2012 IL App (2d) 101049WC
No. 2-10-1049WC
Opinion filed February 14, 2012

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MARK GRUSZECZKA, Appellant and Cross-Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Alliance Contractors, Appellee and Cross-Appellant).	)	Appeal from the Circuit Court of McHenry County No. 09-MR-245 Honorable Thomas A. Meyer, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Presiding Justice McCullough and Justice Hudson concurred in the judgment and opinion.
Justice Stewart dissented, with opinion, joined by Justice Holdridge.
Justice Holdridge dissented, with opinion.

OPINION

¶ 1 The claimant, Mark Gruszeczka, appeals from an order of the circuit court of McHenry County which affirmed a decision of the Illinois Workers' Compensation Commission (Commission), denying him benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2002)) for injuries that he allegedly sustained on July 21, 2004, while working for Alliance Contractors (Alliance). Alliance filed a cross-appeal from the circuit court's denial of its motion to dismiss the claimant's action for judicial review of the Commission's decision for want

of jurisdiction. For the reasons which follow, we vacate the judgment of the circuit court as having been entered in the absence of subject-matter jurisdiction and dismiss the claimant's appeal.

¶ 2 The facts necessary to our resolution of this case are not in dispute. The claimant filed an application for adjustment of claim with the Commission, seeking benefits under the Act for injuries that he allegedly sustained on July 21, 2004, while working for Alliance. Following a hearing, an arbitrator issued a decision denying the claimant benefits. The arbitrator found that the claimant did not sustain injuries arising out of and in the course of his employment with Alliance. The arbitrator also found that, assuming the claimant fell while working on July 21, 2004, he failed to prove by a preponderance of the evidence that his condition of ill-being was causally related to his claimed work accident.

¶ 3 The claimant sought review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission affirmed and adopted the arbitrator's decision. A copy of the Commission's decision was received in the office of the claimant's attorney on April 20, 2009.

¶ 4 The claimant sought judicial review of the Commission's decision. The claimant's request for the issuance of summons and his attorney's affidavit of payment of the probable cost of the record were file stamped by the clerk of the circuit court of De Kalb County on May 14, 2009, a date 24 days after the claimant's attorney received the Commission's decision. In his brief, the claimant concedes that "there is no evidence of when the Circuit Court Clerk received the documents."

¶ 5 Alliance filed a motion in the circuit court of De Kalb County arguing both that the circuit court lacked jurisdiction to entertain the claimant's action for judicial review because it was filed more that 20 days after the Commission's decision was received by the claimant's attorney and that venue was improper in the circuit court of De Kalb County as Alliance is located in McHenry

County. The claimant responded to the motion, arguing that he fulfilled the jurisdictional requirement for the filing of an action for judicial review of a decision of the Commission by mailing all of the necessary documents to the clerk of the court within 20 days of his attorney's receipt of the decision. Attached to the claimant's response were the affidavits of his attorney and of Coreen Berg, a clerk in the attorney's office. In her affidavit, Berg states that on May 4, 2009, she mailed to the clerk of the circuit court the claimant's request for the issuance of summons, summons to the defendants, a certificate of mailing, the attorney's affidavit of payment of the probable cost of the record, and checks for both filing fees and for the certified mailing of the summons. As to the issue of venue, the claimant argued that the circuit court of De Kalb County was an appropriate venue because he was injured while working in De Kalb County.

¶ 6 An order was entered in the circuit court of De Kalb County, denying Alliance's motion to dismiss the claimant's action for want of jurisdiction and granting its motion to transfer venue of the cause to the circuit court of McHenry County. Following the transfer of the matter to the circuit court of McHenry County, Alliance filed a motion to reconsider the denial of its motion to dismiss. The circuit court denied the motion to reconsider.

¶ 7 On the merits of the claimant's action for judicial review, the circuit court of McHenry County confirmed the Commission's decision denying the claimant benefits under the Act. Thereafter, the claimant appealed and Alliance cross-appealed.

¶ 8 We address first Alliance's cross-appeal from the denial of its motion to dismiss the claimant's action for judicial review of the Commission's decision. Alliance argues, as it did before the circuit court, that the requisite subject-matter jurisdiction to entertain the claimant's action for judicial review was lacking because the action was not filed with the clerk of the circuit court within

20 days of receipt of the Commission's decision by the claimant's attorney. The claimant asserts that proof of the mailing of all of the necessary documents to the clerk of the court within the 20-day period is sufficient to vest the circuit court with subject-matter jurisdiction.

