Section 7020.60 Continuances on Arbitration, Notices, Monthly Status Calls, Voluntary Dismissal

a) Continuances on Arbitration; Notices
Written notices will be sent to the parties for the initial status call setting on arbitration only. Thereafter, cases will be continued for 3 month intervals, or at other intervals upon notice by the Commission, until the case has been on file at the Industrial Commission for 3 years, has been set for trial pursuant to Section 7030.20, or otherwise disposed of. The parties must obtain any continued status call dates from the Industrial Commission records.

b) Monthly Status Calls

1) Each Arbitrator, subject to his or her availability, shall hold a monthly status call of cases which appear on the Arbitrator's docket that month.
   A) In Cook County, each Arbitrator's monthly status call shall be held at 2:00 p.m. on a date and place designated by the Commission.
   B) In areas outside of Cook County, each Arbitrator's monthly status call shall be held at 9:00 a.m. on a date and place designated by the Commission.

2) The monthly status call shall be conducted by the Arbitrator as follows:
   A) Cases shall be called in the order that they appear on the monthly status call.
   B) Cases will be continued in accordance with subsection (a) above unless a request for a trial date is made in accordance with Section 7030.20. A request for a trial date may be made in a case which does not appear on the monthly status call if:
      i) a Petition under Section 19(b) of the Act has been filed in accordance with Section 7020.80(a);
      ii) death benefits under Section 7 of the Act or permanent total disability benefits under Section 8 of the Act are claimed; or
      iii) special circumstances exist which in the opinion of the Arbitrator would warrant advancing the case for trial. The moving party must set forth in his motion the basis of the claimed special circumstance.

   Motions for trial dates under subsections (b)(2)(B)(i), (ii) and (iii) above shall be presented at the conclusion of the status call.
   C) Cases on file 3 or more years.
      i) In all cases which have been on file at the Industrial Commission for three years or more, the parties or their attorneys must be present at each status call on which the case appears. The case will be set for trial unless a written request has been made to continue the case for good cause. Such request shall be made part of the case file. The written request must be received by the Arbitrator at least fifteen days in advance of the status call date and contain proof of service showing that the request for a continuance was served on all other parties to the case and/or their attorneys. Any objection to a continuance in such case must be received by the Arbitrator at least seven days prior to the status call date and contain a similar proof of service. The Arbitrator shall rule on such requests for continuances or objections thereto at the status call. The parties must appear at the status call even if there is no objection to the continuance.

ii) Failure of the Petitioner or the Petitioner's attorney to request or answer a request for a continuance in accordance with subsection (b)(2)(C)(i) above and to appear at the monthly status call on which the case appears shall result in the case being dismissed for want of prosecution, except upon a showing of good cause.

iii) Where the Arbitrator has set the matter for trial, the case shall proceed on the date set by the Arbitrator.

D) Section 19(b-1) pretrials, motions, pro se settlement contracts

i) In Cook County, each Arbitrator will hear motions and conduct pre-trial hearings on Petitions filed under Section 19(b-1) of the Act beginning at 8:45 a.m. on the monthly status call date. The Arbitrator shall hear other motions at the conclusion of the monthly status call. Pro se settlements may be presented on the morning of any monthly status call or on days designated by the Arbitrator.

ii) In all areas outside of Cook County, the Arbitrator will hear motions and conduct pre-trial hearings on Petitions filed under Section 19(b-1) of the Act, and hear other motions, at the conclusion of the monthly status call. Pro se settlement contracts may be presented at the conclusion of any monthly status call or on days designated by the Arbitrator.

c) Voluntary Dismissals

1) Any party may voluntarily dismiss his or her claim or any petition or motion filed on his or her behalf upon motion signed by the party, if unrepresented, or his or her attorney of record.

2) A party may file a motion to dismiss his or her claim or any petition or motion filed on his or her behalf without the signature of his attorney of record. The moving party must serve said motion on his or her attorney and the opposing party, in the manner set forth in Section 7020.20(a), and set the motion for hearing as set forth in Section 7020.70. In such cases, there shall be no disposition of the claim on its merits prior to the disposition of said motion.

(Source: Amended at 20 Ill. Reg. 3842, effective February 15, 1996)

Section 7020.70 Motion Practice, General

a) Form of Motions

All motions, except motions made during an Arbitration or Review hearing, motions for a continuance of cases in the regular review call, and petitions filed under Section 19(h) and/or Section 8(a), must be accompanied by an Industrial Commission form entitled Notice of Motion and Order and must be served on the Arbitrator or Commissioner and all other parties in accordance with subsection b). All such motions must set forth the date on which the moving party will appear before the Arbitrator or Commissioner and present the motion and must include the type of motion and nature of the relief sought.

1) Motions on Arbitration

A) Motions requesting a trial date will be heard during the status call in accordance with Section

7020.60(b)(2).

B) All other motions will be heard in accordance with Section 7020.60(b)(2)(D). Each arbitrator will hear all motions, other than motions requesting a date certain for trial, on any case assigned to the Arbitrator, even if it does not appear on the status call.

2) Commissioners' Review Calls
Each Commissioner will hear motions at the hearing location on the days designated by the Commission.

b) Notice; Service of Papers; Proof of Service; and Waiver of Notice.

1)

A) For all motions except Petitions for Immediate Hearing and motions requesting a date for trial, notices of motion shall be in writing and shall be served upon the Arbitrator or Commissioner and the attorney of record of all other parties or, where any other party is not represented by counsel, upon the party himself, by personal or office delivery or by mailing of a copy of the notice with copies of the supporting papers. Such service, if by personal or office delivery, shall be effected 3 days preceding the day of the status call set forth in the notice, exclusive of any intervening Saturday, Sunday or legal holiday. If service is had by mail, then the envelope enclosing a copy of the notice and supporting papers shall be deposited in the post office or post office box at least 5 days before the motion is to be heard, exclusive of any intervening Saturday, Sunday or legal holiday.

B) Motions for an immediate hearing under Section 19(b) of the Act and motions requesting a date for trial shall be served on the Arbitrator and on all other parties 15 days preceding the status call day set forth in the notice.

C) Proof of service of notices or other papers shall be affixed:
i) in any case by written acceptance of service;
ii) in case of service by delivery, by affidavit of the person delivering or leaving the papers, and,
iii) in case of service by mail, by affidavit of the person depositing the papers in the mail, which affidavit shall state the time and place of mailing, the complete address which appeared on the envelope and the fact that proper postage was prepaid.

D) Where the opposite party has not appeared within time fixed by rule, or has appeared, but failed to designate a place for service, service may be directed to his last known business or residence address.

2) Parties may waive the requirements of notice, service and proof of service. Moreover, in the case of any motion, the hearing officer retains the power to enlarge or reduce the time of notice prescribed in paragraph (b)(1)(A) of this part.

c) Who Shall Hear Motions

1) When a cause is pending on the arbitration call, all motions and settlement contracts, except where expressly otherwise provided in the Rules of the Commission, shall be heard by the Arbitrator to whom the case has been assigned. If said Arbitrator is unavailable, the Commission may assign the motion or settlement contract to another Arbitrator for disposition.

2) When a cause is pending on review, but not yet assigned to a specific Commissioner, all motions shall be assigned to a sitting Commissioner. Once the cause has been assigned to a particular Commissioner for hearing, that Commissioner shall hear all motions relative to the case.

(Source: Amended at 15 Ill. Reg. 8221, effective May 17, 1991)

Section 7030.20 Setting a Case for Trial

a) A written request for a date certain for trial may be made at the monthly status call on which the case appears. A request for a trial date in a case which does not appear on the monthly status call may only be made in accordance with Section 7020.60(b)(2)(B).

b) If the parties by agreement request a trial date, the Arbitrator will assign a specific date and time for trial. A pre-trial conference may be held by the Arbitrator. Either party may request a pre-trial conference prior to the start of trial.

c) If there is no agreement:

1) Any party may file a motion requesting a date certain for trial. The motion must be accompanied by a form provided by the Industrial Commission called a Request for Hearing, which sets forth the moving party's claims on each issue.

2) A Respondent may file a motion requesting a date certain for trial if Respondent claims that:
A) Respondent has not received in the prior 6 months any bills or other evidence that Petitioner is under medical care or undergoing physical or vocational rehabilitation related to the alleged accidental injuries, and
B) Respondent has evidence establishing that Petitioner has not been entitled for the prior 6 months to temporary total disability benefits as a result of the alleged accidental injuries, and such benefits have not been paid for that period.

3) The motions for trial dates shall be filed and heard pursuant to Section 7020.70 and Section 7020.60. If the Arbitrator determines that proper and timely fifteen (15) days notice was given of the motion for trial date to the opposing party, opposing party was provided with a completed Request for Hearing, said case appears on the monthly status call on the date the motion is heard, or if the case is not on the status call, the Arbitrator has determined that the case falls within the exceptions in Section 7020.60(b)(2)(B), and that the matter shall proceed to trial, the Arbitrator shall set the matter for trial on a date certain. If any party fails without good cause to appear, the

Arbitrator will hear the motion for trial date ex parte, and if the Arbitrator determines the matter is ready for trial will set a trial date convenient to the Arbitrator and the party that appeared. The party that appeared shall notify the opposing party of the trial date.

d) On each trial day each party or, if represented, the party's attorney of record must appear before the Arbitrator between 8:45 a.m. and 9:15 a.m. during which time the Arbitrator shall establish the order in which cases shall proceed that day. The Arbitrator may give priority to cases in which a Petition under Section 19(b) or 19(b-1) of the Act has been filed, death benefits under Section 7 of the Act or permanent total disability benefits under Section 8 of the Act are claimed or other cases in which special circumstances exist which in the opinion of the Arbitrator warrant granting priority to the case in the trial order. Request for Hearing forms must be completed, signed and submitted to the Arbitrator prior to the beginning of the hearing in the case.

e) Failure of the Petitioner to appear before 9:15 a.m. may bar the case from being heard that day or may result in dismissal of the claim. Failure of the Respondent to appear may result in an ex parte hearing on the merits of the claim.

f) On each trial day the Arbitrator shall begin hearing cases at 9:30 a.m. Any party who requests a date certain for trial must be prepared, absent good cause shown, to proceed to trial. On the trial day parties may report the case settled or request a continuance on a form provided by the Industrial Commission. If the moving party does not respond when the case is called for trial by the Arbitrator, the case may be placed at the end of the trial order.

g) Bifurcated hearings are discouraged and will be allowed only for good cause. Examples of good cause include, but are not limited to, where the number or location of witnesses make it impossible to conclude the hearing in one day or the testimony of a witness must be taken prior to a deposition. All cases, except those which are heard under Section 19(b-1) of the Act, must be concluded within 3 months after the first hearing date or the Arbitrator will close proofs, absent good cause shown, and render a decision.

(Source: Amended at 20 Ill. Reg. 4053, effective February 15, 1996).

*11 IWCC 1114; 2011 Ill. Wrk. Comp. LEXIS 1149, **

GAIL EDWARDS, PETITIONER, v. INTERSTATE BRAND CORP, RESPONDENT.

NO: 09WC 48348

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF ST CLAIR

11 IWCC 1114; 2011 Ill. Wrk. Comp. LEXIS 1149

November 9, 2011

CORE TERMS: arbitrator, trial date, scenario, notice, date certain, opposing party, accompanied, requesting

JUDGES: Kevin W. Lamborn; Daniel R. Donohoo; Thomas J. Tyrrell

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 ex parte hearing, notice, accident, temporary total disability and permanent partial disability and being advised of the facts and law, vacates the Decision of the Arbitrator and remands the case back to the Arbitrator for a trial on all issues.

