consultation questionnaire completed by Petitioner (PX1). When asked what brought on the

lower back pain, Petitioner wrote that he did not know (PX1). When asked when the pain began, Petitioner wrote July 3, 2005 (PX1). Petitioner further described his lower back pain as constant (PX1). Petitioner admitted that he then received short-term disability benefits from his union from July 7, 2005 through June 23, 2006 (T. 33). Following Petitioner's layoff **[*10]** on March 28, 2005, Mr. Wolf testified that Petitioner called him asking for work (T. 79).

Petitioner testified that on July 8, 2005, he returned to McParland with excruciating pain while waiting in the waiting room (T. 22). The records indicate that Petitioner received chiropractic treatments on July 5th, 6fh and 7th of 2005 (PX1). The chiropractic bill lists a consultation on July 8, 2005 but no charge (PX2). He went back to McParland Chiropractic a few times and received some manipulations (PX1; PX2).

He then went to Elmhurst Memorial Hospital emergency room on July 8, 2005 because the pain became excruciating and was radiating down into right leg. (T. 22) On July 8, 2005, Petitioner was examined by Dr. Srinivasan of Elmhurst Memorial Hospital (PX3). Under cross examination, Petitioner could not recall whether he told the hospital that he was employed by Installation Resource, Inc., the company listed on his admission record (T. 46-47). Petitioner testified that he did not work for anyone between his layoff in March of 2005 and his first medical treatment in July of 2005 (T. 47). Petitioner gave a history of complaints of low back and right leg pain (PX3). Petitioner gave a history **[*11]** of having first developed low back pain at age 18 with occasional lumbar pain in his early 20's (PX3). Petitioner gave a history that four days earlier he developed severe lumbar pain and two days earlier developed right leg pain (PX3). He gave no history of any work incident on March 28, 2005. Petitioner was admitted to the hospital (PX3) on July 8, 2005, x-rays were performed of his lumbar region and he was given some pain medications (PX3). A lumbar MRI was prescribed by Dr. Rajammal Srinivisan, which he underwent on July 9, 2005 while at Elmhurst Memorial Hospital. Petitioner underwent a MRI of the lumbar spine which revealed disc herniations at L4/5 and L5/S1 with severe degenerative disc, disease noted at L4-5 and L5-S1 with retrolisthesis at both levels (PX3). Petitioner was diagnosed with chronic lumbar spondylosis, spondylitis, and right lower- extremity radiculitis (PX3).

As a result, on July 10, 2005, Dr. Srinivisan referred him to Dr. Kevin Koutsky of CINN and Dr. Kenneth Heiferman of CINN (PX5). On July 10, 2005, Petitioner was examined by Dr. Koutsky of Elmhurst Memorial Hospital (PX3). Petitioner gave a similar history of steadily progressively worsening back pain over **[*12]** several years which became acutely exacerbated the previous week. Again, he gave no history of any work incident on March 28, 2005. (PX3). On July 10, 2005, Dr. Heiferman and Dr. Koutsky recommended surgery (PX6). On July 11, 2005, Dr. Heiferman performed a a decompressive laminectomy with bilateral foraminotomy (PX3). Petitioner underwent a fusion at L4-5 and L5-S1 with Brantigan cages at Elmhurst. Memorial Hospital (PX3; PX8). On July 8, 2005, Petitioner also gave a history that the pain was present for the past four or five days. On July 14, 2005, the discharge summary reported that Petitioner denied any trauma and did not remember lifting any heavy objects (PX3). Under cross examination, Petitioner testified that after his surgery, he told his doctors that he hurt his back in March, 2005, lifting a countertop while working for Respondent (T. 48). No such history was found in any records admitted into evidence.

He was discharged from the Elmhurst Memorial Hospital on July 14, 2005, and continued to follow-up with Dr. Koutsky and Dr. Heiferman, where they continued to restrict him from work (PX3; PX6; PX8). He attended physical therapy at Elmhurst Memorial Hospital from September **[*13]** 29, 2005 through January 4, 2006 per Dr. Koutsky (PX6). He also attended physical therapy at Athletico from February 13, 2006 through August 22, 2006 per Dr. Koutsky (PX7; PX9) On August 14, 2006, Dr. Koutsky pronounced Petitioner at maximum medical improvement (MMI) and released petitioner to return to work without restrictions as of August 15, 2006. (PX7) He did not return to work with Respondent after that date. He did work for another employer, ALCO, for approximately one week thereafter. He is not currently employed as of the date of the hearing.

On September 13, 2007, Petitioner was examined by Dr. Mark Lorenz as part of an IME requested by his attorney (PX11). Dr. Lorenz's diagnosis was status post laminectomy, diskectomy, and fusion L4 to S1 with quite good results considering the patient's symptomatology. Dr. Lorenz concluded the patient had some mild manageable chronic low back condition that did not cause any dysfunction prior to the alleged work injury of March 2005. Dr. Lorenz noted that at that point in time, the patient had a change in his symptomatology in that he developed back pain that became progressively worse rather than improving as it had in the past going **[*14]** back to normal.. Dr. Lorenz opined that the lifting incident on or about March 31, 2005 aggravated the patient's preexisting condition of disk degeneration and may have in fact caused herniation of his L4-5 disk at that time. Dr. Lorenz recommended a permanent restriction of a maximum lifting of 60 pounds on an occasional basis (PX11) Dr. Lorenz was deposed on August 27, 2008 (PX11). On August 27, 2008, the deposition of Petitioner's Section 12 examiner, Dr. Lorenz took place. Dr. Lorenz's testimony at his deposition was consistent with his report in that he found that the lifting incident on or about March 31, 2005 aggravated the patient's pre-existing condition of disk degeneration and may have in fact caused herniation of his L4-5 disk at that time. During his deposition, Dr. Lorenz made one off-hand comment that Petitioner's repetitive work activities of a carpenter may have also contributed to that pre-existing condition. (PetEx11,p24) Such a comment was not consistent with Dr. Lorenz's report and the Arbitrator sustained Respondent's objection based on **Ghere.** Dr. Lorenz had not made any diagnosis of repetitive trauma as the cause of Petitioner's July, 2005, pain and resultant **[*15]** surgery. He provided no medical evidence to support such a conclusion and provided no medical analysis for reaching such a conclusion. Finally, he did not at any time provide any such expert medical opinion beyond his single of-hand comment. that Petitioner Dr. Lorenz opined that all of the treatment rendered was reasonable and necessary.. Dr. Lorenz further testified that Dr. Mirkovic's opinions were consistent with his own (PX11).