¶ 9 The jurisdiction exercised by the circuit court under the Act is a special statutory jurisdiction, and the circuit court can obtain jurisdiction over such a proceeding only in the manner provided by the statute. *Peter H. Clark Lodge No. 483 v. Industrial Comm'n*, 48 Ill. 2d 64, 68, 268 N.E.2d 382 (1971). Section 19(f)(1) of the Act provides that a proceeding for judicial review of a Commission decision "shall be commenced within 20 days of the receipt of notice of the decision." 820 ILCS 305/19(f)(1) (West 2008). Our supreme court has consistently held that the timely filing of a request for the issuance of a summons and the timely exhibition of proof of payment for the probable cost of the record are jurisdictional requirements which must be strictly adhered to in order to vest the circuit court with subject-matter jurisdiction over a judicial review action under the Act. *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 320, 721 N.E.2d 563 (1999).

¶ 10 It is undisputed that the Commission's decision in this case was received in the office of the claimant's attorney on April 20, 2009. It is also undisputed that the claimant's request for the issuance of summons and his attorney's affidavit of payment of the probable cost of the record were file stamped May 14, 2009, by the clerk of the circuit court of De Kalb County, 24 days after the receipt of the decision by the claimant's attorney. Further, there is no evidence in the record that the claimant's request for the issuance of summons and his attorney's affidavit of payment of the probable cost of the record were received by the clerk of the circuit court of De Kalb County prior to May 14, 2009.

¶ 11 Nevertheless, the claimant takes the position that the circuit court acquired subject-matter jurisdiction over his judicial review action when Berg mailed a request for the issuance of summons, his attorney's affidavit of payment of the probable cost of the record, and the necessary filing fees to the clerk of the circuit court of De Kalb County on May 4, 2009, a date within 20 days of the receipt of the Commission's decision. In so doing, the claimant advocates the adoption of a "mailbox rule" applicable to the commencement of an action in the circuit court for judicial review under section 19(f)(1) of the Act, asserting that the time of the mailing of the documents necessary to prosecute an such action to the clerk of the circuit court is the time of filing for jurisdictional purposes. In support of the proposition, the claimant relies heavily upon our supreme court's decision in *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 533 N.E.2d 1072 (1989), which adopted a mailbox rule applicable to the filing of as notice of appeal from a decision of the circuit court to the appellate court. The dissenters find support in this court's decision in *Norris v. Industrial Comm'n*, 313 Ill. App. 3d 993, 730 N.E.2d 1184 (2000), which adopted a mailbox rule applicable to the filing of a petition before the Commission for a review of an arbitrator's decision under section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)). We believe, however, that the claimant's reliance upon *Harrisburg-Raleigh Airport Authority* is misplaced, and we decline to follow *Norris* for the following reasons.

¶ 12 In *Harrisburg-Raleigh Airport Authority*, the supreme court adopted a rule applicable to the filing of a notice of appeal. In so doing, the supreme court interpreted one of its own rules, Illinois Supreme Court Rule 303(a) (eff. July 1, 1984), and exercised its constitutional power to "provide by rule for expeditious and inexpensive appeals" (Ill. Const. 1970, art. VI, § 16). In this case, we are not dealing with the interpretation or modification of a rule adopted by the judiciary; rather, we

are dealing with the interpretation of a legislative enactment. Our function, therefore, is to determine the intent of the legislature as revealed by the language of the statute (*City of East St. Louis v. Union Electric Co.*, 37 Ill. 2d 537, 542, 229 N.E.2d 522 (1967)); not to modify a rule "to take into account the widespread practice of filing documents by mail" as was the case in *Harrisburg-Raleigh Airport Authority*, 126 Ill. 2d at 340. Although the supreme court certainly has the authority to modify one of its own rules to take into account modern trends (see *Harrisburg-Raleigh Airport Authority*, 126 Ill. 2d at 340), we know of no authority, nor has the claimant cited any, authorizing the judiciary to modify a legislative enactment to comport with some perceived modern policy or trend.

¶ 13 As noted, our sole function is to interpret a statute which provides that a proceeding for judicial review of a Commission decision "shall be commenced within 20 days of the receipt of notice of the decision." 820 ILCS 305/19(f)(1) (West 2008). Section 2-201 of the Code of Civil Procedure states, in relevant part, that: "Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint." 735 ILCS 5/2-201(a) (West 2008). This statute has always been interpreted to mean that the commencement date is the date upon which the complaint is received by the clerk of the court, not the date that the document was mailed to the clerk. *Kelly v. Mazzie*, 207 Ill. App. 3d 251, 253-54, 565 N.E.2d 719 (1990). That same conclusion has been reached in cases commenced by the filing of documents other than a complaint. See *Wilkins v. Dellenback*, 149 Ill. App. 3d 549, 553, 500 N.E.2d 692 (1986). In our case, section 19(f)(1) of the Act provides for the commencement of an action for judicial review of a Commission decision by the filing of a request for summons along with evidence of payment of the probable cost of the record. 820 ILCS 305/19(f)(1) (West 2008). We find no valid reason to deviate from the

holdings or reasoning in either *Kelly* or *Wilkins* when interpreting the commencement date of an action under section 19(f)(1).