In the Decision of the Arbitrator's findings of fact, the Arbitrator noted that Petitioner had filed a Notice of Motion and Order setting the matter for a hearing on October 18, 2010. Petitioner's motion was heard on that date with neither Respondent or Respondent's counsel being present. The matter was set for a trial date certain on November 22, 2010. The Arbitrator further noted that a copy of the Date Certain Order was mailed to Respondent via certified mail and said mail was signed for by an employee of Respondent. At the November 22, 2010, hearing, the Arbitrator deemed that notice to Respondent was proper and proceeded with the hearing. Proofs remained open until December 20, 2010.

Section 7030.20(c)(1) of the **Rules Governing** Practice before the Illinois **[*2]** Workers' Compensation Commission provides that a motion requesting a date certain when the parties

cannot agree to a trial date "must be accompanied by a form provided by the Industrial Commission called a Request for Hearing, which sets forth the moving party's claims on each issue."

In Petitioner's pleadings, no argument was made that the statutorily-required Request for Hearing accompanied the motion requesting a date certain. Instead, Petitioner advanced the notion that Section 7030.20(c)(1) was substantially complied with. The Commission finds the use of the word "must" in Section 7030.20(c)(1) carries the same weight as the word "shall" and does not allow for "substantial compliance," only strict compliance.

Section 7030.20(c)(3) empowers an arbitrator to set a matter for a trial date certain under four scenarios. The first scenario allows this action if the Arbitrator finds proper and timely fifteen (15) days notice was given of the motion for trial date to the opposing party. The second scenario would permit setting a trial date certain if the opposing party was provided with a completed Request for Hearing. The third scenario was if the case appeared on the monthly status **[*3]** call on the date the motion is heard. The last scenario was if the arbitrator determined that the case falls within the enumerated exceptions found in Section 7020.60(b)(2)(B). The Commission, in reviewing the Decision of the Arbitrator, finds that the decision is silent with respect to which of the scenarios under Section 7030.20(c)(2) that the Arbitrator used to circumvent the filing requirements under Section 7030.20(c)(1). Without such an explanation, the Commission finds that the Arbitrator impermissibly set a trial date certain.

IT IS THEREFORE ORDERED BY THE COMMISSION that the February 11, 2011, Decision of the Arbitrator be vacated and the matter be remanded back to the Arbitrator for a trial on all issues.

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 Office of the Secretary of the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Statutory Right

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

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

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **rules and governing** (Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, April 11, 2012 - 11:28 AM EDT

*11 IWCC 1264; 2011 Ill. Wrk. Comp. LEXIS 1357, **

MARTHA **MESSINA,** PETITIONER, v. ABF **FREIGHT** SYSTEMS, INC., RESPONDENT.

NO: 08WC 04894

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

11 IWCC 1264; 2011 Ill. Wrk. Comp. LEXIS 1357

December 23, 2011

CORE TERMS: pain, knee, left knee, lumbar, opined, hip, medial, physical therapy, spine, mild, medical care, degenerative, discogram, underwent, gait, temporary, moderate, current condition, chondromalacia, ill-being, annular, doctor, tear, conclusions of law, temporary disability, permanent disability, above-referenced, causally, antalgic, abnormal

JUDGES: Michael P. Latz; David L. Gore; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of accident, total temporary disability, causal connection, nature and extent, permanent disability, medical expenses, prospective medical care, § 19(k), § 19(1) and § 16 attorney fees, and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the Decision of the Arbitrator finding that the petitioner's low back injury was not causally related to her accident of December 4, 2007. Therefore, the Commission hereby modifies the **[*2]** Decision of the Arbitrator and finds that the respondent has paid $ 49,093.38 in total temporary disability benefits from December 7, 2007 through December 12,

2007; from January 28, 2008 through May 29, 2008; from September 18, 2008 through November 5, 2008; from January 13, 2009 through February 2, 2009; and, from July 27, 2009 through December 22, 2009. The respondent is not liable for total temporary disability payments from December 12, 2007 through January 28, 2008; from May 19, 2008 through September 17, 2008; from November 6, 2008 through January 12, 2009; and, from February 3, 2009 through July 27, 2009 as the petitioner was either working full-time, or working in the respondent's alternative work program earning eighty-five percent of her regular pay. Respondent has therefore, paid all necessary total temporary disability benefits. Having found that the respondent has paid all total temporary disability benefits, the Commission further modifies the Decision of the Arbitrator and finds that the petitioner is not entitled to § 19(k), § 19(1) penalties or § 16 attorney fees. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Respondent shall **[*3]** pay to the Petitioner the sum of $ 926.29 per week for 53 weeks from December 7, 2007 through December 12, 2007; from January 28, 2008 through May 29, 2008; from September 18, 2008 through November 5, 2008; from January 13, 2009 through February 2, 2009; and, from July 27, 2009 through December 22, 2009, 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. The respondent shall be entitled to a credit of $ 49,093.38.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of all medical bills that are reasonable, necessary and related to the treatment of her left knee following the accident of December 4, 2007 through December 22, 2009 for medical expenses under § 8(a) and § 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for **[*4]** Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

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 matter was heard by the Honorable **Brian Cronin,** Arbitrator of the Commission, in the city of **Chicago,** on **December 15, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked **[*5]** below, and attaches those findings to this document.

DISPUTED ISSUES

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. Is Petitioner entitled to any prospective medical care?

L. What temporary benefits are in dispute?

Maintenance TTD

M. Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident, **December 4, 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 ***of her left knee/leg*** is causally related to the accident.

In the year preceding the injury, Petitioner earned **$ 72,250.67**; the average weekly wage was **$ 1,389.44**.

On the date of accident, Petitioner **[*6]** was **42** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$ 49,093.38** for TTD and maintenance paid.

Respondent shall be given a credit of **$ 80,943.00** for medical bills paid.

ORDER

Respondent shall pay the petitioner temporary total benefits of $ **926.29**/week for **81-6/7 weeks** from **12/7/07** through **2/2/09** and from **7/27/09** through **12/22/09**, which is the period of temporary total disability for which compensation is payable.

Respondent is liable for the payment of all medical bills that are reasonable, necessary and related to the treatment of her left knee following the accident of December 4, 2007, through December 22, 2009, and in accordance with Sections 8(a) and 8.2 of the Act.

Respondent shall pay **$ 10,000.00** in penalties, as provided in Section 19(l) of the Act.

Respondent shall pay **$ 13,366.36** in penalties, as provided in Section 19(k) of the Act.

Respondent shall pay **$ 4,673.27** in attorneys' fees, as provided in Section 16 of the Act.

In no instance shall this **[*7]** 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

March 18, 2011

Date

Findings of Fact

On December 4, 2007, Martha **Messina** (Petitioner) was employed by ABF **Freight** Systems, Inc. (Respondent) as a truck driver. On this date she slipped on ice and snow while inspecting Respondent's truck / trailer, which caused an injury to her left knee. Petitioner sought no medical care on her date of accident.

Petitioner testified that when she slipped and fell, **[*8]** she landed on her right hip, both legs went to the right, and she struck the inside of her left knee. She further testified that then she experienced pain on the "inside" of her left knee. She testified that she also felt pain in her right hip, but that the majority of her pain was in the knee. She testified that she finished her workday, went home and experienced swelling and throbbing in her left knee.

Due to her left knee pain, Petitioner missed the next two days at work.

On December 7, 2007, Petitioner called the Respondent and told them that she needed to see a doctor. Petitioner testified that Respondent sent her to a clinic in Hammond, IN. At such clinic, the staff took x-rays of her knee. The doctor prescribed medication and advised her to wear a brace on her knee. The doctor did not give her a brace. The doctor advised her against walking up stairs.

On December 8, 2007, Petitioner treated at Lemont Immediate Care. She complained of left knee pain only and was diagnosed with an "[a]cute left knee sprain, cannot exclude internal derangement." Petitioner was provided with a knee immobilizer. Medication and a left knee MRI were prescribed. She was told to follow up at the **[*9]** occupational clinic on Monday to continue physical therapy. PX.2.

Petitioner treated with Theodore Christou, M.D. on January 4, 2008 and January 18, 2008. On each occasion she complained of left knee pain and swelling only. PX.4.

On January 15, 2008, Petitioner presented to Adventist LaGrange Memorial Hospital. She underwent a left knee x-rays, which were interpreted as unremarkable. PX.4.

Petitioner received physical therapy for her left knee at Physiotherapy Associates for 32 sessions from January 18, 2008 through April 7, 2008. At her January 18, 2008 visit to the physical therapist, the therapist noted that on December 4, 2007, Petitioner fell on her right hip with her legs went to the side. He also wrote that she may have torqued and twisted her knee at that time. Petitioner only complained of left knee pain at that time. PX.4.

Petitioner followed up with Anna Marie **Messina,** D.C., on February 1, 2008. Dr. **Messina** is no relation to the Petitioner. Dr. **Messina** noted that the Petitioner was on medical disability from work after falling and injuring her left knee in December 2007. For the first time since her date of accident, Petitioner complained of excruciating left neck and **[*10]** left shoulder pain with some radiation into the left arm. PX.3.

On February 4, 2008, Petitioner reported to physical therapist Keith Travers that on January 23, 2008, she "woke with pain with rotating left in the upper cervical spine." PX.4.

The Arbitrator notes that since 2004, Dr. **Messina** has treated the Petitioner for lower back and mid back pain. Petitioner began such treatment after being involved in a motor vehicle accident on September 15, 2004 in Hickory Hills, Illinois, over three years prior to her current date of loss. She continued to treat with Dr. **Messina** for mid and low back pain from 2004 through her date of loss of December 4, 2007. On July 11, 2007, Petitioner told Dr. **Messina** that she experienced pain in her lower lumbar area after lifting a suitcase. At that time, she rated her current low back pain and mid back pain at a 9 out of 10. She wrote that she had been previously hospitalized for a neck injury. PX.3.

On February 4. 2008, Petitioner filed an Application for Adjustment of Claim which alleged injuries only to her "left leg." RX 9.

On February 12, 2008, Petitioner sought medical care from Richard T. Beaty, D.O. for evaluation of her left knee. On February **[*11]** 18, 2008, at Dr. Beaty's behest, Petitioner underwent a left knee MRI. The images were interpreted as showing a mild medial collateral ligament sprain and mild to moderate patellofemoral chondromalacia involving the medial patellar facet and medial trochlea of the left knee. No discrete tears of the meniscus or ACL were noted. PX.5.

Petitioner followed up with Dr. Beatty on March 11, 2008 and was placed on light-duty work. PX.5.

Petitioner worked in Respondent's Alternative Work Program ("AWP") from April 30, 2008 through May 18, 2008.

On May 13, 2008, Petitioner returned to Dr. Beaty. Dr. Beaty released her to regular-duty work as of May 19, 2008. PX.5.

Petitioner returned to regular duty and worked in the same capacity from May 20, 2008 through September 15, 2008.

On July 22, 2008, Petitioner returned to Dr. Beaty who stated that she still had persistent left medial joint line tenderness. Dr. Beaty felt that Ms. **Messina** had failed non-operative treatment and that an arthroscopic surgery was indicated. PX.5.

