ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF INTENT TO FILE FOR REVIEW IN CIRCUIT COURT

Please submit two copies of this form.

Case # _____ WC _____

_____
Employee/Petitioner

v.

IWCC Case # _____ IWCC _____

_____
Employer/Respondent

I have filed a *Notice of Intent to File for Review in Circuit Court* with the Illinois Workers' Compensation Commission on _____.

_____
Signature Petitioner ☐ Respondent ☐

_____
Attorney's name and IC code # (please print)

_____
Name of law firm, if applicable

_____
Street address

_____
City, State, Zip code

_____
Telephone number

_____
E-mail address

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUMMANS, ANTHONY
Employee/Petitioner

Case# **12WC000663**

CITY OF PEORIA
Employer/Respondent

Filed 6-12-13

On 6/5/2013, 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 0.08% 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:

4707 LAW OFFICE OF CHRIS DOSCOTCH
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0980 HASSELBERG GREBE SNODGRASS ET AL
VINCENT BOYLE
124 S W ADAMS ST SUITE 360
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ 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

ANTHONY RUMMANS,
Employee/Petitioner

v.

CITY OF PEORIA,
Employer/Respondent

Case # 12 WC 00663

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 19, 2012**. 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. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On **October 22, 2011**, 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 alleged accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$66,492.87**; the average weekly wage was **$1,212.34**.

On the date of accident, Petitioner was **27** years of age, ***married*** with **three** dependent children under 18.

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

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

Respondent shall be given a credit of $ **3,833.12** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **3,833.12**.

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 **$808.23**/week for **9-5/7** weeks, commencing **January 25, 2012** through **April 2, 2012,** as provided in Section 8(b) of the Act.

Respondent shall ***not*** pay Petitioner temporary partial disability benefits, as provided in Section 8(b) of the Act, as he has failed to prove entitlement to same.

Respondent shall pay Petitioner permanent partial disability benefits of **$695.78**/week for **33.4** weeks, because the injuries sustained caused the **20%** loss of use of his **left foot**, as provided in Section 8(e) of the Act.

Petitioner is now entitled to receive from Respondent compensation that has accrued from **October 22, 2011** through **November 19, 2012,** and the remainder, if any, of the award is to be paid to Petitioner by Respondent 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.

Signature of Arbitrator **JOANN M. FRATIANNI** — **June 3, 2013** Date

JUN - 5 2013

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

On October 22, 2011, Petitioner was employed as a policeman. On that date he was involved in an altercation with a suspect. During that altercation he injured his left foot.

Following this accident, Petitioner sought treatment at the emergency room of OSF Hospital. On October 24, 2011, he began treatment with Occupational Health for his foot pain. Petitioner was treated conservatively with medication, modified duty, the use of a walking boot and physical therapy.

Following this, Petitioner was referred by the clinic to see Dr. D'Souza, an orthopedic specialist. Dr. D'Souza diagnosed accessory navicular syndrome and prescribed surgery to remove the accessory navicular bone and transpose the tibial tendon.

On January 25, 2012, Petitioner underwent surgery with Dr. D'Souza for removal of the left accessory navicular bone and transposition of the posterior tibialis tendon. Dr. D'Souza explained that the posterior tibialis tendon inserts into the accessory navicular bone so when the bone was removed, the tendon had to be removed and reattached to other bones in Petitioner's foot.

Petitioner testified that he has experienced a good recovery from surgery and has returned to full duty work. Petitioner testified that he experiences pain any time he runs and has to limit running to no more than 2-2.5 miles before stopping due to pain. Petitioner further testified that he experiences foot pain after prolonged standing, which he rates at 5 out of 10. Petitioner testified that he experiences stiffness in his foot when awakening and that he uses ice, elevation, rest and Ibuprofen for his symptoms.

On August 7, 2012, Dr. Lawrence Nord performed an AMA impairment rating examination. This was performed on behalf of Respondent. Dr. Nord authored a report and testified by evidence deposition. Dr. Nord concluded that Petitioner had an impairment rating of 1% disability to his whole person. Dr. Nord relied on certain medical records, the history of the injury and his examination. Dr. Nord testified that Petitioner experiences residual foot pain with prolonged standing and running and when awakening. Dr. Nord felt that Petitioner was at maximum medical improvement and had reached a state of permanency.

Dr. Nord testified that he was familiar with Petitioner's job as a police office. Dr. Nord testified this was heavy work requiring him to run, climb and stand for prolonged periods. Dr. Nord felt this occupation could potentially aggravate this injury in the future. Dr. Nord testified that it is important to strictly abide by the guidelines of the AMA so that impairment ratings amongst all evaluators are consistent. The AMA Guidelines, 6th Edition mandate that evaluators review medical records before performing the impairment rating. This is so the evaluator can clarify and question the person regarding any inconsistencies in histories or medical records. Dr. Nord admitted that he did not review the medical records prior to his examination, but during the exam. Dr. Nord testified he went through every record with the patient in the examination room and that the examination lasted a half hour.

Petitioner disputed Dr. Nord's testimony. Petitioner testified Dr. Nord did not review any medical records with him and the examination took only 5 minutes.

The AMA guidelines further require appropriate measurements of loss of range of motion, strength, atrophy of tissue mass consistent with injury and other measurements that establish the nature and extent of the impairment. The evaluator also should take measurements of both lower extremities. Dr. Nord testified that Petitioner had normal range of motion and motor function in his foot joints with no discomfort. There is no indication or recordation of measurements bilaterally. Petitioner testified that Dr. Nord only examined his left foot.

Dr. Nord further did not use the Lower Limb Questionnaire, or Appendix 16(a) to the 6th Edition. Rather than using that form, Dr. Nord chose to use his own intake questionnaire or inventory. There is no indication that the form Dr. Nord used is widely accepted by his peers or by the AMA 6th Edition publication.

Dr. Nord testified that disability or impairment is a significant deviation, loss or loss of use of any body structure or body function in an individual with a health condition, disorder or disease. Dr. Nord admitted the 6th Edition defines disability as an activity limitation and/or participation restriction in an individual with a health condition, disorder or disease. Dr. Nord acknowledged that an activity limitation is only one of several determinants of disablement and the relationship remains both complex and difficult, if not impossible to predict.

Dr. Nord also testified that disability is different than impairment.

In considering permanent disability under the new amendments to the Act, this Arbitrator must also consider Petitioner's age, occupation, future earning capacity and evidence of disability as corroborated by treating medical records. This Arbitrator is also required to follow past decisions of the Commission in determining disability, along with the law.

Petitioner at the time of injury was 27 years of age and works as a police officer, which is a heavy occupation. His occupation requires him to meet and achieve a certain level of fitness standards, including strength, endurance and ability to run. There is no evidence this injury will affect future earnings potential, but Petitioner did testify that he hoped to qualify for promotion to the SWAT team, which would require him to pass certain physicial fitness testing including running with full gear.

Based upon the above, the Arbitrator finds that the condition of ill-being is now permanent in nature and represents a 20% loss of use to the left foot.

The Arbitrator bases this conclusion on Petitioner's age, employment, the heavy occupation and the requirement to meet certain fitness standards. This conclusion is also corroborated by the treating medical records in evidence. This conclusion discounts the opinions of Dr. Nord as he did not perform the evaluation in accordance with the AMA Impairment Guidelines as carefully spelled out in their 6th Edition. The Arbitrator also bases this conclusion on the requirement that foot injuries are awarded as a disablement to the foot, and not a disablement to a person as a whole under Illinois law.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "L" above.

At the time of the injury with Respondent, Petitioner was concurrently working as a security guard at the Hy-Vee grocery store in Peoria. Post surgery, Petitioner was off work from his job with Respondent from January 25, 2012 through April 2, 2012, and worked light duty from April 2, 2012 to May 2, 2012. Due to his work status, Petitioner also was unable to continue working with Hy-Vee.

Petitioner testified that he received full salary from Respondent while off of work. This was in accordance with the Public Employees Disability Act. This Act states that in order to receive benefits during a period of disability, the injured person shall not be employed in any other manner, with or without monetary compensation. See 5 ILCS 345/1(d).

There is also evidence that Petitioner was scheduled to work at Hy-Vee from April 12, 2012 through May 2, 2012.

Petitioner claims entitlement to temporary partial disability under these circumstances. Based upon the above, he is not entitled to same and his claim for such benefits is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SPRAGUE, CHERYL R Case# **12WC030146**

Employee/Petitioner

DICKEY JOHN CORPORATION

Employer/Respondent

On 6/19/2013, 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 0.07% 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:

0834 KANOSKI BRESNEY
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

0265 HEYL,ROYSTER VOELKER & ALLEN
GARY BORAH
3731 WABASH AVE
SPRINGFIELD, IL 62711

STATE OF ILLINOIS)
)SS.
COUNTY OF **SANGAMON**)

- ☐ 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

Cheryl R. Sprague
Employee/Petitioner

v.

Dickey John Corporation
Employer/Respondent

Case # **12** WC **30146**

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 **D. Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **May 8, 2013**. 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. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **October 6, 2011**, 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 **$27,499.21**; the average weekly wage was **$528.83**.

On the date of accident, Petitioner was **58** years of age, *married* with **0** children under 18.

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

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

The Parties stipulate Petitioner was underpaid TTD by the amount of **$76.41,** and the Respondent agrees to pay that amount. All other TTD has been paid.

ORDER

Respondent shall pay petitioner permanent partial disability benefits of $317.30 per week for 42.75 weeks because the injuries sustained caused 15% loss of use of the right hand and 7.5% loss of use of the left hand, as provided in Section 8(e)9 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest 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

June 5, 2013
Date

ICArbDec

JUN 19 2013

FINDINGS ON DISPUTED ISSUES:

In support of the Arbitrator's Decision relating to (F) – Causal Relationship, the Arbitrator finds the following facts:

The petitioner testified that she worked on the production assembly line of respondent's factory from September of 1988 continuously through October of 2011. During that time, she assembled items that go on various implements. She stated that the work required her to use hand torque tools, screwdrivers, needle nose pliers, and to constantly use her hands eight hours per day. The petitioner began noticing pain in her hands, noticed her hands going to sleep, and developed cramps in her hands.

On October 5, 2011, petitioner saw her family physician, Dr. Weisgerber (P.X. 1, p. 5). Dr. Weisgerber referred petitioner to Dr. Mehra for EMG testing. The day following Dr. Weisgerber's appointment, petitioner reported the condition to the respondent. She was sent by respondent to MOHA.

The petitioner was evaluated at MOHA on October 6, 2011. There she was tentatively diagnosed with bilateral carpal tunnel syndrome (P.X. 3, p. 24).

An EMG by Dr. Mehra performed on October 19, 2011 showed severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Dr. Weisgerber opined that petitioner's carpal tunnel syndrome was work related (P.X. 1, p. 4). There is nothing in evidence that petitioner's condition is not related to her employment activities. The arbitrator finds the petitioner's bilateral carpal tunnel syndrome was causally related to her employment activities at respondent's factory.

In support of the Arbitrator's Decision relating to (L) - Nature and Extent, the Arbitrator finds the following facts:

The Arbitrator adopts his findings with respect to (F) – Causal Connection as a part of his findings with respect to (L) – Nature and Extent.

The petitioner was referred by Dr. Weisgerber to Dr. Watson for surgery. Dr. Watson performed surgery on petitioner's right carpal tunnel on January 5, 2012. Thereafter, Dr. Watson operated the left hand carpal tunnel on January 26, 2012 (P.X. 2, p. 19, 17). Following surgery, petitioner received a course of physical therapy which was completed March 9, 2012. On that date, the petitioner reported to the therapist that she had mild soreness, a little more in the left than in the right. The therapist noted that the petitioner showed improvement with strength and flexibility during the course of her nine physical therapy visits. However, she was still found to have a slight decrease on wrist flexion bilaterally. The petitioner was discharged to a home exercise program to continue with exercises to further improve her strength in order to return to her previous level of activity (R.X. 2). The petitioner was last seen by Dr. Michael Watson on February 29, 2012. On that date, Dr. Watson noted all of the petitioner's neurologic symptoms had resolved and her incisions were well healed. Dr. Watson found the petitioner's strength was near normal and that her pain was minimal. He released her to return to work without restrictions on March 5, 2012. He released her to return p.r.n. On cross-examination, petitioner acknowledged that she has not returned to Dr. Watson since that time.

On March 2, 2012, petitioner was seen by Dr. Yociss of MOHA for clearance to return to work. The petitioner told Dr. Yociss that her symptoms had improved. She was having no current setbacks, and was slightly tender at the incisions only. The petitioner was otherwise feeling well with no issues or problems. Dr. Yociss concurred with Dr. Watson's release to return to full duty work without restrictions on March 5, 2012 (P.X. 3, p. 20). The petitioner was to call if she had any further problems. On cross-examination, the petitioner acknowledged that she has not returned to Dr. Yociss at any time since her return to work on March 5, 2012.

The petitioner testified that she now notices that her hands go to sleep. She testified that some activities are painful, depending on what she is doing. The petitioner testified that using a screwdriver was painful as was pressing down on the base of the palm. The petitioner testified she does not have as much strength to do things as she used to have, and noted that her hands go to sleep when she drives a long way. She has difficulty with opening jars, notices pain while cutting vegetables, and has given her a self-imposed limit of not lifting more than 30 pounds. The petitioner testified that she retired from Dickey John on April 26, 2013, in part because of the problems she was having with her hands and in part because of problems she was having with spinal stenosis. The petitioner was 60 years old when she retired.

On cross-examination, the petitioner acknowledged that she had no restrictions on her work activities when she retired. The petitioner acknowledged that since returning to work on March 5, 2012 she had missed no time from work due to her carpal tunnel syndrome. She further acknowledged that since returning to work on March 5, 2012 she has not returned to a doctor for further evaluation or treatment of her carpal tunnel syndrome. The petitioner acknowledged that she told all of her physicians the problems she was having at the time she was discharged to return to work, and was nevertheless given a full duty work release. She worked full duty from her return to work on March 5, 2012 through her resignation from employment on April 26, 2013.

At the request of respondent, petitioner was seen for an impairment rating by Dr. Robert Gordon on June 1, 2012. Dr. Gordon's impairment ratings reports were admitted as Respondent's Exhibit 5 and his deposition was admitted as Respondent's Exhibit 6. Dr. Gordon testified that he is Board Certified in Occupational Medicine, is certified to perform impairment ratings under the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment, and that his impairment rating was performed in accordance with the AMA Guides, 6th Edition (R.X. 6, p. 7-9). Dr. Gordon testified that petitioner had a 1% impairment of the left upper extremity (R.X. 6, p. 19) and a 4% impairment of the right upper extremity (R.X. 6, p. 17).

The petitioner testified that she had reviewed Dr. Gordon's impairment rating report, and testified that notwithstanding Dr. Gordon's statement in his report that she had no problems performing her work, she had told him she performed different tasks that hurt.

CONCLUSIONS OF LAW

Section 8.1b of the Act sets forth five factors which are to be considered when determining permanent partial disability.

The first factor is the impairment rating utilizing the AMA Guides, 6th Edition. Dr. Gordon found a 4% loss of the right hand, and 1% of the left. Objectively, he found atrophy of the right thenar eminence, the same finding seen by Dr. Mehra when he performed the initial nerve conduction studies. Subjectively, the Guides require utilization of a grade modifier, provided by the evaluator, and a functional assessment, provided by the Petitioner filling out a questionnaire. Dr. Gordon's grade modifier does not match up with the Petitioner's testimony and physical findings of decreased grip and motion seen when she completed her physical therapy. The questionnaire, which is called a quickDash form, does not accurately reflect the function of each hand. The Arbitrator believes a rating higher than 23 would result if the right hand were tested separately.

The Petitioner worked on an assembly line, requiring her to work at a consistent fast pace. On the date she was injured, she was 58 years old, and she is currently 60. The Arbitrator believes that her age and the type of job she performed leads to the conclusion that her future earning capacity would be limited, even if she had not decided to retire. She said that she did her regular job following her surgeries for about 14 months before retiring. While she said that her normal production was slowed because of her hands, she produced no evidence that her earnings were reduced or that she lost any time from work because of her condition. She also testified that her decision to retire was based on both her hand symptoms and spinal stenosis. The Arbitrator has no way of knowing whether one of those factors outweighed the other.