¶ 14 Section 19(f)(1) does not contain a "mailbox rule," but the legislature certainly knows how to provide for such a rule when it desires to do so. See 5 ILCS 70/1.25 (West 2008). If a mailbox rule were to be engrafted upon the 20-day commencement period mandated in section 19(f)(1), it is the legislature that must do so, not the judiciary under guise of statutory interpretation. We believe that the mailbox rule advocated by the claimant in this case would extend the 20-day commencement period for an action seeking judicial review of a decision of the Commission for that period of time during which the required documents are en route to the clerk of the circuit court via the post office, however long that might take. In this case, it appears that it took some 10 days for the necessary documents to reach the clerk of the circuit court.

¶ 15 The cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature. *People ex rel. Hanrahan v. White*, 52 Ill. 2d 70, 73, 285 N.E.2d 129 (1972). When the language of the statute is clear and unambiguous, courts must interpret the statute according to its terms without resorting to aids of construction. *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961 (1995). When, as in this case, an unambiguous term is not specifically defined, it should be given its plain and ordinary meaning. *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450, 455, 557 N.E.2d 873 (1990). To commence means to begin or to start (Webster's Third New International Dictionary 456 (1981)). We are at a loss to understand how one can begin or start any action in the circuit court before the necessary documentation is presented to the clerk of the court.

¶ 16 We hold, therefore, that the claimant failed to commence his action for judicial review within the 20-day period mandated in section 19(f)(1) of the Act; and, as a consequence, we vacate the judgment of the circuit court as having been entered in the absence of subject-matter jurisdiction, and we dismiss the claimant's appeal.

¶ 17 Judgement vacated and appeal dismissed.

¶ 18 JUSTICE STEWART, dissenting:

¶ 19 This case squarely raises the issue of whether the mailbox rule should be applied in appeals from the Commission to the circuit court. This is an issue of first impression, and it requires that the court determine whether proof of timely mailing of all necessary jurisdictional documents is sufficient to vest the circuit court with subject-matter jurisdiction pursuant to section 19(f)(1) of the Act. 820 ILCS 305/19(f)(1) (West 2008). Section 19(f)(1) requires that a proceeding for review in the circuit court be commenced within 20 days of a party's receipt of the decision of the Commission. The claimant argues that proof of mailing of the necessary jurisdictional documents within the 20 day period is sufficient. The employer argues that the necessary documents must be file-marked by the clerk of the circuit court within 20 days in order to vest the circuit court with subject-matter jurisdiction. I agree with the claimant and would hold that the mailbox rule applies to the filing of appeals from the Commission to the circuit court. Therefore, I respectfully dissent.

¶ 20 I find guidance in previous decisions which hold the mailbox rule applicable to the filing of jurisdictional documents in appeals. In doing so, I note that the mailbox rule has been applied to the filing of a petition for review from an arbitrator to the Commission. *Norris v. Industrial Comm'n*, 313 Ill. App. 3d 993, 994, 730 N.E.2d 1184, 1186 (2000)[1]. Likewise, a notice of appeal filed in the

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[1]It is worthy of note that, in addition to holding that the mailbox rule does not apply to

circuit court to prosecute an appeal to the appellate court is deemed filed on the date of mailing. *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 340, 533 N.E.2d 1072, 1078 (1989). Further, an attorney's affidavit of proof of payment of the probable cost of the record is sufficient if it alleges payment has been mailed within the 20 day period, in order to show that payment has been "made" under the Act. *Lasley Construction Co. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 894, 655 N.E.2d 5, 8 (1995). Thus, in all other jurisdictional steps for appeals of workers' compensation cases through the appellate court it has been held that the mailbox rule applies. I see no reason to rule otherwise in appeals from the Commission to the circuit court.

¶ 21 In holding that the date of mailing should be deemed the date of filing of a notice of appeal in *Harrisburg-Raleigh Airport Authority*, our supreme court reasoned by analogy to Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009), and to section 1.25(1) of the Statute on Statutes (5 ILCS 70/1.25 (West 2008)). Although Supreme Court Rule 373 has since been amended to specifically apply to the filing of a notice of appeal, the court noted that the text of the rule at that time only applied to documents filed in a reviewing court. Nevertheless, the rule provided then, as it does now, that for documents filed in a reviewing court which are received after the due date, "the time of mailing *** shall be deemed the time of filing." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). Likewise, section 1.25

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appeals from the Commission to the circuit court, the majority also states that it "decline[s] to follow" *Norris*. *Supra* ¶ 11. Although this is *dicta*, it is bound to cause considerable confusion for attorneys practicing before the Commission. This unnecessary language may be interpreted as effectively overruling *Norris*, long-standing precedent upon which attorneys have relied in mailing appeals from the arbitrator to the Commission.

of the Statute on Statutes provided then, as it does now, that any document required or authorized to be filed with the State or any political subdivision "if transmitted through the United States mail, shall be deemed filed *** on the date shown by the post office cancellation mark" or if none, "on the date it was mailed" as shown by competent proof. 5 ILCS 70/1.25 (West 2008).

