*51 Ill. 2d 548, *; 283 N.E.2d 880, **;*
*1972 Ill. LEXIS 457, ****

THE CUNEO PRESS, INC., Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Vincent J. Ventrice, Appellee)

No. 43785

Supreme Court of Illinois

51 Ill. 2d 548; 283 N.E.2d 880; 1972 Ill. LEXIS 457

May 22, 1972, Filed

PRIOR HISTORY: [*1]** APPEAL from the Circuit Court of Cook County; the Hon. EDWARD F. HEALY, Judge, presiding.

DISPOSITION: Judgment reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent employer appealed from the judgment of the Circuit Court of Cook County (Illinois), which confirmed the decision of the Industrial Commission (Illinois) in a proceeding filed by petitioner employee under § 19(h) of the Workmen's Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.19(h) (1969).

OVERVIEW: An arbitrator for the Commission awarded the employee compensation for the permanent loss of 25 percent of the use of his leg. On December 30, 1963, the award was affirmed by the Commission. On certiorari, the circuit court confirmed the decision, and the court earlier affirmed the judgment of the circuit court. On May 4, 1967, the employee filed a petition under § 19(h) alleging an increase in his disability. The Commission denied the employer's motion to dismiss the petition, finding that subsequent to the date of the decision of the Commission, the disability of the employee had increased as the result of said accidental injuries and the employee was permanently and totally disabled. The circuit court confirmed the decision. On appeal, the court reversed, reasoning that the §19(h) petition should have been dismissed on the ground that it was not filed within 30 months of the date of the award of compensation by the Commission. The statutory limitation was not tolled by reason of judicial review of the award. Public policy did not require judicial enlargement of the period during which the review could be sought.

OUTCOME: The court reversed the judgment of the circuit court.

CORE TERMS: arbitrator, confirmed, public policy, right of review, disability, terminated

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Civil Procedure > Alternative Dispute Resolution > Judicial Review

Governments > Legislation > Statutes of Limitations > Time Limitations

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

HN1 The statutory limitation under § 19(h) of the Workmen's Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.19(h) (1969), for a claim based on an increase in disability is not tolled by reason of judicial review of the underlying award. The period of limitation begins to run from the date on which the award of the arbitrator is affirmed by the Industrial Commission. The purpose of § 19(h) is to give a period of time in which it may be determined whether the injuries received recurred, increased or diminished. The processes of nature continue without regard to whether there is an appeal pending in the cause, and therefore the ground for an application for review may arise without regard to whether the cause is still pending on appeal. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Types of Contracts > Settlement Agreements

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

HN2 Section 19(h) of the Workmen's Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.19(h) (1969), provides that when the Industrial Commission orders that compensation payable in accordance with an award or settlement contract be paid in a lump sum, the right of review under this section is terminated. In view of the fact that the right of review provided is so easily terminated, public policy does not requires judicial enlargement of the period during which the review may be sought. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: CHARLES L. MICHOD, of Chicago, for appellant.

KENNETH S. LEWIS, of Chicago, and EDWARD J. KIONKA, of Champaign, for appellee.

JUDGES: Mr. Justice GOLDENHERSH delivered the opinion of the court.

OPINION BY: GOLDENHERSH

OPINION

[*548] [881]** The respondent-employer, The Cuneo Press, Inc., appeals from the judgment of the circuit court of Cook County confirming the decision of the Industrial Commission in a proceeding filed by the petitioner-employee, Vincent J. Ventrice, under section 19(h) of the Workmen's Compensation Act (Ill.Rev.Stat. 1969, ch. 48, par. 138.19(h).) The record shows that on May 23, 1963, an arbitrator for the Industrial Commission awarded petitioner compensation for the permanent loss of 25% of the use of his left leg. On December 30, 1963, the award was affirmed by the Industrial Commission. On *certiorari*, on April 28, 1964, the circuit court confirmed the decision of the Industrial Commission and on January 21,

1965, we affirmed the judgment of the circuit court. 32 Ill.2d 153.

[*549] On May 4, 1967, petitioner filed his petition **[***2]** under section 19(h) alleging an increase in his disability. Respondent moved to dismiss the petition on the ground that it was not filed within 30 months of the date of the award of compensation by the Industrial Commission. The Commission denied the motion, heard evidence, found "that subsequent to the date of the decision of the Commission the disability of the petitioner has increased as the result of said accidental injuries, and said petitioner is now permanently and totally disabled * * *." The circuit court confirmed the decision and respondent appealed.

It is respondent's contention that the petition under section 19(h) was not timely filed and we agree. The precise question here presented was considered by this court in *Big Muddy Coal and Iron Co. v. Industrial Com., 289 Ill. 515*, and it was held that HN1 the statutory limitation is not tolled by reason of judicial review of the award. In *City of Chicago v. Industrial Com., 363 Ill. 298*, it was held that the period of limitation begins to run from the date on which the award of the arbitrator is affirmed by the Industrial Commission.

We have considered the arguments of petitioner but adhere to our statement in **[***3]** *Big Muddy* that "The purpose of paragraph (h) of section 19 is to give a period of time in which it may be determined whether the injuries received recurred, increased or diminished. The processes of nature continue without regard to whether there is an appeal pending in the cause, and therefore the ground for an application for review may arise without regard to whether the cause is still pending on appeal." 289 Ill. 515, at 519.

We have also considered petitioner's argument that considerations of public policy **[**882]** require that we overrule the holding of *Big Muddy*. Section 19(h) HN2 provides that when the Industrial Commission orders that compensation payable in accordance with an award or settlement contract be paid in a lump sum the right of review under this section is terminated. In view of the fact that the right **[*550]** of review provided is so easily terminated we are not persuaded that public policy requires judicial enlargement of the period during which the review may be sought.

Because of the decision on this issue we need not consider the other contentions of the parties, and for the reasons stated the judgment of the circuit court of Cook County is **[***4]** reversed.

Judgment reversed.

*286 Ill. App. 3d 963, *; 677 N.E.2d 438, **;*
*1996 Ill. App. LEXIS 989, ***; 222 Ill. Dec. 235*

NANCY ESCHBAUGH, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Continental Bondware, Appellee).

NO. 5-96-0071WC

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT, INDUSTRIAL COMMISSION DIVISION

286 Ill. App. 3d 963; 677 N.E.2d 438; 1996 Ill. App. LEXIS 989; 222 Ill. Dec. 235

December 30, 1996, FILED

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of Shelby County. No. 95-MR-11. Hon. Michael R. Weber, Judge, presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant challenged the judgment of the Circuit Court of Shelby County (Illinois) confirming the decision of the Industrial Commission (Commission), which dismissed claimant's petition to review an award providing for compensation in installments pursuant to section **19(h)** of the Workers' Compensation Act (Act), 820 Ill. Comp. Stat. 305/1 et seq. (1994).

OVERVIEW: The claimant filed a petition to review an award providing for compensation in installments pursuant to § **19(h)**. Finding that the claimant's petition was not timely filed within the 30-month period, the Commission dismissed the petition for lack of subject matter jurisdiction. The claimant did not dispute the fact that the petition was not timely filed under § **19(h)**. However, the claimant contended that the Commission did not have the power to dismiss the petition sua sponte, where neither the claimant nor the employer objected to the Commission's subject matter jurisdiction to conduct a hearing pursuant to § **19(h)**. Noting the distinctions between a limitations provision that is statutory and one that is jurisdictional, the court determined that the statutory limitations period of § **19(h)** is a jurisdictional requirement that may be raised at any time and even sua sponte by the Commission. Thus, the Commission was necessarily divested of its review jurisdiction for change of disability 30 months after agreement or award of compensation. Accordingly, the court affirmed the dismissal of the claimant's petition for lack of jurisdiction.

OUTCOME: The court affirmed the dismissal of claimant's petition for lack of jurisdiction.

CORE TERMS: jurisdictional, claimant's, limitation period, subject matter jurisdiction, statute of limitations, waived, disability, time period, time limitation, timely filed, period of time, sua sponte, substantive rights, installments, prescribed, estoppel, common law, time limit, time provision, jurisdiction to hear, limitations provision, affirmative defense, condition precedent, arbitrator's decision, consented, conferred, recurred, unknown, ended

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Governments > Legislation > Statutes of Limitations > Time Limitations

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

HN1 Section **19(h)** of the Workers' Compensation Act (Act) states in pertinent part that an agreement or award under the Act providing for compensation in installments may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. 820 Ill. Comp. Stat. 305/**19(h)** (1994). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Statutes of Limitations > General Overview

Governments > Legislation > Statutes of Limitations > Pleading & Proof

Labor & Employment Law > Wage & Hour Laws > Statutes of Limitations

HN2 A statute of limitations is procedural in nature, affecting a plaintiff's remedy only, but it does not alter substantive rights. It merely gives a time limit within which legal action shall be brought, with the time beginning when the action has accrued or ripened. A statute of limitations is an affirmative defense that may be waived by the parties and is open to pleas of estoppel. In workers' compensation cases, statutes of limitations are designed to assure fairness to employers by protecting against claims that are too old to be successfully investigated and defended. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation

Governments > Legislation > Statutes of Limitations > General Overview

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

HN3 A statute that creates substantive rights unknown at common law and makes time a component part of the rights created is not a statute of limitations. Rather, the prescribed time period is viewed as a condition precedent to the plaintiff's right to seek a remedy and is deemed jurisdictional. A jurisdictional limitation period is an absolute requirement; it is not an affirmative defense that is subject to waiver or estoppel. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Interpretation

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

HN4 Section **19(h)** of the Workers' Compensation Act (Act), 820 Ill. Comp. Stat. 305/**19(h)** (1994), is remedial legislation that should be construed liberally to allow review of awards for change in disability, however, a liberal construction does not mean the Commission may disregard limitation provisions of the Act. More Like This Headnote

Governments > Legislation > Statutes of Limitations

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

HN5 The time provision set forth in section **19(h)** of the Workers' Compensation Act (Act), 820 Ill. Comp. Stat. 305/**19(h)** (1994), is jurisdictional. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Nancy Eschbaugh, APPELLANT: Warren E. Danz and Richard G. Leiser, both of Peoria.

For Continental Bondware, APPELLEE: Robert A. Hoffman, of Thomas, Mamer & Haughey, of Champaign.

JUDGES: JUSTICE RAKOWSKI delivered the opinion of the court. McCULLOUGH, P.J., and COLWELL, HOLDRIDGE, and RARICK, JJ., concur.

OPINION BY: RAKOWSKI

OPINION

[*964] **[**439]** JUSTICE RAKOWSKI delivered the opinion of the court:

Nancy Eschbaugh (claimant) appeals from the judgment of the circuit court confirming the decision of the Industrial Commission (Commission), which dismissed claimant's petition to review an award providing for compensation in installments pursuant to section **19(h)** of the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 1994)). *HN1* Section **19(h)** states in pertinent part that an agreement or award under the Act providing for compensation in installments "may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently **[***2]** recurred, increased, diminished or ended." 820 ILCS 305/**19(h)** (West 1994). Finding that claimant's petition was not timely filed within the 30-month period, the Commission dismissed the petition for lack of subject matter jurisdiction.

[440]** It is undisputed that claimant's petition to review an award under section **19(h)** of the Act was not timely filed. However, claimant contends the Commission did not have the power to dismiss the petition *sua sponte,* where neither claimant nor Continental Bondware (employer) objected to the Commission's subject matter jurisdiction to conduct a hearing pursuant to section **19(h)** of the Act. The precise issue we address is whether the time limitation set forth in section **19(h)** is jurisdictional or a statute of limitations.

There is an important distinction between a limitations provision that is statutory and one that

is jurisdictional. HN2 A statute of limitations is procedural in nature, affecting a plaintiff's remedy only, but it does not alter substantive rights. *Fredman Brothers Furniture Co. v. Department of Revenue,* 109 Ill. 2d 202, 209, 486 N.E.2d 893, 93 Ill. Dec. 360 (1985). It merely gives a time limit within which legal action shall be brought, with the time beginning when **[***3]** the action has accrued or ripened. *Fredman Brothers Furniture Co.,* 109 Ill. 2d at 209, 486 N.E.2d 893, 93 Ill. Dec. 360. A statute of limitations is an affirmative defense that may be waived by the parties and is open **[*965]** to pleas of estoppel. *Pantle v. Industrial Comm'n,* 61 Ill. 2d 365, 367, 335 N.E.2d 491 (1975). In workers' compensation cases, statutes of limitations are designed to assure fairness to employers by protecting against claims that are too old to be successfully investigated and defended. *Goodson v. Industrial Comm'n,* 190 Ill. App. 3d 16, 19, 137 Ill. Dec. 214, 545 N.E.2d 975 (1989).

In contrast, HN3 a statute that creates substantive rights unknown at common law and makes time a component part of the rights created is not a statute of limitations. Rather, the prescribed time period is viewed as a condition precedent to the plaintiff's right to seek a remedy and is deemed jurisdictional. *Fredman Brothers Furniture Co.,* 109 Ill. 2d at 209-10, 486 N.E.2d 893, 93 Ill. Dec. 360. A jurisdictional limitation period is an absolute requirement; it is not an affirmative defense that is subject to waiver or estoppel.

The Act itself creates substantive rights, unknown to the common law, pursuant to which employees may recover compensation **[***4]** from their employers for accidental injuries or death suffered in the course of employment. 820 ILCS 305/1 *et seq.* (West 1994). The Act also prescribes certain time periods within which employees must enforce those rights by filing notices of claims and petitions to recover benefits. 820 ILCS 305/6(c), (d) (West 1994). The 45-day notice-to-employers provision found in section 6(c) of the Act is deemed jurisdictional *(Ferguson v. Industrial Comm'n,* 397 Ill. 348, 351, 74 N.E.2d 539 (1947); *Ristow v. Industrial Comm'n,* 39 Ill. 2d 410, 413, 235 N.E.2d 617 (1968)), whereas the time period for filing an application for compensation pursuant to section 6(d) of the Act is considered a statute of limitations that is subject to waiver and estoppel. *Tegeler v. Industrial Comm'n,* 173 Ill. 2d 498, 220 Ill. Dec. 114, 672 N.E.2d 1126 (Ill. 1996); *Baldock v. Industrial Comm'n,* 63 Ill. 2d 124, 126, 345 N.E.2d 490 (1976); *Pantle v. Industrial Comm'n,* 61 Ill. 2d 365, 367, 335 N.E.2d 491 (1975); *Railway Express Agency v. Industrial Comm'n,* 415 Ill. 294, 299, 114 N.E.2d 353 (1953). Section 6(d) of the Act is viewed differently, arguably because the effect of the failure to file a timely application is stated **[***5]** in these words: "the right to file such application shall be barred." This is language of limitations, not of jurisdiction. *Railway Express Agency,* 415 Ill. at 299. Be it noted, however, that the limitation period of section 6(d) has also been considered a jurisdictional requirement and a condition precedent to maintaining an action under the Act. *Black v. Industrial Comm'n,* 393 Ill. 187, 193, 65 N.E.2d 798 (1946); *Creel v. Industrial Comm'n,* 54 Ill. 2d 580, 588, 301 N.E.2d 275 (1973) (Davis, J., dissenting). Remarkably, Illinois courts have not squarely addressed the conflict surrounding section 6(d) of the Act. In fact, the divergent cases cited above do not even acknowledge one another.

In addition to the preaward limitation periods set forth in sections 6(c) and 6(d) of the Act, the Act also contains limitation periods **[*966]** that preclude review of awards beyond the statutory time periods. 820 ILCS 305/19(b), (f) (West 1994). The cases are legion that **[**441]** hold that the failure to strictly comply with sections 19(b) and 19(f) of the Act deprives the Commission and the courts of subject matter jurisdiction. **[***6]** *Northwestern Steel & Wire Co. v. Industrial Comm'n,* 37 Ill. 2d 112, 115, 224 N.E.2d 853 (1967) (section 19 (b), petition for review of arbitrator's decision to Commission); *Mattern v. Industrial Comm'n,* 216 Ill. App. 3d 653, 654, 159 Ill. Dec. 870, 576 N.E.2d 539 (1991) (same); *Wiscons v. Industrial Comm'n,* 176 Ill. App. 3d 898, 899, 126 Ill. Dec. 329, 531 N.E.2d 956 (1988) (same); *Garcia v. Industrial Comm'n,* 95 Ill. 2d 467, 469, 70 Ill. Dec. 1, 448 N.E.2d 879 (1983) (section 19(f), correction of clerical errors); *Arrington v. Industrial Comm'n,* 96 Ill. 2d 505, 508-09, 71 Ill. Dec. 712, 451 N.E.2d 866 (1983) (section 19(f)(1), petition for review of Commission's decision to circuit court); *Perusky v. Industrial Comm'n,* 72 Ill. 2d 299, 301-02, 21 Ill. Dec. 192, 381 N.E.2d 270 (1978) (same); *Frank v. Industrial Comm'n,* 276 Ill. App. 3d 214, 216-18, 213 Ill. Dec. 18, 658 N.E.2d 488 (1995) (same); *Fisher v. Industrial Comm'n,* 231

Ill. App. 3d 1061, 1064, 173 Ill. Dec. 207, 596 N.E.2d 831 (1992) (same); *Fortson v. Industrial Comm'n,* 184 Ill. App. 3d 794, 795-96, 132 Ill. Dec. 893, 540 N.E.2d 815 (1989) (same); **[***7]** *Sprinkman & Sons, Corp. v. Industrial Comm'n,* 160 Ill. App. 3d 599, 600-01, 112 Ill. Dec. 579, 513 N.E.2d 1188 (1987) (same).

Finally, section **19(h)** of the Act, at issue here, grants the Commission continuing jurisdiction over compensation claims for a prescribed period of time. This provision allows an agreement or award providing for compensation in installments to be reviewed by the Commission at the request of either party for change of disability of the employee at any time within 30 months after such agreement or award. 820 ILCS 305/**19(h)** (West 1994). At least one Illinois case has viewed this 30-month time limitation as jurisdictional. See *Ruff v. Industrial Comm'n,* 149 Ill. App. 3d 73, 102 Ill. Dec. 660, 500 N.E.2d 553 (1986).

In *Ruff,* the petitioner argued the respondent waived the issue of subject matter jurisdiction by failing to contend the Commission lacked jurisdiction to hear the section **19(h)** petition because it was not timely filed. The court noted that the respondent's jurisdictional claim was not waived, even though it was first presented before the circuit court during its review of the Commission's denial of the section **19(h)** petition. *Ruff,* 149 Ill. App. 3d at 78. The court found, however, that the petitioner filed a timely section **19(h)** petition and, thus, **[***8]** the Commission had proper jurisdiction to hear his claim. *Ruff,* 149 Ill. App. 3d at 78.

The view espoused in *Ruff,* that the time limitation of section **19(h)** is jurisdictional, has case law support from other states. See *Selden v. Workers' Compensation Appeals Board,* 176 Cal. App. 3d 877, 222 Cal. Rptr. 450 (Cal. App. 1986) (statutory time limit for filing a petition to increase award is jurisdictional); *Budget Luxury Inns, Inc. v. Boston,* 407 So. 2d 997 (Fla. App. 1981); **[*967]** *Garza v. W.A. Jourdan, Inc.,* 91 N.M. 268, 572 P.2d 1276 (N.M. App. 1977) (limitation period is jurisdictional and cannot be waived); *Manrose v. Miami Shipbuilding Corp.,* 156 Fla. 402, 23 So. 2d 733, 156 Fla. 771 (Fla. 1945); *Tischer v. City of Council Bluffs,* 231 Iowa 1134, 3 N.W.2d 166 (Iowa 1942). Moreover, this view comports with the expression of our supreme court that there is no sound reason to enlarge the period of time during which review may be had under section **19(h)** of the Act. ***Cuneo Press,*** *Inc. v. Industrial Comm'n,* 51 Ill. 2d 548, 549-50, 283 N.E.2d 880 (1972); *Greenway v. Industrial Comm'n,* 73 Ill. 2d 273, 276-77, 22 Ill. Dec. 725, 383 N.E.2d 201 (1978).