On February 26, 2008, Petitioner was examined by Dr. Mirkovich as part of an IME as requested by Respondent (PX1.1). On February 26, 2008, petitioner was examined by Dr. Srdjan Mirkovic at the request of Respondent. Dr. Mirkovic noted that petitioner was not positive of the exact date of the injury but found that his description of the accident was consistent with back pain as a result of repetitive lifting of heavy objects at work while working with another coworker. In addition, Dr. Mirkovic recommended a functional capacity evaluation to determine his true restrictions but stated that without one, he would release him to work with a 50-60 pound lifting restriction, which would place him at the medium level of work (PX11).

Petitioner admitted that his **[*16]** memory of the alleged accident would have been better back in 2005 then today (T. 34). Petitioner thought he told his chiropractor in July of 2005 how he had injured his back in March of 2005. Petitioner admitted that he completed the handwritten consultation report for McParland Chiropractic (T. 41-42; PX1). Petitioner was shown a copy of the Application for 05 WC 50209 (T. 43; PX11 def. dep. ex. 1). The Application was signed by Petitioner on September 1, 2005 (T. 43) but was not filed until November 14, 2005. Petitioner on this Application alleged an accident date of July 8, 2005. Under re-direct examination, Petitioner admitted to his attorney that he signed a blank Application (T. 54). Petitioner identified the handwritten application that he completed for short-term disability benefits through his union (T. 45; PX11 def. dep. Ex. 3). Petitioner admitted to completing this document in July or August of 2005 (T. 45). Petitioner provided an accident date of July 6, 2005 and wrote that the accident occurred at his chiropractor's office.

Mr. Wolf testified that all new employees are given a list of safety rules which they must sign to acknowledge that will be abide by the rules (T. **[*17]** 73). Mr. Wolf testified that the first rule is that all accidents must be reported to the supervisor immediately (T. 73). Mr. Wolf then identified Petitioner's signature dated April 9, 1991 on the safety sheet (T. 73; RX1). Mr. Wolf testified that Petitioner began working for Respondent in April of 1991 (T. 74). Mr. Wolf testified that he was never notified by anyone that Petitioner had injured his back on any date (T. 75; 80). Mr. Wolf believed that Respondent became aware that Petitioner was alleging an accident was in November of 2005 when they received the Application alleging a July 8, 2005 accident (T. 80). Mr. Wolf did not recall any conversations with Mr. Ireland about an accident (T. 80).

Petitioner was not paid temporary total disability from Respondent for the period of July 8, 2005 through August 14, 2006. He did, however, receive some disability payments from Chicago Regional Council of Carpenters Health and Welfare Fund for period of July 7, 2005 through June 28, 2006 in the amount of $ 14,980.37 (PX12; PX13).

Respondent did not pay any of the medical bills from McParland Chiropractic, Elmhurst Memorial Hospital, Dr. Rajammal Srinivisan, Dr. Kevin Koutsky, Dr. Kenneth **[*18]** Heiferman, or Athletico, totaling $ 333,479.74. The Chicago Regional Council of Carpenter's Health & Welfare Fund paid medical bills in the amount to the providers in the amount of $ 68,114.27 but approximately $ 21,233.60 remain as unpaid balances because they were denied by the Chicago Regional Council of Carpenter's Pension Fund (PX13; PX14). Petitioner still has back pain, and his right foot and left thigh still become numb occasionally. He still does home exercises and stretching to alleviate the pain, and periodically he will take Tylenol. He has not had any subsequent injury to his back after the surgery of July 11, 2005.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING B, WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that on or about March 31, 2005, he was working for Respondent. He testified that he was hired in 1991 as a carpenter. Petitioner further testified that after the alleged lifting incident on or about March 31, 2005, he was laid off and he was waiting to be called back to work. He filed for unemployment benefits on or about May 1, 2005 and received unemployment benefits through **[*19]** June 25, 2005 (RX2) Mr. Wolf testified Respondent hired union carpenters to perform this work (T. 71). Mr. Wolf testified that due to work slow-downs, he was forced to layoff Petitioner and other union carpenters (T. 76-77). Mr. Wolf agreed that Petitioner's last day of work was March 28, 2005 (RX 2; RX4;T.78; 88-89). This was supported by the unemployment compensation notice, which indicated Petitioner's last day of work was March 28, 2005 (RX2). This was further supported by the payroll record admitted into evidence showing the last day of work for Petitioner was March 28, 2005 (RX4). Petitioner testified that since March 28, 2005, he has never returned to work for Respondent.

Based on the foregoing, the Arbitrator concludes that Petitioner and Respondent were in an employer-employee relationship from 1991 until March 28, 2005, but not after that date, including on and about July 8, 2005.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING C, DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner admitted that he received chiropractic care at McParland in the years prior to the **[*20]** alleged accident of March 31, 2005 (T. 31). Petitioner admitted, under cross-examination, that even though he testified that his pain never went away, he did not receive medical treatment in April, May and June of 2005. (T. 38)

Petitioner claims that on or about March 31, 2005, while working for Respondent at Corn Products, he was lifting heavy items or stone countertops, while installing laboratories, steel cabinets, stone countertops, as well as butcher block countertops, when he felt pain in his back. However, he did not seek any medical attention until after he was laid off and his unemployment benefits ran out. Then, on July 5, 2005, more than 3 months after his claimed injury date, he returned to McParland. The records of McParland Chiropractic included a consultation questionnaire completed by Petitioner (PX1). When asked what brought on the lower back pain, Petitioner wrote that he did not know (PX1). When asked when the pain began, Petitioner wrote July 3, 2005 (PX1). Petitioner further described his lower back pain as constant (PX1).

Petitioner testified that on July 8, 2005, he returned to McParland with excruciating pain while waiting in the waiting room (T. 22) He then **[*21]** subsequently went to Elmhurst Memorial Hospital emergency room on July 8, 2005, because the pain became excruciating and was radiating down into right leg. (T. 22) On July 8, 2005, Petitioner was examined by Dr. Srinivasan of Elmhurst Memorial Hospital (PX3). Under cross examination, Petitioner could not recall whether he told the hospital that he was employed by Installation Resource, Inc., the company listed on his admission record (T. 46-47). Petitioner testified that he did not work for anyone between his layoff in March of 2005 and his first medical treatment in July of 2005 (T. 47). Petitioner gave a history of complaints of low back and right leg pain (PX3). Petitioner gave a history of having first developed low back pain at age 18 with occasional lumbar pain in his early 20's (PX3). Petitioner gave a history that four days earlier he developed severe lumbar pain and two days earlier developed right leg pain (PX3).