The objective medical evidence supports permanent partial disability in each hand. She had severe right carpal tunnel syndrome, which has resulted in atrophy. Her functional abilities have been diminished. Her left hand, which is her dominant hand, was not damaged to the same extent. In fact, her nerve tests were borderline for the condition. She does however, have symptoms which are consistent with a nerve entrapment.

The Arbitrator believes that the Petitioner has suffered a loss of 15% of the right hand. She has demonstrated the maximum level of disability, but her functional loss does not amount to clear and convincing evidence required for a higher award. The Arbitrator further awards 7.5% loss of the left hand, for the reasons referred to above.

2013 IL App (3d) 120411WC
No. 3-12-0411WC
Opinion filed May 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

STANISLAWA MLYNARCZYK, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Sophie Obrochta d/b/a Janitorial By Sophie, Appellee).	)	Appeal from the Circuit Court of Will County. No. 11-MR-766 Honorable Barbara Petrungaro, Judge, Presiding.

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

Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 Claimant, Stanislawa Mlynarczyk, appeals from the judgment of the circuit court of Will County confirming a decision of the Illinois Workers' Compensation Commission (Commission). The Commission determined that claimant failed to prove that she sustained an accident arising out of and in the course of her employment with respondent, Sophie Obrochta d/b/a Janitorial by Sophie. On appeal, claimant argues that she was a "traveling employee" and therefore was entitled to benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). We agree.

Therefore, we reverse the judgment of the trial court, vacate the decision of the Commission, and remand this cause for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing held over the course of several dates beginning on September 29, 2009. Respondent operates a cleaning service run by Walter Obrochta and his wife, Sophie. Claimant testified through a Polish interpreter that she became employed by respondent in September 2007. Claimant's duties involved cleaning churches, homes, and offices. Claimant testified that she was paid by the job. Claimant's husband, Edward Mlynarczyk, also worked for respondent. As part of his employment, Edward occasionally drove respondent's employees to and from job sites. Edward used a minivan provided by Walter and Sophie to transport the employees. Neither respondent's name, logo, nor telephone number appear on the minivan.

¶ 4 At the time claimant and Edward were hired by respondent, they did not own an automobile. Accordingly, Edward also used the minivan to drive himself and claimant to work, to visit family, to shop, and to do other personal errands. Edward testified that he paid for the gasoline when he used the minivan for personal trips. At all other times, however, the Obrochtas paid or reimbursed him for fuel. The Obrochtas also paid the other costs associated with the minivan, including insurance and licensing fees.

¶ 5 On December 5, 2007, claimant, then 60 years old, left her home at 6:30 a.m. and was driven by Edward in the minivan to clean a church in Downers Grove, Illinois. After cleaning the church, Edward drove claimant in the minivan to clean two homes. Claimant and Edward finished cleaning

the second home at about 2:30 p.m. Walter testified that claimant and Edward usually had a full day of jobs from 6 a.m. to 4 p.m. On December 5, 2007, however, there were some cancellations due to the holiday season. Walter informed claimant and Edward that there were no other assignments for them, but that if they were interested in assisting the evening crew on another job, they should return to the church at around 4:30 p.m. Claimant and Edward agreed to return that evening. In the meantime, Edward and claimant traveled home in the minivan to eat lunch.

¶ 6 Typically, claimant and Edward took a 15-minute break for lunch. On the date in question, however, Edward and claimant remained home for about 90 minutes. Claimant was not paid for the time between the morning and evening jobs. Shortly after 4 p.m., Edward returned to the minivan to warm it up. The minivan was parked in the driveway of the house where claimant and Edward resided. At approximately 4:10 p.m., claimant left the house to return to work. Claimant testified that the ground was covered with snow, although she was not sure whether there was any ice beneath the snow. As claimant walked around the rear of the minivan, she slipped and fell. Claimant testified that the accident occurred adjacent to the driveway on a "public sidewalk" leading from the house to the driveway. Edward testified that although he did not see claimant fall, he found her lying behind the van, which was parked in the driveway. Claimant testified that she immediately felt "tremendous pain" in her left hand. She was unable to get up, so she called Edward for assistance. According to claimant, at the time of the fall, she had a purse on her shoulder but was not holding anything in her hands. En route to the hospital, Edward informed Walter of the accident. Claimant was diagnosed with a left wrist fracture, which required surgery to repair.

¶ 7 Claimant testified that because of lifting restrictions, she was unable to return to work for

respondent, but found a position performing light housekeeping and cooking for an elderly woman. That job started on December 18, 2008. In September 2009, the woman fell and became unable to walk. Claimant had to quit that job because she could not lift the woman. Claimant testified that she sometimes has pain in her left wrist and feels pain when she attempts to lift anything heavy. She also notices that she does not have the same strength in the left hand as she did before the accident.

¶ 8 Walter testified that because claimant and Edward were "new in this country," he and Sophie tried "to help them to stand on their feet." Walter testified that he lent the minivan to claimant and Edward because he was not using it. Walter testified that claimant and Edward could use the minivan for "anything," including work, shopping, and family visits. Walter stated that Edward returned the minivan in February 2008, after he purchased his own car. According to Walter, the minivan was not titled in the name of the business, but rather in his name and the name of his wife. Walter also testified that he and Sophie, not the company, paid to insure the vehicle.

¶ 9 The arbitrator concluded that claimant sustained a compensable accident. The arbitrator acknowledged the general rule that injuries incurred while traveling to or from the workplace are not considered to arise out of and in the course of one's employment. Nevertheless, the arbitrator found claimant's accident compensable on the grounds that claimant was a traveling employee and respondent provided claimant a means of transportation to and from work for its own benefit. The arbitrator also concluded that claimant's current condition of ill-being is causally related to her employment. The arbitrator awarded claimant reasonable and necessary medical expenses (see 820 ILCS 305/8(a) (West 2006)), 54 weeks of temporary total disability benefits (see 820 ILCS 305/8(b) (West 2006)), and 133¼ weeks of permanent partial disability benefits, representing a 65% loss of

use of the left hand (see 820 ILCS 305/8(e)(9) (West 2006)). In addition, the arbitrator assessed attorney fees and penalties against respondent pursuant to sections 16, 19(k), and 19(l) of the Act. See 820 ILCS 305/16, 19(k), 19(l) (West 2006).

¶ 10 Respondent sought review of the arbitrator's decision before the Commission, challenging the arbitrator's finding of a compensable accident and his imposition of attorney fees and penalties. The Commission reversed the decision of the arbitrator. The Commission found that claimant failed to prove that the injuries she sustained as a result of her fall on December 5, 2007, arose out of and in the course of her employment. The Commission explained as follows:

> "[Claimant] testified that she fell on her personal driveway while walking to a vehicle to go to work. [Claimant] testified she did not know if there was ice under the snow on the sidewalk and driveway. The public sidewalk and private driveway were in the same condition as it related to the ice and snow. [Claimant] was not carrying anything when she fell; she had her purse on her shoulder. The Commission finds that the [claimant] failed to prove that she was exposed to a risk that was connected or incidental to her employment and therefore fails to prove that the injuries she sustained as a result of her fall on December 5, 2007 arose out of her employment.
>
> Further, [claimant] fails to prove that the injuries she sustained due to the fall on her driveway were sustained in the course of her employment. [Claimant] had not yet left her personal property when the injury occurred. She had not been exposed to the hazards of the street or automobile as she had yet to get in a car or leave her own driveway. [Claimant] usually had a set schedule of cleaning jobs that she did daily that would cover the hours of

> 6:30 am to 4:00 pm and she did not normally take a lunch break of more than 15-30 minutes. She was never directed by her employer to take a lunch break. [Claimant] was not paid by the day or hour, but by the cleaning jobs she completed. On December 5, 2007 [claimant's] normal routine was disrupted by cancellations of one or more of her usual cleaning jobs. [Claimant] and her husband were given the option by their employer to assist another cleaning crew on a job that evening if they wanted to make up the lost money from the cancellation. [Claimant] and her husband agreed to the additional cleaning job. It was during the time off from the period between her last scheduled job and before she started the extra evening cleaning job that [claimant] fell on her own driveway. [Claimant] was not on the employer's premises or at a job location where she would have been performing her work duties when she fell. While the Commission does not find [claimant] to be a traveling employee, it notes that [claimant] had not yet left her property or even entered a vehicle when she was injured, was not paid for her time between jobs or mileage for travel and was not exposed to any of the risks of a traveling employee. Even if the Commission found [claimant] to be a traveling employee, it would not circumvent the requirement that the injury arise out of and in the course of her employment. If the Commission were to find accident in this case, then ANY movement by [claimant] at any time during the day or night would lead to a compensable claim." (Emphasis in original.)

The circuit court of Will County confirmed the decision of the Commission. This timely appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, claimant argues that the Commission erred as a matter of law in finding that she was not a traveling employee. Claimant further contends that the Commission erred in finding that she failed to prove that she sustained an accidental injury arising out of and in the course of her employment with respondent.

¶ 13 An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" her employment. 820 ILCS 305/2 (West 2006). Both elements must be present for the claimant's injuries to be compensable. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). "In the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 47 (1989). An injury "arises out of" one's employment if there is a causal connection between the employment and the accidental injury, *i.e.*, the injury has its origin in some risk connected with, or incidental to, the employment or the injury is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58; *Becker v. Industrial Comm'n*, 308 Ill. App. 3d 278, 281 (1999).

¶ 14 Generally, injuries incurred while traveling to and from the workplace are not considered to arise out of and in the course of one's employment. *Becker*, 308 Ill. App. 3d at 282. The determination whether an injury to a "traveling employee" arose out of and in the course of employment, however, is governed by different rules than are applicable to other employees. *Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2012 IL App (4th) 110847WC, ¶ 12. Thus, for instance, a traveling employee is deemed to be in the course of his

employment from the time the employee leaves home until he or she returns. *Cox v. Illinois Workers' Compensation Comm'n,* 406 Ill. App. 3d 541, 545 (2010). Accordingly, we initially address whether claimant is a "traveling employee."

¶ 15 The parties disagree as to our standard of review on the traveling-employee issue. Claimant argues that our review should be *de novo*, while respondent contends that we should apply the manifest-weight-of-the-evidence standard. We apply the manifest-weight-of-the-evidence standard when reviewing the Commission's factual findings. *Lenny Szarek, Inc. v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 597, 603 (2009). We also employ the manifest-weight-of-the-evidence standard where the facts are undisputed, but more than one reasonable inference may be drawn therefrom. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1127 (2007). In contrast, we review *de novo* the Commission's decisions on questions of law. *Otto Baum Co. v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100959WC, ¶ 13. We also apply the *de novo* standard of review when the facts essential to our analysis are undisputed and susceptible to but a single inference and our review therefore involves only an application of the law to those undisputed facts. *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17. With respect to the narrow issue of whether claimant is a traveling employee, we agree with claimant that the *de novo* standard of review applies. Here, claimant does not dispute the accuracy of the Commission's factual findings. Rather, she insists that the Commission's legal conclusion that she is not a traveling employee is erroneous. As such, there are no disputes as to the facts of the case or the factual inferences to be drawn therefrom, and all that remains for us is to determine if the facts satisfy this legal standard.

¶ 16 A "traveling employee" is one who is required to travel away from her employer's premises to perform her job. *Cox*, 406 Ill. App. 3d at 545. It is not necessary for an individual to be a traveling salesman or a company representative who covers a large geographic area to be considered a traveling employee. *Hoffman v. Industrial Comm'n*, 128 Ill. App. 3d 290, 293 (1984), *aff'd*, 109 Ill. 2d 194 (1985). In the present case, claimant did not work at a fixed job site. Rather, her duties required her to travel to various locations throughout the Chicagoland area. As such, we find that she qualifies as a traveling employee.[1]

[1]Respondent concedes that claimant does not have a central job location and that claimant's work for respondent requires her to travel to various sites. Respondent contends, however, that claimant's travel "is analogous to that of a construction worker" and that "[c]onstruction workers routinely travel to and from work sites and injuries that occur in that travel are not compensable because construction workers are not traveling employees." Respondent cites no authority for this proposition and we therefore do not address it. See Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (requiring appellant's brief to include argument "which shall contain the contentions of the appellant and the reasons therefor, *with citations of the authorities* and the pages of the record relied on" (emphasis added.)); *Vallis Wyngroff Business Forms, Inc. v. Illinois Workers' Compensation Comm'n,* 402 Ill. App. 3d 91, 94 (2010) (holding that failure to comply with provision of Illinois Supreme Court Rule 341(h)(7) requiring citation to authority results in forfeiture of argument on appeal); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009) (same).

¶ 17 A finding that a claimant is a traveling employee, however, does not relieve the employee of the burden of proving that her injury arose out of and in the course of her employment. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14. The test whether a traveling employee's injury arose out of and in the course of employment is the reasonableness of the conduct in which she was engaged at the time of the injury and whether that conduct might have been anticipated or foreseen by the employer. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14. The question is one of fact for the Commission, and its determination will not be overturned on appeal unless it is against the manifest weight of the evidence. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, ¶ 15. Although we are reluctant to conclude that a factual determination of the Commission is against the manifest weight of the evidence, we will not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10.

¶ 18 In this case, the Commission determined that even if it had found claimant to be a traveling employee, it would still deny compensation. We conclude that this finding is against the manifest weight of the evidence.

¶ 19 The evidence establishes that claimant's injury occurred after she left home, while walking to a vehicle used to transport her to work. Thus, because claimant is a traveling employee, the injury

occurred in the course of her employment. See *Cox*, 406 Ill. App. 3d at 545 (noting that a traveling employee is deemed to be in the course of his or her employment from the time the employee leaves home until he or she returns). In addition, we find that the injury arose out of claimant's employment. As noted earlier, a traveling employee is one for whom travel is an essential element of his employment. *Cox*, 406 Ill. App. 3d at 545. As such, traveling employees "are compelled to expose themselves to the hazards of the streets and the hazards of automobiles * * * much more than the general public." *Illinois Publishing & Printing Co. v. Industrial Comm'n,* 299 Ill. 189, 197 (1921). Since claimant is a "traveling employee," her exposure to the hazards of the streets is, by definition, greater quantitatively than that of the general public, as long as her conduct at the time of the injury was reasonable and foreseeable to the employer. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14; *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 119 (2007). Claimant testified that the accident occurred as she was walking to the vehicle used to transport her to a work assignment for respondent. Claimant's walk to the minivan constituted the initial part of her journey to her work assignment. As such, it was reasonable and foreseeable.

¶ 20 During oral argument, respondent asserted that even if claimant is a traveling employee, her injury is not compensable because she had not left her private property when the injury occurred and therefore had not yet been subjected to the hazards of the street or an automobile. We find, however, that the evidence does not support the premise that claimant's fall occurred on private property. Edward testified that he did not observe claimant fall. Claimant testified that the accident occurred

adjacent to the driveway on a "public sidewalk" leading from the house to the driveway. Respondent presented no evidence to the contrary, and we find claimant's testimony sufficient to establish that the accident, which occurred on a "public sidewalk," exposed claimant to the hazards of the street. Moreover, we note that respondent cites no authority in support of its claim that a traveling employee who has left the physical confines of his or her home on the way to a job assignment and sustains an accident on private property cannot be subject to the hazards of the street. See *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (2000) (noting that the street-risk doctrine has been extended to cover inside structures if it is a place where the source of the risk could be expected to exist, citing *C.A. Dunham Co. v. Industrial Comm'n*, 16 Ill. 2d 102 (1959) (business traveler's death in an explosion and crash of a commercial plane)).

¶ 21 In so holding, we find misplaced the Commission's concern that such a holding would render compensable "ANY movement by [claimant] at any time during the day or night." (Emphasis in original.) The Commission does not explain why it believes this would be the case, and we note that an employee seeking benefits under the Act would still be required to establish that his injury arose out of and in the course of his employment as well as the reasonableness of the conduct in which the employee was engaged at the time of the injury and whether that conduct might have been anticipated or foreseen by the employer. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14; see also *Caterpillar Tractor Co.*, 129 Ill. 2d at 61-62 ("While the broad language of [the cited] cases might appear to imply that *any* accidental injury sustained on the employer's premises is compensable, this is not the law in this State. An examination of the cases

indicates this court's continued adherence to the maxim that an injury is not compensable unless it is causally connected to the employment." (Emphasis in original.)).