While we must **[***9]** acknowledge that HN4 section **19(h)** of the Act is remedial legislation that should be construed liberally to allow review of awards for change in disability (*Hardin Sign Co. v. Industrial Comm'n,* 154 Ill. App. 3d 386, 389, 107 Ill. Dec. 175, 506 N.E.2d 1066 (1987)), a liberal construction does not mean the Commission may disregard limitation provisions of the Act. The purpose of section **19(h)** of the Act is to set a period of time in which the Commission may consider whether an injury has recurred, increased, decreased, or ended. *Checker Taxi Co. v. Industrial Comm'n,* 343 Ill. 139, 144, 174 N.E. 849 (1931). The power of the Commission to review an award comes from the Act itself, which creates the Commission's authority and fixes the time when such authority must be exercised. **[**442]** *Notman v. Industrial Comm'n,* 219 Ill. App. 3d 203, 205, 161 Ill. Dec. 822, 579 N.E.2d 370 (1991). The Commission, as an administrative, nonjudicial body, has no presumption in favor of jurisdiction, and through section **19(h)**, the legislature confined the Commission's authority to review an award for change of disability to a 30-month period. To permit review beyond the statutory period would bypass this **[***10]** statutory restriction and override the plain meaning of the Act.

Therefore, after examining the history and purposes of the limitations period on review of awards under section **19(h)** of the Act, we are compelled to hold that HN5 the time provision set forth in section **19(h)** of the Act is jurisdictional. To hold otherwise would be akin to "judicial legislation by judgment" (see *Michelson v. Industrial Comm'n,* 375 Ill. 462, 467, 31 N.E.2d 940 (1941)) and detrimental to the strong Illinois precedent holding that time limitations of the Act are jurisdictional.

Having concluded that the time provision of section **19(h)** is jurisdictional, we can readily dismiss claimant's contentions that employer consented to the jurisdiction of the Commission by executing a section **19(h)** proceeding stipulation form and waived the limitations period by partaking in a hearing on the merits of claimant's section **19(h)** petition. It is well settled that the issue of subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties. *Michelson,* 375 Ill. at 470; **[*968]** *Taylor v. Industrial Comm'n,* 221 Ill. App. 3d 701, 703-04, 164 Ill. Dec. 450, 583 N.E.2d 4 (1991); **[***11]** *Swope v. Northern Illinois Gas Co.,* 221 Ill. App. 3d 241, 243, 163 Ill. Dec. 665, 581 N.E.2d 819 (1991); *Ruff,* 149 Ill. App. 3d at 78; *Mitchell v. Industrial Comm'n,* 148 Ill. App. 3d 690, 695, 102 Ill. Dec. 219, 499 N.E.2d 999 (1986). It can be raised at any time and even *sua sponte* when necessary. *Arrington v. Industrial Comm'n,* 96 Ill. 2d 505, 509, 71 Ill. Dec. 712, 451 N.E.2d 866 (1983); *West v. Industrial Comm'n,* 238 Ill. App. 3d 445, 446, 179 Ill. Dec. 766, 606 N.E.2d 598 (1992); *Taylor,* 221 Ill. App. 3d at 703; *Walsh v. Central Cold Storage Co.,* 324 Ill. App. 402, 419, 58 N.E.2d 325 (1944).

We find that claimant's reliance on *Murphy v. Industrial Comm'n,* 408 Ill. 612, 97 N.E.2d 843 (1951), is misplaced. In *Murphy,* the Commission had properly obtained jurisdiction by a petition filed within the time allotted by the Act to review the arbitrator's decision. *Murphy,* 408 Ill. at 615. The court held that the Commission did not lose jurisdiction by a delay in filing the transcript of proceedings six days late, where the parties appeared before the Commission and did not object to its jurisdiction. *Murphy,* 408 Ill. at 615. * *Murphy* is distinguishable **[***12]** from the case *sub judice,* where the Commission never had jurisdiction to begin with because no timely petition was ever filed. Accordingly, the Commission could not be conferred with subject matter jurisdiction by the conduct of the parties. See *Mitchell v. Industrial Comm'n,* 148 Ill. App. 3d 690, 695, 102 Ill. Dec. 219, 499 N.E.2d 999 (1986) (holding that a court may not be conferred with subject matter jurisdiction which is otherwise absent).

FOOTNOTES

* *Murphy* has been overruled to the extent it stands for the proposition that the Commission can, once a proper petition for review is filed, retain review jurisdiction by failing to act on a motion to dismiss a petition for review. *Northwestern Steel & Wire Co. v. Industrial Comm'n,* 37 Ill. 2d 112, 117, 224 N.E.2d 853 (1967).

In sum, we hold that the statutory limitations period of section **19(h)** of the Act is a jurisdictional requirement that may be raised at any time and even *sua sponte* by the Commission. It is an absolute and unconditional restriction **[***13]** on the right of review. As such, the Commission is necessarily divested of its review jurisdiction for change of disability 30 months after agreement or award of compensation. There being no question that claimant petitioned for review of an award beyond the time prescribed by section **19(h)** of the Act, the Commission had no jurisdiction to review the award. Accordingly, we affirm the dismissal of claimant's petition for lack of jurisdiction.

Affirmed.

McCULLOUGH, P.J., and COLWELL, HOLDRIDGE, and RARICK, JJ., concur.

- Caution: Possible negative treatment
- Positive treatment is indicated
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In

*402 Ill. App. 3d 307, *; 929 N.E.2d 1267, **;*
*2010 Ill. App. LEXIS 629, ***; 341 Ill. Dec. 188*

CHARLES DALLAS, Plaintiff-Appellee and Cross-Appellant, v. AMEREN CIPS, Defendant-Appellant and Cross-Appellee.

NO. 4-09-0753

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

402 Ill. App. 3d 307; 929 N.E.2d 1267; 2010 Ill. App. LEXIS 629; 341 Ill. Dec. 188

June 21, 2010, Filed

SUBSEQUENT HISTORY: Appeal denied by Dallas v. Ameren CIPS, 2010 Ill. LEXIS 1671 (Ill., Nov. 24, 2010)

PRIOR HISTORY: [*1]**
Appeal from Circuit Court of Sangamon County. No. 09MR123. Honorable Patrick W. Kelley, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: The Sangamon County Circuit Court (Illinois) entered judgment for plaintiff employee pursuant to an application for entry of judgment filed by him under the **Workers' Compensation** Act, 820 ILCS 305/19(g) (2008), in a case where he had sought **workers' compensation** benefits. Defendant employer appealed; the employee cross-appealed seeking costs and attorney fees on appeal.

OVERVIEW: The employee suffered a back injury while working for the employer. After a hearing, an arbitrator issued a decision granting the employee benefits under the **Workers' Compensation** Act. The arbitrator also determined that the employee established an entitlement to a 820 ILCS 305/8(d)(1) (2002) wage differential award. Neither party sought review. Eventually, the employee filed an application for entry of judgment under 820 ILCS 305/19(g) (2008) to enforce the award after the employer terminated the wage-differential payments. The employer moved for leave to file a counterclaim seeking equitable relief because it believed that the employee was no longer disabled. The trial court denied the motion for leave, granted the application for entry of judgment, and awarded attorney fees

and costs to the employee. The appellate court found that the trial court did not have the authority in a 820 ILCS 305/19(g) (2008) proceeding to consider whether the employee was still disabled, as the only proper defense was payment of the final award, which the employer was not alleging. It also found that the employee had not shown that he was entitled to an award of attorney fees and costs on appeal.

OUTCOME: The appellate court affirmed the trial court's judgment and denied the employee's cross appeal seeking an award of costs and attorney fees.

CORE TERMS: disability, attorney fees, arbitrator's decision, wage-differential, ended, fees incurred, diminished, counterclaim, installment, arbitrator, entry of judgment, wage differential, leave to file, recurred, lineman, final award, cross-appeal, entering judgment, period of time, de novo, certified copy, arbitration proceedings, permanently disabled, terminated, disputed, ection, reopen, amend, earn, weekly

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Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

HN1 Generally, a trial court's decision on whether to grant leave to file a counterclaim or an affirmative defense is reviewed for an abuse of discretion. Where, however, an issue raised by a party requires statutory construction, a reviewing court's review is de novo. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

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

HN2 Proceedings under the **Workers' Compensation** Act (Act) are purely statutory, and courts can obtain jurisdiction only in the manner provided by that Act. More Like This Headnote

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Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

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

HN3 820 ILCS 305/19(g) (2008) of the **Workers' Compensation** Act gives trial courts the authority to render judgment in accordance with an award or decision of the Commission when a certified copy of the decision is presented to the court. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

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

HN4 See 820 ILCS 305/19(g) (2008).

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

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

HN5 820 ILCS 305/19(g) (2008) is designed to permit speedy entry of judgment on an award. A trial court's inquiry is limited to determining whether the requirements of that section have been met. The court cannot question the jurisdiction of the Commission, question the legality of the Commission's actions, review the Commission's decision, or otherwise construe the Act, even if the decision appears too large on its face. The only defense to a 820 ILCS 305/19(g) (2008) petition is full payment of the final award. More Like This Headnote

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

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN6 820 ILCS 305/8(d)(1) (2002) of the **Workers' Compensation** Act provides that an employee who is partially incapacitated from pursuing his usual and customary line of employment shall receive a portion of the difference between his former wages and the wages he earns or is able to earn in his new employment. An employee receiving an installment award under 820 ILCS 305/8(d)(1) (2002) is entitled to compensation for the duration of his disability. More Like This Headnote

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

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

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

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

HN7 820 ILCS 305/8(d)(1) (2002) itself does not authorize the Commission to reopen final installment awards for partial disability. However, under 820 ILCS 305/**19(h)** (2008) of the **Workers' Compensation** Act, the Commission has the authority, for a proscribed period of time, to review an installment award. More Like This Headnote

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

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

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

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

HN8 See 820 ILCS 305/**19(h)** (2008).

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Terminations

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

HN9 820 ILCS 305/**19(h)** (2008) provides a period of time in which the Commission may consider whether an injury has recurred, increased, decreased, or ended. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

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

HN10 A totally and permanently disabled employee's benefits may be terminated upon an employer learning the disability no longer exists, but a partially permanently disabled employee's benefits pursuant to 820 ILCS 305/8(d)(1) (2002), regarding wage differentials, may not. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

HN11 One of the factors considered when determining whether to permit amendment to a pleading is whether the amendment would cure the defect in the pleading. More Like This Headnote

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

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN12 See 820 ILCS 305/19(g) (2008).

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

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

HN13 820 ILCS 305/19(g) (2008) does not specifically provide for payment of attorney fees incurred on appeal. More Like This Headnote

Civil Procedure > Sanctions > General Overview

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > Appeals > Frivolous Appeals

Governments > Courts > Rule Application & Interpretation

HN14 Ill. Sup. Ct. R. 375(b) calls for sanctions where an appeal is not reasonably well

> grounded in law or fact and is made in bad faith or to avoid paying an award. The imposition of sanctions under Ill. Sup. Ct. R. 375(b) is within the appellate court's discretion. More Like This Headnote | *Shepardize:* Restrict By Headnote

JUDGES: PRESIDING JUSTICE MYERSCOUGH ▾ delivered the opinion of the court. KNECHT ▾ and TURNER ▾, JJ., concur.

OPINION BY: MYERSCOUGH ▾

OPINION

[*308] **[**1268]** PRESIDING JUSTICE MYERSCOUGH ▾ delivered the opinion of the court:

Defendant, Ameren CIPS, appeals an order of the circuit court entering judgment for plaintiff, Charles Dallas, pursuant to an application for entry of judgment filed by plaintiff under section 19(g) of the **[**1269]** **Workers' Compensation** Act (Act) (820 ILCS 305/19(g) (West 2008)). Plaintiff cross-appeals, seeking costs and attorney fees on appeal. For the reasons that follow, we affirm the circuit court and deny plaintiff's request for costs and attorney fees on appeal.

I. BACKGROUND

On December 14, 1998, plaintiff suffered an injury to his back while working for defendant. On June 24, 2004, following a hearing, an arbitrator issued a decision granting plaintiff benefits under the Act.

The arbitrator found plaintiff had a compensable injury that resulted in two lumbar surgeries. Permanent restrictions placed on plaintiff precluded him from returning to his work with defendant as a lineman or his previous work as a farm **[***2]** laborer. Although the arbitrator found plaintiff did not meet his burden of proof in establishing permanent total disability, plaintiff did qualify for a wage differential (permanent wage loss) under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2002)). Specifically, the arbitrator made the following finding on the disputed issue of the nature and extent of the injury:

> "It is found [plaintiff] has sustained his burden of proof in establishing entitlement to a permanent wage loss under [s]ection 8(d)(1) of the Act as of [the] date of maximum medical improvement, **[*309]** January 9, 2003. This wage differential of $ 465.67 begins as of January 9, 2003[,] and shall apply as long as the disability lasts."

The arbitrator ordered defendant to pay plaintiff temporary total disability benefits of $ 811.94 per week for 177 4/7 weeks (August 12, 1999, through January 9, 2003). The arbitrator also ordered defendant to pay plaintiff as follows:

> "the sum of $ 456.67 [*sic*] per week for a further period of 68 6/7 weeks, as provided in section 8(d)(1) of the Act because the injuries sustained caused *[w]age loss, limited to the maximum PPD rate as set forth above of $ 465.67, from 01/09/03 through the* **[***3]** *date of trial, and ongoing thereafter for the duration of the disability*." (Emphasis in original.)

Neither party filed a petition for review of the arbitrator's decision. The arbitrator's decision, therefore, became the decision of the Illinois **Workers' Compensation** Commission (Commission). See 820 ILCS 305/19(b) (West 2002) (unless a petition for review is filed within 30 days, the arbitrator's decision shall become the decision of the Commission and, absent

fraud, shall be conclusive). (For the sake of clarity, this court will, like the parties, continue to refer to the decision as the arbitrator's decision.)

On March 25, 2009, plaintiff filed in the circuit court an application for entry of judgment pursuant to section 19(g) of the Act (820 ILCS 305/19(g) (West 2008)). In the application for entry of judgment, plaintiff asserted that no review of the arbitrator's decision was pending and the time for review of the arbitrator's decision had passed. Plaintiff also alleged defendant was "out of time to challenge the arbitrator's decision or pursue any action to assert the disability of the employee has subsequently recurred, increased, diminished, or ended."

Plaintiff further alleged **[***4]** that defendant paid the weekly wage-differential benefits to plaintiff for several years in accordance with the arbitrator's decision. However, on January 24, 2009, defendant informed plaintiff the weekly wage-differential payments would be terminated. Plaintiff had not received weekly wage-differential payments since the end of January 2009. **[**1270]** Plaintiff sought entry of judgment and an award of costs and attorney fees.

On April 22, 2009, defendant filed a responsive pleading. Defendant agreed that (1) the time for review of the arbitrator's decision had passed, (2) defendant had complied with the arbitrator's decision until "the recent developments, questioning how long the disability has lasted," (3) defendant notified plaintiff as to the basis and date of termination of the wage-differential benefits, and (4) no benefits had been paid as of the date of the termination of the wage-differential benefits. Defendant disputed that defendant was out of time to challenge **[*310]** the arbitrator's decision or pursue any remedy, "in view of evidence subsequently gathered questioning whether the disability, that served as premise for the [d]ecision, has continued." Defendant also disputed whether the **[***5]** failure to pay was improper and its responsibility for costs and attorney fees.

On June 18, 2009, plaintiff filed a motion for judgment on the pleadings. On that same date, defendant filed a motion for leave to file "[c]ounterclaim/[a]ffirmative [d]efenses for [e]quitable [r]elief" (hereinafter referred to as the counterclaim). Defendant attached to its motion for leave a proposed counterclaim for equitable relief.

In the motion for leave, defendant alleged that following plaintiff's injury, plaintiff was unable to return to work as a lineman for defendant. After expiration of the time for review of the arbitrator's decision, plaintiff obtained full-time employment as a lineman at an hourly rate in excess of his rate of pay with defendant. Defendant believed plaintiff's alleged disability had ended or diminished. Therefore, in January 2009, defendant terminated plaintiff's wage-differential benefits.

Defendant further asserted it had no adequate remedy at law because the time for review had passed. Defendant argued plaintiff was entitled to the wage-differential benefits only so long as the disability lasted, and, because plaintiff was no longer incapacitated from working as a lineman, **[***6]** plaintiff was not entitled to receive the wage-differential benefits. Defendant's proposed counterclaim sought an order that (1) defendant was no longer obligated to pay plaintiff wage-differential benefits and (2) the wage-differential benefits received by plaintiff after he became reemployed as a lineman should be held in constructive trust for the benefit of defendant and conveyed to defendant. Defendant also filed a motion seeking to stay entry or enforcement of judgment under section 19(g) until the court determined whether defendant was entitled to equitable relief.

On July 2, 2009, plaintiff filed a motion to strike defendant's motions for leave and for a stay. Plaintiff argued the circuit court only had jurisdiction to determine whether the requirements of section 19(g) of the Act had been met and enter the **workers' compensation** award as a civil court judgment.

On July 8, 2009, the circuit court held a hearing. No transcript, bystander's report, or agreed statement of facts pertaining to this hearing has been provided on appeal.

On September 1, 2009, the circuit court entered an order denying (1) defendant's motion for leave to file the counterclaim, (2) defendant's motion for **[***7]** stay, and (3) plaintiff's motion to strike defendant's motions. The court granted plaintiff's motion for judgment **[*311]** on the pleadings. The court entered judgment in favor of plaintiff and against defendant (1) in accordance with the arbitrator's decision and (2) in the amount of $ 5,705.50 for attorney fees and costs.

[1271]** On October 1, 2009, defendant filed a notice of appeal. On October 7, 2009, plaintiff filed a notice of cross-appeal for the purpose of requesting additional fees and costs on appeal.

II. ANALYSIS

A. Issues Raised in Defendant's Appeal

In its direct appeal, defendant argues (1) defendant is without an adequate remedy at law and a court of equity should determine whether defendant must continue to pay benefits to plaintiff and (2) defendant should have been granted leave to amend.

HN1 Generally, a trial court's decision on whether to grant leave to file a counterclaim or an affirmative defense is reviewed for an abuse of discretion. See, *e.g., Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 796, 914 N.E.2d 1195, 1210, 333 Ill. Dec. 383 (2009) (involving leave to file amended affirmative defenses); *Trustees of Schools of Township 42 North, Range 11, East of Third Principal Meridian, Cook County, Illinois v. Schroeder*, 8 Ill. App. 3d 122, 124, 289 N.E.2d 247, 249 (1972) **[***8]** (holding that the "trial court had discretion to allow or deny filing of the counterclaim" postdecree). Here, however, the issue raised by defendant requires statutory construction--whether the Act permitted such a defense in an action under section 19(g) of the Act. Therefore, our review is *de novo*. See, *e.g., Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524-25, 844 N.E.2d 414, 418-19, 300 Ill. Dec. 416 (2006) (reviewing *de novo* whether the Commission had jurisdiction to reopen a 10-year-old wage-differential award *de novo* because the case required interpretation of section 8(d)(1) of the Act).

