1 of 36 DOCUMENTS

JULIE MEIERDIRKS, PETITIONER, v. NORTHBROOK SCHOOL DISTRICT # 28, RESPONDENT.

NO: 07WC 39919

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 647; 2012 Ill. Wrk. Comp. LEXIS 681

June 22, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, permanent disability, medical expenses and wages, 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 Decisions of the Arbitrator filed November 22, 2010 and November 8, 2011 are hereby affirmed and adopted.

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

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

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

ATTACHMENT:

DECISION

Julie Meierdirks
[*2] Employees/Petitioner

v.

Northbrook School District # 28
Employer/Respondent

Case# **07** WC **039919**

The motion to remand to the Arbitrator having been filed by petitioner was properly served on all parties. The matter came before Commission on 06-20-11, in the city of Chicago. After hearing the parties' arguments and due deliberations, Commission DuMunno granted said petition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

On September 28, 2011, the parties agreed that the average weekly wage is $ 1,557.06 pursuant to Elgin School District v. IWCC and Linda Weiler, No. 1-09-3446WC (1st Dist.) April 25, 2011. No new evidence was presented.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Signature of Arbitrator

11-07-11

Date

ARBITRATION DECISION

Julie Meierdirks
Employee/Petitioner

v.

Northbrook School District # 28
Employer/Respondent

Case # **07** WC **039919**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, [*3] and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 4, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

J. [X] 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. [X] What temporary benefits are in dispute?
[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 **02-09-07**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this [*4] accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$ 60,725.60**; the average weekly wage was $ **1,167.80**. On the date of accident, Petitioner was **37** years of age, ***married*** with **1** dependent children.

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 **$ 0** for TTD, **$ 0** for TPD, **$ 0** for maintenance, and **$ 0** for other benefits, for a total credit of $ 0.

Respondent is entitled to a credit of **$ 0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 0 / week for 73/7ths weeks, commencing 02-09-07 through 04-01-07, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $ 0 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $ 0 /week for 0 weeks, because the injuries [*5] *were not caused by a compensable injury under 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

11-19-10

Date

ARBITRATION DECISION

A. STATEMENT OF FACTS

On February 9, 2007, the petitioner, JULIE E. MEIERDIRKS, was employed by the respondent, NORTHBROOK SCHOOL DISTRICT # 28, as a foreign language teacher. The petitioner testified that she had been in that position with the respondent since 1999.

The petitioner testified to her past medical concerns and treatment including the fact that she had been suffering from rheumatoid arthritis since she was a child and previously had total knee replacements on [*6] both knees in 1989 and 1990, a right hip replacement in 2002, surgery to her right foot in 2004, and surgery to her left foot in 2005 as a result of this disease.

The petitioner also testified that she has been wearing a brace on her left ankle since the surgery in 2005 and the brace has been worn everyday since that time. The petitioner testified that she has been in treatment including medications and injections for rheumatoid arthritis for many years.

The petitioner further testified that during the school day, she stays in one room and students taking her foreign language class, either Spanish or French, come to her room for the class period. The petitioner described her room as having a desk in one corner as well as a table towards the front of the room which the petitioner would use during class periods. The petitioner indicated that there are approximately 24 desks in the room in four rows of six desks going back from the table and, at the time of the fall, there were approximately 16 children in her class.

The petitioner testified that new carpet was installed in her room and, in fact, in the entire wing where the foreign language rooms were located in the summer of 2006. [*7] The petitioner testified that although it was her opinion that the new carpet felt "Huffier," she would still describe it as industrial carpeting. The petitioner testified that she had been performing her job in her room with the new carpeting for approximately six months without incident.

The petitioner testified that on February 9, 2007, an assembly was held that morning for the Junior High which caused a shuffling of class periods and, at the end of the day, she was teaching a class rather than having a home room period. The petitioner testified that the date of the fall was a Friday and being at the end of the day, the students were what she would describe as "active," however, there were no disturbances in the classroom and at the time of her fall, she was not attempting to deal with any problem students but merely attempting to describe a homework assignment to the class.

The petitioner testified that she walked around the table and, at that point, lost her footing and fell on her left side striking her head on the desk and her left side and hip on the ground. The petitioner testified at hearing, as well as in her recorded statement taken on February 21, 2007, that there was [*8] no defect whatsoever with the carpet and that she was not holding anything in her hands at the time of the fall, nor was she walking in any manner other than her normal walk. (R.X. 1.) The petitioner described her normal walk, which she was engaging in at the time of the fall, as her "arthritis" walk.

Subsequent to the fall, the petitioner was transported by ambulance to Glenbrook Hospital at which time she was diagnosed with a fractured left hip. On February 10, 2007, the petitioner underwent open reduction and internal fixation surgery to repair the fractured left hip under the direction of Dr. David Beigler. (P.X. 1.)

The petitioner testified that upon her release from Glenbrook Hospital on February 13, 2007, she was then admitted to Alden Rehabilitation where she remained until March 15, 2007, receiving care for the fractured left hip and working to regain range of motion and ambulation.

The petitioner continued to treat under the care of Dr. Beigler until her return to work on a full duty basis effective April 2, 2007, which, as the petitioner testified, is the first day after Spring Break. (P.X. 1.) Petitioner testified that from April 2, 2007, through the present date, she has [*9] been able to return to her regular job as a foreign language teacher for the respondent and remains in that position today. In addition, the petitioner testified that she returned to the room where the fall took place and has worked without incident through the present date.

B. ANALYSIS

C. In support of the Arbitrator's finding that an accident did not occur arising out of and in the course of the petitioner's employment by the respondent, the Arbitrator states as follows:

As clearly stated in the petitioner's testimony and is contained in Respondent's Exhibit No. 1, the petitioner fell while walking in a normal fashion without carrying any items and on what was termed by all parties as "industrial carpeting without defect."

The controlling case in disputes such as this is *First Cash Financial Services v. Industrial Commission, 853 N.E.2d 799* (Ill.App. 1 Dist. 2006), an Appellate Court of Illinois Decision rendered on July 26, 2006. As indicated in the court's decision, the petitioner bears the burden of proof by a preponderance of the evidence that the injury arose out of and in the course of employment. *(Id. at 803.)* [*10]

The court went on to describe three groups of risks to which the employee may be exposed as risks distinctly associated with employment, risks personal to the employee such as idiopathic falls, and neutral risks that have no particular employment or personal characteristics. *(Id. at 803.)*

The applicable risk category in this case is neutral risk as specifically cited in the case, "By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public." *(Illinois Consolidated Telephone Company, 732 N.E.2d 49.)*

In the case at issue, the petitioner must present evidence to support her inference that the fall stemmed from a risk associated with her employment which would be described as a defect at the employer's premises, uneven or slippery ground at the work site, or performing a task that contributes to a risk of falling. *(853 N.E.2d at 804.)*

In the case at issue, the petitioner did not present any evidence explaining the cause of her fall. In fact, the petitioner testified that there was industrial carpeting without [*11] any defect and she was not carrying anything in her hands nor was she walking at an increased rate at the time of the fall. Therefore, no direct evidence was presented establishing a cause for the petitioner's fall which is the petitioner's burden in this case.

The Arbitrator finds that since the petitioner did not present any evidence establishing the cause of her fall, she has failed to meet her burden of proving that the injury arose out of her employment and, therefore, no benefits are awarded.

Since the Arbitrator has found that no accident arose out of and in the course of the petitioner's employment with the respondent, it is not necessary for the Arbitrator to address the following disputed issues:

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

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

(K) What temporary benefits are in dispute?

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

Signature of Arbitrator

11.19.10

Date

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentRisks

1 of 100 DOCUMENTS

DIANE M. OWENS, PETITIONER, v. SOI-VETERAN'S HOME QUINCY, RESPONDENT.

NO. 10WC 01647

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF QUINCY

13 IWCC 977; 2013 Ill. Wrk. Comp. LEXIS 995

November 14, 2013

JUDGES: Kevin W. Lamborn; Charles J. DeVriendt; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent partial disability, 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 January 29, 2013, is hereby affirmed and adopted.

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

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

ATTACHMENT:

ARBITRATION DECISION

DIANE M. OWENS
Employee/Petitioner

v.

SOI, ILLINOIS VETERAN'S HOME QUINCY
Employer/Respondent

Case # **10** WC **001647**

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 **Douglas** [*2] **McCarthy**, Arbitrator of the Commission, in the city of **Quincy, IL**, on **1/2/2013**. 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

C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] 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?
L. [X] What is the nature and extent of the injury?

FINDINGS

On **8/11/2009**, 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 not*** 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 not*** causally related to the accident.

[*3] In the year preceding the injury, Petitioner earned $ **2,700.00**; the average weekly wage was $ **337.50**.

On the date of accident, Petitioner was **21** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $N/A under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove she sustained an accident arising out of her employment. All other issues are moot. Claim is denied.

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 [*4] 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.

Jun. 24, 2013

Date

FINDINGS OF FACT

During the summer of 2009, the Petitioner was a student-employee at Illinois Veteran's Home Quincy, working in the laundry room. The laundry room consisted of two rows of washers and dryers and was not air-conditioned, thus it was very hot. On 8/11/2009, Petitioner had been working in the laundry room for several months and had not had any problems.

On 8/11/2009, Petitioner was standing at her table folding clean clothes when she lost consciousness and fell backwards, striking her head on the floor. Petitioner was taken by ambulance to the emergency room at Blessing Hospital, where she was diagnosed with syncope: vasovagal episode and released back to her full duties at the Veteran's Home. (Rx. 1, 2).

The Adams County Ambulance records show that upon their arrival, Petitioner was laying on concrete floor, conscious, alert and oriented x 3. (Rx. 3). Blessing Hospital ER records state that Petitioner lost consciousness, but was not confused after the event. [*5] (Rx. 1). For the injury, the records state: "hit head." (Rx. 1). Under Clinical Impression, only Syncope: Vasovagal Episode is circled. (Rx. 1). A CT performed at Blessing Hospital has a comparison exam of 11/1/2005 and under "Impression" states "SMALL SCALP HEMATOMA. NO EVIDENCE FOR ACUTE INTRECRANIAL ABNORMALITY." (Rx. 1).

Petitioner testified that prior to fainting, she was feeling completely fine. She testified that she had no symptoms prior to losing consciousness, but rather just had a feeling that her body was horizontal, like she was in bed somewhere. However, the Adams County Ambulance record states that Petitioner complained of her left eye twitching and headache that began about a half hour prior to her syncopal episode and Petitioner's co-worker stated that Petitioner had been complaining of something happening to her left eye and vision prior to her fainting. (Rx 3). Petitioner's co-worker, Christine Logan, filled out a Witness Report on 8/12/09, stating that earlier on 8/11/2009, Petitioner had complained that her eye felt funny. (Rx. 8). Additionally, the records from Blessing Hospital's emergency room state that Petitioner "reported left eye started twitching around [*6] 0840; right before she passed out she felt like she had a headache" and under symptoms occurring just prior to episode, lightheadedness and headache are circled. (Rx 1).

Petitioner also testified on cross-exam, that she did not have headaches due to back pain and that she had not had seizures since she was an infant. However, the 8/11/2009 Adams County Ambulance record states that the Petitioner had back surgery when she was 12 years old and had chronic back pain, but it had been worse lately. (Rx 3). Blessing Hospital records show that on 11/1/2005, Petitioner was admitted with chief complaints of headache, blurred vision, and tongue swelling (resolved). (Rx 1). It was noted that she had the same or similar headaches previously. (Rx 1). Additionally on 10/12/2007, Petitioner was referred to Dr. Hermes who listed a past medical history remarkable for a motor vehicle accident with associated trauma, migraine headaches, anemia and seizures as a consequence of the motor vehicle accident. (Rx 1). That day Petitioner reported weakness, fatigue and weight loss, as well as various neurologic complaints, including seizures, headaches, numbness and tingling. (Rx 1).

Blessing Hospital's ER [*7] record lists that Petitioner had similar symptoms of vasovagal syncope previously, in the 5th grade, and Petitioner admitted that she had previously lost consciousness. (Rx 1).

On 7/22/2010, Petitioner was again admitted to the emergency room at Blessing Hospital after experiencing "near-syncope" while working at Hobby Lobby. (Rx 1). Petitioner complained of dizziness, headache, fatigue, numbness to ears and her jaw hurting. (Rx 1). On 7/27/2010, Petitioner saw Dr. Kim at Quincy Medical Group to establish care for recent syncope, dizziness, headache, ear pain, jaw pain and general checkup. (Px 6). Dr. Kim diagnosed her with "labyrinthitis/dizziness/otitismedia/headaches/nausea/generalized weakness/fatigue/recent syncope." (Px 6). Petitioner admitted on cross-exam that she did not see Dr. Kim on 7/22/2010 because of fainting on 8/11/2009.

Petitioner testified that she felt fine and had no current complaints. On cross exam, Petitioner stated that she did not have any residual impairments or lingering effects from the 8/11/2009 loss of consciousness.

Conclusions of Law

To be compensable under the Workers' Compensation Act, the injury complained of must be one "arising out of [*8] and in the course of the employment." *820 ILCS 305/2*. A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of employment. *820 ILCS 305/2*. Both elements must be present in order to justify compensation. *First Cash Financial Services v. Industrial Comm'n, 367 Ill. App. 3d 102, 105 (2006)*. Arising out of the employment pertains to the origin or cause of the claimant's injury. Id.

The mere fact that claimant was present at the place of injury because of his employment duties will not by itself suffice to establish that the injury arose out of the employment. *Brady v. Louis Ruffolo & Sons Const. Co., 143 Ill.2d 542, 550, 578 N.E.2d 921 (1991)*. Rather, a claimant must demonstrate that his risk of the injury sustained is peculiar to his employment, or that it is increased as a consequence of the work. Id. If an industrial accident is caused by a risk unrelated to the nature of the employment, or is not fairly traceable to the workplace environment, [*9] but results instead from a hazard to which the claimant would have been equally exposed apart from his work, the injury cannot be

said to arise out of the employment. Id. See also *Material Service Corp. v. Industrial Comm'n, 53 Ill.2d 429, 433, 292 N.E.2d 367 (1973).*

The accident on 8/11/2009 did not arise out of Petitioner's employment with Illinois Veteran's Home Quincy. On 8/11/2009, Petitioner experienced a vasovagal episode of syncope (loss of consciousness) while working at the Illinois Veteran's Home Quincy. Medical evidence shows and Petitioner admitted that she has a history of vasovagal syncope. Prior to 8/11/2009, Petitioner experienced vasovagal syncope in the 5th grade. After 8/11/2009, Petitioner again experienced a near-syncope episode on 7/22/2010. Additionally, Petitioner experienced headache and vision changes prior to losing consciousness on 8/11/2009 and Petitioner's medical records show that Petitioner had been suffering from chronic headache, blurred vision, severe back pain, seizures, weakness, fatigue, numbness and tingling since 11/1/2005.

No medical professional opined that Petitioner's work conditions caused [*10] her to faint. Petitioner was not diagnosed with heat-induced syncope and no medical records indicate that heat was a factor in Petitioner's syncopal episodes. The ambulance report makes no reference to the heat, and neither the Petitioner nor the co-worker interviewed mention anything about being fatigued, dehydrated or in any way affected by the heat prior to the accident. (RX 3) Similarly, the accident report completed by the Petitioner makes no mention of any heat related symptoms prior to the fall. (RX 6) The emergency room records from Blessing Hospital on August 9, 2009 also fail to contain any reference to the heat in the Petitioner's history, her symptoms upon presentation, or the doctor's findings. They simply state that she was folding laundry, was lightheaded and fainted (PX 1) This is in contrast to the history she gave the same emergency room about one year later when she said she was working inside, became overheated and nearly passed out. (Id) Petitioner was not given any work restrictions or directions to alter her work environment or not be in the heat upon her release.

Petitioner and her witnesses clearly proved that it was excessively hot in the laundry room on [*11] August 9, 2009 when she fainted at work. However, given the lack of any evidence that the heat had anything to do with her fainting that day, it would be pure speculation for the Arbitrator to find an accident arising out of the employment.

Therefore, Petitioner has not proven by a preponderance of the evidence that her injury arose out of her employment with Illinois Veteran's Home Quincy.

In light of the Arbitrator's findings on the issue of accident, the other issues are moot. Claim is denied.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityCourse of EmploymentPersonal ComfortWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

1 of 100 DOCUMENTS

BERNICE BROSHOUS, PETITIONER, v. STATE OF ILLINOIS/DHS HOME SERVICES PROGRAM, RESPONDENT.

NO. 11WC 41668

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

13 IWCC 970; 2013 Ill. Wrk. Comp. LEXIS 1062

November 8, 2013

JUDGES: Mario Basurto; David L. Gore; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical expenses 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).*

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 5, 2012 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such [*2] a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

ATTACHMENT:

ARBITRATION DECISION

19(b)

Bernice Broshous
Employee/Petitioner

v.

State of Illinois/DHS Home Services Program
Employer/Respondent

Case # **11** WC **41668**

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 **Lee**, Arbitrator of the Commission, in the city of **Rockford**, on **10/31/12**. 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] Is Petitioner entitled to [*3] any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD

FINDINGS

On the date of accident, **2/21/11**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **20,020.00**; the average weekly wage was $ **385.00**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $ **2,374.54** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **2,374.54**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

The respondent [*4] shall pay the petitioner temporary total disability benefits of $ **0** /week for **0** weeks, from **N/A** through **N/A**, as provided in Section 8(b) of the Act, because the Petitioner's current condition of ill-being is not causally related to her work-related accident.

The respondent shall pay $ **0** for medical services, as provided in Section 8(a) of the Act, as the Petitioner's current condition of ill-being is not causally related to her work-related accident.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results [*5] in either no change or a decrease in this award, interest shall not accrue.

12/3/12

Date

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bernice Broshous,

Petitioner,

vs.

State of Illinois/DHS Home Services Program,

Respondent.

11 WC 41668

RESPONDENT'S 19(b) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard before the Honorable Edward Lee, Arbitrator of the Workers' Compensation Commission, in the City of Rockford, on October 31, 2012. After hearing the proofs and reviewing all of the evidence presented, the Arbitrator hereby makes the following findings.

FINDINGS OF FACT

The Petitioner is a Personal Assistant for the State of Illinois Department of Human Services. Petitioner testified that she was taking care of a 57 year old quadraplegic who weighed approximately 150 pounds, and had been working for the state for approximately five years.

The Petitioner testified that her duties included putting the patient into bed, taking him out of bed, washing his face, hands and dressing him. She would also lift him into the wheelchair from the bed, which she accomplished by using belts. Petitioner further testified that she would feed him, [*6] turn the television on, take him outside sometimes, and do some laundry and cleaning.

On the date of the accident, the Petitioner testified that she was lifting a 5 gallon bottle of water on a cooler when she jammed her left thumb, and her right hand and right side of her wrist were sore. The Petitioner treated at FHN Memorial Hospital on February 25, 2011, where she was given x-rays, a brace to wear and pain pills, which she did not take. The Petitioner first treated with Dr. Brinkman on March 2, 2011 and, at that time, Petitioner denied any pain in her wrist or hand. (PX 6.) Dr. Brinkman diagnosed her with mild tendinitises. (PX 6.) Petitioner then saw Dr. Reese again on April 8, 2011, at which time he stated she had left trigger thumb and right deQuervain's. (PX 6.) Petitioner did not return to Dr. Reese again until August 5, 2011, at which time Petitioner complained about numbness and tingling in her hands and was given a steroid injection. (PX 6.) The Petitioner returned to Dr. Reese on August 10, 2011, at which time he took her off work, and he referred Petitioner to Dr. Stormont. (PX 6.) Dr. Stormont did EMG testing, and Petitioner was diagnosed with bilateral carpal tunnel [*7] syndrome. (RX 1.) The Petitioner testified that she did experience numbness prior to the date of accident, but after the accident, she developed pain as well. Dr. Stormont recommended carpal tunnel release surgery. (RX 1.)

Petitioner's doctor, Dr. Stormont, opines that Petitioner's carpal tunnel syndrome was aggravated by her employment activities. (PX 4.) During his deposition, he testified that Petitioner's carpal tunnel was aggravated by her lifting at work. Dr. Stormont testified that he based his opinion on the fact that Petitioner had to do alot of grasping and pulling as well. (PX 1, p. 25.) Dr. Stormont further testified that any normal daily activities could aggravate carpal tunnel syndrome. (PX 1, p. 29.) Dr. Stormont further testified that middle-aged women, body mass index, hyperthyroidism, inflammatory arthritis and smoking are all contributing risk factors to carpal tunnel syndrome. (PX 1, p. 29.)

On cross-examination, when the Petitioner was asked how many times a day she lifted the patient, she testified that she did so once or twice a day. She further testified that her activities were not continuous and varied day to day.

The Petitioner underwent an Independent Medical [*8] Examination on February 29, 2012, with Dr. Vender. Dr. Vender opined that the Petitioner had risk factors for the development of carpal tunnel syndrome, specifically, age, gender, increased body mass index, hyperthyroidism and a smoking history. (RX 2.) Dr. Vender further stated that the Petitioner's activities as a caregiver would not be repetitive, and would not be considered contributory to carpal tunnel syndrome. (RX 2.) Lastly, Dr. Vender indicated that a single incident of picking up a water bottle would not be contributory to carpal tunnel syndrome. (RX 2.)