¶ 22 III. CONCLUSION

¶ 23 For the reasons set forth above, we reverse the judgment of the circuit court of Will County, which confirmed the decision of the Commission. We reverse the decision of the Commission and remand the matter to the Commission to reinstate the arbitrator's awards of medical expenses, TTD benefits, and PPD benefits. In addition, the Commission is instructed on remand to address the propriety of the arbitrator's imposition of attorney fees and penalties pursuant to sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2006)).

¶ 24 Reversed and remanded with directions.

STATE OF ILLINOIS)
)
COUNTY OF WILL)

☐ 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

Case # 08 WC 01595

STANISLAWA MLYNARCZYK
Employee/Petitioner

v.

SOPHIE OBROCHTA d/b/a JANITORIAL BY SOPHIE
Employer/Respondent

WILL COUNTY - ARBITRATOR HENNESSY

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 **Leo Hennessy**, arbitrator of the Commission, in the city of **Joliet**, on **9/29/09, 10/27/09 and 11/23/09**. 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 the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

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

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

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?

M. ☒ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Other _____

FINDINGS

- On 12/5/07, the respondent _____ *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 $ 21,381.36; the average weekly wage was $ 411.18.
- At the time of injury, the petitioner was 60 years of age, *married* with 0 children under 18.
- Necessary medical services *have not* been provided by the respondent.
- To date, $ 0 has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 274.12/week for 54 weeks, from 12/6/07 through 12/17/08, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $ 246.71/week for a further period of 133.25 weeks, as provided in Section 8(e)9 of the Act, because the injuries sustained caused 65% loss of use of the left hand/wrist.
- The respondent shall pay the petitioner compensation that has accrued from 12/5/07 through 11/23/09, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $ 34,818.91 for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $ 24,810.69 in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ 10,000.00 in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ 16,886.40 in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest 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.

Leo Hennessy
Signature of arbitrator

1-22-2010
Date

JAN 26 2010

STATEMENT OF FACTS

On December 5, 2007, Stanislawa Mlynarczyk, a 60 year old woman, was employed by Sophie Obrochta d/b/a Janitorial by Sophie to work cleaning churches and offices. She had been so employed since September 2007 when she and her husband Edward were both hired.

As part of his employment, Edward Mlynarczyk was given a 1998 Dodge Caravan minivan to drive himself and his wife and other employees to and from job sites. Mr. Mlynarczyk kept a log book for driving because he got paid for his hours of driving. The van was owned by the Respondent and her husband. The Respondent paid the insurance, license fees, gas and maintenance for the van.

On December 5, 2007, Stanislawa Mlynarczyk left her home at 6:30 a.m. and was driven by her husband in the Respondent's van to St. Mary's church to clean it. After several hours of working, Walter Obrochta told both Stanislawa Mlynarczyk and her husband Edward that there was no more work until 4:00 p.m. that day. He told them to go home, have lunch and return to St. Mary's Church around 5:00 p.m. to pick up other employees and then drive to the new job site.

Stanislawa Mlynarczyk and her husband returned home and had lunch. Shortly after 4:00 p.m., Edward Mlynarczyk returned to the van to warm it up and clear off fresh fallen snow in order to return to St. Mary's church as instructed. The van was parked in the driveway of the house where the Mlynarczyk's lived. Mr. Mlynarczyk testified that the walk was slippery because of the snow.

At approximately 4:10 p.m., Stanislawa Mlynarczyk left the house to walk to the van to return to work. As she walked around the rear of the van, she slipped and fell suffering a fracture to her left wrist. (Mrs. Mlynarczyk is right hand dominant).

Mr. Mlynarczyk helped the Petitioner into the van. He asked the landlord to go with them to Palos Community Hospital to assist them with the translation as the Mlynarczyk's only speak Polish.

Mr. Mlynarczyk also called Walter Obrochta to report the accident and tell him that they would not be at work that afternoon.

At Palos Community Hospital, the Petitioner was diagnosed with a displaced fracture of the distal radius and a comminuted fracture of the ulna of the left wrist with median nerve numbness. She was admitted and came under the care of Dr. Scott Price, M.D., an orthopedic surgeon. Dr. Price recommended immediate surgery.

An open reduction of the left distal radial fracture and an acute carpal tunnel release was performed on December 6, 2007 by Dr. Price. A locking plate with six (6) was used to repair the fracture.

Following the surgery, the Petitioner was discharged from the hospital on December 8, 2007. The Petitioner followed up with Dr. Price.

An EMG taken March 11, 2008 showed a left median neuropathy indicating demyelination and axon loss through the median nerve.

On June 6, 2008, Stanislawa Mlynarczyk had a follow up appointment with Dr. Price. At that time the Petitioner was given a release to return to work light

duty with a lifting restriction of no more than 20 to 30 pounds. Dr. Price told the Petitioner to follow up as needed. Physical therapy was denied by the Respondent and unpaid medical bills total $34,818.91, pursuant to the fee schedule.

Because of the lifting restrictions, the Petitioner was unable to return to work for the Respondent but found a job performing light housekeeping and cooking for an elderly woman. That job started on December 18, 2008. Unfortunately, that woman fell in September of 2009 and became unable to walk. Ms. Mlynarczyk had to quit that job because she could not lift the woman.

The Petitioner sometimes has pain in her left wrist and feels pain when she attempts to lift anything heavy. She also notices that she does not have the same strength in that hand as before the accident.

The hearing was commenced on September 29, 2009, and continued from time to time until proofs were closed on November 23, 2009.

CONCLUSIONS OF LAW

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

The Arbitrator finds that on December 5, 2007 an accident occurred that arose out of an in the course of Stanislawa Mlynarczyk's employment by Sophie Obrochta d/b/a Janitorial by Sophie.

> "Generally, injuries incurred while traveling to or from the work place are not considered to arise out of an in the course of employment (Citations omitted) 'The rationale underlying the rule

is that the employee's trip to and from work is the result of the employee's decision about where to live, which is a matter of no concern to the employer.' (Citation omitted) **However, an exception to this rule exists where the employer expands the range of employment by providing the employee a means of transportation to and from work for the employer's own benefit. (Citations omitted)** In such situations, the transportation is considered to expand the 'in the course of' element while apparently providing risk incidental to the exigencies of employment that satisfies the 'arising out of' element. (Citation omitted)" Becker v. Industrial Commission, 308 Ill. App. 3d 278 at 282, 719 N.E. 2d 792 at 795, 241 Ill. Dec. 663 at 666, (3rd Dist., 1999).

In this case, the employer supplied a van for transportation so that the Petitioner's husband could drive himself, the Petitioner and other employees to and from job sites throughout the western suburban area of Metropolitan Chicago. The employer clearly benefitted from providing the transportation because the employer was able to hire persons that did not have access to transportation to get to and from the job sites. The employer also benefitted because the employer could easily get his employees to job sites that might not be regularly serviced by public transportation.

Further, the fact that the Petitioner injured herself before she got into the car is unimportant. The Petitioner was on her way to a jobsite as instructed by her employer. She was a traveling employee and the risk of injury was a risk to which the Petitioner, by virtue of her employment, was exposed to a greater degree than the general public. See Potenzo v. Illinois Workers' Compensation Comm., 378 Ill. App. 3d 113, 881 N.E. 2d 523, 317 Ill. Dec. 355 (1st Dist. 2007).

In this case, the Arbitrator finds that at the time of the accident on December 5, 2007 the Petitioner was a traveling employee using a vehicle

supplied by the employer for the employer's benefit. While starting to travel from her home to a jobsite, at the instruction of her employer, she slipped on some fresh snow and fell to the ground suffering a fracture to her left wrist. She was acting within the course and scope of her employment for the benefit of her employer. Therefore, the accident arose out of and in the course of the Petitioner's employment by the Respondent.

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

The Arbitrator finds that the Petitioner's present condition of ill-being is causally related to the injury that occurred on December 5, 2007.

Although the Respondent raised the issue of causal connection, there is no evidence in the record to dispute the fact that the Petitioner suffered a displaced fracture of the distal radius, a comminuted fracture of the ulna and acute carpal tunnel syndrome of the left wrist as a result of the December 5, 2007. Immediately after the accident, the Petitioner was taken from the scene of the accident to Palos Community Hospital where she was admitted and had surgery performed on her wrist on December 6, 2007 by Dr. Scott Price, M.D.

Therefore, based on the undisputed medical records and the testimony of the Petitioner, the Arbitrator finds that the Petitioner's present condition of ill-being is causally related to the injury on December 5, 2007.

J. Were the medical services that were provided to Petitioner reasonable and necessary?

The Arbitrator finds that the medical services that were provided to the Petitioner were reasonable and necessary.

As a result of the December 5, 2007 accident the Petitioner suffered a fractured left wrist and acute carpal tunnel syndrome that had to be surgically repaired with a plate and six screws. The Petitioner was admitted to Palos Community Hospital through the emergency room on December 5, 2007 and surgery was performed by Dr. Scott Price on December 6, 2007. Dr. Price also rendered follow up care and testing. This treatment was all reasonable and necessary.

Therefore, pursuant to the fee schedule the Arbitrator awards the following bills for medical services:

1. Palos Community Hospital - $19,055.20
2. Palos Emergency Medical Services, Ltd. - $329.46
3. Radiology and Nuclear Consultants - $142.00
4. Dr. Mohammed Razzaque, M.D. - $662.22
5. Palos Anesthesia Associates, S.C. - $880.00
6. Associated Cardiovascular Physicians - $25.00
7. Palos Pathology Associates - $49.00
8. Parkview Musculoskeletal Institute (Dr. Price) - $8,649.24
9. Illinois Multi-Med Rehab and Diagnostic - $5,026.79

Total (per fee schedule) - $34,818.91

K) What amount of compensation is due for temporary total disability?

The Arbitrator finds that the Petitioner is due $274.12 per week for 54 weeks from December 6, 2007 through December 17, 2008 for a total of $14,802.48.

The accident happened on December 5, 2007 and Dr. Price kept the Petitioner completely off work until June 6, 2008 when he released the Petitioner to light duty work with a 20 to 30 pound lifting restriction.

The Petitioner was unable to find work within her restrictions until December 18, 2008 when she started a job performing light housekeeping and cooking for an elderly woman. Therefore, temporary total disability benefits are due from December 6, 2007 through December 17, 2008 or 54 weeks at the rate of 274.12 per week based on in average weekly wage of $411.18.

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

The Arbitrator finds that the accident of December 5, 2007 caused a displaced fracture of the distal radius, a comminuted fracture of the ulna and acute carpal tunnel syndrome of the left wrist. The condition had to be surgically repaired in an open procedure using a plate and six screws. The hardware is still in place.

The Petitioner is a 62 year old woman who is right hand dominate and has lifting restrictions pertaining to her left hand and arm. She is Polish speaking and had to use an interpreter to testify. It took her six months to find a new job within her restrictions and at the time of the hearing she was looking for work again

because the woman she was caring for required more help than the Petitioner was physically able to provide.

The Petitioner has some pain in her left hand and wrist, especially if she attempts to lift anything heavy. She notices a lack of strength.

Therefore, because of the severity of the fracture, the restrictions and the difficulty the Petitioner now has in finding employment, the Arbitrator finds that the Petitioner has suffered a 65% loss of use of her left hand.

The Petitioner is entitled to the sum of $246.71 for 133.25 weeks as provided in Section 8(e)9 of the Act.

M. Should penalties and fees be imposed upon the Respondent?

The Arbitrator finds that penalties and fees should be imposed upon the Respondent.

The facts in this case are for the most part undisputed. The Petitioner was injured when she fell on her way to a job site as ordered by the Respondent. In this case, transportation to and from the job sites was provided by the employer for its own benefit. The Petitioner was acting for the benefit of the employer in the course of her employment.

Because of the facts, the Respondent's refusal to pay temporary total disability benefits is unreasonable, vexatious and the defenses raised are frivolous. The testimony of the Petitioner and her husband was credible, clear and consistent unlike the testimony of Walter Obrachta, the husband of Sophie Obrachta. Mr. Obrachta admitted that the Respondent provided up to five

vehicles to other employees to use for the cleaning service. He then attempted to testify that he had no employees because everyone that worked for the Respondent was an "independent contractor."

The Arbitrator awards penalties as follows:

SECTION 19(k)

50% of TTD	$ 7,401.24
50% of medical bills	$17,409.45
TOTAL 19(k)	$24,810.69

SECTION 19(l)

$30.00 per day 12/5/07 through 9/29/09 663 days - maximum	$10,000.00

SECTION 16 FEES

20% of TTD	$ 2,960.49
20% of medical bills	$ 6,963.78
20% of 19(k) penalties	$ 4,962.13
20% of 19(l) penalties	$ 2,000.00
TOTAL FEES	$16,886.40

1 of 1 DOCUMENT

STANISLAWA MIYNARCZTK, PETITIONER, v. SOPHIE OBROCHTA, RESPONDENT.

NO. 08WC 01595

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

2011 Ill. Wrk. Comp. LEXIS 771; 11IWCC0747

July 29, 2011

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary disability, permanent disability and penalties and fees and being advised of the facts and law, reverses the Decision of the Arbitrator.

Respondent appeals the January 26, 2010 decision of Arbitrator Hennessey finding that Petitioner sustained an accidental injury arising out of and in the course of her employment on December 5, 2007 and that Petitioner's current condition of ill-being is causally related to that work accident. As a result, Petitioner was temporarily totally disabled from December 6, 2007 through December 17, 2008 for 54 weeks under § 8(b) of the Illinois Workers' Compensation Act, incurred medical expenses in the amount of $ 34,818.91 and is permanently partially disabled to the extent of 65% loss of use of her left hand/wrist under § 8(e) of the Act.

After considering the entire record, and for the reasons set forth below, the Commission reverses the Decision of the Arbitrator and finds that Petitioner failed to prove she sustained accidental injuries [*2] arising out of and in the course of her employment on December 5, 2007. The Commission vacates the Arbitrator's award of benefits and medical expenses for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 60 year old janitorial worker, testified though a Polish interpreter that she worked for Respondent cleaning churches, homes and offices and had been employed by Respondent since September 2007. Petitioner's husband was also employed by Respondent.
2. Respondent, Mr. Walter Obrochta, testified that Petitioner and her husband usually had a full day of cleaning from 6:00 am to approximately 4:00 pm at various job sites but on December 5, 2007 there were a few cancellations as it was the holiday season. Mr. Obrochta testified that he told Petitioner and her husband that if they wanted, they could help out another cleaning crew that evening.
3. Petitioner testified that she never drove the vehicle that was provided to her husband by Respondent. Petitioner was not paid for travel time to and from jobs. Further, the vehicle did not have any logos or decals on it.