Petitioner gave a similar history of steadily progressively worsening back pain over several years which became acutely exacerbated the previous week (PX3).

Petitioner admitted that his memory of the alleged accident would have been better back in 2005 than today **[*22]** (T. 34). Petitioner thought he told his chiropractor in July, 2005, how he had injured his back in March, 2005. That is not reflected in those records. Petitioner admitted that he completed the handwritten consultation report for McParland Chiropractic which when asked what brought on the lower back pain, Petitioner wrote that he did not know (PX1), when asked when the pain began, Petitioner wrote July 3, 2005. (PX1) (T. 41-42; PX1) Petitioner was shown a copy of the Application for case number 05WC50209 (T. 43; PX11 def. dep. ex. 1). The Application was signed by Petitioner on September 1, 2005 (T. 43) but was not filed until November 14, 2005. Petitioner on this Application alleged an accident date of July 8, 2005. Under re-direct examination, Petitioner admitted to his attorney that he signed a blank Application (T. 54). Petitioner identified the handwritten application that he completed for short-term disability benefits through his union (T. 45; PX11 def. dep. Ex. 3). Petitioner admitted to completing this document in July or August of 2005 (T. 45). Petitioner provided an accident date of July 6, 2005 and wrote that the accident occurred at his chiropractor's office. On July **[*23]** 10, 2005, Petitioner reported to Dr. Koutsky, his surgeon, that his back pain was from an acute exacerbation that occurred one week prior. (PetEx6,7/10/05 Consultation Note) The first claim by Petitioner of a work related incident on March 31, 2005, was in his first Application for Adjustment of Claim, filed November 14, 2005. When Petitioner finally saw Dr. Lorenz on September 13, 2007, 2 1/2 years after his alleged accident, he finally reported, to one of his doctors, the incident at work that he now relies on as a work related accident. (PetEx11,DepEx2)

Based on the foregoing, the Arbitrator concludes that Petitioner did not seek any medical treatment for his alleged March 28, 2005, injury for 3 1/2 months; that, when he did seek medical treatment in July, 2005, he gave repeated, consistent contemporaneous reports to his doctors and elsewhere that his pain was from an acute incident on July 8, 2005, or shortly before that date; and that there is no evidence in the record to confirm Petitioner's claim that he suffered an incident on March 28, 2005, until his visit to Dr. Lorenz on September 13, 2007, 2 1/2 years after his alleged accident. The Arbitrator concludes that the contemporaneous **[*24]** reports by Petitioner when he was seeking to obtain treatment and alleviate his pain are far more credible than his later reports when he is seeking to establish and prove his workers' compensation case. Therefore, the Arbitrator concludes that Petitioner's contemporaneous reports that his pain began with an acute incident in early July, 2005, is far more credible than his current claim that he suffered an incident at work on March 28, 2005. Accordingly, the Arbitrator concludes that Petitioner has failed to meet his burden of proof to establish that an accident did occur on March 28, 2005, that arose out of and in the course of Petitioner's employment by Respondent.

IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING ALL OTHER ISSUES IN THIS CASE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator concluded above that Petitioner has failed to meet his burden of proof to establish that an accident did occur on March 28, 2005, that arose out of and in the course of Petitioner's employment by Respondent. Therefore, all other issues in this case are moot.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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

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

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **ghere** (Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 26, 2012 - 8:18 AM EST

*2010 Ill. Wrk. Comp. LEXIS 1327, **

THOMAS WISNEWSKI, PETITIONER, v. RUAN LEASING COMPANY, RESPONDENT.

No. 06WC 47802

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2010 Ill. Wrk. Comp. LEXIS 1327; 10IWCC 1278

December 23, 2010

CORE TERMS: right shoulder, arbitrator, doctor, right arm, shoulder, opined, pain, truck driver, abduction, rotation, temporary, driving, truck, partial disability, arthroplasty, lifting, flexion, surgery, arm, physical therapy, upper extremity, deteriorated, recommended, deposition, diminished, prognosis, permanent, external, manual, current condition

JUDGES: Kevin W. Lamborn; Yolaine Dauphin; David L. Gore

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, temporary partial disability, permanent partial disability, medical expenses, prospective medical treatment, and wage rate and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Decision of the Arbitrator contained a clerical error with respect to the duration of Petitioner's temporary partial disability award. The duration of the award should be 1-3/7 weeks, not the 3-2/7 weeks awarded, as Petitioner was found to be temporarily partially disabled from February 7, 2007, through February 17, 2007. The Commission, therefore, modifies the Decision of the Arbitrator to find Respondent liable to pay to Petitioner temporary partial disability benefits of $ 651.81 for 1-3/7 weeks under Section 8 (a) of the Act.

The Commission further modifies the Decision of the Arbitrator to vacate **[*2]** the award for medical expenses in the amount of $ 1,379.67 that was given under Section 8(a) of the Act. The Commission finds no basis under Illinois case law to award such an award as the above expenses were incurred as a result of Petitioner undergoing a functional capacity evaluation that was ordered by Petitioner's independent medical examiner, Dr. Newman. Furthermore, the Commission notes that Dr. Newman is not within any chain of referral of either Dr. Ortinau or Dr. Pernona, the two physicians Petitioner saw prior to being seen by Dr. Newman.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated March 29, 2010, as modified herein, is hereby affirmed and adopted.

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

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

ATTACHMENT **[*3]**

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 **Gregory Dollison,** Arbitrator of the Commission, in the city of **Chicago, Illinois,** on **December 16, 2009 and January 6, 2010.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

F. Is Petitioner's current condition of ill-being causally related to the injury?

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. What temporary benefits are in dispute?

TPD
TTD

L. What is the nature and extent of the injury?

FINDINGS

On **August 24, 2006,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an **[*4]** accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **59,635.88;** the average weekly wage was $ **1,217.06.**

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** children under 18.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **32,466.88** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $ **32,466.88.**

Respondent is entitled to a credit of $ **n/a** under Section 8(j) of the Act.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **811.37**/week for **40-6/7** weeks, from **08/25/06** through **10/02/06, 10/10/06** through **02/06/07** and **02/18/07** through **06/24/07,** which is the period of temporary total disability **[*5]** for which compensation is payable.