The Petitioner was off work beginning August 10, 2011, and received Temporary Total Disability benefits from August 10, 2011 through November 15, 2011.

ARGUMENT

F. Whether Petitioner's current condition of ill-being is causally related to the injury?

The Petitioner treated at FHN Memorial Hospital on February 25, 2011, where she was diagnosed with left thumb and right forearm and wrist pain. (PX. 4.) Although the Petitioner testified that she had wrist pain following the work-related accident, she failed to list it on the first Report of Injury; rather, Petitioner indicated that she jammed her left thumb and [*9] her right arm was sore. (RX 1.) Petitioner did not note any wrist pain, numbness or tingling, and at her first visit with Dr. Brinkman, Petitioner denied any pain in her wrist or hand. (PX 6.) Petitioner, when questioned why she did not indicate an injury to her wrists on her first report of injury, testified that she considered her wrist part of her arm. Petitioner treated with Dr. Reese April 8, 2011, who indicated that Petitioner had left trigger thumb and right deQuervain's. (PX 6.) It is apparent that Petitioner sustained left trigger thumb and an aggravation of right deQuervain's due to her work-related injury and successfully underwent conservative treatment. The Petitioner's carpal tunnel syndrome, on the other hand, is not causally related to her work injury. Petitioner went approximately four months without treatment with Dr. Reese, and did not complain about carpal tunnel symptoms, namely, numbness and tingling, until several months after the accident. Lastly, she testified that she had been experiencing it for approximately one year prior to the work-related accident.

Although Petitioner's doctor, Dr. Stormont, opines that Petitioner's carpal tunnel is causally related [*10] to her work activities, during his deposition testimony, he testified that he did not review a copy of her detailed job description, and he relied solely on Petitioner's assertion that she had to do a lot of repetitive lifting and pulling. (PX 1, p. 24, 25.) However, Petitioner testified that she lifted the patient only once or twice daily. Dr. Stormont further testified that he based his opinion on the fact that Petitioner had to do alot of grasping and pulling as well. (PX 1, p. 25.) Dr. Stormont could not state how many times per day the Petitioner lifted things, grasped or pulled things. He also could not state whether her duties were consistent throughout the day or if she could take breaks. (PX 1, p. 26.) The Petitioner, however, testified that her activities were not continuous throughout the day. Dr. Stormont testified that he was unaware of how many days a week she worked, how many hours a day she worked, or how many hours a day she lifted, grasped or pulled. (PX 1, p. 26.) Dr. Stormont further testified that any normal daily activities could aggravate carpal tunnel syndrome. (PX 1, p. 29.) Dr. Stormont's lack of knowledge regarding the Petitioner's daily work activities [*11] undermines his opinion that these activities aggravated the Petitioner's carpal tunnel syndrome. The Petitioner herself testified that she only lifted once or twice a day and that her duties varied day to day. Lifting once or twice a day would not constitute a repetitive activity. Petitioner testified that her other duties included, *inter alia,* washing the patient's face, hands, feeding him, laundry and some cleaning. None of these activities could be considered repetitive activities performed on a continuous basis.

The Arbitrator finds the Independent Medical Examination Report of Dr. Vender more credible than the deposition testimony of Dr. Stormont. Dr. Vender opined that the Petitioner's activities as a caregiver would not be considered repetitive and, consequently, contributory to bilateral carpal tunnel syndrome. Dr. Vender further opined that the single incident of picking up a water bottle would not be contributory to carpal tunnel syndrome.

Therefore, based on the evidence presented, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to her work-related accident.

K. Whether Petitioner is entitled to any prospective medical [*12] care?

The Arbitrator finds that the evidence submitted supports a finding that the Petitioner's bilateral carpal tunnel syndrome is not causally related to her work accident. Most compelling is the fact that the Petitioner did no repetitive activities on a continuous basis and did not complain of any numbness or tingling in her hands until August of 2011, approximately four months after her work related accident. Additionally, the Arbitrator finds the opinion of Dr. Vender,

who opined that a single incident of placing a water bottle on top of a cooler would not contribute to carpal tunnel syndrome, more credible than the opinion of Petitioner's treating physician.

As the Arbitrator finds that Petitioner's carpal tunnel syndrome is not causally related to her work injury, the Petitioner is not entitled to any prospective medical care.

L. Whether Petitioner is entitled to any TTD benefits?

As the Arbitrator finds that Petitioner's carpal tunnel syndrome is not causally related to her work accident, the Petitioner is not entitled to any further TTD benefits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesCumulative InjuriesWorkers' Compensation & SSDICompensabilityInjuriesSuccessive Injuries

2 of 100 DOCUMENTS

LORI CADY, Petitioner, v. STATE OF ILLINOIS -- MENARD CORRECTIONAL CENTER, RESPONDENT.

NO. 12WC 10991

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILLIAMSON

13 IWCC 981; 2013 Ill. Wrk. Comp. LEXIS 999

November 14, 2013

JUDGES: Kevin W. Lamborn; Charles J. DeVriendt; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues accident, causal connection, temporary total disability, medical expenses both current and prospective, and the Arbitrator's denial of Respondent's request to amend the stip sheet after testimony, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

Findings of Fact and Conclusions of Law

1. Gail Walls was called to testify by Petitioner. She testified she is the Director of Nursing for Respondent and had held that position for two years. She has known Petitioner since Petitioner started working for Respondent in October of 2008. She went over Petitioner's time sheets and noted she worked overtime for a total shift of up to 16 hours.

2. The witness further testified nurses are never on their feet the entire time of their shifts. Occasionally nurses would be on their feet 90% of the time. The time spent on one's feet depended on the number of patients they had. She acknowledged that her department was short on staff. [*2] The job included climbing stairs. She agreed with the job description Petitioner provided Dr. Schmidt that she worked up to 16 hours and her job activities including climbing stairs and being on her feet "all day." She prepared Respondent's job activities statement. It included climbing stairs 0-2 hours and walking 2-4 hours daily. She acknowledged that sometimes a nurse would walk more than four hours a day, but they always had intermittent breaks.

3. Petitioner testified that she started working as a nurse for Respondent on November 3, 2008. She had seen the report by Dr. Schmidt. She gave him an accurate description of her job activities. Petitioner's job changed as of April of 2012; she is now working the "doctor's call line." Petitioner began to develop symptoms in her foot in her previous job. She noticed a large lump on the back of her right Achilles tendon; it began hurting more and more as she walked and climbed stairs. Her pain got worse every day. She would climb stairs, walk, and stand "periodically all day long." Petitioner has received really no treatment for her condition but has had an MRI.

4. On cross examination, Petitioner testified she had no previous problems [*3] with her right foot. She began to notice symptoms around May of 2011. She had an MRI the previous October, but had no idea why that was not in her medical records. She was told it showed a tear in the Achilles tendon. She ran the MRI through group insurance and has not received a bill. She has been prescribed Tramadol for her "Achilles tendonitis" by a physician's assistant in October of 2012.

5. Petitioner estimated that she saw about 10 patients a day while at first aid. She would have to go and get patients only on emergency runs. She estimated she had two or three such emergency runs a day. There are 26 beds in the infirmary, and it generally had about 15 to 18 patients. Only one nurse was assigned to the infirmary. In that job she had to climb stairs to obtain medications and charts.

6. Petitioner indicated that on average three nurses were assigned to "med passes." In that job she took medications to the inmates in "multiple cell houses;" "that means you climb the galleries and back for every single one of them." Handing out the med passes took about two to two and a half hours. Even if there were no "inmates in the cell house;" she would still have to climb stairs to get [*4] to the bathroom or talk to supervisors, nurse practitioners, or doctors. There is a chair in the med room, in the infirmary, and in the break room, but not in the medical records room. On an average day she was on her feet at least six hours a day.

7. Petitioner further testified she related her foot condition to her work activities as soon as she noticed symptoms. She did not report it initially because she thought it would go away, but it just got worse. She was lucky if she got one half hour for lunch and she took a cigarette break once a day. She did not mention the change of her job to Dr. Schmidt. She only mentioned the med pass assignment to Dr. Schmidt because he asked what was causing her problem. She did tell him that at times she walked, stood, and climbed stairs 10 to 16 hours a day.

8. On redirect examination, Petitioner testified that she provided her lawyer a job description when she had previous work accidents. That description was provided by her previous supervisor, Ms. Malley. However, her job duties had changes a lot since then. She has to do a "little bit more with the inmates' when the facility is on lockdown, but she did not know how often the facility was [*5] on lockdown.

9. At this point Respondent moved to amend the stip sheet to include notice as a disputed issue. It based the request on Petitioner's testimony that she related her symptoms to her work in May 2011. Petitioner objected and the Arbitrator denied the request.

10. Gail Walls was recalled to testify by Respondent. She testified that in May of 2011 Petitioner worked a total of 42 hours overtime, which would have been in the infirmary or first aid; none of that time was in med pass. In June of 2011, Petitioner worked a total of 18.25 hours overtime, two of which was in med pass. In that month she worked infirmary and first aid. In July 2011, Petitioner worked a total of 17.5 hours of OT. In that month she had two med pass shifts and two cell house assignments. Her other assignments were infirmary, first aid, and doctor's call line. In August 2011, Petitioner worked a total of 20.5 hours overtime, none of which were in med pass. In September 2011, Petitioner had no overtime and worked first, aid, doctor's call line, and one cell house assignment. In October 2011, Petitioner worked a total of 26.5 hours overtime, none of which were in med pass, but she did give flu shots once. [*6] In November 2011, Petitioner worked a total of 16.75 hours overtime, none of which were in med pass, but she did have one shift assigned to a cell house and she gave out flu shots once. In December 2011, Petitioner worked a total of 33.25 hours overtime. She had one cell house assignment at gave out TB tests thrice. Petitioner did not work any overtime in January 2011, and 30 hours overtime in February 2011. In March 2011, Petitioner worked 28.25 hours overtime and in April 2011, she worked a total of 43.75 hours of overtime.

11. The witness explained that working in the doctor's call line is like working in a doctor's office. Inmates come into the office area. The nurse gets the chart ready, collects necessary lab work, and takes the inmates' vitals. The nurse is then "responsible to take the orders off once they've been seen." From Janu-

ary 2011 through March 2011, Petitioner had six med pass assignments; otherwise she was in infirmary or first aid.

12. The witness was shown a job description analysis executed by Ms. Malley on September 13, 2010. She did not believe it was an accurate description of Petitioner's job activities. First, the times noted for activities added up to [*7] more than eight hours. In addition, it may accurately depict a particular day, but not generally every day. She disagreed that Petitioner job entailed 10 to 16 hours of walking, standing, and climbing stairs daily.

13. On cross examination, the witness testified the Demands of Job Performance form is only filled out if there is a workers' compensation packet filled out. When it is filled out it is the normal performance of a supervisor's everyday course of business. She agreed that occasionally, job assignments can change "on the fly."

14. The medical records indicate that on September 1, 2011, Petitioner presented to Chester Clinic with persistent right Achilles tendonitis for the past few months. She was unaware of how she injured it but she was on her feet at work all day. A CAM boot was ordered and an MRI was recommended to rule out a small tear. She was taken off work for five days.

15. On September 6, 2011, Petitioner reported the pain improved significantly with the boot. However, Respondent would not allow her to work with the boot. Petitioner could return to work on September 9, 2011 with the restriction of no prolonged standing or walking.

16. On September 26, 2011, Petitioner [*8] returned to the clinic. She was supposed to return to work on September 16, 2011 because of delay in paperwork. However, her vacation started and she had not returned to work. Petitioner's ankle was much improved with the rest. Petitioner was provided an Ace wrap.

17. On October 17, 2011, Petitioner returned to the clinic. She reported the pain was tolerable but worsening after she returned to work and the swelling was returning. An orthopedic consultation was a possibility to determine the need for an MRI or whether six to eight weeks of rest was called for. Petitioner wanted to stay on work until her treatment plan was decided.

18. On September 2, 2011, Petitioner filed her accident report. She indicated she had right Achilles tendonitis through repetitive motion; her job requires a lot of walking. She indicated she reported her injury immediately after seeing a physician.

19. On September 6, 2011, Gail Walls filled out an injury report. She noted Petitioner's responsibilities were "patient care, sometimes first aid, doctor's call line, infirmary change nurse duties, may pass medications to inmates, & insular charting." Also on that date Ms. Walls issued a "Demands of Job" analysis. [*9] In it she indicated Petitioner's daily job requirements included zero to two hours climbing stairs, two to four hours walking, and zero to two hours standing. There was intermittent rest associated with all activities.

20. On September 24, 2011, Petitioner presented to Dr. Schmidt for an examination under Section 12 of the Act, at the request of Respondent. She reported pain in the right Achilles tendon of recent onset. Petitioner reported walking and climbing stairs a lot and working long hours; up to 16 hour shift at times. She requested an MRI, but that was denied. Currently, Petitioner complained of swelling and 6/10 pain. She denied any preexisting condition or trauma. Dr. Schmidt indicated Petitioner's condition was "a very classic presentation of chronic Achilles tendinitis." "These can be insidious in onset and would certainly be aggravated by 10 to 16 hours of daily walking, standing, and climbing stairs as she describes." Therefore, he opined that there was a direct relation to this extensive standing and walking that she reports. "The diagnosis would be causally related to her employment as a nurse, working in a short-handed unit and spending extended time standing and [*10] walking throughout her day."

In finding accident/causation, the Arbitrator found Petitioner sustained a repetitive trauma injury to her right foot attributable to the requirement that she spend at least six hours a day on her feet, walking, standing, and climbing stairs, and on occasion she would have to work 16 hour days. He awarded her 2 2/7 weeks temporary total disability benefits and ordered Respondent to authorize and pay for prospective treatment recommended by an orthopedic specialist.

First, there is no dispute that the basis of Petitioner's theory for recovery is the requirement of her job that she must stand and walk for extended periods of time. There is also no dispute that Petitioner did not suffer any acute trauma and could not attribute her condition to any specific event. Simply stated, the Commission does not believe that the mere act of "repetitive standing" or "repetitive walking" constitutes an accident as contemplated under the Workers' Compensation Act.

Second, the Commission concludes that Petitioner did not sustain her burden of proving that her condition of ill-being was actually caused by her work activities. Although Respondent's Section 12 medical presented [*11] an opinion that Petitioner's condition was caused by her work activities, he also specified that Achilles tendonitis can be of insidious onset. It also appears that Dr. Schmidt was under a misimpression regarding exactly how much walking, standing, and climbing Petitioner did on an average day. He assumed Petitioner was on her feet for between 10 and 16 hours a day. Petitioner admitted that she told Dr. Schmidt only about her job on med pass, which was the most "walking intensive" of her duties and was only one part of her overall job activities. She also testified that she specifically told Dr. Schmidt that she was on her feet 10 to 16 hours a day. In contrast, Ms. Walls' job description indicated a nurse would be on her feet between two and eight hours a day. Finally, Ms. Walls testified Petitioner worked a total of 276.75 hours of overtime for the preceding 10-month period. Assuming a 22 day work month, Petitioner would have averaged about 1.25 hours of overtime a day. That would appear to suggest that her description to Dr. Schmidt that she was on her feet 10-16 hours a day was misleading and that the assumptions underlying his opinion were incorrect.

Because the Commission finds [*12] that Petitioner has not sustained her burden of proving accident and causal connection, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator issued on January 25, 2013 is hereby reversed and compensation is denied.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Lori Cady
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # 12 WC 10991

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on December 11, 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

C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and [*13] necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?

[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident (manifestation), September 1, 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 $ 68,368.04; the average weekly wage was $ 1,314.77.

On the date of accident, Petitioner was 50 years of age, married with 2 dependent child(ren).

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

Respondent shall be given a credit of $ 0.00 for TTD, $ 0.00 for TPD, $ 0.00 for maintenance, and $ 0.00 for other benefits, [*14] for a total credit of $ 0.00.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall receive a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and make payment for the medical treatment recommended by an orthopedic specialist, including, but not limited to, additional diagnostic procedures and treatment.

Respondent shall pay Petitioner temporary total disability benefits of $ 876.51 per week for two and two-sevenths (2 2/7) weeks, commencing September 1, 2011, through September 15, 2011 and October 2, 2011, through October 3, 2011, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent [*15] disability, if any.

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

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

William R. Gallagher, Arbitrator

January 18, 2013

Date

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of September 1, 2011, and that Petitioner sustained repetitive trauma to her right foot. Respondent disputed liability on the basis of accident and causal relationship. The case was tried as a 19(b) proceeding and Petitioner sought an order for medical bills, temporary total [*16] disability benefits, prospective medical as well as penalties under Sections 19(k) and 19(l) and attorneys' fees under Section 16a.

Petitioner worked for Respondent as a Corrections Nurse and began working for Respondent in that capacity in October, 2008. Petitioner is claiming to have sustained repetitive trauma to her right foot as a result of the long-term standing and walking necessitated by her job duties.

Petitioner's counsel initially called Gayle Walls, Respondent's Director of Nursing at Menard Correctional Center, to testify regarding Petitioner's work assignments and duties. Walls previously worked in Petitioner's job capacity and agreed that there were days in which 90% of her time would be spent on her feet. When Walls was shown a copy of a medical report of Dr. Gary Schmidt (who examined Petitioner at Respondent's request) she reviewed that portion of the report in which Petitioner described her work duties and agreed that the description was reasonably accurate. Walls also agreed that from February, 2011, through August, 2011, that Petitioner did work overtime and that there were a number of days in which Petitioner would have worked 16 hours at a time.

Petitioner [*17] testified that she began working for Respondent as a Corrections Nurse in the fall of 2008. In regard to her job duties, Petitioner stated that she was required to spend approximately six hours per day on her feet and that this included standing, walking and climbing stairs. When Petitioner worked overtime, she stated that she could work as long as 16 hours at a time. Petitioner testified that her right foot began to develop symptoms in May, 2011, primarily in the back of the foot at the level of the Achilles tendon. Over time, this condition got progressively worse to where Petitioner developed a lesion in that area of her right ankle.

Petitioner initially sought medical treatment from her family physician, Dr. Lisa Rohlfing, on September 1, 2011. At this time, Petitioner was seen by Dr. Rohlfing's Physicians Assistant (PA), Jamie Linzy. In the record of her visit of that date, it was noted that Petitioner had complaints of right Achilles tendinitis over the last few months. The record contained the entry that "She is unsure of how she injured it but she is on her feet all day at work and that seems to aggravate it very much." Petitioner was authorized to be off work for five days, [*18] a CAM boot was prescribed and an MRI was recommended. Petitioner reported that she had sustained a repetitive trauma injury to her right foot the following day to Respondent and both Employee's Notice of Injury and Supervisor's Report of Injury Forms were completed.

Petitioner was seen again by PA Linzy on September 6, 2011, and while the CAM improved the pain symptoms, the ankle and foot remained tender. When Petitioner removed the boot, the symptoms would increase and this was a significant problem because Petitioner was not permitted to wear the boot while at work. Petitioner was authorized to be off work from September 1 to September 8 and to return to work on September 9 with restrictions of no prolonged standing or walking. Respondent was unable to accommodate these restrictions. Petitioner was seen again by PA Linzy on September 26, 2011, and the condition in her foot was improved with rest but it remained tender. Petitioner was prescribed an Ace bandage and was instructed to elevate it, rest and apply ice to the foot as needed. Petitioner was seen by PA Linzy again on October 17, 2011, and reported that her right foot condition had worsened since the time she had returned [*19] to work. An orthopedic consultation was recommended at that time.

At Respondent's direction, Petitioner was examined by Dr. Gary J Schmidt, an orthopedic foot/ankle surgeon, on September 24, 2012. When seen by Dr. Schmidt, Petitioner informed him that she worked as a nurse in a prison and had to work long hours, up to 16 hour shifts on occasion. She further informed Dr. Schmidt that she had to walk a lot as well as climb stairs. Dr. Schmidt opined Petitioner had Achilles tendinitis in her right foot, that she was not at MMI and that an MRI should be performed to determine if there was a partial tear. In regard to the issue of causal relationship, Dr. Schmidt opined that the condition of Achilles tendinitis could be aggravated by 10 to 16 hours of walking, standing and

climbing stairs as described by the Petitioner and that the condition was related to Petitioner's employment as a nurse which required her to spend extended time standing and walking throughout the day.

Petitioner testified that in April, 2012, she was able to secure another position which did not require as much walking and being on her feet. At trial when Petitioner was questioned why she did not tell Dr. Schmidt [*20] about her new job duties which were less foot-intensive, she stated that he had asked her what caused the problem and she simply explained to him what caused it. Petitioner also testified that she recently underwent an MRI (the report was not available at the hearing) and was informed the MRI revealed some thickening of the Achilles tendon. Petitioner does want to follow-up with the referral to a specialist for treatment as previously recommended by Dr. Rohlfing's office.