4. Mr. Mlynarczyk, Petitioner's husband, testified that he would [*3] use the van that Respondent had loaned him for personal errands and buy his own gas when he did so. Mr. Mlynarczyk further testified that he only used the Respondent's van until he was able to purchase his own car and used his own car for travel to and from work after he did so.
5. Respondent, Mr. Walter Obrochta, testified that the van which was lent to Mr. Mlynarczyk was a personal vehicle of his and his wife which was lent to Petitioner's husband for a short time as a courtesy and was returned to him by Mr. Mlynarczyk after he was able to purchase his own vehicle.
6. On December 5, 2007, Petitioner testified she started work at 6:30 am cleaning a church with her husband. After Petitioner and her husband cleaned the church, Petitioner's husband drove them to two homes which they cleaned without incident. Petitioner testified that after Petitioner and her husband cleaned the homes, Petitioner's husband spoke with Respondent who advised there were no other cleaning assignments for them at that time but they could meet Respondent later in the evening and assist another cleaning crew on a job.
7. Petitioner and her husband drove Respondent's van back to their home around 2:30 or 3:00 [*4] in the afternoon and ate a meal. They were home for approximately an hour and a half then left to meet Respondent for a cleaning assignment that evening.
8. Petitioner testified that when she is on the job her lunch breaks are usually only ten to fifteen minutes long.
9. Petitioner testified that on December 5, 2007 she was not paid for her time at home before she went back out to undertake another cleaning assignment. Petitioner testified that she is paid by the job, not by the hour, by Respondent.
10. Petitioner testified she walked out of her home and the ground was covered with snow. She testified that she slipped behind the car and had pain in her left hand.
11. Petitioner testified that when she fell, she had not yet gotten into the vehicle and was still on her landlord's property in the driveway. Petitioner testified she was not carrying anything when she fell and only had her purse on her shoulder.
12. Petitioner called to her husband who came and helped her up. Petitioner, her husband and their landlord, who served as an interpreter for the couple, went to the emergency room in the landlord's vehicle.
13. Petitioner suffered a displaced fracture involving the left distal [*5] radius and a comminuted fracture of the ulnar styloid which was minimally displaced. Petitioner underwent open reduction of the left distal radial fracture with acute carpal tunnel release on December 6, 2007 (PX1).
14. Petitioner testified that after she was released to light duty work from the December 5, 2007 injury she chose not return to Respondent's employ but instead found another job as an in-home care taker for an elderly woman.

To obtain compensation under the Act, a Petitioner must show by a preponderance of the evidence that she has suffered a disabling injury arising out of and in the course of her employment. *820 ILCS 305/2.* Injuries sustained on the employer's premises, or at a place where the petitioner might reasonably have been while performing her duties and while at work are generally deemed to have been received in the course of the employment. The Courts have held that an injury that occurs while going to or coming from work is generally not compensable as it does not occur out of and in the course of employment. *Martinez v. Industrial Comm'n, 611 N.E. 2d 545 (1993).* To 'arise out of' employment [*6] requires that the risk be connected with, or incidental to the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co., 129 Ill.2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989).* The Courts have recognized three general types of risk to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 317 Ill. Dec. 355 (2007).* Injuries resulting for risks personal to the employee, such as idiopathic falls, generally do not arise out of employment. Injuries resulting from a neutral risk, such as a fall with fresh ice and snow on the ground, generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to a risk to a greater degree than the general public.

Petitioner testified that she fell [*7] on her personal driveway while walking to a vehicle to go to work. Petitioner testified she did not know if there was ice under the snow on the sidewalk and driveway. The public sidewalk and private driveway were in the same condition as it related to the ice and snow. Petitioner was not carrying anything when she fell; she had her purse on her shoulder. The Commission finds that the Petitioner failed to prove that she was ex-

posed to a risk that was connected or incidental to her employment and therefore fails to prove that the injuries she sustained as a result of her fall on December 5, 2007 arose out of her employment.

Further, Petitioner fails to prove that the injuries she sustained due to the fall on her driveway were sustained in the course of her employment. Petitioner had not yet left her personal property when the injury occurred. She had not been exposed to the hazards of the street or automobile as she had yet to get in a car or leave her own driveway. Petitioner usually had a set schedule of cleaning jobs that she did daily that would cover the hours of 6:30 am to 4:00 pm and she did not normally take a lunch break of more than 15-30 minutes. She was never directed by [*8] her employer when to take a lunch break. Petitioner was not paid by the day or hour, but by the cleaning jobs she completed. On December 5, 2007 Petitioner's normal routine was disrupted by cancellations of one or more of her usual cleaning jobs. Petitioner and her husband were given the option by their employer to assist another cleaning crew on a job that evening if they wanted to make up the lost money from the cancellation. Petitioner and her husband agreed to the additional cleaning job. It was during the time off from the period between her last scheduled job and before she started the extra evening cleaning job that Petitioner fell on her own driveway. Petitioner was not on the employer's premises or at a job location where she would have been performing her work duties when she fell. While the Commission does not find Petitioner to be a traveling employee, it notes that Petitioner had not yet left her property or even entered a vehicle when she was injured, was not paid for her time between jobs or mileage for travel and was not exposed to any of the risks of a traveling employee. Even if the Commission found Petitioner to be a traveling employee, it would not circumvent the [*9] requirement that the injury arise out of and in the course of her employment. If the Commission were to find accident in this case, then ANY movement by Petitioner at any time during the day or night would lead to a compensable claim. Based on the Record and for the forgoing reasons, the Commission finds the injuries sustained by the Petitioner did not arise out of and in the course of her employment with Respondent on December 5, 2007 and reverses the Arbitrator's finding of accident in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 26, 2010, is hereby reversed. Petitioner failed to prove she sustained accidental injury arising out of and in the course of her employment on December 5, 2007. Compensation is denied.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

STANISLAWA MLYNARCZYK,

Plaintiff,

vs.

ILLINOIS WORKER'S COMPENSATION COMMISSION OF ILLINOIS and SOPHIE OBROCHTA d/b/a JANITORIAL BY SOPHIE,

Defendants.

No.: 11 MR 766

ORDER

This cases arises out of injuries incurred by Stanislawa Mlynarczyk (hereinafter "Plaintiff") to left wrist while employed by Sophie Obrochta d/b/a Janitorial by Sophie (hereinafter "Defendant"). Plaintiff was granted benefits by the Arbitrator. The Commission reversed the decision of the Arbitrator and determined that the Plaintiff failed to prove that she sustained accidental injuries arising out of and in the course of her employment. (Rec. at p. 000380.) The Commission determined that the Plaintiff testified that she fell on ice and snow on her personal driveway while walking to a vehicle to go to work. (Rec. at p. 000382.) The Commission determined that the Plaintiff failed to prove that she was exposed to a risk connected or incidental to her employment and thus, failed to prove that the injuries sustained by Plaintiff from the fall arose out of her employment. (Rec. at p. 000382.)

The facts at the hearing established that Plaintiff's husband, Edward Mlynarczyk, was given a 1998 Dodge Caravan by the Defendant to drive himself, his wife and other employees to and from job sites. (Rec. at pp. 000039, 000128.) The van was owned by Walter and Sophie Obrochta, the owners of Defendant. (Rec. at pp. 000039-40, 000128, 000130.) The van was not owned by Defendant. (Rec. at p. 000130.) Mr. Obrochta testified that he was trying to help the Plaintiff and her husband after they came to this country and so he lent Plaintiff and her husband the car. (Rec. at p. 000129.) Mr. Obrochta testified that the van was for their personal use. (Rec. at p. 000129.) Mr. & Mrs. Obrochta paid insurance, registration, gas and maintenance for the van. (Rec. at pp. 000041, 000130.) Mr. Mlynarczyk would receive money from Defendant for which he would purchase gasoline for the van, but he would keep the receipts. (Rec. at p. 000041.) He would do an accounting for the gasoline with the receipts. (Rec. at p. 000041.)

Mr. Mlynarczyk testified that he is a driver and that he would drive Plaintiff to an assigned job and would sometimes receive a phone call and would have to drive and pick up other women for the Defendant and take them to a location. (Rec. at pp. 000039, 000128.) Mr. Mlynarczyk did not know who owned the car. (Rec. at pp. 000039-40.) He would pick up other people and drive them to locations three times a week. (Rec. at p. 000052.)

Mr. Mlynarczyk testified that he had permission from the employer to use the van to go visit his daughter in River Grove, Illinois and his son in Chicago, Illinois. (Rec. at pp. 000057-58.) Sometimes he would use the van to stop for groceries on his way home from work. (Rec. at pp. 000058-59.) He would not use the van for his own personal use without permission. (Rec. at p. 000068.) Mr. Mlynarczyk kept a log of when he would use the van, but not when he used the van for his own personal use. (Rec. at pp. 000069-70.)

On the date of Plaintiff's accident, Mr. Mlynarczyk was driving the van that day. (Rec. at p. 000042.) They were living in Lemont at the time and started work around 6:30 a.m. (Rec. at pp. 000042, 000078.) Plaintiff and her husband went to clean the church and after that had two additional houses to clean. (Rec. at pp. 000043, 000078-79.) They drove to the church from their home and aft, 000106er they were done cleaning the church, they drove to clean the two houses. (Rec. at pp. 000043-45, 000078-79.) After they were done cleaning the two houses, they were told by Mr. Obrochta to take lunch. (Rec. at pp. 000046, 000081, 000106-09, 000135.) Mr. Obrochta testified that he told them that there was a window of time so that they could do whatever they wanted. (Rec. at p. 000135.) Normally they had a fifteen minute lunch break, but on that day, they were given 90 minutes because they were supposed to go to a new job. (Rec. at pp. 000053, 000136.) They never previously had an hour and a half lunch break. (Rec. at pp. 000054, 000136.)

Plaintiff and her husband were instructed by Mr. Obrochta to be back at the church at 4:30 p.m. (Rec. at pp. 000047, 000080-81.) They went home for lunch and did not go anywhere else. (Rec. at pp. 000046, 000054, 000082, 000106.) They were not paid for that lunch break. (Rec. at pp. 000110, 000136.) They could do whatever they wanted and they were not under the control of their employer. (Rec. at pp. 000110-11, 000136-37.) Mr. Mlynarczyk was not paid to drive the van to work, but he was paid if he drove other employees to work. (Rec. at pp. 000139-40.)

Sometime after 4:00 p.m., Plaintiff and her husband left their home to go to the church. (Id.) The van was parked next to the building where they lived. (Rec. at p. 000048.) Mr. Mlynarczyk started the car and Plaintiff came out of the house. (Id.) Mr. Mlynarczyk did not see her fall but he helped her off the ground. (Rec. at pp. 000048-49.) She was two or three steps behind the car. (Id.) There is a public sidewalk from the house to the driveway. (Rec. at pp. 000063, 000111-12.) The accident happened on the driveway and the sidewalk. She was using the sidewalk to get to the driveway. Her husband parked in front of the garage on the driveway, where he normally parks. (Rec. at p. 000112.) Sometimes Mr. Mlynarczyk or another tenant would remove snow from the sidewalk. (Rec. at pp. 000064-65.) When she fell, Plaintiff had her purse on her shoulder and was not carrying anything else in her hands. (Rec. at p. 000114.) Mr. Mlynarczyk drove her to the hospital.(Rec. at p. 000050.)

The question of whether an injury arises out of employment is generally a question of fact for the Commission which should not be disturbed unless it is against the manifest weight of the evidence. Illinois Inst. of Tech. Research Inst. v. Indus. Comm'n, 314 Ill. App. 3d 149, 164-65, 731 N.E.2d 795, 808 (1st Dist. 2000). The manifest weight of the evidence is that which is the clearly evident, plain and indisputable weight of the evidence. In order for a finding to be

contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Id. However, "[w]here the facts are undisputed * * * and are susceptible to but a single inference, the question of whether an injury arose out of and in the course of employment becomes a question of law." Id. (citing Kemp v. Industrial Comm'n, 264 Ill. App. 3d 1108, 1110, 636 N.E.2d 1237 (5th Dist. 1994)).

Plaintiff appears to argue that she is a "travelling employee." As the court noted in Cox v. Illinois Workers' Comp. Comm'n, 406 Ill. App. 3d 541, 941 N.E.2d 961 (1st Dist. 2010)

> A "traveling employee" is one who is required to travel away from his employer's premises in order to perform his job. Jensen v. Industrial Comm'n, 305 Ill. App. 3d 274, 278, 711 N.E.2d 1129 (1999). . . .The determination of whether an injury to a traveling employee arose out of and in the course of employment is governed by different rules than are applicable to other employees. Hoffman v. Industrial Comm'n, 109 Ill. 2d 194, 199, 93 Ill.Dec. 356, 486 N.E.2d 889 (1985). As a general rule, a traveling employee is held to be in the course of his employment from the time that he leaves home until he returns. Urban v. Industrial Comm'n, 34 Ill.2d 159, 162–63, 214 N.E.2d 737 (1966).

Cox, 406 Ill. App. 3d at 545-46, 941 N.E.2d at 965-66. The Cox court further stated:

> Generally, injuries incurred by an employee while traveling to or from the workplace are not considered to arise out of and in the course of the employment. Commonwealth Edison Co. v. Industrial Comm'n, 86 Ill. 2d 534, 537, 428 N.E.2d 165 (1981). However, an exception to this general rule exists when, as in this case, the employer for its own benefit provides the employee with means of transportation to and from work. Beattie v. Industrial Comm'n, 276 Ill. App. 3d 446, 450, 657 N.E.2d 1196 (1995). "In such situations, the transportation is considered to expand the 'in the course of' element while apparently providing a risk incidental to the exigencies of employment that satisfy the 'arising out of' element." Becker v. Industrial Comm'n, 308 Ill. App. 3d 278, 282, 719 N.E.2d 792 (1999).

Cox, 406 Ill. App. 3d at 546, 941 N.E.2d at 966. The Commission specifically determined, based upon the evidence, that Plaintiff was not a "travelling employee." Based upon the evidence, this finding is not in error. The employer did not provide the Plaintiff with a vehicle. Mr. and Mrs. Obrochta owned the vehicle in their personal capacities. The company did not own the vehicle.

As the Plaintiff is not a "travelling employee" the next question is whether her injuries were sustained in the course of her employment. As the Commission noted, she had not yet left her personal property when the injury occurred. Plaintiff and her husband were able to do anything they wished during this unusual lunch break. They were not paid by the employer for their time during this lunch break. Plaintiff was not injured in the course of her employment.

WHEREFORE, for the reasons set forth above, the decision of the Commission is AFFIRMED. Clerk to notify.

5/10/12
Date

Hon. Bobbi N. Petrungaro

2013 Il App (1st) 121136WC

Workers' Compensation
Commission Division
Filed: June 3, 2013

No. 1-12-1136WC

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

UNITED AIRLINES, INC.,	)	Appeal from the
	)	Circuit Court of
Appellee,	)	Cook County
	)	
v.	)	
	)	No. 11 L 50815
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	
(Richard Young,	)	Honorable
	)	Roberto Lopez Cepero,
Appellant).	)	Judge Presiding.

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

Presiding Justice Holdridge and Justices Hudson, Harris and Stewart concurred in the judgment and the opinion.

OPINION

¶ 1 The claimant, Richard Young, appeals from an order of the Circuit Court of Cook County which reversed a decision of the Illinois Workers' Compensation Commission (Commission) awarding him, amongst other relief, weekly wage differential payments of $277.06, beginning April 27, 2009, pursuant to section 8(d)(1) of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)(1) (West 2006)) and continuing for the duration of the disability he suffered as a consequence of his employment with United Airlines, Inc. (UAL). In addition, the circuit court reinstated the decision

of the arbitrator which, in part, had awarded the claimant weekly wage differential payments which decreased annually over the course of ten years and terminated on April 13, 2018. For the reasons which follow, we reverse the judgment of the circuit court and reinstate the decision of the Commission.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 5, 2010.

¶ 3 The claimant testified that he started working as a ramp service worker for UAL on April 12, 1999. As a ramp service worker, the claimant loaded and unloaded luggage bags for UAL. On December 28, 2004, he sustained a right wrist injury arising out of and in the course of his employment. In December 2004, the claimant earned $20.66 per hour, which included shift differential pay ($0.50/hour) and line pay ($0.10/hour); he was also eligible for longevity and overtime pay. The claimant testified that in December 2004, he averaged 44 hours per week, which included overtime hours. On April 17, 2006, his physician released him to return to work on a trial basis; he returned to work on April 19, 2006. Two days later, on April 21, the claimant suffered a right shoulder injury while lifting a bag. On July 20, 2007, the claimant's physician, Dr. Terry Nicola, released him to return to work with permanent restrictions; the restrictions precluded him from returning to his ramp service position.