On August 1, 2008, Petitioner followed up with Dr. **Messina** and for the first time since her date of accident, complained of right hip pain/discomfort. Dr. **Messina** wrote **[*12]** that there is no radiation, that Petitioner denies trauma and that Petitioner is "[w]alking crooked." Petitioner also complained of left knee pain. PX.3.

On August 4, 2008, Dr. **Messina** recorded that Petitioner's right lower back is very sore/tender, R>L, experiencing some spasm in the right lumbar region, but no radiation. She also recorded that Petitioner's left knee is still sore. PX.3.

The Respondent sought a Utilization Review to evaluate Dr. Beaty's recommendation for a diagnostic arthroscopy to rule out derangement of the left knee. In a report dated August 15, 2008, Coventry authorized such procedure. RX 4.

On September 18, 2008, Petitioner presented to Dr. Beaty and underwent arthroscopic surgery to her left knee that consisted of a shaving of the chondromalacia from the patella. Dr. Beaty did not find any evidence of loose articular debris in the gutters. He did not find evidence of a medial synovial plica. Although Dr. Beaty found some arthritic changes on the medial femoral condyle, he also found that the medial meniscus, the lateral meniscus and the anterior cruciate ligament were all intact. Dr. Beaty offered a post-operative diagnosis of "Chondromalacia of the patella, **[*13]** inferior and medial facet, left knee." PX.5.

On September 23, 2008, Petitioner returned to Dr. Beaty and was to start range of motion exercises. Once she obtained a full range of motion, she was to start physical therapy. She was to remain off work at that time. PX.5.

Petitioner was seen for physical therapy for her left knee at Athletico for 30 sessions, from October 1 through December 8, 2008. It was noted that Petitioner's greatest limitations were due to her low back and hip discomfort. PX.6.

On October 14, 2008, Petitioner returned to Dr. Beaty who released her to return to light -duty work. PX.5.

On November 8, 2008, Petitioner reported to the Athletico therapist an increase in low back pain and left glute pain since she returned to work in a light-duty capacity. PX.6. On November 11, 2008, Petitioner complained to Dr. Beaty of back and right buttock pain. Dr. Beaty wrote: "The knee exercises appear to be aggravating her back and right buttock." He also noted that Petitioner had left knee chondromalagic pain. PX.5

On December 23, 2008, Petitioner returned to Dr. Beaty and complained of pain in her left hip and low back. Petitioner was sent for an MRI of the lumbar spine **[*14]** to rule out a herniated disc. She was also to continue therapy for both her back and knee. PX.5.

On January 5, 2009, Petitioner underwent an MRI of the lumbar spine. The radiologist interpreted the results as revealing, in part, disc dehydration with preservation of disc height and a small posterior annular tear and mild annular bulging at L4-5; disc dehydration, vacuum phenomenon, and moderate loss of disc height, diffuse annular bulging, mild impingement of the exiting L5 nerve roots at L5-S1. The radiologist's impression was "Mild to moderate spondylosis in the lower thoracic and lumbar spine. No significant narrowing of the central canal. Slight lateral recess narrowing is present at several levels. There is moderate foraminal narrowing at L5-S1 with impingement of the bilateral exiting L5 nerve roots." PX.5.

On January 13, 2009, Petitioner returned to Dr. Beaty. He diagnosed Petitioner with degenerative disc disease and neuroforaminal stenosis at L5-S1. Petitioner was given a slip for physical therapy for pelvic traction and was to remain off work. PX.5.

Petitioner worked in Respondent's AWP from February 3, 2009 through July 26, 2009. RX 7.

On February 3, 2009, Petitioner **[*15]** returned to Dr. Beaty and requested a referral to Mark Lorenz, M.D., due to her back pain. Dr. Beaty recommended the same. Dr. Beaty noted on Petitioner's chart "***now*** back & left hip pain" [emphasis added]. PX.5.

On February 5, 2009, Petitioner presented to Dr. Lorenz with complaints of back pain. Dr. Lorenz's assessment was internal derangement with pain in the left knee and aggravation of pre-existing degenerative disk disease at the L5-S1 level by both the fall as well as the antalgic gait. Dr. Lorenz stated that Petitioner was not a surgical candidate at that point and that she should undergo a course of physical therapy for her lower back. She could return to work with a 15 pound restriction requiring a position change every 1/2 hour. PX.8.

On February 25, 2009, Petitioner presented to Andrew Zelby, M.D. for a Section 12

examination. She reported a prior history of low back pain in 1995. She told Dr. Zelby about the December 4, 2007 accidental injury to her left knee, and also reported that "she was limping because of the knee pain for months before she underwent surgery in September 2008, and developed low back pain around March 2008 because of the limping." RX.1.

[*16] The Arbitrator notes that there are no documented complaints of back or hip pain until August 2008.

Dr. Zelby conducted a physical examination and a review of past medical records on February 25, 2009. He offered the following impression: LUMBAR DEGENERATIVE DISC DISEASE. Dr. Zelby noted that this condition was not aggravated as a consequence of her fall since she had no complaints related to her low back until months after the fall. He opined that her antalgic gait could have exacerbated her underlying degenerative condition, but did not cause or accelerate this condition. After Petitioner's knee problems resolved, Dr. Zelby opined, she should have 3-4 weeks of physical therapy which would provide her with resolution of her back complaints. Petitioner would then be able to return to her usual vocational and avocational activities without restrictions. RX. 1.

On April 20, 2009, Petitioner presented to Dr. Lorenz for re-evaluation with complaints of back pain rated 6-8/10 and left buttock and thigh pain rated 7/10. He recommended a discogram. PX.8.

On April 28, 2009 Petitioner returned to Dr. Beaty. She continued to have pain in the *pes bursal* area. Petitioner was restricted **[*17]** to a sit-down position with minimal ambulation and no climbing. PX.5.

On May 19, 2009, Petitioner returned to Dr. Beaty. She complained of hip pain greater than knee pain. The *pes bursal* area was still tender. Petitioner remained on restricted duty. PX.5.

Coventry Workers' Comp Services conducted a Utilization Review ("UR") with regard to Dr. Lorenz's request for a lumbar discogram at L3-4-5-S1. In a report dated May 28, 2009, Coventry's doctor found that the medical necessity of the lumbar discogram was not documented. Thus, the discogram was not certified. RX.5.

Dr. Lorenz pointed out that Coventry's reviewing physician, Grace Hunter, D.O., does not specialize in orthopedic surgery, but specializes in physical medicine and rehab medicine. PX.11.

On July 14, 2009, Petitioner returned to Dr. Beaty. At that time, Petitioner reported that her left hip pain was more symptomatic than her left knee pain. Dr. Beaty noted that Petitioner's knee incision was well healed. PX.5.

On July 15, 2009, Petitioner presented to Dr. Zelby for re-evaluation. Dr. Zelby noted that Petitioner had lumbar spondylosis. He further noted that Petitioner had developed findings that could not be explained **[*18]** based on her underlying degenerative condition. A discogram was unnecessary since surgery would not be appropriate given her persistent problems with the knee. Dr. Zelby opined that Petitioner's back symptoms are not due to an injury to her low back, but only a temporary exacerbation related to her abnormal gait. He opined that when the abnormal gait is corrected, this exacerbation will subside. This condition is not treated with a fusion. RX.1.

On July 30, 2009, Petitioner presented to Ira Kornblatt, M.D. for a Section 12 examination. Dr. Kornblatt noted that Petitioner walked with an exaggerated limp. Dr. Kornblatt gave a diagnosis of chronic left knee pain and stated that there was a paucity of objective findings to substantiate her ongoing subjective complaints. Dr. Kornblatt felt Petitioner had reached maximum medical improvement with respect to the left knee injury and that no further treatment or studies were needed. With regard to work activities, Dr. Kornblatt recommended

that a functional capacity evaluation ("FCE") be performed. RX.3.

On August 18, 2009, Petitioner returned to Dr. **Messina** and complained of low back discomfort. Petitioner underwent 18 chiropractic sessions **[*19]** through October 21, 2009.

On August 18, 2009, Petitioner returned to Dr. Beaty who noted that her "primary problem with her sitting for extended periods of time is her low back and left hip pain." Dr. Beaty opined that Petitioner was "at MMI *[maximum medical improvement]* as far as her knee is concerned." PX.3.

On September 14, 2009, Petitioner underwent a functional capacity evaluation at ATI physical therapy clinic. Physical therapist Jeff O'Boyle found Petitioner to be functioning at the LIGHT duty level. He further noted Petitioner exhibited "increased pain reports and behaviors on virtually all of the assessment activities." Petitioner's job as a truck driver at ABF **Freight** was listed as a MEDIUM physical demand level position. However, Petitioner's functioning at the LIGHT duty level did not meet this MEDIUM duty level of work. Mr. O'Boyle found the FCE to be Valid. PX.7.

On September 22, 2009, Petitioner returned to Dr. Beaty who found her left knee to be stable. He further noted Petitioner's FCE evaluator found that she was unable to lift over 10 lbs. and allowed her to sit and stand as needed. PX.5., PX.7.

In a report dated November 18, 2009, Dr. Kornblatt noted he **[*20]** had reviewed Petitioner's FCE in which the evaluator found Petitioner capable of working at the light physical demand level. Dr. Kornblatt noted all of Petitioner's limitations were related to her back and hip pain. He found Petitioner had reached MMI and based upon her left knee condition, was capable of carrying out her previous job activities as a truck driver, which is a medium-level job. Dr. Kornblatt further noted that he "found no evidence of significant, permanent disability with respect to the left knee at the time of the independent medical evaluation on July 30, 2009." RX.3.

In a report dated December 16, 2009, Dr. Zelby opined that Petitioner's lumbar spine degeneration would not keep her from returning to full-time, full-duty work of the type that she performed prior to her December 4, 2007 loss date. Dr. Zelby noted that pursuant to the FCE, Petitioner has no objective abnormality to the left knee. He further reiterated his opinion that Petitioner did not injure her lumbar spine on the loss date. Dr. Zelby found Petitioner could return to all of her usual vocational and avocational activities without restrictions. RX.1.

Respondent terminated TTD benefits on December **[*21]** 18, 2009. Yet, Respondent claims that Petitioner is entitled to TTD benefits through December 22, 2009. AX.1.

Petitioner has not looked for employment of any kind since her benefits were terminated.

Dr. Lorenz, in a work status report dated April 30, 2010, opined that Petitioner was unable to work. He recommended that Petitioner undergo a discogram.

Petitioner underwent a provocative lumbar discogram on May 11, 2010. Non-concordant pain with high pressure was observed at L3-4. Non-concordant pain with low pressure was seen at L4-5 with an abnormal nucleogram. The L5-S1 disc had severe degenerative changes.

Dr. Lorenz, in a work status report dated June 7, 2010, opined that Petitioner was unable to work.

On December 7, 2010, Dr. Lorenz found that Petitioner was capable of returning to modified-duty work.

Conclusions of Law

F. WITH REGARD TO ISSUE (F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator incorporates and adopts the above-referenced findings of fact as pertinent.

Petitioner's current condition includes being status/post left knee arthroscopic **[*22]** surgery with shaving of the chondromalacia from the patella. Petitioner's pre-operative diagnosis was a mild medial collateral ligament sprain and mild to moderate patellofemoral chondromalacia involving the medial patellar facet and medial trochlea of the knee with no discrete tears of the meniscus or ACL. Petitioner's post-operative diagnosis was chondromalacia of the patella, inferior and medial facet, left knee. The Arbitrator concludes that the need for such knee surgery resulted from her injury of December 4, 2007, which arose out of and in the course of her employment by the Respondent.