At trial, Petitioner introduced a Demands of the Job form into evidence which was completed on September 13, 2010, by one of Petitioner's supervisors, Nikki Malley. On this form, Ms. Malley indicated that Petitioner spent approximately two to four hours per day climbing stairs; four to six hours per day walking; and four to six hours per day standing. Another Demands of the Job form was filled out by another of Petitioner's supervisors, Gayle Walls, on September 6, 2011, five days after the injury was reported. This Demands of the Job form stated Petitioner spent two to four hours walking per day; zero to two hours per day standing and zero to two hours per day climbing stairs. When Ms. Walls testified she could [*21] offer no explanation as to why there were these differences and discrepancies between the two forms.

Based upon the opinion of Dr. Schmidt that Petitioner's condition was causally related to her work duties, Petitioner's counsel filed a Motion for Penalties and Attorneys' Fees in view of Respondent's continued denial of the claim even after receiving the report of Dr. Schmidt.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to her right foot arising out of and in the course of her employment for Respondent.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified credibly that her work duties as a Corrections Nurse for Respondent required her to spend approximately six hours per day on her feet, walking, standing or climbing stairs. Petitioner further testified that when she worked overtime she would, on occasion, have to work a 16 hour shift.

Gayle Walls', Petitioner's supervisor, testimony was consistent with Petitioner's and stated that Petitioner could spend 90% of her work day on her feet. When shown [*22] the report of Respondent's examining physician, Dr. Schmidt, and the job description contained therein, Walls agreed that it was reasonably accurate.

Petitioner's treating physician and PA attributed Petitioner's right foot symptoms to her work activities. Respondent's examining physician, Dr. Gary Schmidt, also agreed that there was a causal relationship between Petitioner's work activities and the condition in her right foot/ankle.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical services provided to Petitioner were reasonable and necessary and Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue [*23] (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to prospective medical treatment including, but not necessarily limited to, a course of treatment prescribed by an orthopedic specialist.

In support of this conclusion the Arbitrator notes the following:

Respondent's examining physician, Dr. Schmidt, opined that Petitioner's right foot condition is not at MMI and that additional diagnostic procedures and treatment may be indicated.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

Petitioner is entitled to payment of temporary total disability benefits for a period of two and two-sevenths (2 2/7) weeks from September 1, 2011, through September 15, 2011 and October 2, 2011, through October 3, 2011.

In support of this conclusion the Arbitrator notes the following:

There is no dispute that Petitioner was temporarily totally disabled for the aforestated periods of time.

In regard to disputed issue (M) the Arbitrator makes the following conclusion of law:

The Arbitrator finds that Petitioner is not entitled to penalties under Sections 19(k) or 19(l) or attorneys' fees under Section [*24] 16a.

In support of this conclusion the Arbitrator notes following:

In spite of the Arbitrator's conclusions in favor of the Petitioner on the other disputed issues and the conclusion of Respondent's Section 12 examiner, Dr. Schmidt, the Arbitrator finds that Respondent's reliance on the Demands of the Job form which stated that Petitioner worked substantially less on her feet than what was alleged was neither unreasonable nor vexations.

William R. Gallagher, Arbitrator

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesCumulative Injuries

2 of 100 DOCUMENTS

JOSHUA AUBUCHON, PETITIONER, v. M & M TIRES, RESPONDENT.

NO. 11WC 29530

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF FRANKLIN

13 IWCC 972; 2013 Ill. Wrk. Comp. LEXIS 1064

November 12, 2013

JUDGES: Charles J. DeVriendt; Michael J. Brennan; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, wages, temporary total disability and medical both incurred and prospective 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 Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).*

The Commission finds that Petitioner failed to prove that his "tips" should be included in his average weekly wage. Although Petitioner had 2 co-workers testify to the amount of tips they received, none of them had any written documentation of the tips. Both owners of M & M Tires testified that there was no policy against [*2] tips and that sometimes customers would leave tips with them to give to the workers. However, Petitioner offered nothing in the way of written documentation that he received these tips and the amount he received. He did not report any of these tips on his tax returns. In *Stacy R. Brown v Pizza Hut 12 IWCC 289 (2012)* we found that "while Petitioner's testimony regarding her tips was un-rebutted, she offered no documentation to indicate her actual (or claimed) wages for the year prior to her work accident." Therefore there was "no definitive evidence of Petitioner's claimed earnings, we find that using anything but Respondent's wage statement would be speculative." As in that case the Commission adopts Respondent's wage statement as Petitioner's average weekly wage.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 254.89 per week for a period of 29 5/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further [*3] amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 28,546.30 for medical expenses under § 8(a) of the Act and 8-2. In addition Respondent will authorize medical treatment for Petitioner consistent with the recommendation of Dr. Gornet.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 35,900.00. The party commencing [*4] the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

19(b)

JOSHUA AUBUCHON
Employee/Petitioner

v.

M & M TIRES
Employer/Respondent

Case # **11** WC **29530**

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **October 4, 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
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 to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits [*5] are in dispute?
[X] TTD

FINDINGS

On the date of accident, **12/21/2010**, 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 $ **15,854.28**; the average weekly wage was $ **304.89**.

On the date of accident, Petitioner was **18** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $ **237.93** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **237.93**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $ 28,546.30, [*6] as provided in Section 8(a) and subject to the medical fee schedule, Section 8.2 of the Act. Petitioner's condition of ill being remains causally related to his work accident of 12/21/2010. Respondent shall authorize medical treatment for Petitioner consistent with the recommendations from Dr. Gornet.

Respondent shall pay Petitioner temporary partial disability benefits of $ 286.00 per week for 29 5/7 weeks, commencing 07/08/2011 to 08/18/2011 and again from 04/24/2012 to the date of trial, 10/04/2012, as provided in Section 8(b) of the Act. Respondent has agreed to satisfy the previous lost time period of 12/23/2010 to 01/04/2011, and this period of lost time benefits does not remain in dispute as it has been resolved and agreed to by both parties with credit being paid in part to satisfy this period.

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this [*7] 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.

11/26/2012

Date

ARBITRATION DECISION

19(b)

JOSHUA AUBUCHON
Employee/Petitioner

v.

M & M TIRES
Employer/Respondent

Case # 11 WC 29530

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On December 21, 2010, Petitioner, Joshua Aubuchon, was working for Respondent, M & M Tires, as a tire installer. His job involved the removal and installation of tires on cars and trucks. Petitioner testified that on the date of the accident, he was lifting a tire overhead when he felt symptoms in his low back. He attempted to continue working that day and sustained further injury while trying to lift a tire rim. Petitioner testified that following this second event, he advised his supervisor as well as co-workers before leaving work early that day.

Petitioner [*8] reviewed payroll information and testified that it was accurate. (See Respondent's Exhibit (RX) 7). However, Petitioner testified that in addition to payroll, he received tips from customers, as well as from the owner, that

would range between $ 50.00 to $ 100.00 per week. Petitioner's testimony on this issue was further confirmed by co-workers Andrew Aubuchon and Nathan Preston. Andrew Aubuchon testified that he would make anywhere from $ 50.00 to $ 150.00 per week in tips. Nathan Preston testified that he would make anywhere from $ 15.00 to $ 30.00 per day, which would equate to $ 75.00 to $ 150.00 per week in tips. Respondent's witnesses, shop manager Raymond Benoit and Respondent's owner, Mohammad Mokhtar, confirmed that workers obtained tips from customers. Both witnesses admitted that they were not aware of the amount of the tips since many of the cash tips were paid directly from customers to Petitioner. Both Mr. Benoit and Mr. Mokhtar testified that if a customer gave a tip to them, they would in turn give the tip to the employee who performed the service. Mr. Mokhtar testified that tips are allowed for his employees, and that the employees do not have to notify him when they [*9] receive tips.

Petitioner testified that following the work injury, he was sent by Respondent to Touchette Regional Hospital on December 26, 2010. Petitioner testified that he advised the hospital of this work accident and was provided medications as well as work restrictions. Medical records from Touchette Regional Hospital confirm that Petitioner was seen on December 26, 2010. At that time, Petitioner advised them that he hurt his back on December 21, 2010 while lifting a truck tire at work. Petitioner was prescribed pain medications and advised to follow up for further medical care. (PX 1).

Petitioner testified that Respondent then sent him Midwest Occupational Medicine (hereafter "MOM") in January 2011. Petitioner testified that MOM did nothing in the way of active treatment, but simply prescribed medications for him. Petitioner testified that when he was released by MOM, he was continuing to have low back pain as well as right leg pain, and had advised the doctor of these ongoing symptoms. Petitioner noted that MOM provided him with a back brace, which he continued to wear at work. (See also PX 2).

Following his release by MOM, Petitioner testified that he returned to work with [*10] Respondent. However, Petitioner noted that he had problems completing his work activities as he was unable to lift the heavier tires to put onto the vehicles. Petitioner testified that he told co-workers of his low back problems but did not tell his employer for fear of being fired. Petitioner noted that co-workers would try to help him lift the heavier weighted items. Petitioner admitted that the activities from co-workers were done when supervisors were not looking, as he knew the co-workers would have gotten in trouble if they were caught assisting Petitioner.

Andrew Aubuchon and Nathan Preston both confirmed Petitioner's testimony regarding his ongoing low back problems. Both Andrew Aubuchon and Mr. Preston confirmed that following this work injury, they had had conversations with Petitioner, who had advised of his continuing low back problems. Both witnesses continued to work alongside Petitioner leading up to his termination in May 2011, with Andrew Aubuchon leaving this employment shortly before Petitioner's termination. Both Andrew Aubuchon and Mr. Preston confirmed that they assisted Petitioner in lifting tires on and off the vehicles. Both witnesses also confirmed that they [*11] had to hide their assistance to Petitioner from their supervisor as well as the owner since they were advised of the company policy of "one man, one tire," which meant that co-workers were not allowed to help each other lift heavy items on and off the vehicles.

Medical records from MOM confirm that Petitioner was seen on December 28, 2010. At that time, Petitioner was noted to have pain that was 5/10 when taking medications but otherwise increased to 9.5/10 when the medication wore off. A nurse practitioner examined Petitioner and confirmed that Petitioner was having tenderness along the right flank area as well as limitations of range of motion. The nurse practitioner noted that right lateral flexion was significant for pain at 30 degrees and left lateral flexion was significant for pain at 45 degrees. Petitioner was provided a back support as well as medications. (PX 2).

Petitioner was seen for follow up on January 4, 2011, where he continued to note pain in the right low back to the right lumbar area. The nurse practitioner noted that Petitioner continued to have mild tenderness to palpation along the lumbar spine and paravertebral muscles of the lumbar area. By January 11, 2011, [*12] the nurse practitioner recorded that Petitioner advised her that his low back pain was gone and that he was not having any discomfort or problems. As a result, he was released from care without restrictions and without follow up instructions. (PX 2). Petitioner disputes the conclusions from MOM, and testified that he continued to advise the doctors that he was having ongoing symptoms in his low back as well as problems down his leg.

Petitioner noted that when he attempted to lift any heavy items, he would notice increased problems in his low back, as well as symptoms down his leg. He noted that although he was continuing to have these problems, he did not suffer any new accidents or new injuries leading up to his termination from Respondent in May 2011.

On May 5, 2011, Petitioner developed severe headaches to the point that he was seen in the emergency room. He followed up the next day concerning this problem with St. Louis University -- O'Fallon Family Medicine. Vision prob-

lems were also noted. (RX 4). Petitioner testified that the medical evaluations and treatment regarding the foregoing headache and vision problems were not related to his work accident in December 2010.

Petitioner [*13] testified that as a result of headaches, he was taken off work by his doctor. Petitioner testified, and the records confirm, that he was released back to work effective May 21, 2011. (See RX 4). Petitioner testified that he gave his off-work slips to Mr. Mokhtar. Petitioner testified his employment was then terminated. Petitioner testified that Mr. Mokhtar informed him that the reason for the termination was that Petitioner was "scrapping." n1 Petitioner further testified that he was advised from the Illinois Department of Employment Security that he was terminated because of 5 days of "no-show and no-call." Mr. Mokhtar confirmed that Petitioner was terminated on May 21, 2011.

Andrew Aubuchon and Mr. Preston also testified that following his termination, Petitioner continued to have ongoing low back problems. Both witnesses noted that they would often visit Petitioner at his home and that he was continuing to have problems with low back symptoms to the point that he was often found resting [*14] in bed for relief. Both witnesses confirmed that when they would see Petitioner, he would appear to be in pain and would advise them that he was continuing to have low back problems. Andrew Aubuchon noticed that Petitioner would walk with a limp.

Petitioner testified that after he was terminated, he sought legal advice regarding his workers' compensation case. He was referred to Dr. Stephen Woods for evaluation. Dr. Woods first evaluated Petitioner on July 8, 2011. (PX 3). Petitioner testified that he had received no treatment between MOM and Dr. Woods in spite of having ongoing low back problems, as he was fearful of being terminated. He noted that the work activities for Respondent continued to cause problems in his low back. Petitioner testified that by the time he saw Dr. Woods he was having problems sitting or standing for too long; lifting any significant weights; or moving too quickly. Petitioner noted whenever he would perform these types of activities, he would have increased symptoms in his low back that went down his right leg.

Dr. Woods' medical records confirm history of a work injury, but use a different date of accident. Dr. Woods reports in his records that on December [*15] 28, 2010, Petitioner was lifting a 17" tire when he developed immediate low back pain. (PX 3). Petitioner testified that Dr. Woods' history is accurate, but that the date of accident was off by one week, and that the actual date of accident was December 21, 2010. Date of accident is not in dispute.

Following examination, Dr. Woods diagnosed Petitioner with having a lumbar strain with a possible disc disruption. Dr. Woods recommended an MRI, which was completed at Imaging Center at Wolf Creek. (PX 3). The MRI revealed that Petitioner had protruding discs at L4-5 as well as a significant bulge at L5-S1. The MRI revealed that the disc material abutted the S1 nerve root. (PX 4). Following this MRI, Dr. Woods referred Petitioner to Dr. Matthew Gornet. Dr. Woods took Petitioner off work, effective July 8, 2011. Dr. Woods also reported that Petitioner's condition was causally related to the December 2010 work injury. (PX 3).

On August 18, 2011, Dr. Gornet examined Petitioner at the request of Dr. Woods. Dr. Gornet recorded that Petitioner was lifting a tire into the back of a dump truck whenever he felt slight pain. However, while lifting a smaller tire, he developed more severe symptoms [*16] to the point that he had to leave work early. Following evaluation, Dr. Gornet reported that he needed to review the MRI films to determine the next course of treatment. At that time, Dr. Gornet allowed Petitioner to try to return to work effective August 18, 2011. (PX 5).

On October 10, 2011, Dr. Gornet reviewed the MRI and confirmed the diagnosis of a central disc herniation and annular tear at L4-5 with a smaller protrusion with change in disc hydration at L5-S1. Dr. Gornet confirmed that he believed that these MRI findings accounted for Petitioner's symptoms. As a result, Dr. Gornet recommended a steroid injection into L4-5 as well as L5-S1. Dr. Gornet opined that Petitioner's condition was causally related to the December 2010 work injury. (PX 5). Dr. Gornet referred Petitioner to Dr. Kaylea Boutwell, who performed these epidural injections on October 17, 2011, and again on November 7, 2011. (PX 7). Petitioner noted that these epidural injections provided temporary relief with his low back.

Petitioner testified that prior to this work accident, he had no prior low back problems or medical treatment. Petitioner's statement is consistent with the medical records from Touchette [*17] Regional Hospital, MOM, Dr. Woods and Dr. Gornet. No medical evidence was submitted in contradiction.

Respondent sent Petitioner to Dr. David Lange on November 10, 2011 for an evaluation pursuant to Section 12 of the Illinois Workers' Compensation Act, *820 ILCS 305/1* et seq. (hereafter the "Act"). Dr. Lange suggested Petitioner had in some fashion developed lumbar complaints subsequent to his termination while pointing to no specific subsequent accident. Additionally, Dr. Lange noted that Petitioner had pre-existing congenital pedicle stenosis as well as minimal degenerative prominences at both L4-5 and L5-S1. Dr. Lange concluded that these findings are common in the general population, even in an 18 year old like Petitioner. Dr. Lange also suggested that the mechanism of injury was a

moving target since Petitioner advised him that he hurt his back lifting a bobcat tire over his head but that medical records suggested that he had also injured himself lifting a 17 inch alloy wheel. Dr. Lange noted that Petitioner advised him of both events. Dr. Lange reported that the medical records initially identified the problems as having occurred on December [*18] 22, 2010, whereas Dr. Gornet identified the accident date as December 28, 2010. (RX 1).

Dr. Lange prepared an addendum report on June 19, 2012. Dr. Lange diagnosed Petitioner as having mechanical low back pain. He noted that temporarily restricting the activities of Petitioner would have been reasonable. However, he felt that Petitioner had reached maximum medical improvement (MMI) long before and that further conservative treatment would not change the outcome. Additionally, he did not recommend any form of injection or surgery as he felt that this condition was best avoided for "discogenic" low back pain. (RX 1).

Petitioner testified that Dr. Lange spent approximately 2-3 minutes with him discussing this injury and performing the physical examination. Petitioner testified that he did not advise Dr. Lange of any subsequent low back injuries and does not know where the doctor would have came up with this medical conclusion. Petitioner further testified that he had advised Dr. Lange that he was still having symptoms in his low back going down his right side. He noted that these were the same problems that he had told to Dr. Woods and Dr. Gornet.

Petitioner continued to receive medical [*19] treatment with Dr. Gornet and Dr. Boutwell. By December 12, 2011, Petitioner was noted to have improved back pain but with continued leg pain. As a result, Dr. Gornet recommended a new MRI that was completed at MRI Partners of Chesterfield. (PX 5). The MRI confirmed a herniation at L4-5 as well as a confirmed internal annular tear with broad based central herniation at L5-S1. (PX 6).

Following this MRI, Dr. Gornet examined Petitioner on April 23, 2012. At that time, Dr. Gornet reported that Petitioner was being denied further treatment by Respondent, and that they were therefore at a "standstill." Dr. Gornet reported: "We will wait for more formal treatment options including potential for injections, discography or even potential surgical treatment, depending on the results of our conservative care." Additionally, he placed Petitioner on restricted duty pending approval for this medical care. Petitioner testified that since the last visit with Dr. Gornet, his medical treatment has been at a standstill since the insurance company will not authorize any further diagnostic testing. Further, the doctor's office will not move forward with any further treatment until authority is granted. [*20]

Petitioner testified that since being terminated by Respondent in May 2011, he has not found employment with any other position. Petitioner testified that he has not looked for work since he does not feel that he can do any lifting activities without having significant increase in his low back problems.

Petitioner admitted that leading up to his termination with Respondent, he had performed "scrapping" activities, wherein he would scrap vehicles and small metal for cash. However, Petitioner testified that when performing such "scrapping" activities, it was done with the assistance of Andrew Aubuchon, Nathan Preston, and Andrew Todd. Petitioner testified that he performed none of the lifting activities, but simply drove the scrap to the scrap yard. Petitioner testified that he performed no physical lifting and sustained no new injury. Petitioner noted that his "scrapping" activities were just a hobby for extra cash and that the activity only included "scrapping" two cars, as well as items that they found on the side on the road. Petitioner noted that the proceeds from this "scrapping" were shared between he and the other three members of the group.

Andrew Aubuchon and Mr. Preston confirmed [*21] Petitioner's testimony with regard to the "scrapping" activities. Both Andrew Aubuchon and Mr. Preston confirmed that they assisted Petitioner with "scrapping" activities that included vehicles as well as metal items that they would find on the side of the road. Both witnesses noted that Petitioner engaged in absolutely no lifting and that all physical activities such as lifting were performed by themselves. Petitioner's activity in this hobby was limited to driving the scrap to the scrap yard. Petitioner testified that the foregoing "scrapping" group made a total of around $ 2,000, which was split between them.

Petitioner testified that when he was taken off of work by Dr. Woods from July 8, 2011 until August 18, 2011, he was not paid lost time benefits from the workers' compensation carrier. Additionally, after being placed on restricted duty by Dr. Gornet on April 24, 2012, Respondent did not offer to take him back within the restrictions. Petitioner has not been paid any lost time benefits from the workers' compensation carrier, with the exception of a payment of $ 237.93. Petitioner testified that as a result of the lack of income and lack of job, he has had to move back in with [*22] his mother.

Petitioner testified at trial that he continues to have low back pain that is approximately 5/10, but can get as high as 8/10. He testified that the symptoms have continued since this work injury and continue to remain in his low back, occasionally going down his right leg. He noted that the symptoms will increase if he is sitting in a car too long, sitting on

the couch too long, moving the wrong way, or trying to walk long distances. Petitioner testified that he continues to have the problems down his right leg, and that his right leg still wants to give out approximately two times per week. He testified that he has fallen four or five times because of this, but has not sustained any new injuries. Petitioner testified that he has problems going up and down steps or uneven surfaces because his leg wants to give out on him. Petitioner noted that the medications that he was taking were not strong enough to assist him.

Mr. Mokhtar testified that he was aware of Petitioner's work injury and noted that he continued to pay Petitioner when he returned to work light duty. Mr. Mokhtar testified that when Petitioner returned to work full duty, he sent him back to his old job and [*23] was not aware that he was continuing to have any problems. Mr. Mokhtar testified that if Petitioner had had ongoing problems, he would have given him light duty and sent him back to the doctor.