¶ 4 On August 29, 2007, at UAL's request, the claimant met with Joseph Belmonte for a vocational interview. The claimant began seeking alternative employment both inside and outside of UAL. In February 2008, the claimant accepted a station operations representative (SOR) position at UAL. As an SOR, the claimant managed the weight loads of airplanes, requiring him to sit at a

desk and monitor computer screens. The SOR position paid $20.63 per hour for 40 hours per week. The claimant testified that had he still been employed as a ramp service worker in April 2008, he would have been making $19.81 plus shift differential, line pay, and longevity pay, based on the union agreement that was in effect in March 2008. The claimant worked as an SOR at the $20.63 per hour rate for approximately six weeks, until April 27, 2008. At that time, UAL informed the claimant that there was an error and that his wage was being reduced to $9.92 per hour, because the union agreement required that he start at the lowest wage for the SOR position. As an SOR, he was also able to receive longevity pay and shift differential. The claimant testified that he worked 40 hours per week as an SOR, whereas he had the opportunity to work overtime hours as a ramp service worker. As a ramp service worker, overtime could be mandatory on some occasions, such as when the weather was bad, and it usually ranged from one hour to four hours.

¶5 On cross-examination, the claimant admitted that as a ramp service worker, he was a member of the International Association of Machinists and Aerospace Workers Union (IAM). He testified that he was still a member of this union as an SOR. The claimant also admitted that, pursuant to the union agreement for ramp service workers, overtime became mandatory only in emergencies, such as weather-related conditions. He admitted his current hourly pay was "$10.60-something," and he was eligible for annual wage increases as an SOR. On March 15, 2010, his wage was set to increase to $11.07 per hour. The claimant denied that his wage would progress in the same manner as a ramp service worker. He explained that when he started as a ramp service worker there was a five-year progressive pay scale; he was earning the top wage as a ramp service worker at the time of his injury. Under the current union agreement, there was a 10-year progressive pay scale for both positions.

The claimant admitted that he would be at the top wage for the SOR position in 2018.

¶ 6 The report of Joseph Belmonte was submitted into evidence. Belmonte opined that the claimant was employable in a variety of alternative occupations, including truck driving and transportation related activities, material handling and warehouse activities. Belmonte opined that occupations such as industrial truck operator or forklift operator, which often paid $15 per hour, might also be suitable positions for the claimant. Belmonte recommended that the claimant seek alternative employment and undergo vocational testing and training.

¶ 7 Julianne Cooney, a labor relations analyst at UAL, testified that she ensured that union contract terms relating to wages and other rules were followed. She had been employed by UAL for 22 years, the last eight years as a labor relations analyst. She testified that the same union, IAM, oversaw ramp service workers and SORs. She explained that IAM negotiated two separate agreements, the Ramp Service Agreement and the Public Contact Employees Agreement, which applied to ramp service workers and SORs, respectively.

¶ 8 Cooney identified the Ramp Service Agreement, dated July 1, 2005, which was still in effect at the time of the hearing. She admitted that a new agreement was being negotiated, but she did not know when such agreement would be reached. Cooney also identified the Public Contact Employees Agreement, dated May 1, 2008. She testified that the claimant began working as an SOR on March 17, 2008, earning $20.63 per hour. That hourly rate was incorrect, because the Public Contact Employees Agreement provided that inactive employees begin at the lowest wage. The $20.63 hourly wage was the top wage for an SOR; the starting wage was $9.67. Under the contract terms, the claimant was considered an "inactive" employee.

¶ 9 Cooney testified that on March 17, 2008, had the claimant still been employed as a ramp service worker, he would have been earning the maximum base pay ($19.81 per hour), line pay ($0.10 per hour), and longevity pay ($0.06 per hour), totaling $19.97 per hour. Using the current Ramp Service Agreement, Cooney projected the claimant's wages through April 12, 2020, incorporating contractual wage increases. As of April 26, 2009, Cooney projected that the claimant would have been earning $21 per hour as a ramp service worker. She explained that the contractual increases generally occurred annually, but admitted that such increases depended upon the terms of the agreement. In her experience, contractual increases historically have been the same for both the ramp service and SOR positions.

¶ 10 Cooney also projected the claimant's wages through April 12, 2020, using the SOR pay scale. She testified that the claimant's SOR wage as of March 17, 2008, was $9.61 per hour. On April 12, 2009, the claimant earned $10.36 per hour as an SOR. As of March 5, 2010, the hearing date, Cooney testified that the claimant earned $10.61 per hour. She testified that the claimant would progress to the top of the SOR wage scale on March 17, 2018, earning $21.77 per hour. At that point, Cooney testified that the claimant would be earning more money than he would have had he remained in the ramp service position, which she projected would pay $21.08 per hour in 2018. Cooney testified that employees could not receive discretionary raises, because they were bound by the union agreements. The claimant's counsel objected to Cooney's projections on the basis the projections were speculative. The arbitrator overruled the objection.

¶ 11 On cross-examination, Cooney admitted her projections were based on the current union agreements, which covered years 2005 through 2009. She admitted that, under the Ramp Service

Agreement, the ramp service worker's top wage decreased from the prior agreement's top wage. Cooney explained that UAL was in bankruptcy before the 2005 agreement was reached. As part of the terms of the bankruptcy, UAL had to implement a court-imposed wage reduction. Cooney admitted that it was possible that wages may change over the next decade, based on UAL's performance and changes in union contracts. She admitted that her projections did not reflect these factors.

¶ 12 Cooney testified that she did not know whether either position worked overtime hours. She admitted her projections did not incorporate any overtime wages. Cooney testified that, because of UAL's financial distress, it was greatly reducing overtime offered. She admitted that the Ramp Service Agreement required overtime in emergency conditions, but that the Public Contact Employees Agreement did not contain a similar provision for SORs.

¶ 13 Following the hearing, the arbitrator found that, although the claimant was entitled to wage differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)), those benefits would decrease annually over the course of ten years and terminate on April 13, 2018. In his written decision dated April 21, 2010, the arbitrator found that the parties agreed that the claimant earned an average weekly wage of $791.55 in the year preceding his injury and that his injury arose out of and in the course of his employment. Temporary total disability (TTD) benefits pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2006)) were awarded in the amount of $527.70 for the time period between November 15, 2006, and August 15, 2007. Maintenance benefits pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) were awarded in the same amount for the time period between August 16, 2007, and March 16, 2008. Annually

decreasing weekly wage differential payments were awarded to the claimant according to UAL's projected figures, based on 40 hours per week, for a ten-year period.

¶ 14 The arbitrator ruled that the wage differential benefit payments should end effective April 13, 2018, finding that UAL had proven by the preponderance of the evidence that the claimant will then be earning more as an SOR than he would have had he remained a ramp service worker. The arbitrator determined that the factual circumstances of this case were unique: the previous and current employer were the same; the claimant was covered by the same union in both positions; and the parties had a history of operating under contract, periodically renegotiating new contracts. The arbitrator concluded that he could fairly determine the claimant's pay "at present and in the future without resorting to speculation, guess, or conjecture by simply referencing the provisions of the present and any future collective bargaining agreements between UAL and the [IAM] by which [the parties] herein are bound."

¶ 15 The claimant sought a review of the arbitrator's decision before the Commission. On July 7, 2011, the Commission issued a ruling affirming and adopting the arbitrator's decision except for his wage differential payment schedule, which it modified to provide that the claimant will receive $277.06 per week, beginning April 27, 2009, and continuing for the duration of the disability. The Commission found that the arbitrator erred in adopting UAL's position that the wage differential could be calculated based upon wages to be paid past the date of the arbitration hearing. The Commission found "that the wage differential can only be determined based on what [wages are] at the time of the hearing." The Commission based its wage differential award on the claimant's working 40 hours per week.

¶ 16 UAL sought judicial review of the Commission's decision in the circuit court of Cook County. On March 20, 2012, the circuit court set aside the Commission's decision and reinstated the arbitrator's decision. The claimant now appeals.

¶ 17 The parties do not dispute that the claimant is entitled to wage differential benefits; they dispute only the amount and duration of the award. In modifying the arbitrator's wage differential award, the Commission stated:

> "The main issue before the Commission is calculation of §8(d)(1) wage differential. The difference in pay between the ramp service position and the SOR position is that [claimant] was topped out of the step increases in the ramp service position and was no longer getting step raises. The reason the wage differential shrinks is that in the SOR position [claimant] is getting step raises, having come into that position at the bottom of the steps. The Commission finds that the Arbitrator erred in adopting [UAL's] position that the wage differential can be calculated past the date of the arbitration hearing. The Commission finds that the wage differential can only be determined based on what it is at the time of the hearing."

¶ 18 The claimant argues that the Commission properly rejected the arbitrator's step-down schedule of wage differential payments, because Cooney's projections were speculative. He argues that the Commission's award was based on a correct interpretation of section 8(d)(1) and relevant evidence. UAL counters, contending that the Commission's modification of the arbitrator's wage differential award was based on its erroneous construction of section 8(d)(1) of the Act. It argues that the Commission misapplied the holding in *Cassens Transportation Co. v. Industrial Comm'n*,

218 Ill. 2d 519, 844 N.E.2d 414 (2006), which provides that the arbitration hearing was the only opportunity for both parties to present evidence showing the likely duration of an injury and its effect on future earning capacity. We begin by addressing UAL's argument that the Commission misapplied the law.

¶ 19 The Commission's conclusion, that section 8(d)(1) requires the wage differential award to be calculated as of the date of the hearing, is a matter of statutory construction, which is a question of law. Issues of law are considered *de novo* on review without deference to the Commission's determination. *Elliott v. Industrial Comm'n of Illinois*, 303 Ill. App. 3d 185, 187, 707 N.E.2d 228 (1999). Therefore, we will review *de novo* whether section 8(d)(1) allows an award of wage differential payments pursuant to a step down schedule which terminates on a date certain.

¶ 20 Section 8(d)(1) provides, in relevant part, that a partially incapacitated employee shall:

> "receive compensation for the duration of his disability ***equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2006).

¶ 21 In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature. *Cassens*, 218 Ill. 2d at 524. The best indication of this intent is the plain and ordinary language of the statute itself. *Dodaro v. Worker's Compensation Comm'n*, 403 Ill. App. 3d 538, 545, 950 N.E.2d 256 (2010). We determine this intent by reading the statute as a whole and considering all the relevant parts. *Cassens*, 218 Ill. 2d at 524. "We interpret the Act liberally to effectuate its

main purpose: providing financial protection for injured workers." *Id.*

¶ 22 In this case, section 8(d)(1) states that the wage differential award will be equal to 66-2/3% of the "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation" at the time of the accident and "the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2006). The statute does not provide for a varying amount to be paid out at various future dates. Rather, as the statute states, the award must be based upon the *average* amount of the claimant's wages at the time of the accident and the *average* amount which the claimant is earning or able earn in some suitable employment after the accident. The statute, under its plain and ordinary language, does not contemplate multiple figures to be computed and awarded at future dates. Therefore, we agree with the Commission's interpretation of section 8(d)(1), that it requires the wage differential to be determined as of the date of the arbitration hearing.

¶ 23 In so holding, we reject UAL's argument that the Commission's interpretation of section 8(d)(1) disregards the supreme court's decision in *Cassens*. In *Cassens*, the Commission awarded a weekly wage differential to the employee in 1993. *Cassens*, 218 Ill. 2d at 521. Ten years later, the employer sought to terminate that award, because the employee's wage in 2002 matched the wage he had been earning at the time of the injury in 1988. *Id.* The employer raised the issue in a petition filed pursuant to section 19(h) of the Act (820 ILCS 305/19(h) (West 2002)). *Id.* at 523. The supreme court considered whether the Commission had jurisdiction to reopen or modify the 10-year-old wage differential award under either section 19(h) or section 8(d)(1) itself. *Id.* at 524-5.

¶ 24 The *Cassens* court concluded that section 8(d)(1) did not authorize the parties to petition for

review of an award and the time had passed for the parties to raise the issue in a section 19(h) petition. *Id.* The *Cassens* court further rejected the employer's argument that the duration clause of section 8(d)(1) was meaningless if future modifications were not allowed, stating that it was meaningful to the Commission's initial determination of the propriety of a wage differential award. *Id.* at 529. At the initial hearing, the Commission was allowed to determine whether the claimant's disability was likely to end, abate, or increase after a certain duration, and award compensation accordingly. *Id.* The *Cassens* court stated that the "Act establishes that employees and employers alike must use the opportunity of their initial hearing to present evidence showing the likely duration of an injury and its effect on the claimant's earning capacity." *Id.* at 530.

¶ 25 Further, "to receive an award under section 8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Id.* at 530-1. The court stated that the second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay; taking into account factors such as wage increases, overtime, and increased hours of work. *Id.* at 531. The *Cassens* court stated:

> "Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity. While this may result in an imperfect award, the legislature has not currently authorized infinite opportunities for correction." *Id.*

¶ 26 *Cassens* did not hold that multiple awards may be awarded at various future dates. Rather, *Cassens* provided that the parties may present evidence beyond wages to establish long-term earning capacity during the arbitration hearing. *Cassens*, 218 Ill. 2d at 530. The Commission's interpretation of section 8(d)(1) neither bars the parties from presenting evidence beyond wages to establish long-term earning capacity nor prevents the arbitrator or Commission from considering such evidence in determining the award. It only requires the fact-finder to determine the value of the award at the time of the arbitration hearing that best addresses the evidence presented at the hearing.

¶ 27 In our view, under *Cassens* and section 8(d)(1), the parties have the ability to present relevant evidence regarding the duration of the claimant's physical or mental disability and the claimant's earning capacity, including factors such as wage increases, overtime, and increased hours of work. However, the award must be calculated as of the date of the arbitration hearing. As *Cassens* noted, when considering the average wages of the past and present positions and factors beyond wages, awards may be imperfect. *Cassens*, 218 Ill. 2d at 531. Therefore, we reject UAL's contention that the Commission's interpretation of section 8(d)(1), that it requires the wage differential to be determined as of the date of the arbitration hearing, disregards the supreme court's decision in *Cassens* or is otherwise legally incorrect.

¶ 28 Next, we determine whether the Commission's award of $277.06 per week is erroneous based on this legal standard and the evidence presented. Whether the Commission's calculation of the amount of the weekly wage differential based upon the evidence presented was correct involves a question of fact and will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). For a finding

of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

¶ 29 In this case, UAL presented evidence of the claimant's future earning capacity, including evidence of the 2005-2009 SOR wage schedule, which included step increases over a ten-year period. It was the duty of the Commission to factor this evidence, along with evidence pertaining to the duration of the claimant's disability, into its determination of the award as of the date of the hearing. The Commission determined that as of the date of the arbitration hearing, the claimant should receive $277.06 per week, finding that he had been earning $21 per hour as a ramp service worker and $10.61 per hour as an SOR. Given that Cooney's projections did not factor in potential changes in the union agreement and changes in UAL's performance, we cannot hold that the Commission's finding is against the manifest weight of the evidence. Cooney's projections were speculative, because she could not predict changes in future union contracts and UAL's future performance, and the Commission could have discounted such speculative evidence when determining the amount of the claimant's award. See *United Airlines v. Workers' Compensation Comm'n*, 407 Ill. App. 3d 467, 473, 942 N.E.2d 711 (2011) (finding the Commission committed no error by excluding economist's opinion that the claimant would likely retire around age 62, because such evidence was speculative and irrelevant to a determination of the duration of the claimant's disability or impairment in the wages the claimant earned or was able to earn); *Deichmiller v.*

Industrial Comm'n, 147 Ill. App. 3d 66, 74, 497 N.E.2d 452 (1986) (finding the Commission did not err in refusing to calculate the claimant's wage differential award on speculative evidence of what he would have earned as a union plumber instead of as an apprentice plumber where the claimant had not taken the test to be admitted to the union and had never earned union plumber wages). Accordingly, we find that the Commission's decision to award the claimant $277.06 per week, based on evidence of the wages he had earned as a ramp service worker before the injury and the wages he was earning as an SOR after the injury, is not against the manifest weight of the evidence.

¶ 30 Finally, we consider the claimant's argument that the Commission was required to consider mandatory overtime hours in determining the wage differential amount. We agree that evidence of mandatory overtime may be presented during the arbitration hearing. *Cassens*, 218 Ill. 2d at 531. However, the calculation of an employee's wage differential award is a factual finding, which will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Copperweld Tubing Products, Co. v. Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 635, 931 N.E.2d 762 (2010).

