STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF DU PAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

Matuszczak
Plaintiff

vs

Wal-Mart and the IWCC

2012 MR 1631
CASE NUMBER

File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter, **IT IS HEREBY ORDERED:**

This matter coming to be heard on Plaintiff's appeal of the workers' compensation commission decision terminating the temporary total disability benefits, It is ORDERED:

The Court reverses the decision of the Illinois workers' compensation Commission in terminating Plaintiff's temporary total disability benefits.

This order is final and appealable

Name: Sondling ☐ PRO SE

DuPage Attorney Number: 1095

Attorney for: Plaintiff

Address: 55 W Monroe

City/State/Zip: Chgo IL

Telephone: 312-346-6444

ENTER:

Bonnie M Thurston
Judge

Date: 4-23-13

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Walter Matuszczak,

Petitioner,

vs. No: 10 WC 11819

Wal-Mart,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice having been given to all parties, the Commission, after having considered the issue of whether Petitioner is entitled to temporary total disability benefits after his employment was terminated, and having been advised of the facts and law, hereby modifies the Arbitrator's decision as stated below and otherwise affirms and adopts the Arbitrator's decision, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator awarded Petitioner 23-2/7 weeks of temporary total disability benefits representing a period from June 13, 2011, the day after Petitioner's employment was terminated, to November 22, 2011, the date of arbitration. The Commission hereby modifies the Arbitrator's decision by vacating the award of temporary total disability benefits.

In awarding temporary total disability benefits, the Arbitrator relied on Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n, 236 Ill.2d 132, 923 N.E.2d 266 (2010). Respondent contends that Petitioner's theft of cigarettes from Respondent on multiple occasions, with knowledge that his theft could lead to termination, is equivalent to his refusing light duty work. Respondent contends that under Interstate Scaffolding, benefits may be

suspended or terminated if the claimant refuses work within his physical restrictions. The Commission agrees with Respondent's position.

The Commission interprets that the Interstate Scaffolding decision does not eliminate all circumstances under which a claimant may lose his temporary total disability benefits. We do not believe that the Interstate Scaffolding decision stands for the proposition that an injured employee, whose employment has been terminated, has an unqualified or absolute right to temporary total disability benefits so long as the employee's condition has not stabilized and the employee is under light duty restrictions.

We believe that the Interstate Scaffolding court's purpose was to convey explicitly that the termination of a claimant's employment does not automatically result in a loss of temporary total disability benefits; there still has to be a determination of whether the claimant's physical condition has stabilized. This is evident with the court's statements with the use of the word, "automatically":

> "The appellate court below believed that a discharged employee should be automatically barred from receiving TTD benefits because 'allowing an employee to collect TTD benefits from his employer after he was removed from the work force as a result of volitional conduct unrelated to his injury would not advance the goal of compensating an employee for a work-related injury.' [citation omitted] This logic, however, is faulty. . . . In our view, the Act's purpose is not furthered by automatically denying TTD benefits to an injured employee simply because he has been discharged by his employer."

Interstate Scaffolding, 236 Ill.2d 132, 148-149, 923 N.E.2d 266, 275 (2010). The Interstate Scaffolding court was rejecting an automatic barring of temporary total disability benefits in cases where a claimant's employment is terminated as a result of volitional conduct unrelated to his injury. The court also stated that "[a]n injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge." Interstate Scaffolding, 236 Ill.2d at149, 923 N.E.2d at 276. Thus, we believe the court made two significant points: (1) that there should not be an automatic, mechanical approach to deny temporary total disability benefits when an injured employee has been discharged, and (2) that the Commission should not be examining the reasons for discharge and assessing whether such discharge was proper.

The Interstate Scaffolding court also referenced circumstances under which temporary total disability benefits could be suspended or terminated: "if the employee refuses to submit to medical, surgical, or hospital treatment essentially to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts. [citations omitted] Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor." Interstate Scaffolding, 236 Ill.2d at146-147, 923 N.E.2d at 274.

The Commission finds that Petitioner's repeated theft of cigarettes amounts to a refusal to work in the light duty position that Respondent had been providing for over a year. Petitioner

12IWCC1079

testified that he understood that stealing is a crime and that stealing from Respondent could result in his employment termination. Petitioner also testified that but for his employment termination, he believed he would still be working in the light duty position with Respondent. Under the circumstances of this case, we find that Petitioner refused Respondent's ongoing offer of work within his physical restrictions.

We do not believe the Interstate Scaffolding court was proscribing all use of discretion in cases involving employment termination; rather, as stated previously, we believe the court was rejecting an analysis of the propriety of the discharge and rejecting an automatic suspension or termination of temporary total disability benefits in cases involving employment termination.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision, filed on January 25, 2012, is modified with respect to temporary total disability benefits. The award of temporary total disability benefits is hereby vacated.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,300.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT - 5 2012
TJT: lc
o 08/06/12
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) DECISION OF ARBITRATOR
8(a)

MATUSZCZAK, WALLY
Employee/Petitioner

Case# **10WC011819**

WAL-MART
Employer/Respondent

12IWCC1079

On 1/25/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2208 CAPRON & AVGERINOS PC
STEPHEN J SMALLING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0560 WIEDNER & MCAULIFFE LTD
CATHERINE MAFEE LEVINE
ONE N FRANKLIN SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

12IWCC1079

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Walter Matuszczak,
Employee/Petitioner

v.

Wal-Mart,
Employer/Respondent

Case # **10** WC **11819**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **November 22, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **travel expenses**

12IWCC1079

FINDINGS

On the date of accident, **3/7/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$25,308.25**; the average weekly wage was **$486.70**.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $324.46 per week for 23-2/7 weeks, commencing 6/13/11 through 11/22/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 3/8/10 through 11/22/11, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $14,227.41, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner is entitled to prospective medical treatment in the form of the surgical procedure recommended by Dr. Lorenz, and Respondent shall pay the reasonable and necessary medical expense associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

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

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

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

Signature of Arbitrator

1/25/12
Date

ICArbDec19(b)

JAN 25 2012

STATEMENT OF FACTS:

Petitioner had been employed by the Respondent for three years as a night stocker prior to the subject accident. His job duties involved bending, lifting and stocking shelves with various products, some exceeding 100 pounds. Prior to the accident, he described himself as being in excellent health with never having been treated for any back or cervical condition which impacted on his ability to perform his job duties.

On March 7, 2010, Petitioner was stocking an end cap which contained liquids and bottles weighing 150 to 200 pounds per shelf. He estimated the top shelf was at eye level. While bending down to access a lower shelf, the entire end cap fell on him and as a result he sustained injuries to his neck, back and right arm.

On March 10, 2010, Petitioner was directed to Concentra Medical Center by the Respondent. (PX3). At that time he presented with increased complaints of pain in the neck with radiating pain into both hands and tingling. He was also noted to have lumbar pain bilaterally together with pain and weakness in the left wrist. Physical therapy and medication were prescribed. Petitioner testified he remained under the care of Concentra Medical Center through April 12, 2010. During that time he was provided light duty work in accordance with the restrictions imposed by his treating physician.

At the suggestion of his physical therapist, Petitioner sought an evaluation with Dr. Mark Lorenz at Hinsdale Orthopedics on March 22, 2010. (PX4). The neurological exam performed on his upper extremity was noted to be normal and x-rays revealed degenerative disc disease at the level of C5-6. Dr. Lorenz diagnosed his condition as neck and back strain as well as a contusion of the medial epicondyle. He imposed light duty restrictions and advised Petitioner to continue with physical therapy over the next month. On April 21, 2010 Petitioner was re-examined by Dr. Lorenz who noted that he continued to experience pain in his neck, his elbow together with occasional headaches emanating if his neck acted up. Dr. Lorenz referred Petitioner to Dr. Bardfield for supervision of his rehabilitation. Dr. Lorenz did not feel he was a surgical candidate at that time and wanted his rehabilitation therapy supervised by a physical therapy rehabilitation specialist. He continued his light duty restrictions.

As of June 18, 2010, Petitioner had completed his initial physical therapy but his neck symptoms were not resolving. He was noted to have headaches and pain with extension and his diagnosis was possible cervical facet joint syndrome and cervicogenic headaches. Dr. Bardfield referred him to Dr. Gary Koehn for evaluation of potential cervical facet joint injections. Dr. Lorenz testified that cervical facet joint syndrome is an inflammatory change in the joint in the cervical spine and reflected that Petitioner's symptoms were clarifying themselves and the conservative treatment to date was failing. That was the basis for the referral to a pain specialist for the injection therapy. (PX6, pp.10-11). Dr. Lorenz further testified that the cervicogenic headaches implied that the origin of the headaches was caused by the inflammatory changes in the neck which also necessitated evaluation by a pain specialist. (PX6, p.12).

Petitioner was first examined by Dr. Koehn on July 23, 2010. (PX5). His initial impression of Petitioner's condition was chronic bilateral posterior neck pain, right cervical radiculopathy with intermittent bioccipital frontal and temporal headaches following the work injury that was only partially responsive to conservative treatment to date. After reviewing the Petitioner's MRI, Dr. Koehn recommended performance of two transforaminal epidural steroid injections which were performed on August 24, 2010 and September 28, 2010. In addition, Dr. Koehn imposed light duty restrictions and referred him back to physical therapy. Petitioner testified that the symptoms in his cervical spine did not resolve following the epidural steroid injections. On December 28, 2010, diagnostic medial branch blocks were performed which showed the pain was not changed

suggesting it was not a facet-related phenomenon. Dr. Koehn then referred the Petitioner back to Dr. Lorenz for a surgical consultation and reiterated the light duty restrictions. (PX5).