Petitioner's current condition of ill-being also includes a small posterior annular tear and mild annular bulging at L4-5. The radiologist's impression of the 1/5/09 lumbar MRI included mild to moderate spondylosis in the lower thoracic and lumbar spine and moderate foraminal narrowing at L5-S1 with impingement of the bilateral exiting L5 nerve roots. Petitioner sought medical care for her lumbar spine from a chiropractor for three years prior to her date of loss due to a pre-existing motor vehicle accident.

Orthopedic surgeon Mark Lorenz, M.D., testified that Petitioner told him that she **[*23]** experienced back pain "right off the bat" following the December 4, 2007 accident. PX.11, p. 23. Petitioner reported to neurosurgeon Andrew Zelby, M.D., that she developed low back pain around March 2008 as a result of her limping. RX.2, p. 8. However, after December 4, 2007, there are no documented complaints of hip pain or low back pain until August 1, 2008 and August 4, 2008, respectively. From December 7, 2007 through July 30, 2008, Petitioner treated for her left knee with the company clinic, Lemont Immediate Care, Dr. Christou, Physiotherapy and Dr. Beaty. She reported neck and arm pain to Dr. **Messina** on February 1, 2008. Yet, in all these medical records there is not a single mention of hip pain or low back pain until August 1, 2008 and August 4, 2008, respectively.

The Arbitrator places more weight on the medical records than he does on the history Petitioner later provided to Dr. Lorenz or on Petitioner's testimony.

Dr. Lorenz opined that Petitioner's December 4, 2007 slip and fall was a competent cause for creating annular tears and pain. PX.11, p. 16. Yet, Dr. Lorenz's opinion was based, in part, on the history that Petitioner provided to him. Dr. Lorenz testified that **[*24]** Petitioner provided the following history:

> **She worked as a truck driver. She was getting out of her cab when she slipped on the ice and fell. In the process of doing this, she twisted her left knee, had some pain in the knee and had pain in the lower back and was treated for her knee and her back.**

Post-accident, Petitioner did not begin treating for her lower back until August 4, 2008.

On cross-examination, Dr. Lorenz testified that walking around with a painful knee doesn't cause back pain, but that if one has a traumatic event that causes a discogenic tear or rupture, then the antalgic gait will prolong the healing process. PX. 11, p. 51.

Dr. Lorenz opined that treatment from physical therapy did not aggravate or accelerate Ms. **Messina's** condition of pain. PX. 11, p. 25.

Dr. Lorenz admitted that he had not reviewed the records from Concentra, Back In Balance Chiro & Accupuncture Center (Dr. **Messina)** and Dr. Christou, and that he only reviewed some of Dr. Beaty's records. PX.11, pp. 20-22.

Therefore, the Arbitrator concludes that Dr. Lorenz's causation opinion is defective due to the inaccurate history that Petitioner provided to him and due to Dr. Lorenz's incomplete **[*25]** review of the medical records.

Dr. Zelby opined that "Ms. **Messina** had lumbar degenerative disk (sic) and that might be the cause for her complaints of pain." However, he opined, "the condition was not aggravated as a consequence of her fall since she had no complaints related to her low back until months after her fall." Moreover, Dr. Zelby testified, "[t]he antalgic gait could have exacerbated her underlying degenerative condition but did not cause or accelerate that condition." RX.2, p. 16. Dr. Zelby opined that when Petitioner's abnormal gait is corrected, the exacerbation will subside. RX.2, p. 22.

Dr. Zelby acknowledged that Petitioner's FCE was valid. However, he noted that during this test, Petitioner had increased pain reports and behaviors on virtually all of the assessment activities. RX.2, p. 25.

When Dr. Zelby examined the Petitioner, he noted that she exhibited "astasia abasia", which is an abnormal walk that has no neurologic or orthopedic basis. He also found that the lying straight leg raise test was positive bilaterally in the back only, but sitting straight leg raise test remained normal, which is negative. RX.2, p. 19.

Dr. Zelby opined that Petitioner did not **[*26]** sustain a back injury and, apparently, she also had no objective abnormality in her knee, and if there was no objective basis for her ongoing knee complaints, there was no objective basis for any continued aggravation of her lumbar degenerative disk disease. RX.2, p. 26. Dr. Zelby concluded that Petitioner does not need a lumbar fusion and that such fusion is not going to provide her with relief of her subjective complaints. RX.2, p. 29.

The Arbitrator notes that Dr. Zelby made the following presentation:

> **Zelby AS, Keefe, EF. Complex Causation Issues in Repeat Injuries -- The Legal and Medical Perspectives. Illinois Workers' Comp Forum. Council on Education in Management. Lombard, IL March 12, 2008.** RX.2, Deposition Exhibit # 1

On cross-examination, Dr. Zelby testified that he examined the Petitioner on two occasions: February 25, 2009 and July 30, 2009. In his report following the first examination, Dr. Zelby wrote that once Petitioner's antalgic gait has resolved, her back pain should not return. Dr. Zelby agreed with Petitioner's Counsel that as of his second examination, Petitioner's back complaints had not yet resolved. RX.2, p. 33.

Further, the Arbitrator notes that **[*27]** Petitioner's Application for Adjustment of Claim ("Application") lists as the affected body part "left leg." Petitioner's Application makes no reference to any other affected body part.

Petitioner did not seek to amend the Application until after the Arbitrator had conducted a hearing on the merits.

Section 7020.20 (e) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission states:

Applications for Adjustment of Claim may be amended prior to a hearing on the merits by filing an Amended Application for Adjustment of Claim under the letter and number given the original Application for Adjustment of Claim. The Amended Application for Adjustment of Claim must be clearly labeled "Amended" and must have attached to it proof that filing party has served a copy of the Amended Application for Adjustment of Claim on the opposing party in the manner set forth in Section 7020.70.

The Arbitrator denied Petitioner's post-arbitration-hearing verbal Motion to Amend the Application, based on the above rule

The Arbitrator finds the opinions of Dr. Zelby to be more convincing than those of Dr. Lorenz.

Based on the foregoing, the Arbitrator concludes that Petitioner **[*28]** has proven that her current condition of ill-being of her left knee is causally related to the accident of December 4, 2007, but has failed to prove that her current condition of ill-being of her lumbar spine is causally related to the accident of December 4, 2007.

J. WITH REGARD TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator incorporates and adopts the above-referenced findings of fact and conclusions of law as pertinent.

Respondent paid $ 80,943.00 in medical bills for treatment incurred by Petitioner from December 7, 2007 through August 25, 2010. RX 6.

Respondent is entitled to a credit for amount paid.

Respondent is liable for all medical bills incurred by Petitioner for medical care tendered with regard to her left knee only.

Respondent is *not* liable for any medical bill incurred by Petitioner for medical care tendered with regard to any malady or condition of ill-being other than the left knee.

The reasonableness of all medical **[*29]** charges is determined by the Illinois Medical Fee Schedule. Payment of medical bills shall be in accordance with Sections 8(a) and 8.2 of the Act.

Respondent is not liable for any medical bills incurred by Petitioner after December 22, 2009, the date on which on which TTD benefits were terminated by Respondent based upon the Utilization Review and the opinions of Dr. Kornblatt and Dr. Zelby.

K. WITH REGARD TO ISSUE (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator incorporates and adopts the above-referenced findings of fact and conclusions of law as pertinent.

Respondent is not liable for any medical bills incurred by Petitioner after December 22, 2009, the date on which TTD benefits were terminated by Respondent based upon the UR and the opinions of Dr. Kornblatt and Dr. Zelby. The Arbitrator further notes that Dr. Beaty had

previously found Petitioner's left knee to be stable and Petitioner to be at MMI.

L. WITH REGARD TO ISSUE (L) WHAT TEMPORARY BENEFITS ARE IN DISPUTE (TTD/MAINTENANCE), THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

[*30] The Arbitrator incorporates and adopts the above-referenced findings of fact and conclusions of law as pertinent.

Petitioner claims that she is entitled to TTD benefits from 12/7/07 through 2/2/09 and from 7/27/09 through 12/15/10. Respondent claims that Petitioner is entitled to TTD benefits from 12/7/07 through 2/2/09 and from 7/27/09 through 12/22/09. AX.1.

Respondent indicated that they have paid $ 49,093.38 in TTD/maintenance benefits through December 20, 2009. RX 7.

Petitioner seeks TTD/maintenance benefits from December 23, 2009 to the present. At no time during this period has Petitioner looked for employment.

On November 18, 2009 and December 16, 2009, respectively, Dr. Kornblatt and Dr. Zelby found Petitioner capable of returning to her pre-injury employment position with no restrictions. Dr. Beaty had previously found Petitioner's left knee to be stable and, with regard to the left knee, to be at MMI.

Respondent is bound by its stipulation, pursuant to Walker v. Indus. Comm'n, 345 Ill.App. 3d 1084, 804 N.E.2d 135 (2004)

The Arbitrator concludes that Petitioner is entitled TTD benefits from 12/7/07 through 2/2/09 and from **[*31]** 7/27/09 through 12/22/09, or 81-6/7 weeks.

Then, 81-6/7 (or 81.86) weeks times a TTD rate of $ 926.29 = $ 75,826.10.

M. WITH REGARD TO ISSUE (M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator incorporates and adopts the above-referenced findings of fact and conclusions of law as pertinent.

Respondent relied in part upon Utilization Review to deny Petitioner's request for a discogram.

Moreover, Respondent relied on the opinions of Doctor Zelby and Kornblatt with regard to the issues of prospective medical care and TTD/maintenance.

The Arbitrator finds that Respondent had a bona fide dispute on the issue of causation.

However, Respondent has only paid the Petitioner $ 49,093.38 of the $ 75,687.16 in TTD benefits that they owe the Petitioner. No explanation was offered for such underpayment.

Therefore, based on the foregoing, the Arbitrator concludes that Petitioner is entitled to Section 19(l) and 19(k) penalties and Section 16 attorneys' fees, as follows:

19(l) penalties = $ 30.00 per day times over 333.33 days --> = $ 10,000.00

19(k) penalties = $ 75,826.10 minus $ 49,093.38 **[*32]** = $ 26,732.72 times .50 = $ 13,366.36

Attorneys' Fees $ 10,000.00 + $ 13,366.36 = $ 23,366.36 times .20 = $ 4,673.27

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**
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Date/Time: Friday, April 13, 2012 - 9:39 AM EDT

In

Section 7110.10 Vocational Rehabilitation

a) The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs.

b) The assessment shall address the necessity for a plan or program which may include medical and vocational evaluation, modified or limited duty, and/or retraining, as necessary.

c) At least every 4 months thereafter, provided the injured employee was and has remained totally incapacitated for work, or until the matter is terminated by order or award of the Commission or by written agreement of the parties approved by the Commission, the employer or his or her representative in consultation with the employee, and if represented, with his or her representative shall:

1) if the most recent previous assessment concluded that no plan or program was then necessary, prepare a written review of the continued appropriateness of that conclusion; or

2) if a plan or program had been developed, prepare a written review of the continued appropriateness of that plan or program, and make in writing any necessary modifications.

d) A copy of each written assessment, plan or program, review and modification shall be provided to the employee and/or his or her representative at the time of preparation, and an additional copy shall be retained in the file of the employer and, if insured, in the file of the insurance carrier, to be made available for review by the Commission on its request until the matter is terminated by order or award of the Commission or by written agreement of the parties approved by the Commission.

e) The rehabilitation plan shall be prepared on a form furnished by the Commission.