HN2 "Proceedings under the **Workers' Compensation** Act are purely statutory, and courts can obtain jurisdiction only in the manner provided by that Act." *Beasley v. Industrial Comm'n*, 198 Ill. App. 3d 460, 464, 555 N.E.2d 1172, 1174, 144 Ill. Dec. 653 (1990); see also *Kavonius v. Industrial Comm'n*, 314 Ill. App. 3d 166, 169, 731 N.E.2d 1287, 1290, 247 Ill. Dec. 279 (2000) (noting that circuit courts exercise special statutory jurisdiction in **workers' compensation** proceedings and strict compliance with the statute is required to vest the court with subject-matter jurisdiction). *HN3* Section 19(g) of the Act gives circuit courts the authority **[***9]** to render judgment in accordance with an award or decision of the Commission when a certified copy of the decision is presented to the court. *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259, 264, 383 N.E.2d 207, 209, 22 Ill. Dec. 731 (1978). Section 19(g) provides as follows:

> **[*312]** *HN4* "Except in the case of a claim against the State of Illinois, either party may present a certified copy of the award of the [a]rbitrator, or a certified copy of the decision of the Commission when the same has become final, when no proceedings for review are pending, providing for the payment of compensation according to this Act, to the Circuit Court of the county in which such accident occurred or either of the parties are residents, whereupon the court shall enter a judgment in accordance therewith. In a case where the employer refuses to pay compensation according to such final award or such final decision upon which such judgment is entered[,] the court shall in entering judgment thereon, tax as costs against him the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered, which judgment and costs taxed as herein provided shall, **[***10]** until and unless set aside, have the same effect as though duly entered in an action duly tried and **[**1272]** determined by the court, and shall with like effect, be entered

and docketed." 820 ILCS 305/19(g) (West 2008).

HN5 Section 19(g) is "designed to permit speedy entry of judgment on an award." *Aurora East School District v. Dover*, 363 Ill. App. 3d 1048, 1055, 846 N.E.2d 623, 629, 301 Ill. Dec. 298 (2006). The circuit court's inquiry is limited to determining whether the requirements of section 19(g) have been met. *Ahlers*, 73 Ill. 2d at 268, 383 N.E.2d at 211. The court cannot question the jurisdiction of the Commission, question the legality of the Commission's actions, review the Commission's decision, or "otherwise construe the Act, even if the decision appears too large on its face." *Aurora East School District*, 363 Ill. App. 3d at 1055, 846 N.E.2d at 629; see also *Ahlers*, 73 Ill. 2d at 268, 383 N.E.2d at 211 (the court can refuse to "enter judgment only, for example, when a lack of jurisdiction appears on the face of the record"). The only defense to a section 19(g) petition is full payment of the final award. *Aurora East School District*, 363 Ill. App. 3d at 1055, 846 N.E.2d at 630.

In this appeal, defendant **[***11]** does not challenge whether the requirements of section 19 (g) have been met; nor does defendant assert that full payment has been tendered. Defendant only challenges the circuit court's refusal to consider defendant's claim that plaintiff was no longer entitled to a wage-differential payment.

Such an argument is not appropriately raised in a section 19(g) proceeding. See *McCormick v. McDougal-Hartmann Co.*, 47 Ill. 2d 340, 343, 265 N.E.2d 610, 612 (1970) (employer could not raise, in an action to enforce an award of compensation under section 19(g), its claim that it was entitled to credit for recovery the employee received from a third party); *Franklin v. Wellco Co.*, 5 Ill. App. 3d 731, 734, 283 N.E.2d 913, 915 (1972) ("An employer cannot have the award reviewed **[*313]** by filing an answer in an action brought by the employee under section 19(g) to enforce the award"). Therefore, the circuit court did not have jurisdiction to review the award and did not err by denying defendant leave to file its counterclaim.

Defendant was not without a remedy. As noted, the arbitrator awarded plaintiff a wage differential pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2002)). HN6 Section 8(d)(1) **[***12]** of the Act "provides that an employee who is partially incapacitated from pursuing his usual and customary line of employment shall receive a portion of the difference between his former wages and the wages he earns or is able to earn in his new employment." *Cassens*, 218 Ill. 2d at 522, 844 N.E.2d at 417, citing 820 ILCS 305/8(d)(1) (West 2002). "An employee receiving an installment award under section 8(d)(1) is entitled to compensation 'for the duration of his disability.'" *Cassens*, 218 Ill. 2d at 522, 844 N.E.2d at 417, quoting 820 ILCS 305/8(d)(1) (West 2002).

HN7 Section 8(d)(1) itself does not "authorize the Commission to reopen final installment awards for partial disability." *Cassens*, 218 Ill. 2d at 528, 844 N.E.2d at 421. However, under section **19(h)** of the Act, the Commission has the authority, for a proscribed period of time, to review an installment award. See *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 555, 837 N.E.2d 909, 915, 297 Ill. Dec. 458 (2005) (under section **19(h)**, where the employee's disability has recurred, increased, diminished, or ended, the Commission may review an award); **[**1273]** *Eschbaugh v. Industrial Comm'n*, 286 Ill. App. 3d 963, 966, 677 N.E.2d 438, 441, 222 Ill. Dec. 235 (1996) (finding section **19(h)** **[***13]** of the Act gives the Commission continuing jurisdiction over an award providing for compensation in installments for a proscribed period of time, and the time provision of section **19(h)** jurisdictional).

Section **19(h)** provides as follows:

> HN8 "An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred,

> increased, diminished[,] or ended.
>
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under [s]ection 8 (d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground **[*314]** that the disability of the employee has subsequently recurred, increased, diminished[,] or ended.
>
> On such review, compensation payments may be re-established, increased, diminished[,] **[***14]** or ended." 820 ILCS 305/**19(h)** (West 2008).

As such, HN9 section **19(h)** provides a period of time in which the Commission may consider whether an injury has recurred, increased, decreased, or ended. *Behe v. Industrial Comm'n*, 365 Ill. App. 3d 463, 466, 848 N.E.2d 611, 614, 302 Ill. Dec. 312 (2006). The 30-month time period applies here because the 60-month time period applies only to injuries that occurred on or after February 1, 2006. See Pub. Act. 94-277, §95, eff. July 20, 2005 (2005 Ill. Legis. Serv. 1911, 1965 (West)). Therefore, in this case, defendant could have petitioned the Commission, within 30 months of the wage-differential award, and argued the injury diminished or ended. See Cassens, 218 Ill. 2d at 528, 844 N.E.2d at 421 (noting that the employer could have asked the Commission to reopen an installment award on the ground that the employee's disability diminished or ended but had to do so within 30 months of the issuance of the award).

While this outcome seems unfair, this court is bound by the statute and *Cassens* to so rule and encourages the legislature to revisit this situation. HN10 A totally and permanently disabled employee's benefits may be terminated upon the employer learning the disability **[***15]** no longer exists, but a partially permanently disabled employee's benefits pursuant to section 8(d)(1) (wage differential) may not. See 820 ILCS 305/8(f) (West 2008) (providing that in cases of complete disability, if the employee returns to work or is able to do so and earns as much as before the accident or is able to do so, payments under the award shall cease); *Cassens*, 218 Ill. 2d at 527, 529, 844 N.E.2d at 421 (finding "[s]ection 8(f) indicates that employers may cease payments when a totally and permanently disabled employee returns to the workforce, giving the employee authorization to petition the Commission for review of the award" and construing the statute as authorizing "ongoing review" by the Commission). Concededly, just as the employer can only petition to terminate benefits on a wage differential within 60 months (for injuries occurring on or after February 1, 2006), an employee may not seek an increase in his wage differential even if further disabled after 60 months.

[1274]** Defendant also argues on appeal that it should have been allowed to amend its pleading. Nothing in the record demonstrates defendant sought leave to amend or shows what that amendment entailed. In any **[***16]** event, HN11 one of the factors considered when determining whether to permit amendment to a pleading is whether the amendment would cure the defect in the pleading. See *Gurnitz v. Lasits-Rohline* **[*315]** *Service, Inc.*, 368 Ill. App. 3d 1129, 1132, 859 N.E.2d 1156, 1159, 307 Ill. Dec. 479 (2006). Here, defendant could not cure the defect in the pleading because its counterclaim was not a proper defense to the section 19(g) action, and, in any event, the trial court was not the proper forum in which to raise its claim that plaintiff's injury diminished or ended. See 820 ILCS 305/**19(h)** (West 2008) (providing the method and means for challenging an installment award under the Act before the Commission). Consequently, we affirm the circuit court's judgment.

B. Plaintiff Not Entitled to Costs and Attorney Fees Incurred on Appeal

In his cross-appeal, plaintiff argues he is entitled to costs and attorney fees incurred on appeal either under section 19(g) of the Act or pursuant to Supreme Court Rule 375, which pertains to frivolous appeals.

Section 19(g) of the Act provides for an award of costs and attorney fees in certain circumstances:

> HN12"In a case where the employer refuses to pay compensation according to such final award or **[***17]** such final decision upon which such judgment is entered *the court shall in entering judgment thereon, tax as costs against him the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered*, which judgment and costs taxed as therein provided shall, until and unless set aside, have the same effect as though duly entered in an action duly tried and determined by the court, and shall with like effect, be entered and docketed." (Emphasis added.) 820 ILCS 305/19(g) (West 2008).

In this case, the circuit court did, in conformance with section 19(g), award plaintiff his reasonable costs and attorney fees. Plaintiff now seeks costs and attorney fees incurred on appeal. HN13Section 19(g) does not, however, specifically provide for payment of attorney fees incurred on appeal.

In support of his argument that he is entitled to costs and attorney fees incurred on appeal, plaintiff cites *McAnally v. Butzinger Builders*, 263 Ill. App. 3d 504, 636 N.E.2d 19, 200 Ill. Dec. 828 (1994). In *McAnally*, the trial court dismissed the plaintiff's section 19(g) petition. *McAnally*, 263 Ill. App. 3d at 506, 636 N.E.2d at 20. On appeal, **[***18]** the appellate court reversed and remanded, directing the trial court to calculate the amount due and to enter a judgment in favor of plaintiff. *McAnally*, 263 Ill. App. 3d at 509, 636 N.E.2d at 22. The appellate court also found "plaintiff [was] entitled to costs and attorney fees for the employer's refusal to pay, and the fee award shall include those incurred in prosecuting the appeal." **[*316]** *McAnally*, 263 Ill. App. 3d at 509, 636 N.E.2d at 22. The court reasoned that although the right to appeal is important, the injured worker also has the right to be promptly compensated for the full amount of the final award. *McAnally*, 263 Ill. App. 3d at 509, 636 N.E.2d at 22.

In contrast here, the circuit court granted plaintiff's 19(g) petition and awarded costs and attorney fees as provided by section 19(g) of the Act. No remand is required here, as entry of judgment has **[**1275]** occurred. Nothing in the language of section 19(g) compels an award of attorney fees under these circumstances. Section 19(g) refers to an award of costs and attorney fees incurred in the arbitration proceedings and in the court entering judgment. Unlike the situation in *McAnally*, where the circuit court was directed to enter judgment **[***19]** to include costs and attorney fees incurred on appeal, no remand is required here. As such, section 19(g) of the Act does not require this court to award plaintiff his costs and attorney fees incurred on appeal, and we decline to do so.

Plaintiff also seeks costs and attorney fees incurred on appeal pursuant to Supreme Court Rule 375(b) (155 Ill. 2d R. 375(b)). HN14Supreme Court Rule 375(b) calls for sanctions where an appeal is not reasonably well grounded in law or fact and is made in bad faith or to avoid paying an award. 155 Ill. 2d R. 375(b). The imposition of sanctions under Rule 375(b) is within the appellate court's discretion. See *Residential Carpentry, Inc. v. Illinois* ***Workers' Compensation*** *Comm'n*, 389 Ill. App. 3d 975, 976, 910 N.E.2d 109, 111, 331 Ill. Dec. 36 (2009). We find that although defendant's argument on appeal was unpersuasive, the argument was not so lacking in foundation and law and evidence as to merit sanctions. *Greene Welding & Hardware v. Illinois* ***Workers' Compensation*** *Comm'n*, 396 Ill. App. 3d 754, 759, 919 N.E.2d 1129, 1134, 336 Ill. Dec. 204 (2009). Therefore, we deny plaintiff's request for costs and attorney fees on appeal.

III. CONCLUSION

For the reasons stated, we affirm the circuit court's **[***20]** judgment and deny plaintiff's request on cross-appeal for costs and attorney fees.

Affirmed.

KNECHT and TURNER, JJ., concur.

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Fees Awarded to Defend 19(h) brought by Arenas Dissent

2004 WL 3044968 (Ill.Indus.Com'n), 04 I.I.C. 0714, 90 IL.W.C. 37,053

Industrial Commission of Illinois
State of Illinois

County of Cook

JAVIER ARENAS, Petitioner,
v.
POLYFOAM PACKERS CORP., Respondent.
No. 90 W.C. 37053, No. 04 I.I.C. 0714
November 3, 2004

DECISION AND OPINION ON REVIEW

Respondent comes before the Commission on a Motion to Modify an Award of Permanent Total Disability to Petitioner pursuant to Section 8(f) filed on January 17, 2002, seeking to terminate Petitioner's permanent total disability benefits on the basis that Petitioner is currently able to return to work. Petitioner was found permanently and totally disabled by the Arbitrator in a decision dated October 28, 1994. The Decision became final. A hearing was held on Respondent's Motion as well as on Petitioner's Petitioner for Section 16 Fees and Expenses in front of Commissioner Kinnaman on December 4, 2003 and a transcript was prepared. The Commission heard oral arguments on Respondent's Motion and Petitioner's fee Petition on September 8, 1994. The issues before the Commission are whether Petitioner's permanent total disability benefits should be terminated under Section 8(f) and whether Petitioner's attorney is entitled to fees and expenses under Section 16 of the Act. The Commission, after considering the entire record, denies Respondent's Motion to Modify Petitioner's Section 8(f) award and finds that Petitioner's attorney is entitled to fees in the amount of $11,375.00 and expenses in the amount of $2,988.11 to be paid by Respondent or its insurance carrier directly to Petitioner's counsel, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner's permanent total disability award became final in October 1994. Respondent paid benefits through October 2000 at which time benefits were briefly suspended for 17 days and then reinstated once Respondent determined that Petitioner had attended a scheduled IME exam. On April 19, 2001 Respondent filed a Petition for Review under Section 19(h) or 8(a) of the Act seeking to modify the award. Commissioner Kinnaman set the case for several status hearings throughout 2002 and 2003 due to the party's efforts to reconstruct the lost Arbitration transcript. In the interim, on January 17, 2002 Respondent filed a new pleading entitled "Section 8(f) Petition" again seeking to terminate Petitioner's permanent

total disability benefits on the basis that Petitioner is now "able to return to work." At the December 2003 hearing, Petitioner filed a Response to the Respondent's Motion and a Petition for Attorney's Fees and Expenses. Attached to Petitioner's response were several pleadings in lieu of the Arbitration transcript which could not be produced. Petitioner's Response and the exhibits were marked as Commission Ex 1 and admitted without objection. Respondent's exhibits 1 through 6, including 4 video tapes were also admitted without objection. The Commission has viewed the videos.

2. Petitioner suffered a work injury on June 13, 1990 when he sustained crush and puncture injuries to his right forearm as a result of catching his arm in a compressor machine. He underwent 4 surgeries with the last surgery occurring in June 1992. Petitioner's dominant right hand was rendered useless and he was found to be permanently and totally disabled based on several factors, including his complete inability to use his right hand due to partial loss of sensory axons of the medial nerve, contractures of the right hand fingers and an inability to flex the fingers when the metacarpophalangeal joint is flexed. Petitioner's primary language is Spanish, he reached the 10^{th} grade in Columbia and his work experience lies only in unskilled labor. Due to his injury, he cannot write. During a supervised job search, Petitioner accepted the only job offered to him (out of 120 leads) as a dishwasher. However, he was unable to perform the job due to an inability to grip. The Respondent's job search also revealed only manual labor which Respondent conceded Petitioner was unable to perform as the jobs were outside his abilities. The jobs required bilateral hand use, gripping with the right hand, right wrist or digit extension or production quotas. Petitioner was found permanent totally disabled and awarded the statutory minimum amount of $229.12 per week under Section 8(f) of the Act.

3. Respondent paid the permanent total disability benefits through October 2000 when they were briefly suspended after Respondent determined that Petitioner failed to attend an IME exam. However, the benefits were reinstated 17 days later in October 2000 after it was determined that Petitioner did attend the scheduled exam with Dr. Pomerance. On October 6, 2000 and January 13, 2001, Dr. Pomerance issued his reports following his examinations of Petitioner. In his first report, Dr. Pomerance noted that Petitioner underwent several surgeries after the accident but that he had not had any treatment since approximately 1996. Petitioner conveyed current complaints of pain throughout his right upper extremity, numbness and tingling of the radial digits and loss of strength and range of motion in his right hand. On physical exam Dr. Pomerance noted loss of muscle bulk mainly within the volar radial aspect of the forearm and grip weakness. In October 2000, he opined that Petitioner reached maximum medical improvement and may return to work despite noting that "activities which require sustained forceful grasp may be beyond his capabilities."

4. After reviewing two videos in December 2000 depicting Petitioner's activities in May and June 2000, Dr. Pomerance further noted that Petitioner "appeared to have some functional use of his right upper extremity" as he is shown climbing a ladder, using a caulk gun, siphoning gas from his car using a squeeze ball with both hands and carrying a child. Dr. Pomerance noted that as per his clinical exam in October 2000 he "would not consider Mr. Arenas totally disabled and believe

that he is capable of some functional use with the right upper extremity. I do believe that he would be employable in occupations which do not require forceful or heavy lifting or have fine dexterity as an integral component of the job." Finally, he states, "compared to his state in 9/94, it appears as though that he is significantly more employable." At his deposition, Dr. Pomerance testified that the upper extremity use seen in the video was commensurate with the type of deformity he had at the time of the evaluation. PX 5, p. 15. When asked if Petitioner needed future surgery, Dr. Pomerance testified that he did not "have any surgical procedures that ... would completely restore Mr. Arenas' arm at this time." PX 5, p. 16. He testified that there are some activities Petitioner is capable of but that he could not do activities requiring heavy lifting or fine dexterity. He opined that Petitioner could use his right hand "as a general assist to the opposite hand." PX 5, p. 17. As to whether Petitioner's condition has changed since the time of his last functional capacity exam in 1993, Dr. Pomerance testified that Petitioner was now at MMI. PX 5, p. 19.

5. Dr. Pomerance agreed that Petitioner's use of the right upper extremity is significantly limited as a result of this injury. When asked why he felt Petitioner was currently more employable than he was in 1994, Dr. Pomerance explained that because Petitioner was no longer undergoing medical treatment and no surgeries were pending or planned for the future, he considers Petitioner's employability status "... more now rather than when he would be having to take significant periods of time off work in order to have his surgery and recover from them." PX 5, pp. 29,31. Dr. Pomerance believes Petitioner is capable of some kind of restricted employment but does not offer any choices or options. PX 5, p. 32.

6. Respondent also offered a labor market survey prepared in April 2002. RX 6. The survey references Dr. Pomerances' belief that Petitioner could work in jobs that do not require forceful or heavy lifting or fine dexterity. Based on those restrictions, the survey revealed positions in customer service, telemarketing and security. Of 32 contacts 20 were hiring with the most available jobs being in security. However, several jobs require GED or high school diploma, the ability to write and speak English, sales experience and computer skills.