Mr. Mokhtar testified that if Petitioner was having problems, co-workers would not have been allowed to assist him. He noted that all workers were expected to perform the lifting activities on their own and that he would have reprimanded co-workers who would try to help him. Mr. Mokhtar testified that he was not aware that Petitioner was continuing to wear a back brace.

Mr. Mokhtar testified that he was not aware of Petitioner's specific "scrapping" activities. However, after he had terminated Petitioner, Petitioner had returned to the shop with a chopped-up car on a flatbed in order to have Respondent remove the tires.

Raymond Benoit testified on behalf of Respondent. Benoit was the working manager who had been employed by Respondent for the last 14 years. Additionally, he lived next door to Respondent's shop in a house that is owned by Mr. Mokhtar. Mr. Benoit testified that he was not present on the date of the accident and does not know any of the specifics of the work injury. However, when [*24] Petitioner returned to work on light duty, Mr. Benoit testified that Petitioner performed the light duty job of repairing valve stems. However, once Petitioner was released full duty, Mr. Benoit said Petitioner returned to his previous activities of installing tires. Mr. Benoit testified that he was not aware of the fact that Petitioner was wearing a back brace.

Mr. Benoit prepared a witness statement for the unemployment office marked as Respondent's Exhibit 6 at the behest of Mr. Mokhtar. Mr. Benoit testified that the witness statement was in his own handwriting.

Mr. Benoit testified that in his witness statement, Petitioner had declared to co-workers at some time on or about April 28, 2011, that he had lied to his employer about sick time off so that he could perform mechanical and auto scrapping jobs on the side. Mr. Benoit testified that these purported statements were not made directly to him personally, but that he overheard them. Mr. Benoit testified that he had never seen Petitioner performing any mechanical or auto scrapping jobs and was simply basing this statement on what Petitioner had stated on that one date.

Similarly, Mr. Benoit indicated in his witness statement that [*25] Petitioner had stated that it was easy to get medical time off because he had a medical card. However, Mr. Benoit noted that prior to this work injury, he was not aware of Petitioner taking any other time off of work.

Mr. Benoit also testified that on or about April 28, 2011, Petitioner had declared that he could make more money in one day sick absence than he could earn with Respondent in a two week period. Mr. Benoit admitted that when an employee misses time from work, he is not paid for those wages as there is no sick time program. Additionally, he is not aware of the amount that Petitioner may or did make "scrapping."

Finally, Mr. Benoit testified that Petitioner stated he did not care if he was fired for excessive absenteeism because he could collect unemployment compensation and scrap cars at the same time. Mr. Benoit admitted that when he was advised of such a statement against the employer, he did not tell the employer or in any way reprimand the employee for such a statement.

Petitioner testified that he did not make any such statements. Petitioner stated that he knew that Mr. Benoit was the supervisor, and believed that Mr. Benoit was a personal friend of the owner. As [*26] a result, Petitioner testified he would not have declared that he wanted to get fired from his job so that he could go "scrapping." Further, Petitioner testified that he did not miss any time from work in order to go "scrapping," as such activities could be done after hours. Petitioner noted that if he did not work, he would not have been paid by Respondent, and therefore he would actually have lost money. Further, Petitioner testified that besides the time periods that he was taken off of work by MOM for the work injuries, he had not missed any other time from work. Moreover, Petitioner testified that he had never asked any doctor to take him off of work.

Petitioner testified that in spite of the fact that he had an annular tear as well as a herniated disc in his low back, he continued to work his full shifts. He did not complain to the owner about his back, but continued to use full effort to try to complete his work activities. Petitioner testified that he had never told Mr. Benoit that he did not care if he got fired. To the contrary, he had continued to perform all of his work activities in spite of the physical injury and ongoing problems in his back. Petitioner testified that [*27] if he was terminated, he could not have survived exclusively on the income provided by "scrapping."

Andrew Aubuchon confirmed Petitioner's testimony in this regard. Andrew Aubuchon testified that Petitioner did not have any mechanical jobs "on the side," and only performed "scrapping" activities when with he, Nathan Preston and Andrew Todd. Andrew Aubuchon testified that he was not aware of Petitioner ever missing any time from work from Respondent in order to complete any jobs "scrapping" since he would have had to have been with him at the time of this activity. Andrew Aubuchon confirmed that he himself had never taken off of work for "scrapping" activities either.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's current condition of ill-being remains causally related to the work injury of December 21, 2010. Petitioner testified that since this work injury, he has continued to have low back problems, as well as symptoms down his right leg that has been diagnosed as being a herniated disc and an annular tear. Petitioner's testimony is bolstered by the testimony of two co-workers [*28] who risked their own job in order to assist Petitioner in completing the lifting associated with work activities. Respondent brought forth no evidence to support a pre-existing or subsequent intervening event that would break the medical causal chain.

Petitioner has demonstrated that his condition of ill-being is causally connected to the work injury of December 21, 2010. On that date, Petitioner sustained two injuries while trying to lift a tire and a rim. The medical records immediately following this work injury clearly support that nature of the work accident and resulting medical condition.

Following this work injury, Petitioner received treatment with two facilities chosen by Respondent. Although MOM provided Petitioner with a back brace and noted symptoms that went as high as 9.5/10, this facility offered little in the way of actual medical treatment other than to provide medications. MOM offered no MRI, nor did it offer any form of physical therapy.

Following his release to full duty by MOM, Petitioner testified that he continued to have a number of problems with his low back that hindered his ability to complete his work activities. Petitioner's testimony is supported by [*29] witnesses Andrew Aubuchon and Nathan Preston. Both witnesses confirmed that Petitioner continued to have low back problems, as well as symptoms down his leg which limited his effectiveness at work. Both Andrew Aubuchon and Mr. Preston testified they assisted Petitioner in lifting tires on and off of vehicles. Petitioner testified that he did not tell his employer of these ongoing problems due to a fear of being terminated.

However, once Petitioner was terminated, he sought legal counsel as well as further medical treatment surrounding this work injury. Although Respondent terminated Petitioner for five days of "no-show/no-call," owner Mr. Mokhtar offered no explanation as to how Petitioner could have been terminated for five days of "no-show/no-call" when he was not released until one day before the termination.

Medical records from Dr. Woods and Dr. Gornet confirm the same history of work accident. Neither doctor records any form of subsequent intervening event or pre-existing medical conditions. Both Dr. Woods and Dr. Gornet causally relate the need for medical treatment to the work injury. MRIs completed by both Dr. Woods and Dr. Gornet confirm that Petitioner had two levels of [*30] abnormalities at L4-5, as well as L5-S1, leading to Dr. Gornet's recommendation for further medical treatment.

Respondent's examining physician, Dr. Lange, discusses potential pre-existing or subsequent medical conditions. However, he does not cite to any pre-existing conditions, but simply states that Petitioner's 18 year old back would be expected to have this level of injury by way of a degenerative process. Moreover, Dr. Lange suggests that Petitioner must have re-injured himself in some manner but does not cite to a specific accident, event, or medical record to support such a conclusion. As a result, Dr. Lange's medical opinions are given less weight than those of Dr. Gornet, as Dr. Lange attempts to include medical conditions that are not supported by Petitioner's history or by any medical reports.

At the time of trial, Petitioner testified that he continues to have the same low back problem that began following this work injury. Petitioner testified that he has not had any remittance of these symptoms and that they become especially problematic when he attempts to use his back in any type of lifting, bending, or extended sitting activities. Petitioner's medical complaints are [*31] supported by the medical records. MOM's premature release of Petitioner does not refute these allegations as Petitioner had not had an opportunity to use his back in a full duty environment until well after he had been released by MOM. As a result, Petitioner's testimony is consistent that his attempted work activities with Respondent served to further aggravate and make symptomatic the problems in his low back. These mechanical low back symptoms stemming from lifting or positional activities are consistent with the diagnosed condition of a herniated disc and annular tear.

Based upon the foregoing, Petitioner's current medical condition remains causally related to the work accident of December 21, 2010. Petitioner's testimony is supported not only by the medical evidence but also by co-workers who testified to Petitioner's ongoing low back complaints and limitations.

Issue (G): What were Petitioner's earnings?

Payroll records for Petitioner from January 6, 2010 to December 22, 2010 (26 pay periods representing 52 weeks of compensation) were entered into evidence as Respondent's Exhibit 7. Petitioner is claiming his annual earnings in the year preceding the accident were $ [*32] 16,706.84, and that his average weekly wage was $ 309.17; Respondent disputes and claims Petitioner's average weekly wage is $ 259.89. (Arbitrator's Exhibit 1). At issue is whether the Arbitrator should consider additional income in the form of tips as further remuneration to be factored into the average weekly wage.

The methods for calculation of wages is found in Section 10 of the Act. Case law interpretation has noted that the average weekly wage must include all earnings with the exception of overtime and bonuses. *General Tire and Rubber Co. v. Industrial Comm'n, 221 Ill. App. 3d 641, 582 N.E.2d 744 (5th Dist. 1991).* As a result, tips have been noted to be included as wages under Section 10 of the Act. *See Carter v. Intelistaff Healthcare, Inc., 06 IWCC 435 (2006); Crumpton v. Harmony's Corner, Inc., 11 IWCC 156 (2011).*

At trial, Petitioner testified that in addition to his payroll wages, he received cash tips between $ 50.00 to $ 100.00 per week. Petitioner's testimony is confirmed by co-worker Andrew Aubuchon, who testified that he would make anywhere between $ 50.00 to [*33] $ 150.00 per week in tips. Further, co-worker Nathan Preston testified that he would make between $ 15.00 to $ 30.00 per day in tips, thereby leading to tips of $ 75.00 to $ 150.00 per week. Respondent's witnesses, shop manager Raymond Benoit and owner Mohammed Mokhtar, both testified that they were aware that their employees were receiving tips. However, since many of the tips came directly from the customers, neither witness could specifically identify the amount that employees received per week. Further, both Mr. Benoit and Mr. Mokhtar testified that customers would at times give them the tips, and they would in turn give those tips to the employees. Mr. Mokhtar testified that there was no policy against receiving tips, and that the employees did not need to report receiving tips to him.

As a result, Petitioner has satisfied his burden of proving that his average weekly wage should include at minimum $ 50.00 per week of additional income in tips. According to Petitioner's wage statement (RX 7), his average weekly wage based strictly on this form equates to $ 254.89 ($ 13,254.41 in earnings divided by 52 weeks). Adding $ 50.00 per week to this amount results in an average weekly [*34] wage of $ 304.89. As a result, benefits should be paid utilizing the average weekly wage of $ 304.89.

Issue (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?

There are outstanding medical bills listed in Petitioner's Exhibit 8 for which Petitioner seeks payment. These medical care providers include Dr. Stephen Woods; Imaging Center at Wolf Creek; Dr. Matthew Gornet; St. Louis Spine and Orthopedic Surgery Center; Dr. Kaylea Boutwell; MRI Partners of Chesterfield; and Wal-Mart Pharmacy. Petitioner testified that this medical treatment stemmed exclusively from the low back injury which occurred on December 21, 2010.

Review of the medical records supports Petitioner's position in this regard. Medical records from Dr. Stephen Woods confirm that medical care with his office stemmed from the work injury of December 21, 2010. Further testing from Dr. Woods included a referral for an MRI as well as transferring treatment to Dr. Matthew Gornet for further orthopedic care. In addition, medical records from Dr. Gornet confirm that the doctor feels that [*35] Petitioner's current

condition remains causally related to the work injury. Dr. Gornet sought further treatment in the form of injections with Dr. Boutwell, as well as an additional MRI. The medical records from these facilities indicate that the need for medical treatment is related exclusively to the work injury that Petitioner sustained while lifting a tire for Respondent.

Based upon the foregoing, Respondent is ordered to pay the outstanding medical bills set forth in Petitioner's Exhibit 8 and pursuant to the medical fee schedule, Section 8.2 of the Act. Those medical bills total $ 28,546.30.

Issue (K): Is Petitioner entitled to any prospective medical care?

Regarding prospective medical care proposed by Dr. Gornet, the Arbitrator notes that less invasive methods of treatment were tried without success. Petitioner has continued to suffer from the effects of a herniated disc and annular tear in his low back. Petitioner attempted to return to work but had significant increases in his low back symptoms as well as an inability to lift any significant weights. Dr. Gornet is currently prescribing possible further injections and discography to determine whether Petitioner's [*36] condition is surgical. Respondent is hereby ordered to authorize further testing and treatment with Dr. Gornet consistent with his recommendations.

Issue (L): What temporary benefits are in dispute? (TTD)

Petitioner seeks temporary total disability (TTD) benefits from July 8, 2011 to August 18, 2011, and from April 24, 2012 leading up to the date of trial, October 4, 2012. During this time, Petitioner was taken off work by Dr. Woods or placed on light duty by Dr. Gornet. It is undisputed that Petitioner was terminated. As has been noted by the Illinois Supreme Court, TTD benefits may not be denied to an injured worker who has been terminated in cases like the one at bar. An employer's obligation to pay TTD benefits does not necessarily cease at the time of firing. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d. 132, 923 N.E.2d 266 (2010).* Under *Interstate Scaffolding*, Petitioner would be entitled to TTD benefits as long as the condition had not yet stabilized; Petitioner's condition has indeed not yet stabilized.

In the present case, Dr. Woods placed Petitioner off of work in order to complete further [*37] medical treatment and testing. Additionally, Dr. Gornet attempted to allow Petitioner to return to work full duty. However, due to ongoing problems and complaints, the doctor placed temporary work restrictions on Petitioner pending further testing. To date, this testing has not been approved and therefore the light duty status remains in effect as of April 24, 2012. As a result, Respondent is hereby ordered to pay TTD benefits for the period of July 8, 2011 to August 18, 2011, and again from April 24, 2012 to the date of trial, October 4, 2012, as the medical condition has not yet stabilized and Petitioner remains on a light duty status which Respondent is unable to accommodate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

n1 Petitioner and the two witnesses called by Petitioner testified that the process of "scrapping" involved finding abandoned metallic items, such as vehicles, washing machines, copper wire, etc., and transporting these items for recycling, whereupon cash payment for the scrap items was received.

2 of 100 DOCUMENTS

JESSICA MARION, PETITIONER, v. SELECT STAFFING, RESPONDENT.

NO. 10WC 00720

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

13 IWCC 925; 2013 Ill. Wrk. Comp. LEXIS 1017

November 1, 2013

JUDGES: Ruth W. White; Charles J. DeVriendt; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

Initially, the Commission notes that the Decision of the Arbitrator cites the date of accident as December 12, 2009. The record indicates that the actual date of accident is December 17, 2009. Therefore, the Commission hereby corrects that clerical error.

The Commission agrees with [*2] the Decision of the Arbitrator regarding his finding accident, finding causal connection, awarding current medical expenses, ordering Respondent to authorize and pay for prospective medical treatment, and denying the imposition of penalties and fees. Accordingly, the Commission affirms and adopts those portions of the Decision of the Arbitrator.

The Arbitrator awarded Petitioner 143 6/7 weeks of temporary total disability benefits, from the date of the accident, December 17, 2009, through the date of arbitration, September 19, 2012. Respondent offered Petitioner light-duty work after she was examined by Dr. Lewis, its Section 12 medical examiner. Petitioner did not respond to that offer because she was still on off work status from her doctor, Dr. Dworsky. Petitioner testified Respondent terminated Petitioner's employment on or about April 12, 2010. Dr. Dworsky referred Petitioner to Dr. Kirincic who released Petitioner to light duty on February 3, 2012. Petitioner never contacted Respondent after she was released to restricted work to inquire whether it would re-employ her within her restrictions. At Arbitration Petitioner testified that she was currently working part time. Therefore, [*3] the Commission modifies the Decision of the Arbitrator by terminating temporary total disability benefits as of February 3, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 14, 2013 is hereby modified as specified above and otherwise is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 277.33 per week for a period of 111 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 37,894.76 for medical expenses under § 8(a) of the Act, subject to the applicable medical fee schedule under § 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is ordered to authorize and pay for prospective medical treatment recommended by Dr. Dworsky.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 70,000.00. The party commencing the proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Jessica Marion
Employee/Petitioner

v.

Select Remedy
Employer/Respondent

Case # **10** WC **00720**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* [*5] was mailed to each party. The matter was heard by the Honorable **Gregory Dollison,** Arbitrator of the Commission, in the city of **New Lenox, Illinois,** on **September 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
C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] 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. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident, **12/12/09**, 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*** [*6] 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 $ **16,610.88;** the average weekly wage was $ **277.33.**

On the date of accident, Petitioner was **24** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $ **4,991.92** for TTD and/or maintenance benefits.

Respondent is entitled to a credit of $ **9,448.88** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner Temporary Total Disability benefits of $ 277.33 /week for 143-6/7 weeks, from December 18, 2009 through September 19, 2012, which is the period of Temporary Total Disability for which compensation is payable.

Respondent shall pay the further sum of $ 37,894.76 for necessary medical services, as provided in Section 8(a) of the Act. The medical bills incurred are to be paid pursuant to the [*7] medical fee schedule contained in the Illinois Workers Compensation Act. This may cause the total amount awarded to decrease to comply with the provisions of said schedule.

Respondent shall further authorize the prospective medical services as prescribed by Dr. Dworsky, as provided in Section 8(a) of the Act.

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

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

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

1/13/13

Date

FINDINGS OF FACT:

On December 17, 2009, Petitioner worked as a line lead/ supervisor [*8] for RR Donnelly through Select Staffing. Petitioner was working at her machine at the end of her shift. Petitioner testified that another employee approached the narrow area where she was standing. Petitioner indicated that she attempted to move out of the way of the employee and struck her left knee against a corner of the hydraulic ramp. She then stepped backwards and started to fall down the three stairs. However, she was able to grab the railing, catch herself and regain her balance.

Petitioner's supervisor, Tim Totos, was standing in the area and saw the incident. Petitioner prepared an "Injured Employee's Statement." Petitioner provided, "went to move out of way of people. Hit corner of pump on left knee and then fell down." In the portion of the statement asking, "How did the accident occur," Petitioner wrote, "trying to get out

of the way with other.' She described her injury as, 'left knee stabbing sharp pain from the outside to inside center." (PX A) In addition, Mr. Totos filled out a Witness Report where he confirmed that Petitioner was "trying to move out of way she banged her knee off of the comer of the lift stepped backward down the stairs." (PX B)

Petitioner testified [*9] that she felt immediate pain in her left knee after striking the hydraulic ramp. She had never experienced similar symptoms to her left knee prior to this. Petitioner went to Physicians Immediate Care that day and related a history of striking her left knee against a hydraulic ramp on one of its corners that morning at work. She rated her left knee pain as 7/10 which was constant and sharp in quality. X-rays were taken which were within normal limits. Petitioner was assessed with left knee contusion. She was provided with crutches, a knee support instructed to begin Biofreeze, prescribed medication and returned to sit-down work. (PX D)

Later that day, Petitioner presented to Provena St. Joseph Medical Center with continued complaints of pain in her left knee. Records show Petitioner provided a history of "...hit[ting] knee on something at work. There is no known previous injury to the affected area." X-rays taken showed no evidence of fracture or dislocation. Petitioner was diagnosed with knee contusion, was released with an immobilizer and instructed to follow-up with her orthopedic doctor. (PX F)

On December 21, 2009, Petitioner returned to Provena St. Joseph Medical Center, with [*10] complaints of acute throbbing and pain to her left knee. This was aggravated by standing up and changing positions. She was provided pain medications and advised to refrain from work for the following two days. (PX F)

On December 22, 2009, Petitioner went to William Baylis, M.D. at Parkview Musculoskeletal Institute. Petitioner provided a history that she was "at work trying to get out of the way of 300lb. person, hit corner of hydrolic ramp and felt burning stabbing and then fell but caught self down the stairs and felt and heard a tearing noise." Dr. Baylis diagnosed Petitioner with a knee sprain, ordered an MRI to rule out an internal derangement and took her off work. (PX H) The MRI when taken on December 29, 2009 demonstrated no evidence of meniscal tear or ligament tear. Also noted was focal deep chondral fissuring or partial possibly full thickness chondral defect or even chondral flap, posterior apect of the medial femoral condyle without significant underlying osseous edema (PX I)

Petitioner returned to Dr. Baylis on January 5, 2010. The doctor noted that the MRI showed no sign of internal derangement. He questioned as to whether there was a little cartilage bruise to the [*11] medial femoral condyle. Dr. Baylis recommended an intraarticular steroid injection, physical therapy and continued off work. (PX H)

Petitioner continued to treat with Dr. Baylis through February 19, 2010. During that time, she received two steroid injections into her knee. She was also given a prescription for pain medication, a knee sleeve and advised to start physical therapy. Lastly, Dr. Baylis advised Petitioner to remain off work. (PX H)

Petitioner began physical therapy at ATI Physical Therapy on January 18, 2010. On March 10, 2010, it was noted that she made improvements leading to increased range of motion and strength which allowed her to lift her infant child and increase her walking tolerance to one hour. (PX J)

