2012 IL App (1st) 113130WC

Workers' Compensation
Commission Division
Filed: December 21, 2012

Nos. 1-11-3130WC and 1-11-3182WC (Consolidated)

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

UNIVERSITY OF ILLINOIS HOSPITAL, Appellant / Cross-Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (MARTHA ARAGON, Appellee / Cross-Appellant).	)	Appeal from the Circuit Court of Cook County Nos. 10 L 051012 and 10 L 051013 Honorable Margaret Brennan, Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Justices Hudson, Holdridge, Appleton and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 Both the claimant, Martha Aragon, and the University of Illinois Hospital (University Hospital) have appealed from an order of the Circuit Court of Cook County which confirmed a decision of Illinois Workers' Compensation Commission (Commission), awarding the claimant certain benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), for injuries she allegedly received while in the employ of University Hospital. We consolidated the two appeals for review. For the reasons that follow, we vacate the judgment of the

circuit court, and remand the cause to the Commission for entry of a final decision with regard to the claimant's request for permanent disability benefits.

¶ 2 The following factual recitation is taken from the record on appeal, including the evidence presented at the arbitration hearing conducted on September 2 and 23, 2008.

¶ 3 At the arbitration hearing, the claimant presented testimony and documentary evidence with regard to her 10-year employment as a building service worker with University Hospital and her treatment for carpal tunnel syndrome. She also presented expert testimony indicating that the development of her carpal tunnel syndrome and her current condition of ill-being were causally connected to her employment with University Hospital and that she was permanently and totally disabled under the odd-lot category.

¶ 4 University Hospital presented medical evidence and expert opinions indicating that the claimant's injury and current condition of ill-being were caused by a systemic disease, which was not related to her employment. In addition, University Hospital presented evidence that the claimant was not permanently and totally disabled and was capable of performing the necessary functions of a clerical-assistant, a position that had been offered to the claimant in December 2005, but which she had rejected.

¶ 5 Upon consideration of the evidence presented at the hearing, the arbitrator found that the claimant sustained a work-related injury, as manifested on October 21, 1999, which aggravated a pre-existing condition, and that the current condition of ill-being in the claimant's wrists and hands was causally connected to the employment injury. The arbitrator determined that the claimant was entitled to temporary total disability (TTD) benefits for 179 4/7 weeks from February 14, 2000,

through July 29, 2003. The arbitrator also found that the claimant sustained a permanent partial disability (PPD) to the extent of 25% loss of use of the right hand and 22.5% loss of use of the left hand. As a consequence, the arbitrator awarded the claimant PPD benefits of $291.11 per week for a period of 73.625 weeks, pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 2008)). The arbitrator also determined that University Hospital was liable for compensation that had accrued from July 30, 2003, through the date of the hearing and for $4,912.67 in claimed medical expenses.

¶ 6 Both the claimant and University Hospital sought review of the arbitrator's decision before the Commission. On review, the Commission, with one commissioner dissenting and one commissioner concurring in part and dissenting in part, corrected and clarified certain portions of the arbitrator's decision, but affirmed and adopted the arbitrator's decision as to causation, TTD, and medical expenses. The Commission's decision also purported to award the claimant 90 1/7 weeks of PPD benefits, based, in part, on the determination that the claimant was not permanently and totally disabled under the odd-lot category and, therefore, was not entitled to permanent total disability (PTD) benefits. However, only one commissioner expressed the view that the claimant was entitled to PPD benefits and was not entitled to PTD benefits under the odd-lot theory. A second commissioner, who dissented in part, concluded that the claimant had proved that she was permanently and totally disabled under the odd-lot category and was entitled to PTD benefits. The third commissioner, who dissented from the entire decision, determined that the claimant had failed to prove that her injury and current condition of ill-being were causally related to her employment, thereby precluding the claimant's entitlement to any benefits, including a permanency award.

¶ 7 The claimant and University Hospital both sought review of the Commission's decision in

the circuit court of Cook County. The circuit court confirmed the Commission's decision, and this consolidated appeal followed.

¶ 8 The parties did not raise the issue of the circuit court's jurisdiction in their original briefs. However, this court ordered supplemental briefing on the question, based on our obligation to consider the jurisdictional issue *sua sponte*. That obligation stems from the fundamental principle that, if the circuit court lacked subject matter jurisdiction, then its orders are void and of no effect. *Supreme Catering v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 111220WC, ¶ 6; *Rojas v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 965, 970, 942 N.E.2d 668 (2010)). The failure of a party to object to the lack of subject matter jurisdiction cannot confer jurisdiction upon the court. *Supreme Catering*, at ¶ 6; *Taylor v. Industrial Comm'n*, 221 Ill. App. 3d 701, 703, 583 N.E.2d 4 (1991). Subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties. *Supreme Catering*, at ¶ 6; *Jones v. Industrial Comm'n*, 335 Ill. App. 3d 340, 343, 780 N.E.2d 697 (2002).