. The respondent shall pay the petitioner temporary partial disability benefits of $ **651.81**/week for **3-2/7** weeks, from **02/07/07** through **02/17/07** that being the period of temporary partial disability for which compensation is payable under § 8(a) of the Act.

. The respondent shall pay the petitioner the sum of $ **619.97**/week for a further period of **164.45** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the permanent loss of use of the right arm to the extent 65% thereof.**

. The respondent shall pay the further sum of $ **1,394.67** for necessary medical services, as provided in Section 8(a) of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day **[*6]** 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

3/29/2010

Date

Attachment to Arbitrator Decision

(06 WC 47802)

FINDINGS OF FACT:

Petitioner, Thomas "Buck" Wisneski, was an over the road truck driver employed by

Respondent, Ruan Leasing Co. on August 24, 2006. Petitioner testified to driving a semi-trailer truck delivering new and used car batteries for Respondent. His duties consisted of driving a semi truck with a manual transmission of up to 70. hours per week including the loading and unloading of pallets of batteries with an automatic pallet jack. Petitioner testified that on August 24, 2006 as he was pulling a heavy pallet of old batteries with an electric jack, the jack got stuck underneath the palette. He rocked the handle back and forth and pulled really hard to get it un-stuck. While doing so he felt immediate pain in his right shoulder. He got the pallet into the truck and drove to a rest stop where he called his wife. Petitioner stated he went to sleep and woke up with a great deal of shoulder pain that next morning. He called the terminal manager **[*7]** John Tulley who sent a driver to deliver Petitioner's load to the warehouse and to drive him to the hospital.

Petitioner was driven to Delnor Community Hospital for care on August 25, 2006. The Delnor records reflect that Petitioner was treated for a right shoulder injury brought on pulling a heavy pallet the day before at work. The record also recalls Petitioner's history of two prior operations on his right shoulder including prior removal of distal clavicle. The physician in the emergency room rendered an impression of right shoulder strain; rotator cuff tear and/or proximal biceps tendon tear rupture. Petitioner was placed in a shoulder immobilizer and advised that "...he has had a serious injury to the shoulder and [that] clearly requires prompt orthopedic follow-up. (PX 1, pp. 6-7, 13, 17).

Petitioner testified that he had injured his right shoulder twice in the past. In 1991 he had surgery and was off work for a total of four years. He returned to. work as a truck driver thereafter and suffered a work injury to the right shoulder in 1997. This injury required conservative care and he restarted his truck driving career four months later. The records of Rezin Orthopedic indicate **[*8]** that Petitioner was released to full duty work on May 6, 1997 by Dr. Treacy. (PX 2, RX 6). Petitioner testified that he had been driving a semi trailer for various employers ever since and up through the August 24, 2006 date of accident using a manual transmission. He testified that he drove the manual shift in a conventional fashion using his right arm.

On August 28, 2006, Petitioner presented to Dr. Ortinau at Rezin Orthopedics. The doctor diagnosed shoulder strain, took Petitioner off work and prescribed an MRI Arthrogram. On September 18, 2006, Dr. Ortinau noted the arthrogram demonstrated fairly significant and chronic rotator cuff issues. Petitioner reported that he had good function up until this last injury. The doctor opined that Petitioner sustained a rotator cuff tear. He felt the condition was chronic but noted that Petitioner had an acute injury which may have worsened his situation. He placed him on restrictions of no lifting over 5 lbs with the right shoulder, no overhead use of right shoulder, no truck driving and ordered physical therapy which commenced on September 21, 2006. (PX 4). Petitioner's restrictions were continued on September 28, 2006. (PX 2). Petitioner **[*9]** testified he provided these restrictions to Respondent but a position was not provided.

Petitioner next sough a second opinion and began treating with Dr. Paul Perona. The records of Dr. Perona reflect an October 3, 2006 visit and a history of hurting his right shoulder while moving an electric jack at work and prior shoulder surgery 15 years prior. Upon examination he presented with forward flexion limited to 80 degrees with anterior crepitus, abduction limited to 50 degrees with pain, weak resisted abduction, internal rotation to L5, 0 degrees of external rotation and positive Hawkins and impingement signs. The doctor assessed right shoulder significant degenerative joint disease of the glenohumeral joint. He continued the 10 lb lifting restriction with no lifting above waist level. He also recommended the continuation of physical therapy and administered an injection. On October 10, 2006, Dr. Perona declared Petitioner totally incapacitated from work until the next evaluation. Petitioner returned to the doctor on October 31, 2006. At that time, Dr. Perona discussed a total shoulder arthroplasty of right shoulder and indicated Petitioner totally disabled from work for an undetermined **[*10]** length of time. (PX 5).

Petitioner continued to participate in physical therapy at the Community Hospital of Ottawa until December 4, 2006 when therapy was halted by Dr. Perona. (PX 4). Petitioner received another cortisone shot on December 29, 2006 from Dr. Perona. (PX 5)

Petitioner was examined pursuant to § 12 of the Act by Respondent's physician Dr. Brian Cole on January 29, 2007. Dr. Cole discussed the prior history of surgeries and indicated Petitioner had a full recovery with no shoulder problems prior to the August 24, 2006 work accident. On examination Dr. Cole found reduced active and passive range of motion of right shoulder. Dr. Cole opined that Petitioner had osteoarthritis. He felt that "[d]espite the preexisting condition, this is an aggravation of that." The doctor stated "[t]here is no indication that had he not been pulling the pallet jack that this would have otherwise become symptomatic. Therefore, this is a permanent aggravation of the preexisting condition." He opined further that "[g]iven the mechanism of injury, immediate reporting of pain, I would recommend that he undergo a total shoulder replacement and this would be considered work related." He felt Petitioner **[*11]** should be restricted to no overhead lifting, no lifting pushing or pulling more than five pounds. (RX 2).

Petitioner testified he did attempt to return to light duty pending surgery approval with the restrictions recommended by Dr. Cole. Respondent accommodated these restrictions and allowed him to work forty hours per week. The wage records indicate he received TTD through February 7, 2007. (RX 9) Petitioner began light duty work on February 7, 2007 through February 17, 2007 earning gross wages of $ 1,078.00 with a net of $ 785.05. (PX 12)

On February 06, 2007 Dr. Perona discussed the total shoulder arthroplasty. The doctor noted that he agreed with Dr. Coles' restrictions. However, he expressed a strong recommendation that Respondent provide Petitioner with some type of transportation to and from work citing Petitioner's difficulty keeping his hand on steering wheel. He declared. Petitioner totally disabled from operating an automobile. (PX 5)

On February 28, 2007 Dr. Perona performed a right total shoulder arthroplasty. Petitioner followed up with Dr. Perona in March, April, May and June 2007. He continued physical therapy at Community Hospital of Ottawa at this time. Dr. Perona **[*12]** also kept Petitioner off work during this time. (PX 5).