¶ 22 The court noted that although Rule 373 did not apply to documents filed in the circuit court and that section 1.25 did not apply to the judiciary, "together they evince the modern policy of equating time of mailing with actual receipt." *Harrisburg-Raleigh Airport Authority*, 126 Ill. 2d at 341, 533 N.E.2d at 1078. The court also based its decision on its interpretation of Supreme Court Rule 303 (eff. May 30, 2008), which required that a notice of appeal be "filed with the clerk of the circuit court within 30 days." In determining that a notice of appeal that is mailed within the 30-day period but received thereafter is timely filed, the court stated:

> "Our conclusion follows from a reading of the words 'filed with the clerk of the circuit,' considered in the light of modern policies and practices. The rule itself contains no definition of this phrase. And while older case law has held that papers are not filed until actually committed to the control and custody of the clerk [citation] more recent authority suggests that this rule should be modified to take into account the widespread practice of filing documents by mail." *Harrisburg-Raleigh Airport Authority*, 126 Ill. 2d at 340, 533 N.E.2d at 1078.

The same reasoning applies to the interpretation of section 19(f)(1) of the Act. Although the Act provides no definition of what must be done for a proceeding for review to be "commenced" or for a request for summons to be "filed" with the circuit clerk, consistent with *Harrisburg-Raleigh Airport Authority*, I would interpret the statute in light of modern promailing policies and practices.

¶ 23 The majority seeks to distinguish *Harrisburg-Raleigh Airport Authority* because in that case the supreme court was interpreting "one of its own rules," rather than a statute. I do not believe the supreme court's opinion can be distinguished on that basis. It is well settled, and explicit in Illinois Supreme Court Rule 2(a) (eff. May 30, 2008), that supreme court rules are to be construed in the same manner as statutes are construed. See *People v. Fitzgibbon*, 184 Ill. 2d 320, 328, 704 N.E.2d 366, 370 (1998) (supreme court rules are to be construed in the same manner as statutes are construed); Ill. S. Ct. R. 2(a), Committee Comments (revised July 1, 1971) ("Paragraph (a) makes it clear that the same principles that govern the construction of statutes are applicable to the rules."). Thus, it is appropriate to follow supreme court precedent construing "one of its own rules" in determining the proper construction of section 19(f)(1) of the Act.

¶ 24 The majority also cites cases holding that the mailbox rule does not apply to the filing of original actions in the circuit court. See *Kelly v. Mazzie*, 207 Ill. App. 3d 251, 253-54, 565 N.E.2d 719, 720-21 (1990) (holding that the mailbox rule does not apply to the filing of a complaint in circuit court); *Wilkins v. Dellenback*, 149 Ill. App. 3d 549, 553, 500 N.E.2d 692, 695 (1986) (holding that the mailbox rule does not apply to the filing of a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure). I do not disagree with the holdings in those cases. In each of the cases cited by the majority, the court specifically distinguished cases adopting the mailbox rule for the very reason that those cases only applied the mailbox rule to jurisdictional steps in an appeal process rather than to the filing of an original action in the circuit court. I would not apply the mailbox rule to original actions in the circuit court where a statute of limitations is involved. Rather, I would only interpret section 19(f)(1) of the Act to allow the filing by mail of

jurisdictional documents in the circuit court where the circuit court is acting as a court of review pursuant to its special statutory jurisdiction provided in the Act.

¶ 25 Accordingly, consistent with previous holdings applying the mailbox rule to appeals to the Commission and to the appellate court, I would hold that the time of mailing the documents necessary to prosecute an appeal from the Commission to the circuit court should be deemed the time of filing. Since the claimant timely mailed all jurisdictional documents to the circuit clerk, I would find that the circuit court had subject matter jurisdiction and would proceed to the merits of this appeal.

¶ 26 JUSTICE HOLDRIDGE joins in this dissent.

¶ 27 JUSTICE HOLDRIDGE, dissenting:

¶ 28 I join in Justice Stewart's dissent. I dissent separately to point out the majority's misinterpretation of this court's previous holding in *Norris v. Industrial Comm'n*, 313 Ill. App. 3d 993 (2000). In *Norris*, this court was asked to determine the legislative intent in section 19(b) of the Act, concerning the timeliness of a petition for review by the Commission of an arbitrator's decision. Section 19(b) provides:

> "Unless a petition for review is filed by either party within 30 days after the receipt by such party of the copy of the decision *** then the decision shall become the decision of the Commission and in the absence of fraud shall be conclusive." 820 ILCS 305/19(b) (West 2008).