¶ 9 Although Illinois courts are courts of general jurisdiction and are presumed to have subject matter jurisdiction, this presumption does not apply to workers' compensation proceedings. *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502, 879 N.E.2d 439 (2007); *Kavonius v. Industrial Comm'n*, 314 Ill. App. 3d 166, 169, 731 N.E.2d 1287 (2000). It is firmly established that " '[o]nly final determinations of the Commission are appealable.' " *Supreme Catering*, at ¶ 7 (quoting *Bechtel Group, Inc. v. Industrial Comm'n*, 305 Ill. App. 3d 769, 772, 713 N.E.2d 220 (1999)). A judgment is final if it determines the litigation on the merits, and it is not final if the order leaves disputed matters pending and undecided. See *Supreme Catering*, at ¶ 7 (citing *Honda*

of Lisle v. Industrial Comm'n, 269 Ill. App. 3d 412, 414, 646 N.E.2d 318 (1995)).

¶ 10 Section 19(e) of the Workers' Compensation Act provides, in relevant part, that "a decision of the Commission shall be approved by a majority of a panel of 3 members of the Commission ***." In this case, the record affirmatively demonstrates that there was no approval by a majority of the 3-member panel of commissioners with regard to the claimant's entitlement to a permanent disability award.

¶ 11 As set forth above, just one commissioner, Commissioner Dauphin, expressed the view that the claimant was entitled to PPD benefits and was not entitled to PTD benefits under the odd-lot theory. A second commissioner, Commissioner Mason, dissented in part and concluded that the claimant had proved that she was permanently and totally disabled under the odd-lot category and was entitled to PTD benefits. The third commissioner, Commissioner Lindsay, dissented from the entire decision and found that the claimant was not entitled to benefits under the Act because she had failed to prove that her injury and current condition of ill-being were causally related to her employment. Thus, the two commissioners who found that the claimant was entitled to receive benefits did not agree with regard to a permanency award. In light of the fact that a majority of the commissioners did not approve the PPD award, the decision issued by the Commission is not final because it does not dispose of the claimant's request for permanent disability benefits in accordance with the unambiguous language of section 19(e).

¶ 12 In the absence of a final determination by the Commission, the circuit court lacked the requisite subject-matter jurisdiction to entertain this matter and enter its order confirming the Commission's decision. *Bechtel Group, Inc.*, 305 Ill. App. 3d at 772.

¶ 13 For the foregoing reasons, we vacate the judgment of the circuit court, and remand the cause to the Commission for entry of a final decision with regard to the claimant's request for permanent disability benefits.

¶ 14 Circuit court judgment vacated, and cause remanded to Commission for further proceedings.

1 of 1 DOCUMENT

MARTHA ARAGON, PETITIONER, v. UNIVERSITY OF ILLINOIS HOSPITAL, RESPONDENT.

No: 00WC 002595

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2010 Ill. Wrk. Comp. LEXIS 515

May 26, 2010

JUDGES: Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

To begin we make corrections on page 10 of the Arbitrator's Decision. In the first paragraph on that page, the Decision indicates "Respondent repeatedly offered her employment" and subsequently refers to "those offers." We find only one offer of employment referenced in the Transcript. Therefore, "repeatedly" is stricken, and "those offers" is replaced by "that offer."

We make an additional correction with respect to the number of weeks of permanent partial disability awarded. The Arbitrator purported to award 73.625 weeks of permanent partial disability benefits based on a 25 percent loss of use of Petitioner's right hand and a 22.5 percent loss of use of Petitioner's left hand. However, [*2] the actual number of weeks corresponding to those losses is 90 1/7 weeks, and page two of the Arbitrator's Decision is corrected to so reflect.

Next, we wish to expound on our decision to otherwise affirm and adopt the Arbitrator's permanency determination. In our view, the significant permanent partial disability award of 25 percent loss of use of the right hand and 22.5 percent loss of use of the left is justified by Petitioner's myriad conditions attacking her hand functionality.

We likewise agree with the Arbitrator that a permanent total disability award would have been inappropriate. "An employee is totally and permanently disabled when she is unable to make some contribution to the work force sufficient to justify the payment of wages. [Citation.] An employee, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. [Citation.] Instead, the employee must show that she is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for them. [Citation.]" *Economy Packing Co. v. Illinois Workers' Compensation Comm'n, 387 Ill. App. 3d 283, 293 (2009).* [*3]

We cannot find Petitioner permanently and totally disabled because Respondent offered her work she appeared to have the capacity to perform. The duties of the proffered clerical position appeared to be within her restrictions; her own physician, Dr. Fernandez, believed she could perform the work. Likewise, Dr. Fernandez *encouraged* Petitioner to make return to work attempts with Respondent, and her own certified rehabilitation counselor, Joseph Belmonte, too, believed the best way to know if Petitioner could perform a job would be for her to try it out. Under this evidence, with Petitioner

declining to even attempt the offered position, against medical and vocational advice, we cannot say that Petitioner was entitled to a permanent total disability award.