On March 4, 2010, Petitioner went to Bradley Dworsky M.D. at Hinsdale Orthopedic for a second opinion. She provided a history of her injury on December 17, 2009, when she struck a hydraulic ramp while getting out of the way of a 300 pound person. Petitioner also discussed her prior medical history which involved two surgeries to her left knee in 1996 and 1997 for an OCD lesion that was drilled. Petitioner told the doctor that subsequent to that she had no problems [*12] at all with her left knee. During that office visit to Dr. Dworsky, Petitioner complained of increasing pain and swelling to her left knee, with difficulty in bending or squatting. In addition, her knee would occasionally lock and make cracking noises. Dr. Dworsky ordered a second MRI noting Petitioner's symptoms were very consistent with meniscal pathology. (PX K)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Michael Lewis on March 23, 2010. Dr. Lewis obtained a history, reviewed Petitioner's treating records through February 19, 2010 and performed an examination. In his report dated March 30, 2010, he opined that Petitioner had no objective evidence of orthopedic pathology to her left knee; did not need further medical treatment; and that she could return to work full duty over the next six weeks. He further concluded that the chondral defect noted on the MRI was not an acute injury since there was no underlying osseous edema. He believed that the defect was related to her old Osgood-Schlatter disease. (RX 7)

On April 12, 2010, Respondent authored a letter advising Petitioner that modified duty work was available. (RX 2)

Petitioner returned to Dr. [*13] Dworsky on April 12, 2010. Dr. Dworsky discussed the findings of the MRI with Petitioner which indicated a significant chondromalacia in the medial femoral condyle. Dr. Dworsky felt that the focal

chondral change within the medial femoral condyle was the source of Petitioner's continued pain. Since she failed conservative management, Dr. Dworsky recommended a diagnostic arthroscopy and possible osteochondral autograft transplant versus an autologous chondrocyte transplant, depending on the size and degree of the lesion. In addition, Petitioner was advised to remain off of work. (PX K)

On May 11 2010, Petitioner underwent surgery at Provena St. Joseph Medical Center, where it was noted that Petitioner had a large, 2.2 to 2.4 cm x 1.2 to 1.4 cm full thickness damage to the medial femoral condyle. In addition, there was significant fragmentation, fissuring and a chondral lesion in that region. As a result, Dr. Dworsky felt this was subsequently too large for an OATS type procedure and that an autologous chondrocyte transplant was necessary. Therefore, Petitioner had a chondral cartilage biopsy. (PX K)

On May 17 2010, Petitioner returned to Dr. Dworsky. The doctor noted the post cartilage [*14] biopsy of the very large full-thickness chondral damage to the medial femoral condyle. The doctor provided that there was evidence of acute on chronic changes with fracturing and fragmentation of the region that could be consistent with her recent onset of problems. Petitioner was advised to be unprotected weight-bearing until the second procedure, the autologous chondrocyte transplant, was to be performed. In addition, Dr. Dworsky told her to refrain from any type of work until after the second surgical procedure. (PX K)

On June 17, 2010, Dr. Dworsky authored a report detailing Petitioner treatement. Dr. Dworky wrote, "...given the two year history of asymptomatic use of the knee with higher level activities and no complaints, I do feel that the injury on December 17, 2009, lead to the onset of pain, clicking, difficulty with bending and squatting and swelling...I do feel that the injury did exacerbate the know preexisting condition of osteochondritis dissecans...and that the injury in December of 2009 worsened the current situation such that she had an irreversible change in her knee..." (PX K)

On November 8, 2010, Dr. Dworsky modified Petitioner's work restrictions. He recommended [*15] that she not be on her feet for long periods of time, not bend for excessive amounts and not climb, lift, or carry. These light-duty restrictions continued until December 6, 2010. At that time, Dr. Dworsky noted that Petitioner's knee would not resolve without surgical intervention. He explained that the longer they waited, the worse her condition would be and become detrimental to her long-term outcome. The doctor decided to keep Petitioner off work until the second surgery indicating that any increased stress may worsen the situation. (PX K)

On March 14, 2011, Petitioner presented to David Guelich, M.D. for a second opinion on surgery. After examining Petitioner, he felt that based on her young age, stable findings in terms of the ligament injury, as well as normal alignment of the isolated cartilage injury as described in the operative report, was consistent with the type of lesion that should be managed with the autologous chondrocyte implantation. He opined that the retrograde drilling of the medial femoral condyle which was done in her adolescence does not necessarily correlate to this type of problem later on. The doctor noted that the x-rays as well as MRI show no evidence [*16] of a large osteoid defect consistent with an unhealed osteochondral injury. The doctor also noted the MRI showed what appeared to be mostly delaminating articular cartilage injury. He felt that both of these supported his opinion that an acute recent injury was associated with the trauma from December 17, 2009. (PX O)

Over the next several months, Petitioner continued to treat with Dr. Dworsky. He monitored her condition and prescribed pain medications while waiting for Respondent to approve the cartilage transplantation surgery. Dr. Dworsky also referred Petitioner to Marie Kirincic, M.D. for pain management. (PX K)

On June 24, 2011, Petitioner was first seen by Dr. Kirincic, who prescribed narcotic pain medications and kept Petitioner off work. Petitioner continued to treat with Dr. Kirincic through 2012. On January 6, 2012, Dr. Kirincic issued a return to work with a ten pound restriction and sitting and walking with brace, bending, squatting kneeling. Records show that the doctor's restricted duty prescription continued through August 8, 2012, when Dr. Kirincic provided Petitioner was unable to return to work. (PX K)

Petitioner testified that after her surgery in 1996 and 1997, [*17] she had no subsequent problems or treatment of any kind to her left knee. Petitioner stated that she provided Respondent with off work slips prescribed by Dr. Dworsky. She indicated that when Respondent offered modified duty in April 2010, Dr. Dworsky had not released her to return to work in any capacity. Petitioner testified that she was subsequently terminated in July 2010. Lastly, Petitioner testified that her knee is still sore.

Tim Totos, Petitioner's supervisor testified on behalf of Respondent in this matter. Mr. Totos testified that he observed the occurrence on December 17, 2009. Mr. Totos stated that he saw Petitioner "step backwards to move out of

the way; saw her slip."Mr. Totos indicated Petitioner did not fall but she stepped back one step down and caught herself. Mr. Totos provided that he did not see the entire occurrence as he was behind Petitioner.

Dr. Guelich testified via deposition in this matter. Dr. Guelich disagreed with all of the findings of Dr. Lewis. During his examination, Dr. Guelich found that Petitioner had tenderness in her left knee in a very specific area. She had examination findings that were consistent with the type of problem she was complaining [*18] of. He disagreed with Dr. Lewis' assessment of no orthopedic pathology. (PX P. p. 24).

Dr. Guelich testified that he also disagreed with Dr. Lewis' conclusion that since there was no underlying osseous edema on the MRI, that there was no acute injury. Dr. Guelich testified that he has treated many patients that have no osseous edema and yet suffer an acute injury. (PX P. p. 24-25). Lastly, Dr. Guelich disagreed with Dr. Lewis' conclusion that Petitioner's symptoms were related to her Osgood-Schlatter disease. Dr. Guelich pointed out that Petitioner never had Osgood-Schlatter disease. Dr. Guelich distinguished between Petitioner's childhood disease and her current condition. He testified that Petitioner had an OCD or osteochondritis dissecans when she was a child. This involves the bone below the growth plate and above the cartilage failing and forming a "sinkhole". Dr. Guelich testified that if Petitioner was still having a problem from her prior surgery, the surgeon would have seen some problems within the bone "almost like the bone has got chunks of apple out of it..." The doctor noted that since the operative report confirmed that there was only a problem with the cartilage and [*19] not the bone, Petitioner's current problems were not associated with her prior OCD lesion. He testified that cartilage injuries are rarely, if ever, in his experience associated with the prior OCD lesion. (PX P. p. 27-28).

Dr. Guelich excluded Petitioner's prior OCD lesion as being a source of her current problems by his own x-rays. He testified that if there was a current problem, he would see early arthritis, cavitation, or some type of irregularity to the contour of the bone. Since there was no bony changes on the x-rays, this also confirmed that her prior OCD with not a current cause of her problems. (PX P. p. 28, 53, 76). Under cross-examination, Dr. Guelich further clarified this opinion when he stated that if the prior OCD lesion was the reason for the cartilage injury, the x-rays or MRIs would also show bony changes. An injury to the cartilage alone would not be related to the prior OCD lesion. (PX P. p. 74-75).

Dr. Guelich clarified the terminology for Petitioner's current injury versus her childhood condition. He provided that while both are sometimes referred to as an OCD, they are meant as something different. The osteochondral defect refers to a cartilage injury whereas [*20] the osteochondritis dissecans refers to a bony injury. Petitioner's childhood surgery involved an osteochondritis dissecans to the bone. However, her current injury involves an osteochondral defect to her cartilage. (PX P. p. 77).

The Arbitrator has viewed video surveillance submitted by Respondent. Petitioner is observed over a five (5) day period in the months of November and December 2010. She is seen walking briskly, getting in and out of an automobile and carrying a young child. (RX 9)

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner credible and unrebutted testimony demonstrates that she was leaving work when another employee approached the narrow area where she was standing. Petitioner attempted to move out of the way of a co- employee and struck her left knee against a corner of the hydraulic ramp. She then stepped backwards, started to fall, grabbed a railing and regained her balance. This occurrence was also witnessed by her supervisor, Tim Totos, whose testimony was in consort with Petitioner's version. Both accounts [*21] were documented in an "Injured Employee's Statement," completed by Petitioner and a "Witness Report" completed by Mr. Totos.

Based on the above, the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course of her employment with Respondent on December 17, 2009.

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

Petitioner had surgery to her left knee in 1996 and 1997. She credibly testified that she had no subsequent problems or treatment of any kind to her left knee.

On December 17, 2009, Petitioner sustained a blunt trauma to her left knee after striking the knee against a corner of the hydraulic ramp. On the date of accident Petitioner went to Physicians Immediate Care where she was assessed with left knee contusion. Later that day, Petitioner presented to Provena St. Joseph Medical Center with continued complaints of pain in her left knee. She was again diagnosed with a knee contusion, and instructed to follow-up with her orthopedic doctor.

On December 22, 2009, Petitioner presented to William Baylis, [*22] M.D. at Parkview Musculoskeletal Institute. Petitioner provided a history that she was "at work trying to get out of the way of 300lb. person, hit corner of hydrolic ramp and felt burning stabbing and then fell but caught self down the stairs and felt and heard a tearing noise." Dr. Baylis diagnosed Petitioner with a knee sprain, ordered an MRI to rule out an internal derangement. The MRI when taken on December 29, 2009 noted focal deep chondral fissuring or partial possibly full thickness chondral defect or even chondral flap, posterior aspect of the medial femoral condyle without significant underlying osseous edema.

Petitioner returned to Dr. Baylis on January 5, 2010. The doctor questioned as to whether there was a little cartilage bruise to the medial femoral condyle. Dr. Baylis recommended an intraarticular steroid injection, and physical therapy. Dr. Baylis administered two steroid injections into her knee, both without benefit.

On March 4, 2010, Petitioner saw Bradley Dworsky M.D. at Hinsdale Orthopedic for a second opinion. She provided a history of her injury on December 17, 2009. Petitioner also discussed her prior medical history which involved two surgeries to her left [*23] knee in 1996 and 1997 for an OCD lesion that was drilled. Petitioner told the doctor that subsequent to that she had no problems at all with her left knee. Dr. Dworsky ordered a second MRI noting Petitioner's symptoms were very consistent with meniscal pathology.

When Petitioner obtained the diagnostic image, Dr. Dworsky discussed the findings of the MRI with Petitioner which indicated a significant chondromalacia in the medial femoral condyle. Dr. Dworsky felt that the focal chondral change within the medial femoral condyle was the source of Petitioner's continued pain. Dr. Dworsky recommended a diagnostic arthroscopy and possible osteochondral autograft transplant versus an autologous chondrocyte transplant, depending on the size and degree of the lesion.

On May 11 2010, Petitioner underwent surgery at Provena St. Joseph Medical Center, where it was noted that Petitioner had a large, 2.2 to 2.4 cm x 1.2 to 1.4 cm full thickness damage to the medial femoral condyle. In addition, there was significant fragmentation, fissuring and a chondral lesion in that region. As a result, Dr. Dworsky felt this was subsequently too large for an OATS type procedure and that an autologous chondrocyte [*24] transplant was necessary. Therefore, Petitioner had a chondral cartilage biopsy.

Post surgery, Dr. Dworsky provided that there was evidence of acute on chronic changes with fracturing and fragmentation of the region that could be consistent with her recent onset of problems. On June 17, 2010, Dr. Dworsky authored a report detailing Petitioner treatment. Dr. Dworky wrote, "...given the two year history of asymptomatic use of the knee with higher level activities and no complaints, I do feel that the injury on December 17, 2009, lead to the onset of pain, clicking, difficulty with bending and squatting and swelling...I do feel that the injury did exacerbate the known preexisting condition of osteochondritis dissecans...and that the injury in December of 2009 worsened the current situation such that she had an irreversible change in her knee..."

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Michael Lewis on March 23, 2010. Dr. Lewis obtained a history, reviewed Petitioner's treating records through February 19, 2010 and performed an examination. Dr. Lewis opined that Petitioner had no objective evidence of orthopedic pathology to her left knee; did not [*25] need further medical treatment; and that she could return to work full duty over the next six weeks. He further concluded that the chondral defect noted on the MRI was not an acute injury since there was no underlying osseous edema. He believed that the defect was related to her old Osgood-Schlatter disease.

The Arbitrator finds Dr. Lewis' opinion to lack credibility when contrasted with the aforementioned opinions of Petitioner's treating physician, Dr. Bradley Dworsky, an orthopedic surgeon who examined Petitioner on numerous occasions and performed the first surgery. Dr. Lewis never reviewed any medical records after February 19, 2010. This would include the operative report from May 11, 2010; as well as any of Dr. Dworsky's pre or post-operative records.

On March 14, 2011, Petitioner presented to David Guelich, M.D. for a second opinion on surgery. After examining Petitioner, he felt that based on her young age, stable findings in terms of the ligament injury, as well as normal alignment of the isolated cartilage injury as described in the operative report, was consistent with the type of lesion that should be managed with the autologous chondrocyte implantation. He opined that [*26] the retrograde drilling of the medial femoral condyle which was done in her adolescence does not necessarily correlate to this type of problem later

on. The doctor noted that the x-rays as well as MRI show no evidence of a large osteoid defect consistent with an unhealed osteochondral injury. The doctor also noted the MRI showed what appeared to be mostly delaminating articular cartilage injury. He felt that both of these supported his opinion that an acute recent injury was associated with the trauma from December 17, 2009.

Dr. Guelich disagreed with all of the findings of Dr. Lewis. During his examination, Dr. Guelich found Petitioner had tenderness in her left knee in a very specific area and that her examination findings were consistent with the type of problem she was complaining of. He disagreed with Dr. Lewis' assessment of no orthopedic pathology.

Dr. Guelich also disagreed with Dr. Lewis' conclusion that since there was no underlying osseous edema on the MRI, there was no acute injury. Dr. Guelich testified that he has treated many patients that have no osseous edema and yet suffer an acute injury. Dr. Guelich disagreed with Dr. Lewis' conclusion that Petitioner's symptoms [*27] were related to her Osgood-Schlatter disease. Dr. Guelich pointed out that Petitioner never had Osgood-Schlatter disease. Dr. Guelich distinguished between Petitioner's childhood disease and her current condition. He testified that Petitioner had an OCD or osteochondritis dissecans when she was a child. This involves the bone below the growth plate and above the cartilage failing and forming a "sinkhole". Dr. Guelich testified that if Petitioner was still having a problem from her prior surgery, the surgeon would have seen some problems within the bone "almost like the bone has got chunks of apple out of it..." The doctor noted that since the operative report confirmed that there was only a problem with the cartilage and not the bone, Petitioner's current problems were not associated with her prior OCD lesion. He testified that cartilage injuries are rarely, if ever, in his experience associated with the prior OCD lesion.

Dr. Guelich excluded Petitioner's prior OCD lesion as being a source of her current problems by his own x-rays. He testified that if there was a current problem, he would see early arthritis, cavitation, or some type of irregularity to the contour of the bone. Since [*28] there was no bony changes on the x-rays, this also confirmed that her prior OCD with not a current cause of her problems. Dr. Guelich further clarified this opinion stating that if the prior OCD lesion was the reason for the cartilage injury, the x-rays or MRIs would also show bony changes. He indicated that an injury to the cartilage alone would not be related to the prior OCD lesion.

Dr. Guelich addressed the terminology for Petitioner's current injury versus her childhood condition. He provided that while both are sometimes referred to as an OCD, they are meant as something different. The osteochondral defect refers to a cartilage injury whereas the osteochondritis dissecans refers to a bony injury. Petitioner's childhood surgery involved an osteochondritis dissecans to the bone. However, her current injury involves an osteochondral defect to her cartilage.

With respect to the video surveillance taken, Dr. Guelich testified in his deposition that the activities Petitioner was performing on the surveillance tape did not change his opinion as to the necessity of the cartilage transplantation surgery. In addition, the physical therapy records from ATI Physical Therapy confirmed that [*29] Petitioner was able to stand for one hour and carry her 1 1/2-year-old child without symptoms.

Based on all the above, the Arbitrator finds that Petitioner's current left knee condition of ill-being is causally related to the accident sustained on December 17, 2009.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that she was paid TTD payments from the date of accident through the results of the IME with Dr. Lewis and then received an advance of $ 1,663.98 that her attorney procured. She was paid a total amount of $ 4,991.92.

Petitioner testified that she gave disability slips from Dr. Baylis and Dr. Dworsky to Jennifer Long, Branch Manager at Respondent's Crest Hill, Illinois branch location. Respondent offered no evidence to dispute this. Tim Totos testified that he did not know whether Petitioner gave the disability slips to Jennifer Long. He could only confirm that he himself did not receive any after the initial disability slip that Petitioner gave him. Furthermore, Respondent did not offer any type of light duty work until April 12, 2010, in [*30] a letter from Jennifer Long to Petitioner. This was based on the findings of the Section 12 examination from Dr. Lewis. However, Petitioner was recommended to remain off work completely at that time and subsequent thereto by Dr. Dworsky.

The Arbitrator finds that as a result of the December 17, 2009 accident, Petitioner was temporarily totally disabled from December 18, 2009, through September 19, 2012, for a total of 143-6/7 weeks.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J), WHETHER THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY, AND (K), WHETHER PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner submitted the following medical bills:

Physician Immediate Care	$ 70.00
Prairie Emergency Phys.	$ 301.00
Provena St. Joseph Medical Center	$ 14,196.05
Prescription Partners, LLC	$ 1,849.82
Parkview Orthopaedic Group, S.C.	$ 956.00
Athletic & Therapeutic Institute	$ 5,175.89
Hinsdale Orthopedics Associates	$ 11,994.00
Future Diagnostics Group	$ 1,769.00
Associated Anesthesiologists of Joliet	$ 1,078.00
Chicago Ortho And Sports Medicine	$ 505.00
TOTAL:	$ 37,894.76

Incorporating [*31] the Arbitrator's findings regarding causal relationship, the Arbitrator finds the submitted medical bills, totaling $ 37,894.76, are reasonable and necessary and causally related to the accident. Respondent paid $ 9,488.88 of the medical bills, leaving a balance due in the amount of $ 28,405.88. Respondent shall pay the balance pursuant to the medical fee schedule.

Having relied on the opinions of Dr Dworky and Dr. Guelich, the Arbitrator further finds that Respondent shall authorize the prospective medical services prescribed by Dr. Dworky, as provided in Section 8(a) of the Act.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (M), WHETHER THE PETITIONER IS ENTITLED TO PENALTIES AND FEES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a legitimate dispute existed with respect to whether Petitioner's present left knee condition of ill-being was causally related to the incident of December 17, 2009. As such, Petitioner's request for penalties and attorneys fees are denied.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized TreatmentWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

1 of 100 DOCUMENTS

MIKE WESTHOFF, PETITIONER, v. ALTON STEEL, RESPONDENT.

NO. 12WC 13704

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MADISON

13 IWCC 969; 2013 Ill. Wrk. Comp. LEXIS 1038

November 8, 2013

JUDGES: Mario Basurto; David L. Gore; Daniel R. Donohoo

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent 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 February 28, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 14,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

Mike Westhoff
Employee/Petitioner

v.

Alton Steel
Employer/Respondent

Case # 12 WC 13704 [*2]

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on

January 23, 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
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?

FINDINGS

On July 5, 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 $ 50,333.40; the average weekly wage was $ 967.95.

On the date of accident, Petitioner was 32 years of age, single with 0 dependent [*3] child(ren).

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 $ 13,274.76 for TTD, $ 0.00 for TPD, $ 0.00 for maintenance, and $ 7,550.01 for other benefits, for a total credit of $ 20,824.77.

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

ORDER

Respondent shall pay temporary total disability benefits of $ 645.30 per week for a period of 20 1/7 weeks, commencing July 7, 2011, through November 25, 2011, as provided in Section 8(b) of the Act. Respondent shall receive a credit for TTD paid of $ 13,274.76.

Respondent shall pay Petitioner permanent partial disability benefits of $ 580.77 per week for 38.05 weeks because the injury sustained caused the 100% loss of use of the right fifth toe and the 15% loss of use of the right foot, as provided in Section 8(e) of the Act. Respondent shall receive a credit of $ 7,550.01 representing 100% loss of use of the right fifth toe.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects [*4] a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

William R. Gallagher, Arbitrator

February 25, 2013

Date

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on July 5, 2011. According to the Application, Petitioner sustained an injury to the right foot when a truck ran over it.