¶ 31 In this case, the claimant testified that he averaged 44 hours per week as a ramp service worker in 2004 and that overtime hours became mandatory only during emergency conditions, such as poor weather. The claimant's pay history as a ramp service worker did not demonstrate that he worked mandatory overtime hours on a regular basis. Further, Cooney testified that, because of UAL's financial distress, it had been avoiding having employees work any overtime hours. Therefore, the Commission's decision to exclude the claimant's alleged mandatory overtime hours in his wage differential award was not against the manifest weight of the evidence.

¶ 32 Based upon the foregoing analysis, we reverse the judgment of the circuit court, and we reinstate the Commission's decision.

¶ 33 Reversed and Commission decision reinstated.

*2011 Ill. Wrk. Comp. LEXIS 707, **

RICHARD YOUNG, PETITIONER, v. UNITED AIRLINES, RESPONDENT.

NO. 06WC 19505

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2011 Ill. Wrk. Comp. LEXIS 707; 11IWCC0667

July 7, 2011

CORE TERMS: arbitrator, ramp, earning, wage differential, pain, wage loss, equating, work force, differential, earn, presently, cervical, disability, duration, spine, average amount, occupation, temporary total disability, collective bargaining, wage scale, persuasive evidence, collective bargaining agreement, new position, conditioning, load, top, proven, paying, average weekly wage, upper extremity

JUDGES: Mario Basurto; James F. DeMunno; David L. Gore

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent and penalties and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The main issue before the Commission is calculation of § 8(d)1 wage differential. The difference in pay between the ramp service position and the SOR position is that Petitioner was topped out of the step increases in the ramp service position and was no longer getting step raises. The reason the wage differential shrinks is that in the SOR position Petitioner is getting step raises, having come into that position at the bottom of the steps. The Commission finds that the Arbitrator erred in adopting Respondent's position that the wage differential can be calculated past the date of the arbitration hearing. The Commission finds that the wage differential can only be determined based on what it is at the time of the hearing.

Therefore, the Commission modifies the **[*2]** § 8(d)1 wage differential award to: -from April 28, 2008 through April 26, 2009: $ 281.60 per week, 2/3rds difference between $ 819.20 (40 hours x $ 20.48 per hour in Ramp Services) and $ 396.80 (40 hours x $ 9.92 in SOR). -from April 27, 2009 through the date of arbitration hearing March 5, 2010: $ 277.06 per week, 2/3rds difference between $ 840.00 (40 hours x $ 21.00 per hour in Ramp Services) and $ 424.40 (40 hours x $ 10.61 in SOR).
-from March 6, 2010 for duration of disability: $ 277.06 per week.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 527.70 per week for a period of 39-1/7 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 $ 527.70 per week for a period of 30-4/7 weeks for maintenance benefits under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 281.60 per week for a period of 52 weeks, as provided in § 8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing **[*3]** the duties of his usual and customary line of employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 277.06 per week for a period of 44-5/7 weeks, as provided in § 8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on March 6, 2010, Respondent pay to Petitioner the sum of $ 277.06 per week for the duration of his disability, as provided in § 8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. The Commission notes that Respondent paid Petitioner $ 30,095.18 for TTD and maintenance benefits. The Commission notes that Respondent paid Petitioner $ 32,656.76 for wage differential **[*4]** benefits.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

Richard Young
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **06WC19505**

Consolidated cases: **05WC09479**

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 **Gerald Jutila,** Arbitrator of the Commission, in the city of **Chicago,** on **March 5. 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
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
G. [X] What were Petitioner's earnings?
J. [X] Were the medical services that were provided **[*5]** to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?

[X] Maintenance
[X] TTD

L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS:

On **April 21, 2006,** Respondent **United Airlines *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.

The parties agree Petitioner earned an average weekly wage of **$ 791.55** in the year preceding the injury (AX2).

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

ORDER:

Temporary Total Disability **[*6]**

Respondent shall pay Petitioner temporary total disability benefits of **$ 527.70**/week for **39-1/7** weeks, commencing **November 15, 2006** through **August 15, 2007,** as provided in

Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **November 15, 2006** through **March 5, 2010,** and shall pay the remainder of the award, if any, in weekly payments.

Maintenance

Respondent shall pay Petitioner maintenance benefits of **$ 527.70**/week for **30-4/7** weeks, commencing **August 16, 2007** through **March 16, 2008,** as provided in Section 8(a) of the Act. Respondent shall pay Petitioner the maintenance benefits that have accrued from **August 16, 2007** through **March 5, 2010,** and shall pay the remainder of the award, if any, in weekly payments.

Credits

Respondent shall be given a credit of **$ 30,095.18** for temporary total disability benefits and maintenance benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services rendered by Stroger Hospital, (PX4), MRI Lincoln Imaging Center, (PX4), and Integrity Physical Therapy, (PX4), **[*7]** as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Wage differential

Respondent shall pay Petitioner permanent partial disability benefits as set forth in detail on **pages 15 and 16** of this decision because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act. Respondent shall be given a credit of **$ 32,656.76** for wage differential benefits that have been paid.

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.

Gerald D. Jutila, arbitrator

April 19, 2010

Date

BACKGROUND

Petitioner has filed two Applications for Adjustment of Claim with the Commission; **[*8]** 05WC09479 for an injury on December 28, 2004, and 06WC19505 for an injury on April 21, 2006. The respondent agrees that petitioner sustained accidental injuries that arose out of and in the course of his employment by the respondent on both dates, (AX1 & 2). The two claims were consolidated by Order of the Commission and tried together on March 5, 2010.

The arbitrator is issuing two separate decisions. However, the arbitrator is issuing one common Finding of Facts wherein he reviews the evidence in chronological order for both claims as an aid to the reader in understanding the evidence.

SUMMARY OF THE CASE

Petitioner began his employment with the respondent airline in 1999. At the time of both injuries he was working as a ramp service worker. Following the second injury he was unable to return to his regular work handling passenger baggage for reasons relating to his physical limitations. However, he was able to obtain lighter duty work within his physical abilities as a station operations representative (SOR) for the respondent. This position requires petitioner to sit in front of a computer and plan aircraft loads for respondent's flights.

Both positions are subject to collective **[*9]** bargaining agreements between United Airlines (UAL) and the International Association of Machinists and Aerospace Workers (IAMAW), (RX 1, 2, 3, & 4). Each of the agreements has a sliding pay scale that provides for annual increases in pay based upon an employee's longevity with the respondent company. Petitioner was at the top of the wage scale while working ramp service. However, because of a provision in the collective bargaining agreement he was required to start at the bottom of the wage scale when he began his new position as a SOR worker as of March 17, 2008.

This has resulted in petitioner earning significantly less money in his present SOR position than he would have been earning in his prior ramp service position, but for his accidental injuries. Therefore, petitioner has elected to seek his remedy under Section 8(d)1 of the Act, the so-called "Wage Differential" provision of the Act. The main issue in dispute is a disagreement between parties as to the proper method of calculating the wage differential benefit.

FINDING OF FACTS

Petitioner is presently 51 years of age. He was hired by the respondent on April 12, 1999 as a ramp service worker. His duties involved lifting, **[*10]** sorting, stowing, and moving passenger baggage of various weights up to 100 pounds each. He is right hand dominant and denied any prior injuries to his right upper extremity.

December 28, 2004 accident (05WC09479)

The December 28, 2004 accident occurred during the busy holiday travel period. On that day petitioner was working in an area known as product sort; sorting bags, lifting them on to a conveyor belt, and generally working to clear the work area of passenger bags. As he performed his duties he began to notice pain in his right wrist and elbow. He reported the injury on the same date, (AX1 & PX1).

Petitioner sought care from a physical medicine and rehabilitation specialist at the Rehabilitation Institute of Chicago (RIC), Dr. Rittenberg, on January 6, 2005. Those records were received in evidence as PX8. Petitioner described the pain as achy, burning, numbness, tingling, and tightness. Dr. Rittenberg noted decreased sensation in the right 5th digit and a positive Tinel sign over the ulnar nerve at the right wrist and elbow. He diagnosed right ulnar neuropathy, ordered x-rays of the right wrist and elbow (both were normal), and prescribed medications, splinting, restricted **[*11]** duty and occupational therapy, (PX8).

Once in therapy petitioner also complained of pain near the right shoulder blade. Dr. Rittenberg added periscapular myofascial pain to the diagnosis. Petitioner participated in therapy from January 15 through March 1, 2005. An EMG/NCV was done on January 31, 2005 and was reported to be a normal study. Dr. Rittenberg then referred petitioner to an orthopedic surgeon, Dr. Carroll, (PX8).

Petitioner saw Dr. Carroll at the Northwestern Center for orthopedics on March 21, 2005. Those records were received in evidence as PX9. Dr. Carroll noted some evidence of ulnar neuritis at the elbow. He prescribed additional therapy and continued restricted work with a ten pound lifting restriction. Petitioner participated in therapy from March 21 through May 25, 2005. Petitioner actually worked at restricted duty through March 29, 2005. A valid FCE on June 3,

2005 resulted in a recommendation for additional work conditioning. The therapist reported that the patient put forth a valid effort in work conditioning. However, the conditioning program resulted in an increase in symptoms with numbness in the right forearm and pain and restricted motion in the shoulder, **[*12]** (PX9).

On June 29, 2005 a MRI study of the right shoulder and neck was ordered by Dr. Carroll. The studies were performed on August 3, 2005. The MRI of the cervical spine revealed herniated discs at C4-5, C5-6, and C6-7 with bilateral foraminal stenosis and slight impingement of the thecal sac at C4-5. The MRI of the right shoulder also revealed a questionable abnormality in the anterior labrum, possibly representing a small tear, (PX9).

Thereafter Dr. Carroll referred petitioner to a spinal surgeon, Dr. Mirkovic, for consultation on the cervical spine issues. Dr. Mirkovic's reports are also included in PX9. Dr. Mirkovic examined petitioner on September 14, 2005 and diagnosed cervical spondylosis and cervical disc herniation, work related. He recommended an EMG/NCV study of the right upper extremity. The study was finally performed on March 35, 2006. The study did not reveal any electrodiagnostic evidence of right upper extremity mononeuropathy, plexopathy, or radiculopathy. Therefore, on April 5, 2006 Dr. Mirkovic released petitioner to return to work with regards to the cervical spine only. The impression of Dr. Mirkovic at that time was cervical spondylosis, (PX9).

Petitioner **[*13]** also followed up with Dr. Carroll on April 17, 2006. Dr. Carroll noted petitioner continued to experience weakness and fatigue in the right arm with pain in the neck and scapula. Nevertheless, Dr. Carroll also recommended that petitioner return to work activities relative to the (right upper) extremity with a follow-up in six weeks and possible additional treatments on an as needed basis. The diagnosis of Dr. Carroll was pain in the right trapezius and cervical spine, (PX9).

The parties agree that petitioner was temporarily totally disabled from March 30, 2005 through April 18, 2006 (with the exception of 1-6/7 weeks) and that he returned to his duties as a ramp service worker on April 19, 2006, (AX1). Petitioner testified that the return to work was on a trial basis.

April 21, 2006 accident (06WC19505)

On the second day after he returned to work petitioner was working in the product sort area loading heavy bags. He lifted a bag on a cart and experienced numbness in his right hand with pain in the right side of his neck and right scapula, followed by weakness in his right arm, (PX2). He reported the injury and sought care at the nearby Resurrection Medical Center shortly **[*14]** thereafter. The Resurrection records were received in evidence as PX10. Petitioner was diagnosed with a neck or upper back strain and advised to restrict his work activities.

Petitioner also sought emergency medical care at the Stroger Hospital on April 23, 2006 with follow-up care on April 31, May 3, 11, 17, and 22, 2006. Those records were received in evidence as PX11. Some of the records are handwritten and difficult to decipher. However, it appears there were concerns of a possible thoracic outlet syndrome and petitioner was referred to Dr. Nicola at the University of Illinois Medical Center at Chicago.

The records of Dr. Nicola were received in evidence as PX12. On June 27, 2006 Dr. Nicola examined petitioner, performed an extensive review of petitioner's medical history, and reviewed the previous MRI films. He also noted petitioner was currently working light duty. The examination showed evidence of muscular atrophy at the right pectoralis minor and right deltoid. (NB: Petitioner is right hand dominant.) The impression of Dr. Nicola was right scapular pain with associated muscle atrophy, decreased pinprick sensation, decreased strength, decreased active range of motion, and **[*15]** C4-5 disc herniation with bilateral neural foraminal stenosis. He recommended another EMG that would better evaluate the more proximal nerve roots and the upper trunk of the brachial plexus.

The EMG study was done on July 14, 2006. It failed to detect any evidence of a brachial plexus injury. There were also x-ray studies of the cervical and thoracic spines, right shoulder and ribs on July 14, 2006; all of which were normal except for a hint of disc space narrowing at C4-5, (PX12). Dr. Nicola noted pectoral atrophy and swelling of the right hand during a follow-up exam on August 3, 2006. He injected trigger points and prescribed a home exercise program (HEP), and continued light duty, (PX12).

An MRI study of the thoracic spine on August 25, 2006 revealed minimal dextroscoliosis. Petitioner continued to follow with Dr. Nicola and his team on a regular basis throughout the remainder of 2006. Dr. Nicola pushed for approval of a work conditioning program and suggested petitioner consider a job change to less physically demanding work. He also provided trigger point injections, electrical stimulation and monitored petitioner's progress with the HEP, (PX12).

On January 9, 2007 Dr. Nicola's **[*16]** team placed petitioner in a sling that provided some relief. Dr. Nicola advised no use of the right arm for eight weeks and ordered a CT scan. The scan was performed on February 13, 2007 and was read to show mild degenerative disease with no disruption in the costovertebral joint. Thereafter petitioner continued with work conditioning throughout May, June, and into July with an assessment that petitioner was suffering from a significant thoracoscapular impingement and thoracicostal sprain, (PX12).

On July 10, 2007 petitioner underwent a Functional Capacity Evaluation (FCE) at Flexion Rehabilitation. The evaluator concluded that petitioner should be able to lift light and medium strength weights which did not meet the requirements of his position of a ramp service worker. The evaluator also wrote that petitioner demonstrated variable levels of physical effort and inconsistent reports of pain during the test, (RX8).

Petitioner protested the results of the FCE. Dr. Nicola wrote a prescription for another FCE at a different facility, Integrity Physical Therapy. That testing took place on August 15, 2007. The evaluator concluded that petitioner could perform some physical activity at **[*17]** the heavy demand level and other activity at the medium demand level. Therefore, he did not meet the job demands of a ramp service employee. The evaluator wrote that petitioner demonstrated consistent effort during the test, (PX13). Petitioner testified that he paid for the second FCE in the amount of $ 1,136.00, (PX4).

Petitioner continued to follow-up with Dr. Nicola on a periodic basis through May 6, 2008. Dr. Fassola of the United Airlines Medical Department also performed an assessment of petitioner's functional capabilities and determined he has long term restrictions limiting him to perform medium intensity work, (PX14). (NB: Unfortunately Dr. Fassola failed to date the document.)

Meanwhile respondent retained a vocation expert, Mr. Belmonte, of Vocomotive to assist petitioner in finding employment within his physical capabilities. His reports were received in evidence as PX17. Mr. Belmonte began working with Mr. Young on February 10, 2008.

Petitioner applied for and accepted a new position with respondent as a load planner (SOR worker) beginning March 17, 2008. As previously noted herein petitioner was at the top of the wage scale while working ramp service at the time **[*18]** of his injury. However, because of a provision in the collective bargaining agreement he was required to start at the bottom of the wage scale when he began his new position as a SOR worker as of March 17, 2008. This has resulted in a significant reduction in pay from what he could have been making as a ramp service worker.

Petitioner testified that he continues to experience right scapular pain and numbness in the right forearm. He now relies on his non dominant left upper extremity for lifting over 20 pounds. He has no plans to retire. He stated that he needs to keep working in order to live.

ISSUES AND CONCLUSIONS

Is the petitioner's present condition of ill-being causally related to the injury of April 21, 2006?

The arbitrator concludes that petitioner's present conditions of ill-being that have resulted in restrictions and limitations on his physical activities and prevented him from returning to his regular employment as a ramp service worker are causally related to the injury he sustained at work on April 21, 2006.

What were the petitioner's earnings?