(Source: Amended at 30 Ill. Reg. 11743, effective June 22, 2006)

*11 IWCC 1224; 2012 Ill. Wrk. Comp. LEXIS 204, **

THOMAS TUCKER, PETITIONER, v. WASHINGTON GROUP, RESPONDENT.

NO: 07WC 23448

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF FRANKLIN

11 IWCC 1224; 2012 Ill. Wrk. Comp. LEXIS 204

February 1, 2012

CORE TERMS: knee, surgery, replacement, medical treatment, laborer, pain, temporary total disability, vocational, temporary, light duty, recommended, medical care, notice, written request, full time, permanent disability, total incapacity, injured worker, continuous, regular, resume, accidental injury, current condition, disputed issues, period of time, accommodate, prescribed, deposition, ill-being, arthritis

JUDGES: Thomas J. Tyrrell; Daniel R. Donohoo; Kevin W. Lamborn

OPINION: [*1]

CORRECTED DECISION AND OPINION ON REVIEW

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

The Commission expands the Arbitrator's decision to note Respondent's obligation to provide a vocational assessment under **Rule** 7110.10 of the **Rules Governing** Practice before the Illinois Workers' Compensation Commission. **Rule** 7110.10 states in part:

> "The employer or his representative, in consultation with the injured employee **[*2]** and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs." Ill. Admin. Code tit. 50 § 7110.10 (2009).

Dr. Golz noted on June 29, 2010, that Petitioner would not be able to return to work as a laborer after receiving joint replacement and as such, would require vocational rehabilitation. Dr. Golz again stated on November 1, 2010, that Petitioner would no longer be able to work as a laborer after a total knee replacement. Should Petitioner prove unable to resume his regular duties after undergoing the total knee replacement, Respondent would be obligated to provide a vocational assessment pursuant to **Rule** 7110.10.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is affirmed and adopted.

IT IS FURTHER **[*3]** ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 604.27 per week for a period of 158-4/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 2,987.46 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the medical treatment recommended by Dr. Golz reasonably required to cure or relieve from the effects of the accidental injury.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on **[*4]** 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 Office of the Secretary of the Commission.

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION 19(b)

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 **JOHN DIBBLE,** Arbitrator of the Commission, in the city of **HERRIN,** on **12/15/2010.** 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?
F. Is Petitioner's current condition of ill-being causally related to the injury?
K. Is Petitioner entitled **[*5]** to any prospective medical care?
L. What temporary benefits are in dispute?

FINDINGS

On the date of accident, **02/23/2007,** 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 ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **47,132.8**; the average weekly wage was $ **609.40**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **5** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

Based on the evidence **[*6]** of Dr. Golz, the Petitioner's testimony and the fact that the Petitioner was working full time for the Respondent as a union laborer, the medical treatment of Dr. Golz was necessary because of the work injury to the knee. Petitioner has not reached maximum medical improvement and is still in need of continuing medical treatment as prescribed by Dr. Golz. Petitioner was released for light duty but Respondent could not accommodate and provided no vocational rehab. Petitioner is awarded an additional 158 4/7 weeks of temporary total disability from December 11, 2007 through the date of the 19(b) hearing, December 15, 2010. Petitioner is entitled to and is awarded the continuing medical treatment, i.e., total knee replacement, and temporary total disability from the date of such surgery until Dr. Golz releases him.

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 **[*7]** 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

January 24, 2011

Date

ATTACHMENT

The Arbitrator takes notice of the prior decision on the workers' compensation case. The final decision being in Pulaski County Circuit Court on August 3, 2009.

The Petitioner testified that on February 23, 2007, he was cleaning a concrete vibrator when it swung into his knee causing pain. Facts from the earlier 19(b) show that the Petitioner continued to work and did not seek medical care for 30 days, but, when the pain worsened, he did see a Dr. Oliver.. Dr. Oliver treated conservatively and referred him to an orthopedic doctor. At that time, the case was tried in the Illinois Workers' Compensation Commission and the Petitioner did not receive any treatment until October 2, 2009, two years and eight months after the **[*8]** original accident. Petitioner stated he was referred to Dr. Golz. Dr. Golz examined him and suggested surgery. Petitioner testified that the surgery did help his pain somewhat, but due to continuous complaints of pain, Dr. Golz recommended a total knee replacement.

Dr. Golz first saw Petitioner on October 2, 2009, and started conservative treatment. When that was unsuccessful, Dr. Golz performed arthroscopic surgery on November 16, 2009. After the surgery, Dr. Golz proceeded with the post-op physical therapy. He stated the surgery relieved some of the issues with pain, but the Petitioner was still having significant complaints, and at that time, Dr. Golz recommended a viscosupplemental injection. Again, this eased the pain for a period of time. The Petitioner continued to have significant complaints and Dr. Golz recommended total knee replacement. In his deposition, Dr. Golz's opinion was that the work accident was the cause of the meniscus tear and aggravated the pre-existing arthritis.

At the request of the employer, Petitioner was examined by Dr. Sherwyn Wayne. It was Dr. Wayne's opinion that even though Petitioner was working full time as a union laborer prior to the work injury, **[*9]** had no complaints from upper management that the work accident is not the reason for the need for the surgery performed by Dr. Golz. He also opined that the need for the total knee replacement is due to the advanced arthritis and not the work related injury.

Dr. Golz had the Petitioner off work for a period of time after the surgery then released him to light duty. Dr. Sherwyn Wayne, in his deposition, stated that he felt the employee would never go back to work as a laborer, but could have worked at a light duty position, even prior to the surgery performed by Dr. Golz.

Arbitrator finds:

That based on the evidence of Dr. Golz, the Petitioner's testimony and the fact that the Petitioner was working full time for the Respondent as a union laborer, the medical treatment of Dr. Golz was necessary because of the work injury to the knee. Petitioner has not reached maximum medical improvement and is still in need of continuing medical treatment as prescribed by Dr. Golz. Petitioner was released for light duty but Respondent could not

accommodate and provided no vocational rehab. Petitioner is awarded an additional 158 4/7 weeks of temporary total disability from December 11, 2007 through **[*10]** the date of the 19 (b) hearing, December 15, 2010.

END OF ATTACHMENT

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 > Benefit Determinations > Medical Benefits > General Overview

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

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Date/Time: Wednesday, April 11, 2012 - 11:23 AM EDT

*96 Ill. 2d 213, *; 449 N.E.2d 832, **;*
*1983 Ill. LEXIS 371, ***; 70 Ill. Dec. 485*

McLEAN TRUCKING COMPANY, Appellant, v. THE INDUSTRIAL **COMMISSION** et al. (John Schackney, Appellee)

No. 56593

Supreme Court of Illinois

96 Ill. 2d 213; 449 N.E.2d 832; 1983 Ill. LEXIS 371; 70 Ill. Dec. 485

May 18, 1983, Filed

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of Cook County, the Hon. Warren Wolfson, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Pursuant to Ill. Sup. Ct. R. 302(a), 73 Ill. 2d R. 302(a), appellant employer sought review of the order of the Circuit Court of Cook County (Illinois), which confirmed the order of appellee Industrial **Commission (Commission)** in the claim brought by appellee employee.

OVERVIEW: The employee filed his **application** for adjustment of claim and alleged that he sustained a heart attack, which arose out of his employment. When the arbitrator found that the date of the alleged heart attack and the proofs did not coincide, he allowed the employee to **amend** his complaint to conform to the proofs. The Industrial **Commission** upheld the award in most regards, and the employer appealed. The court held that the employer had ample opportunity to meet the change because the change did not require additional evidence but was simply a motion to **amend** the pleadings to conform to the evidence already in the record. The court found that the decision of the **Commission** was not against the manifest weight of the evidence and that the issue of permanency was properly reserved until after the prescribed rehabilitation program.

OUTCOME: The court affirmed the order of the circuit court that confirmed the order of the **Commission** in the claim brought by the employee.

CORE TERMS: claimant, pain, rehabilitation, chest, arbitrator, training, amend, disability, vocational, manifest, carton, rehabilitative, course of employment, dispatcher, trailer, compensation act, injuries arose, complains, conform, heavy, Act Ill, heart attack, injuries arising, truck driver, good health, myocardial infarction, causal connection, accidental, physically, demanding

LEXISNEXIS® HEADNOTES Hide

Evidence > Procedural Considerations > Variances Between Pleadings & Proof

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

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

HN1 In pleadings under a compensation act, calling things by wrong names, or bringing a petition under a wrong title, or making other harmless mistakes as to details such as dates, are immaterial if the intention of the pleading is clear. As to variance between pleadings and proof, wide latitude is allowed. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Testimony > Examination > General Overview

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

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

HN2 The determination of factual issues by the Industrial **Commission,** including the resolution of conflicting medical evidence, and the credibility and weight of testimony, will not be disturbed unless against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Public Health & Welfare Law > Healthcare > Services for Disabled & Elderly Persons > Rehabilitation

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN3 Until the claimant has completed a prescribed rehabilitation program, the issue of the extent of permanent disability cannot be determined. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Musschoot, Womack & Galich, of Chicago (Andrew A. Galich and Peter Fedij, of counsel), for appellant.

Perry M. Laks, of Laks & Forman, of Chicago, for appellee.

JUDGES: JUSTICE WARD delivered the opinion of the court.

OPINION BY: WARD

OPINION

[*215] **[**833]** On December 18, 1979, John Schackney filed an **application** for adjustment of claim alleging that he sustained a heart attack on July 25, 1979, which arose out of and in the course of his employment by the respondent, McLean Trucking Company (McLean Trucking). On October 7, 1980, an arbitrator decided that the claimant did not sustain accidental injuries arising out of and in the course of employment on the date alleged. After taking additional evidence, the Industrial **Commission** granted the claimant's unopposed motion to **amend** the **application** for adjustment of claim by substituting July 23, 1979, as the date of the accident. The **Commission** later found that Schackney had sustained an accidental injury arising out of and in the course of employment on July 23, 1979. The **Commission** awarded temporary **[***2]** total disability, reimbursement for medical expenses, compensation "for treatment, instruction and training necessary for * * * physical, mental and vocational rehabilitation" as **[*216]** provided in section 8(a) of the **Workers' Compensation** Act (the Act) (Ill. Rev. Stat. 1979, ch. 48, par. 138.8(a)), and interest as provided in section 19 (n) of the Act (Ill. Rev. Stat. 1979, ch. 48, par. 138.19(n)). The Industrial **Commission** remanded to the arbitrator "for further proceedings consistent with this Decision." On April 1, 1982, the circuit court of Cook County set aside that portion of the finding of the Industrial **Commission** pertaining to the payment of interest, but confirmed the balance of the finding. The employer brought this direct appeal under our Rule 302(a) (73 Ill. 2d R. 302(a)).

McLean Trucking complains on this appeal that the **Commission** erred in allowing Schackney to **amend** the **application,** that the **Commission's** finding that the claimant's injuries arose out of and in the course of employment was contrary to the manifest weight of the evidence, and that the **Commission** should not have awarded vocational and rehabilitative training in the absence of evidence of the need **[***3]** for rehabilitation and before it was determined whether the claimant's disability is permanent.