Admittedly, we reach our conclusion under somewhat unique circumstances. Here, Respondent appeared to create a position specifically for Petitioner, to allow her to return to work. Normally, we are suspicious as to whether such positions are *bona fide*. But, in this case, Respondent also offered training to help Petitioner overcome her educational and language deficits. The offer of training distinguishes the present situation [*4] from those cases where employers offer positions merely for the purposes of avoiding liability; including by creating positions intended to be refused by the employee. Instead, Respondent's offer seems to reflect a genuine desire to help Petitioner return to the workforce with skills that could even be transferred to another employer.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 323.46 per week for a period of 179 4/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 291.11 per week for a period of 90 1/7 weeks, as provided in § 8(e)(9) of the Act, for the reason that the injuries sustained caused the loss of use of Petitioner's right hand to the extent of 25 percent, and the loss of use of Petitioner's left hand to the extent of 22.5 percent.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 4,912.67 for medical expenses under § 8(a) of the Act.

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

IT IS FURTHER [*5] ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Richard A. Peterson**, arbitrator of the Commission, in the city of **Chicago**, on **September 2 and 23, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
D. What was the date of the accident?
F. Is the petitioner's present condition of ill-being causally related to [*6] the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **October 21, 1999**, the respondent, **University of Illinois - Chicago, *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

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

. In the year preceding the injury, the petitioner earned $ **25,229.88**; the average weekly wage was $ **485.19**.

. At the time of injury, the petitioner was **45** years of age, ***single*** with **-1-** children under 18.

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

. To date, $ **117,618.17** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **323.46** [*7] /week for **179 4/7ths** weeks, from **February 14, 2000** through **July 29, 2003**, which is the period of temporary total disability for which compensation is payable. Respondent shall be entitled to a credit for for all amounts heretofore paid.

. The respondent shall pay the petitioner the sum of $ **291.11**/week for a further period of **73.625** weeks, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **Petitioner to suffer the loss of use of her right hand to the extent of 25% thereof and to her left hand to the extent of 22.5% thereof.**

. The respondent shall pay the petitioner compensation that has accrued from **July 30, 2003** through **the present**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **4,912.67** for necessary medical services, as provided in Section 8(a) of the Act.

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

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

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

RULES [*8] **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

JAN 30 2009

January 29, 2009

Date

FINDINGS OF FACT

Petitioner testified through a Spanish interpreter that at the time of the hearing she was 54 years of age, approximately 5 feet 2 inches tall and weighed 210 pounds. Petitioner started working for Respondent on November 24, 1989; her last day of work was February 13, 2000. Petitioner performed various job duties during this period of employment but all of them involved cleaning. She normally worked the third shift or night shift until she was moved to a building entitled "912" where she worked just prior to her alleged injury [*9] date of October 21, 1999. Petitioner testified that when she worked at Building "912," she worked the day shift from 7:30 a.m. to 4:30 p.m. with two 15 minute breaks and one 30 minute break.

Petitioner described the various cleaning duties she was required to do while working at Building "912": there were a lot of offices and she would remove a lot of garbage and take it out to the dumpster. In addition, Petitioner had to

clean both public and private bathrooms; empty trash; dust windows; vacuum and mop both the floors of the building as well as mop the bathrooms. While mopping, Petitioner had to dump her mop bucket twice -- once while cleaning the floors and once while rinsing the floors. She also had to clean the bathrooms using a smaller bucket wiping things with her right hand while she held onto the bucket with her left hand. She used a large mop to do the corridors of the building and used both hands to move the mop. Petitioner testified that she would usually throw out the garbage bags into the dumpster twice a day and that the bags could weigh up to 50lbs. During her last hour of work, Petitioner would have to take out and dump carts of water. Respondent submitted into evidence [*10] a job description which purported to indicate information regarding the job of "Building Service Worker." RespEx10. The work activities of a building service worker included 25% of the time doing sweeping, stripping and refinishing floors using automatic waxers, buffers and single disc machines; 25% of the time cleaning and servicing lavatory and restrooms on a daily basis; 25% of the time gathering and dumping waste, washing walls, and dusting furniture and fixtures routinely; 15% other miscellaneous duties. RespEx10.

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

The Industrial Clinic triage note reads as follows: "Patient states numbness in hands with pain for past 6 months....tingling and numbness in hands and forearms for three weeks. Fatigue in shoulders and neck. Works [*11] as a janitor cleaning all day." PetEx6. The physician at Respondent's clinic diagnosed Petitioner with bilateral hand paresthesias; the doctor prescribed occupational therapy and placed Claimant on limited work activities with no lifting/carrying over five pounds and limit mopping to 10 minutes every hours. PetEx6. Petitioner continued to work and started occupational therapy as directed. The initial therapy note indicated: "Maintenance worker whose duties include mopping, sweeping and general cleaning reports sudden onset of extreme pain and numbness in bilateral hands on 10/20/1999." PetEx6. The records show that Petitioner participated in occupational therapy from October 25, 1999, through November 19, 1999. PetEx6. An Injury Report contained within Respondent's records indicate the date of accident as October 21, 1999 wherein Petitioner reported "(w)hile mopping the floor my hands closed up." PetEx6. Petitioner underwent an EMG on November 18, 1999, which revealed bilateral carpal tunnel syndrome to a moderate degree. PetEx6. During a November 29, 1999, follow-up visit with Respondent's clinic, Petitioner was referred to Dr. Gonzales. The initial evaluation with Dr. Gonzales took [*12] place on December 15, 1999; upon examination, the doctor diagnosed Petitioner with bilateral carpal tunnel syndrome related to her work as a janitor and placed her on a surgery schedule. PetEx6. In a letter dated December 15, 1999, Dr. Gonzales stated: "(i)t is my feeling that although carpal tunnel syndrome may not, per se, be caused by work activities, it is exacerbated by repetitive work activity and thus covered by WC." PetEx6.