Subsequent to the trial the parties agreed that petitioner's average weekly wage for the second accident (06WC19505) **[*19]** on April 21, 2006 was $ 791.55, and initialed the Request for Hearing form to reflect this agreement, (AX2).

Were the medical services that were provided to petitioner reasonable and necessary?

Petitioner claims respondent is liable for the following medical expenses: $ 242.78 for services rendered by the Stroger Hospital of Cook County, $ 1,400.00 for an MRI study of the dorsal spine on February 13, 2007, and $ 1,136.00 to reimburse petitioner for the FCE on August 15, 2007, (PX4).

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that the bills contained in PX4 represent charges for necessary medical care reasonably required to cure or relieve him from the effects of his injuries.

What amount of compensation is due for temporary total disability and maintenance as a result of the April 21, 2006 accidental injury?

Petitioner returned to work at his regular duty on April 19, 2006 but was reinjured in a work accident on April 21, 2006.

Petitioner alleges that following the April 21, 2006 work injury he was temporarily totally disabled for a period of 39-1/7 weeks from November 15, 2006 through August 15, 2007 (the day of his third **[*20]** FCE). Additionally he alleges that he is entitled to maintenance benefits for another 30-4/7 weeks from August 16, 2007 (the day after his third FCE) through March 16, 2008 (the day before he started his new job as a SOR load planner).

Respondent contends that following the April 21, 2006 work injury the petitioner was temporarily totally disabled for a period of 35-4/7 weeks from November 15, 2006 through July 20, 2007 (ten days after petitioner's second FCE). Additionally respondent contends that petitioner is entitled to maintenance benefits for another 34-1/7 weeks from July 21, 2007 through March 16, 2008 (the day before he started his new job as a SOR load planner.

(NB: The arbitrator notes that the parties are actually in agreement that petitioner is entitled to a combined total of 69-5/7 weeks of TTD and maintenance benefits. Further, the parties are now in agreement that the petitioner's average weekly wage for the April 21, 2006 injury was $ 791.55. Petitioner's compensation rate for both TTD and maintenance following the April 21, 2006 injury is $ 527.70 per week based upon an average weekly wage of $ 791.55.)

The arbitrator concludes that the issue of petitioner's permanent **[*21]** restrictions was not accurately determined until the third FCE (PX13) on August 15, 2007. Therefore, the arbitrator concludes that the period for which maintenance benefits are payable shall begin on August 16, 2007, the day after the third FCE.

Respondent shall pay petitioner temporary total disability benefits of $ 527.70 per week for 39-1/7 weeks from November 15, 2006 through August 15, 2007 and maintenance benefits of $ 527.70 per week for another 30-4/7 weeks from August 16, 2007 through March 16, 2008.

Respondent is allowed a credit in the amount of $ 30,095.18 for TTD and maintenance benefits it has previously paid to petitioner.

What is the nature and extent of the injury?

Petitioner has elected to seek his remedy under Section 8(d)1 of the Act, the so-called wage loss differential remedy. Section 8(d)1 provides in-part as follows:

If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall . . . receive compensation for the duration of his disability . . . equal to 66-2/3% of the difference between the average amount which he would be able **[*22]** *to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or able to earn in some suitable employment of business after the accident.*

The respondent agrees that Section 8(d)1 is the appropriate remedy and it is presently paying or purports that it is paying petitioner pursuant to the provisions of Section 8(d)1. The arbitrator agrees that Section 8(d)1 is the appropriate remedy considering the facts of these claims. However, the parties do not agree on the basis for the calculation of a wage loss differential.

Petitioner's attorney argues that the arbitrator to should enter an Order awarding petitioner a weekly wage loss differential beginning on April 27, 2008 with decreasing adjustments until April 26, 2009. He argues that as of April 26, 2009 petitioner should continue to receive the same weekly wage loss payment of $ 333.06 per week for the duration of his disability. Petitioner's proposed Order ignores the persuasive evidence of the effect of the contractual agreements between UAL and the IAMAW on petitioner's present and future wages as compared to what he could be earning **[*23]** presently and in the future as a ramp service worker. Petitioner's proposed Order would essentially result in his receiving $ 333.06 per week for the remainder of his life; a lifetime annuity of $ 17,319.12.

Respondent raises two arguments. In the first argument respondent contends that once petitioner eventually retires and leaves the work force his earning capacity will no longer be impaired. Therefore, it concludes petitioner will no longer be entitled to wage loss differential payments after he leaves the work force.

Bureau of Labor Statistics data documents that workers do not, on the average, remain in the work force until their death. Following that observation economic scholars and statisticians have collected and collated data on various peer groups in an attempt to predict an individual's work life expectancy or predict the age at which members of the various peer groups can be expected to have a final separation from the work force.

In an attempt to prove when petitioner will likely leave the work force respondent has offered an analysis from an economist, Arthur Eubank, Ph.D. of Eubank Economics. Dr. Eubank's report was received in evidence as RX10. Dr. Eubank's analysis **[*24]** opines on the number of years of work-life expectancy and the expected number of years in the work force for the petitioner, Mr. Young. His opinion is predicated on statistical data.

Statisticians have created various peer groups made up of individuals with similar demographic characteristics, *i.e.*, gender, age, educational level achieved, and whether or not an individual is in an active or inactive status in the work force. The statistical tables relied upon by Dr. Eubanks in his analysis of petitioner were published in 2000 and 2003.

Dr. Eubanks opines with a reasonable degree of economic certainty that Mr. Young's work life expectancy or the age at which he would be expected to exit the work force would be between his age of 62.70 and 66.90 years, assuming a trial date of May 11, 2009.

One hundred fifty seven years ago Judge Coleridge observed: "Judges are not necessarily to be ignorant in Court of what everyone else, and they themselves out of Court, are familiar with; nor was that unreal ignorance an attribute of the Bench in early and strict times." Lumley v. Gye, 118 Eng.Rep. 749 (Queens Bench 1853). Stated similarly: ". . . justice does **[*25]** not require that courts profess to be more ignorant than the rest of mankind." 15 R.C.L. 1054. Likewise, this arbitrator should not profess to be more ignorant than the rest of mankind.

The arbitrator notes that the empirical data upon which Dr. Eubanks rests his opinion was compiled before the great and unprecedented economic upheaval that occurred in 2008 and 2009; a crisis that continues to date and which has had a deleterious effect on pension plans and retirement accounts, and altered the retirement opportunities and plans of most working Americans. These are facts of common and general knowledge of which the arbitrator takes judicial notice. Therefore, the arbitrator concludes that the opinions of respondent's expert have not taken into account the realities of the present day economic conditions and the impact of those conditions on petitioner's work-life expectancy. Indeed, the picture of petitioner's peer group upon which Dr. Eubanks bases his opinion does not exist anymore. The arbitrator concludes that it would be pure speculation to adopt the opinion of respondent's expert economist and conclude that petitioner will likely retire and leave the work force between the ages **[*26]** of 62.70 and 66.67.

Respondent raises a second argument that the impairment of petitioner's earning capacity will eventually abate. In support of this argument it introduced the testimony of Ms. Cooney, a labor relations analyst in the employ of respondent. Ms. Cooney administers the contracts that are in place between the respondent airline and the various unions representing respondent's employees.

Ms. Cooney testified that in his previous position as a ramp service worker petitioner was subject to the 2005-2009 collective bargaining agreement between United Airlines (UAL) and the International Association of Machinists and Aerospace Workers (IAMAW), (RX 1 & 2). Further, in his present position as an SOR worker petitioner is subject to a separate 2005-2009 collective bargaining agreement between United Airlines (UAL) and the International Association of Machinists and Aerospace Workers (IAMAW), (RX3 & 4). Both UAL and the petitioner are bound by those agreements. The agreements were in effect through December 31, 2009. However, the agreements provide that thereafter the agreements shall renew yearly without change and that if a new tentative agreement is not in place by August **[*27]** 1, 2009 the parties will jointly invoke the mediation services of the National Mediation Board. Ms. Cooney stated that new agreements are being negotiated at the present time but that it is not known when the negotiations will be concluded and new agreements will be reached and put in place.

Ms. Cooney testified that both agreements provide an 11 step sliding pay scale providing for annual wage increases based upon the employee's longevity with UAL. At the time of his two injuries Mr. Young was by reason of his longevity at the top of the sliding pay scale for ramp service workers. However, because of contract provisions Mr. Young was required to start at the bottom of the sliding pay scale for SOR workers when he began his new position as a load planner on March 17, 2008 resulting in a significant wage loss that is the subject of petitioner's claim and this decision. Ms. Cooney prepared an analysis which demonstrates that on March 17, 2018 and thereafter Mr. Young will be making as much or more as a SOR worker than he could have been making as a ramp service worker, (RX7). Her analysis is based upon the present 2005-2009 collective bargaining agreements under which the parties are **[*28]** presently working and by which they are bound.

Based upon Ms. Cooney's analysis respondent's attorney has proposed that the arbitrator enter

an Order awarding petitioner a weekly wage loss differential beginning on April 28, 2008* in the amount of $ 281.60 with decreasing annual adjustments as petitioner's SOR wages increase so that from April 13, 2017 through April 12, 2018 the weekly amount will be $ 82.93; and then abate the award after April 12, 2018 in as much as the existing contracts demonstrate that petitioner will then be earning more as an SOR worker than he could then be earning if he had remained a ramp service worker. Respondent's calculations are based upon the 2005-2009 collective bargaining agreements and therefore assume that the parties will continue to operate under the present agreement until April 13, 2018. However, additional evidence introduced by respondent is that historically UAL and the IAMAW have operated pursuant to a contract, that the contract has been renegotiated on a regular basis, that although the original term of the present contract has passed the parties are presently operating on a contract extension, and that a new contract is presently the **[*29]** subject of negotiations.

The arbitrator notes that the Order proposed by petitioner's attorney would require that the arbitrator ignore the persuasive evidence in this record that before petitioner reaches age 60 he will be earning as much as a SOR worker than he could be earning as a ramp service worker at that time.

*(Respondent proposes that the wage loss differential payments begin on April 28, 2008 instead of March 17, 2008, the date petitioner began his new position as a SOR worker. The reason for the delay is that respondent erroneously paid petitioner at the top wage scale during the period from March 17, 2008 through April 27, 2008. However, respondent did not seek reimbursement for the overpayment of wages from petitioner. Therefore, petitioner did not incur any actual wage loss during this short period of time.)

Section 8(d)1 has been the subject of frequent litigation at the Commission and our Appellate Court and Supreme Court. Much of that litigation has concerned the duration clause and the injured worker's prospective earnings; evidence of which in the past has frequently been found to be speculative.

This arbitrator has previously concluded in other decisions based **[*30]** on other factual scenarios that for purposes of interpreting the duration clause, disability as used in Section 8(d) 1 refers to physical or emotional disability, not economic disability, citing Petrie v Industrial Commission, 160 ILL.App. 3d 165 (1987). The arbitrator's conclusions herein do not change his prior opinions on the subject. Instead, the arbitrator's conclusion herein addresses the amount of money to be awarded to the petitioner pursuant to Section 8(d)1 in order to effectuate the purpose of the Act; financial protection for injured workers.

The narrow issue before the arbitrator is a determination of the average amount the petitioner would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or able to earn in some suitable employment or business after the accident. In prior cases before this arbitrator evidence on the amounts of those earnings beyond the date of arbitration has proven to have been speculative. However, in the instant case respondent's attorney has introduced persuasive evidence as to the future amounts of those **[*31]** earnings.

Our Supreme Court has stated that the initial (arbitration) hearing gives both employers and employees the opportunity to present evidence showing the likely duration of the injury and its effect on the claimant's earning capacity; and while conceding that this may result in less than a perfect award, the legislature has not authorized infinite opportunities for corrections. Further, the arbitrators must determine an appropriate wage differential in the original workers' compensation proceeding, Cassens Transportation Company v Industrial Commission, 218 Ill.2d 519 (2006). Respondent's attorney has following the direction of the Court by providing the Commission with persuasive evidence on the issue of future earnings at the original arbitration hearing.

Respondent's attorney has proven that the factual circumstances of the present claim are

unique. The previous and current employer of the petitioner is the same, and although the petitioner is working in a different position with this same employer, he is member of the same union that negotiated the collective bargaining agreements for his previous position and his present position; and it **[*32]** is presently negotiating new agreements with the respondent. Further, the collective bargaining agreement under which petitioner was operating and is now operating have contract extension clauses, and the respondent and the union have a history of operating under contract and periodically renegotiating new contracts.

Therefore, the average amount which petitioner would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning and will be able to earn in his present occupation, which the arbitrator finds is a suitable occupation, can be fairly determined at present and in the future without resorting to speculation, guess, or conjecture by simply referencing the provisions of the present and any future collective bargaining agreements between UAL and the IAMAW by which the petitioner and respondent herein are bound.

The arbitrator concludes that the unique factual circumstances in this case and the persuasive evidence introduced by the respondent's attorney provide a method by which the arbitrator can and does find that petitioner's physical disability, which the arbitrator **[*33]** deems to be permanent, is a distinct and separate element of proof from the amount petitioner could have earned in his previous occupation and the amount petitioner can presently earn and will earn in the future by simply referencing the present and future collective bargaining agreements between UAL and IAMAW.

Therefore, the respondent shall pay petitioner 8(d)(1) benefits as follows:

From April 28, 2008 through April 26, 2009: **$ 281.60** per week, equating to 2/3 of the difference between $ 819.20 (40 x $ 20.48 in Ramp) and $ 396.80 (40 x $ 9.92 in SOR).

From April 27, 2009 through April 12, 2010: **$ 277.06** per week, equating to 2/3 of the difference between $ 840.00 (40 x $ 21.00 in Ramp) and $ 424.40 (40 x $ 10.61 in SOR).

From April 13, 2010 through April 12, 2011: **$ 264.80** per week, equating to 2/3 of the difference between $ 840.40 (40 x $ 21.01 in Ramp) and $ 443.20 (40 x $ 11.08 in SOR).

From April 13, 2011 through April 12, 2012: **$ 246.13** per week, equating to 2/3 of the difference between $ 840.80 (40 x $ 21.02 in Ramp) and $ 471.60 (40 x $ 11.79 in SOR).

From April 13, 2012 through April 12, 2013: **$ 234.67** per week, equating to **[*34]** 2/3 of the difference between $ 841.20 (40 x $ 21.03 in Ramp) and $ 489.20 (40 x $ 12.23 in SOR).

From April 13, 2013 through April 12, 2014: **$ 206.40** per week, equating to 2/3 of the difference between $ 840.60 (40 x $ 21.04 in Ramp) and $ 532.00 (40 x $ 13.30 in SOR).

From April 13, 2014 through April 12, 2015: **$ 188.80** per week, equating to 2/3 of the difference between $ 842.00 (40 x $ 21.05 in Ramp) and $ 558.80 (40 x $ 13.97 in SOR).

From April 13, 2015 through April 12, 2016: **$ 158.93** per week, equating to 2/3 of the difference between $ 842.40 (40 x $ 21.06 in Ramp) and $ 604.00 (40 x $ 15.11 in SOR).

From April 13, 2016 through April 12, 2017: **$ 123.73** per week, equating to 2/3 of the difference between $ 842.80 (40 x $ 21.07 in Ramp) and $ 657.20 (40 x $ 16.43 in SOR).

From April 13, 2017 through April 12, 2018: **$ 82.93** per week, equating to 2/3 of the difference between $ 843.20 (40 x $ 21.08 in Ramp) and $ 718.80 (40 x $ 17.97 in SOR).

The wage differential benefit payments shall abate effective April 13, 2018, as respondent has

proven by a preponderance of the evidence that petitioner will then be earning more as an SOR worker **[*35]** than he would have had he remained as a ramp service worker. Wage loss differential payments will no longer accrue on and after April 13, 2018.

Respondent is allowed a credit for all Section 8(d)1 wage loss differential benefits it has previously paid petitioner.

Should penalties or fees be imposed upon the respondent?