Petitioner was examined by Dr. Lorenz on March 16, 2011 who noted that the conservative treatment had failed. A discography at the level C5-6 was prescribed by Dr. Lorenz. Dr. Lorenz testified that he did it blindly "wherein he did not advise Dr. Koehn of the level that he suspected was causing the Petitioner's symptoms" so as to add additional objectivity to the results. He further testified that the discography was medically necessitated in order to assess the Petitioner's medical condition. (PX6, pp.17-19). The discography confirmed Dr. Lorenz's impression that the issues were at the C5-6 level with pain and an abnormality, particularly a fissure or tear of the disc and a demonstrated narrowing in the back of the exit hole. All other levels were normal and given the findings, he recommended that Petitioner either live with the condition subject to restrictions or consider a discectomy and fusion at C5-6. Dr. Lorenz testified that the discectomy and fusion would remove the pain causing interval and normalize the abnormality of movement and weight distribution at the C5-6 interval in addition to freeing up the nerves posteriorally. (PX6, pp.21-22). Dr. Lorenz specifically opined that the injury sustained by the Petitioner on March 7, 2010 aggravated a pre-existing degenerative condition at C5-6 necessitating the surgical recommendation. (PX6, p.23).

Petitioner testified that he continues to experience pain in his cervical spine which has intensified since the accident. It is his desire to undergo the surgical procedure in an attempt to return to his previous functional capacity.

On June 8, 2011, Petitioner was examined by Dr. Steven Mather at the request of the Respondent for purposes of a §12 examination. Dr. Mather opined the Petitioner sustained a simple contusion to his neck and possibly upper extremities and did not require further active medical care. He further felt that Petitioner could return to work without restrictions and was at maximum medical improvement. (RX1).

In an addendum report of June 30, 2011, Dr. Mather opined that the pain treatment administered by Dr. Gary Koehn was reasonable and necessary to treat the condition. He further opined that the EMG recommended by Dr. Lorenz was reasonable and necessary to address the injury. (RX2).

On November 18, 2011, Dr. Mather authored an additional addendum to his report. After reviewing the results of the discogram and CT performed by Dr. Koehn, he reiterated his opinion that Petitioner sustained a simple contusion of the neck and possibly upper extremities. He further opined the Petitioner did not require surgery in reference to his March 7, 2010 injury. (RX3).

Petitioner testified that he received the sum of $25.00 for travel expenses to attend the examination with Dr. Mather. Petitioner's Exhibit No. 1 contains receipts for travel expenses incurred by the Petitioner in attending the examination.

Petitioner testified that on June 12, 2011, his employment with Respondent was terminated as a result of his stealing cigarettes from work. Petitioner testified that he has not been employed since that date. On cross-examination, Petitioner testified that had tried looking for work within his light duty restrictions, specifically at a grocery store, a dollar store, Menard's and Target.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The evidence shows that prior to the accident in question Petitioner was in good health and had never experienced any problems with his cervical spine necessitating treatment nor the imposition of restrictions on his activities as it relates to his ability to perform his job with Respondent. Since the incident, Petitioner has undergone an extensive course of conservative care.

Drs. Lorenz, Bardfield and Koehn all opined that Petitioner suffered from medical conditions necessitating the imposition of light duty restrictions, pain management treatment, narcotic pain medications and a surgical recommendation. Dr. Lorenz testified that the x-rays together with the discography were objective evidence of the instability of Petitioner's cervical spine resulting from an aggravation of the pre-existing degenerative condition. Dr. Lorenz testified as to the necessity of the injections to initially treat this condition before proceeding with surgery. (PX6, pp.17-19). These injections have failed to relieve Petitioner's symptoms.

Petitioner testified that he has sustained no other injuries to his cervical spine subsequent to the accident of March 7, 2010. He is still subject to light duty restrictions imposed by three separate physicians and taking narcotic pain medication to relieve his symptoms.

Dr. Mather, Respondent's Section 12 examiner, opined that Petitioner sustained a simple contusion to his neck and possibly upper extremities.

Based on the above, and the medical records taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the undisputed accident on March 7, 2010. Along these lines, the Arbitrator finds the opinion of treating orthopedist Dr. Lorenz to be more persuasive than that offered by Respondent's §12 examining physician, Dr. Mather.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner submitted into evidence claimed outstanding medical bills at PX2.

Dr. Lorenz testified that he felt conservative treatment was indicated and that a referral to Dr. Bardfield, a physical medicine and rehabilitation specialist, was therefore necessary. Dr. Bardfield in turn referred the Petitioner to Dr. Koehn for cervical facet injections given his lack of response to the physical therapy and other conservative measures. Dr. Koehn performed transforaminal epidural injections on the Petitioner together with diagnostic medial branch blocks. When the Petitioner failed to realize substantial relief from this treatment, he was referred back to Dr. Lorenz for surgical consultation. Dr. Lorenz thereupon ordered a discogram which ultimately resulted in his recommendation for surgery.

Dr. Steven Mather, the Respondent's examiner, opined that the pain clinic treatment rendered by Dr. Koehn was both reasonable and necessary to treat Petitioner's medical condition. He further felt that the EMG prescribed by Dr. Lorenz was reasonable to treat the effects of the injury. Indeed, with the exception of the discography, Dr. Mather does not opine that any other treatment was unnecessary. His criticism of the discography is premised on his belief that Petitioner was suffering from myofascial pain syndrome. However, in this regard, the Arbitrator finds Dr. Lorenz's testimony, to the effect that the discography was not only necessary but supported his diagnosis and treatment recommendations, to be more persuasive than the opinion offered by Dr. Mather. The record shows that Petitioner had failed all conservative treatment and that discogram test was necessary to determine if Petitioner was a surgical candidate. It is also interesting that it was performed in such a way that

the physician who performed the test was not told as to the level in question, further buttressing Dr. Lorenz's diagnosis and recommendation along these lines.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses in the amount of $14,227.41 pursuant §8(a) and the fee schedule provisions of §8.2 of the Act and as set forth in the parties' stipulation admitted into evidence as Arb.Ex. 2.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Given the Petitioner's failure to respond to the pain clinic treatment, Petitioner was referred back to Dr. Lorenz for surgical consultation. Before recommending surgery, Petitioner underwent a discography in order to confirm his impression that the pain was emanating at the C5-6 level. (PX6, p.19). The discography confirmed Petitioner had pain at the C5-6 interval together with abnormalities which included a tear of the disc as well as narrowing in the back of the hole at that level. Given these findings, Dr. Lorenz felt Petitioner was suffering from a structural issue as opposed to a neurological issue. Dr. Lorenz was of the opinion that Petitioner had failed conservative treatment and that Petitioner could learn to live with the pain, while maintaining permanent restrictions, or undergo surgery – namely, a discectomy and fusion at C5-6.

Petitioner testified that he continues to experience significant pain in his cervical spine the majority of his day. He noted that it is aggravated by certain movements and that he continues to be prescribed narcotic pain medication to alleviate his symptoms. Drs. Lorenz, Koehn and Bardfield have all imposed permanent restrictions on Petitioner given his condition. In this regard, the Arbitrator once again finds the opinion of Dr. Mather – to the effect that Petitioner sustained a simple contusion to his neck, requires no further active medical care and can return to work without restrictions – to be unpersuasive.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to prospective medical care and treatment in the form of the surgery prescribed by Dr. Lorenz, and Respondent is liable for the reasonable and necessary costs associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's employment with the Respondent was terminated on June 12, 2011 when he was caught stealing cigarettes from the Respondent. At the time of his termination, Petitioner was subject to light duty restrictions which were being accommodated by the Respondent. He has not returned to work following the termination. On cross examination, Petitioner testified that had tried looking for work within his light duty restrictions, specifically at a grocery store, a dollar store, Menard's and Target.

In *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill2d 132, 923 N.E. 2d 266 (2010), the court found that the employer was obligated to pay TTD benefits even when the employee has been discharged, whether or not the discharge was for cause, and that when an injured employee has been discharged by his employer the inquiry for deciding his entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. More to the point, the court noted that if the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work related injury, the employee is entitled to these benefits.

In the present case, the evidence shows that Petitioner has remained under the same light duty restrictions imposed at the time of his termination. It also appears that Petitioner's condition has yet to stabilize and/or reach maximum medical improvement.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from June 13, 2011, the day after his termination, through the date of arbitration on November 22, 2011, for a period of 23-2/7 weeks.

WITH RESPECT TO ISSUE (O), WHETHER PETITIONER IS ENTITLED TO TRAVEL EXPENSES, THE ARBITRATOR FINDS AS FOLLOWS:

On May 26, 2011, Petitioner attended a §12 examination at his employer's request. Petitioner testified that he lives in Glendale Heights, Illinois and the appointment with Dr. Mather was in Lemont, Illinois. According to MapQuest, the mileage distance from petitioner's home in Glendale Heights, Illinois to Dr. Mather's office in Lemont, Illinois, is 21.63 miles one way. Petitioner testified that prior to examination, he received a check for $25.00, which he understood was to be applied towards travel expenses to the examination with Dr. Mather on May 26, 2011. Petitioner testified that he does not have a driver's license and admitted that he did not contact his attorney or his employer prior to the examination, to discuss travel assistance to and from the examination with Dr. Mather. Petitioner admitted that he went to the examination and then sent his employer and his attorney, 3 receipts for taxi cab fare after the fact.