At the hearing before the arbitrator, the 59-year-old claimant testified that he had been employed by the respondent as a truck driver for 27 years. Prior to July of 1979, he had never missed a day of work, had never had a work-related accident, and was in good health. His daily duties included lifting approximately 400 cartons and placing them on a conveyor belt leading from his truck. Each carton weighed between 80 and 100 pounds. His formal education ended at the completion of seventh grade.

He said that on July 23, 1979, his first day of work following a three-week vacation, he unloaded 485 cartons, each weighing from 80 to 110 pounds, between 8:30 a.m. and 2 p.m. Afterwards, he experienced sharp pains in his chest and right **[**834]** arm. He reported the pains **[*217]** to his dispatcher, who instructed him to drop the empty trailer at a location two or three miles away. Following his return to the terminal at 4:30 p.m., he again notified the dispatcher of his pain and went home. The claimant rested at home the next day but he was still experiencing chest pains **[***4]** when he arrived for work on July 25, 1979. He hooked up a trailer and made a three-mile trip but did not have to unload the trailer. He returned to the terminal and told the dispatcher that he was not feeling well and was going home. His wife drove him to South Suburban Hospital, where his condition was diagnosed as an acute myocardial infarction. He was in an intensive-care unit for five days. He was released from the hospital on August 8, 1979, but was hospitalized again from August 26, 1979, to September 8, 1979, because of a recurrence of chest pains. On September 8, he was admitted to Presbyterian -- St. Luke's Hospital, underwent a cardiac catheterization, and was released on September 25, 1979. He testified that he suffers from extreme fatigue.

South Suburban Hospital's medical record, which shows an admission date of July 25, 1979, notes:

> "chest pain for the past 2-3 days c some diaphorisis, is not aware of past cardiac hy."

However, the case history completed by a Dr. Purdy on July 31, 1979, notes "complaints of chest pain one day prior to admission * * * denies any past history of heart disease or chest

pains. He has had no serious illnesses. This is **[***5]** his first hospital admission." A consultant's report completed by Dr. W. Padamadan, a cardiologist, and dated July 25, 1979, contains the finding that Schackney complained of chest pain "which started yesterday."

Dr. Joseph Muenster treated the claimant during his hospitalization at Presbyterian -- St. Luke's. A discharge summary signed by Dr. Muenster, but apparently dictated by a Dr. T. Bleck on September 21, 1979, states:

> **[*218]** "He was in his usual state of good health until 7/25/79. * * * The pain lasted for 5-10 minutes. It was brought on while he was lifting heavy cartons."

A "patient data base nursing assessment" completed the day Schackney was admitted to Presbyterian -- St. Luke's noted:

> "the first chest pain came 7/23/79, lasted longer than 1 day * * * had 1st heart attack on 7/23/79."

Dr. Nathaniel D. Greenberg, an internist, testified for the claimant. After examining Schackney on March 4, 1980, he was of the opinion that there was a direct causal connection between the claimant's work activities on July 23 and July 25 and his myocardial infarction. Dr. William B. Buckingham examined the claimant on March 4, 1980, at the request of the **[***6]** employer, and declared there was not a causal connection. Both doctors testified that the claimant's condition is permanent and that he would not be able to drive a truck again or perform any physically demanding labor.

There was no error by the **Commission's** allowing Schackney to **amend** his claim by changing the date of the accident. The holding in *Lake State Engineering Co. v. Industrial Com.* (1964), 31 Ill. 2d 440, which the respondent cites, is not relevant. The decision there concerned the statute of limitations and whether the employee's claim was timely filed. It did not concern whether, as here, an employee may **amend** his **application** for adjustment of claim to conform to the evidence adduced at the hearings before the arbitrator and the Industrial **Commission.**

> ***HN1*** "In pleadings under a compensation act, calling things by wrong names, or bringing a petition under a wrong title, or making other harmless mistakes as to details such as dates, are immaterial if the intention of the pleading is clear." (3 A. Larson, Workmen's Compensation sec. 77A.42 (1983).)

Larson goes on to state:

> "As to variance between pleadings and proof, wide **[*219]** latitude is allowed." **[***7]** (3 A. Larson, Workmen's Compensation sec. 77A.45 (1983).)

[835]** We consider that the **Commission's** finding that the "Respondent had ample opportunity to meet the change [in date of the accident], that the change did not require additional evidence, and that it was simply a motion to **amend** the pleadings to conform to the evidence already in the record" was not against the manifest weight of the evidence. At the hearing on the same issue, the circuit court said:

> "I think anybody reading the testimony of the Petitioner would agree that he was talking about July 23rd. It wouldn't make any sense to talk about any other date."

It is clear from the record that the employer was not prejudiced by the amendment. Too, any complaint McLean Trucking has to the amendment was waived by its failure to object to the motion.

The **Commission** found that Schackney's injuries arose out of and in the course of his employment with McLean Trucking. HN2 The **Commission's** determination of factual issues, including the resolution of conflicting medical evidence, and the credibility and weight of testimony, will not be disturbed unless against the manifest weight of the evidence. **[***8]** (*Hart Carter Co. v. Industrial Com.* (1982), 89 Ill. 2d 487.) We cannot say that the **Commission's** decision was contrary to the manifest weight of the evidence.

McLean Trucking argues, too, that the **Commission** should not have awarded the claimant compensation for physical, mental, and vocational rehabilitative training under section 8(a) of the Act. Both Dr. Greenberg and Dr. Buckingham testified as to the claimant's inability to perform physically demanding labor. The claimant testified that he was 59 years old, has a seventh-grade education, and has worked as a truck driver since the age of 17. We consider that the **Commission** had sufficient evidence before it to direct that an arbitrator conduct a hearing on the question of rehabilitation.

McLean Trucking complains that there has not been **[*220]** any evidence presented concerning the type of rehabilitation best suited to the claimant and that there has not yet been a decision regarding whether the claimant is permanently disabled. We consider that the Industrial **Commission** remanded the cause for a hearing to determine what type of treatment and training for rehabilitation purposes is necessary and appropriate. The necessity **[***9]** for and details of the specific character and extent of rehabilitation have been left for future determination, and we consider that "any objections that [the employer] may have to any particular type of rehabilitation on the ground that it is unnecessary can be advanced at a future hearing." (*Kropp Forge Co. v. Industrial Com.* (1981), 85 Ill. 2d 226, 230.) As this court noted in *Hunter Corp. v. Industrial Com.* (1981), 86 Ill. 2d 489, trained rehabilitation personnel can be called as witnesses so that any vocational rehabilitation award that may be made will be appropriate. Considering the **Commission's** heavy responsibilities, it was not inappropriate for it to refer the question to an arbitrator for the hearing.

That there has not yet been a ruling on whether the claimant's disability is permanent does not preclude an award of the costs of rehabilitative training. What we said in *Hunter* may apply here: HN3 "Until the claimant has completed a prescribed rehabilitation program, the issue of the extent of permanent disability cannot be determined." 86 Ill. 2d 489, 501.

For the reasons given, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed **[***10]** .

*2010 Ill. Wrk. Comp. LEXIS 412, **

STEVEN BEAL, PETITIONER, v. TOWN OF NORMAL, RESPONDENT.

NO. 06WC 25261

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCLEAN

2010 Ill. Wrk. Comp. LEXIS 412

April 19, 2010

CORE TERMS: elbow, carpal tunnel syndrome, tunnel, claimant, carpal, surgery, right hand, notice, wrist, work-related, paresthesias, hydrant, fingers, valve, job duties, trauma, grip, repetitive, nerve, diagnosed, cubital, manifestation, diagnosis, backhoe, timely notice, doctor, syndrome, retired, median, wrench

JUDGES: Yolaine Dauphin; Molly C. Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

On June 9, 2006, Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right hand with the manifestation date of June 23, 2005. On November 6, 2008, the Arbitrator filed a Decision finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment and failed to give Respondent notice within 45 days of the alleged accident. The Arbitrator denied Petitioner's claim.

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

PETITIONER'S TESTIMONY

Petitioner, a 55 year old right hand dominant "utility worker 3" in the Water Distribution Department at the time of the accident, testified that he worked for Respondent for 32 years.

He started doing the job of a utility worker in 2004. His job duties as a utility worker included repairing water main breaks and fire **[*2]** hydrants, and operating a backhoe.

On May 12, 2005, Petitioner injured his right elbow when he gave a six foot valve key a "jerk" while sealing a water valve. He treated with Dr. Lawrence Nord and underwent surgery on the elbow. (Petitioner's claim for injuries to the elbow ultimately settled.)

Petitioner's last day of work before he retired was June 23, 2005. When asked to describe his job duties shortly before he retired, he responded:

> "Couple days a week, I'd operate the backhoe and we had a maintenance program where I would turn water valves with the *** valve key.
>
> And we had a hydrant program where we went out for ten hours and used a 18 inch ratchet wrench, took the caps off three nipples, greased them, put them back on and then dry fired the hydrant which is leaving the hydrant open and back shut again."

Petitioner further testified that he worked four 10-hour days a week. He spent approximately equal time using the backhoe and the wrench. The following colloquy then occurred:

> "Q. What did you notice about your hands when you're operating the joy sticks on the backhoe?
>
> A. Well, after awhile, *** they would vibrate. They would tingle.
>
> Q. And when you operated the backhoe, **[*3]** how many hours a day are you operating that, on average?
>
> A. Probably actually fully operated, probably about five, six hours.
>
> Q. And you operated the backhoe how frequently?
>
> You said about half your work week?
>
> A. Yes. Yes. Probably about two days a week. Maybe more sometimes. Less sometimes.
>
> Q. And with regard to using the ratchet wrenches and turning the valves in a typical day, how many hours a day are you out on the field making those turns?
>
> A. Let's see, coffee breaks--lunch,--probably six, seven hours.
>
> Q. And the type of equipment, do you always use ratchet wrenches or do you use other type of tools when you turn these valves?
>
> A. The valve--we use that valve key, six inch valve key in the shape of a T, you put it down on there and you turn it."

Petitioner stated that although he often dropped tools, he did not think much about it.

Petitioner further testified that in January of 2006, he underwent an EMG/NCV study, which showed cubital tunnel syndrome and carpal tunnel syndrome. In November of 2006, he underwent carpal tunnel release surgery.

On December 3, 2007, Petitioner began working for another employer. He drives an airport shuttle 20 hours a week. Petitioner denied prior **[*4]** injuries to the right wrist.

Petitioner described his current condition as follows:

> "My strength is down. The wrist aches. It seems like weather affects it, too. And my grip strength is--I got to use my left hand. I can't open a peanut butter jar or--and just simple things like holding a garden hose and water and stuff, I can't do it for very long because the grip strength is gone.
>
> ***
>
> I was trying to spray paint a shutter and I can't hold the nozzle down and grip it for very long at all. I mean I just *** I couldn't finish the shutter."

On cross-examination, Petitioner acknowledged that he was not diagnosed with carpal tunnel syndrome until January of 2006, more than six months after leaving Respondent's employ. Petitioner denied working anywhere after leaving Respondent's employ and before being diagnosed with carpal tunnel syndrome. Petitioner disagreed that cubital tunnel surgery relieved the symptoms in his right hand. He stated that carpal tunnel surgery helped somewhat. He takes Celebrex for pain in his elbow, but it does not help with pain in his hand.

The following colloquy then occurred:

> "Q. Did you have a problem with your grip prior to that incident in May of 2005? **[*5]**
>
> A. Oh, no.
>
> Q. *** You started noticing the problems with your grip following your first surgery for your elbow?
>
> A. No.
>
> When I injured the elbow.
>
> Q. That's when you started experiencing problems with your hand, with your grip?
>
> A. Yes."