Petitioner seeks and Order from the Commission requiring respondent to pay $ 4,682.92 in Section 19(k) penalties and $ 1,873.17 in Section 16 attorney fees for a delay in paying Section 8(d)1 wage differential benefits for the period from April 27, 2008 through January 6, 2009. Respondent actually overpaid petitioner's wages from March 17, 2008 through April 26, 2008 on the erroneous belief that petitioner was entitled to be paid at the top wage scale when he began his new SOR position. Respondent waived any claim against petitioner for the overpayment. Thereafter respondent issued a check to petitioner and his attorney in the amount of $ 12,100.88 on January 6, 2009 in a good faith attempt to bring petitioner current on Section 8(d)1 benefits. Since then respondent has been paying petitioner Section 8(d)1 benefits on a regular basis. In fact the parties agreed **[*36]** by up to the date of arbitration the respondent had paid petitioner $ 32,656.76 in wage differential benefits, (AX2).

An award of Section 19(k) penalties and Section 16 attorney fees is discretionary. The arbitrator concludes that an award of penalties and fees is not appropriate considering the facts of this case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
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Date/Time: Tuesday, June 4, 2013 - 8:43 AM EDT

*2011 Ill. Wrk. Comp. LEXIS 706, **

RICHARD YOUNG, PETITIONER, v. UNITED AIRLINES, RESPONDENT.

NO. 05WC 09479

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2011 Ill. Wrk. Comp. LEXIS 706; 11IWCC0666

July 7, 2011

CORE TERMS: arbitrator, pain, ramp, cervical, ill-being, spine, temporary total disability, conditioning, upper extremity, right shoulder, right hand, wage scale, evaluator, follow-up, decreased, causally, numbness, therapy, lifting, elbow, neck, bag, totally disabled, new position, right arm, temporarily, recommended, exacerbated, prescribed, permanency

JUDGES: Mario Basurto; James F. DeMunno; David L. Gore

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent and penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 21, 2010 is hereby affirmed and adopted.

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 the Petitioner on account of said accidental injury.

No bond for the removal of this cause to the Circuit Court by Respondent is required as credit to

Respondent exceeds the TTD awarded. 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:

ARBITRATION [*2] DECISION

Richard Young
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **05WC09479**

Consolidated cases: **06WC19505**

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 **Gerald Jutila,** Arbitrator of the Commission, in the city of **Chicago,** on **March 5, 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
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
K. [X] What temporary benefits are in dispute?

[X] TTD

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

FINDINGS:

On **December 28, 2004,** Respondent **United Airlines *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 **[*3]** ***was*** given to Respondent.

Petitioner's conditions of ill-being relative to the injury sustained on December 28, 2004 for which he received treatment by Dr. Mirkovic and Dr. Carroll ***are*** causally related to that work accident. However, before those conditions of ill-being reached a state of permanency they were worsened and exacerbated by a subsequent work injury sustained on April 21, 2006. Therefore, all remaining issues other than TTD accrued before the April 21, 2006 accident will be addressed by the arbitrator in his decision on petitioner's companion case, **06WC19505.**

In the year preceding the injury, Petitioner earned **$ 46,602.40;** the average weekly wage was **$ 896.20.**

On the date of accident, Petitioner was **46** years of age, ***married*** 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.

Petitioner was temporarily totally disabled for **54-6/7** weeks from **March 30, 2005** through **April 18, 2006.**

ORDER:

Temporary Total Disability

Respondent shall pay Petitioner **[*4]** temporary total disability benefits of **$ 597.47**/week for **54-6/7** weeks, commencing **March 30, 2005** through **April 18, 2006,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **March 30, 2005** through **March 5, 2010,** and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$ 32,964.04** for TTD benefits it has previously paid to petitioner.

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.

Gerald D. Jutila, arbitrator

April 19, 2010

Date

BACKGROUND

Petitioner has filed two Applications **[*5]** for Adjustment of Claim with the Commission; 05WC09479 for an injury on December 28, 2004, and 06WC19505 for an injury on April 21, 2006. The respondent agrees that petitioner sustained accidental injuries that arose out of and in the course of his employment by the respondent on both dates, (AX1 & 2). The two claims were consolidated by Order of the Commission and tried together on March 5, 2010.

The arbitrator is issuing two separate decisions. However, the arbitrator is issuing one common Finding of Facts wherein he reviews the evidence in chronological order for both claims as an aid to the reader in understanding the evidence.

SUMMARY OF THE CASE

Petitioner began his employment with the respondent airline in 1999. At the time of both injuries he was working as a ramp service worker. Following the second injury he was unable to return to his regular work handling passenger baggage for reasons relating to his physical

limitations. However, he was able to obtain lighter duty work within his physical abilities as a station operations representative (SOR) for the respondent. This position requires petitioner to sit in front of a computer and plan aircraft loads for respondent's **[*6]** flights.

Both positions are subject to collective bargaining agreements between United Airlines (UAL) and the International Association of Machinists and Aerospace Workers (IAMAW), (RX 1, 2, 3, & 4). Each of the agreements has a sliding pay scale that provides for annual increases in pay based upon an employee's longevity with the respondent company. Petitioner was at the top of the wage scale while working ramp service. However, because of a provision in the collective bargaining agreement he was required to start at the bottom of the wage scale when he began his new position as a SOR worker as of March 17, 2008.

This has resulted in petitioner earning significantly less money in his present SOR position than he would have been earning in his prior ramp service position, but for his accidental injuries. Therefore, petitioner has elected to seek his remedy under Section 8(d)1 of the Act, the so-called "Wage Differential" provision of the Act. The main issue in dispute is a disagreement between parties as to the proper method of calculating the wage differential benefit.

FINDING OF FACTS

Petitioner is presently 51 years of age. He was hired by the respondent on April 12, 1999 **[*7]** as a ramp service worker. His duties involved lifting, sorting, stowing, and moving passenger baggage of various weights up to 100 pounds each. He is right hand dominant and denied any prior injuries to his right upper extremity.

December 28, 2004 accident (05WC09479)

The December 28, 2004 accident occurred during the busy holiday travel period. On that day petitioner was working in an area known as product sort; sorting bags, lifting them on to a conveyor belt, and generally working to clear the work area of passenger bags. As he performed his duties he began to notice pain in his right wrist and elbow. He reported the injury on the same date, (AX1 & PX1).

Petitioner sought care from a physical medicine and rehabilitation specialist at the Rehabilitation Institute of Chicago (RIC), Dr. Rittenberg, on January 6, 2005. Those records were received in evidence as PX8. Petitioner described the pain as achy, burning, numbness, tingling, and tightness. Dr. Rittenberg noted decreased sensation in the right 5th digit and a positive Tinel sign over the ulnar nerve at the right wrist and elbow. He diagnosed right ulnar neuropathy, ordered x-rays of the right wrist and elbow (both **[*8]** were normal), and prescribed medications, splinting, restricted duty and occupational therapy, (PX8).

Once in therapy petitioner also complained of pain near the right shoulder blade. Dr. Rittenberg added periscapular myofascial pain to the diagnosis. Petitioner participated in therapy from January 15 through March 1, 2005. An EMG/NCV was done on January 31, 2005 and was reported to be a normal study. Dr. Rittenberg then referred petitioner to an orthopedic surgeon, Dr. Carroll, (PX8).

Petitioner saw Dr. Carroll at the Northwestern Center for orthopedics on March 21, 2005. Those records were received in evidence as PX9. Dr. Carroll noted some evidence of ulnar neuritis at the elbow. He prescribed additional therapy and continued restricted work with a ten pound lifting restriction. Petitioner participated in therapy from March 21 through May 25, 2005. Petitioner actually worked at restricted duty through March 29, 2005. A valid FCE on June 3, 2005 resulted in a recommendation for additional work conditioning. The therapist reported that the patient put forth a valid effort in work conditioning. However, the conditioning program resulted in an increase in symptoms with numbness in **[*9]** the right forearm and pain and restricted motion in the shoulder, (PX9).

On June 29, 2005 a MRI study of the right shoulder and neck was ordered by Dr. Carroll. The studies were performed on August 3, 2005. The MRI of the cervical spine revealed herniated discs at C4-5, C5-6, and C6-7 with bilateral foraminal stenosis and slight impingement of the thecal sac at C4-5. The MRI of the right shoulder also revealed a questionable abnormality in the anterior labrum, possibly representing a small tear, (PX9).

Thereafter Dr. Carroll referred petitioner to a spinal surgeon, Dr. Mirkovic, for consultation on the cervical spine issues. Dr. Mirkovic's reports are also included in PX9. Dr. Mirkovic examined petitioner on September 14, 2005 and diagnosed cervical spondylosis and cervical disc herniation, work related. He recommended an EMG/NCV study of the right upper extremity. The study was finally performed on March 35, 2006. The study did not reveal any electrodiagnostic evidence of right upper extremity mononeuropathy, plexopathy, or radiculopathy. Therefore, on April 5, 2006 Dr. Mirkovic released petitioner to return to work with regards to the cervical spine only. The impression of Dr. **[*10]** Mirkovic at that time was cervical spondylosis, (PX9).

Petitioner also followed up with Dr. Carroll on April 17, 2006. Dr. Carroll noted petitioner continued to experience weakness and fatigue in the right arm with pain in the neck and scapula. Nevertheless, Dr. Carroll also recommended that petitioner return to work activities relative to the (right upper) extremity with a follow-up in six weeks and possible additional treatments on an as needed basis. The diagnosis of Dr. Carroll was pain in the right trapezius and cervical spine, (PX9).

The parties agree that petitioner was temporarily totally disabled from March 30, 2005 through April 18, 2006 (with the exception of 1-6/7 weeks) and that he returned to his duties as a ramp service worker on April 19, 2006, (AX1). Petitioner testified that the return to work was on a trial basis.

April 21, 2006 accident (06WC19505)

On the second day after he returned to work petitioner was working in the product sort area loading heavy bags. He lifted a bag on a cart and experienced numbness in his right hand with pain in the right side of his neck and right scapula, followed by weakness in his right arm, (PX2). He reported the injury **[*11]** and sought care at the nearby Resurrection Medical Center shortly thereafter. The Resurrection records were received in evidence as PX10. Petitioner was diagnosed with a neck or upper back strain and advised to restrict his work activities.

Petitioner also sought emergency medical care at the Stroger Hospital on April 23, 2006 with follow-up care on April 31, May 3, 11, 17, and 22, 2006. Those records were received in evidence as PX11. Some of the records are handwritten and difficult to decipher. However, it appears there were concerns of a possible thoracic outlet syndrome and petitioner was referred to Dr. Nicola at the University of Illinois Medical Center at Chicago.

The records of Dr. Nicola were received in evidence as PX12. On June 27, 2006 Dr. Nicola examined petitioner, performed an extensive review of petitioner's medical history, and reviewed the previous MRI films. He also noted petitioner was currently working light duty. The examination showed evidence of muscular atrophy at the right pectoralis minor and right deltoid. (NB: Petitioner is right hand dominant.) The impression of Dr. Nicola was right scapular pain with associated muscle atrophy, decreased pinprick sensation, **[*12]** decreased strength, decreased active range of motion, and C4-5 disc herniation with bilateral neural foraminal stenosis. He recommended another EMG that would better evaluate the more proximal nerve roots and the upper trunk of the brachial plexus.

The EMG study was done on July 14, 2006. It failed to detect any evidence of a brachial plexus injury. There were also x-ray studies of the cervical and thoracic spines, right shoulder and ribs on July 14, 2006; all of which were normal except for a hint of disc space narrowing at C4-5, (PX12). Dr. Nicola noted pectoral atrophy and swelling of the right hand during a follow-up

exam on August 3, 2006. He injected trigger points and prescribed a home exercise program (HEP), and continued light duty, (PX12).

An MRI study of the thoracic spine on August 25, 2006 revealed minimal dextroscoliosis. Petitioner continued to follow with Dr. Nicola and his team on a regular basis throughout the remainder of 2006. Dr. Nicola pushed for approval of a work conditioning program and suggested petitioner consider a job change to less physically demanding work. He also provided trigger point injections, electrical stimulation and monitored petitioner's **[*13]** progress with the HEP, (PX12).

On January 9, 2007 Dr. Nicola's team placed petitioner in a sling that provided some relief. Dr. Nicola advised no use of the right arm for eight weeks and ordered a CT scan. The scan was performed on February 13, 2007 and was read to show mild degenerative disease with no disruption in the costovertebral joint. Thereafter petitioner continued with work conditioning throughout May, June, and into July with an assessment that petitioner was suffering from a significant thoracoscapular impingement and thoracicostal sprain, (PX12).

On July 10, 2007 petitioner underwent a Functional Capacity Evaluation (FCE) at Flexion Rehabilitation. The evaluator concluded that petitioner should be able to lift light and medium strength weights which did not meet the requirements of his position of a ramp service worker. The evaluator also wrote that petitioner demonstrated variable levels of physical effort and inconsistent reports of pain during the test, (RX8).

Petitioner protested the results of the FCE. Dr. Nicola wrote a prescription for another FCE at a different facility, Integrity Physical Therapy. That testing took place on August 15, 2007. The evaluator concluded **[*14]** that petitioner could perform some physical activity at the heavy demand level and other activity at the medium demand level. Therefore, he did not meet the job demands of a ramp service employee. The evaluator wrote that petitioner demonstrated consistent effort during the test, (PX13). Petitioner testified that he paid for the second FCE in the amount of $ 1,136.00, (PX4).

Petitioner continued to follow-up with Dr. Nicola on a periodic basis through May 6, 2008. Dr. Fassola of the United Airlines Medical Department also performed an assessment of petitioner's functional capabilities and determined he has long term restrictions limiting him to perform medium intensity work, (PX14). (NB: Unfortunately Dr. Fassola failed to date the document.)

Meanwhile respondent retained a vocation expert, Mr. Belmonte, of Vocomotive to assist petitioner in finding employment within his physical capabilities. His reports were received in evidence as PX17. Mr. Belmonte began working with Mr. Young on February 10, 2008.

Petitioner applied for and accepted a new position with respondent as a load planner (SOR worker) beginning March 17, 2008. As previously noted herein petitioner was at the top of **[*15]** the wage scale while working ramp service at the time of his injury. However, because of a provision in the collective bargaining agreement he was required to start at the bottom of the wage scale when he began his new position as a SOR worker as of March 17, 2008. This has resulted in a significant reduction in pay from what he could have been making as a ramp service worker.

Petitioner testified that he continues to experience right scapular pain and numbness in the right forearm. He now relies on his non dominant left upper extremity for lifting over 20 pounds. He has no plans to retire. He stated that he needs to keep working in order to live.

ISSUES AND CONCLUSIONS

Is the petitioner's present condition of ill-being causally related to the injury of December 28, 2004?

The arbitrator concludes that petitioner's conditions of ill-being relative to the injuries he sustained on December 28, 2004 had not yet reached a state of permanency when those conditions were worsened and exacerbated by a second work injury on April 21, 2006. Therefore, the arbitrator is unable to make a separate award of permanent disability for injuries sustained in the December 28, 2004 accident, **[*16]** case number 05WC09479. However, the issue of permanent disability is addressed in the arbitrator's decision in case number 06WC19505.

What were the petitioner's earnings?

At trial the parties stipulated that petitioner's average weekly wage for the first accident (05WC09479) on December 28, 2004 was $ 896.20, (AX1).

What amount of compensation is due for temporary total disability and maintenance as a result of the December 28, 2004 accidental injury?

The parties agree that petitioner was temporarily totally disabled from March 30, 2005 through April 18, 2006, (AX1). Respondent shall pay petitioner temporary total disability (TTD) benefits of $ 597.47 per week for 54-6/7 weeks from March 30, 2005 through April 18, 2006. Respondent is allowed a credit of $ 32,964.04 for TTD benefits it has paid to petitioner.

What is the nature and extent of the injury?

Petitioner's conditions of ill-being relative to the injury sustained on December 28, 2004 for which he received treatment by Dr. Mirkovic and Dr. Carroll are causally related to that work accident. However, before those conditions of ill-being reached a state of permanency they were worsened and exacerbated by a subsequent **[*17]** work injury sustained on April 21, 2006. Therefore, all remaining issues other than TTD accrued before the April 21, 2006 accident will be addressed by the arbitrator in his decision on petitioner's companion case, 06WC19505.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > General Overview

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

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

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