¶ 29 In *Norris*, we found the language of section 19(b) to be ambiguous as to exactly when the petition was considered to be "filed," noting that, based solely upon the language of the statute, it was equally plausible that the term "filed" meant placed in the United States mail (the mailbox rule)

or actually received by the Commission. *Norris*, 313 Ill. App. 3d at 995. We further noted that neither interpretation would produce absurd, unjust, unreasonable or inconvenient results that the legislature could not have intended. See *Collins v. Board of Trustees of the Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 110 (1993) ("[a] statute capable of two interpretations should be given that which is reasonable and which will not produce absurd, unjust, unreasonable or inconvenient results that the legislature could not have intended").

¶ 30 After acknowledging that the term "filed" in section 19(b) was ambiguous as to whether a mailbox rule could apply to the filing of a petition for review before the Commission, the *Norris* court relied, in part, on our supreme court's holding in *Alton v. Byerly Aviation, Inc.*, 68 Ill. 2d 19, 23 (1977), where the court held that the term "to file" in section 5(a) of the Act (now 820 ILCS 305/5(a) (West 2008)) was ambiguous and should be interpreted as adopting the mailbox rule. The *Norris* court also recognized that our supreme court in *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 340-41 (1989), had recognized a "modern trend" toward equating the time of mailing with actual receipt when interpreting statutorily enacted deadlines.

¶ 31 As discussed above, *Norris* stands for the proposition that the term "filed" in section 19(b) of the Act is ambiguous and that, under the supreme court precedent of *Alton* and *Harrisburg-Raleigh Airport Authority*, the ambiguity should be resolved in favor of a "mailbox rule" interpretation of the term "filed." I see no reason not to follow the reasoning articulated in *Norris*.[2]

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[2]I agree with Justice Stewart's observation that the majority's *dicta* concerning the holding in *Norris* unnecessarily calls into question the precedential value of *Norris*. I would point out, however, that the holding in *Norris* is limited to whether the mailbox rule applies to filings with the Commission under section 19(b) while the issue in the instant matter is limited to filings with the

¶ 32 At issue in the instant matter is whether section 19(f)(1) of the Act is ambiguous when it provides that a proceeding for judicial review of a Commission decision "shall be commenced within 20 days of the receipt of [the] notice of decision." 820 ILCS 305/19(f)(1) (West 2008). The majority, relying upon section 2-201 of the Code of Civil Procedure (735 ILCS 5/2-201(a) (West 2008) ("Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint.")), concludes that use of the term "commenced" in section 19(f)(1) of the Act clearly and unambiguously indicates a legislative directive that the action is commenced only when the request for summons and evidence of payment of the probable cost of the record is actually received by the clerk of the court. I disagree. Section 2-201 of the Code of Civil Procedure clearly provides that "[e]very action, *unless otherwise expressly provided by statute*, shall be commenced *by the filing of a complaint.*" (Emphasis added.) 735 ILCS 5/2-201(a) (West 2008).

¶ 33 Here, the action is "commenced" not by the filing of a complaint. Rather, section 19(f)(1) provides that an action is commenced by a written request for summons along with evidence of payment of the probable cost of the record. I would point out that section 19(f)(1) is actually silent as to how that written request for summons is to be presented to the court. I see nothing but ambiguity in section 19(f)(1) regarding the mechanics of bringing a "proceeding for review" of the Commission's decision before the circuit court. I would, therefore, find section 19(f)(1) ambiguous and would look to the well-settled precedent articulated in *Alton, Harrisburg-Raleigh Airport Authority*, and *Norris* to find that the mailbox rule applies to the filing of a request for summons with the circuit clerk. I, therefore, respectfully dissent.

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circuit court under section 19(f)(1). The decision in the instant matter leaves the holding in *Norris* unchanged.

¶ 34 As I would deny the cross-appeal, I would address the merits of the original appeal. I would find that the Commission's determination that the claimant did not sustain an injury that arose out of and in the course of his employment has support in the record and is not against the manifest weight of the evidence. The medical records of Drs. Darland and Eller established that the claimant had back problems prior to the alleged accident on July 21, 2004, even though the claimant maintained that he had no back pain prior to the accident. It is the peculiar province of the Commission to determine the credibility of witnesses, to weigh medical testimony, and to draw reasonable inferences from the record, and a reviewing court will not substitute its judgment for that of the Commission. Here, the Commission weighed the inconsistencies in the testimony and found that the claimant was not credible. It further found that the witnesses testifying for the employer were more credible than those testifying for the claimant. There is sufficient evidence in the record to support the Commission's findings. I would, therefore, affirm the decision of the Commission.