7. Respondent objected to the use of Dr. Nagle's report in connection with the Section 8(f) motion so his deposition was taken. Dr. Nagle was Petitioner's treating physician at the time of his injury and when he underwent two functional capacity evaluations in 1992 and 1993. The results of these evaluations were considered by the Arbitrator in finding permanent total disability in 1994. Petitioner was restricted to performing work activities which required "no full wrist or digit extension, no production quota, no bilateral lifting activities greater than 15 pounds (above chest level) and no power grip with the right hand." At his deposition in 2002, Dr. Nagle reiterated these restrictions and testified that Petitioner's condition has not changed since 1993 and the restrictions have never been modified or lessened. EX J. p. 7. He further stated that in 1999 Petitioner returned complaining of right median nerve irritation which Dr. Nagle attributed to the original injury and in 2002 Petitioner complained of numbness and tingling in his right fingers and trouble grasping and using his right hand. The complaints were confirmed on exam and demonstrated "sequelae of his original injury, including the volar forearm scar" and the loss of muscle mass and grip

strength. EX J, p. 10. Dr. Nagle also watched the videos and testified that his opinion on Petitioner's disability did not change. EX J, p. 12. According to Dr. Nagle, the functional capacity evaluation in March 1993 demonstrated that Petitioner was at maximum medical improvement at that time and it was unlikely there would be any great change in his condition as it related to the original injury. Dr. Nagle charged $2,304.67 for his deposition and reports.

8. Petitioner also submitted a report from vocational expert Susan Entenberg dated June 18, 2002 indicating her opinion that Petitioner is still permanently totally disabled. Ms. Entenberg was Petitioner's vocational expert at Arbitration as well. Petitioner is now 53 years old with a 10th grade education from Columbia and no additional training or education. He has not learned English and cannot read or write. In her opinion, Petitioner's physical condition has not changed since 1993 and Respondent's most recent labor market survey does not provide Petitioner with any viable employment options in light of his continuing restrictions.

9. With regard to Petitioner's Petition for fees, Petitioner's counsel submitted an affidavit of his time spent on this matter since August 2000 when his defense of Petitioner's Section 8(f) award was initiated. First, counsel accomplished the reinstatement of Petitioner's benefits after the interruption in October 2000. Counsel provided an estimate of 65.50 hours in time spent over the next three years through October 2003 defending against Respondent's attempts to terminate benefits. Petitioner further submitted an affidavit attesting to the reasonable fee of $175.00 per hour for Petitioner's counsel in a workman's compensation setting. Petitioner's submitted attorney expenses total $2,988.11 in subpoena, deposition and travel expenses.

Based on the above, and the record taken as a whole, the Commission denies Respondent's Motion to Modify Petitioner's Section 8(f) award. With regard to Petitioner's physical condition, Petitioner's long-standing treating physician, Dr. Nagle, testified repeatedly that Petitioner's physical condition has not changed since his last evaluation in 1993. The restrictions on the use of his right arm remain in place as Petitioner continues to suffer significant loss of muscle, grip strength and range of motion. Rather than opining that Petitioner's physical condition has changed or improved, Dr. Pomerance opined simply that Petitioner was "at MMI" and could return to some form of work because he has not had any recent treatment and is not scheduled to receive any treatment for his admittedly severely disabled arm. The Commission assigns greater weight to the opinion of Petitioner's treating physician with regard to Petitioner's physical condition and the lack of improvement.

In considering Respondent's Motion, the Commission further considered whether Respondent met its burden to prove a change in Petitioner's employability such that he has returned to work or is able to return to work and earn as much as or is able to earn as much as before the accident as required under Section 8(f) before permanent total disability benefits can be terminated or reduced. See King v. Industrial Commission, 189 Ill.2d 167, 724 N.E.2d 896, 244 Ill.Dec.8 (2000). Respondent failed to meet that burden.

With regard to his employability, Petitioner's vocational expert, Susan Entenberg, concluded that Petitioner remains permanently and totally disabled. She determined that Petitioner is currently 53 years old with a 10th grade education from Columbia and no additional training or education. He knows only unskilled labor and does not speak, read or write in English. These factors have not changed since her original assessment of Petitioner. Furthermore, Ms. Entenberg asserts that Petitioner's physical condition has not changed since 1993. Finally, she opines that Respondent's most recent labor market survey does not provide Petitioner with any viable employment options in light of his continuing physical and educational disabilities. The Cascade labor survey provided by Respondent includes recommended jobs which completely ignore Petitioner's numerous job impediments, which also have not changed since he was determined permanently and totally disabled in 1994.

The Commission reviewed the 4 video tapes submitted by Respondent to show that Petitioner's physical condition has stabilized, that his limitations have been exaggerated and that his disability is not as severe as previously thought by two experts. Respondent asserts that the tapes depict a change in Petitioner's ability to work mandating the termination of his Section 8(f) benefits. Contrary to Respondent's view of the videos, the Commission finds no support for Respondent's Motion in the video depictions of Petitioner. Rather, the Commission notes that Petitioner's physical capabilities are no greater than when he was determined permanently and totally disabled. Respondent's Motion to Modify Petitioner's Section 8(f) benefits is denied.

Furthermore, Respondent's first Petition to terminate benefits filed under Sections 19(h) and 8(a) is denied as untimely. The Petition was filed well beyond the allowable 30 month period.

The Commission finds that Petitioner's counsel is entitled to fees in the amount of $11,375.00 and expenses in the amount of $2,988.11 to be paid by Respondent or its insurance carrier directly to Petitioner's counsel. In awarding these fees and expenses, the Commission finds that Respondent's efforts to terminate the Section 8(f) benefits were unreasonable, vexatious and unfounded. Again, Petitioner's treating physician Dr. Nagle and his vocational expert Susan Entenberg were emphatic in their opinion that Petitioner showed no improvement in either his physical condition or his employability such that any modification in his prior award is justified. Respondent's examining physician, vocational report and video evidence failed to provide sufficient evidence of change or employability.

The Commission further notes that Respondent's pursuit of benefit termination several years after the Commission's award resulted in significant defense efforts from Petitioner's current counsel who substituted in after the withdrawal of Petitioner's trial counsel. Moreover, Petitioner's counsel incurred report, deposition, travel and subpoena expenses due to Respondent's refusal to accept a treating doctor's report in lieu of a deposition in connection with the defense of the Motion. Under the circumstances of this case, equity demands an award of attorney's fees and reimbursement of expenses incurred in defense of the frivolous Motion to Modify Section 8(f) benefits filed years after the Commission's award became final and the Section 16a(B) 20% fee was collected by his former counsel.

Moreover, the actions of Petitioner's counsel in defense of this Motion are clearly akin to those extraordinary efforts of an attorney taken post-commission in the Courts. Attorney's fees in excess of the 20% fee are awarded in those cases under similar factual scenarios and are appropriately awarded here. Roman v. Caterpillar, Inc., 94 IIC 1012, Josef Rysz v. Emanon Co. & State Farm Insurance Co., 01 IIC 0557. The alternative is to force pro bono work on counsel or risk leaving a Petitioner without counsel in these unusual circumstances. It should also be noted that Respondent made no argument at any time, written or oral, opposing Petitioner's fee and expense request, time estimates or proposed hourly fee rate. No contrary evidence was offered on this issue by Respondent.

Finally, in light of the statutory minimum benefit payment received by Petitioner, Respondent is ordered to pay these fees and expenses directly to Petitioner's counsel in a lump sum. See Murphy v. Industrial Commission, 258 Ill.App.3d 764, 630 N.E.2d1065, 196 Ill.Dec. 900 (1994). Said payment will have no effect on the continued permanent total disability payment by Respondent directly to Petitioner in the amount of $229.12 per week for life under Section 8(f) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Modify the Section 8(f) award is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is to continue to pay Petitioner $229.12 per week for life pursuant to Section 8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is to pay directly to Petitioner's attorney fees in the amount of $11,375.00 and expenses in the amount of $2,988.11 pursuant to Section 16 of the Act.

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 Industrial Commission of Illinois in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

Susan O. Pigott

Paul W. Rink

CONCURRING IN PART AND DISSENTING IN PART

This case presents difficult issues created by the Act. I do concur with the majority that the Respondent's §19(h) petition should be denied. Regarding Petitioner's §16 petition for attorneys' fees, the majority finds that "equity demands" the awarding of same. If we had equitable powers, I would also hold that the Respondent should pay for the costs of defense. The problem is that the Commission does not have equitable powers and that jurisdiction of the Commission does not include the ability to award attorney fees in this manner absent a legislative grant of that authority. I also agree with the majority that the alternatives to this action are to force pro bono work on counsel or risk leaving

a petitioner without counsel in these circumstances. I am also aware that failure to provide this remedy would leave the possibility of abuse of process by a respondent which may not leave petitioners a remedy that I would deem adequate. This Respondent at oral argument argues that this remedy granted by the majority would create a chilling effect on Respondents' bringing §19(h) petitions. These are not concerns unique to this issue [FN1] but these are matters for the legislature, not the Commission, to address.

The majority presents no case law to form a legal basis for charging a respondent the costs of bringing an unsuccessful or frivolous motion for attorneys fees and costs based not on late payments or cut off of payments or non-payment or awards as in the prior Commission cases it cites, but rather simply on the fact that the Respondent filed the pleading which required defense. In short, §16 of the Act does not authorize this result and the Commission is without jurisdiction to do it on its own. See Alvarado v. Industrial Commission, 347 Ill.App.3d 352, 807 N.E.2d 494 (2004).

David R. Akemann

FN1. Respondents are often heard to argue that Petitioner's pleadings can be frivolous or even fraudulent and that they must either get and pay for an attorney or proceed at their peril without counsel. The counter argument in these cases is that to allow a remedy of a respondent to get attorneys fees would also create a chilling effect on employees from filing claims.

2004 WL 3044968 (Ill.Indus.Com'n), 04 I.I.C. 0714, 90 IL.W.C. 37,053

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*365 Ill. App. 3d 463, *; 848 N.E.2d 611, **;*
*2006 Ill. App. LEXIS 388, ***; 302 Ill. Dec. 312*

KENNETH W. BEHE, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Sullivan Delivery Service, Appellee).

No. 2-05-0813WC

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

365 Ill. App. 3d 463; 848 N.E.2d 611; 2006 Ill. App. LEXIS 388; 302 Ill. Dec. 312

May 5, 2006, Decided

SUBSEQUENT HISTORY: [*1]** Released for Publication June 5, 2006.
Rehearing denied by Behe v. Indus. Comm'n, 2006 Ill. App. LEXIS 518 (Ill. App. Ct. 2d Dist., June 5, 2006)

PRIOR HISTORY: Appeal from the Circuit Court of Du Page County. No. 05--MR--48. Honorable Edward R. Duncan, Jr., Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: After the denial by appellee Illinois Industrial Commission of appellant employee's first petition under 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002), the employee filed a second petition under § **19(h)** with the Commission. The Commission granted appellee employer's motion to dismiss the employee's second petition. The Circuit Court of Du Page County (Illinois) confirmed the decision. The employee appealed.

OVERVIEW: After an arbitrator found that the employee had suffered a compensable injury, the Commission modified the arbitrator's decision to increase the employee's award. Neither the employee nor the employer appealed the decision. When the employee filed his second petition under § **19(h)** with the Commission, alleging a recurrence or increase in his compensable injuries, the Commission found that it did not have jurisdiction to hear the employee's motion because it was filed outside of the 30-month time period prescribed by § **19(h)** as the denial of the employee's first petition under § **19(h)** did not toll the 30-month

limitations period mandated by § **19(h)**. The employee argued that the limitations period began anew after the denial of his first petition. On appeal, the court noted that the Commission, pursuant to the employee's first petition, determined that the employee had not experienced a change in circumstances warranting an increase in the original award. Thus, the Commission properly determined it did not have jurisdiction to review the employee's second petition because the petition was untimely as the denial of the first petition did not toll the 30-month limitations requirement.

OUTCOME: The judgment was affirmed.

CORE TERMS: claimant's, limitations period, disability, etition, successive, toll, original award, prescribed, effectuate, temporary, Act In, Pub Act, Public Act, petition filed, arbitrator's decision, jurisdiction to hear, time limitation, medical expenses, total disability, express language, speculative, anticipated, meaningless, arbitrator's, recurrence, acquiesced, frustrate, liberally, remedial, recurred

LEXISNEXIS® HEADNOTES Hide

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

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

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

HN1 See 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002).

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

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

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

HN2 The purpose of 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002) is to set a period of time in which the Commission may consider whether an injury has recurred, increased, decreased, or ended. The 30-month limitations period on review is jurisdictional, and the Illinois Industrial Commission is divested of its review jurisdiction for change of disability 30 months after an agreement or award of compensation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Types

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

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

HN3 When review of an arbitrator's decision is not sought, the 30-month limitations period under 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002) that applies to all other agreements or awards begins from the date of the arbitrator's award. More Like This Headnote

Governments > Legislation > Interpretation

HN4 In construing a statute, a court must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void. More Like This Headnote

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

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

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

HN5 The express language of 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002) requires that a petition for review for a change in circumstances be filed within 30 months after the award is reviewed by the Illinois Industrial Commission. In order to trigger the right to review, an award must have been made. More Like This Headnote

Governments > Legislation > Interpretation

HN6 As a rule, where the Illinois Legislature chooses not to amend terms of a statute after judicial construction, it will be presumed that it has acquiesced in the court's statement of legislative intent. More Like This Headnote

COUNSEL: For Kenneth W. Behe, Appellant: Daniel N. Kadjan, Arnold & Kadjan, Attorneys at Law, Chicago, IL.

For Illinois **Workers' Compensation,** Appellee: Dennis R. Ruth, Chairman, Illinois **Workers' Compensation** Commission, Chicago, IL.

For Sullivan Delivery Service, Appellee: Joseph D. Donnelly, Law Offices of Loretta M. Griffin, Attorneys at Law, Chicago, IL.

JUDGES: JUSTICE McCULLOUGH delivered the opinion of the court. HOFFMAN, CALLUM, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

OPINION BY: McCULLOUGH

OPINION

[613]** **[*464]** JUSTICE McCULLOUGH delivered the opinion of the court:

Claimant, Kenneth W. Behe, appeals from the July 27, 2005, order of the circuit court of Du Page County, confirming the December 29, 2004, order of the Industrial Commission [1] (Commission), which dismissed his second petition filed pursuant to section **19(h)** of the **Workers' Compensation** Act (Act) (820 ILCS 305/**19(h)** (West 2002)). For the reasons that follow, we affirm.

FOOTNOTES

1 Renamed the Illinois **Workers' Compensation** Commission. See Pub. Act 93--721, eff. January 1, 2005.

On April 30, 1997, an arbitrator found claimant had suffered an injury arising out of and in the course of **[***2]** his employment with employer, Sullivan Delivery Service, and awarded him 30% loss of the person as a whole. On December 30, 1997, the Commission modified the arbitrator's decision, increasing claimant's award to 50% loss of **[*465]** the person as a whole. On April 21, 1999, claimant filed a section **19(h)** petition, alleging a recurrence or increase in his compensable injuries. On December 6, 2001, the Commission denied claimant's petition. Neither party appealed this decision. On July 22, 2002, claimant again filed a section **19(h)** petition. Employer filed a motion to dismiss, alleging the Commission was without jurisdiction to hear claimant's motion because it was filed outside of the 30-month time period prescribed by statute. On December 29, 2004, the Commission granted employer's motion to dismiss, finding the denial of claimant's first section **19(h)** petition did not toll the 30-month limitations period mandated by section **19(h)** of the Act. In its order, the Commission stated:

> "Both parties cite the same case in support of their respective positions: *Hardin Sign Co. v. Industrial Comm.*, 154 Ill. App. 3d 386, 107 Ill. Dec. 175, 506 N.E.2d 1066 (1987). While the [claimant] **[***3]** cites to language in that case indicating that a 'decision' on a [section] **19(h)** [p]etition effectively tolls the 30[-]month limitations period authorized by this section of the Act, the Commission believes that this finding by the court must be read within the context of that decision. In *Hardin Sign*[,] the claimant filed an initial [section] **19(h)** [p]etition within the prescribed 30[-]month period. This [p]etition was granted, as claimant was found to have suffered a recurrence of disability and was awarded additional medical expenses and temporary total disability. Thus, when claimant filed a second **19(h)** [p]etition eight months later, the court held that the Commission continued to have jurisdiction of the claim because it was filed within 30 months of the last 'award', *i.e.*[,] the decision granting the initial **19(h)** [p]etition.
>
> In the case at bar, [claimant's] initial [section] **19(h)** [p]etition was denied by the Commission. As such, there was no additional 'award' which would toll the 30[-] month requirement of [s]ection **19(h)**. To hold that claimants can simply file successive [section] **19(h)** [p]etitions, regardless of their merit or **[***4]** whether they are denied by the Commission, would frustrate the meaning of [s] ection **19(h)**. Claimants could file such [p]etitions every 30 months in order to hold the claim open indefinitely. While the court has made clear that the Act is a 'humane law of a remedial nature' and should be liberally construed to effectuate its purpose, to hold otherwise in this case would frustrate any meaning behind the 30[-]month limitation period."

[614]** Claimant appealed this decision to the circuit court. On July 27, 2005, the circuit court confirmed the decision of the Commission. This appeal followed.

Section **19(h)** of the Act provides in pertinent part:

> **[*466]** *HN1* "[A]s to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended." 820 ILCS 305/**19(h)** (West 2002). **[***5]**

HN2 The purpose of section **19(h)** is to set a period of time in which the Commission may consider whether an injury has recurred, increased, decreased, or ended. *Eschbaugh v. Industrial Comm'n*, 286 Ill. App. 3d 963, 967, 677 N.E.2d 438, 441, 222 Ill. Dec. 235 (1996). The 30-month limitations period on review is jurisdictional, and the Commission is divested of

its review jurisdiction for change of disability 30 months after an agreement or award of compensation. *Eschbaugh*, 286 Ill. App. 3d at 967, 677 N.E.2d at 442. We note section **19(h)** was recently amended by Public Act 94--277 (Pub. Act 94--277, eff. July 20, 2005) to allow a section **19(h)** petition to be filed within 60 months of an award made under section 8(d)(1) of the Act. In this case a section 8(d)(1) award was not granted. HN3 When review of the arbitrator's decision is not sought, the 30-month limitations period that applies to all other agreements or awards begins from the date of the arbitrator's award. *Greenway v. Industrial Comm'n*, 73 Ill. 2d 273, 276, 383 N.E.2d 201, 202, 22 Ill. Dec. 725 (1978).

Claimant argues the 30-month limitations period began anew from the date **[***6]** of the denial of his first section **19(h)** petition. In support of this argument, claimant relies on *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 390, 506 N.E.2d 1066, 1069, 107 Ill. Dec. 175 (1987). Employer argues the situation in *Hardin* is distinguishable from the situation in the case at bar, and the case is, therefore, not controlling.

In *Hardin*, the claimant filed a second section **19(h)** petition more than 30 months after the entry of the original award. On appeal, the claimant argued the award of additional temporary total disability and medical expenses pursuant to claimant's first section **19(h)** petition was a new "award," which created a new date from which the 30-month limitations period would begin to run. In agreeing, the court stated section **19(h)** was remedial in nature and should be construed liberally to effectuate the purpose of the Act, namely, to provide financial protection for workers whose earning power is interrupted or terminated as a consequence of injuries arising out of and in the course of employment. *Hardin*, 154 Ill. App. 3d at 390, 506 N.E.2d at 1068-69. The court stated:

> "In the first section **19(h)** **[***7]** petition, claimant sought additional total temporary disability compensation as well as additional medical **[*467]** and incidental expenses because he was experiencing recurrent difficulty from his original injury. After a hearing, the Industrial Commission found a change in circumstances and increased the original award so as to include the additional benefits requested. In this regard, it is our conclusion that section **19(h)** of the Act mandates that additional review of an award be **[**615]** encouraged so as to effectuate the purpose and spirit of the Act. Furthermore, such method of determination of a claimant's disability eliminates the most difficult problem of attempting to anticipate the progress of a claimant's disability and making a somewhat speculative award to him to cover anticipated increases or decreases in disability. We therefore conclude (1) that no party should be barred from filing more than one section **19(h)** petition during the appropriate time limitation, and (2) that the 30-month time limitation provided for in section **19(h)** should begin anew from the date of the Industrial Commission's decision on the first **19(h)** petition. Consequently, claimant's second section **19(h)** petition **[***8]** was properly and timely filed." *Hardin*, 154 Ill. App. 3d at 390, 506 N.E.2d at 1069.