On June 18, 2007, Petitioner was again examined pursuant to § 12 of the Act by Respondent's Dr. Brian Cole. The doctor felt Petitioner's right shoulder glenohumeral degenerative joint disease was fixed and stable. He opined that Petitioner was at maximum medical improvement and released him to full duty as a truck driver. Dr. Cole noted that there was a potential subscapularis tendon healing issue and cautioned Petitioner with respect to getting in and out of his rig and also using any lifting or external rotation. (RX 3)

On June 21, 2007, Dr. Perona released Petitioner to full duty work beginning June 25, 2007. Petitioner was advised to return to the doctor in three months. (PX 5)

Petitioner testified that he did not attempt to return to work for Respondent following his full duty work release. He instead went to work for Coal City as a semi truck driver transporting chemicals. Petitioner began working for Enterprise Trucking on September 3, 2007 as a truck driver.

On September 28, 2007 Petitioner followed up with Dr. Perona with a main complaint of weakness. Upon examination his range of motion was 170 degrees of abduction, **[*13]** 170 degrees of forward flexion, 20 degrees of external rotation, internal rotation to the right buttock and strength at 4/5, especially with abduction and forward flexion. Dr. Perona recommended home exercises and Celebrex. (PX 5).

At his request Petitioner was examined by Dr. Daniel C. Newman on January 10, 2008. In deposition testimony Dr. Newman testified that he reviewed the reports of Dr. Brian Cole,

Delnor Community Hospital, Midwest Center for Advanced Imaging, office notes of Dr. Perona and the records of Newsome Physical Therapy contemporaneous with his examination of Petitioner. (PX 9, p. 7). His examination on January 10, 2008 demonstrated Petitioner was neurologically symmetrical except for some weakness to bicep grip and tricep on the right side. His active range of motion of forward flexion of right shoulder was limited to 100 degrees, abduction limited to 90 degrees, passive range of motion was limited by ten degrees of abduction, limited by 20 degrees of internal rotation and 25 degrees of external rotation with pain at extremes of motion. (PX 9, p. 9). Dr. Newman opined Petitioner had marginal ability to perform current truck driving duties even without loading and **[*14]** unloading. This marginal ability was due to loss of range of motion, pain and loss of strength he exhibited in the right shoulder upon examination. (PX 9, p. 10). Dr. Newman testified that he reviewed the June 18, 2007 report of Dr. Cole. The doctor stated Petitioner's right shoulder condition had significantly deteriorated in the time span between Dr. Cole's examination of June 18, 2007 and the examination he conducted on January 10, 2008. (PX 9, p. 11).

Petitioner testified that his shoulder was hurting "real bad." He stated that his right shoulder was getting worse. He stated that he attempted to see Dr. Perona but couldn't because his group health insurance woouldn't cover the visits because it was worker's compensation injury and that the worker's compensation carrier wouldn't authorize the visits.

On September 12, 2008 he returned to Dr. Perona with complaints of constant shoulder pain. Upon examination his range of motion was reduced to forward flexion to 20 degrees, 30 degrees of abduction and external rotation to 10 degrees. The doctor administered a lidocaine injection into Petitioner's right shoulder. (PX 5).

On October 7, 2008 the parties deposed Petitioner treating orthopedic **[*15]** surgeon Dr. Paul Perona. The doctor testified that on June 25, 2007 Petitioner was doing quite well and he released him to work without restrictions. Dr. Perona opined the next time he saw Petitioner on September 28, 2007, he presented with some weakness but that his prognosis was good. (PX 8, p. 15). Dr. Perona examined Petitioner next on 09/12/08 and he recalled Petitioner's significantly deceased range of motion and diagnosed him with status post total right shoulder arthroplasty with fibroarthrosis of the shoulder. Dr. Perona stated Petitioner's prognosis was good after the September 18, 2007 appointment but had gotten worse. He felt Petitioner's prognosis was poor noting Petitioner demonstrated significantly less range of motion and was in pain as of the September 12, 2008 exam. (PX 8, pp. 16-17, 20). (Respondent's counsel objected to said testimony on the basis of ***Ghere*** stating that the 09/12/08 medical visit of Petitioner and subsequent testimony constitutes surprise medical testimony.) Dr. Perona opined that within a reasonable degree of medical and surgical certainty that the current condition of Petitioner's right shoulder is related to the August 24, 2006 work injury. **[*16]** The doctor noted Petitioner's condition before the accident and the accident made the condition symptomatic. He also noted that Petitioner functioned as a competent truck driver without complaints for a number of years prior to the August 2006 incident. (PX 8, pp. 19) Dr. Perona opined that within a reasonable degree of medical and surgical certainty that the medical care received by Petitioner is related to the August 24, 2006 accident and was reasonable and necessary to cure the effects of this injury. (PX 8, p. 20).

Dr. Perona offered that he had a detailed knowledge of the daily routine and requirements of a truck driver. (PX 8, pp. 25-26). He testified that Petitioner will have permanent restrictions of avoiding lifting over shoulder level and 20-30 lb lifting restrictions on the right arm. (PX 8, pp. 26-27) He also testified Petitioner may very well need future medical treatment of fairly lengthy and extensive physical therapy, if no improvement after a year then a revision of the total shoulder arthroplasty at a cost of $ 25,0000.00-$ 30,000.00. (PX 8, p. 22-23). He further testified that he reviewed the June 18, 2007 report of Dr. Cole and the January 10, 2008 report of Dr. **[*17]** Newman. The doctor indicated that neither had an effect on his opinions on causation or the permanent nature of Petitioner's injuries. (PX 8, p. 23) Dr. Perona testified that Petitioner initially recovered well from surgery initially but then deteriorated thereafter (PX 8, pp. 29) indicating Petitioner's right shoulder deteriorated between the September 2007 and the

September 2008 visits. (PX 8, p. 54)

On December 8, 2008 the parties deposed Respondent's IME Dr. Brian Cole. Dr. Cole testified that he first examined Petitioner on January 29, 2007. At that time he felt that a shoulder replacement was appropriate. He agreed with Dr. Perona that a shoulder replacement that was related in that the August 24, 2006 incident aggravated Petitioner's pre-existing condition. Dr. Cole testified that when he saw Petitioner postoperatively, on June 18, 2007, he felt Petitioner could return to work as a truck driver. He noted that there was a risk of a possible subscapularis tendon healing issue. He further cautioned Petitioner to be careful getting into and out of his big rig and to be cautious about doing any lifting or external rotation of the shoulder. (RX 1. p. 8-10). The doctor also testified **[*18]** that he agreed that people with full joint replacements usually need continued exercise and strengthening to maintain the functional use of the joint. (RX 1, p. 10-11).