*2009 Ill. Wrk. Comp. LEXIS 378, *; 9 IWCC 0366*

MARK **GRUSZECZKA,** PETITIONER, v. ALLIANCE CORP., RESPONDENT.

NO: 04WC 36665

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF DEKALB

2009 Ill. Wrk. Comp. LEXIS 378; 9 IWCC 0366

April 15, 2009

CORE TERMS: arbitrator, pain, medication, presentation, concrete, narcotic, prescription, causally, petitioner failed, preponderance, temporary total disability, average weekly wage, accidental injuries, laborer, doctor, poured, neck, union local, opportunity to review, deposition testimony, causal connection, present condition, petitioner told, disputed issues, emergency room, auto accident, credibility, surveillance, observable, prescribed

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

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 issue(s) of accident, causal connection, average weekly wages, temporary total disability, permanent partial disability, penalties 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 March 18, 2008 is hereby affirmed and adopted.

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

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

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money

order therefor and deposited with the Office of the Secretary of the Commission.

DATED: APR 15 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION [*2] COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was The matter was heard by the Honorable Arbitrator Andros, arbitrator of the Commission, in the city of DeKalb, on 6/22/07, 9/13/07, 10/18/07, 11/15/07 and 12/20/07. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
G. What were the petitioner's earnings?
M. Should penalties or fees be imposed upon the respondent?
O. Other Admission of PX 31, 32, & 33

FINDINGS

. On 07/21/04 the respondent Alliance Contractors 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 not sustain injuries that arose out of and in the course of employment.

. Timely notice of **[*3]** this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 5,166.72; the average weekly wage was $ 19.36.

. At the time of injury, the petitioner was 43 years of age, single, with 0 children under 18.

. Necessary medical services have been provided by the respondent.

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

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ 0.00/week for weeks, from 0/0/00 through 0/0/00, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 0.00/week for a further period of weeks, as provided in Section of the Act, because the injuries sustained caused

. The respondent shall pay the petitioner compensation that has accrued from 0/0/00 through 0/0/00 and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ 0.00 for necessary medical services, as

L4 through S1 (Px 2).

Petitioner's visits to Dr. Darland continued throughout 2002, 2003 and into 2004. These visits included complaints of low back pain which radiated down one leg or the other and caused limitation of motion. They included renewal of narcotic pain medication prescriptions. On May 20, 2004, petitioner told Dr. Darland he had resumed work in April which caused him increased low back pain and numbness down the left arm (Px 2). Dr. Darland wrote out prescriptions for narcotic pain medications; said prescription being post dated to **[*7]** June 6, 2004. On June 22, 2004, less than one month before his claimed accident, petitioner received prescriptions for Hydrocodone, Diazepam and Bextra, for neck and back complaints (Px 2).

On the claimed date of accident, July 21, 2004, petitioner was sent to work from the union hall, to work for Respondent. Petitioner filled out paper work prior to starting the work day (Rx 10). In that form, he denied being on any prescribed medication.

Petitioner claims he was injured while pulling pins from the ground. Petitioner claims he fell on the concrete curbing that had been poured that morning. Petitioner claims that he did not deform the freshly poured concrete in any fashion, a point which was subject to dispute at trial.

The Respondent contends that if petitioner had fallen on the concrete as he claims, the concrete would have been deformed per the testimony of the supervisor whose testimony is adopted in total by the Arbitrator.

Petitioner presented himself in the emergency room at Katherine Shaw Bethea Medical Center after the alleged accident occurred (Rx 4). Petitioner admitted to having taken Vicodin that morning prior to the accident (Rx 4). He admitted to similar symptoms previously. **[*8]** He was not even x-rayed. He was diagnosed as having a back strain and discharged. Notably, these records also reflect a visit on May 17, 2002, wherein petitioner acknowledged a history of chronic back pain (Rx 4).

Petitioner saw Dr. Darland after his emergency room visit. Dr. Darland ordered a new MRI of the low back and then referred petitioner to Dr. Eller, a neurosurgeon. Dr. Eller eventually performed surgery on petitioner on August 23, 2005 consisting of a laminectomy and diskectomy at LA-5 (Px 4, 8, 9).

At Respondent's request, petitioner saw Dr. Morris Marc Soriano on December 2, 2004 (Rx 11).

The Arbitrator has heard the testimony of petitioner and from Jose Ontiveros and Rodney Hisel, employees of Respondent. The Arbitrator has had the opportunity to review surveillance taken of petitioner, and to compare petitioner's presentation under surveillance, with his presentation at trial. The Arbitrator has studied the evidence deposition testimony of not only Drs. Darland, Eller and Soriano, but the evidence deposition testimony of Antonio Losoya, and Reidar Jakobsen. Mr. Jakobsen also testified before the Arbitrator on other issues.