§ 12 of the Illinois Workers Compensation Act states in relevant part that "[a]n employer requesting such an examination of an employee residing within the State of Illinois, shall pay in advance of the time fixed for the examination, sufficient money to defray the necessary expense of travel by the most convenient means to and from the place of the examination, ..." 820 ILCS 305/212.

In the present case, Respondent sent Petitioner a check in the amount of $25.00 prior to the IME with Dr. Mather on May 26, 2011. On cross examination, Petitioner acknowledged his receipt of the $25.00 check before the IME. Petitioner also admitted that he never called his attorney or his employer to discuss additional travel expenses to the examination. There was no evidence that mass transit or any other means of transportation were available. Furthermore, it stands to reason that if Respondent had known of Petitioner's inability to drive himself, and if a request had been made, Respondent may have been able to arrange alternative transportation, presumably at a cheaper rate, or else even scheduled an examination at a location closer to Petitioner's residence or assess to mass transit. Instead, Petitioner chose his own method of transportation (taxi cab) and later submitted 3 receipts to his attorney for reimbursement.

Furthermore, all 3 receipts reflect varying costs without any mileage amount indicated. The Arbitrator notes that one receipt is even dated May 25, 2011, or the day before the §12 exam with Dr. Mather.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove his entitlement to travel expenses in excess of the statutorily mandated $25.00, said amount having been timely tendered. Accordingly, Petitioner's request for additional travel expenses is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GUTZLER, HEATH
Employee/Petitioner

Case# **11WC046999**

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 4/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0246 HANAGAN & McGOVERN PC
STEVE HANAGAN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

0299 KEEFE & DEPAULI PC
ANDREW J KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

APR 15 2013

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Heath Gutzler
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # 11 WC 46999

Consolidated cases: n/a

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on February 8, 2013. By stipulation, the parties agree:

On the date of accident, November 1, 2011, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $48,442.16; the average weekly wage was $931.58.

At the time of injury, Petitioner was 31 years of age, single, with 1 dependent child(ren).

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $5,057.21 for TTD, $0.00 for TPD, $0.00 for maintenance, and $8,468.18 for other benefits (permanent partial disability benefits), for a total credit of $13,525.39.

At trial, the parties stipulated that temporary total disability benefits were paid in full and that Respondent had made weekly advance payments of permanent partial disability benefits from October 23, through February 6, 2013, for a total of $8,464.18.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $558.95 per week for 100 weeks because the injuries sustained caused the 20% loss of use of the body as a whole as provided in Section 8(d)2 of the Act. Respondent shall be given a credit for weekly advance payments of permanent partial disability benefits paid from October 23, through February 6, 2013, a total of $8,464.18, as well as any subsequent advance payments of permanent partial disability benefits.

Respondent shall pay Petitioner compensation that has accrued from March 13, 2012, through February 8, 2013, and shall pay the remainder of the award, if any, in weekly payments.

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

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

William R. Gallagher, Arbitrator

April 5, 2013
Date

APR 9 - 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on November 1, 2011. According to the Application, Petitioner was pulling and twisting on a cassette and he sustained an injury to his low back and legs. There was no dispute regarding the accident and the parties stipulated at trial that medical and temporary total disability benefits had been paid in full. The only disputed issue at trial was the nature and extent of disability; however, the parties also stipulated that Respondent had commenced payment of weekly permanent partial disability benefits on October 23, 2012, and had paid those benefits through February 6, 2013, and that Respondent was entitled to a credit for those payments as well as any other additional permanent partial disability payments.

Petitioner testified that he worked for Respondent as a tire builder. Petitioner's job duties required him to change tire stock and this process involved the removal of a tire "cassette" from a machine. On November 1, 2011, Petitioner was pulling on one of these cassettes and experienced a pulling sensation in his low back.

Following the accident, Petitioner sought medical treatment from Dr. Bernard Rerri, an orthopedic surgeon, who he initially saw on November 14, 2011. At that time Petitioner complained of back and right leg pain. Dr. Rerri examined Petitioner and obtained an MRI which revealed an extruded disc at L4–L5 on the right side compressing the right L5 and S1 nerve roots. Dr. Rerri recommended surgery and, on November 16, 2011, Dr. Rerri performed surgery which consisted of a right L4–L5 hemilaminectomy, discectomy and excision of the extruded disc and decompression of the cauda equina.

Subsequent to the surgery, Petitioner remained under Dr. Rerri's care and was referred to physical therapy. Dr. Rerri authorized Petitioner to return to work on light duty on January 3, 2012, and later released Petitioner to return to work without restrictions on March 13, 2012. At that time, Petitioner still had some problems with prolonged sitting, some right leg numbness and still required some prescription medications. Petitioner has not been seen by Dr. Rerri since that time. At the request of the Respondent, on May 25, 2012, Dr. Rerri prepared a medical report in which he opined that Petitioner had an impairment rating of 12% of the whole person.

Dr. Rerri was deposed on October 11, 2012, and his deposition testimony was received into evidence at trial. Dr. Rerri's testimony regarding his diagnosis and treatment of the Petitioner was consistent with the information contained in the medical treatment records. In regard to his impairment rating, Dr. Rerri testified that it was an AMA rating in accordance with the Sixth Edition of the AMA guidelines. When questioned about this impairment rating, Dr. Rerri agreed that it was not a rating of disability, that it is one of the several factors to be considered when determining disability and that it is not intended to estimate or place work restrictions nor does it consider the person's work environment or what affect the injury might have on one's ability to work.

Dr. Rerri further testified that Petitioner's L4–L5 disc has been weakened and that it has lost its ability to function as a shock absorber. He also opined that this disc is "...almost invariably

going to gradually collapse over time," and that Petitioner's low back will be more susceptible to re-injury in the future.

Petitioner testified that his back is now stable and that he is no longer in constant pain; however, he also stated that it is not as good as it was prior to the injury. Petitioner acknowledged that he was able to return to work as a tire builder; however, he testified that he now exercises greater caution at work to avoid re-injury, he avoids performing heavier tasks by himself and now seeks assistance. Petitioner described his ability to bend as being limited, that he gets uncomfortable if he has to sit for an hour or longer and that he still experiences numbness in the right leg especially during periods of cold weather.

Petitioner testified that prior to the accident, he customarily worked four to 12 hours a week overtime. Since returning to work, Petitioner does not work any overtime hours at all unless he is scheduled to do so. Petitioner also stated that he works on a production quota and that, prior to the accident, he was usually able to meet it. Since the time he returned to work, Petitioner stated that he has had difficulties meeting his production quota because he is unable to move as quickly as he was able to do before the accident; however, Petitioner also acknowledged that he has not receive any sort of discipline from Respondent for failure to meet any quotas.

Conclusions of Law

The Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 20% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Dr. Rerri opined that Petitioner had a 12% impairment of the whole person based on the AMA guidelines. As is noted herein, Dr. Rerri agreed that this is not a rating of disability, that it is not intended to estimate or place work restrictions nor does it consider the individual's work environment and what affect the injury might have on one's ability to work.

Petitioner is a tire builder and, based on Petitioner's description of his job duties, this occupation does require a significant amount of heavy manual labor with pulling and lifting. Petitioner testified that he now uses greater caution in performing his job duties and will seek assistance when he has to perform heavier tasks.

At the time of the injury, Petitioner was 31 years of age meaning that he will have to live with the effects of this disability for a substantial amount of time. Furthermore, as was noted by Dr. Rerri, Petitioner will be more susceptible to re-injury in the future.

Petitioner's future earning capacity is diminished because of this injury. Prior to this accident Petitioner worked four to 12 hours of overtime per week and now, because of the effects of the injury, only works overtime if he is scheduled to do so.

Petitioner's testimony regarding his disability is corroborated by the medical treatment records. There is no controversy or dispute that Petitioner had an extruded disc at L4–L5 that required

excision and Petitioner's complaints as to his ongoing symptoms are consistent with the injury he sustained.

William R. Gallagher, Arbitrator

1 of 81 DOCUMENTS

ISMAEL DIAZ, EMPLOYEE/PETITIONER v. VILLAGE OF MONTGOMERY, EMPLOYER/RESPONDENT

No. 07WC 40520

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

2010 Ill. Wrk. Comp. LEXIS 1380

May 13, 2010

JUDGES: Leo Hennessy

OPINION: [*1]

ARBITRATION DECISION

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **HENNESSY**, Arbitrator of the Commission, in the city of **GENEVA**, on **2/17/2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

FINDINGS

On **May 29, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is*** causally [*2] related to the accident.

In the year preceding the injury, Petitioner earned $ **57,200.00**; the average weekly wage was $ **1,100.00**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **2** dependent children.

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

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

ORDER

Petitioner was temporarily totally disabled from August 1, 2007 through October 23, 2007 representing 12 weeks. However, Respondent paid Petitioner full salary during said period of temporary total disability and shall receive full credit for the same.

Respondent shall pay Petitioner permanent partial disability benefits of $ 619.97 per week for 75 weeks because the injury sustained caused 15% loss of person as a whole as provided in Section 8(d)(2) of the Act.

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

STATEMENT OF INTEREST RATE If [*3] the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

5-13-10

Date

STATEMENT OF FACTS

Petitioner, Ismael Diaz, has been employed by the Respondent, Village of Montgomery, as a police patrolman since 2004. Petitioner was on active patrol on the accident date of May 29, 2007. Petitioner responded to a call regarding a domestic disturbance.