Petitioner further testified that from 1979 until 2001, he was an assistant distribution supervisor in the water department. He supervised seven utility workers. Petitioner qualified that he "actually performed more work than [he] supervised."

On redirect examination, the following colloquy occurred:

"Q. [W]hile you're working for [Respondent] [in] 2005, you do recall dropping things with your right hand?

A. Oh, yes. I mean tools--I broke a lot of coffee cups. Pencils. ***

Q. And the time you understood that you had a diagnosis of carpal tunnel was the first time you made any recollection that that was from you work environment?

A. Right.

Q. So prior to your diagnosis, did you even know what carpal tunnel was?

A. I had no idea. I thought it was something office workers get."

On re-cross examination, Petitioner testified that he gave Dr. Nord a typewritten description of his job duties. On April 17, 2006, he wrote a letter to Dr. Nord asking to **[*6]** address whether his right wrist condition was work-related.

The following testimony was then adduced regarding Petitioner's job duties:

"Q. [A]ccording to this job description, you installed water main fittings, nuts and bolts with ratchet wrenches.

Is that right?

A. Yes.

Q. And how often did you do that?

A. Whenever a job came up.

Q. How often would that be in a day?

A. Water fittings and stuff?

Q. Yes.

A. It's hard to say about the water fittings because that was a particular job that--

Q. *** So you couldn't recall off the top of your head how many a day?

A. No.

Q. How about operating concrete saws, how often would you do that in a

A. We would have one day where we would operate a lot and then they wouldn't operate again for--it all depends if we had to get into the concrete.

Q. How often would you ever get into concrete?

A. Couldn't say. I mean, you know, it's--

Q. *** You have here number 5 in your letter to Dr. Nord, opens and shuts thousands of fire hydrants.

A. Doesn't it say this there somewhere--it says during my career that's what I did?

Q. It says in the left following, my work duties for the last 32 years.

A. Okay. My career.

Q. So how often did you open and shut thousands **[*7]** of hydrants?

A. Well, over 32 years. A lot. I mean we used to flush every hydrant at night. I mean--that was my job.

Q. *** So in the beginning of your career, you were opening and closing fire hydrants?

A. Yes.

Q. So for 32 years, you were doing this?

A. Yes.

Q. And it's only now that you're noticing that you've got problems with your right hand?

A. Well, --yes.

Q. You open and shut thousands of water main valves?

A. In 32 years, yes.

Q. *** How often did you do these things?

A. The valves here at the last, we had the valve maintenance program where we go out for ten hour days and open and shut 20 to 30 valves.

Q. Did you have problems doing that?

A. Besides being old?

I did my job.

***

Whatever they told me to go do, I went and did it.

Q. And while you're opening and shutting valves, did you ever have problems and complaints with your grip strength while you were doing that?

***

A. I would get tired, yes. I thought maybe it was just--I'm getting old towards the

end.

Q. *** But you were able to do all that without any problems with your right hand.

Is that right?

A. I used to be able to do a lot of stuff.

***

Q. Says here, operated vibrators and compactors?

A. That was when we [were] **[*8]** back filling ditches. Yes. You had to compact the gravel.

Q. How often would you do that?

A. Whenever we opened the street.

I couldn't even think of all the jobs I've done in the last 32 years.

Q. How about in the last five years?

Your last five years there, did you do those activities that often?

A. Yes.

Q. Do you recall how often you did those activities?

A. Which activities are you talking about?

Q. The ones opening and closing fire hydrants?

A. We did with that a lot because we had a maintenance program. *** Probably 20 a day on the maintenance program in the last year."

Petitioner conceded that he opened fewer fire hydrants when he was a supervisor.

On further redirect examination, Petitioner clarified that in 2001, he went from being a supervisor to being a crew leader. In 2004, he went from being a crew leader to being a utility worker. During the last four years of his employment with Respondent, his primary job duties included using a ratchet wrench and a valve key, and operating a backhoe. Petitioner stated that he told Dr. Nord about these job duties.

MEDICAL RECORDS

The medical records in evidence show that on June 14, 2005, Petitioner sought treatment with Dr. Nord **[*9]** for pain in the right elbow. Dr. Nord recorded a history consistent with Petitioner's testimony. Petitioner was diagnosed with lateral epicondylitis of the right elbow. There is no mention of symptoms in the right wrist or hand.

Petitioner followed up for his elbow condition on January 12, 2006. Dr. Nord ordered an MRI of the elbow. The clinical note from January 19, 2006, mentions complaints of paresthesias in the fourth and fifth fingers of the right hand, in addition to the elbow complaints. Dr. Nord ordered an NCV of the right upper extremity. The NCV study, performed January 25, 2006, was

significant for right carpal tunnel syndrome. It also showed a motor velocity delay in the ulnar nerve. On February 9, 2006, Dr. Nord diagnosed right carpal tunnel syndrome and scheduled Petitioner for elbow surgery (elbow arthrotomy).

On April 11, 2006, Petitioner complained of continued paresthesias in the fourth and fifth fingers of the right hand, in addition to the elbow complaints. Dr. Nord diagnosed cubital tunnel syndrome, lateral epicondylitis and carpal tunnel syndrome. On April 12, 2006, Dr. Nord performed a right elbow arthrotomy and cubital tunnel release. Petitioner's postoperative **[*10]** recovery was uneventful. On April 13, 2006, and April 25, 2006, he reported resolving discomfort in the elbow and resolving paresthesias in the fourth and fifth fingers. In a report dated April 27, 2006, Dr. Nord stated that he reviewed a description of Petitioner's job duties and opined that Petitioner's carpal tunnel syndrome is causally connected to his employment with Respondent. (Petitioner's letter to Dr. Nord describing his job duties is in evidence.) On May 16, 2006, Petitioner reported that the paresthesias in the fourth and fifth fingers had resolved.

On June 15, 2006, Petitioner reported some recurrent paresthesias and constant aching in the fourth and fifth fingers. Also, he complained of pain when gripping with the right hand. The clinical notes from July 13, 2006, and August 31, 2006, state that the paresthesias in the fourth and fifth fingers had again resolved. An MRI of the elbow performed September 6, 2006, showed a new onset of olecranon bursitis. On September 14, 2006, Petitioner complained of low-grade discomfort in the elbow olecranon bursal area. On September 28, 2006, Petitioner continued to complain of low-grade discomfort in the elbow, but most of his complaints **[*11]** related to the carpal tunnel, including complaints of paresthesias in the median nerve distribution. Dr. Nord scheduled Petitioner for surgery.

On November 14, 2006, Dr. Nord performed a right median nerve decompression. Once again, Petitioner's postoperative recovery was uneventful. On November 28, 2006, Petitioner reported that the paresthesias in the median nerve distribution had resolved. On December 19, 2006, he reported some mild weakness in the hand. Dr. Nord thought that Petitioner had an excellent result with the surgery. On January 18, 2007, the examination of the right hand was normal.

On March 15, 2007, and June 14, 2007, Petitioner had only elbow complaints. On December 11, 2007, Petitioner complained of vague paresthesias in the fourth and fifth fingers, in addition to the elbow complaints. On June 12, 2008, Petitioner complained of "[l]ow grade discomfort in the right arm with peripheral neuropathy symptoms." Also, he continued to complain of vague paresthesias in the fourth and fifth fingers. Dr. Nord prescribed physical therapy. An NCV study performed June 17, 2008, showed

> "a delay of the median motor latency and median sensory velocity at the level of the right **[*12]** wrist consistent with Carpal Tunnel Syndrome. This patient presents with a trace delay of the ulnar nerve motor velocity at the level of the right elbow and a trace delay of the ulnar sensory velocity at the level of the left wrist and a trace delay of the ulnar nerve F wave latency at the level of the right arm."

Grip testing, also performed June 17, 2008, showed no significant difference in grip strength between the left and the right hand. Sustained grip strength testing showed a 17 percent deficit on the right. Muscle strength testing of the wrist showed a 33 percent deficit with flexion and a 25 percent deficit with extension. On June 24, 2008, and September 28, 2008, Petitioner continued to complain of right arm neuropathy and vague paresthesias in the fourth and fifth fingers.

SECTION 12 REPORTS

In a report dated March 31, 2006, Dr. Stephen Weiss, an orthopedic surgeon and Respondent's section 12 examiner, stated that he examined Petitioner "regarding the impact of an alleged May 12, 2005, work-related injury." Petitioner gave a history consistent with his testimony. Dr. Weiss noted that electrodiagnostic studies showed carpal tunnel syndrome. However, the Tinel sign over **[*13]** the right carpal tunnel was negative. The Phalen test was negative, as well. Dr. Weiss diagnosed "[l]ateral epicondylitis secondary to the May 12, 2005, work incident," cubital tunnel syndrome, and "[e]lectrical carpal tunnel syndrome--asymptomatic and unrelated to [the work] incident."

In a supplemental report dated November 24, 2006, Dr. Weiss stated, "[The patient] brings a job description with him. His work activities involved opening and shutting fire hydrants and water main valves, operating vibrators and compactors, digging holes, and using a veneer torque wrench." Dr. Weiss did not examine Petitioner's wrist or hand because Petitioner had only recently undergone carpal tunnel surgery. He opined that Petitioner's carpal tunnel syndrome was not related to his employment with Respondent, explaining:

> "[The patient] stopped working in June 2005. *** [T]he carpal tunnel syndrome was an 'incidental finding' noted on electrical studies performed about eight months after he stopped working. When I examined him in March 2006, there was no evidence of carpal tunnel syndrome and [the patient] did not complain of any carpal tunnel symptoms. Specifically, the Tinel sign and Phalen test **[*14]** were bilaterally negative over the carpal tunnel. Accordingly, I believe it is clear that [the patient's] carpal tunnel syndrome came on long after his work activities stopped and therefore represents a normal progression of an underlying, nonwork-related condition. I suspect his smoking could be a possible cause of this diagnosis."

MEDICAL BILLS

Petitioner's Exhibit 12 contains medical bills in the sum of $ 9,617.35 related to the carpal tunnel syndrome. Respondent interposed no objection.

DISCUSSION

The Arbitrator found that Petitioner failed to prove his carpal tunnel syndrome is related to his employment with Respondent. Further, relying on the appellate court decision in White v. Workers' Compensation Comm'n, 374 Ill. App. 3d 907 (2007), the Arbitrator found that Petitioner failed to give Respondent timely notice of the alleged accident. We disagree with the Arbitrator on both points.

In White, the claimant filed an application for adjustment of claim alleging repetitive trauma injuries to his shoulders and back, with the accident/manifestation date of July 17, 2000. The claimant stated in the application for **[*15]** adjustment of claim that the accident/manifestation date was the last day he worked for the employer. At the arbitration hearing, the claimant testified that in his final years of employment, he worked as a laborer. His last day of work was July 17, 2000. The claimant stated that he stopped working to undergo shoulder surgery. Six months after the shoulder surgery, he underwent back surgery. In May of 2001, the claimant completed a sickness/accident form on which a box was checked stating that his back and shoulder conditions were not work-related. The claimant retired when his sickness and accident benefits ran out. On October 15, 2002, the claimant's family physician, Dr. Barnhart, attributed his conditions of ill-being to repetitive trauma at work, and on October 29, 2002, the claimant filed an application for adjustment of claim.