C. Did an accident occur that arose out of [*9] and in the course of the petitioner's employment by the respondent?

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

The Arbitrator has had the opportunity to review all the evidence and weigh the testimony of the various witnesses. After having done so, the Arbitrator concludes that the petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment. Even assuming an accident did in fact occur, the petitioner has failed to prove by a preponderance of the evidence that his condition of ill being and need for treatment, including surgery, is causally related to his claimed work accident.

The Arbitrator finds the testimony of the Respondent's witnesses, Ontiveros and Hisel, much

provided in Section 8(a) of the Act.

. The respondent shall pay $ 0.00 in penalties, as provided in Section 19(k) of the Act.

. The respondent **[*4]** shall pay $ 0.00 in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ 0.00 in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 1-31% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

March 15, 2008

Date

MAR 18 2008

STATEMENT OF FACTS

The petitioner has alleged accidental injuries arising out of and in the course of his employment by Respondent on July 21, 2004. Petitioner has testified that he was hired as a laborer, and to assist in the installation of curbing along a street. Petitioner alleges only injuries to his low back as a result of his claimed work injury while working for Respondent, not his neck or shoulders (Transcript, hereafter "T." **[*5]** p. 82).

The petitioner's first date of employment with Respondent was the date of the claimed accident. Prior to this date, petitioner had an extensive history of low back problems for which he received medications and had seen at least two doctors. The records of Dr. Mark Myers (Rx 5) reflect that petitioner complained to him of low back pain dating back to an auto accident on June 2, 1999. He complained of low back pain and numbness that radiated down the left leg and into his foot. He was prescribed narcotic pain medication. Dr. Myers terminated his relationship with petitioner on July 3, 2001 because the doctor learned petitioner was receiving sedative medications from another physician as well as from him. Dr. Myers indicated that it was not in petitioner's best interest to take that much medication (Rx 5).

Petitioner transferred his care to Dr. Harry Darland, whom petitioner first saw on December 17, 2001 (Px 2 and Px 5, p. 48). Petitioner complained on this date of low back pain as a result of doing labor and concrete work for eight years (Px 2 and Px 5, p. 49). On this visit, Dr. Darland ordered an MRI of the low back and the neck.

He also began prescribing various narcotic **[*6]** pain medications including Vicodin and Valium, prescriptions which he renewed on a regular basis up to the claimed date of accident (See Px 2, Px 5, pp 50 -- 67; and Rx 7).

The MRI of the lumbar spine was performed on January 6, 2002 (It should also be noted that petitioner told Dr. Darland of a prior MRI of the low back after his auto accident, although same is not contained within any records in evidence). This revealed petitioner to have diffuse bulging at L3 through S1 with a small superimposed central disk protrusion at L4-5, causing mild to moderate central canal stenosis. Also described was degenerative changes of the facet joints at

more persuasive than the testimony of petitioner and his witnesses, Losoya and Jakobsen. The Arbitrator notes that at the request of either petitioner or his attorney, Mr. Jakobsen authored a report dated September 1, 2004 (Px 35). That report indicates that petitioner spoke with Mr. Jakobsen on Friday August 20, 2004 about a work accident occurring on that date. While giving every **[*10]** benefit of the doubt to Mr. Jakobsen, the Arbitrator notes the month of accident to be inconsistent, the date of accident to be inconsistent and the day of accident to be inconsistent with petitioner's allegations. There is nothing of significance within Mr. Jakobsen's note to support petitioner's claim for accident. The Arbitrator also finds it difficult to believe that a man of petitioner's size could fall on freshly poured concrete and not make any impression on same. This is inconsistent with the testimony of Mr. Hisel.

Credibility is a threshold consideration and finding of fact at bar. The Arbitrator attaches no credibility to petitioner's testimony based upon his own testimony and response to all the questions, his demeanor and inflections while under cross examination, his version of events compared to the testimony of others, and his direct avoidance of on point answers about his medical treatment prior to the alleged fall in the case at bar. The Arbitrator watched the petitioner as he limped into and out of the hearing room. However, petitioner's presentation video is inconsistent with this presentation (Rx 14 & 15). The Arbitrator has seen footage of petitioner outside **[*11]** a bar, pacing and talking on a cell phone, all without limp or other indication of impaired gait. Petitioner demonstrated by visual observation a facility to enter and exit a pick up truck without observable pain behavior or observable requirement to compensate by body movements for any ostensible impairment.

The Arbitrator notes further that when pulled over for a driving infraction (Rx 8), petitioner claimed employment with "Black Hawk Siding," a claim petitioner denied at trial and a claim that the owner of Black Hawk Siding also disputed (Px 39). The Arbitrator notes the records of Dr. Darland dated October 28, 2004 also reflect petitioner to be working selling siding (Px 2 & Px 5, p. 77).

For the above reasons and those in the material Statement of Facts, the Arbitrator concludes as a matter of material fact and as a matter of law the petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment by Respondent.