After the domestic disturbance matter was resolved, Petitioner was confronted by a neighbor who was upset because squad cars were blocking his driveway. Petitioner advised the citizen that the squad cars would be moved as soon as they were done handling the original call. The citizen went into his house and came back outside holding what appeared to be a handgun.

In response, Petitioner drew his weapon and gave the citizen commands to drop the gun. The citizen did not comply but continued to walk towards the Petitioner and another officer. Petitioner took cover behind a motor vehicle. When the [*4] citizen was approximately 15 feet away, Petitioner observed that the handgun had an orange tip indicating that it was not a real gun but perhaps a BB gun. The citizen continued to ignore commands to drop the handgun and eventually retreated back into his residence at which point a standoff began.

The Montgomery Police Department requested assistance from the City of Aurora Special Response Team (S.W.A.T. team). This resulted in a standoff that lasted several hours. In regards to the May, 2007 incident, Petitioner was on the scene for approximately five hours. There were approximately 25 other officers on the scene during the standoff with the suspect. Eventually tear gas was utilized to force the suspect out of his residence.

After the incident, that evening, Petitioner was unable to sleep. The following day he began feeling anxiety. At roll call a few days later on June 1, 2007, Petitioner's vision became blurred and he felt dizzy. He was sweaty and felt heart palpitations. Petitioner attempted to go into his squad car on patrol. However, his symptoms would not pass and he returned to the police station where he spoke with the Deputy Chief. An ambulance was called and Petitioner [*5] was taken to Rush Copley Medical Center out of concern that Petitioner was suffering some type of cardiac event. Once at the hospital various tests were performed which confirmed Petitioner had not suffered a heart attack or other cardiac event.

The following day Petitioner followed up at Dreyer Medical Clinic on June 5, 2007. Petitioner continued to have palpitations, anxiety and distress. Petitioner has continued to follow up with Dreyer Medical Clinic through the hearing date of February 17, 2010. He has been diagnosed with post-traumatic stress disorder. He has been prescribed anxiety

medication since July of 2007 through the present including Lexapro. At the time of arbitration, he was taking an anti-depressant drug, Sertraline, on a daily basis and an anti-anxiety drug, Clonazepam, on an as-needed basis.

Petitioner was taken off duty from August 1, 2007 through October 23, 2007. This was done with the agreement of the Chief of Police. Petitioner underwent a fitness for duty evaluation at Respondent's request on August 21, 2007 and was found unfit for duty.

Subsequently, Petitioner returned to light duty work in October, 2007. This involved plain clothes work assisting investigators. [*6] Petitioner was not allowed to wear his uniform or deal with the public. He was also not allowed to use a firearm. Subsequently, Petitioner was returned to full duty work on November 30, 2007 and has returned to uniform patrol with his firearm.

Prior to the May, 2007 incident at issue, Petitioner was involved in another incident about two years prior to the May, 2007 incident. This involved assisting a fellow officer. Petitioner responded to the scene and was confronted by a man with a knife. Subsequently, other squad cars were called to the area. Another officer shot the suspect three times. The suspect was then taken into custody. Petitioner did not seek any psychiatric treatment after that prior incident.

At the present time Petitioner has flashbacks that relate back to the prior incident as well as the May, 2007 incident. Petitioner continues to suffer occasional anxiety and heart palpitations.

Prior to the May, 2007 incident Petitioner had never been prescribed anti-depressant or anxiety medication. He had never sought or received psychiatric care. He had never experienced any of the anxiety or depression problems that he has experienced following the May, 2007 incident.

Deputy [*7] Chief Daniel Meyers testified on behalf of Respondent. The Deputy Chief confirmed that the Aurora S.W.A.T. team was called to the scene. This involved approximately 30 Aurora S.W.A.T. team members.

When the Deputy Chief arrived at the scene, Petitioner and the other officers were in a place of cover and safety. The other ten or fifteen officers present were also in a position of cover and safety. Deputy Chief Meyers acknowledged that this was appropriate because there was a concern that the suspect was armed and dangerous. There were also four hostage negotiators on the scene. Several city blocks, numerous residences and an apartment building were vacated around the perimeter of the suspect's residence. The suspect would not respond to the police officers so it became necessary to "breach the window" of the residence by launching a portable phone inside.

Until the suspect was actually subdued and under control by the Aurora S.W.A.T. team he was considered armed and dangerous. The Deputy Chief acknowledged that "even though it turned out that this assailant had only toy weapons, your department and the Aurora department acted appropriately and in accordance with proper police procedure [*8] in exercising extreme caution in approaching this assailant." The Deputy Chief further acknowledged that "it was perfectly appropriate for Officer Diaz to at all times consider the assailant armed and dangerous."

The records of Dreyer Medical Clinic (PX.1) confirm that Petitioner's condition of ill-being is causally related to the May, 2007 incident. The records confirm that the incident caused Petitioner to develop anxiety and panic attacks for which he was initially prescribed Lexapro. Petitioner was subsequently diagnosed with post-traumatic stress disorder and his medication changed to Sertraline and Clonazepam. Although Petitioner's condition improved, his diagnosis remained post-traumatic stress disorder. Petitioner was last seen at Dreyer Medical Clinic on November 16, 2009 at which time he was noted to be functioning well and taking Clonazepam for his anxiety. The assessment remained post-traumatic stress disorder. Petitioner was to continue with his medication and follow up in six months.

The Respondent had a police officer fitness for duty evaluation performed on Petitioner in August, 2007 (DX.1). Respondent's evaluation confirms symptoms consistent with post-traumatic stress [*9] disorder. Petitioner was found unfit for duty as a police officer at the time of the initial evaluation because he was "emotionally overwhelmed and plagued by significant anxiety and depressive issues" due to "post-traumatic stress symptoms". The evaluation recommended that the Petitioner follow up with a psychologist "specializing in the treatment of significant anxiety problems and post-traumatic stress disorder." The evaluation recommended a minimum of three months of therapy.

Respondent had Petitioner undergo a police officer fitness for duty re-evaluation on November 30, 2007 (RX.2). Once again, Respondent's evaluation confirmed that Petitioner had "experienced significant anxiety symptoms stemming from on-duty incidents in which he had been involved." The evaluation further concluded that Petitioner had been "experiencing significant physical and psychological issues relative to post-traumatic stress disorder" but that his symptoms had stabilized through medication and psychotherapy. Petitioner was subsequently found fit to return to duty as a

police officer. However, it was recommended that Petitioner continue consulting with his psychiatrist for medication management.

[*10] **DISPUTED ISSUES**

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

It is undisputed that Petitioner was involved in a stressful and traumatic incident on May 29, 2007 in the course and scope of his employment as a police patrolman with the Respondent, Village of Montgomery. The Arbitrator finds that the facts of this situation, as set forth in the Statement of Facts, constitute an accident that arose out of and in the course of Petitioner's employment by Respondent.

Since the Supreme Court decided *Pathfinder Co. v. Industrial Commission, 62 Ill.2d 556 (1976),* a petitioner has been allowed to recover benefits for a psychiatric disability even though no physical harm or injury was sustained: "We must conclude that an employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." *Id. at 563.*

Subsequent to *Pathfinder*, numerous Commission decisions have [*11] upheld psychiatric disability claims for police officers: *Meginnis v. Village of Riverdale Police Department*, 99WC32282 (Aug. 14, 2002) upholding permanent total disability award for a police officer who suffered post-traumatic stress disorder as a result of involvement in a shooting incident; *Verkler v. Village of Bourbonnais*, 95WC028975 (Jan. 30, 2003) upholding permanent partial disability award for police dispatcher who suffered post-traumatic stress disorder after taking a call from a citizen involved in a violent home invasion incident; *Kaminski v. Elgin Police Department*, 02WC30545 (Dec. 27, 2007) affirming 50% person as a whole disability award for a police officer diagnosed with post-traumatic stress disorder subsequent to involvement in a fatal shooting incident.

The Arbitrator concludes and finds that an accident occurred on May 29, 2007 that arose out of and in the course of Petitioner's employment by Respondent.

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

Having concluded that the Petitioner suffered accidental injuries, there is no serious dispute that Petitioner subsequent diagnosis of post-traumatic stress disorder [*12] is causally related to the line of duty incident. The Arbitrator relies on the findings in the treating medical records at Dreyer Medical Clinic and the two fitness for duty evaluations performed at the request of Respondent. The Arbitrator finds and concludes that Petitioner's current condition of ill-being, that being post-traumatic stress disorder, is causally related to the accidental injuries of May 29, 2007.

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

Petitioner has been consistently diagnosed with post-traumatic stress disorder and continues to see his psychotherapist on a regular basis and remains on anti-anxiety medication more than two and a half years post incident. Petitioner testified credibly that he still suffers from occasional anxiety and heart palpitations.

The Arbitrator finds and concludes that Petitioner has suffered permanent partial disability to the extent of 15% person as a whole pursuant to Section 8(d)(2) of the Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

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ISMAEL DIAZ, PETITIONER, v. VILLAGE OF MONTGOMERY, RESPONDENT.