Claimant argues *Hardin* stands for the proposition that a successive section **19(h)** petition will be allowed so long as it is filed within 30 months of the decision on the previous section **19(h)** petition. Employer disagrees and submits that, unlike the claimant in *Hardin*, claimant in this case was not awarded additional compensation pursuant to his first section **19(h)** petition, and therefore, the limitations period prescribed in section **19(h)** of the Act expired 30 months from the date of the Commission's modification of the arbitration award. Because claimant did not file his second section **19(h)** petition within this time period, employer argues the Commission was without jurisdiction to hear claimant's claims. We agree.

The court's holding in *Hardin* was made within the context of a change in circumstances that had occurred since the entry of the claimant's award. As the court noted, allowing a claimant to file a subsequent section **19(h)** petition after a change in an award alleviates the inherent

problem of speculative awards that must account for anticipated increases **[***9]** and decreases in a claimant's disability. See *Hardin*, 154 Ill. App. 3d at 390, 506 N.E.2d at 1069. However, unlike the claimant in *Hardin*, in this case, the Commission, pursuant to claimant's first section **19(h)** petition, determined that claimant had not experienced a change in circumstances warranting an increase in the original award. Claimant did not appeal this finding. Under claimant's rationale, a claimant may preserve his right of review in perpetuity so long as a successive section **19(h)** petition is filed within 30 months of the denial of the previous section **19(h)** petition. This reasoning is contrary to the express language of section **19(h)** of the Act.

[*468] HN4 In construing a statute, "[w]e must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statue meaningless or void." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 300 Ill. Dec. 416 (2006). HN5 The express language of section **19(h)** requires that a petition for review for a change in circumstances be filed within 30 months after the *award* **[***10]** is reviewed by the Commission. First, in order to trigger the right to review, an award must have been made. *Hardin* is not inconsistent with this requirement. The *Hardin* court held that a successive section **19(h)** petition filed outside the 30-month limitations period will be permitted only if an award was granted for a change in circumstances on the previous section **19(h)** petition. *Hardin*, 154 Ill. App. 3d at 390, 506 N.E.2d at 1069. HN6 As a rule, "where the legislature chooses not to amend terms of a statute after judicial construction, it will be presumed that it has acquiesced in the court's statement of legislative intent." **[**616]** *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 404, 830 N.E.2d 584, 589, 294 Ill. Dec. 172 (2005). Section **19(h)** of the Act was recently amended by Public Act 94--277. However, the amendment did not concern the 30-month limitations requirement. Therefore, it is presumed, in amending this section, the legislature knew of the court's construction of section **19(h)**'s limitations requirement and acquiesced to that interpretation. See *R.D. Masonry, Inc.*, 215 Ill. 2d at 404, 830 N.E.2d at 589. Second, **[***11]** any reading of section **19(h)** that allows for endless filings of section **19(h)** petitions renders the 30-month requirement meaningless and is not an acceptable interpretation. Therefore, the denial of a section **19(h)** petition does not toll the 30-month limitations requirement. As such, claimant's second section **19(h)** petition was untimely, and the Commission properly determined it did not have jurisdiction to review claimant's petition.

For the foregoing reasons, the trial court's judgment is affirmed.

Affirmed.

HOFFMAN, CALLUM, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

In

*218 Ill. 2d 519, *; 844 N.E.2d 414, **;*
*2006 Ill. LEXIS 317, ***; 300 Ill. Dec. 416*

CASSENS TRANSPORT COMPANY, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Edwin Ade, Appellee).

Docket No. 100183.

SUPREME COURT OF ILLINOIS

218 Ill. 2d 519; 844 N.E.2d 414; 2006 Ill. LEXIS 317; 300 Ill. Dec. 416

February 17, 2006, Opinion Filed

PRIOR HISTORY: [*1]**
Cassens Transp. Co. v. Ill. Indus. Comm'n (Ade), 354 Ill. App. 3d 807, 821 N.E.2d 1274, 2005 Ill. App. LEXIS 17, 290 Ill. Dec. 700 (Ill. App. Ct. 4th Dist., 2005)

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former employer challenged a decision from an appellate court in Illinois, which dismissed the employer's appeal in a workers' compensation dispute with appellee former employee.

OVERVIEW: The employee suffered a disability, and he was awarded benefits under 820 Ill. Comp. Stat. 305/8(d)(1) (2002). About 10 years later, the employer sought to terminate the award based on the fact that the employee earned too much money. The Illinois Workers' Compensation Commission denied relief, and the decision was confirmed by a circuit court. The employer's subsequent appeal was dismissed, and it again sought review. In affirming the dismissal of the appeal, the state supreme court determined that the Commission lacked jurisdiction to hear the case. The Commission had jurisdiction for this purpose, but only for 30 months following the issuance of the award, pursuant to 820 Ill. Comp. Stat. 305/**19(h)** (2002). The state supreme court determined that the review sought by the employer was not appropriate for partial disability claims, even though they were authorized for claims of totally and permanently disabled persons under 820 Ill. Comp. Stat. 305/8(f) (2002). The state supreme court also rejected the argument that due process and rights under Ill. Const. art. I, § 12 were violated. There was no right to a specific form of review, and the employer had already received a hearing.

OUTCOME: The dismissal of the appeal was affirmed.

CORE TERMS: disability, duration, earn, installment, authorize, reopen, wage differential, modify, workers' compensation, earning capacity, final award, arbitrator, ended, injured worker, partial disability, modification, claimant's, earning, suspend, jurisdiction to modify, physical disability, clerical errors, plain language, incapacitated, authorization, meaningless, permanently, diminished, partially, customary

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

HN1 820 Ill. Comp. Stat. Ann. 305/8(d)(1) (2002) provides that an employee who is partially incapacitated from pursuing his usual and customary line of employment shall receive a portion of the difference between his former wages and the wages he earns or is able to earn in his new employment. An employee receiving an installment award under 820 Ill. Comp. Stat. Ann. 305/8(d)(1) (2002) is entitled to compensation for the duration of his disability. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN2 820 Ill. Comp. Stat. Ann. 305/**19(h)** (2002) requires requests for review based on a change in disability to be filed within 30 months of the date of an award. More Like This Headnote

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Coverage > General Overview

HN3 A matter of statutory construction presents a question of law that an appellate court reviews de novo. In interpreting a statute, the appellate court's primary goal is to ascertain and give effect to the intent of the legislature. The appellate court determines this intent by reading the statute as a whole and considering all the relevant parts. The appellate court must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void. The appellate court interprets the Illinois Workers' Compensation Act liberally to effectuate its main purpose: providing financial protection for injured workers. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

HN4 The Illinois Workers' Compensation Commission is an administrative agency, lacking general or common law powers. Because its powers are limited to those granted by the Illinois Legislature, any action taken by the Commission must be specifically authorized by statute. An act that is unauthorized is beyond the scope of the agency's jurisdiction. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

HN5 Section 18 of the Illinois Workers' Compensation Act authorizes the Illinois Workers' Compensation Commission to settle all questions arising under the Act, 820 Ill. Comp. Stat. 305/18 (2002), and § 19 of the Act establishes the procedure by which the Commission is authorized to do so. 820 Ill. Comp. Stat. 305/19 (2002). Section 19(f) of the Act provides that a decision of the Commission is conclusive unless a proceeding for review is commenced within 20 days of receipt of notice of the decision. 820 Ill. Comp. Stat. 305/19(f) (2002). Thus, the Commission may modify a conclusive decision only where the Act specifically authorizes it to do so. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN6 The Illinois Workers' Compensation Act specifies only two instances where the Illinois Workers' Compensation Commission may modify a final award. Section 19(f) of the Act gives the Illinois Workers' Compensation Commission limited authority to correct clerical errors. 820 Ill. Comp. Stat. 305/19(f) (2002). Section **19(h)** of the Act gives the Commission authority to review an installment award within 30 months of its entry when a party alleges that the employee's disability has recurred, increased, diminished, or ended. 820 Ill. Comp. Stat. 305/**19(h)** (2002). More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN7 See 820 Ill. Comp. Stat. 305/19(f) (2002).

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

HN8 See 820 Ill. Comp. Stat. 305/**19(h)** (2002).

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

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

HN9 See 820 Ill. Comp. Stat. 305/8(f) (2002).

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

HN10 See 820 Ill. Comp. Stat. 305/8(d)(1) (2002).

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

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

HN11 The language of 820 Ill. Comp. Stat. 305/8(d)(1) (2002) does not authorize either party to petition for review of an award, as 820 Ill. Comp. Stat. 305/**19(h)** (2002) does. It does not authorize the Illinois Workers' Compensation Commission to recall an award, as § 19(f) does. Nor does it authorize an employee to petition for

review, as 820 Ill. Comp. Stat. 305/8(f) (2002) does. It would be inappropriate for a court to read one of these procedures into § 8(d)(1) when the Illinois Legislature has included none of them in that section. Reading the Illinois Workers' Compensation Act as a whole, § 8(d)(1) does not specifically authorize the Commission to reopen final installment awards for partial disability. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN12 The Illinois Supreme Court rejects the assertion that the duration clause of 820 Ill. Comp. Stat. 305/8(d)(1) (2002) is meaningless if it does not grant jurisdiction to modify an award in perpetuity. Rather, the duration clause is meaningful to the Illinois Workers' Compensation Commission's initial determination of the proper award in any § 8(d)(1) case. By its plain language, it allows arbitrators and the Commission the option of determining that a claimant's disability is likely to end, abate, or increase after a certain duration, and awarding compensation accordingly. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

HN13 To receive an award under 820 Ill. Comp. Stat. 305/8(d)(1) (2002), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn. The second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay. Illinois courts have rejected the argument that a wage differential under § 8(d) should be measured solely by gross yearly income. Rather, courts look to factors such as wage increases, overtime, and increased hours of work. The conclusion that "the test is the capacity to earn, not necessarily the amount earned" remains apt. Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity. While this may result in an imperfect award, the legislature has not currently authorized infinite opportunities for correction. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN14 See Ill. Const. art. I, § 12.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN15 The Illinois Supreme Court has noted that Ill. Const. art. I. § 12 is merely an expression of a philosophy and not a mandate that a "certain remedy" be provided in any specific form. More Like This Headnote

COUNSEL: For **Cassens** Transport Company, APPELLANT: Paul A. Krauter, Roddy, Leahy, Guill & Zima Ltd., Chicago, IL.

For Edwin J. Ade, APPELLEE: Mr. Jon E. Rosenstengel, Bonifield & Rosenstengel, P.C., Belleville, IL, Mr. Edward J. Kionka, Attorney at Law, Carbondale, IL.

JUDGES: JUSTICE GARMAN delivered the judgment of the court, with opinion. Chief Justice Thomas and Justices Freeman, McMorrow, Fitzgerald, and Kilbride concurred in the judgment and opinion. Justice Karmeier took no part in the decision.

OPINION BY: GARMAN

OPINION

[*521] **[**417]** The Industrial Commission made an award to an injured worker, Edwin Ade, in 1993. The award required Ade's former employer, **Cassens** Transport Company, to pay Ade a weekly wage differential on a continuing basis. Ten years later, **Cassens** sought to terminate that award on the grounds that Ade's wage in the year 2002 matched the wage he had been earning at the time of his injury in 1988. The Commission denied this relief. The circuit court of Coles County confirmed the Commission. The appellate court vacated this decision, finding that the Commission lacked jurisdiction to review **[***2]** Ade's award. 354 Ill. App. 3d 807, 821 N.E.2d 1274, 290 Ill. Dec. 700. We granted **Cassens'** petition for leave to appeal. 177 Ill. 2d R. 315.

BACKGROUND

On August 24, 1988, employee Edwin Ade injured his left hand while working for employer **Cassens** Transport Company. As compensation for this injury, the Illinois Industrial Commission [1] awarded Ade wage differential benefits in the amount of $ 203.55 per week. Although **[*522]** evidence of the initial proceeding is absent from the record in this appeal, the parties' briefing indicates that the Commission made its award pursuant to HN1 section 8 (d)(1) of the Workers' Compensation Act (820 ILCS 305/8(d)(1) (West 2002)). This section provides that an employee who is partially incapacitated from pursuing his usual and customary line of employment shall receive a portion of the difference between his former wages and the wages he earns or is able to earn in his new employment. 820 ILCS 305/8(d)(1) (West 2002). An employee receiving an installment award under section 8(d)(1) is entitled to compensation "for the duration of his disability." 820 ILCS 305/8(d)(1) (West 2002).

FOOTNOTES

1 The Industrial Commission is now known as the Illinois Workers' Compensation Commission. 820 ILCS 305/13 (West 2004).

[*3]** A decade after Ade's injury, **Cassens** renewed its interest in Ade's case. In the years 1999 and 2000, **Cassens** requested Ade's income tax returns. Ade declined to disclose this information. **Cassens** then filed a motion with the Commission, requesting that it suspend Ade's benefits based on his refusal to provide current wage information. The Commission denied this motion. While **Cassens'** appeal to the circuit court was pending, the company served a subpoena on Ade's current employer and obtained 11 years of information about Ade's wages. The wage information revealed that in the year 2002, **[**418]** 14 years after he was injured as a **Cassens** employee, Ade began to earn a wage that exceeded the wage **Cassens** paid him at the time of his injury.

Cassens terminated the appeal of its original motion to suspend Ade's benefits. It filed a new motion to suspend benefits, arguing that the wage discrepancy which gave rise to Ade's award under section 8(d)(1) no longer existed. The Commission again denied **Cassens'** motion. The Commission relied on an appellate court case, **[*523]** *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165, 513 N.E.2d 104, 111 Ill. Dec. 858 (1987), to determine that the section 8(d)(1) phrase **[***4]** "for the duration of his disability" refers to the duration of the employee's physical or mental disability, not the duration of an economic loss. Thus, the alleged change in

Ade's earnings was irrelevant.

The circuit court of Coles County denied **Cassens'** motion to overturn the decision of the Commission, echoing the Commission's rationale. On appeal, the appellate court vacated the decision of the Commission and dismissed **Cassens'** motion to suspend benefits, finding that the Act did not give the Commission or the court jurisdiction to entertain the motion. 354 Ill. App. 3d at 811. The appellate court relied on HN2 section **19(h)** of the Act, which requires requests for review based on a change in disability to be filed within 30 months of the date of an award. 354 Ill. App. 3d at 810, citing 820 ILCS 305/**19(h)** (West 2002). The court determined that the "duration" language in section 8(d)(1) of the Act did not give the Commission jurisdiction to reopen or modify an award after the 30-month period of section **19(h)**. 354 Ill. App. 3d at 811.

However, before dismissing the appeal, the court addressed **Cassens'** argument that **[***5]** the definition of "disability" in section 8(d)(1) includes economic loss. The court noted that while *Petrie* addressed the definition of "disability" in section **19(h)** of the Act (820 ILCS 305/**19(h)** (West 2002)), it did so by examining the use of language throughout the Act. 354 Ill. App. 3d at 809. The *Petrie* court determined that "disability" means "physical disability" because the Act consistently uses other terms when referring to economic status. 354 Ill. App. 3d at 809, citing *Petrie*, 160 Ill. App. 3d at 171-72. Thus, the section 8(d)(1) language addressing the duration of a disability refers to the duration of a physical disability. 354 Ill. App. 3d at 809. In a special concurrence, one justice noted that this discussion of the merits **[*524]** was *dictum*. 354 Ill. App. 3d at 811 (Holdridge, J., specially concurring). The special concurrence also noted that the court's holding on jurisdiction did not prevent an employer from unilaterally terminating benefits based on a belief that the duration of a claimant's disability had ended. 354 Ill. App. 3d at 811 (Holdridge, **[***6]** J., specially concurring).

The appellate court denied **Cassens'** petition for rehearing, but filed a statement that the case involves a substantial question warranting consideration by this court. We granted **Cassens'** petition for leave to appeal. 177 Ill. 2d R. 315.

ANALYSIS

This case requires us to interpret section 8(d)(1) of the Workers' Compensation Act (820 ILCS 305/8(d)(1) (West 2000)). HN3 This is a matter of statutory construction, presenting a question of law that we review *de novo*. *R.D. Masonry, Inc. v.* **[**419]** *Industrial Comm'n*, 215 Ill. 2d 397, 402, 830 N.E.2d 584, 294 Ill. Dec. 172 (2005). In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232, 756 N.E.2d 822, 258 Ill. Dec. 548 (2001). We determine this intent by reading the statute as a whole and considering all the relevant parts. *Sylvester*, 197 Ill. 2d at 232; *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 555, 813 N.E.2d 119, 286 Ill. Dec. 62 (2004) (declining to read section 8(d)(1) in isolation). We must construe the statute so that each word, clause, and sentence is given **[***7]** a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void. *Sylvester*, 197 Ill. 2d at 232. We interpret the Act liberally to effectuate its main purpose: providing financial protection for injured workers. *Flynn*, 211 Ill. 2d at 556.

This appeal presents the threshold question of whether the Workers' Compensation Commission has jurisdiction to reopen or modify a 10-year-old wage differential **[*525]** award. **Cassens** argues that section 8(d)(1) grants extended jurisdiction by allowing an employee to receive compensation "for the duration of his disability." 820 ILCS 305/8(d)(1) (West 2002). **Cassens** argues that the use of this phrase suggests that the Commission may modify an award whenever a disability no longer exists.

In determining whether section 8(d)(1) of the Act allows limitless modifications to an installment award for partial disability, we are mindful that HN4 the Workers' Compensation

Commission is an administrative agency, lacking general or common law powers. *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 553, 837 N.E.2d 909, 297 Ill. Dec. 458 (2005), **[***8]** citing *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108, 113, 357 N.E.2d 1154, 2 Ill. Dec. 711 (1976). Because its powers are limited to those granted by the legislature, any action taken by the Commission must be specifically authorized by statute. *Alvarado*, 216 Ill. 2d at 553, citing *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243, 555 N.E.2d 693, 144 Ill. Dec. 334 (1989). An act that is unauthorized is beyond the scope of the agency's jurisdiction. *Alvarado*, 216 Ill. 2d at 553-54, citing *Business & Professional People*, 136 Ill. 2d at 243.

HN5Section 18 of the Act authorizes the Commission to settle all questions arising under the Act (820 ILCS 305/18 (West 2002)), and section 19 establishes the procedure by which the Commission is authorized to do so (820 ILCS 305/19 (West 2002)). Section 19(f) of the Act provides that a decision of the Commission is conclusive unless a proceeding for review is commenced within 20 days of receipt of notice of the decision. 820 ILCS 305/19(f) **[***9]** (West 2002). Thus, the Commission may modify a conclusive decision only where the Act specifically authorizes it to do so.

This court recently noted that ***HN6***the Act specifies only two instances where the Commission may modify a final award. *Alvarado*, 216 Ill. 2d at 555. Section 19(f) gives **[*526]** the Commission limited authority to correct clerical errors. 820 ILCS 305/19(f) (West 2002); *Alvarado*, 216 Ill. 2d at 555. Section **19(h)** gives the Commission authority to review an installment award within 30 months of its entry when a party alleges that the employee's disability has recurred, **[**420]** increased, diminished, or ended. 820 ILCS 305/**19(h)** (West 2002); *Alvarado*, 216 Ill. 2d at 555. **Cassens** argues that section 8(f) of the Act provides a third route to modification of a final award, one which **Cassens** analogizes to extended jurisdiction under section 8(d)(1).