Petitioner sought a second opinion on the surgical recommendation from Dr. John Fernandez. This evaluation took place on January 27, 2000. Dr. Fernandez testified via deposition that he is fluent in Spanish and communicated in Spanish with Petitioner at his consultations. PetEx11, p. 7. Dr. Fernandez testified that Petitioner described her work activities to him in great detail. PetEx11, p. 8. The doctor also noted that she did not have any contributory past medical history to her problem. PetEx11, p. 9. Dr. Fernandez diagnosed Petitioner with bilateral wrist carpal tunnel syndrome of moderate severity with recalcitrant to conservative treatment. PetEx11, p.11. He also concluded that there was a causal relationship between her occupational history over [*13] the previous ten years and the development of her carpal tunnel syndrome. PetEx11, p.12. Dr. Fernandez agreed that Petitioner required surgical intervention and referred her back to Dr. Gonzales for that treatment. PetEx11, p.12.

Petitioner returned to see Dr. Fernandez on February 8, 2000 requesting that he take over her care. PetEx7 (visit of 2/8/2000). Petitioner also returned to the University Health Services at which time she was placed on work restrictions of the right arm limited to 10 pounds for lifting, carrying, pushing and pulling. PetEx6. Dr. Fernandez also placed restrictions on Petitioner as of February 14, 2000. PetEx7. Petitioner's unrebutted testimony was that her restrictions could no longer be accommodated as of February 14, 2000.

Respondent sent Claimant for a Section 12 examination with Dr. Paul Papierski. RespEx1. Dr. Papierski noted in his history that Petitioner bilateral hand pain and numbness and tingling which began gradually but became worse in October, 1999. RespEx1. Dr. Papierski reviewed a job evaluation and determined that "Building Service Worker" does not indicate anything considered to contribute to development of carpal tunnel syndrome. RespEx1. [*14]

Petitioner saw her family physician, Dr. Cavero, to be cleared for surgery. Dr. Cavero referred her to a hand surgeon, Dr. Bittar at a visit on May 26, 2000. PetEx10. Dr. Bittar consulted with Petitioner on May 31, 2000, and administered two cortisone injections into her wrist. PetEx8. Dr. Bittar eventually performed bilateral carpal tunnel releases on Petitioner. The first surgery, to the right hand, occurred on July 19, 2000. PetEx9. The second surgery, performed to her left hand, occurred on June 7, 2001. PetEx9. Dr. Cavero also referred Petitioner to Dr. Daniel Hirsen for consultation for a rheumatoid evaluation. PetEx10 (1/3/2002 consult).

Petitioner consulted with Dr. Hirsen on January 3, 2002. Dr. Hirsen opined that Petitioner's surgeries prevented progression of her bilateral condition but "she may still have abnormal and even necrotic nerve fibers that no longer function properly and cause paresthesias and difficulty with fine movement." PetEx1. On January 31, 2002, Dr. Hirsen opined that Petitioner is disabled as far as the heavy manual labor requiring hand dexterity because of the carpal tunnel syndrome. PetEx1. Petitioner underwent another EMG on June 20, 2002 which indicated [*15] mild bilateral carpal tunnel syndrome. PetEx4. On June 23, 2003, Dr. Hirsen performed an injection under each flexor retinaculum and opined that her current symptoms were largely due to carpal tunnel syndrome. PetEx1.

On July 29, 2003, Dr. Fernandez performed another evaluation of Petitioner; he determined that, as of that date, she had reached maximum medical improvement. PetEx7. Dr. Fernandez diagnosed Petitioner with incomplete recovery post bilateral carpal tunnel releases and residual pain and numbness. PetEx7. Petitioner testified that she continues to consume medication for pain as well for other illnesses. She takes her medication in the morning and usually wears hand splints in the evening.

Petitioner testified that, in 2005, a job offer was extended to her from Respondent. She was advised that the job would require her to go to school and obtain training and use a computer and answer telephones and make appointments for people and work with files and folders. Petitioner testified she turned down the position because she doesn't have a lot of education; she doesn't know how to use a computer; she doesn't know how to type; and she has difficulty speaking English, cannot write [*16] in the English language and cannot read in the English language. Petitioner testified that she only completed the 6th Grade in Mexico. Petitioner testified that she had a friend help her complete the job application when she applied to Respondent.

Petitioner testified that her two prior employers before working with Respondent were the Hyatt Hotel chain working for three years in the laundry department and three years working for a beauty parlor. Petitioner stated she has had no experience answering phones; making appointments; arranging files or folders or using a computer.