NO. 07WC 40520

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

2011 Ill. Wrk. Comp. LEXIS 763; 11IWCC0739

July 25, 2011

JUDGES: Kevin W. Lamborn; Daniel Donohoo

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Respondent appeals Arbitrator Hennessy's decision, filed on May 18, 2010, finding that Petitioner sustained an accident arising out of and in the course of his employment with Respondent on May 29, 2007, and that his posttraumatic stress disorder condition is causally related to the accident. The Arbitrator awarded Petitioner permanent partial disability benefits representing a 15% loss of use to his person as a whole. The issues on review are accident, causal connection, and nature and extent. The Commission, after having considered the entire record, hereby reverses the Arbitrator's decision and finds that Petitioner failed to prove that he sustained a compensable accident. Compensation is therefore denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, a 28 year old police officer, testified that he started working with Respondent in 2004 as a patrolman. On May 29, 2007, Petitioner was on active patrol working on the day shift. Petitioner was responding to a disturbance call between neighbors. They kicked in a door and, after a brief struggle, they took the offender into custody.

Petitioner explained a subsequent incident that occurred [*2] on May 29, 2007, approximately at 4:00 P.M. as follows:

> "While on the disturbance dealing with the original call, there was a neighbor who got upset because there were squad cars blocking his driveway. Asked us if we could move the squad cars and we told him as soon as we were done handling the original call we would move the squad cars. He became upset because we didn't move them immediately. He walked into his house, . . . and he came out and he was holding what appeared to be a gun."

Petitioner testified that after seeing what appeared to be a handgun, he drew his weapon and commanded the subject to drop the gun. The subject did not comply and continued to walk toward Petitioner and Petitioner's backup officer. Petitioner testified further as follows: "When he got approximately I want to say about 15 feet away from where I had taken cover behind a SUV, I saw that it had an orange tip." Petitioner stated that the orange tip indicated to him that the gun was not a real gun, that it was possibly a BB gun or some type of toy gun. Petitioner also stated that he continued to command the subject to drop the gun and that he did not want to take any chances so he continued to stay [*3] behind cover,

The subject eventually retreated into his house, and a standoff began. Petitioner stated that Aurora's special response team responded to the scene, secured the perimeter, and brought in a negotiator. Petitioner stated that he was on the scene until about 11:00 P.M.

Petitioner testified that he could not sleep the evening of the incident. The following day, Petitioner indicated that he started feeling anxiety.

Petitioner testified that on June 1, 2007, during roll call, he experienced the following:

> "When we were in roll call for afternoon shift, I was sitting down at the roll call. I was reading something, and I remember I kind of lost vision on what I was reading. My vision got kind of blurred, and I felt a little dizzy. Got up and went out and got a drink of water. Came back and still felt the same. Had like heart palpitations. I was sweaty. Just felt like nervous."

Petitioner thought that he was dehydrated. He got into his squad car and started to go on his patrol. When his symptoms did not pass, Petitioner returned to the police station and spoke with the deputy chief. Petitioner was transported by ambulance to Rush Copley Hospital.

Petitioner testified that [*4] he began treating at Dreyer Clinic on June 5, 2007. Petitioner was prescribed Lexapro for posttraumatic stress disorder on July 20, 2007. He continues to follow up at Dreyer Clinic every couple of months. Petitioner believes that his follow up visits at Dreyer Clinic will continue indefinitely. At the present time, a psychiatrist at Dreyer Clinic is prescribing Sertraline, an anti-depressant, which he takes on a daily basis, and Clonazepam, an anti-anxiety drug, which he takes on an as needed basis.

Petitioner described a prior incident that occurred approximately two years before the May 29, 2007, incident in early 2005. There was an emergency broadcast indicating that an officer needed assistance involving a man with a knife. Petitioner was the first backup officer that arrived at the scene. The subject was sitting in a chair outside a motel holding a machete in one hand and a knife in his other hand. Petitioner parked his squad car approximately 150 yards away from the subject.

Petitioner described the incident as follows:

> "While on the scene, I was still standing by my squad car and Oswego chief of police, he was standing on the roadway I want to say probably about 100 feet [*5] away from where the guy was sitting. I'm not sure what he said to the guy. The guy didn't appear to say anything. He just started walking to the chief waving the machete and knife. He's walking towards him as they're crossing Route 30, you know, so we all have our guns drawn and he just keeps coming and eventually one of the officers on scene did shoot him I want to say three times and I think the chief shot him once or twice at that time. The subject went down and he was taken into custody."

Petitioner testified that after the incident in Oswego, he did not seek psychiatric treatment. Petitioner indicated that two to three days after the Oswego incident, he experienced anxiety for about a week and then the anxiety went away.

On cross examination, Petitioner testified that he has had weapons training. He believes that weapons training is required twice a year.

Petitioner testified further on cross examination that he did not experience gunfire during the May 29, 2007, incident. Petitioner estimated that about 10 to 15 seconds passed from the time that he first saw the subject to the time he realized the subject had a toy gun. Petitioner indicated that after he realized it was a [*6] toy gun, the closest that the subject got to him was about 10 feet. The subject never made physical contact with Petitioner.

Petitioner estimated that there were 15 to 25 officers on the scene. Petitioner was not at the scene when the incident resolved. He thinks that the special response team threw some tear gas, made entry, and took the subject into custody.

Also on cross examination, Petitioner testified that during the Oswego incident in 2005, he was not threatened directly by the suspect. When an officer shot the suspect, Petitioner was approximately 10 to 15 yards away.

Respondent presented Daniel Meyers, deputy chief of police. Mr. Meyers has worked with Respondent for 25 years. Mr. Meyers has been Petitioner's supervisor for Petitioner's entire career.

Mr. Meyers testified that he was present on the scene on May 29, 2007. Mr. Meyers indicated that the first call came in around 5:50 P.M. Mr. Meyers received a call at 6:13 P.M. and was at the scene at 6:33 P.M. When he arrived, there were about 10 to 15 officers at the scene. Mr. Meyers contacted the Aurora special response team, and approximately 30 members from the team arrived. In total, there were about 40 officers on the [*7] scene. Mr. Meyers confirmed that there were no shots fired during the standoff.

Mr. Meyers testified that when he arrived, Petitioner was on the perimeter behind a tree, about 50 to 60 yards away from the subject's house. Petitioner briefed him. Mr. Meyers also indicated that when he met with Petitioner, he did not notice whether Petitioner was in distress.

On cross examination, Mr. Meyers indicated that even though there was a belief that the subject had a toy gun, there was still a concern that the subject was potentially armed and dangerous. Up until the subject was actually subdued and under control by the special response team, the subject was considered to be armed and dangerous. The items found in the subject's home were "the two toy rifles or air soft rifle and air soft pistol."

The Commission hereby reverses the Arbitrator's decision and finds that Petitioner failed to prove that he sustained a compensable accident. It is well established that recovery for psychological disability absent physical trauma is permitted under the Act. In *Pathfinder Co. v. Industrial Comm'n, 62 Ill.2d 556, 343 N.E.2d 913 (1976),* a female employee suffered [*8] emotional trauma immediately after she extracted a coworker's severed hand from a punch press. The court concluded "that an employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place, and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." *Pathfinder, 62 Ill.2d at 563, 343 N.E.2d at 917.*

In finding that Petitioner failed to prove accident, we rely on *General Motors Parts Division v. Industrial Comm'n, 168 Ill.App.3d 678, 522 N.E.2d 1260 (1988).* In General Motors, the court interpreted the Pathfinder decision and concluded that compensation "is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment." *General Motors, 168 Ill.App.3d at 687, 522 N.E.2d at 1266.* [*9] The court rejected the idea that Pathfinder was meant to be read broadly to include cases involving any mental disability which can be traced to any nonphysical traumatic work related incident.

The Commission adopts a more narrow construction of Pathfinder as expressed in the General Motors decision. In this case, Petitioner is a police officer and is trained in weapons training. Petitioner is also trained to handle encounters with subjects who are considered armed and dangerous. The event on May 29, 2007, was not Petitioner's first encounter with an armed and dangerous subject, as evidenced by the Oswego incident in 2005 during which shots were fired. Petitioner testified that he quickly realized, in a matter of seconds, that the subject was carrying a toy gun. After Petitioner realized the subject was carrying a toy gun, the closest that the subject ever got to Petitioner was approximately 10 feet. Petitioner indicated that the subject never made physical contact with him. Petitioner also testified that he did not experience gunfire during the incident. Petitioner also was not on the scene when the standoff resolved. We acknowledge that Petitioner's encounter with the [*10] subject on May 29, 2007, presented a dangerous and precarious situation. We find, however, that the encounter that Petitioner had with the subject on May 29, 2007, is not an uncommon event of significantly greater proportion than what he would otherwise be subjected to in the normal course of his employment.

Our decision is consistent with other Commission decisions. In *Sole v. Livingston County, 10 IWCC 1121,* the Commission affirmed the Arbitrator's decision denying benefits to the claimant who worked as a dispatcher at a 911 call center. The claimant alleged that he sustained posttraumatic stress disorder after handling a call involving a residential fire. A firefighter died as a result of the injuries he sustained in the residential fire. In denying benefits, the Commission noted that the claimant acknowledged that he handled a lot of calls which involved trauma and death, and the call that he took involving the fire was not unusual for his position.

In *Ushman v. City of Springfield, 08 IWCC 0234,* the Commission affirmed the Arbitrator's finding that Petitioner failed to prove that he sustained a compensable accident. [*11] The claimant, a police officer, was involved in a chase of a murder suspect who was considered to be armed and dangerous. The suspect fired his rifle at the claimant, and the claimant fired three shots at the suspect. The Arbitrator found that "the occurrence on December 16, 2004 would not be an uncommon event of significantly greater proportion than that to which he is subjected as a police officer." The Arbitrator also found that the claimant did not suffer a sudden severe emotional shock resulting in immediately apparent psychic injury.