We note first that the plain language of section 8(d)(1), which authorizes compensation to an injured worker "for the duration of his disability," does not mention modification of a final award. In accordance with our responsibility **[***10]** to read the Act as a whole (*Sylvester*, 197 Ill. 2d at 232; *Flynn*, 211 Ill. 2d at 555), we examine each provision which does specifically authorize the Commission to reopen a final award.

Section 19(f) allows modifications to correct clerical errors:

> ***HN7***"(f) *** The Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision." 820 ILCS 305/19(f) (West 2002).

Section **19(h)** allows the Commission to reopen any installment award for a limited time:

> "(h) ***
>
> *** ***HN8***As to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months after such agreement or award be reviewed by the Commission at the **[***11]** request of either the employer or the employee on the ground that **[*527]** the disability of the employee has subsequently recurred, increased, diminished, or ended." 820 ILCS 305/**19(h)** (West 2002).

Section 8(f) authorizes the reassessment of any award for total and permanent disability:

> HN9"(f) In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of total and permanent disability as provided in subparagraph 18 of paragraph (e) of this Section, compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life.
>
> ***
>
> If any employee who receives an award under this paragraph afterwards returns to work or is able to do so, and earns or is able to earn as much as before the accident, payments under such award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, such employees have the right **[***12]** at any time within 30 months after the date of such termination or reduction to file petition with the Commission for the purpose of determining whether any disability exists as a result of the original accidental injury and the extent thereof." 820 ILCS 305/8(f) (West 2002).

Each of these provisions includes language that is tailored to authorize a review proceeding. Section 19(f) specifically **[**421]** gives the arbitrator and Commission the power to recall an award. Section **19(h)** allows either party to petition for review of an installment award within 30 months of its issuance. Section 8(f) indicates that employers may cease payments when a totally and permanently disabled employee returns to the workforce, giving the employee authorization to petition the Commission for a review of the award. The plain language of each section alerts employers and employees to when review may be had and how to obtain it. In contrast, section 8(d)(1) **[*528]** contains no language about review proceedings:

> HN10"(d) 1. If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, **[***13]** he shall *** receive compensation for the duration of his disability *** equal to 66-_% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2002).

HN11The language of section 8(d)(1) does not authorize either party to petition for review of an award, as section **19(h)** does. It does not authorize the Commission to recall an award, as section 19(f) does. Nor does it authorize an employee to petition for review, as section 8(f) does. It would be inappropriate for us to read one of these procedures into section 8(d)(1) when the legislature has included none of them in that section. Reading the Act as a whole, we hold that section 8(d)(1) does not specifically authorize the Commission to reopen final installment awards for partial disability. Thus, the Commission does not have jurisdiction under section 8(d)(1) to reopen Ade's final award. Our holding is based on the statutory interpretation **[***14]** of section 8(d)(1) and does not affect the operation of other sections of the Act.

Cassens has asked the Commission to reopen an installment award based on the allegation that Ade's disability has diminished or ended. Section **19(h)** authorizes the Commission's jurisdiction for this purpose, but only for 30 months following the award's issuance, a time limit that **Cassens** has exceeded. 820 ILCS 305/**19(h)** (West 2002); see also *Cuneo Press, Inc. v. Industrial Comm'n*, 51 Ill. 2d 548, 549-50, 283 N.E.2d 880 (1972) (declining to rely on public policy to enlarge section **19(h)** review period). **Cassens** also argues that section 8(f), which allows totally **[*529]** and permanently disabled employees to petition for review, implies that a review proceeding would also be appropriate for partial disability under section 8(d)(1). However, the presence of section 8(f)'s specific authorization actually defeats this argument. The language of section 8(f), which gives the Commission jurisdiction to determine whether a total and permanent disability continues to exist, shows that the legislature could have similarly authorized ongoing review of permanent partial disability if it had **[***15]** intended to do so.

Cassens argues that if the Commission does not have the ability to modify an award under section 8(d)(1), then the section 8(d)(1) statutory language authorizing an employee's wage differential "for the duration of his disability" is meaningless. Ade, in his brief, argues that by making the award, the Commission determines that the duration of the disability is permanent. Alternatively, he argues that the duration clause gives an employer the option of terminating an award once it unilaterally determines that the disability no **[**422]** longer exists. At oral argument, counsel for Ade offered a third possible interpretation of the duration clause, arguing that it gives the Commission jurisdiction to modify an award upon an allegation that a physical disability has ended, but not upon an allegation that the recipient's economic circumstances have changed.

HN12We reject the assertion that the duration clause of section 8(d)(1) is meaningless if it does not grant jurisdiction to modify an award in perpetuity. Rather, the duration clause is meaningful to the Commission's initial determination of the proper award in any section 8(d)(1) case. By its plain language, it allows arbitrators **[***16]** and the Commission the option of determining that a claimant's disability is likely to end, abate, or increase after a certain duration, and awarding compensation accordingly. See, *e.g.*, *Phillips v. Consolidated Personnel Corp.*, **[*530]** Ill. Workers' Compensation Comm'n, No. 01WC 59242 (May 25, 2005) (awarding worker three separate section 8(d)(1) wage differential awards for three separate durations).

In the same way that trial judges and juries have one opportunity to set an appropriate tort award for lost wages, arbitrators and the Commission must determine an appropriate wage differential in the original workers' compensation proceeding, without authorization to reexamine an award in perpetuity. As we have noted, permitting employers to litigate *ad infinitum* does not comport with the Act's overriding purpose of early and thorough compensation for income lost due to job-related injuries. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 14, 442 N.E.2d 861, 66 Ill. Dec. 300 (1982). Although **Cassens** argues that this lack of jurisdiction is purely to the advantage of the employee, we note that the Act similarly gives the Commission no jurisdiction **[***17]** to reopen an installment award if an employee's wages should fall below the level contemplated in the initial award. See *Forest City Erectors v. Industrial Comm'n*, 264 Ill. App. 3d 436, 441, 636 N.E.2d 969, 201 Ill. Dec. 537 (1994). Instead, the Act establishes that employees and employers alike must use the opportunity of their initial hearing to present evidence showing the likely duration of an injury and its effect on the claimant's earning capacity. See 820 ILCS 305/19 (West 2002) (establishing procedure for resolving disputed questions of law and fact).

Cassens stated at oral argument that jurisdiction to reopen an installment award

under section 8(d)(1) would not be problematic because the appropriateness of an installment award can be continuously redetermined by a simple examination of the claimant's annual income tax return. However, this reflects an overly limited view of the Commission's role when making an initial award. HN13 To receive an award under section 8(d)(1), an injured **[*531]** worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an **[***18]** impairment in the wages he or she earns or is able to earn. 820 ILCS 305/8(d)(1) (West 2002). This court has held that the second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay. *Sroka v. Industrial Comm'n*, 412 Ill. 126, 128, 105 N.E.2d 716 (1952). In *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 76 N.E.2d 457 (1947), the court rejected the employer's argument that a wage differential under section 8(d) should be measured solely by gross yearly income. *Franklin*, 398 Ill. at 532. Rather, the court looked to factors such as wage increases, **[**423]** overtime, and increased hours of work. Although *Franklin* and *Sroka* interpreted an earlier version of section 8(d), the language "is earning or is able to earn" remains the same. Thus, the court's conclusion that "the test is the capacity to earn, not necessarily the amount earned" remains apt. *Franklin*, 398 Ill. at 533. Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity **[***19]** to present evidence beyond wages to establish long-term earning capacity. While this may result in an imperfect award, the legislature has not currently authorized infinite opportunities for correction.

This opportunity to prove earning capacity defeats **Cassens'** arguments as to due process and the "right to a remedy" provision of the Illinois Constitution. **Cassens** first argues that if section 8(d)(1) does not confer jurisdiction for the Commission to modify an award, it deprives the employer of its constitutional right to a remedy under article I, section 12, of the Illinois Constitution (Ill. Const. 1970, art. I, § 12). Article I, section 12, states:

HN14 "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, **[*532]** privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Ill. Const. 1970, art. I, § 12.

HN15 This court has noted that this provision is "merely '"an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form."'" *Segers v. Industrial Comm'n*, 191 Ill. 2d 421, 435, 732 N.E.2d 488, 247 Ill. Dec. 433 (2000), quoting *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 72, 588 N.E.2d 1139, 167 Ill. Dec. 1009 (1992), **[***20]** quoting *Sullivan v. Midlothian Park District*, 51 Ill. 2d 274, 277, 281 N.E.2d 659 (1972). In this case, it is unclear what injury or wrong **Cassens** has suffered. **Cassens'** continuing responsibility to pay Ade's wage differential is the remedy that Ade received as part of the statutorily prescribed workers' compensation process; this responsibility is not an injury suffered by **Cassens.** Even if **Cassens** has suffered some sort of injury, the legislature has determined that **Cassens** must seek any relief in the initial proceeding before the Commission or within 30 months thereafter. 820 ILCS 305/8(d)(1), **19(h)** (West 2002). Article 1, section 12, does not create a right to the specific review action that **Cassens** desires. See *Segers*, 191 Ill. 2d at 435.

Cassens also argues, briefly, that without continuing jurisdiction to reopen an award, section 8 (d)(1) violates **Cassens'** right to due process. In support of this argument, **Cassens'** brief states, "The Appellant must *** be afforded the right to a hearing to determine whether the disability exists. Otherwise, if there is no right for a hearing, section 8(d)(1) should be **[***21]** found unconstitutional for granting a limitation on the award, with no process to

enforce it." As explained above, the Commission may enforce the limitation found in the duration clause when it makes its initial award. **Cassens** received a hearing before Ade received an award of any kind. **Cassens'** right to due process is not violated by the Commission's absence of jurisdiction for perpetual rehearings.

[*533] CONCLUSION

For the reasons stated above, we hold that the Commission has no jurisdiction to modify Ade's award. This holding makes it unnecessary to address **Cassens'** arguments as to the definition of "disability" in section 8(d)(1) and, accordingly, the appellate court's discussion of that issue was **[**424]** improper. Nevertheless, we affirm the appellate court's dismissal of this appeal.

Affirmed.

JUSTICE KARMEIER took no part in the consideration or decision of this case.

*189 Ill. 2d 167, *; 724 N.E.2d 896, **;*
*2000 Ill. LEXIS 8, ***; 244 Ill. Dec. 8*

JOE W. KING, Appellant, v. THE INDUSTRIAL **COMMISSION** et al. (R.R. Donnelly, Appellee).

Docket No. 87099

SUPREME COURT OF ILLINOIS

189 Ill. 2d 167; 724 N.E.2d 896; 2000 Ill. LEXIS 8; 244 Ill. Dec. 8

January 21, 2000, Opinion Filed

PRIOR HISTORY: **[***1]** Appeal, Appellate Court, First District. Cook County. TRIAL JUDGE: Hon. Lester A. Bonaguro. CASE NUMBERS: AC1-97-2625WC, TR97L50024.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant challenged the decision of the appellate court (Illinois), which required appellant to submit to a medical exam in order to continue receiving **worker's** compensation benefits.

OVERVIEW: Appellant was injured during an on the job accident, and he was awarded permanent total disability. Several years later appellee employer filed a petition to suspend appellant's compensation under the **Worker's** Compensation Act, 820 Ill. Comp. Stat.305/12 (1996). Appellee argued that appellant's compensation should be suspended because he refused to comply with its § 12 request for a medical examination. The court determined that a medical exam was proper. A medical exam will often be the best method of ascertaining whether appellant was able to work and able to earn. Appellant's fear that employers will improperly utilize § 12 in an attempt to cut off liability failed to acknowledge the manner in which § 12 operated. The section cannot be utilized to suspend a claimant's compensation unless claimant refuses to comply with a proper request for a medical exam. Appellant could have avoided a suspension of compensation under § 12 through compliance.

OUTCOME: Judgment affirmed; medical exam was proper; statutory requirement for medical exam cannot be utilized to suspend a claimant's compensation unless claimant refuses to comply with a proper request for a medical exam.

CORE TERMS: claimant, exam, total disability, earn, order requiring, modification, disability, returns to work, medical examination, purpose of ascertaining, authorize, modified, suspend, time to time, amount of compensation, earning, modify, disability payments, required to submit, entitled to receive, suspension, suspended, compensation owed, physical disability, refused to comply, plain language, ordinary meaning, returned to work, ability to earn, termination

LEXISNEXIS® HEADNOTES **Hide**

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN1 Statutory interpretation is a question of law, which this court reviews de novo. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. Moreover, courts afford considerable deference to the interpretation placed on a statute by the agency charged with its administration. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

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

HN2 In case of complete disability, which renders the employee wholly and permanently incapable of work compensation shall be payable. 820 Ill. Comp. Stat. 305/**8(f)** (1996). If any employee who receives an award under this paragraph afterwards returns to work or is able to do so, and earns or is able to earn as much as before the accident, payments under such award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, such employees have the right at any time within 30 months after the date of such termination or reduction to file petition with the **Commission** for the purpose of determining whether any disability exists as a result of the original accidental injury and the extent thereof. 820 Ill. Comp. Stat. 305/9(f)(1996). More Like This Headnote

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

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

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

HN3 820 Ill. Comp. Stat. 305/**8(f)** sets forth a procedure for modifying a § **8(f)** award for permanent total disability. § **8(f)** provides for the termination of such an award where the employee thereafter returns to work or is able to do so and earns or is able to earn as much as before the accident. § **8(f)** also provides for the reduction of such an award where the employee thereafter returns to work or is able to do so and earns or is able to earn part, but not as much, as before the accident. Accordingly, a § **8(f)** petition for modification looks to whether the employee has returned to work or is able to do so and to the employee's earnings or ability to earn. The burden of proof is on the employer to show that the claimant's award should be modified pursuant to § **8(f)**'s provisions. More Like This Headnote |

Shepardize: Restrict By Headnote

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

HN4 In contrast to 820 Ill. Comp. Stat. 305/**8(f)**, 820 Ill. Comp. Stat. 30519(h) grants employers the right to have certain compensation awards reviewed, but only within 30 months. The remedy provided in § **8(f)** is separate from the remedy contained in § **19(h)**. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Benefit Entitlements

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > Employee Rights

HN5 820 Ill. Comp. Stat. 305/12 of **worker's** compensation act governs medical examinations. It provides, in pertinent part: an employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of the act. If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this act for such period. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Benefit Entitlements

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > Employee Rights

HN6 820 Ill. Comp. Stat. 305/12 requires employees entitled to receive disability payments to submit to medical exams at the employer's request for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of the **worker's** compensation act. According to 820 Ill. Comp. Stat. 305/**8(f)**, a final § **8(f)** award for permanent total disability is modifiable under certain circumstances. Thus, the language from § 12 allows for a medical exam so that an employer can ascertain whether the amount of compensation owed a claimant possibly may be modified pursuant to § **8(f)**'s provisions. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

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

HN7 820 Ill. Comp. Stat. 305/**8(f)** allows for the modification of a § **8(f)** award for permanent total disability where the claimant returns to work, or is able to do so, and earns or is able to earn. A § **8(f)** modification, therefore, is not limited to situations where the claimant has actual earnings. Rather, a § **8(f)** modification is obtainable where the employer proves that the claimant is able to return to work and able to earn. A change to a claimant's physical disability is relevant to these

determinations. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN8 A medical exam may be required for an employer to determine whether grounds exist for filing a petition to modify a claimant's benefits pursuant to the terms of 820 Ill. Comp. Stat. 305/**8(f)**. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN9 820 Ill. Comp. Stat. 305/12 authorizes medical exams without requiring a pending petition for modification, and 820 Ill. Comp. Stat. 305/**8(f)** allows for the modification of a § **8(f)** award for permanent total disability where the claimant has returned to work or is able to do so and is earning money or has the ability to earn. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Joe W. King, APPELLANT: Mr. George L. Gaines, Gaines & Gaines, Chicago, IL.

For R.R. Donnelly, APPELLEE: Mr. Mark A. Braun, Braun, Lynch, Smith & Strobel, Ltd., Chicago, IL.

For Illinois Self-Insurers Association, AMICUS CURIAE: Mr. Harry E. Kinzie, III, Nyhan, Pfister, Bambrick & Kinzie, P.C., Chicago, IL.

JUDGES: JUSTICE BILANDIC delivered the opinion of the court.

OPINION BY: BILANDIC

OPINION

[*168] **[**897]** JUSTICE BILANDIC delivered the opinion of the court:

This appeal involves the **Workers'** Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 1996)). The narrow question presented is whether a claimant who has been awarded permanent total disability under section **8(f)** of the Act (820 ILCS 305/**8(f)** (West 1996)) may later be required to submit to an employer-requested medical examination under section 12 of the Act (820 ILCS 305/12 (West 1996)), even where the employer has not filed a petition seeking to modify the claimant's benefits pursuant **[*169]** to section **8(f)** or **19(h)** of the Act (820 ILCS 305/**19(h)** (West 1996)). We answer in the affirmative.

BACKGROUND

Claimant, Joe W. King, sought an adjustment of claim for a shoulder injury that he sustained in 1986 while employed by respondent, R.R. Donnelly (employer). The arbitrator awarded claimant temporary total disability for 154 2/7 weeks and **[***2]** permanent total disability for life (Ill. Rev. Stat. 1991, ch. 48, pars. 138.8(b), (f)). The Industrial **Commission (Commission)** affirmed and adopted the decision of the arbitrator in 1991. The **Commission** held that claimant established his permanent total disability under section **8(f)** of the Act. The **Commission** determined that claimant fell within the "odd-lot" category because, although claimant was not altogether incapacitated for work, his condition was such that he will not be employed regularly in any well-known branch of the labor market. In making this determination, the **Commission** considered the claimant's physical impairment along with the following factors: that claimant was 59 years of age (in 1991); that claimant had completed the

third grade and was functionally illiterate; and that claimant had worked as an unskilled laborer for employer for 17 years. The record also disclosed that claimant had made a diligent but unsuccessful job search and that his attempt at vocational rehabilitation had failed. Neither party appealed.

Years later, on April 17, 1996, employer filed with the **Commission** a motion to suspend claimant's compensation under section 12 of the Act (820 ILCS 305/12 **[***3]** (West 1996)). Employer argued that claimant's compensation should be suspended because claimant refused to comply with its section 12 request for a medical examination. The **Commission** held a hearing on the motion. Correspondence between the parties showed that claimant had refused to comply with employer's request on the advice of counsel.

[*170] Following the hearing, the **Commission** denied employer's motion to suspend claimant's compensation for his refusal to submit to a medical exam. The **Commission** ruled that a suspension of compensation was not warranted under the facts of this case. The **Commission** explained that, because claimant had qualified for permanent total disability under the odd-lot doctrine, claimant's physical condition was not the only factor contributing to his award. Other factors were claimant's age and his limited education, training and work experience. According to the **Commission,** employer thus failed to prove sufficient grounds on which to suspend compensation. The **Commission,** however, interpreted section 12 as granting employer the right to a medical exam. It therefore held that section 12 required claimant to submit to a medical exam and ordered him to do so.

[*4]** **[**898]** The circuit court confirmed the decision of the **Commission.** Claimant then appealed, challenging only that portion of the **Commission's** order requiring him to submit to a medical exam.

The Industrial **Commission** division of the appellate court initially issued a unanimous opinion reversing that portion of the **Commission's** order requiring claimant to submit to a medical exam. On rehearing, however, the appellate court withdrew that opinion and issued a new opinion affirming that portion of the order requiring claimant to submit to a medical exam. *King v. Illinois Industrial **Commission,*** 301 Ill. App. 3d 958, 235 Ill. Dec. 142, 704 N.E.2d 715. Two of the five justices dissented. Subsequently, three justices of the appellate court filed a statement that this case involves a substantial question warranting the consideration of this court. 177 Ill. 2d R. 315(a). We allowed claimant's petition for leave to appeal. 177 Ill. 2d R. 315(a). We now affirm the judgment of the appellate court, for the reasons explained below.