On cross-examination, Petitioner testified that she worked as a beautician for three years part-time; having went to school, received a license and training. Petitioner admitted that the job offer from Respondent indicated there was a 12-month training program. Petitioner stated she performed her job as a building service worker successfully and followed procedures and instructions. Petitioner also stated that half of the communication with her supervisor was in Spanish. Petitioner stated that she was a lot of pain which explained why she did not respond to the job offer of Respondent.

Petitioner testified that [*17] she never looked for work after she saw Dr. Fernandez. She also stated she never completed any job applications or did any job search or job contacts. Petitioner came to the United States in 1970 at age 15; she is a U.S. citizen, having passed the examination for citizenship on the third try, and she has had a valid driver's license since 1981.

Petitioner testified on cross-examination that for the first ten years of her employment with Respondent she worked in all of the buildings (more than ten) but that sometimes she would be in one building for a whole week. She described the broom she used as larger in size than her height and about four feet in width. The sweeper at the end of the broom was made of metal and was three feet in length and one foot wide. The broom weighed about 3lbs and she always pushed it. Petitioner also stated she would change which hand she used with the broom when she would turn around. She also testified she used three different sizes of mops. The largest one was two feet wide with a long handle. A second-sized mop was used for the bathrooms. In addition, there were different sizes of buckets used. Petitioner also had to clean the toilets, mirrors and the [*18] walls: she used a special brush for toilets and a brush to clean the walls. Petitioner testified she was right-handed but used both hands to clean the walls.

Petitioner testified she uses a cane to support her hand which incurs a different type of pain as opposed to symptoms from her diagnosed arthritis. She lives in a Spanish neighborhood; doesn't drive a vehicle; and she doesn't take public transportation. She testified she has had no contact with Respondent since she was released by Dr. Fernandez.

CONCLUSIONS OF LAW

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

The Arbitrator has concluded, in F below, that Petitioner suffered an aggravation of her bilateral carpal tunnel syndrome causally related to her work activities for Respondent. The Arbitrator has further concluded, in D below, that such aggravation manifested itself to Petitioner on October 21, 1999. Based on the foregoing, the Arbitrator concludes that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

IN SUPPORT [*19] OF THE ARBITRATOR'S DECISION RELATING TO D, WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

The Industrial Clinic triage note reads as follows: "Patient states numbness in hands with pain for past 6 months....tingling and numbness in hands and forearms for three weeks. Fatigue in shoulders and neck. Works as a janitor cleaning all day." PetEx6. The physician at Respondent's clinic diagnosed Petitioner with bilateral hand paresthesias; the doctor prescribed occupational therapy and placed Claimant on limited work activities with no lifting/carrying over five pounds and limit mopping to 10 minutes every hours. PetEx6. Petitioner continued to work and started occupational therapy as directed. The initial [*20] therapy note indicated: "Maintenance worker whose duties include mopping, sweeping and general cleaning reports sudden onset of extreme pain and numbness in bilateral hands on 10/20/1999." PetEx6. The records show that Petitioner participated in occupational therapy from October 25, 1999 through November 19, 1999. PetEx6. An Injury Report contained within Respondent's records indicate the date of accident as October 21, 1999 wherein Petitioner reported "(w)hile mopping the floor my hands closed up." PetEx6. Petitioner underwent an EMG on November 18, 1999 which revealed bilateral carpal tunnel syndrome to a moderate degree. PetEx6. During a November 29, 1999 follow-up visit with Respondent's clinic, Petitioner was referred to Dr. Gonzales. The initial evaluation with Dr. Gonzales took place on December 15, 1999; upon examination, the doctor diagnosed Petitioner with bilateral carpal tunnel syndrome related to her work as a janitor and placed her on a surgery schedule. PetEx6. In a letter dated December 15, 1999, Dr. Gonzales stated: "(i)t is my feeling that although carpal tunnel syndrome may not, per se, be caused by work activities, it is exacerbated by repetitive work activity and [*21] thus covered by WC." PetEx6.

Based on the foregoing, the Arbitrator concludes that Petitioner, on October 21, 1999, while performing her job duties, suffered increased symptoms greater than she had theretofore experienced. She reported her increased symptoms to her supervisor and was sent for medical treatment. The Arbitrator concludes that October 21, 1999, is an appropriate date of manifestation for Petitioner's aggravation of her bilateral carpal tunnel syndrome; and, therefore, that the date of Petitioner's accident was October 21, 1999.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that on October 21, 1999, while performing her job duties, she noticed pain in her hands. She had never had this type of pain before and had suffered no prior accidents or injuries to her hands prior to October 21, 1999. She notified her supervisor, Jesse, informing him that she couldn't move her hands any longer and that her hands were very tired. After reporting these complaints, Petitioner was referred to Respondent's medical clinic.