The Commission concludes that Petitioner failed to prove that he sustained a compensable accident as a result of the incident on May 29, 2007.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision, filed on May 18, 2010, is hereby reversed. Compensation is denied.

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

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and [*12] deposited with the Office of the Secretary of the Commission.

DISSENTBY: THOMAS J. TYRRELL

DISSENT: I respectfully disagree with the majority opinion and would affirm and adopt the Arbitrator's decision. I believe that Petitioner has established that he sustained compensable psychological injuries, namely posttraumatic stress disorder. Petitioner was originally handling a disturbance call on May 29, 2007. In the course of handling the disturbance call, a neighbor appeared and wanted the squad cars to be moved. The neighbor became upset that they were not moved immediately, went into his home, and returned and pulled out a handgun. Petitioner ordered him to drop the gun. Despite the fact that at least two policemen had drawn their weapons, the subject continued to advance toward Petitioner. The subject ran back to his home and a standoff ensued.

The standoff lasted for hours, well into the night, and involved over 40 policemen. A special response team and a negotiator were called to the scene. Tear gas was shot into the subject's home, and the special response team entered the home and the subject was ultimately taken into custody. Whether the handgun was a real gun or a toy gun is immaterial. The subject, [*13] at all times, was treated as armed and dangerous.

The incident on May 29, 2007, is not an event that is common or anticipated in the general working population or among police officers. When police officers receive a call, their mindset is prepared to handle that particular type of call. In the process of handling the disturbance, a deranged individual approached Petitioner with a handgun, after which a long, drawn out standoff occurred. The incident is no less shocking or traumatic because Petitioner is a police officer.

Moreover, I disagree with the majority and believe that the incident on May 29, 2007, is an uncommon event of significantly greater proportion than what he would otherwise be subjected to in the normal course of his employment. Petitioner is a patrolman and, as such, most likely does not encounter large scale, dangerous incidents such as this incident in the normal course of his police work. The environment in which Petitioner works is a suburban town. His environment is different from working in an inner city, urban environment in which such large incidents may not be uncommon. A veteran Chicago policeman assigned to gang crimes task force, who may have the unfortunate [*14] circumstance of encountering dangerous and serious event on a daily basis, may find certain events more common and less shocking or traumatic than a relatively young policeman with less experience working in a smaller town.

In Kaminski v. Elgin Police Department, 02 WC 30545, the Commission adopted the Arbitrator's finding that the claimant, a police officer, sustained compensable accidents on August 25, 2001, and September 4, 2001. On August 25, 2001, the claimant was investigating the abduction and sexual assault of a 9 year old boy. The investigation revealed that the child had been orally and anally assaulted. On September 4, 2001, the claimant was present and had his gun drawn when a 19 year old suspect was fatally shot. The Arbitrator found that the claimant was "exposed to traumatic events which presented sudden and severe emotional shocks that would cause an emotional response in any reasonable person." The Arbitrator also found that these "events are no less shocking to police officers than to the general public."

In Verkler v. Village of Bourbonnais, 95 WC 28975, the Commission affirmed and adopted the Arbitrator's decision awarding compensation to a claimant who [*15] was a dispatcher for respondent's police department. The claimant received an emergency telephone call from a woman who reported that there was an intruder in her home who was stabbing people, including children. The claimant later learned that one of the people died from the injuries the intruder inflicted. The Arbitrator found that the incident "establishes that petitioner sustained a severe, immediate emotional trauma on January 13, 1994 when she took the emergency phone call."

For the reasons noted above, I respectfully dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

2013 IL App (2d) 120294WC
No. 2-12-0294WC
Opinion filed April 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

ISMAEL DIAZ, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (The Village of Montgomery, Appellee).	)	Appeal from the Circuit Court of Kane County. No. 11-MR-377 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE STEWART delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman and Hudson concurred in the judgment and opinion.

Justice Turner dissented, with opinion.

OPINION

¶ 1 The claimant, Ismael Diaz, filed an application for adjustment of claim against his employer, the Village of Montgomery, seeking workers' compensation benefits for posttraumatic stress disorder allegedly caused by a work-related accident on May 29, 2007. The claim proceeded to an arbitration hearing pursuant to the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)). The arbitrator found that the claimant sustained an accident that arose out of and in the course of his employment and awarded temporary and

permanent disability benefits. The employer appealed to the Illinois Workers' Compensation Commission (Commission) and, in a 2 to 1 decision, the Commission reversed the arbitrator's decision and found that the claimant failed to prove that he sustained a compensable accident. The claimant filed a timely petition for review in the circuit court of Kane County, and the circuit court confirmed the Commission's decision. The claimant filed a timely notice of appeal to this court.

¶ 2 This case requires us to consider the proof necessary for a claimant to recover in a workers' compensation claim for a psychological disability in the absence of a physical injury, a type of case commonly known as a "mental-mental" claim. The sole issue raised by the claimant in this appeal is whether, as a police officer, he was improperly held to a higher standard of proof than workers in other occupations. We hold, as a matter of law, that the Commission applied the wrong standard to this claim. Accordingly, we reverse the decision of the Commission and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Our recitation of the facts in this case is derived from the evidence presented at the arbitration hearing held on February 17, 2010. The claimant testified that he began working for the employer in 2004, as a patrolman. On May 29, 2007, he responded to a call about a disturbance between neighbors. While dealing with the original call, another neighbor became upset because the police squad cars were blocking his driveway and asked the officers to move the cars. The neighbor, who was later identified as a Mr. Ethridge, was told that the cars would be moved as soon as the police officers were done handling the original call. Ethridge became upset, went into his house, and came out holding what appeared to be a handgun.

¶ 5 The claimant testified that after seeing the handgun, he drew his weapon and commanded Ethridge to drop the gun. Ethridge did not comply and continued to walk toward the claimant and another officer. The claimant testified that "[w]hen he got approximately I want to say about 15 feet away from where I had taken cover behind a SUV, I saw that [the gun] had an orange tip—." The claimant stated that the orange tip indicated to him that the handgun might not be a real gun, that it was possibly a BB gun or some type of toy gun. He continued to command Ethridge to drop the gun. The claimant stated that while he believed Ethridge had a BB gun or some type of toy gun, he did not want to take any chances so he stayed behind cover. The closest Ethridge came to him while holding the gun was about 10 feet away. The claimant stated that 10 to 15 seconds elapsed from the time he saw Ethridge with the gun until he realized it was a BB gun or some type of toy gun. At the time he instructed Ethridge to drop the gun, there was just one other officer present. The claimant called for backup, and additional officers arrived within one or two minutes.

¶ 6 The claimant testified that Ethridge eventually retreated into his house at which point a standoff began. The Aurora special response team responded to the scene, secured the perimeter of the house, and brought in a negotiator to commence talks with Ethridge. The claimant remained on the scene until approximately 11 p.m., but left prior to the resolution of the standoff. Eventually the special response team used tear gas or smoke bombs to gain entrance to Ethridge's home and took him into custody.

¶ 7 Daniel Meyers, deputy chief of police for the employer, testified that he has supervised the claimant the entire time the claimant has worked for the employer. He stated that he was present at the incident on May 29, 2007, and that the original disturbance call came in at about 6 p.m. He received the call for backup at 6:13 p.m., and he arrived on the scene at 6:33 p.m.

When he arrived, the claimant was behind a tree located about 40 to 50 yards from the house. The claimant briefed Deputy Chief Meyers on the circumstances leading up to the standoff. Deputy Chief Meyers testified that when he arrived, there were approximately 10 to 15 officers on the scene. He stated that the Aurora special response team was returning from training and that he asked for their assistance. The entire team of just under 30 members arrived to assist with the standoff. He estimated that there were more than 40 officers on the scene. Deputy Chief Meyers testified that even though there was a belief that Ethridge had a toy gun, there was still a concern by all the officers present that he was potentially armed and dangerous.

¶ 8 The claimant testified that he did not immediately experience anxiety after the incident. He stated that he "was just wound up, you know, I guess like adrenaline." He went to work the next day and did not experience palpitations or anxiety. On May 31, 2007, he responded to an accident with injuries, and he felt anxious. On June 1, 2007, during roll call, he experienced the following:

> "I was reading something, and I remember I kind of lost vision on what I was reading. My vision got kind of blurred, and I felt a little dizzy. Got up and went and got a drink of water. Came back and still felt the same. Had like heart palpitations. I was sweaty. Just felt like nervous."

The claimant testified that he thought he was dehydrated. He did not mention his symptoms to anyone. He got into his squad car and started his patrol, thinking that the symptoms would pass, but his condition did not improve. He realized that he should not be driving so he returned to the station. The claimant spoke to Deputy Chief Meyers, who suggested that an ambulance be called. Deputy Chief Meyers testified that the claimant did not complain of nervousness, anxiety, or palpitations prior to that day.

¶ 9 The claimant was transported by ambulance to a hospital where he was examined to rule out a heart attack. He began treatment at the Dreyer Clinic on June 5, 2007, and was diagnosed with posttraumatic stress disorder. The medical records from the Dreyer Clinic reflect that he was treated with medication and counseling. Although he attempted to continue working, he suffered from multiple "panic attacks" and was overwhelmed by anxiety. He reported flashbacks from the incident in May and from a prior incident described below, as well as troubling dreams about his work as a police officer.

¶ 10 At the beginning of August, the claimant had a discussion with Chief Schmidt in which he told the chief that he did not believe he could perform the job of a police officer due to the anxiety he was experiencing. The chief agreed that the claimant should be off work. During the time he was off work, he received full pay through his sick leave, "comp" time, and vacation time.