ANALYSIS

There is no dispute in this appeal regarding whether **[*171]** claimant's compensation should have been suspended under section 12 for his failure to submit to a medical exam. The **Commission** held that a suspension was not warranted. Employer **[***5]** waived its right to challenge this holding before the appellate court and likewise does so here.

This appeal concerns only the propriety of the order requiring claimant to submit to a medical exam. To be precise, the issue is whether claimant, who received an award of permanent total disability under section **8(f)**, may now be required to submit to employer's request for a medical examination under section 12, even though employer has not filed a petition to modify claimant's benefits pursuant to section **8(f)** or section **19(h)**.

HN1Statutory interpretation is a question of law, which this court reviews *de novo*. *Sun Choi v. Industrial Comm'n*, 182 Ill. 2d 387, 392, 231 Ill. Dec. 89, 695 N.E.2d 862 (1998). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189, 149 Ill. Dec. 286, 561 N.E.2d 656 (1990). The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479, 203 Ill. Dec. 463, 639 N.E.2d 1282 (1994); *Kraft, Inc.*, 138 Ill. 2d at 189. **[***6]** Moreover, courts afford considerable

deference to the interpretation placed on a statute by the agency charged with its administration. *Denton v. Civil Service Comm'n*, 176 Ill. 2d 144, 148, 223 Ill. Dec. 461, 679 N.E.2d 1234 (1997); *City of Decatur v. American Federation of State, County, & Municipal Employees, Local 268*, 122 Ill. 2d 353, 361, 119 Ill. Dec. 360, 522 N.E.2d 1219 (1988). In light of these principles, we turn to the statutory provisions at issue.

HN2 Section **8(f)** provides, in relevant part:

"In case of complete disability, which renders the employee wholly and permanently incapable of work *** compensation shall be payable *** .

***

If any employee who receives an award under this paragraph afterwards returns to work or is able to do so, **[*172]** and earns or is able to earn as much as before the accident, payments under such award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, **[***7]** such employees have the right at any time within 30 months after the date of such termination or reduction to file petition with the **Commission** for the purpose of determining whether any disability exists as a result of the **[**899]** original accidental injury and the extent thereof." 820 ILCS 305/**8(f)** (West 1996).

As the plain language indicates, HN3 section **8(f)** sets forth a procedure for modifying a section **8(f)** award for permanent total disability. *Superior Coal Co. v. Industrial Comm'n*, 321 Ill. 240, 242-44, 151 N.E. 890 (1926). Section **8(f)** provides for the termination of such an award where the employee thereafter returns to work or is able to do so and earns or is able to earn as much as before the accident. Section **8(f)** also provides for the reduction of such an award where the employee thereafter returns to work or is able to do so and earns or is able to earn part, but not as much, as before the accident. Accordingly, a section **8(f)** petition for modification looks to whether the employee has returned to work or is able to do so and to the employee's earnings or ability to earn. See *Keystone Steel & Wire Co. v. Industrial Comm'n*, 85 Ill. 2d 178, 52 Ill. Dec. 55, 421 N.E.2d 918 (1981); **[***8]** *Perry Coal Co. v. Industrial Comm'n*, 343 Ill. 525, 175 N.E. 801 (1931); *Superior Coal Co.*, 321 Ill. at 246. The burden of proof is on the employer to show that the claimant's award should be modified pursuant to section **8(f)**'s provisions. See *Keystone Steel & Wire Co.*, 85 Ill. 2d at 184; *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 363, 17 Ill. Dec. 207, 376 N.E.2d 206 (1978).

HN4 In contrast to section **8(f)**, section **19(h)** grants employers the right to have certain compensation awards reviewed, but only within 30 months. 820 ILCS 305/**19(h)** **[*173]** (West 1996). The remedy provided in section **8(f)** is separate from the remedy contained in section **19(h)**. *Superior Coal Co.*, 321 Ill. at 244.

In the present case, employer has never filed either a section **8(f)** or section **19(h)** petition. Rather, as discussed above, employer initiated this proceeding by filing a motion to suspend claimant's compensation under section 12 because claimant refused to submit to a medical exam. Employer asserts that it is entitled to a current medical exam of claimant to determine whether grounds exist **[***9]** for a section **8(f)** modification of claimant's award.

HN5 Section 12 of the Act governs medical examinations. It provides, in pertinent part:

"An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the

purpose of determining the nature, extent and probable duration of the injury received by the employee, *and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act.* ***

* * *

If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period." (Emphasis added.) 820 ILCS 305/12 (West 1996).

Claimant contends that section 12 does not authorize **[***10]** the order requiring him to submit to a medical examination. We disagree. Given its plain and ordinary meaning, the language of section 12 authorizes the medical exam here at issue. Claimant is "an employee entitled to receive disability payments" (820 ILCS 305/12 (West **[*174]** 1996)), having been awarded permanent total disability for life pursuant to section **8(f)**. Claimant concedes that employer requested a section 12 medical exam of claimant at employer's expense and at claimant's convenience. Accordingly, pursuant **[**900]** to section 12, claimant "shall be required *** to submit himself *** for examination *** for the purpose of ascertaining the amount of compensation which may be due [claimant] from time to time for disability according to the provisions of this Act" (820 ILCS 305/12 (West 1996)). Employer requested the medical exam of claimant for the purpose of ascertaining whether the amount of compensation owed claimant possibly may be modified pursuant to section **8(f)** of the Act. Therefore, section 12 authorizes the order requiring claimant to submit to a medical exam.

Claimant, however, argues that section 12 does not authorize **[***11]** the order requiring him to submit to a medical exam because his permanent total disability award under section **8(f)** is final. According to claimant, when section 12 refers to the medical exam being "for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act" (820 ILCS 305/12 (West 1996)), it is referring only to awards that are not final, such as temporary disability awards. We disagree with claimant that section 12's language is limited to only nonfinal awards. *HN6*Section 12 requires employees entitled to receive disability payments to submit to medical exams at the employer's request "for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act" (820 ILCS 305/12 (West 1996)). According to section **8(f)** of the Act, a final section **8(f)** award for permanent total disability is modifiable under certain circumstances. Thus, this quoted language from section 12 allows for a medical exam so **[*175]** that an employer can ascertain whether the **[***12]** amount of compensation owed a claimant possibly may be modified pursuant to section **8(f)**'s provisions.

Claimant also submits that actual earnings are required before a section **8(f)** award for permanent total disability may be modified pursuant to section **8(f)**. Consequently, claimant argues, a change to one's physical disability is not relevant to the question of whether such an award is modifiable under section **8(f)**. *HN7*The plain language of section **8(f)** belies claimant's position. Section **8(f)** allows for the modification of a section **8(f)** award for permanent total disability where the claimant "returns to work, *or is able to do so*, and earns *or is able to earn*." (Emphasis added.) 820 ILCS 305/**8(f)** (West 1996). A section **8(f)** modification, therefore, is not limited to situations where the claimant has actual earnings. Rather, a section **8(f)** modification is obtainable where the employer proves that the claimant is able to return to work and able to earn. A change to a claimant's physical disability is relevant to these determinations.

Claimant argues in the alternative that employer is not entitled to a section 12 medical exam unless employer first **[***13]** files a section **8(f)** petition to modify claimant's compensation. We reject this argument. Section 12 does not contain any language restricting an employer's right to a medical exam in this manner. We will not engraft such a restriction onto section 12.

See *Jackson Coal Co. v. Industrial Comm'n*, 295 Ill. 18, 20-21, 128 N.E. 813 (1920) (declining to read a restriction into section 12). We also reject claimant's assertion that requiring him to submit to a medical exam when no other proceeding is pending before the **Commission** serves no meaningful purpose. HN8 A medical exam may be required for an employer to determine whether grounds exist for filing a petition to modify a claimant's benefits pursuant to the terms of section **8(f)**.

As a final matter, claimant contends that requiring **[*176]** claimants to submit to medical exams when no other proceeding is pending would open the door to the harassment of claimants by employers who demand exams after awards have been made. Claimant fears that employers may improperly **[**901]** utilize section 12 in an attempt to cut off liability.

Of course section 12 should not be used for the improper purpose of harassing claimants or in a wrongful attempt **[***14]** to cut off a claimant's compensation. These mere possibilities, though, do not persuade us to disregard the plain meaning of the language in sections 12 and **8(f)** of the Act. HN9 Section 12 authorizes medical exams without requiring a pending petition for modification, and section **8(f)** allows for the modification of a section **8(f)** award for permanent total disability where the claimant has returned to work or is able to do so and is earning money or has the ability to earn. A medical exam will often be the best method of ascertaining whether the claimant currently is able to work and able to earn within the meaning of section **8(f)**. We note, moreover, that claimant's fear that employers will improperly utilize section 12 in an attempt to cut off liability fails to acknowledge the manner in which section 12 operates. Section 12 cannot be utilized to suspend a claimant's compensation unless the claimant refuses to comply with a proper request for a medical exam. 820 ILCS 305/12 (West 1996). A claimant, therefore, can avoid a suspension of compensation under section 12 through compliance.

CONCLUSION

For the reasons stated, the **Commission's** order requiring **[***15]** claimant to submit to a medical exam was proper. Accordingly, the appellate court's judgment, affirming the judgment of the circuit court and the decision of the **Commission,** is affirmed.

Affirmed.

*321 Ill. 240, *; 151 N.E. 890, **;*
*1926 Ill. LEXIS 899, ****

THE SUPERIOR COAL COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (WARREN DINKENS, Defendant in Error.)

No. 16431.

Supreme Court of Illinois

321 Ill. 240; 151 N.E. 890; 1926 Ill. LEXIS 899

April 23, 1926

SUBSEQUENT HISTORY: [*1]** Rehearing denied June 2, 1926.

PRIOR HISTORY: WRIT OF ERROR to the Circuit Court of Macoupin county; the Hon. FRANK W. BURTON, Judge, presiding.

DISPOSITION: *Reversed and remanded, with directions.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer appealed from a judgment of the Circuit Court of Macoupin County (Illinois), which confirmed a decision of the Industrial Commission (Illinois) and denied the prayer of the petition. The employer sought to have an award of permanent total disability benefits in favor of defendant in error employee terminated.

OVERVIEW: The employer contended that because the employee had returned to work for a different employer since the award was made, the employer should have been relieved from further payments under the previous award. The Commission determined that the employee's disability had not decreased and dismissed the petition, and the circuit court confirmed the decision. On appeal, the court reversed and remanded, finding that the Commission should have reviewed the award under § 8, para. f of the Workmen's Compensation Act (Illinois), as it was amended in 1921. The court concluded that § 19, para. h of the Act did not apply because the petition for review was made more than 18 months after the award was entered. However, under the amended provision of § 8, para. f of the Act, the employer was entitled to have the award reviewed because the employee testified that he had returned to work and that he was not earning as much as he earned prior to the injury. The court noted that the new provisos added new remedies, which had retrospective operation in the absence of a savings clause.

OUTCOME: The court reversed the circuit court's judgment and remanded the matter with

direction to the Commission to review the award under a certain statutory provision.

CORE TERMS: proviso, per week, disability, arbitrator, modified, earn, complete disability, soft drinks, pension, decreased, percentum, earning, selling, prayer, weekly, coal, died, vested right, saving clause, afterward, amount paid, death benefit, returns to work, weekly payment, average weekly wages, modification, commencing, settlement, incapable, surviving

LEXISNEXIS® HEADNOTES Hide

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

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

HN1 An award cannot be reviewed under § 19, para. h of the Workmen's Compensation Act (Illinois) when more than 18 months have elapsed after the award was entered. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

HN2 Section 8, para. f of the Workmen's Compensation Act (Illinois), as amended in 1921, provides that in case of complete disability, which renders the employee wholly and permanent incapable of work, compensation equal to 50 percentum of his earnings but not less than $ 7.50 nor more than $ 14 per week, commencing on the day after the injury, and continuing until the amount paid equals the amount which would have been payable as a death benefit under § 7, para. a of the Act, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in § 7, para. a, and thereafter a pension during life annually equal to eight per cent of the amount which would have been payable as a death benefit under § 7, para. a, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in § 7, para. a. Such pension shall not be less than $ 10 per month and shall be payable monthly. It is provided that any employee who receives an award under the paragraph and afterwards returns to work, or is able to do so, and who earns or is able to earn as much as before the injury, payments under such award shall cease; if such employee returns to work, or is able to do so and earns or is able to earn part but not as much as before the injury, such award shall be modified so as to conform to an award under § 8, para. h. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Statutory Remedies & Rights

HN3 Where a statute confers a vested right such right cannot afterward be altered or amended so as to destroy it, but if a change in the law affects only the remedy or procedure all rights of action are governed thereby, without regard to whether they accrued before or after such change and without regard to whether suit had previously been instituted or not, unless there is a saving clause as to the existing litigation. More Like This Headnote

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Statutory Remedies & Rights

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

HN4 The right of review given by § 8, para. f of the Workmen's Compensation Act (Illinois), as amended in 1921, is an additional provision for review similar in character to the one provided in § 19, para. h of the Act. This proviso is not in the nature of a grant, but is simply a new remedy or a new procedure for a review of an award of compensation. The law in such cases is that a statute of that character is to be held retrospective in its operation, as there is no saving clause providing otherwise. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

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

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

HN5 Under the provisions of the proviso in § 8, para. f of the Workmen's Compensation Act (Illinois), as amended in 1921, the questions are whether or not the employee has returned to work or is able to do so, and whether or not he is able to earn as much as before the injury or a part of the amount that he originally earned. In either case the award is to be modified so as to conform to an award under § 19, para. h of the Act, which provides that in no event shall compensation to be paid exceed 50 percentum of the average weekly wage or exceed $ 12 per week in amount, nor, except in case of complete disability as defined, shall any payment extend over a period of more than eight years from the date of the accident. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: VAUGHN & NEVINS, for plaintiff in error.

JOSEPH A. LONDRIGAN, for defendant in error.

OPINION BY: DUNCAN

OPINION

[*241] [891]** Mr. JUSTICE DUNCAN delivered the opinion of the court:

Defendant in error on June 21, 1919, while in the employ of plaintiff in error as a loader, received an injury by reason of a fall. On application for compensation he was awarded compensation by the arbitrator $12 per week for 64.7 weeks for temporary total disability, and the further sum of $12 per week for 226 weeks and $11.60 for one week, and thereafter a pension for life of $23.33 per month for complete and permanent disability. The award of the arbitrator was entered September 16, 1920, and was not reviewed by the commission or the circuit court. Plaintiff in error, Superior Coal Company, paid the compensation as provided by the award until July 13, 1923. On March 7, 1923, plaintiff in error filed its petition with the Industrial Commission praying for a review of the award under paragraph (*h*) of **[***2]** section 19 of the Workmen's Compensation act, alleging that the disability had diminished and ended. The defendant in error moved the commission to dismiss the petition for the reason that eighteen months had elapsed since the date of the award. A hearing was had before the commission and evidence was introduced to show that the defendant in error had been engaged in the business of tending bar continuously since July 1, 1922, and had earned from $21 to $25 per week since that time. At the conclusion of the hearing plaintiff in error filed by leave of the commission an amended petition to suspend and modify compensation payments, and alleged that defendant in

error was completely recovered from any and all disability to work by reason of his former injury. The prayer of the **[*242]** petition is that the plaintiff in error be relieved from further payments of compensation on account of the previous award. This amended petition was filed under what is now paragraph (*f*) of section 8 of said act as amended in 1921. The commission denied the prayer of the petition and found that the disability of the defendant in error had not decreased. The circuit court of Macoupin county **[***3]** confirmed the decision of the commission, and this court granted a writ of error to review the judgment of the court on application of plaintiff in error.

HN1This award could not be reviewed under paragraph (*h*) of section 19 because more than eighteen months had elapsed after the award was entered. The question now before the court is whether or not the award of the arbitrator should have been reviewed by the commission under said paragraph (*f*) of section 8 as it was amended in 1921, which as so amended reads as follows:

"(*f*) ***HN2***In case of complete disability, which renders the employees wholly and permanent incapable of work, compensation equal to fifty percentum of his earnings but not less than $7.50 nor more than $14 per week, commencing on the day after the injury, and continuing until the amount paid equals the amount which would have been payable as a death benefit under paragraph (*a*), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in said paragraph (*a*), section 7, and thereafter a pension during life annually equal to eight per cent of the amount which would have been payable as a death **[***4]** benefit under paragraph (*a*), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (*a*), section 7. Such pension shall not be less than $10 per month and shall be payable monthly: *Provided,* any employee who receives an award under this paragraph and afterwards returns to work, or is able to do so, and who earns or is able to earn as much as before the **[*243]** injury, payments under such award shall cease; if such employee returns to work, or is able to do so and earns or is able to earn part but not as much as before the injury, such award shall be modified so as to conform to an award under paragraph (*h*) of this section: *Provided, further,* that disability as enumerated in subdivision 18, paragraph (*e*) of this section shall be considered complete disability."

The award by the arbitrator was made under the provisions of said section 8, paragraph (*f*), which provided that in case of complete disability, which renders the employee wholly and permanently incapable of work, compensation equal to fifty percentum of his earnings, but not more than $12 per week, commencing on **[***5]** the day after the injury and continuing until the amount paid equals the amount which would have been payable as a death benefit under paragraph (*a*) of section 7 if the employee had died as a result of the injury, etc. This paragraph (*f*) was amended in 1919 and also in 1921. The amendment in 1921 added the two provisos above quoted. The other part of this paragraph was not changed by this latter amendment except as to the amount of the compensation payable weekly, that the weekly payment should not be less than $7.50 per week nor more than $14 per week, which would not change the amount of compensation to be paid except in the amount thereof to be paid weekly. Paragraph (*h*) **[**892]** was also changed in just one particular, and this change was that the average weekly wage paid as compensation should in no event exceed $14 per week in lieu of $12 per week as previously provided by paragraph (*h*) of section 8. So the substantial changes of paragraph (*f*) of section 8 are the said two provisos added in 1921.

The question on this record is whether or not plaintiff in error was entitled to have the award of the arbitrator reviewed and modified by the Industrial **[***6]** Commission under the provisions of the first proviso aforesaid. It is contended, in substance, by the defendant in error, that as the **[*244]** time for review of the award under paragraph (*h*) of section 19 had passed, that the award became a vested right in the defendant in error and could not be reviewed or changed by the Industrial Commission under the said proviso of paragraph (*f*) of section 8. The substantial contention of the plaintiff in error is, that the said proviso merely gives a further right of a review of the award by the Industrial Commission, and that the evidence in this record is such as

to entitle plaintiff in error not only to a review of the award, but to a modification thereof in accordance with the terms and provisions of the proviso.

In the case of *Otis Elevator Co.* v. *Industrial Com.* 302 Ill. 90, this court held that HN3 where a statute confers a vested right such right cannot afterward be altered or amended so as to destroy it, but if a change in the law affects only the remedy or procedure all rights of action are governed thereby, without regard to whether they accrued before or after such change and without regard to whether suit had **[***7]** previously been instituted or not, unless there is a saving clause as to the existing litigation. This case was followed in the subsequent case of *New Staunton Coal Co.* v. *Industrial Com.* 304 Ill. 613, and the rule established in the *Otis Elevator case* has been announced in a number of previous decisions of this court. HN4 The right of review given by the above proviso is an additional provision for review similar in character to the one provided in paragraph (*h*) of section 19, which had become inoperative and ineffective in this case by lapse of time. This proviso is not in the nature of a grant, but is simply a new remedy or a new procedure for a review of an award of compensation. The law in such cases is that a statute of that character is to be held retrospective in its operation, as there is no saving clause providing otherwise.