On February 19, 2009 Petitioner was examined again by Dr. Daniel C. Newman. The doctor testified that on his examination Petitioner's active range of motion of the right shoulder was to 30 degrees of abduction and 45 degrees of forward flexion, which the doctor noted was a decrease from his previous examination. He found further that passive range of motion in the right shoulder was severely painful at minus 45 degrees of abduction and limited rotation in both directions. Dr. Newman opined that Petitioner's condition had significantly deteriorated in the year between the two examinations (01/10/08 & 02/19/09). The doctor noted Petitioner's forward flexion was reduced from 100 to 45 degrees, abduction from 90 to 30 degrees and a reduction in passive range of motion. Dr. Newman opined that Petitioner's condition had gotten much worse since January 10, 2008 in that Petitioner had more pain and less range of motion. (PX 9, p. 13) Dr. Newman felt Petitioner was" barely able to function with his right upper extremity." He **[*19]** opined that Petitioner could use his left arm using the right arm as minimal assist. The doctor also felt Petitioner should not be driving and had permanent restrictions of maximum 5 lb lift with right arm, no repetitive motion with right upper extremity and essentially use of right arm as assist for the left arm. (PX 9, p. 14-15).

Dr. Newman testified that he also recommended a FCE on February 19, 2009. (PX9, p15) The FCE when performed on March 25, 2009 was deemed valid demonstrating Petitioner functioned at the Light-to-Medium Physical Demand Level. (PX 7) Dr. Newman testified he reviewed the FCE results. He discounted the assessment noting Petitioner's ability to drive a semi truck was not tested. (Respondent's counsel objected to any questions predicated on a review of the 3/25/09 FCE under **Ghere.**) Dr. Newman stated the basis of discounting the FCE was because "[Petitioner] can't get his right arm out to the top of the steering wheel, and he shifts his rig by keeping his seat unlocked, and with his arm pressed against the arm rest he just swivels the seat to shift the truck." Dr. Newman states that these driving motions weren't tested in the FCE. (PX 9, pp. 17-18). Dr. Newman **[*20]** opined that Petitioner's condition hasn't stabilized as he gotten worse between his two exams and he doesn't know that Petitioner won't continue to deteriorate. Dr. Newman's long term prognosis is that he will be basically functioning almost as a one-armed individual, having very little function in the right upper extremity. Dr. Newman stated that based on the FCE, he would recommend left hand work only, right arm as an assist only and no driving. (PX 9, pp. 18-19).

On cross examination Dr. Newman agreed Petitioner had done well initially following surgery and at the time of the June 18, 2007 examination by Dr. Cole. (PX 9, p. 29-30). Dr. Newman indicated that if an individual had a successful surgery prior there shouldn't be any restrictions or severe problems later in life. He also indicated that even a distal clavicle surgery is a standard procedure with good long term prognosis. (PX 9, pp. 33-34). The doctor also clarified that Petitioner's loss of motion was a real restriction and not subjective. (PX 9, pp. 37-38). Dr. Newman opined that Petitioner's loss of strength demonstrated on exam was not within the control of the patient. He felt Petitioner was truthful and exhibiting **[*21]** no signs of symptom magnification. (PX 9, pp. 39-40).

On June 16, 2009 Petitioner was examined pursuant to Section 12 of the Act by Respondent's

IME Dr: Gleason. Upon examination Petitioner complained of constant pain in the right shoulder with limited range of motion and radiation of pain into the neck and right upper arm as well as intermittent tingling over the entire right arm up to the neck. He diagnosed Petitioner with diminished range of motion of the right shoulder with atrophy and weakness and positive impingement and cross over tests. (PX 14).

On December 1, 2009 the parties deposed Dr. Thomas Gleason with respect to his examination in June of 2009. Dr. Gleason testified that Petitioner presented with complaints of constant pain in the right shoulder radiating into the neck and upper arm with intermittent tingling over the entire right arm into the neck with limited range of motion. (RX 4, p. 10). Petitioner's demonstrated range of motion of the right arm was diminished flexion 50% or 45 degrees, extension 50% or 20 degrees and abduction 90 degrees with the right as compared to 150 degrees left, external rotation of right to 40 degrees, left was 70, internal rotation right **[*22]** 30 degrees to left 45. The doctor noted that although the range of motion of the left shoulder was 150 degrees, there was pain on the left shoulder with abduction over 90 degrees. Strength was normal. The doctor also noted Petitioner exhibited positive impingement and cross over tests of the right shoulder. Dr. Gleason testified that he did not have a good explanation for Petitioner's diminished range of motion upon his June 2009 examination given Petitioner's reasonably good range of motion following the February 2007 arthroplasty. Dr. Gleason speculated that other causes for diminished range of motion may be subsequent injury or some voluntary aspects. (RX 4, pp. 12-15).

Dr. Gleason opined that based upon his review of the records including the FCE, injuries of 1991 and 1997, injury of August 24, 2006, diagnostic testing and his examination; he would release Petitioner to work as a truck driver hauling chemicals with limitations of loading and unloading and capability of at least light to medium physical demand. He recommended home exercise and weight loss, over the counter medications or non-steroidal anti-inflammatory medication. (RX 4, p. 18-20). He opined that Petitioner had **[*23]** an advanced degenerative condition that was aggravated by the accident of August 24,2006. He felt the accident was a permanent aggravation of Petitioner's condition that warranted the February 28, 2007 total shoulder arthroplasty of the right shoulder. (RX 4, p. 21). He opined that, besides the home exercise, weight loss and taking of medication, he did not foresee any further complaints or associated treatment. He opined that Petitioner reached MMI in June 2007 and was able to return to regular work. (RX 4, p. 22-23).