Petitioner testified that he worked for Respondent as a furnace operator and that a vehicle ran over his right foot on July 5, 2011, resulting in a crushing type injury to it. Petitioner further stated that he had no prior injuries to his right foot. Subsequent to the accident, Petitioner was taken to St. Antony's Health Center where x-rays revealed fractures of the proximal [*5] and distal phalanxes of the right fifth toe. Petitioner later came under the care of Dr. Bruce Vest who performed surgery on July 11, 2011, the procedure consisting of an open reduction and internal fixation of the proximal phalanx fracture. Unfortunately, Petitioner developed a necrosis which ultimately resulted in Dr. Vest performing a surgical amputation of the right fifth toe on July 20, 2011. Following a period of physical therapy and work hardening, Dr. Vest released Petitioner to return to work without restrictions on November 27, 2011. At trial, Petitioner and Respondent stipulated to Petitioner's entitlement to temporary total disability benefits from July 7, 2011, through November 25, 2011, a period of 20 1/7 weeks.

Because Petitioner continued to experience symptoms with his right foot, he sought medical treatment from Dr. Jeremy McCormick who initially saw him on May 10, 2012. At that time, Petitioner complained of persistent pain in the forefoot and a "marble" sensation at its lateral aspect. Dr. McCormick prescribed physical therapy and some custom orthotics and Petitioner's symptoms did improve. Dr. McCormick last saw Petitioner on August 23, 2012, and Petitioner still [*6] had some complaints of occasional aches and pains. On clinical examination, Dr. McCormick noted that Petitioner had some callusing of the area between the fourth and fifth metatarsal heads and that the fifth metatarsal head was a bit prominent.

At trial, Petitioner testified that he still has a dull aching pain in his right foot especially with temperature changes and cold weather. Petitioner stated that he still experiences pain between the fourth and fifth metatarsals and that his gait has changed to where he has to "drag" his right foot. Petitioner acknowledged that he was able to return to work without restrictions in November, 2011, and continues to work in that capacity at the present time. Petitioner has not sought any further medical care or treatment for any right foot issues since the time of his last visit with Dr. McCormick in August, 2012.

Conclusions of Law

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Because of the stipulation of Petitioner and Respondent at the time of trial, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 20 1/7 weeks, commencing July 7, 2011, through November [*7] 25, 2011, and that Respondent is entitled to a credit of $ 13,274.16.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 100% loss of use of the right fifth toe and 15% loss of use of the right foot. Respondent shall receive a credit of $ 7.550.01 representing 100% loss of use of the right fifth toe.

In support of this conclusion the Arbitrator notes the following:

There is no dispute that the accident resulted in the surgical amputation of the right fifth toe and that Petitioner is entitled to payment for 100% loss of use of the right fifth toe. Respondent has made payment of same.

Petitioner's injury is not limited to the 100% loss of use of the right fifth toe because Petitioner has complaints to the foot itself which did require additional medical evaluation and treatment including the prescription of orthotic devices.

Further, Petitioner still has symptoms and complaints to the right foot including sensitivity to cold weather and temperature changes and that his gait has been altered.

William R. Gallagher, Arbitrator

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

1 of 1 DOCUMENT

COMFORT ALADESAIYE, PETITIONER, v. STATE OF ILLINOIS - HOWE DEVELOPMENTAL CENTER, RESPONDENT,

NO. 08WC 32283

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

13 IWCC 982; 2013 Ill. Wrk. Comp. LEXIS 1000

November 18, 2013

JUDGES: Charles J. DeVriendt; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, nature and extent 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 December 6, 2012, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing July 21, 2012, Respondent pay to Petitioner the sum of $ 849.29 per week for life under § 8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION commencing on the second July 15 after the entry of this Award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent [*2] shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

ATTACHMENT:

ARBITRATION DECISION

Comfort Aladesaiye
Employee/Petitioner

v.

State of Illinois/Howe Developmental Center
Employer/Respondent

Case # **08** WC **32283**

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **7/20/12**. 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?
J. [X] 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?
L. [X] What is the nature and extent of the injury?

FINDINGS

On **September 15, 2006**, Respondent ***was*** operating under [*3] 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 $ **1,273.94**; the average weekly wage was $ **66,244.88**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $ **147,633.27** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **147,633.27**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services of $ **4,130.94**, as [*4] provided in Sections 8(a) and 8.2 of the Act, if those charges remain unpaid.

Temporary Total disability
Respondent shall pay Petitioner temporary total disability benefits of $ **849.29** per week for **274-6/7** weeks, from **4/15/07** through **7/20/12,** as provided in Section 8(b) of the Act.

Permanent Total Disability
Respondent shall pay Petitioner permanent and total disability benefits of $ **849.29**/week for life, commencing **7/21/12**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) 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; [*5] however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

December 5, 2012

Date

ARBITRATION DECISION

Comfort Aladesaiye
Employer/Petitioner

v.

State of Illinois/Howe Developmental Center
Employer/Respondent

Case # **08** WC **32283**

FINDINGS OF FACT

The Petitioner, Comfort Aladesaiye, was employed as a Registered Nurse 1 for Howe Developmental Center on September 15, 2006. The Petitioner had never injured her back prior to that date. On September 15, 2006, the Petitioner was giving medication to a patient at the facility. The patient became aggressive and pushed her, causing the Petitioner to fall to the ground and injuring her low back.

Following the attack, the Petitioner sought treatment at Midwest Physician Group. She was diagnosed with a back contusion and placed on restrictions (Px. # 1).

The Petitioner then started treating with Dr. Valesia Phillips, her family physician. Dr. Phillips diagnosed back pain with radiculopathy and recommended magnetic resonance imaging ("MRI"), medication, and therapy (Px. # 2). She also saw Dr. Ram Aribindi at Southland Bone & Joint Institute [*6] on September 22, 2006. Dr. Aribindi diagnosed low back pain with radicular symptoms and placed her on restrictions of no lifting or carrying more then 10 pounds (Px. # 4).

The Petitioner started therapy at Physiotherapy Associates and attended 18 sessions. The therapist noted some improvement but stated that the Petitioner's pain continued to be a problem (Px. # 5).

The Petitioner underwent an MRI which showed hypertrophic changes at the facets at L4-L5 with compression of the left L4 nerve root (Px. # 2).

The Petitioner returned to Dr. Valesia Phillips following the MRI. The doctor diagnosed radiculopathy and disc bulging. The Petitioner continued to have ongoing back pain and Dr. Phillips referred her to an orthopedist, Dr. Charles M. Slack (Px. # 1).

The Petitioner began treating with Dr. Slack on February 1, 2007. Dr. Slack diagnosed left lumbar radiculopathy with L4-L5 disc bulging and lumbar spondylosis. The doctor recommended epidural steroid injections, physical therapy and medication. He felt the Petitioner could only perform light-duty work and would have to avoid prolonged standing, walking, repetitive bending, twisting and limit lifting to 5 pounds (Px. # 6).

The Petitioner [*7] resumed physical therapy at Physiotherapy Associates and underwent the injections as recommended by Dr. Slack. She obtained the injections from Dr. Murtaza at The Centers for Pain Management.

Following the third epidural steroid injection, Dr. Slack recommended a functional capacity evaluation ("FCE"), which was performed at Physiotherapy Associates. The test was done on August 8, 2007, and was valid. The therapist noted that the Petitioner only met the partial demands of her job (Px. # 5).

The Petitioner returned to Dr. Slack on August 21, 2007, and Dr. Slack placed permanent restrictions of no repetitive bending, twisting or prolonged walking. He noted that Petitioner could only walk occasionally 1/3 of the time and would have to change positions frequently. She could not lift over 22 pounds (Px. # 6).

The Petitioner testified that she remained on light duty at Howe Developmental Center until April 14, 2007. At that time, she was advised by the facility that they could no longer accommodate her light-duty restrictions. She remained an employee of that facility until 2010.

The Petitioner continued to have ongoing back problems and returned to Dr. Slack on November 20, 2007. At that [*8] time, he advised the Petitioner to continue her home exercise program and medication.

The Petitioner saw Dr. Slack on June 30, 2008, and advised him that she continued to have flare-up pain in her back and into her left leg. Dr. Slack ordered a new lumbar MRI to evaluate the Petitioner for further worsening and progression of her disc bulge. He stated that she would then be a candidate for further epidural injections. Dr. Slack noted that since there was no modified work available, the Petitioner would remain temporarily totally disabled. He advised the State that he needed authorization to proceed with further treatment (Px. # 6).

The Petitioner underwent an additional MRI on September 18, 2008, and then returned to Dr. Slack. Dr. Slack's impression was persistent low back derangement with radicular symptoms with degenerative lumbar disc and facet disease. He noted that because of her ongoing symptoms, she needed a medial branch facet block and she might benefit from a facet lesioning procedure. Once again, Dr. Slack advised the State that he needed authorization before proceeding (Px. # 6).

When the Petitioner saw the doctor on April 22, 2009, he wrote that she was having increased [*9] weakness in her right leg with pain and numbness. He noted she was using an AFO brace and was using a cane or walker for short distances. He felt that her condition had significantly changed and recommended another MRI. He stated she was temporarily totally disabled from work (Px. # 6).

The MRI was eventually performed on October 5, 2009, at AMIC. The scan was consistent with facet arthropathy at L5-S1 with partial effacement of the lateral recesses and a posterior disc protrusion. It also showed an L4-L5 disc osteophyte complex and facet effusions. Dr. Slack was of the opinion that a component of the pain could be due to facet joint irritation and recommended a facet block followed by a facet lesioning procedure. Once again, Dr. Slack needed approval for the procedures (Px. # 6).

The Petitioner returned to Dr. Murtaza on January 13, 2010. The doctor noted that after the medial branch block, she had a significant amount of relief and therefore felt a radio frequency ablation would be needed. The Petitioner underwent the ablation of the medial branch nerves at the left side from L2-L5 on March 25, 2010, at APAC Group (Px. # 6).

Following the ablation, Dr. Murtaza recommended an additional [*10] transforaminal injection on the right side at L4-L5. The Petitioner returned to Dr. Slack on August 25, 2010. Dr. Slack noted that the Petitioner had persistent low back derangement due to the degenerative lumbar disc disease and recommended an FCE to determine her physical capabilities.

The Petitioner underwent such FCE on September 17, 2010, at ATI. The test was valid and the therapist felt the Petitioner could only work at a sedentary work level (Px. # 7). The Petitioner returned to Dr. Slack on September 23, 2010, at which time he felt the Petitioner could only return to work within the sedentary guidelines per the FCE. Dr. Slack stated that she needed to avoid prolonged standing, walking, repetitive bending or twisting, and would have to change positions frequently. He felt she had finally reached maximum medical improvement ("MMI") and should continue using the topical patches. Dr. Slack's impression was persistent low back derangement due to a symptomatic aggravation of her degenerative disc (Px. # 6).

The Petitioner received a letter from the Illinois Department of Human Services on February 3, 2010, which stated that Howe Developmental Center was closing its doors and she [*11] would either be laid off or could apply for a vacancy as a Registered Nurse I at Ludeman Center (Px. # 9). The Petitioner did apply for a lateral move to Ludeman. She then received a subsequent letter from Central Management Services dated May 14, 2010, which indicated that her name would be placed on a recall list for up to two years. The letter stated that the effective date of the move was June 1, 2010.

The Petitioner testified that she went to Ludeman in 2011, but was advised they could not accept her due to her restrictions. In the meantime, the Petitioner filed a request for vocational rehabilitation with the Commission on January 7, 2011. (Px. # 16)

On August 9, 2011, the State sent the Petitioner for a Section 12 evaluation with Dr. Frank M. Phillips. Dr. Phillips felt that the Petitioner's condition had reached MMI and that she was capable of returning to work with the restrictions imposed by the therapist just after the 2007 FCE (Rx. # 1).

The Petitioner returned to Dr. Slack on August 25, 2011, at which time he noted persistent symptomatic aggravation of her degenerative disc disease. Again, he recommended sedentary-type work and the avoidance of repetitive bending and [*12] twisting as outlined in the FCE from 2010 (Px. # 6).

The Petitioner began looking for work within her restrictions. The Petitioner testified that the State did not offer any type of vocational assistance to her. She further testified that as of the date of the hearing, she had looked for work at over 250 places. The Petitioner was still off work on date of the arbitration hearing.

CONCLUSIONS OF LAW

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

The Petitioner never injured her low back prior to the accident of September 15, 2006. She began receiving immediate medical treatment following the injury. She was initially sent to Midwest Physician Group and placed on restricted duties. She then continued follow-up treatment with her family doctor, Dr. Valesia Phillips, who also agreed with the restrictions. The Petitioner continued to work until April 14, 2007, when her employer could no longer accommodate her restrictions.

The Petitioner was referred to Dr. Charles Slack, an orthopedic spine surgeon, by her family doctor. She initially saw Dr. Slack on February 1, 2007. Dr. Slack diagnosed persistent left lumbar radiculopathy with L4-L5 disc [*13] bulging and lumbar spondylosis. He recommended epidural steroid injections, medication and physical therapy which the Petitioner received. The treatment lasted several months. Dr. Slack then referred the Petitioner for an FCE and placed the Petitioner on permanent restrictions. At the time of the FCE, the therapist determined that Petitioner did not meet all the physical demands of an RN.

The Petitioner continued under the care of Dr. Slack and saw him on November 20, 2007 and June 30, 2008. In June 2008, she advised the doctor that she was having bouts of flare-up pain throughout her back and down her left leg into her toes. The doctor examined her and noted restricted range of motion and weakness in the leg. Dr. Slack felt that her ongoing leg symptoms necessitated further treatment. He recommended a new MRI scan and felt there might be a further progression of the disc bulging.

Dr. Slack subsequently prescribed a medial facet block and referred the Petitioner back to Dr. Murtaza who had performed her prior epidural steroid injections.

Dr. Murtaza saw the Petitioner in January 2010 and noted improvement after he performed the blocks and recommended a radio frequency ablation, which [*14] the Petitioner subsequently underwent on March 25, 2010. She also advised the doctor that the procedure gave her approximately 60% relief of pain.

When the Petitioner returned to Dr. Slack on August 25, 2010, he noted that she had continued symptoms and recommended an FCE. The Petitioner underwent the second FCE on September 17, 2010, which placed her at a sedentary work level.

Dr. Slack wrote a report dated September 21, 2011, in which he opined that Petitioner's state of ill-being was a result of her symptomatic aggravation of her degenerative lumbar disc disease that occurred at the time of her injury on the job on September 15, 2006. He stated that she had gone through extensive treatment and that she would be permanently restricted in her activities based on the valid FCE study from September 17, 2010. Dr. Slack noted that her capabilities fell far below the job description of a Registered Nurse, which required a 50-pound occasional lift. Dr. Slack placed the Petitioner at a sedentary work level.

The State had the Petitioner evaluated by Dr. Frank M. Phillips on August 9, 2011. Dr. Phillips stated that he did not believe her current condition of ill-being was causally related [*15] to the 2006 injury and felt that she could have returned to work based on the 2007 FCE. Dr. Phillips felt that the limitations were based on subjective complaints and were not corroborated by objective findings.

However, Dr. Slack reviewed the report of Dr. Phillips and disagreed with his conclusions. The records of Dr. Slack substantiate the objective, ongoing condition of the Petitioner since her injury in 2006. Dr. Slack's records note restricted flexion, positive straight leg raising, absence of ankle reflexes and weakness in the leg throughout the course of his treatment. Dr. Murtaza's evaluation of the Petitioner also substantiated that she had objective, ongoing problems as a result of this injury.

There is no report in the treating records of any malingering or symptom-magnifying behavior. Therapist Michael Manning found 0 /5 Waddell's signs in the 2007 FCE (Px. # 5) and therapist David Noble found the 2010 FCE (Px. # 7) to be valid. Notwithstanding the foregoing, Dr. Phillips, in a report dated 8/9/2011, opined "[s]he has at least 3 or 4 Waddell's signs to my exam." Yet, Dr. Phillips did not identify which signs were positive or how he arrived at this conclusion. Dr. Phillips [*16] performed many examination tests. Dr. Phillips noted "Straight leg raise on the right is positive causing diffuse leg pain at 50 degrees." There is no way of telling if Dr. Phillips performed this test on the Petitioner with her in the seated position, in the supine position or in both positions. (Rx. # 1)

The Arbitrator finds the opinions of Dr. Charles M. Slack to be more persuasive than those of Dr. Frank M. Phillips.

Even if one of the medical witnesses was equivocal on the question of causation, it is for the Commission to decide which medical view is to be accepted, and it may attach greater weight to the opinion of the treating physician. *International Vermiculite Company v. Indus. Comm'n, 77 Ill. 2d 1, 394 N.E.2d 1166 (1979) citing Holiday Inns of America v. Indus. Comm'n (1969), 43 Ill. 2d 88, 89-90; Proctor Community Hospital v. Indus. Comm'n (1969), 41 Ill. 2d 537, 541.*

The Respondent points out that the Petitioner returned to Dr. Slack on June 30, 2008, which was over 10 months after she had been declared at MMI and released from care. At that time, new MRIs [*17] and new treatment were recommended pursuant to Petitioner's pain complaints. The Respondent argues that the Petitioner's condition, at the time she presented to Dr. Slack on June 30, 2008, had worsened and that such worsening was due to a cause other than her initial September 15, 2006 work accident. The Respondent further argues that the need for new treatment was not related to the September 15, 2006 work accident.

No evidence was presented that Petitioner sustained an intervening injury to her lumbar spine during this 10 month period of time.

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Tower Automotive v. Illinois Workers' Comp. Comm'n, 943 N.E.2d 153, 407 Ill. App.3d 427, 347 Ill. Dec. 863 (1st Dist. 2011)*

Based on the foregoing, the Arbitrator concludes that the Petitioner's current condition of ill-being of her lumbar spine is causally related to the accident of September 15, 2006.

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

The Petitioner [*18] submitted into evidence four bills which appear to be outstanding. The bill from ATI, in the amount of $ 2,459.16, is for the FCE administered in 2010 (Px. # 12). The bill from Illinois Bone & Joint (Px. # 14), in the amount of $ 572.00, is for the services of Dr. Slack for dates of service of August 25, 2010, September 23, 2010, and August 25, 2011. The only objection to the bills by the State was that they had been placed in line for payment, but that it appears that they had not yet been paid.

The bill from Belmar Physicians/Dr. Pareja (Px. # 13), in the amount of $ 275.00, and the bill from Advanced Pain & Anesthesia/Dr. Murtaza (Px. # 15), in the amount of $ 824.78, appear to have been vouchered by the State and paid based on payment screen documentation in Rx. # 4 and Rx. # 5.

Based on the Arbitrator's findings of fact and conclusions of law with regard to issue F, causation, the Arbitrator concludes that such medical treatment and the corresponding bills are reasonable, necessary and related to the accident of September 15, 2006. Consequently, the Arbitrator awards these four bills. The parties agreed that if these bills have been paid, then Petitioner would not seek duplicate [*19] payments provided the State has evidence of such payment.

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

The Petitioner was employed as a Registered Nurse 1 at the time of her injury with the State. Her job as a Registered Nurse involved medicating patients, bending, stooping, lifting and walking. The U.S. Department of Labor's Dictionary of Occupational Titles defines a Registered Nurse as a medium physical demand level with 50 pounds occasion-

al lifting (Px. # 7). The Petitioner underwent functional capacity evaluations in 2007 and 2010. Both tests concluded that the Petitioner did not meet the demands of an RN.

The Petitioner's educational experience included some junior college and a Bachelor of Science degree in Radiology. Prior to the Petitioner's employment at Howe Developmental Center, the Petitioner worked as an X-ray Technician for 25 years. Petitioner testified that that job involved positioning patients on tables, heavy lifting and moving x-ray machines to patient's rooms. The Petitioner provided unrebutted testimony that the job of an X-ray Technician was even heavier than that of a Registered Nurse.

The Petitioner began her employment at the State in 1999 (Rx. # [*20] 2). She was employed until February 3, 2010. The Petitioner received a letter in February 2010, and was advised that Howe Developmental Center was closing. She was told that she would be placed in a layoff status or in the alternative she could apply for a lateral move as a Registered Nurse 1 from Howe to Ludeman Center (Px. # 9). The Petitioner received a second letter from Central Management Services stating that the lateral assignment in lieu of layoff became effective June 1, 2010. She was told that her name would be placed on a recall list for up to 2 years. She was further advised that her name would be removed if she refused an offer of re-employment (Px. # 10).

After the Petitioner received the letters, she was never offered any type of employment from the State. She testified that she went to Ludeman Center and had an interview with them in 2011, but they advised her they could not take her back due to her restrictions.

On January 7, 2011, the Petitioner filed a motion with the Commission in which she requested vocational rehabilitation, pursuant to Section 8(a) of the Act. The Petitioner testified that no one at the State contacted her to provide any vocational services. [*21] The Petitioner then prepared her own resume' with the help of her son, and began looking for work.