The substance of the evidence given under the amended petition was the testimony of Warren Dinkens, the defendant in error, who testified in substance as follows: Was **[*245]** formerly employed by the Superior Coal Company, loading coal. Went to work for it in 1908 and worked until June 21, 1919, the date of the injury. After that **[***8]** he did not work for it. Since that he has worked for Ed and John Williams, of Gillespie, Illinois, whose business is selling soft drinks. He went to work for them in July, 1920. When he began with them his wages were $21 per week. He worked off and on, until finally he quit working for them altogether. He is now working for Mr. Carroll. In the last five months he laid off a week one time. Two or three weeks would cover the time he has lost in the last five months, and which lost time was on account of his condition. During all the time he has been receiving $25 per week, and he is still in his employ. The work he is now doing is selling cigars and soda in a soft drink parlor and is a whole lot lighter than what he was doing in July, 1920. He then states that he had done no work requiring manual labor and that he cannot do any lifting whatever. When asked as to his physical ability to do work of the character he is now doing his answer was, "I feel good; I feel well enough; I can't exert myself." This answer was given in cross-examination over the objections of plaintiff in error, the commissioner ruling that the question for settlement was whether or not there has been an **[***9]** increase in his ability to work. This ruling was made, however, before the amended petition was filed. The witness then further testified that he was not doing as much work then as he was when working in July, 1920; that he is not physically able to do any more work, as it bothers him too much.

There had been paid of the award of the arbitrator a total sum of $2528.40, according to the allegations of the petition. The decision of the commission was that the disability of the defendant in error had not decreased, and the prayer of the petition was for that reason denied.

Working in a soft drink parlor and selling cigars and soft drinks by the defendant in error in the manner he **[*246]** testified was returning to work within the meaning of the first proviso aforesaid, and he was earning a part but not as much as he earned before the injury, the evidence before the arbitrator having shown by stipulation that his average weekly wages while working in the mine was $32.22. The plaintiff in error was therefore entitled to have a hearing under the provisions of the proviso aforesaid and a modification of the award as provided thereby. The question before the commission was not **[***10]** whether or not the disability had decreased. That would have been one question under the provisions of paragraph (*h*) of section 19, but it is not applicable for the reasons aforesaid. HN5 Under the provisions of the proviso the questions for settlement are whether or not the employee has returned to work or is able to do so, and whether or not he is able to earn as much as before the injury or a part of the amount that he originally earned. In either case the award is to be modified so **[**893]** as to conform to an award under paragraph (*h*), which provides that in no event shall compensation to be paid exceed fifty percentum of the average weekly wage or exceed $12 per week in amount,

nor, except in case of complete disability as defined above, shall any payment extend over a period of more than eight years from the date of the accident. In this case, if the evidence should show that the weekly payments should be modified in amount, as the evidence now seems to show in the record, the payments should be modified upon the above basis and the pension for life should be discontinued.

The judgment of the circuit court is reversed and the cause is remanded to that court, with **[***11]** directions to the commission to review the award under the proviso aforesaid of paragraph (*f*) of section 8, and any further evidence may be submitted by either party that is competent under said section.

*298 Ill. App. 3d 719, *; 700 N.E.2d 732, **;*
*1998 Ill. App. LEXIS 603, ***; 233 Ill. Dec. 204*

PAUL **POORE,** Appellant v. THE INDUSTRIAL COMMISSION et al. (Auto Parts Unlimited, Appellee).

NO. 5-97-0223WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INDUSTRIAL COMMISSION DIVISION

298 Ill. App. 3d 719; 700 N.E.2d 732; 1998 Ill. App. LEXIS 603; 233 Ill. Dec. 204

April 22, 1998, Oral Argument Held, Submitted
September 8, 1998, Filed

SUBSEQUENT HISTORY: [*1]** Released for Publication October 7, 1998.

PRIOR HISTORY: Appeal from Circuit Court of Macon County. No. 93MR125. Honorable John K. Greanias, Judge Presiding.

DISPOSITION: Affirmed in part and reversed in part; cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of an order of the Circuit Court of Macon County (Illinois), which confirmed the decision of appellee Industrial Commission (commission) that denied the employee's request for additional permanent partial disability (PPD) benefits and additional temporary total disability (TTD) benefits for an injury that occurred while the employee worked for appellee employer.

OVERVIEW: The employee had filed a petition for review with the trial court pursuant to the Workers' **Compensation** Act (Act), 820 Ill. Comp. Stat. 305/8(a), **19(h)**(1996), and requested that the commission increase his PPD benefits and TTD benefits. The trial court confirmed the commission's decision so the employee appealed. On appeal, the court affirmed the decision of the trial court with regard to the denial of additional PPD benefits, but reversed and remanded the decision of the trial court with regard to the denial of additional TTD benefits. The court held that the employee did not raise the issue of the PPD benefits in his appellate brief so the issue was waived. Nonetheless, the court ruled that an increase in PPD benefits would not have been warranted because the evidence showed the employee recovered from his left leg pathology. Thus, the commission's decision was not against the manifest weight of evidence. The court held that in order for the employee to receive additional TTD benefits he had to show that his disability destabilized and required more treatment or recovery time and that, as a result, he was temporarily and totally disabled.

OUTCOME: The court affirmed the decision of the trial court that confirmed the commission's decision that the employee was not entitled to an increase in PPD benefits. The court reversed the decision of the trial court that confirmed the commission's decision that the employee was not entitled to an increase in TTD benefits. The court remanded the case for further proceedings.

CORE TERMS: claimant, disability, temporary, total disability, surgery, tendon, burn, partial disability, stabilized, totally disabled, temporarily, waived, pain, foot, Compensation Act, medical expenses, per week, unable to work, reimbursement, restabilize, arbitrator's, permanency, diminished, materially, recovered, asserting, recurred, manifest, ended, leg

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Appeals > Oral Arguments

Civil Procedure > Appeals > Reviewability > Preservation for Review

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

HN1 Points that are not argued in an appellant's brief are waived by the appellant and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. More Like This Headnote

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

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

HN2 The extent and permanency of a claimant's disability are questions of fact, and the commission's factual determinations will not be overturned unless they are against the manifest weight of the evidence. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Duration of Employment > Fixed Term

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

HN3 Section **19(h)** of the Illinois Workers' **Compensation** Act (Act) provides in part: As to accidents, which are covered by any agreement or award under the Act providing for **compensation** in installments made as a result of such accident, such agreement or award may at any time within 30 months after such agreement or award be reviewed by the Industrial Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. On such review, **compensation** payments may be re-established, increased, diminished or ended.820 Ill. Comp. Stat. 305/**19(h)**(1996). More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

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

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN4 A period of temporary total disability (TTD) can be the result of a period in which a claimant's permanent partial disability, which was once thought to be permanent, becomes unstable or degenerates and requires additional treatment to restabilize. In such cases, an additional period of temporary total disability is compensable by an award of TTD benefits. More Like This Headnote

Evidence > Inferences & Presumptions > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > Burdens of Proof

HN5 Although the law requires a claimant to prove that his permanent disability has materially increased to qualify for an increase in his permanent partial disability benefits, a claimant does not have to prove an increase in his permanent disability to be entitled to temporary total disability. Rather, all claimant must show is that his disability destabilized and required more treatment or recovery time and that, consequently, he was temporarily and totally disabled. That claimant's permanent disability later restabilized or improved after further treatment or recovery does not change the fact that he was temporarily and totally disabled and unable to work. More Like This Headnote

COUNSEL: For Paul **Poore,** Appellant: Warren E. Danz, Attorney at Law, Peoria, IL. ARGUER: For Appellant: Warren E. Danz.

For Auto Parts Unlimited, Industrial Comm. of Illinois, Appellee: Carl Kessinger, Evans & Dixon, St. Louis, MO. APPEARANCE ENTER DATE: 04/25/97. ARGUER: For Appellee: Carl Kessinger.

JUDGES: Thomas R. Rakowski, J., Honorable John T. McCullough, J. - CONCUR, Honorable Michael J. Colwell, J. - CONCUR, Honorable William E. Holdridge, J. - CONCUR, Honorable Philip J. Rarick, J. - CONCUR. JUSTICE RAKOWSKI delivered the opinion of the court.

OPINION BY: Thomas R. Rakowski

OPINION

[*720] [732]** JUSTICE RAKOWSKI delivered the opinion of the court:

Claimant, Paul **Poore,** filed a petition for review pursuant to sections 8(a) and **19(h)** of the Workers' **Compensation** Act (Act) (820 ILCS 305/8(a), **19(h)** (West 1996)), requesting that the Industrial Commission (the Commission) **[**733]** modify a previous decision. Specifically, claimant asked the Commission to **[***2]** increase his permanent partial disability (PPD) benefits, grant him additional temporary total disability (TTD) benefits, and award him an additional reimbursement for medical expenses. The Commission granted claimant's request for further reimbursement for medical expenses and denied claimant's requests for an increase in PPD benefits as well as an additional award of TTD benefits. Claimant appealed to the circuit court of Macon County, which confirmed the Commission. We affirm the denial of PPD benefits, but we reverse the denial of additional TTD benefits and remand for further proceedings. I. FACTS On January 8, 1988, claimant sustained severe burns arising out of and in the course of his employment with Auto Parts Unlimited (employer). Claimant suffered burns over 46% of his body, covering the majority of claimant's lower body and extremities. On April 21, 1990, the arbitrator awarded petitioner TTD benefits of $ 160 per week for 85 1/2 weeks pursuant to

section 8(b) of the Act as well as PPD benefits of $ 144 per week for 250 weeks for claimant's permanent loss of 50% of a man as a whole pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(b), 8(d)(2) (West 1996). Both parties **[***3]** appealed to the Commission, and, on February 26, 1991, the Commission modified the arbitrator's award, awarding claimant TTD benefits for 76 5/7 weeks instead of 85 1/2 weeks. Neither party appealed this determination.

After the Commission's decision, claimant still required additional medical treatment for the burns he sustained in 1988. The back side of claimant's left calf developed a neuroma and an ulceration. Dr. Ernest Clyde Smoot III, claimant's plastic surgeon, corrected this problem in December 1990.

In addition, as a result of the treatment of claimant's burns, his left heel no longer met the ground when he walked, causing claimant to walk on his toes instead of his entire left foot. Claimant's abnormal gait caused sores and calluses to develop on the bottom of his left foot. Consequently, claimant limped and was in constant pain due to his condition.

Dr. Smoot referred claimant to Dr. John R. Fisk, an orthopedic **[*721]** surgeon, to address claimant's left heel condition. Dr. Fisk determined that claimant suffered from an equinus contracture of the left ankle, or in other words, claimant's Achilles tendon had "shortened." This condition decreased dorsiflexion by 18 degrees. **[***4]** Because claimant was falling often as well, Dr. Smoot also referred claimant to Dr. Gelber, a neurologist. Having determined that claimant's problem was mostly mechanical and not neurological, Dr. Gelber quit treating claimant, and claimant returned to Dr. Fisk for treatment.

Dr. Fisk initially attempted to cure claimant's condition by using casts to stretch the Achilles tendon. However, because the casts excessively irritated claimant's leg, claimant opted to undergo surgery, which was successful.

Dr. Fisk asserted that, after recovery from the surgery, claimant had a normal gait. Similarly, Dr. David J. Fletcher testified that the tendon surgery increased the range of motion of claimant's left foot. He also opined that claimant's disability status had not changed from the original arbitration of his claim, although claimant testified that his problems have recurred. Dr. Fisk, Dr. Smoot, and Dr. Fletcher all agreed that claimant's tendon condition and the subsequent need for surgery were causally related to claimant's burn accident.

The Commission did not make any findings regarding the time span that claimant was totally incapacitated due to the above treatments. However, the **[***5]** evidence shows that Dr. Gelber first released claimant from work in February 1991 and that Dr. Fisk believed claimant was physically able to return to work on August 5, 1991. The record also shows that, on behalf of claimant, Mrs. **Poore** requested a written release to work on November 29, 1991.

II. DISCUSSION

A. *Permanent Partial Disability Benefits*

At oral argument, claimant argued that the Commission erred by failing to award an increase in PPD benefits. However, **[**734]** after careful review of claimant's argument in his appellate brief, we conclude that claimant only raised the issue of whether the Commission properly denied additional TTD benefits. As such, we deem claimant's argument regarding an increase in PPD benefits waived. 155 Ill. 2d R. 341(e)(7) *HN1*("Points not argued [in appellant's brief] are waived [by appellant] and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Archer Daniels Midland Co. v. City of Chicago*, 294 Ill. App. 3d 186, 190, 689 N.E.2d 392, 395, 228 Ill. Dec. 520 (1997).

Even assuming *arguendo* that this argument has not been waived, appellant's argument is without merit. After careful review of the **[***6]** record, we find the record replete with evidence that claimant recovered **[*722]** from his left leg pathology to the extent that an increase in PPD benefits was unwarranted. As such, we cannot conclude that the Commission's

decision was against the manifest weight of the evidence. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770, 776, 200 Ill. Dec. 431 (1994) HN2 ("The extent and permanency of a claimant's disability are questions of fact, and the Commission's factual determinations will not be overturned unless they are against the manifest weight of the evidence").

B. *Temporary Total Disability Benefits* Claimant also contends that the Commission erred when it denied claimant's petition for additional TTD benefits pursuant to section **19(h)** for the period he was unable to work due to treatment of and recovery from his Achilles tendon condition. Claimant's contention raises the issue of whether an additional award of TTD benefits is contemplated by section **19(h)** of the Act where the Commission determined in prior proceedings that claimant's injury reached a state of permanency.

HN3 Section **19(h)** provides in pertinent part:

> "As to accidents **[***7]** ***, which are covered by any agreement or award under this Act providing for **compensation** in installments made as a result of such accident, such agreement or award may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
>
> On such review, **compensation** payments
>
> may be re-established, increased, diminished or ended." 820 ILCS 305/**19(h)** (West 1996).

In denying additional TTD benefits, the Commission relied on *Briggs Manufacturing Co. v. Industrial Comm'n*, 212 Ill. App. 3d 318, 570 N.E.2d 1152, 156 Ill. Dec. 430 (1989), without explanation. In *Briggs*, the court reversed the Commission's grant of TTD benefits and affirmed the Commission's denial of an increase in PPD benefits. There, after the Commission's initial decision, claimant had been laid off once because of a general layoff, rehired, and then laid off again because of her medical restrictions. Another employer ultimately hired her to perform light work. It was at this job that she had recurring back **[***8]** pain, which was treated by pain medication from her doctor. She left that job due to pay cuts and later took a job as a waitress.

Before making its findings, the court asserted:

> " *** TTD benefits are available only from the time an employee is injured until he has recovered as much as the character of his injury will permit. [Citation.] Temporary incapacity might be described as the period of the healing process. [Citation.] Once the **[*723]** Commission concludes that the petitioner's condition has stabilized and that the permanent nature of the injury can be assessed, an award of temporary total disability is no longer appropriate under section **19(h)**." *Briggs Manufacturing Co.*, 212 Ill. App. 3d at 320, 570 N.E.2d at 1153.

Applying this reasoning to the facts, the court found that claimant's permanent disability had stabilized at the time of the Commission's first decision and that the Commission inappropriately awarded TTD benefits. *Briggs Manufacturing Co.*, 212 Ill. App. 3d at 321, 570 N.E.2d at 1153. See also **[**735]** *Howard v. Industrial Comm'n*, 81 Ill. 2d 50, 60, 405 N.E.2d 750, 755, 39 Ill. Dec. 771 (1980) (asserting that a claim for additional TTD benefits was **[***9]** not properly before Commission where "claimant's condition had stabilized and that the permanent nature and extent of the injury could be assessed"); *City of Alton v. Industrial Comm'n*, 231 Ill. App. 3d 334, 338-39, 596 N.E.2d 639, 641, 173 Ill. Dec. 15 (1992) (declining to review whether

claimant suffered from a temporary total disability since no increase in his permanent partial disability was shown); *Archer Daniels Midland Co. v. Industrial Comm'n*, 174 Ill. App. 3d 918, 922, 529 N.E.2d 237, 240, 124 Ill. Dec. 417 (1988) (asserting that "once the employee's physical condition has stabilized and he has completed a rehabilitation program which will enable him to resume employment without further training or education, neither TTD nor maintenance is appropriate); but see *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 388, 506 N.E.2d 1066, 1067, 107 Ill. Dec. 175 (1987) (noting that, after a section **19(h)** hearing, the Commission had awarded TTD benefits without an increase in PPD benefits and no parties appealed that determination).

Under different facts, this court in **[***10]** *World Color Press v. Industrial Comm'n*, 249 Ill. App. 3d 105, 619 N.E.2d 159, 188 Ill. Dec. 795 (1993), found that a claimant was entitled to TTD benefits under section **19(h)**. There, claimant's hand disability worsened after the Commission's decision, requiring three additional surgeries. As a result, claimant's physicians took him off work for substantial intervals. The Commission granted claimant's section **19(h)** request for an increase in PPD benefits and additional TTD benefits.

In affirming the Commission's award of TTD benefits, the court clarified the rule followed in *Briggs*. The court explained that ***HN4***a period of temporary total disability can be the result of a period in which a petitioner's permanent partial disability, which was once thought to be permanent, becomes unstable or degenerates and requires additional treatment to restabilize. *World Color Press*, 249 Ill. App. 3d at 109, 619 N.E.2d at 162. The court asserted that, in such cases, an additional period of temporary total disability is compensable by an award of TTD benefits. *World Color Press*, 249 Ill. App. 3d at 109, 619 N.E.2d at 162.

[*724] Employer argues that, under *World Color*, claimant must first prove that his permanent partial disability materially increased before he can obtain **[***11]** an additional award of TTD benefits. We disagree. ***HN5***Although the law requires a claimant to prove that his permanent disability has materially increased to qualify for an increase in his PPD benefits, a claimant does not have to prove an increase in his permanent disability to be entitled to TTD benefits. See *World Color Press*, 249 Ill. App. 3d at 109, 619 N.E.2d at 162 (claimant required additional treatment to restabilize a condition that was thought to be stable and permanent causing claimant to be temporarily and totally disabled during the treatments and the subsequent recovery periods). Rather, all claimant must show is that his disability destabilized and required more treatment or recovery time and that, consequently, he was temporarily and totally disabled. *World Color Press*, 249 Ill. App. 3d at 109, 619 N.E.2d at 162. That claimant's permanent disability later restabilized or improved after further treatment or recovery does not change the fact that he was temporarily and totally disabled and unable to work.

This approach comports with the spirit and purpose of the Act.

> "'The Workers' **Compensation** Act is a humane law of a remedial nature. [Citation.] **[***12]** The underlying purpose of the Act is to provide financial protection for workers whose earning power is interrupted or terminated as a consequence of injuries arising out of and in the course of their employment.'" *World Color Press*, 249 Ill. App. 3d at 109, 619 N.E.2d at 162, quoting *Hardin Sign Co.*, 154 Ill. App. 3d at 389, 506 N.E.2d at 1068.

When the Commission rendered its decision, it lacked the benefit of the guidance provided in *World Color*. Consequently, we remand this case back to the Commission for **[**736]** determination of whether claimant is entitled to an additional award of TTD benefits. III. CONCLUSION

For the foregoing reasons, we affirm the circuit court's confirmation of the Commission's decision

denying an increase in PPD benefits, but reverse the circuit court's confirmation of the Commission's decision denying additional TTD benefits and remand this case back to the Commission for further proceedings consistent with this opinion.

Affirmed in part and reversed in part; cause remanded.

McCULLOUGH, P.J., and COLWELL, HOLDRIDGE, and RARICK, JJ., concur.