Dr. Gleason testified that he had not seen any evidence of a subsequent injury to Petitioner's right shoulder after August 24, 2006 nor did he find any evidence Petitioner was malingering or voluntarily limiting his active range of motion. (RX 4, p. 29). Dr. Gleason agreed that Dr. Cole found a normal range of motion of Petitioner's right shoulder on his June 18, 2007 examination and that Petitioner had demonstrated diminished range of motion as reflected in Dr. Perona's September 12, 2008 note. The doctor also noted Petitioner exhibited diminished range of motion upon his own examination. He agreed further that he found no evidence of Petitioner's voluntarily limiting **[*24]** his active range of motion. (RX 4, p. 31-32). When posed as to whether he agreed with Dr. Newman that the condition of Petitioner's right shoulder had deteriorated between his June 2007 release to work by Dr.'s Perona and Cole and his recent examination of 06/19/09, Dr. Gleason stated, "yes I would say that there has been." Dr. Gleason indicated that he did find diminished strength of the right arm 4-5 minus out of 5. He also indicated that he was unaware of how Petitioner currently drives his truck. (RX 4, pp. 34-39).

Petitioner testified about his current condition and employment. He testified that he does work as a truck driver but that in order to drive a manual transmission, he must leave his seat unhooked with his right arm pinned against the arm rest (which lays along his right thigh) and twists his legs swiveling his seat to provide momentum enabling him to shift the manual transmission with his right arm. He testified that he steers with his left hand and uses the right arm as a minimal assist. Before the accident he shifted in a conventional fashion using solely his right arm.

With respect to the evidentiary objections, the Arbitrator finds the following:

During the **[*25]** deposition of Petitioner's treating orthopedic surgeon, Dr. Paul Perona, Respondent's counsel objected on the basis of ***Ghere*** stating that any medical testimony based upon the September 12, 2008 medical visit was surprise medical testimony when viewed in light of November 1, 2007 report of Dr. Perona. The medical records and testimony of Petitioner and Dr. Perona reflect that on September 12, 2008 Petitioner was receiving medical treatment, was examined and administered a lidocaine injection to the right shoulder by his treating physician Dr. Paul Perona. The bar to testimony under ***Ghere*** and its progeny only bear upon reports made in anticipation of litigation. Dr. Perona's testimony on the September 12, 2008 medical visit does not constitute a report drafted in anticipation of litigation. Said note is a record of medical treatment.

The rule in Illinois is that statements to treating physicians describing medical history, past or present symptoms, pain, or sensations are admissible as an exception to the hearsay rule if made to the physician for purposes of medical diagnosis or treatment. *Roszak v. Kanakakee Firefighters' Pension Bd.,* 376 Ill.App.3d 130, 875 N.E.2d 1280 (2007). **[*26]** As a treating orthopedic surgeon his comments, findings and diagnosis made in course of medical treatment possess circumstantial guarantee of trustworthiness and have always been held to be admissible by Illinois courts. As such, any opinions elicited from Dr. Perona, based upon the September 12, 2008 medical visit of Petitioner are admissible as an exception to the hearsay rule.

The Arbitrator notes that during the deposition of Dr. Perona, Petitioner offered what appeared to be a narrative report of Dr. Perona dated November 1, 2007. Apparently, the report was in response to questions posed by Petitioner's counsel. Respondent objected to said admission due to said report being generated in preparation for litigation. After reviewing the deposition, it appears the report was not submitted. As such, Respondent's objection is moot.

In regards to objections with respect to Dr. Newman's testimony about Petitioner's restrictions, the Arbitrator finds that Respondent's ***Ghere*** objection is overruled. During direct testimony, Dr. Newman was posed with the follow:

> Q. Okay. And based on your examination would you place any restrictions on [Petitioner's] activities?"
>
> A. I think he's **[*27]** barely able to function with his right upper extremity. I think he can work with his left arm. He can use the right arm for minimal assist, and in my opinion he should not be driving.
>
> Q. So what exactly would be the restrictions you would place on him?
>
> A. I would -- he's recently had a functional capacity eval performed which says that he can work --
>
> Mr. Dweyer: Objection to any comments on the functional capacity evaluation based on your objection. Go ahead and answer, Doctor.
>
> Q. Doctor, if I can rephrase. Simply based upon your examination solely what would be your restrictions if any?
>
> A. That I probably have him lift no more than 5 lbs. with his right upper extremity, and no repetitive motion with the right upper extremity, and essentially using the right extremity as an assist for left arm.

Petitioner's counsel went to question the doctor on whether he recommended a FCE during the February 19, 2009 examination, whether he had the opportunity to review the March 25, 2009 FCE and queried him about his opinion with respect to its significance. Respondent's counsel objected to any opinions predicated on a review of the March 25, 2009 FCE under ***Ghere.*** As noted above, the **[*28]** Arbitrator overrules said objection. As indicated in the deposition, Respondent had notice of the impending FCE in the February 19, 2009 report of Dr. Newman who, at that time, recommended an FCE. This report precipitated the March 31, 2009 deposition of Dr. Newman." Moreover, Respondent admitted; at the time of his objection, that he received a copy of the FCE report on March 26, 2009, 5 days before the deposition of Dr. Newman. Accordingly, the Arbitrator finds that Respondent had adequate notice of the opinions of Dr. Newman prior to the deposition of March 31, 2009. As such, any opinions elicited from Dr. Newman based upon the March 25, 2009 FCE are admitted into evidence. Notwithstanding the Arbitrator's ruling, Dr. Newman testified that the restrictions were solely based upon his examination.

With respect to (F), whether Petitioner's current condition of ill-being is causally related to the accident, the Arbitrator finds the following:

Petitioner's unrebutted testimony and a review of the medical records demonstrate that he did not have a symptomatic right shoulder condition of ill-being prior to August 24, 2006. He worked in a full duty capacity as a truck driver from his **[*29]** full duty release on May 6, 1997 until the date of accident. The accident and resulting condition of pain was consistently recorded in the medical records.

Whether a causal connection exists between an accident and a condition of ill being may be determined from both medical and non-medical evidence. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 442 N.E.2d 908 (1982). A chain of events demonstrating a prior condition of good health, an accident and a subsequent disabling condition of ill being will suffice to establish a causal connection between the accident and the employee's injury. *Westinghouse Elec. Co. v. Industrial Comm'n,* 64 Ill.2d 244, 356 N.E.2d 28 (1976); *Plano Foundry Co. v. Industrial Comm'n,* 356 Ill. 186, 190 N.E.2d 255 (1934); *Phillips v. Industrial Comm'n,* 187 Ill.App.3d 704, 543 N.E.2d 946 (1989).