The Petitioner submitted into evidence a job log that purports to show that she initially began looking for work in January 2011. (Px. # 8) The job log indicates that from January 6, 2011 through February 7, 2011, Petitioner made 27 contacts to hospitals and nursing homes. Then, from February 8, 2012 through July 13, 2012, Petitioner made 188 contacts to hospitals, rehab centers, nursing homes and home care facilities. At the arbitration hearing, when shown the job log (Px. # 8), Petitioner testified that of all these places, no one offered her a job within her restrictions. When shown the Labor Market Survey conducted by Genex (Rx. # 2), Petitioner testified that she called every single one of the places listed but found that none of them could accommodate her restrictions. She was told by these leads that they wanted someone who could operate in the full capacity of a nurse. Petitioner learned that one of the facilities on the Labor Market Survey, Quality Medical Staffing, had closed down.

On cross-examination, Petitioner testified that since 2007, she applied at hundreds of places [*22] - - at least 250 - - hospitals and doctor's offices. Petitioner further testified that although she applied for jobs in 2010, she did not document such efforts until her lawyer advised her to do so. Petitioner testified that the job log, Px. # 8, does not reflect all of the jobs for which she searched because she lost some of the folders that held the job search documents. The Petitioner testified that most of the contacts were made via telephone, 20 were made via email and 10 were made in person. She testified that she made so few contacts in person because she was unable to drive for very long. She testified that most of her interviews were done on the telephone. Mostly, Petitioner continued, she made unsolicited telephone calls to job ads posted in nursing magazines. Petitioner testified that she did not bring her resume' with her to the hearing.

Petitioner testified that she is up to date on her nursing certification and that she renewed her license last year.

The Arbitrator further points out that the Respondent is required, pursuant to the rules of the Illinois Workers' Compensation Commission, Section 7110.10, to prepare an assessment for a plan to include medical and vocational [*23] evaluation for modified or limited duty and/or retraining as needed. The Respondent did not present any type of vocational rehabilitation plan in this case. Instead, the Respondent conducted a Labor Market Survey.

In *Economy Packing Co., vs. Illinois Workers' Compensation Commission, 387 Ill. App. 3d 283, 901 N.E.2d 915 (1st Dist. 2009),* the Court held that a claimant can satisfy the requirement that he falls in an odd lot category by showing a diligent but unsuccessful job search or by demonstrating that because of his age, training, education, experience and condition, he is unable to engage in stable and continuous employment. At that point, the burden shifts to the employer to show that suitable work is regularly and continuously available to the claimant.

Notwithstanding Respondent's refusal to present any type of vocational rehabilitation plan, the Arbitrator considers whether or not Petitioner conducted a diligent job search.

The Respondent conducted minimal cross-examination of the Petitioner with regard to the job log (Px. # 8) and raised no objection to its admission. The Arbitrator notes that the job log, which consists of 24 [*24] pages of hand-written entries, is not the original. The Arbitrator has questions with regard to foundation: When was each entry in the job log made? Was information transferred to the job log from Petitioner's job search notes? Petitioner testified that she contacted most of the prospective employers by telephone. Yet, of the 215 contacts that she listed in the job log, she provided phone numbers for only 32 contacts. Petitioner did not provide an address or a complete address for 5 of the contacts. Petitioner *did* write in a "RESULTS" entry for each of the contacts. But there is no evidence as to: which contacts (if any of the contacts) Petitioner sent her resume', which contacts Petitioner sent an email inquiry and which contacts Petitioner appeared in person. There is no evidence that Petitioner followed up with any of these contacts. At the arbitration hearing, Petitioner failed to produce a copy of her resume' or copies of rejections letters or emails from prospective employers.

On February 18, 2010, Petitioner certified that she received official notification of the layoff action, and applied for the vacant "RN I" position at the Ludeman Center. (Px. # 9) Then, in a letter [*25] dated May 14, 2010, the State of Illinois CMS Deputy Director advised the Petitioner that as a result of Petitioner's approval of the layoff plan, her name would be placed on recall list(s) for a Registered Nurse I and that recall list placement can be for as long as two years following the effective date. Petitioner participated in the second FCE on September 17, 2010 at which time she was released to sedentary-type work. (Px. # 7)

Petitioner provided no documentation of any job search in 2010, and, for 2011, only provided documentation of a job search for the period of January 6, 2011 through February 7, 2011.

The Arbitrator concludes that since the job log (Px. # 8) was admitted into evidence, Petitioner has made a *prima facie* case for an "odd-lot" permanent total. Petitioner has thus proven that she conducted a diligent, but unsuccessful, job search. Please see *Valley Mould & Iron v. Indus. Comm'n, 84 Ill. 2d 538, 419 N.E.2d 1159 (1981)*

The burden then shifts to the Respondent. The Respondent chose not to provide true vocational counseling or true vocational rehabilitation, but instead, chose to conduct a Labor Market Survey. The [*26] Respondent submitted into evidence a report from Genex, which is dated November 8, 2011. The report appears to be written by Richard Morison, a Certified Rehabilitation Consultant. The report notes that the file was referred for a Labor Market Survey on October 4, 2011. The report states that the FCE that was used to determine the restrictions was the one from 2007, and not from 2010. Therefore, the Labor Market Survey was based on faulty information and was not prepared with the more severe restrictions kept in mind. Petitioner's treating doctor ordered the more severe restrictions.

The Petitioner testified that she did receive a copy of the Labor Market Survey and contacted every facility that was listed on the form. She testified that none of the facilities would hire her and that one of the facilities, Quality Medical Staffing, had closed its doors and was no longer in business.

The Petitioner is currently 62 years of age. The Arbitrator concludes that the physical demands of an X-ray Technician are greater than those of an RN. Petitioner holds a Bachelor of Science degree and is currently certified as a Registered Nurse.

Dr. Slack concluded that the Petitioner could not return [*27] to work as a Registered Nurse and that her physical capabilities fell far below the level of that job. He concluded that she could only perform at a sedentary physical demand level in which she could only lift and carry weights between 14 and 17 pounds, but could not perform any lifting from floor level.

The Respondent did not offer any vocational services to the Petitioner to assist her in finding employment. Petitioner performed her own job search, but to no avail.

Furthermore, the Respondent based its Labor Market Survey on the 2007 FCE, and not on the 2010 FCE, which showed that the Petitioner was capable of only performing sedentary-type work. The Petitioner's current restrictions are based on the more recent FCE.

The Respondent presented no evidence that suitable work would be regularly and continuously available for this Petitioner. The Labor Market Survey was based on inaccurate information. However, the Petitioner still contacted the facilities listed in the Survey but was not offered a job.

The Arbitrator finds that based on the Petitioner's job search, there is no stable labor market for this Petitioner.

Consequently, the Arbitrator concludes that the Petitioner is permanently [*28] and totally disabled pursuant to Section 8(f) of the Act.

DISSENTBY: RUTH W. WHITE

DISSENT: I disagree with the majority's finding that Petitioner is permanently totally disabled. Petitioner has two college degrees and a wealth of work experience. She cannot return to work as a registered nurse in a position that requires lifting; however, she is certainly qualified for many other positions in medical management and administration. She can work. Her failure to find a job does not render her permanently totally disabled. An award pursuant to Section 8(d-2) would be appropriate.

With respect, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

1 of 100 DOCUMENTS

NELSON CENTENO, PETITIONER, v. MINUTE MEN, RESPONDENT.

NO. 10WC 44071

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

13 IWCC 914; 2013 Ill. Wrk. Comp. LEXIS 952

October 30, 2013

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

Dr. David Freeland provided Petitioner with approximately ninety low-back chiropractic treatments between November 22, 2010 and October 17, 2011. The ninety treatments incurred nearly $ 57,000.00 in chiropractic charges. The Commission finds that only six of the low-back chiropractor treatments were reasonable and [*2] necessary. The remaining chiropractic treatments to the low-back were not reasonable or necessary. In support of its finding, the Commission relies on Dr. Reese Polesky's June 14, 2011 peer review, and the opinion of Dr. G. Klaud Miller. Dr. Polesky opined that six chiropractic sessions to the low-back were warranted. Dr. Polesky noted that Petitioner exceeded the maximum duration of care after the initial month of care and, at which point, there was no definitive evidence of functional improvement. In further support, Dr. Miller performed an Independent Medical Examination on March 9, 2011. He opined that the Petitioner may have sustained a lumbar strain, but his current complaints were non-physiologic and could not be explained based upon a lumbar sprain. He noted that Dr. Freeland's chiropractic manipulation on each visit was not appropriate as the current guidelines only allow for one month of chiropractic treatment for a lumbar sprain. The records reflect that Petitioner gained no improvement from the treatments. The treatments appear to be physical therapy administered by a chiropractor. Therefore, the Commission finds that six treatments to the low back were reasonable and necessary. [*3]

Accordingly, the Commission finds the chiropractic treatment that Dr. Freeland provided to Petitioner's low back on November 22, 2010 in the amount of $ 412.00, and the treatment provided to Petitioner's low back on November 23, 2010, November 24, 2010, November 26, 2010, November 27, 2010 and November 29, 2010 each in the amount of $ 247.00 was reasonable and necessary. The remaining chiropractic treatment to the low back was not reasonable or necessary.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 4, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 319.00 per week for a period of 100-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 66,781.33 for medical expenses [*4] under § 8(a) of the Act and subject to the fee schedule.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Nelson Centeno
Employee/Petitioner

v.

Minute Men
Employer/Respondent

Case # **10** WC **44071** [*5]

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **September 7, 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
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] 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. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?
O. [X] Other **Petitioner's number of dependants**

FINDINGS

On the date of accident, **October 7, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** [*6] exist between Petitioner and Respondent.

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

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

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

In the year preceding the injury, Petitioner earned $ **25,253.80**; the average weekly wage was $ **485.65**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $ **18,140.08** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **18,140.08**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of Respondent shall pay Petitioner temporary total disability benefits of $ 319.00/week for 100-1/7 weeks, commencing 10/08/10 through 09/07/12, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable [*7] and necessary medical services of $ 97,243.01, as provided in Sections 8(a) and 8.2 of the Act.

The Respondent shall further pay for and authorize medical treatment prescribed by Dr. McNally in accordance with Section 8(a) of the Act.

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

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

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

1/3/13

Date

Findings of Fact:

Petitioner testified that as of October 7, 2010 he had been employed by Respondent, a temporary agency, for about 3 months at a concrete company. [*8] The company made concrete walls. It was his job to frame out the windows and doors in these walls for the concrete pour. He would install wood that was 12-13 inches high for this purpose. This required him to stand in the area where the concrete would be poured. Besides the wood framing he also installed rebar to strengthen the concrete and also a metal sheet that they would unroll and the supervisor would cut around the windows and doors, leaving scraps for him to pick up. Petitioner applied an oil lubricant all over the surface of the metal sheet using a sprayer and then a mop.

Petitioner testified that he had completed the above tasks including the application of the oil. While in proximity to the window framing, he was picking up the pieces of metal and went to step into the inside of the window framing. As he stepped onto a piece of the lubricated metal his foot slipped and twisted causing him to fall. Petitioner provided that he fell and struck his low back at the waistline on the raised top edge of the wood framing of the window and slid down into a seated position against the framing. Petitioner indicated that his left ankle "broke" and he had pain in his back and left knee. [*9]

Emergency personnel was called to the scene. Petitioner testified that the ambulance personnel asked him if the ankle was broken and he told them "yes." Petitioner stated that they did not ask him if he hurt his back. Aurora Fire Department EMS records show Petitioner reported left ankle pain but denied any head, neck or back injury. (PX 1) Petitioner was taken to Provena Mercy Emergency Department where he complained of left ankle pain and swelling and mild left knee and mild low back pain. X-rays were taken of the left ankle that demonstrated mildly displaced distal fibular, medial malleolar and distal fibular tip fractures. X-rays of the left knee and lumbar spine were unremarkable. Petitioner was diagnosed with left ankle fracture, left knee pain and low back pain. He was released with instructions not to work and to follow up at the Provena Occupational Health Clinic. (PX 2) Petitioner testified that upon contacting Respondent, he was told instead to go to Tyler Medical Center in Aurora.

Petitioner presented to Tyler Meidcal Services on October 8, 2010. Petitioner reported complaints with respect to his left ankle, knee and his low back. Records show that Petitioner's left ankle, [*10] left knee and lumbar spine were examined. He was diagnosed with left ankle fracture, left knee sprain and low back pain-all secondary to a fall. Petitioner was kept off work and referred to Dr. Suchy. (PX 3)

Petitioner testified that he went directly to Dr. Suchy's office. At Dr. Suchy's office his son translated for him. Dr. Suchy's records show Petitioner presented complaining about his left ankle. According to the records, Petitioner denied any head, neck or back injury. (PX 4) Petitioner testified that he was not asked about his back and that he being referred only for his ankle. Dr. Suchy diagnosed unstable bimalleolar fracture of the left ankle and recommended surgery. (PX 4)

On October 12, 2010, Dr. Suchy performed an open reduction and internal reduction left ankle. (PX 5) Post surgery, Petitioner continued with Dr. Suchy. (PX 3) Petitioner provided that he still had pain in his left knee and his back, but was not receiving any treatment for these conditions. He was also continued off work. On November 11, 2010, Dr. Suchy recommended the commencement of active/passive ROM therapy. (PX 3)

Petitioner's therapy session commenced on November 15, 2010. Records submitted show "[h]e [*11] reports his low back has been bothering him, but he has not received treatment for that....He states that the LBP came from the fall. In addition to ankle therapy modalities, Petitioner was instructed on home "[g]enrich LB exercises." On his next visit of November 19, 2010, the session only addressed the left ankle. (PX 3)

Petitioner elected to seek care for his back on November 22, 2010. Petitioner testified that based on the recommendation of a friend he presented to West Chicago Chiropractic where he came under the care of Dr. David Freeland. In addition to his ankle complaints Petitioner reported "...ongoing LBP after ankle fx...Patient points to L5-S1 central region. Rate 9 out of 10 at worse. Constant pain...Left LE anterior thigh pain to knee. Rated 8/10 at worse. Sharp -- burning pain both leg and back. No prior history of LBP..." (PX 6) Dr. Freeland diagnosed ankle fracture, lower back pain and anterior thigh pain. The doctor noted Petitioner's injuries were work related and commenced a course of therapy. The doctor also kept Petitioner off work. (PX 6) On November 23, 2010, Dr. Freeland recommended that Petitioner see Dr. Freedberg, an orthopedic surgeon. (PX 6)

On November [*12] 24, 2010, Petitioner saw Dr. Freedberg complaining of left ankle and low back pain after a work related injury on October 7, 2010. After performing an examination and obtaining x-rays of the left ankle and knee and of the lumbar spine the doctor diagnosed left knee RPPS; lumbar sprain/strain and S/P Left ankle bimaleollar fracture with ORIF. Dr. Freedberg instructed him to stay off work, prescribed a back brace, medication and to continue therapy with Dr. Freeland. Dr. Freeberg provided Petitioner's condition was work related. (PX 7)

On December 16, 2010, Petitioner returned to Dr. Freeberg. Petitioner reported that his ankle was improving with therapy. He also reported that he still had back complaints with not much improvement. The doctor continued Petitioner's treatment regiment. The doctor also continued Petitioner's off work status. (PX 7)

Petitioner returned to Dr. Freedberg on January 13, 2011. Dr. Freeberg noted Petitioner's ankle was getting better. The doctor also noted Petitioner provided that his back feels better during therapy sessions, but the pain returns after an hour after he returns home. Petitioner also reported moderate pain in the left knee. Petitioner's treatment [*13] was continued. A lumbar MRI was also ordered. (PX 7) Petitioner testified that Respondent did not authorize same.

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Klaud Miller on March 9, 2011. Dr. Miller reviewed the treating medical records from Tyler Medical, Provena Medical Center, Dr. Suchy, Dr. Freeberg and chiropractor Dr. Freeland. In his report, Dr. Miller noted that Petitioner stated that his ankle did not aggravate his back and that his low back was gradually getting worse. After performing an examination, Dr. Miller assessed left bimalleolar ankle fracture and low back pain most likely secondary to degenerative disk disease. The doctor noted that he could not rule out a low back sprain. Dr. Miller opined that there was completely insufficient evident to substantiate a causal relationship between Petitioner's current condition and the accident in question. Dr. Miller indicated, "He specifically denied any preaccident in question low back pain. The emergency room and Tyler Medical clearly documented complaints of low back pain, but his examinations were nothing more than minimally positive. However, he specifically denied low back pain to Dr. [*14] Such on 10/8/10 and Dr. Freeland's records are simply insufficient to confirm or deny anything other than Mr. Centeno complained of pain since the accident in question. Even Dr. Freedberg's examination was normal except for bilateral lumbar spine tenderness. My own examination showed severe nonphysiologic abnormalities and multiple positive Waddell signs consistent with a non-organic pain syndrome." Additionally, the doctor stated, "There is evidence to support he may have suffered a lumbar spine sprain in the accident in question but his current complaints are nonphysiologic and cannot be explained based upon a simple lumbar spine sprain." Dr. Miller felt Petitioner's lumbar sprain should have resolved within 2 or 3 weeks. The doctor felt that Petitioner needed continued physical therapy for range of motion strengthening and gait training from the standpoint of the ankle. He also felt that because Petitioner's low back is a nonphysiologic pain syndrome, he required a pain clinic to determine the psychogenic cause of his lumbar spine complaints. (RX 4)

Petitioner continued therapy with Dr. Freeland after the IME visit. (PX 6) When he next saw Dr. Freedberg on May 5, 2011 Petitioner [*15] provided that his ankle had improved, but that his back discomfort was still the same. Petitioner continued to report left anterior thigh numbness and pain. Dr. Freedberg noted that Petitioner had an injection on the left knee which helped. The doctor continued to recommend off work, continued therapy and a lumbar spine MRI. Also noted is the doctor's recommendation for hardware removal from the ankle. (PX 7)

Petitioner underwent the prescribed MRI on May 11, 2011. The indication was for low back pain, work injury with left leg radiculopathy. The diagnostic study was read to show central protrusion at L5-S1. (PX 8) On May 19, 2011, Petitioner and Dr. Freedberg discussed the MRI findings and the possibility of steroid injections. The doctor also reiterated the need for hardware removal. (PX 7) Same was carried out on June 3, 2011 at Alexian Hospital. Petitioner underwent left ankle removal of the medial and lateral hardware with scar revision and repair of the deltoid ligament. (PX 9)

Pursuant to Dr. Freedberg's referral Petitioner saw Dr. Christopher Morgan on June 14, 2011 for consideration of lumbar epidural steroid injection. Dr. Morgan felt Petitioner would benefit from a series [*16] of L5-S1 and S1 transforaminal epidural steroid injections. Dr. Morgan referred him to Dr. Jain at Chicago Accredited Ambulatory. (PX10, PX 11)

Petitioner underwent the injections on June 21, 2011 and on July 5, 2011. (PX 11) Petitioner returned to Dr. Morgan on July 15, 2011 at which time the doctor noted that Petitioner showed no significant benefit from the injection. As a result, the doctor felt Petitioner would not benefit from any further injections. (PX 10)

At the request of Dr. Freedberg Petitioner saw Dr. Thomas McNally, an othopaedic surgeon, on August 2, 2011. Petitioner presented with low back and left leg pain. An examination was performed and the doctor reviewed diagnostic studies taken. Dr. McNally opined lumbar disc displacement. A discussion was held regarding non-operative and operative treatment options. Dr. McNally provided that "[t]he work related injury on 10/7/10 did not cause the degenerative changes in the patient's lumbar spine. The L5-S1 disc herniation seen on the lumbar MRI is consistent with a history of trauma." He felt "the work related injury on 10/7/10 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, [*17] caused them to become symptomatic and require treatment." An EMG was ordered to confirm the suspected lumbar radiculopthy. (PX 7)

Petitioner returned to McNally on September 8, 2011. Records submitted show that the EMG was carried out on August 15, 2011. Same was determined to be abnormal consistent with multilevel lumbosacral radiculopathy, more prominent at level L3-L4 on the left and bilateral L4-L5 and L5-S1 levels. pain radiating into his buttocks. Dr. McNally recommended a referral to Dr. Lipov for a left L4-5 lumbar epidural steroid injection. The doctor noted that although Petitioner had two prior injections without significant relief, he felt an additional injection specifically to the left L4-L5 level would be helpful for diagnostic and therapeutic purposes. The doctor also noted that based on Petitioner's symptoms of back pain greater than left thigh pain, and the EMG and MRI findings, Petitioner would probably not find much

relief from a L5-S1 discectomy. He noted Petitioner had the option to consider undergoing fusion surgery with the understanding that the pain relief is not as predictable. (PX 7) Petitioner testified that the additional injection was not authorized [*18] by Respondent.

As of his October 24, 2011 visit with Dr. Freedberg, Petitioner was released from care for the ankle, but instructed to continue with treatment for his low back with Dr. McNally. (PX 7) By this point all therapy for the back, ankle and leg had concluded with Dr. Freeland at West Chicago Chiropractic as of October 17, 2011. (PX 6) On October 27, 2011, Dr. McNally recommended additional physical therapy with Dr. Freeland. (PX 7) Petitioner testified that as of November 3, 2011, Respondent stopped TTD payments.