¶ 11 On August 21, 2007, the claimant underwent a police officer fitness-for-duty evaluation at the request of the chief of police. The examiners found the claimant unfit for duty as a police officer at that time. They found he was emotionally overwhelmed and plagued by significant anxiety and depressive issues. They found the assessment results were consistent with posttraumatic stress symptoms and warranted intensive treatment prior to his return to the job.

¶ 12 Prior to and following the fitness evaluation, the claimant underwent treatment which included psychiatric care and counseling. The claimant testified that he continues to follow up with the Dreyer Clinic every couple of months and that the treatment will continue indefinitely. He stated that he currently takes sertraline, an antidepressant, on a daily basis and clonazepam, an antianxiety drug, as needed.

¶ 13 The claimant also described an incident that occurred in early 2005, two years prior to the May 2007 incident. There was an emergency broadcast indicating that an officer needed assistance with a man with a knife. The claimant responded and was the first backup officer at the scene. The officer requesting assistance told the claimant that he was writing a report when an individual approached his squad car and broke out the window. When the claimant arrived at the scene, the suspect was sitting at a motel with a machete in one hand and a knife in the other hand, approximately 150 yards from where the claimant parked his squad car. The claimant was standing by his squad car and the Oswego chief of police was standing on the roadway about 100 feet from the suspect when the suspect started walking toward the chief waving the machete and knife. Although the officers had their guns drawn, the suspect kept approaching until he was shot several times by other officers. At the time of the shooting, the claimant had moved to within 10 to 15 yards from the suspect. After the shooting incident, the claimant had some anxiety that lasted for about one week, but he did not seek or obtain psychiatric treatment at that time.

¶ 14 The claimant testified that he had never previously experienced the level of anxiety or depression he suffered from after the May 2007 incident. Prior to May 2007, he was never prescribed antidepressant or antianxiety medication, and he never sought or received psychiatric care. The claimant stated that certain police calls now create anxious feelings, but that the medicine he takes helps control his anxiety. Since he started taking his medications "the symptoms, if they do come, they're not as severe and they're not as long lasting as they were without the medication."

¶ 15 The claimant testified that he has had weapons training and that he was required to have weapons training twice per year. He further stated that he had been trained in how to deal with

someone with a weapon. He stated that he followed proper protocol during the May 29, 2007, incident.

¶ 16 On November 11, 2007, the claimant underwent a police officer fitness-for-duty reevaluation. At that time the examiners found that the claimant's symptoms of anxiety, apprehension, and agitation had dissipated. The examiners found "based on personality and interview data, as well as positive progress in his respective treatments," that the claimant was fit for duty as a police officer. It was recommended that he continue consulting with his psychiatrist for medication management and with his psychotherapist to assist with his transition into his position and to address handling charged or stressful situations. The claimant returned to light-duty work on October 27, 2007, and to full-duty work on November 30, 2007.

¶ 17 The arbitrator, citing the supreme court's decision in *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 343 N.E.2d 913 (1976), found that the claimant was involved in an accident on May 29, 2007, that the accident arose out of and in the course of his employment, and that his condition of ill-being was causally related to the accident. He found that the claimant had been temporarily totally disabled from August 1, 2007, through October 23, 2007, and that because the employer had paid him a full salary during that period, it should receive full credit for those payments. He further found that the claimant's injury caused a 15% loss of the person as a whole and ordered the employer to pay the claimant permanent partial disability benefits of $619.97 per week for 75 weeks.

¶ 18 The Commission, in a 2 to 1 decision, reversed the arbitrator's decision and found that the claimant failed to prove that he sustained a compensable accident. In doing so, a majority of the Commission found as follows:

"In finding that Petitioner failed to prove accident, we rely on *General Motors Parts Division v. Industrial Comm'n.*, 168 Ill. App. 3d 678, 522 N.E.2d 1260 (1988). In *General Motors*, the court interpreted the *Pathfinder* decision and concluded that compensation 'is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment.'

* * *

The Commission adopts a more narrow construction of *Pathfinder* as expressed in the *General Motors* decision. In this case, Petitioner is a police officer and is trained in weapons training. Petitioner is also trained to handle encounters with subjects who are considered armed and dangerous. *** We acknowledge that Petitioner's encounter with the subject on May 29, 2007, presented a dangerous and precarious situation. We find, however, that the encounter that Petitioner had with the subject on May 29, 2007, is not an uncommon event of significantly greater proportion than what he would otherwise be subjected to in the normal course of his employment."

One Commissioner dissented, noting that "[t]he incident is no less shocking or traumatic because petitioner is a police officer."

¶ 19 The claimant filed a petition for review in the circuit court of Kane County. In a *de novo* review, the court confirmed the Commission's decision, holding that there was no showing of "a sudden severe emotional shock resulting in immediately apparent psychic injury." The claimant filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 The parties differ on the standard of review. The claimant argues that the only question is the application of the law to the undisputed facts, and therefore, the Commission's decision should be reviewed *de novo* and set aside. The employer argues that the Commission's decision should be affirmed because it was not against the manifest weight of the evidence. We agree with the claimant for two reasons. First, the relevant facts in this case are undisputed. There is no indication that the Commission drew any inferences or did anything other than apply the law to the undisputed facts. When the facts are undisputed, deference should be given to the Commission's decision only when it must draw inferences from the facts in order to render its decision. *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 553, 813 N.E.2d 119, 123-24 (2004). When there is no question of inference or weight to be given evidence, and all the Commission does is apply the law to the undisputed facts, review is *de novo*. *Id.*, 813 N.E.2d at 124. Second, the issue in this case is whether the Commission held the claimant to a higher standard of proof than is required in a mental-mental claim. "Whether a claimant must prove certain elements to establish a compensable claim is purely a question of law and it is therefore reviewed *de novo*." *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 912 (2002). Findings based on the application of incorrect conclusions of law are not entitled to deference. *Id.* Accordingly, our review is *de novo*.

¶ 22 The underlying question is whether the Commission held the claimant, a police officer, to a unique standard of "severe emotional shock" not otherwise applicable to employees in other lines of work and its decision is, therefore, contrary to law. The history of this case demonstrates the confusion that exists regarding the elements of proof necessary to establish a mental-mental claim. The arbitrator, citing only *Pathfinder*, found the claim to be compensable.

A majority of the Commission, however, by its own terms, adopted the "more narrow construction" of *General Motors,* and denied compensation.

¶ 23 Prior to the court's holding in *Pathfinder*, mental disability was compensable only if it was precipitated by physical contact or injury. *City of Springfield v. Industrial Comm'n*, 291 Ill. App. 3d 734, 738, 685 N.E.2d 12, 14 (1997). In *Pathfinder*, the claimant pulled a coworker's severed hand from a machine, fainted, and subsequently developed psychological problems. *Pathfinder*, 62 Ill. 2d at 559, 343 N.E.2d at 915. In upholding the Commission's award, the Illinois Supreme Court set out guidelines for the compensability of psychological disability absent physical trauma and thus established the mental-mental theory of recovery. *Id.* at 563, 343 N.E.2d at 917. The court held that an employee who "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." *Id.*

¶ 24 To be compensable under the Act, the injury complained of must arise out of and in the course of employment. *Baggett*, 201 Ill. 2d at 194, 775 N.E.2d at 912. In mental-mental cases, a claimant must be engaged in employment at the time and place of the precipitating cause of the injury and must prove that the injury occurred because of a work-related risk or because the employment placed the claimant at risk of exposure exceeding that of the general public. *Id.* at 195, 775 N.E.2d at 913.

¶ 25 In the instant case, the risk the claimant was exposed to arose out of and in the course of his employment. He was responding to a disturbance call when an unstable individual approached him. When he did not immediately do what the individual wanted, the individual pulled a gun and pointed it at the claimant. The claimant did not realize until sometime after the

gun was pulled that it was likely a toy gun. Backup was called and the individual returned to his home where an extended standoff occurred. Until the individual was restrained, he was considered by almost 40 officers to be armed and dangerous. Three days after the incident, the claimant had a panic attack. He was subsequently diagnosed with posttraumatic stress disorder. There was a clear causal relationship between the May 29, 2007, event and his disability.

¶ 26 In the instant case, the Commission did not find that the claimant failed to prove any of the *Pathfinder* requirements that he suffered a sudden, severe emotional shock that was traceable to a definite time and place and that caused his psychological injury. Instead, the Commission adopted "a more narrow construction of *Pathfinder* as expressed in the *General Motors* decision." The claimant asserts that the Commission misapplied *General Motors*' interpretation of *Pathfinder*.

¶ 27 In *General Motors*, the personnel director yelled at the claimant after the claimant made repeated requests to change shifts. *General Motors*, 168 Ill. App. 3d at 679-80, 522 N.E.2d at 1261. According to the claimant the personnel director became outraged and responded with "a highly charged invective punctuated by obscene and racial remarks." *Id.* Both the personnel director and the claimant were African-American. *Id.* at 679, 522 N.E.2d at 1261. The claimant testified that the incident left him feeling like less of a man and at the end of his shift he started drinking. *Id.* at 680, 522 N.E.2d at 1261. The claimant developed a drinking problem, but continued to work his regular shift until six months later when he fell down a flight of stairs at his niece's house. *Id.* More than one year after the yelling incident, the claimant started seeing a psychiatrist. *Id.* The arbitrator denied benefits on the basis that the claimant failed to prove he sustained a compensable, accidental injury. *Id.* at 685, 522 N.E.2d at 1264. The Commission reversed, and the circuit court confirmed the Commission. *Id.*, 522 N.E.2d at 1264-65.