The Arbitrator finds that the opinion of Respondent's IME Dr. Cole are consistent with that of Dr. Perona, Dr. Newman and Dr. Gleason in that the accident of August 24, 2006 aggravated **[*30]** the underlying preexisting condition of Petitioner's right shoulder. The Arbitrator finds that the deteriorating current condition of Petitioner's right shoulder is supported by the objective measures of the reduced range of motion and pain upon examinations by Dr. Perona on September 12, 2008, Dr. Newman on February 19, 2009 and Dr. Gleason on June 19, 2009. Moreover, the testimony of Dr. Perona and Dr. Newman support the deteriorating condition and worsening prognosis for Petitioner's condition of right shoulder since his June 2007 full duty release.

Accordingly, the Arbitrator finds that Petitioner's current right shoulder condition of ill-being is causally related to the accident of August 24, 2006.

With respect to (J) Were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds the following:

All treating and examining physicians Drs. Perona, Newman, Cole and Gleason all agree that the need for the February 28, 2007 right shoulder arthroplasty and care through September 12, 2008 is related, reasonable and necessary to cure the ill effects of the work injury of August 24, 2006. Moreover, there is no evidence to rebut the liability, **[*31]** reasonableness and necessity of the medical care from the date of injury through 09/12/08.

The Arbitrator finds that Dr. Perona opined that within a reasonable degree of medical and

surgical certainty that the medical care received by Petitioner is related to the August 24, 2006 accident and was reasonable and necessary to cure the effects of this injury. The Arbitrator finds that the condition of Petitioner's right shoulder has deteriorated since June 25, 2007.

Accordingly, the Arbitrator finds that Respondent is liable under Section 8(a) for all medical bills incurred as stated in petitioner's Exhibit 13. Petitioner has requested payment for the following bills:

Provider	Beginning	Ending	Charges	FS Charges	PET Pd.	Balance
ATI	3/25/2009	3/25/2009	$ 2,376.00	$ 1,046.70	$ 0.00	$ 2,376.00
Dr. Paul Perona	9/12/2008	9/12/2008	$ 370.00	$ 292.97	$ 0.00	$ 370.00
Morris Radiology Assoc.	9/7/2006	9/7/2006	$ 40.00	$ 40.00	$ 0.00	$ 40.00
Walmart Pharmacy	9/29/2006	9/29/2006	$ 15.00	$ 15.00	$ 15.00	$ 0.00
Total			$ 2,801.00	$ 1,394.67	$ 15.00	$ 2,786.00

Provider	FS Balance
ATI	$ 1,046.70
Dr. Paul Perona	$ 292.97
Morris Radiology Assoc.	$ 40.00
Walmart Pharmacy	$ 0.00
Total	$ 1,379.67

[*32] Therefore, the Arbitrator finds that Respondent shall pay the medical bills under Section 8(a) in the amount of $ 1,379.67 according to the medical fee schedule and $ 15.00 to Petitioner for out of pocket costs associated with Walmart Pharmacy.

With respect to (K) what temporary benefits are due for temporary total and temporary partial disability, the arbitrator finds the following:

The Arbitrator finds that the August 25, 2006 records of Delnor Hospital placed Petitioner's right shoulder in an immobilizer and states he had a serious injury requiring immediate orthopedic follow-up. The August 28, 2006 records of Rezin Orthopedic take Petitioner off work and thereafter he begins physical therapy. Dr. Perona takes Petitioner off work from October 10, 2006 through his full duty release of June 25, 2007.

Having found a causal connection between the work injury and Petitioner's condition of ill being, the Arbitrator finds that Petitioner was temporarily totally disabled from August 25, 2006, through October 2, 2006, October 10, 2006 through February 6, 2007, February 18, 2007 through June 24, 2007, representing a period of 40-6/7 weeks.

Petitioner reattempted light duty work the week **[*33]** of February 07, 2007 following the light duty release of Section 12 examiner of Dr. Cole on January 29, 2007. Petitioner began light duty work on February 7, 2007 and worked through February 17, 2007, a period of 3-2/7 weeks. During that period he earned net wages of $ 785.05. (PX 12). Had Petitioner been working in the full performance of his duties during this period of time he would have earned $ 3,991.96 ($ 1,217.06 AWW x 3-2/7).

The Arbitrator finds that as a result of the light duty restrictions add pursuant to Section 8(a) of

the Act Petitioner is owed temporary partial disability benefits of $ 651.81 per week for 3-2/7 weeks [Sum of (3,991.96 - 785.05) x 2/3 = 2,137.94 divided by 3-2/7 weeks].

Based upon the foregoing, the Arbitrator finds that Respondent shall pay the sum of $ 811.37 per week for a period of 40-6/7 weeks, that being the period of temporary total disability for which compensation is payable under § 8(b) of the Act and $ 651.81 for 3-2/7 weeks, that being the period of temporary partial disability for which compensation is payable under § 8(a) of the Act.

With respect to (L) What is the nature and extent of the injury, the Arbitrator finds the following: [*34]

Petitioner was asymptomatic and was working as a full duty truck driver from May of 1997 to the date of injury with no limitations. The medical records of examination and the testimony of Drs. Perona, Newman and Gleason demonstrate that the condition of Petitioner's right shoulder has significantly deteriorated since the June 25, 2007 full duty release. Petitioner now has permanent restrictions of left hand only, right arm as an assist only. Both Dr. Perona and Dr. Newman feel Petitioner has marginal ability to drive a truck using the right arm as an assist only and no driving. They both also opine that Petitioner's long term prognosis is poor and that he will be basically functioning almost as a one-armed individual, having very little function in the right upper extremity and may very well need future medical treatment including lengthy and extensive physical therapy and a revision of the total shoulder arthroplasty. Lastly, Petitioner credibly testified that although he works as a full time truck driver, he has to shift his manual transmission by leaving his seat unhooked with his right arm pinned against the arm rest (which lays along his right thigh) and twisting his legs and **[*35]** swiveling his seat to provide momentum enabling him to shift the manual transmission with his right arm.

Based on all the above, the Arbitrator finds that Petitioner sustained the permanent loss of use of the right arm to the extent of 65% pursuant to § 8(e) of the Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **ghere** (Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 26, 2012 - 8:20 AM EST