Dr. Fernandez [*22] performed an independent medical examination at the request of Petitioner. He opined that "...there was a significant contributory effect from her work history to the development of her carpal tunnel syndrome." (PetEx11,DepEx3,p4)

The causal opinion of Dr. Fernandez is however impaired by other evidence in the record. Petitioner was referred to Dr. Hirsan by her family doctor. Dr. Hirsan found that Petitioner suffered from "polyarthritisis" which was causing much of her symptoms. In addition, Petitioner was examined at the request of Respondent by Dr. Goldberg and Dr. Papierski. They both found significant systemic problems suffered by Petitioner. Dr. Fernandez stated unequivocally

that Petitioner did not have any systemic causes to her carpal tunnel syndrome. Petitioner offered no dispositive rebuttal to the evidence of Dr. Hirsan, Dr. Goldberg and Dr. Papierski. This reduces the credibility and weight of Dr. Fernandez' causal opinion. However, it does not totally eliminate the credibility and weight that Petitioner's carpal tunnel syndrome was aggravated by her work activities.

More troubling is the reliance by Dr. Fernandez solely on the description given to him by Petitioner of [*23] her work activities, which description was not recorded and preserved by Dr. Fernandez. Petitioner testified to a large range of work activities which she was required to perform throughout the day. She was required to use two different mops. These mops required her to exert significant stress on her hands and wrists; however, she used these mops only in a limited portion of her day and therefore those forces were experienced by her only sporadically. Similarly, she was required to clean. That required her to exert significant but different stress on her hands and wrists; however, she performed this cleaning only in a limited portion of her day and therefore those different forces were experienced by her only sporadically. A number of other activities and stresses were also explained in her testimony. In Dr. Fernandez's reports, opinions and deposition, it is clear that he was not aware of the wide variance in the exertions required of Petitioner throughout the day or of the sporadic nature of each of those variations. Accordingly, his opinion on causation is further compromised regarding causation of her carpal tunnel syndrome complaints.

Based on the foregoing, the Arbitrator concludes [*24] that the credibility of Dr. Fernandez's opinion that Petitioner's work activities caused her carpal tunnel syndrome complaints is severely compromised and the weight entitled thereto is greatly reduced. However, those factors are of considerably less importance with regard to the causal connection of her work activities to an aggravation of her pre-existing carpal tunnel syndrome. Therefore, the Arbitrator concludes that Petitioner's carpal tunnel syndrome complaints are causally connected to an aggravation of her carpal tunnel syndrome by her work activities over the years of her service with Respondent.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator, found above that Petitioner's condition of ill-being of her bilateral carpal tunnel syndrome was causally related to her an aggravation of her carpal tunnel syndrome of October 21, 1999. Petitioner submitted into the record evidence of medical bills, in accordance with the Medical Fee Schedule where applicable, as follows:

CAVERO CLINIC

CODES	DATE	PROVIDER FEE	IWCC FEE
99213	1/22/08	$ 110.00	$ 96.98
99213	2/19/08	$ 110.00	$ 96.98
99212	4/16/08	$ 90.00	$ 73.99
99213	5/20/08	$ 110.00	$ 96.98
99213	6/17/08	$ 110.00	$ 96.98

[*25] DANIEL J. HIRSEN, M.D.

CODES	DATE	PROVIDER FEE	IWCC FEE
99242	3/27/07	$ 125.00	$ 161.79
99243	7/19/07	$ 155.00	$ 210.82
73130	7/24/07	$ 30.00	$ 99.04
73130	7/24/07	$ 30.00	$ 99.04
73562	7/24/07	$ 30.00	$ 112.76
73562	7/24/07	$ 30.00	$ 112.76
73562	7/24/07	$ 30.00	$ 112.76
99242	8/16/07	$ 125.00	$ 161.79
99242	12/6/07	$ 125.00	$ 161.79
99242	3/6/08	$ 125.00	$ 164.98
99242	6/5/08	$ 125.00	$ 164.98

HOLY CROSS HOSPITAL

CODES	DATE	PROVIDER FEE	IWCC FEE

CODES	DATE	PROVIDER FEE	IWCC FEE
J2001	5/14/06	$ 11.00	$ 21.25
90718	5/14/06	$ 46.00	$ 31.17
90718	5/14/06	$ 30.50	$ 31.17
9928325	5/14/06	$ 341.00	$ 259.16(76%)
CODER	5/14/06	$ 667.00	$ 506.92(76%)

MACNEAL HOSPITAL

CODES	DATE	PROVIDER FEE	IWCC FEE
2507721	11/5/07	$ 49.62	$ 37.71(76%)
4200176	11/5/07	$ 515.46	$ 391.74(76%)
4200531	11/8/07	$ 182.26	$ 138.51(76%)
4200531	11/12/07	$ 182.26	$ 138.51(76%)
4200531	11/14/07	$ 182.26	$ 138.51(76%)
4200531	11/16/07	$ 182.26	$ 138.51(76%)
4200531	11/19/07	$ 182.26	$ 138.51(76%)
4200531	11/21/07	$ 182.26	$ 138.51(76%)
4200531	11/26/07	$ 182.26	$ 138.51(76%)
4200531	11/28/07	$ 182.26	$ 138.51(76%)
3620135	2/15/08	$ 307.16	$ 233.44(76%)

RAYMOND H. NOOTENS, M.D./RONALD R. WEISS, M.D.