¶ 28 The appellate court examined whether the facts of the case justified an award under the rationale in *Pathfinder*. The court held: "We do not read *Pathfinder* to permit recovery for every nontraumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety." *Id.* at 687, 522 N.E.2d at 1266. The court concluded that "the supreme court's decision in *Pathfinder* is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment." *Id.* The court went on to clarify that "anxiety, emotional stress or depression which develops over time in the normal course of an employment relationship does not constitute a compensable injury within the holding of *Pathfinder*." *Id.* It further found that "[c]ompensation for nontraumatic psychic injury cannot be dependent solely upon the particular vicissitudes of the individual employee as he relates to his general work environment." *Id.*

¶ 29 The court concluded that the claimant failed to establish, as a matter of law, that he suffered a compensable injury within the meaning of *Pathfinder*. *Id.* The court found that the episode which allegedly precipitated the disability involved an argument between the employee and his supervisor, and while the verbal abuse the claimant suffered was unpleasant, it was an ordinary incident of employment which might be encountered in a great many occupations. *Id.* at 688, 522 N.E.2d at 1266. The court further found that the claimant failed to establish that his disability flowed from the confrontation with the personnel director, because he did not seek treatment for his mental condition until almost 15 months after the incident, there were contradictory statements by the claimant as to the cause of his depression, and the claimant's

physician testified that his condition was, in part, a form of male menopause. *Id.*, 522 N.E.2d at 1266-67.

¶ 30 In the instant case, the Commission acknowledged that the claimant's May 29, 2007, encounter with an individual armed with an orange-tipped gun presented a dangerous and precarious situation, but it denied compensation based on a statement taken out of context from *General Motors*. It found that the claimant could not recover because the traumatic incident was not an uncommon event of significantly greater proportion than what he would otherwise have been subjected to in the normal course of his employment as a police officer. The Commission denied the claimant compensation because he "is a police officer and is trained in weapons handling" and is "trained to handle encounters with subjects who are considered armed and dangerous."

¶ 31 Read in context, *General Motors* uses the phrase "an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment" to distinguish compensable claims from a mental disability that arises from the ordinary job-related stress common to all lines of employment. This is in keeping with the well-established holding that mental disorders not resulting from a severe emotional shock "must arise from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience." *Chicago Board of Education v. Industrial Comm'n*, 169 Ill. App. 3d 454, 468, 523 N.E.2d 912, 918 (1988). To allow compensation for a gradually developing mental disability which is attributed to factors such as worry, anxiety, tension, pressure, and overwork without proof of a specific time, place, and event producing the disability would "open a floodgate for workers who succumb to the everyday pressures of life." *Id.* at 466, 523 N.E.2d at 917. The instant case is not one where the

claimant developed a mental disability attributable to factors such as worry, anxiety, tension, pressure, overwork, and the emotional strain all employees experience. The May 29, 2007, incident was a severe emotional shock traceable to a specific time, place, and event that produced the claimant's disability.

¶ 32 By adopting such a narrow reading of *General Motors*, the Commission ignores that the language it relies on was meant to distinguish between psychic injuries an employee suffers because of a stressful work-related episode that is an ordinary incident of employment which might be encountered in a great many occupations and psychic injuries an employee suffers because of a severe emotional shock traceable to a definite time, place, and cause. Under the Commission's analysis it would be virtually impossible for police officers or others involved in dangerous occupations to qualify for a mental-mental claim. To be compensable under the Act, the traumatic incident must arise out of the claimant's employment as a police officer. It was because the claimant was a police officer that he encountered the subject with a handgun. According to the Commission's analysis, if the incident involves something that the claimant is trained for, it is not an uncommon event out of proportion to the incidents of normal employment activity, and therefore, it cannot be compensable. Under the Commission's analysis, a firefighter who rescued people from the World Trade Center on September 11, 2001, and subsequently developed posttraumatic stress disorder could not recover, because firefighters are trained to rescue people from burning buildings.

¶ 33 While we believe the Commission misinterpreted *General Motors*, we acknowledge that a literal reading of the language in that case, taken out of context, would result in a narrower construction of the standard set forth in *Pathfinder*. A requirement that a claimant prove an event "of significantly greater proportion or dimension than that to which the employee would

otherwise be subjected in the normal course of employment," if applied within the context of a claimant's particular occupation, would make it virtually impossible for employees in inherently dangerous occupations to obtain compensation. Nothing in *Pathfinder* requires that the "sudden, severe emotional shock" which must be proved should be considered within the context of the claimant's occupation or training. On the contrary, the *Pathfinder* court specifically noted that the shock experienced by the claimant in that case "would be the reaction of a person of normal sensibilities." *Pathfinder*, 62 Ill. 2d at 567, 343 N.E.2d at 919. Accordingly, we believe that whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard, rather than a subjective standard that takes into account the claimant's occupation and training. To the extent that the holding in *General Motors* would require, in a mental-mental claim, that the precipitating event be viewed in the context of the claimant's occupation and training, we reject the court's decision in that case and decline to follow it.

¶ 34 The main purpose of the Act is to provide protection for injured workers. *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 419 (2006). The Commission applied an incorrect standard of proof and failed to provide compensation to an injured worker in a compensable mental-mental claim. The claimant suffered a sudden, severe emotional shock on May 29, 2007, that resulted in his developing posttraumatic stress disorder. The accident arose out of and in the course of the claimant's employment, and his condition of ill-being was causally related to the accident. The psychological harm the claimant suffered is compensable under the Act.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Kane County confirming the decision of the Commission is reversed, the decision of the Commission is reversed, and this cause is remanded to the Commission for further proceedings consistent with this opinion.

¶ 37 Reversed and remanded.

¶ 38 JUSTICE TURNER, dissenting.

¶ 39 I respectfully dissent. Here, the claimant could recover only if he demonstrated his psychological injury was caused by "a sudden, severe emotional shock traceable to a definite time, place and cause." *Pathfinder*, 62 Ill. 2d at 563, 343 N.E.2d at 917. In *Pathfinder*, 62 Ill. 2d at 559, 343 N.E.2d at 915, the claimant had an immediate reaction of fainting when she pulled the coworker's hand out of the punch press and underwent immediate medical treatment following the event. This court has emphasized the limited nature of such compensable, psychological injuries. In *General Motors*, 168 Ill. App. 3d at 687, 522 N.E.2d at 1266, this court concluded the following:

> "[T]he supreme court's decision in *Pathfinder* is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in *immediately apparent psychic injury* and is precipitated by an *uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment*." (Emphases added.)

¶ 40 In reversing the Commission in this case, the majority rejects *General Motors'* interpretation of *Pathfinder* to the extent it suggests the determination of whether a sudden, severe emotional shock occurred must be "considered within the context of the claimant's occupation or training." *Supra* ¶ 33. I disagree with that rejection as *General Motors'* interpretation of *Pathfinder* has stood as precedential authority for almost a quarter of a century.

See *Runion v. Industrial Comm'n*, 245 Ill. App. 3d 470, 472, 615 N.E.2d 8, 9 (1993); *Jones v. Chicago Transit Authority*, Ill. Workers' Compensation Comm'n, No. 10-WC-25860 (Dec. 23, 2011). Moreover, I disagree with the Commission's description of *General Motors* "as a more narrow construction of *Pathfinder*." *Diaz v. Village of Montgomery*, Ill. Workers' Compensation Comm'n, No. 07-WC-40520 (May 18, 2010). I believe *General Motors* is a fair interpretation of our supreme court's decision in *Pathfinder*. The claimant's occupation and training are part of the circumstances that must be considered in determining whether an event causing a sudden, severe shock has occurred. Naturally, for an event to cause sudden, severe shock, it must be out of the normal work routine; otherwise it would not cause a shock.

¶ 41 Regardless, the majority should not even reach the issue of the validity of *General Motors*' interpretation of *Pathfinder* because the undisputed facts show the claimant did not suffer a sudden, severe emotional shock. The term "shock" is defined as "a sudden or violent mental or emotional disturbance." Merriam-Webster's Collegiate Dictionary 1079 (10th ed. 2000). The record contains no evidence the claimant had any immediate mental or emotional disturbance when he witnessed a man with a gun that the claimant quickly realized was a toy. The claimant testified he did not experience any immediate anxiety after the incident and was fine the next day as well. It was not until two days after the incident that he felt some anxiety when responding to an accident with injuries. Those facts alone are sufficient to find the claimant did not establish he suffered sudden and severe shock from the gun incident as contemplated by our supreme court in *Pathfinder*. Thus, even if the Commission overemphasized the claimant's employment as a police officer, the facts of this case still do not show an accident under *Pathfinder*. The claimant's training and occupation are just additional

facts that make it even less likely the claimant suffered a severe, sudden shock. Accordingly, I would affirm the Commission's decision.

¶ 42 Additionally, while I agree with the *de novo* standard of review used in this case, I note this court utilized the manifest-weight-of-the-evidence standard of review in a recent mental-mental case where the facts were undisputed. See *Chicago Transit Authority v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120253WC, ¶ 23. I find the court's application of the different standards of review inconsistent and disagree with *Chicago Transit Authority*'s reasoning for applying a manifest-weight-of-the-evidence standard. See *Chicago Transit Authority*, 2013 IL App (1st) 120253, ¶¶ 21-23. In my view, no coherent explanation justifies utilizing these inconstant standards.