Even assuming arguendo an accident did occur, the petitioner failed to prove his condition is causally related to the claimed accident. Petitioner presented the evidence testimony of **[*12]** Dr. Eller; based upon that evidence Dr. Eller did not address the history of his extensive low back problems or comment on or viewing of MRI films or reports that predate the claimed accident. The Arbitrator can ascribe little weight to Dr. Eller's opinion as to causal connection in light of the lack of any history as to petitioner's prior condition. The Arbitrator cannot give any credence to the opinions of Dr. Darland. Dr. Darland never reviewed any MRI films and relied solely on conclusions from different radiologists as to the condition of petitioner's low back. Dr. Darland liberally prescribed quantities of narcotic pain medication to petitioner for low back pain prior to the claimed accident.

In this particular case at bar, the Arbitrator is persuaded by the testimony and comment of Dr. Soriano (Rx 11). Petitioner denied to Dr. Soriano a history of back problems even when confronted with the records. Dr. Soriano concluded that petitioner either suffered from an incredibly short memory, or more likely, attempted to mislead the doctor with respect to petitioner's prior medical history. The Arbitrator also notes the inconsistencies in petitioner's physical presentation to Dr. Soriano **[*13]** and equates those with petitioner's presentation at Arbitration and as seen on video.

For all of the above reasons, the Arbitrator concludes that petitioner failed to prove by a preponderance of the evidence that his current condition is causally related to his claimed work accident.

G. What were Petitioner's earnings?

It's undisputed that petitioner only worked about half a day for respondent. Respondent has admitted to an average weekly wage of $ 99.36 (Arb. Ex. 1).

There is nothing of record for the Arbitrator to rely upon in order to justify any other average weekly wage. There are no records of a similarly situated employee. Both petitioner and his field rep, Reidar Jakobsen, agreed that there was no guaranteed minimum rate of pay. As a journeyman laborer, petitioner would show up to work jobs as assigned by his Hall.

M. Should penalties or fees be imposed upon Respondent?

This is not a case where penalties are appropriate. The circumstances surrounding the alleged accident, the multi-year history of back problems and possible abuse of narcotic pain medication make it clear that Respondent had a reasonable basis for disputing liability. Respondent has made an exceptional **[*14]** good faith challenge to the payment of compensation. Petitioner's claim for penalties and attorney fees is denied.

Despite outstanding and tenacious advocacy by his trial counsel, the Petitioner's own claim for workers compensation is denied.

O. Other - Admission of Px. 31, 32 & 33

Petitioner offered for admission into evidence selected documents from Local 727. Respondent objected. Petitioner offered the additional testimony of Reidar Jakobsen (T. p. 199 et seq.). Mr. Jakobsen was a field representative for Union Local 32 before he retired in June 2005 (T. pp. 199-200). Mr. Jakobsen did not maintain the documents marked as Px. 31, 32 & 33 as they were from a different union local (T. p. 208). Mr. Jakobsen was not the person who would send out the wage scale records to contractors (T. p. 209).

In addition, Px. 31 does not contain information of wage scales for a highway laborer (T.p. 209).

As to Px. 33, Mr. Jakobsen acknowledged he could not vouch for its accuracy (T.p. 213).

As to Px. 32, portions of the exhibit postdate Mr. Jakobsen's retirement in June 2005, and also reflect wages of a different union.

None of the documents reflect any guarantee with respect to pay for a **[*15]** set number of hours per day (T. p. 212). As to the following: Px. 31, 32 & 33 they are not admitted into evidence.

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

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CASE # 04 WC 036665

EMPLOYEE	GRUSZECZKA, MARK	HEARING LOCATION	
EMPLOYER	ALLIANCE CORP	MUNICIPAL BLDG	
SETTING	DEKALB	200 S 4TH STREET	
ARBITRATOR	FALCIONI, ROBERT	DEKALB	IL 60115
COMMISSIONER	LAMBORN, KEVIN	ACCIDENT DATE	07/21/04
BODY PART	BACK N/A	CASE FILED	07/30/04

EMPLOYEE ATTORNEY	EMPLOYER ATTORNEY
PETER F FERRACUTI & ASSOCIATES	RUSIN MACIOROWSKI & FRIEDMAN L
110 E MAIN ST	10 S RIVERSIDE PLAZA
PO BOX 859	SUITE 1530
OTTAWA IL 61350	CHICAGO IL 60606

STATUS APELLATE APP

STATUS CALL	FIRST	10/14/04	LAST	00/00/00	NEXT	00/00/00
REVIEW	FIRST	00/00/00	LAST	00/00/00	NEXT	00/00/00
RETURN	FIRST	07/11/08	LAST	00/00/00	NEXT	07/11/08
ORAL	FIRST	04/08/09	LAST	00/00/00	NEXT	04/08/09

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