CODES	DATE	PROVIDER FEE	IWCC FEE
92014	2/1/06	$ 160.00	$ 105.80
92015	2/1/06	$ 25.00	$ 25.51
92014	12/3/07	$ 160.00	$ 109.82
92015	12/3/07	$ 30.00	$ 26.48

[*26] TOTALS

PROVIDER FEE	IWCC FEE
$ 5,260.82	$ 4,912.67

Based on the foregoing, the Arbitrator concludes that Respondent is liable for medical bills in the amount of $ 4,912.67 in 8(a) medical expenses.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO K, WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner testified that she has not worked anywhere since February 13, 2000. The medical records indicated that the University Health Services physician restricted her from her regular work activities on February 1, 2000, and February 3, 2000. PetEx6. The February 9, 2000, records from the University Health Services document that Respondent "cannot accommodate these restrictions." PetEx6. The physician at that visit indicated that Petitioner should return to her primary care doctor or treating doctor. Otherwise she was disabled. PetEx6.

On February 14, 2000, Dr. Fernandez noted that Petitioner could not return to her regular employment and restricted her to no use of her left arm. Dr. Fernandez explained in his deposition why, if Petitioner was right-hand dominant, the left hand carpal tunnel was worse: "Curiously enough, [*27] dominance has never been shown to be a significant risk factor in the development of carpal tunnel syndrome . . . the left hand becomes weaker, so to speak, or it is weaker to begin with, and then they'll have more symptoms...." PetEx11, pp. 44-45. The unrebutted testimony of Petitioner was that Respondent could not or would not accommodate her restrictions at that time.

Based upon the above opinions of the University Health Service and Dr. Fernandez, at a minimum, Petitioner was restricted from performing the full capacities of her job since February 14, 2000, through the date that Dr. Fernandez opined she had reached maximum medical improvement on July 29, 2003. PetEx7. No other physician, during this time period ever released her to full duty work since February 14, 2000.

Respondent did not offer Petitioner work within her restrictions. The dispositive question is whether the claimant's condition had 'stabilized'. Here, Dr. Fernandez opined that Petitioner had not reached maximum medical improvement until July 29, 2003. PetEx7. Thus, the Arbitrator concludes that Respondent was unable or unwilling to accommodate the restrictions of Petitioner after February 14, 2000, and before [*28] she reached maximum improvement on July 29, 2003. Therefore, the Arbitrator concludes that Petitioner is entitled to Temporary Total Disability benefits from February 14, 2000, through July 29, 2003, a period of 179 and 4/7ths weeks, at the rate of $ 323.36 per week. Respondent shall be entitled to a credit for this period up to $ 58,066.23.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Dr. Fernandez opined that Petitioner had not reached maximum medical improvement until July 29, 2003. PetEx7. On that date, he released Petitioner to work with restrictions. However, Petitioner never sought to find a job. In fact, Respondent repeatedly offered her employment within her restrictions. Dr. Fernandez found that Petitioner could perform the duties offered her by Respondent. In spite of those offers, Petitioner chose to stay off work and continue to receive her benefits from State Employee Retirement System(SERS). Therefore, the Arbitrator concludes that Petitioner took herself out of the job market and chose to no longer work. Based on the foregoing, the Arbitrator concludes that Petitioner is [*29] not entitled to permanency benefits as a permanent total or for a wage differential; rather, she is entitled to benefits for partial loss of use of her bilateral hands.

On July 29, 2003, Dr. Fernandez performed another evaluation of Petitioner; he determined that, as of that date, she had reached maximum medical improvement. PetEx7. Dr. Fernandez diagnosed Petitioner with incomplete recovery post bilateral carpal tunnel releases and residual pain and numbness. PetEx7. Petitioner testified that she continues to consume medication for pain as well for other illnesses. She takes her medication in the morning and usually wears hand splints in the evening. Upon her release, Dr. Fernandez imposed permanent restrictions on Petitioner. Petitioner chose to retire on her SERS benefits. Based on the foregoing, the Arbitrator concludes that Petitioner suffered the loss of use of her right hand to the extent of 25% thereof and to her left hand to the extent of 22.5% thereof.

CONCURBY: MOLLY C. MASON

DISSENTBY: MOLLY C. MASON, NANCY LINDSAY

DISSENT: SPECIAL CONCURRENCE AND DISSENT

I agree with Commissioner Dauphin's findings and conclusions as they relate to the issue of causation but respectfully disagree with the majority's [*30] permanency evaluation and award.

In the majority's view, Petitioner failed to establish entitlement to "odd lot" permanent total disability benefits because she declined the job offer that Respondent extended in December of 2005. RX 5. The majority concedes that the job Petitioner declined was "created" specifically for her and that such jobs are inherently suspicious. In the next breath, however, the majority concludes that because the job offer incorporated a period of training, it reflected a "genuine desire" to return Petitioner to the workforce.