The Commission denied the claim on the ground that the claimant failed to give the employer timely notice of the alleged accident. The appellate court affirmed. The court rejected the claimant's argument that repetitive trauma claims are exempt from the 45-day notice requirement of the Act. Further, the court stated:

> "[White] goes on to argue that filing **[*16]** of his application for adjustment of claim provided timely notice because the filing occurred within 45 days after Doctor Barnhart's October 15, 2002, letter opining that his problems were work related.
>
> It is true that a claimant's last workday is not *ipso facto* his 'manifestation date' for purposes of the Belwood standard. *But the instant case presents a different question because White specifically alleged that July 17, 2000, not October 15, 2002, was his accident date. He cannot argue one date before the Commission and then obtain reversal on appeal by asserting a completely different date*. The recent case of Durand v. Industrial Comm'n, 224 Ill. 2d 53 (2006), is instructive. In that case, when the claimant filed her application for adjustment of claim, the accident date she alleged was the date on which a doctor diagnosed carpal tunnel syndrome and opined that the condition was work related. White did not do this. Citing AC & S v. Industrial Comm'n, 304 Ill. App. 3d 875 (1999), he asserts that his situation is dispositively distinguishable from the Durand situation because at the time he received Doctor **[*17]** Barnhart's letter, he was no longer employed by Freeman United. This assertion presupposes that a repetitive trauma accident date cannot occur after the claimant's last day of employment with the respondent. We disagree.
>
> White has repeatedly argued that there is no 'specific accident' or 'accident date' in repetitive trauma cases. This argument lacks merit in light of the precedent cited above. Moreover, the method for ascertaining the accident date in a repetitive trauma case makes it possible for that date to fall after the claimant's last day of employment. Indeed such a scenario occurred in AC & S. Although the claimant was laid off on June 10, 1993, the Commission found that his accident date was June 22, 1993, because 'the injury would have become plainly apparent to a reasonable person on this date.' AC & S, 304 Ill. App. 3d at 878; see also Belwood, 115 Ill. 2d at 531 (accident/manifestation date is 'the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person'). The Commission's decision was affirmed **[*18]** on appeal.
>
> In the instant case, if White wanted the notice period to begin running on October 15, 2002, he needed to allege that date as his accident date. It does not matter that his employment with Freeman United had ceased. It would have been no more unreasonable for him to allege a postemployment accident date than it was for the Commission to find one in AC & S. In reality, the Commission's finding was not unreasonable at all. The accident date in a repetitive trauma case turns on when certain facts would have become plainly apparent to a reasonable person, and such awareness can arise for the first time after termination of employment." (Emphasis added.) White, 374 Ill. App. 3d at 912-13.

We interpret the White decision consistently with established precedent as estopping the claimant from changing the accident/manifestation date at the point in litigation when doing so would prejudice the employer. *Cf.* **McLean Trucking** Co. v. Industrial Comm'n, 96 Ill. 2d 213, 218-19 (1983); Freeman United Coal Mining Co. v. Industrial Comm'n, 297 Ill. App. 3d 662,

667 (1998). **[*19]**

In the instant case, Petitioner alleged repetitive trauma to the right hand with the manifestation date of June 23, 2005. However, he was not diagnosed with carpal tunnel syndrome until February 9, 2006. On review, Petitioner asks the Commission to change the date of accident in the application for adjustment of claim to February 9, 2006. Petitioner maintains that he proved his carpal tunnel syndrome is work-related and he gave Respondent timely notice of the condition.

We note that Dr. Nord did not causally connect Petitioner's carpal tunnel syndrome to his employment with Respondent until April 27, 2006. We find Dr. Nord's causation opinion persuasive in light of Petitioner's credible testimony regarding his job duties.

With regard to notice, it is apparent from the record that Respondent was following Petitioner's elbow condition and thus had notice of Petitioner's carpal tunnel syndrome diagnosis before any physician rendered a causation opinion on the subject. Unlike the claimant in White, Petitioner did not advise Respondent that his condition was not work-related, thus precluding the investigation of the claim. Rather, before the connection between Petitioner's carpal tunnel **[*20]** syndrome and his employment would have been plainly apparent to a reasonable person, Respondent already had Petitioner's carpal tunnel examined by Dr. Weiss. It is clear from the record that Respondent would not be prejudiced by the amendment. We therefore find that the instant case is distinguishable from White and amend the date of accident in the application for adjustment of claim to conform to the proofs. See **McLean Trucking**, 96 Ill. 2d at 218-19; Freeman United Coal Mining, 297 Ill. App. 3d at 667.

Petitioner seeks temporary total disability benefits from November 22, 2006, through December 22, 2006. We find that an award of temporary total disability benefits is not appropriate because Petitioner had retired for reasons unrelated to his condition.

We find that Petitioner is entitled to medical expenses in the sum of $ 9,617.35 associated with the carpal tunnel condition, to be paid in accordance with the medical fee schedule where applicable. Regarding the nature and extent of Petitioner's disability, we find that the injuries sustained caused loss of the use of the right hand to the extent of 15 percent thereof. **[*21]** We note that the parties stipulated Petitioner's earnings during the year preceding the injury were $ 55,494.40 and his average weekly wage was $ 1,067.20.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 6, 2008, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 9,617.35 for medical expenses under § 8(a) of the Act pursuant to the medical fee schedule, where applicable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 591.77 per week for a period of 30.75 weeks, as provided in § 8(e)9 of the Act, for the reason that the injuries sustained caused loss of the use of the right hand to the extent of 15 percent thereof.

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 **[*22]** the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DISSENTBY: NANCY LINDSAY

DISSENT: Rather than affirm the Arbitrator's decision denying Petitioner's carpal tunnel claim based upon an accident date of June 23, 2005, the Majority has granted Petitioner's request, expressed for the first time on review, that Petitioner's date of accident be amended to February 9, 2006. In so doing, the Majority has rendered a decision unsupported by the record as Petitioner failed to prove accident, notice, or causal connection with respect to his claim. This was one of two claims Petitioner filed against Respondent and they were heard by the Arbitrator at the same time. As occasionally happens when multiple claims are tried together, the facts of one are blurred with the facts of the other and the need for each case to stand on its own is overlooked. Petitioner herein injured his right elbow in a specific trauma occurring on May 12, 2005. His last day of work with Respondent was June 23, 2005, at which time he voluntarily retired. Petitioner testified that as he was working his hands would tingle; however, as the record clearly shows, he never mentioned that **[*23]** to any of the doctors. Petitioner further testified that after he retired he sought treatment with Dr. Larry Nord for his hand and that on/about January of 2006 Dr. Nord told him he had carpal tunnel syndrome and cubital tunnel syndrome. Again, if one looks at the medical records, that is not what they state. In response to a leading question, Petitioner testified he told his supervisors at the city about his elbow and wrist injuries. More specifically, in "February of '06" he stopped in at distribution and "he [thought]" he told Robert Miller and "John" he had to have surgery. According to Petitioner he was supposed to have elbow surgery in February but it was postponed until Petitioner saw Dr. Weiss.

Dr. Weiss examined Petitioner on March 24, 2006 and again on November 24, 2006, regarding the May 12, 2005, elbow injury. Dr. Weiss noted Petitioner had sustained lateral epicondylitis in May of 2005 and subsequently started developing cubital tunnel syndrome. He noted electrical studies had shown only carpal tunnel syndrome. While Dr. Weiss found Petitioner had clinical evidence of cubital tunnel syndrome he found no clinical evidence of carpal tunnel syndrome. He opined that the carpal **[*24]** tunnel syndrome was not a work-related condition. Rather than adopt Dr. Weiss' well-informed, well-reasoned, and well-analyzed causation opinions which were based upon two examinations of Petitioner, a review of all medical records and a job description, as well as an accurate chronology of events, the Majority has found more credible Dr. Nord's letter to Petitioner's attorney setting forth a causal connection opinion based upon hindsight and information furnished by Petitioner and his attorney but never previously brought to Dr. Nord's attention. Dr. Nord's February 9, 2006 nerve conduction velocity exam/report fails to indicate why Petitioner was being tested. In terms of complaints, Petitioner's were solely limited to the 4th and 5th fingers of his right hand (which are the fingers innervated by the ulnar nerve, not the median nerve) and his right elbow. Dr. Nord's office notes thereafter describe Petitioner's right carpal tunnel syndrome as an "old diagnosis/illness". Despite the diagnosis, Dr. Nord's office notes clearly show Petitioner underwent no examination or treatment for his alleged carpal tunnel complaints until September 28, 2006, when Petitioner informs the doctor **[*25]** he wants to be scheduled for surgery. Dr. Nord was never deposed. Dr. Nord never addressed the fact Petitioner never mentioned his work duties as a source of his hand/wrist problems. Dr. Nord never addressed Petitioner's lack of complaints and treatment while employed by Respondent. Dr. Weiss did. Petitioner's testimony as to the onset of his carpal tunnel complaints is not corroborated by any of the medical records. He never complained about his job duties and hand/wrist problems. The finding of Dr. Nord in February of 2006 was exactly what Dr. Weiss described it as -- an incidental finding. Dr. Nord's causation opinion is simply not credible and the manifest weight of the evidence in this record supports a finding of no liability.

Even assuming, arguendo, that the record supports a finding of accident, the Majority has clearly erred in finding proper notice of that accident was given. According to the Majority, "it is apparent from the record that Respondent was following Petitioner's elbow condition and thus had notice of Petitioner's carpal tunnel syndrome diagnosis before any physician rendered a causation opinion on the subject". Under the Act, a claimant is required **[*26]** to give notice of

a work- related injury within forty-five days of the date of accident. There is absolutely no evidence in this record establishing that Petitioner advised Respondent of a work-related accident within 45 days of February 9, 2006. The Majority's finding that Respondent was "following" Petitioner's elbow condition is not supported by the record. There is no evidence in the record indicating how and if Respondent, Town of Normal, was "following" Petitioner's elbow condition. Secondly, even if Respondent was aware of Petitioner's treatment records for his elbow condition (and thus was presumably "following" his care) there is nothing in those records apprising Respondent of a work-related carpal tunnel accident, injury, or claim. Third, finding Respondent had notice of an accident because it was "following" a course of treatment for another injury does not meet the requirement that claimant give notice of the hand/wrist accident to Respondent. The only evidence in the record regarding notice was Petitioner's testimony described above. That testimony did not establish that Petitioner gave proper notice of his work-related right carpal tunnel claim to Respondent. If anything, **[*27]** it establishes Petitioner may have told two of Respondent's supervisors he was going to have right elbow surgery, but that was all. He couldn't have told Respondent he had a work-related carpal tunnel claim at that time as it was not until April 17, 2006, that Petitioner wrote a letter to his doctor, enclosing a letter from his attorney, and asked if his carpal tunnel might be work-related. In White v. Workers' Compensation Commission, 374 Ill. App.3d 907, 873 N.E. 2d 388, 313 Ill.Dec. 764 (4th Dist., 2007) the Fourth District Appellate Court held that claimant's application for adjustment of claim was barred due to claimant's failure to provide timely notice of his accident to his employer. In so holding, the Court reiterated the long-standing rule that the "prejudice inquiry" does not pertain unless some notice was given in the first place." White, 873 N.E.2d 388, 392. As here, "The instant case does not involve timely but defective notice, it involves a lack of timely notice altogether". Id. The Arbitrator reached the right result in this instance, regardless **[*28]** of the date of accident. Petitioner failed to prove accident, notice, or causal connection. For these reasons, I dissent.

DATED: APR 19 2010

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