I cannot agree with this conclusion. The majority completely ignores the timing of Respondent's offer. When Petitioner's condition stabilized in 2003, Respondent did nothing. It was only after Dr. Fernandez rendered a causation opinion in July of 2005 and Petitioner motioned the case for hearing in November of 2005 that Respondent took action. Any "genuine desire" on Respondent's part was a desire to avoid liability.

The majority also ignores the reality of Petitioner's background. I cannot conclude that Respondent acted in good faith simply because it offered twelve months of training. In my view, the fact that Respondent offered a year [*31] of training immediately suggests that it recognized Petitioner was unqualified for the clerical job in question. Petitioner was born in Mexico and obtained only six years of education there. She testified that she is only able to write "a little bit" in Spanish. T. 38. While she was able to obtain employment after coming to the United States in 1970, she never performed clerical duties. She worked in factories, a beauty parlor and a hotel laundry before Respondent hired her in 1989. Her job for Respondent involved removing garbage, mopping floors and cleaning bathrooms. Over the years, she acquired limited English skills, but in the workplace, not the classroom. She passed a test that enabled her to become a United States citizen but only on the third try and only by virtue of attending classes in Spanish. She passed an Illinois driver's license test but the test was administered in Spanish. T. 53-54.

The job that Respondent offered would have required Petitioner to use a computer and other unspecified office equipment, "file materials/documents in established alphabetical, chronological and numerical filing systems," "sort and distribute mail," "reply to routine inquiries by sending [*32] appropriate form-letter responses," "review documents for completeness" and "maintain fiscal records." RX 5. The question in this case is not whether these tasks fell within Petitioner's restrictions but whether Petitioner (who testified she had never used a computer) would ever be capable of performing these tasks education-wise. Petitioner did not have to attempt the training in order for this question to be answered. It is simply not possible to "train" a 54-year-old person who cannot write well in her native language, let alone read or write in English, to perform such tasks within a year. The job also came with a "minimal acceptable qualification" of a high school degree "or equivalent." What kind of year-long training can convert a sixth grade education in a Spanish-speaking country to a twelfth grade education in the United States?

I must also respectfully suggest that the majority has elected to ignore the applicable law. Petitioner successfully shifted the burden of proof to Respondent via Joseph Belmonte's expert vocational testimony. *Westin Hotel v. Industrial Commission, 372 Ill.App.3d 527 (1st Dist. 2007).* Respondent did not call any [*33] vocational expert and completely failed to show that "some kind of suitable work is regularly and continuously available to" Petitioner. *Contour Designs, Inc. v. Industrial Commission, 95 Ill.2d 278, 286-287 (1994).*

The record supports an award of "odd lot" permanent total disability benefits.

I respectfully disagree on the issue of causal connection. While my colleagues appear to agree with the Arbitrator's finding on causation, that finding only establishes, at most, that "Petitioner's carpal tunnel syndrome complaints are causally connected to an aggravation of Petitioner's carpal tunnel syndrome by her work activities over the years of her service with Respondent." I don't believe the credible evidence in the record supports an aggravation theory. Additionally, absent from the Arbitrator's Decision is any determination that Petitioner's current condition of ill-being in her hands/wrists is related to her work accident. This is a critical omission as Petitioner's medical condition has significantly changed over the years. While she was initially diagnosed with bilateral carpal tunnel syndrome and treated for it with surgery, as of June 22, 2001, Dr. [*34] Iftikhar (the doctor who performed her left carpal tunnel release) noted Petitioner had good subjective improvement following her surgery and was having no particular problems. He further noted Petitioner was satisfied with relief of her symptoms. She was given the option of occupational therapy but preferred to try it on her own so a home exercise program was explained to her. She was to return in three weeks or as and when needed. Thereafter, her complaints took a different course. Petitioner didn't return to Dr. Iftikhar for several months at which time her carpal tunnel exam was deemed satisfactory but fibromyalgia-like symptoms were noted. She was subsequently diagnosed with fibromyalgia, inflammatory polyarthritis, and seronegative rheumatoid arthritis, all of which were deemed non-work-related by her treating physician. Even if one assumes Petitioner had a work-related carpal tunnel syndrome initially, whether or not she has continued to have work-related complaints in her hands since mid-2001 is not established by the credible evidence in the record. Dr. Fernandez's opinions are not credible as they are not based upon a review of all the medical records and he clearly wasn't [*35] aware of her diagnosis of polyarthritis. Even the Arbitrator noted various problems with Dr. Fernandez's opinion and I find it difficult to reconcile how the deficiencies in his opinions can't support an award based upon causation but can support an aggravation theory. Dr. Goldberg was the only physician to review all of Petitioner's medical records in their entirety, unlike Drs. Fernandez or Gonzalez. His opinions, including those of malingering and secondary gain motivations, are the most credible. They are also consistent with those of Dr. Papierski. Petitioner's current condition in her hands and wrists is no longer related to carpal tunnel syndrome or any work duties she performed for Respondent; rather, she continues to have symptoms and treat for separate, non-work-related problems. Her claim should have been denied due to a failure to prove the requisite causal connection. For this reason, I respectfully dissent.

DATED MAY 26 2010

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