Petitioner returned to Dr. McNally on November 10, 2011. The doctor noted Petitioner provided that he saw Dr. Lipov who felt that additional injections would not be helpful. Dr. McNally recommended continual therapy with Dr. Freeland, prescribed continual medication and recommended that he consider lumbar surgery options. Petitioner was also continued off work. (PX 7)

Petitioner followed-up with Dr. McNally on December 22, 2011. At that time, the doctor recommended a lumbar discogram and continued Petitioner's off work status. (PX 7) Petitioner testified that Dr. McNally's recommendation has not been authorized by Respondent.

On February 1, 2012 Petitioner returned [*19] to Dr. Freedberg with left ankle pain complaints. Dr. Freedberg ordered an MRI. (PX 7) The MRI was performed on February 22, 2012. (PX 8) On February 27, 2012, Dr. Freedberg noted the MRI didn't indicate any surgical indications. The doctor recommended permanent restrictions for the ankle and that he should continue with Dr. McNally for his back pain. (PX 7)

As of the date of trial, Petitioner testified that he was under a 20-pound weight restriction for the left ankle by Dr. Freedberg and instructed to be off work completely by Dr. McNally for his back. Petitioner provided that his back pain is worse from when he last saw Dr. McNally. He has pain from the low back down his left leg to the knee. He continues to wear a lumbar brace on his waist. He continues with pain his ankle and says that he cannot walk as well and does not feel as strong. He has continued pain in his left knee similar to the ankle. He takes over the counter medications for all of his pain and continues the home exercises for his back. He wants the back surgery, if it is still prescribed after the discogram.

Petitioner testified that he never had any back pain, left ankle pain, left thigh pain or left knee pain [*20] or any medical treatment for any of these conditions before the accident in this case.

At the time of hearing on direct Petitioner testified that he had five (5) dependents living in his household. When questioned on cross-examination, Petitioner could not name all five children nor provide their ages and dates of birth. However, Petitioner did testify that he did have three (3) minors with one turning 18 last year.

Respondent had the chiropractic charges of West Chicago Chiropractic undergo a Clinical Peer Report and Utilization Review. A report was issued on June 14, 2011. In this report, the Utilization Review noted that Petitioner undertook eight-eight (88) visits of chiropractic manipulations to the low back with up to five (5) PT modalities to the low back, left knee and left ankle from November 22, 2010 through May 31, 2011. Dr. Reese Polesky is the Board Certified Orthopedic Surgeon who reviewed the prior treating records which focused on the chiropractic care. Dr. Polesky opined that the treatment to Petitioner should have been modified and certified six (6) visits of chiropractic manipulations to the low back with up to five (5) PT modalities to the low back, left knee and [*21] left ankle. The Utilization Review report noted that purely passive modalities are never appropriate and that ODG guidelines indicate that one month of chiropractic treatment is sufficient when a diagnosis of lumbar strain is made. (RX 5)

Petitioner called Dr. David Freeland, D. C. live at trial, who is a doctor of chiropractic. R 125. He testified to his schooling, experience and license and certifications, a summary of which was entered into evidence by his CV. He described the composition of patients he treats being trauma from car accidents and work injuries. (PX 59) He explained that as a chiropractor he is trained and licensed to treat the entire musculoskeletal system including the spine, all joints and extremities including ankles, knees, wrists, etc.

Dr. Freeland testified that his license and training affords him the same tools as a licensed physical therapist, for all passive therapies such as electrical stimulation, moist heat, ultrasound, and light therapy. He described rehabilitation protocols (active therapy) such as Therabands, weight machines, dumbbells, wobble boards, and rocker boards. His clinic has all of this equipment and he frequently provides therapy treatment [*22] on referral by physicians. The doc-

tor provided that his license and training affords him both the ability to provide conventional physical therapy and to initially diagnose and prescribe it.

Dr. Freeland testified that he came to see Petitioner as a patient on November 22, 2010. He recounted the history that Petitioner slipped on a piece of greasy metal, fell and broke both sides of his left ankle, striking his back, consequently causing immediate pain to his left ankle, knee and back, resulting in radiating anterior thigh pain and difficulty sleeping. Dr. Freeland diagnosed Petitioner with left ankle fracture, lumbar spine strain, muscle spasms and sciatica.

Dr. Freeland testified that he prescribed a plan of chiropractic manipulation to the spine only, complimented by electrical interferential stimulation, deep tissue, moist heat and rehabilitative protocols, and the same for the ankle and knee except no chiropractic manipulation. Ultimately, on November 24, 2010, the doctor referred Petitioner to Dr. Freedberg, an orthopedic surgeon, who would manage all of Petitioner's care from that point on.

Dr. Freeland testified that Petitioner was discharged from all care at his clinic on [*23] October 17, 2011. He stated that Petitioner had received maximum benefit to the ankle and knee and the back had plateaued. Dr. Freeland provided that the back was more difficult to treat stating, "we had ups and downs." He indicated that the goal was to keep the back stabilized and to decrease the sciatic pain. The doctor provided that after getting the MRI and EMG studies, it was determined that Petitioner was no longer a candidate for conservative chiropractic care and he became a candidate for surgery. The doctor noted that the ankle resolved very well. Dr. Freeland added that when he last saw Petitioner, he continued with low back pain and shooting left leg pain. This radicular pain was consistently present throughout care.

Dr. Freeland explained how each day of his notes reflects the efficacy of treatment, the specific modalities rendered and to which body parts, using codes and abbreviations. His bills are reflected in PX 16 (back treatment) and PX 15 (ankle and knee).

Dr. Freeland identified PX 26 as being a selected portion of Petitioner's Exhibit 63, which contains an itemization of his unpaid bills and payments to date by Respondent. He provided that the ankle and knee care [*24] is pure physical therapy modalities with no CPT charges for any chiropractic care (PX 15). For the back, only one CPT code 98941 is for a chiropractic adjustment, with the other codes being pure therapy modalities (PX 16).

Dr. Freeland acknowledges receipt of the Utilization Review report and his right to challenge the opinion and appeal the decision. He testified that he did not consider it stating that doing so was "a waste of his time." Dr. Freeland further testified that he did not believe the statement that chiropractic manipulation should be discontinued if it does not improve the patient's condition within three to for weeks. He concluded that he did not agree with the national standards as elicited in the ODG guidelines as well as the ACOEM guidelines.

The UR reviewer for the West Chicago Chiropractic care of 11/22/10-5/31/11, Dr. Polesky, was deposed. RX 5, RX 12. Dr. Polesky testified that he was asked to provided an Utilization Review of chiropractic care over a period of time from November 2010 through March 2011. After reviewing documentation provided he generated a report certifying five (5) modalities to the low back, or six (6) sessions. The doctor indicated that the [*25] recommendation was based on the ODG and ACOME guidelines. He provided that the report is an expression of the application of the ODG and ACOEM manuals to the records, not a reflection of his own personal opinions. He does not necessarily agree with the manual guidelines himself. While he cited to both, he is only trained in understanding one manual, being the ACOEM because his state adopted it in work injury cases. RX 12, p. 29. As for the ODG, he does not know if any practitioners use it for standard of care. RX 12, p. 31. The doctor indicated that he rarely uses the ODG to determine treatment in his private practice. RX 12, p. 34. He clarified that his opinions in this report are "isolated to what the guidelines say with respect to chiropractic manipulation in these records as it pertains to the back only." RX 12, p. 59-61, L23-6. He said he is giving no opinions as to the "physical therapy to the knee or ankle." RX 12, p. 61 L1-5. He has "no opinions in this particular case in connection with the physical therapy treatment, ... [he is] only giving opinions in regards to the chiropractic manipulation." RX 12, p. 53, L 3-8. He has "not by this report intended to give any opinions [*26] as to utilization or review of the pure physical therapy modalities in these records." RX 12, p. 53, L9-16. His "only opinion is in connection with what would be the ICD-9 coded treatment known as chiropractic manipulation." RX 12, p. 53, L21-24.

Dr. Polesky agreed that the mandate of utilizing the ODG according to its author is that it is "just a guideline, not inflexible prescriptions, and they should not be used as sole evidence for an absolute standard of care...[and] cannot take into account the uniqueness of each patient's clinical circumstance." RX 12, p. 56. He further agreed "within reason"

that "a physical therapist's judgment is always a consideration in determining the appropriate frequency and duration of treatment." RX 12, p. 56.

With respect to (F.)Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accidental injury he sustained on October 7, 2010 consisting of a bi-malleolar fracture of his left ankle, a strain of his left knee and a lumbar sprain and a L5-S1 disc herniation, and further that this trauma [*27] caused his condition of a previously asymptomatic degenerative lumbar spine to become symptomatic.

The Arbitrator relies on Petitioner's un-rebutted and credible testimony of the mechanism of his injury which supports a left ankle fracture, left knee strain and an injury to his lumbar spine, being that he fell with his full body weight contacting his lower back with a ridged edge of a piece of standing lumber after an immediate fracture of both sides of his left ankle. This combines with the fact of ongoing and consistent complaints involving his back, radiating pain into his leg and positive exam findings reported by his physicians, as well as the undisputed fact of his ankle fracture and knee strain. Moreover, Petitioner testified that before he fell in this case, he never had any left ankle, knee or back pain and never saw a doctor for any condition related to these body parts.

All early charted histories and complaints consistently support the undisputed left knee and ankle injuries as well as the back injury. Petitioner's Exhibit 64 is an extrapolation of the early treatment records and histories. PX 64. These are portions of PX 1, 2, and 3 consisting respectively of the City [*28] of Aurora ambulance record, the Provena Mercy Hospital emergency room record and the chart of Respondent's work clinic, Tyler and Dr. Suchy. These highlight the fact of the back injury along side of the uncontested left knee and ankle injuries.

The ambulance record is consistent with Petitioner's testimony that the medics only focused on his left ankle as all entries are exclusively discussing that condition and do not comment on the presence or lack of any other injury. The emergency room record is also consistent with Petitioner's testimony that there, he was ask to list all of his complaints from the accident as Page 2/31 (PX 64) includes "pain to ... lower back/coccyx." Page 4/31 recites "mild low back pain ... fell on back." PX 64. Page 5/31 shows the lumbar spine was x-rayed and under "Impression/Diagnosis" "left knee pain [and] low back pain" is included. PX 64; see also P 6/31. On Page 7/31 a "Work Status" sheet was issued at Provena and under "Diagnosis" it is written "Left knee and low back pain" as well as results written for the x-rays of both these body parts. PX 64. Page 8/31 is an x-ray report for the "lumbar spine" which recites a history of "low back pain after fall." [*29] PX 64.

Page 9/31 is the Form 1500 for the initial visit of October 8, 2010 at Tyler Medical Clinic and it is coded with "left knee sprain" and "Pain, back (low, lumbar) for billing purposes and the box "Yes" is checked for "Is Patient's Condition Related to Employment." PX 64. On Page 10/31 the Tyler initial history does not recite anything but the ankle fracture, but on the 2nd page (11/31), under "Diagnosis" it clearly records "left knee sprain, and low back pain -- all secondary to a fall." PX 64. Page 12/31 is a Tyler "Notification of Worker's Compensation Referral" to Dr. Suchy that re-counts "... Left knee sprain, and low back pain all secondary to fall." PX 64. On Page 13/31, the Tyler work restriction form, it lists the numbered diagnoses to include "... 2. Left knee sprain 3. Low back pain." PX 64. The next pages of PX 64 (P 14-20/31) are the ensuing visits at Tyler for October 14, 21 and November 11, 2010, none of which mention in the chart notes anything about Petitioner's ongoing left knee and low back pain, yet all the Form 1500's code that each visit is for these conditions. PX 64.

Consistent with Petitioner's testimony, on November 15, 2010, his first therapy visit [*30] at Tyler charts that "[h]e reports his low back has been bothering him, but he has not received treatment for that....He states that the LBP came from the fall." PX 64, P 21/31.

The Arbitrator also relies on the fact of ongoing consistent and credible reports by Petitioner of the history and his complaints in later medical records. In pages 26-31/31 of PX 64 is the handwritten history taken by Dr. Freeland on Petitioner's first presentation to West Chicago Chiropractic on November 22, 2010. It recites a secondary diagnosis of "lower back pain" (P 26/31), and on Pages 27-28/31, it states "constant pain -- all ADL's increase pain to LBP, Left LE anterior thigh pain to knee, rated 8/10 at worse. Sharp -- burning pain both leg and back. No prior history of LBP -- ankle pain -- anterior thigh pain b/f accident. Left knee pain also noted -- rated 8/10. Sporadic -- not constant." PX 64. On Pages 29/31 it lists the positive low back findings on exam and on Page 31/31 it lists a lumbar sprain strain and "sciatica" as part of the diagnosis. PX 64.

On Petitioner's first presentation to Dr. Freedberg, his orthopedic surgeon, on November 24, 2010 the record states chief complaint is "left ankle [*31] and low back injury" and the history is consistent with Petitioner's testimony that "area wet and slick, slipped and foot rolled laterally and then medially, and he lost his balance and fell backwards. Felt pain immediately in ankle and lower back." PX 7. The "Plan" is set forth in 3 paragraphs, the first and second of which refer respectively to the back and left knee.

Dr. Freeland diagnosed Petitioner with left ankle fracture, lumbar spine strain, muscle spasms and sciatica. He verified objective findings on full orthopedic clinical exam. He formed the opinion that the complaints of low back pain, leg pain, thigh symptoms, left knee pain and left ankle fracture were all as a direct result of his slip and fall and subsequent ankle fracture.

Dr. Freedberg opined on each of the work status reports he issued after every visit that Petitioner's "2. Left knee sprain 3. DDD L5-S1" were "related to work". PX 7. These reports contain an "X" in the box for work relatedness and the corresponding entry of the diagnosis referred to, and were issued after every visit to Dr. Freedberg. All 1500 forms for all treatment for the back, left knee and left ankle are all coded "Employment related."

Dr. [*32] McNally opined in the record of his first visit on August 2, 2011 "The work related injury of October 7, 2010 did not cause the degenerative changes in the patient's lumbar spine. The L5-S1 disc herniation seen on the lumbar MRI is consistent with the history of his trauma. To a reasonable degree of medical and surgical certainty, the work related injury on October 7, 2010 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, caused them to become symptomatic and require treatment." PX 7. Dr. McNally also opined after every visit on his work status reports that his recited diagnosis of "Lumbar disc displacement" was "related to work." PX 7.

On June 14, 2011 Petitioner was examined and a history was taken by Dr. Morgan at the pain clinic, Chicago Pain and Orthopedic Institute. His Patient Quick Report is expressed "L-discogenic; L/S radiculopathy; L-facet" and "work-related injury."

Dr. Miller, Respondent's Section 12 examiner, reported on March 13, 2011 that his diagnosis was "left bi-malleolar ankle fracture and low back pain most likely secondary to degenerative disk disease. I cannot rule out low back sprain." See RX 3, Par. [*33] 1. He goes on to state, "...clearly documented low back complaints of the emergency room and Tyler ... were nothing more than minimally positive." The doctor's statement acknowledges that there were "positive" signs of at least a back strain, which he explicitly does not rule out.

When specifically asked about causal connection Dr. Miller says "there is completely insufficient evidence to substantiate a causal relationship between his current condition and the accident in question. There is evidence to support he may have suffered a lumbar spine sprain in the accident in question, but his current complaints are non-physiologic and cannot be explained based upon a simple lumbar spine sprain." See RX 3, Par. 2. Again, Dr. Miller confirms "evidence" of a lumbar injury without saying whether he thinks there was one or not. As to the "current compliant" being non-physiologic, he does not explain how this can be so, nor why he disagrees with the work clinic, Dr. Freeland, and Dr. Freedberg that that exam findings verily such an injury and that it warrants the treatment they are providing. As such, the IME's opinions is not persuasive.

The Arbitrator notes that Dr. Miller says Petitioner [*34] showed "multiple Waddell signs," but he does not say which Waddell signs, how many, nor how they make all of his back complaints non-physiologic. Dr. Freeland explicitly disagreed that any of Petitioner's complaints were "a non-physiologic pain syndrome".

Lastly, Dr. Miller's opinions are stale as the doctor has not had the benefit of any subsequent medical treatment, exam findings, MRI or EMG findings or the opinion of Dr. McNally.

The Arbitrator finds the opinions of the treating physicians are more persuasive and credible in light of the uncontested mechanism of injury, early and consistent complaints of Petitioner, tests and exam findings and relies on them to support his finding of causal connection.

With respect to (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, the Arbitrator finds as follows:

The Arbitrator finds that the care rendered to Petitioner for his back, left knee and left ankle was reasonable and necessary to treat his injuries and relies on the following opinions and facts and therefore awards Petitioner the medical bills [*35] so claimed on his Exhibit 26 and detailed below.

Treater Opinions, Clinical Findings, MRI, EMG, Lumbar Shots.

Dr. Freeland opined that all of the therapy that was prescribed by Dr. Freedberg for the ankle, knee and back as well as the chiropractic care he himself rendered to Petitioner's back was clinically warranted and necessary to cure Petitioner from his injuries caused by his fall at work.

Dr. Freeland summarized the results of therapy to contain ups and downs on the back, while achieving the goal of stabilizing this condition by preventing the pain and sciatica from increasing in intensity or frequency. He explained that the other goal was to avoid surgery for the back. As for the ankle and knee, they were successful in that they resolved very well.

Dr. Freeland amplified that it was significant that Petitioner had this second surgery (removal of hardware June 2011) because most of the progress he had gained in the ankle, was lost and had to be re-gained in a second period of rehab. He also explained that in a case of this magnitude involving multiple surgical interventions, crutches, canes, supportive boots etc., it was expected the patient would have ups and downs for [*36] the back during therapy. Furthermore, the interplay between the back pain and the abnormal gait caused by the various stages of the ankle condition and use of the walking devices, complicated the treatment duration of the back.

Dr. Freedberg prescribed all the care with Dr. Freeland, necessarily believing it to be necessary and reasonable. As of his initial visit he prescribed "therapy with Dr. Freeland to include heat and ice," and advised Petitioner "to use support bracing with possible steroid injection and he was given a back brace per his request." PX 7. He performed regular systematic exams and assessments on a 4-6 week interval before prescribing any further such treatment. PX 7. He ultimately prescribed the lumbar MRI and explained his reasoning in doing so, and the pain clinic treatment by way of injections and the EMG and ultimately his decision to refer Petitioner to Dr. McNally. It bears noting that the MRI of the lumbar spine was delayed due to Respondent denying approval. As such, the pain clinic trials were delayed as well as all further work up.

The therapy records demonstrate ongoing passive and active therapies at West Chicago Chiropractic with Dr. Freeland, ups and [*37] downs in his recorded symptoms, a lumbar MRI performed on May 11, 2011, two lumbar injections, one on June 14 and one on July 5, 2011, and a referral ultimately by Dr. Freedberg to his partner a spine surgeon, Dr. McNally.

The MRI report of May 11, 2011 reads "History: Low back pain, work injury with left leg radiculopathy" and the result was "Central protrusion at L5-S1." PX 8. On his final visit for pain management on July 15, 2011, the two epidural injections were deemed ineffective and he was returned to the care of Dr. Freedberg. PX 10; see also PX 11. The EMG of August 15, 2011 was read as "abnormal" consistent with "multilevel lumbosacral radiculopathy, more prominent at level L3-4, on the left and bilateral L4-5 and L5-S1 levels." PX 12.

After the LESI's of June and July, 2011 failed, Petitioner came to see Dr. McNally on August 2, 2011 who ordered the EMG "to confirm the suspected lumbar radiculopathy" and discussed the possibility of surgery and gave Petitioner informational material for this purpose. PX 7. On September 8, 2011 he followed up with Dr. McNally who "discussed that although the patient had two prior lumbar epidural steroid injections without significant relief, [*38] we feel that an additional injection specifically to the L4-5 level would be helpful for diagnostic and therapeutic purposes." PX 7. Dr. McNally said that "we do not believe he will find much relief from a L4-5 discectomy surgery at this time. The patient has the option of undergoing a fusion surgery to treat his back pain...." PX 7.

Petitioner last saw Dr. McNally on December 22, 2011 who prescribed a lumbar discogram "of L5-S1 and 1 to 2 control levels, in order to determine if the L5-S1 level reproduces the patient's back pain....if there is concordant pain at the L5-S1 level, with non-concordant pain or no pain at the control level(s), then performing an L5-S1 fusion would have a greater chance of providing him some relief of his back pain."

The above treatment course reasonably starts out with a complicated injury of back and ankle and progresses through conservative efforts, a 2nd surgery on the ankle causing a set back in ankle therapy, then an MRI, pain clinic trials, a referral to a spine surgeon, a positive EMG leading to a need to consider spine surgery subject to a discogram. This is all reasonable and supported by positive objective findings.

Respondent's IME and UR [*39] Reports.

In rebuttal to the care rendered to Petitioner, Respondent offered four (4) utilization reviews performed (RX 5):

6/14/11 Treatment at West Chicago Chiropractic 11/22/10-5/31/11
(88 visits for the back, left knee and left ankle) -- Certified
6 visits.

6/28/11 Lumbar spine x-rays 11/24/10; 12/16/10; left knee x-ray 11/24/10;
left ankle x-ray 11/24/10; 1/13/11; Lumbar MRI requisition
1/13/11 (performed 5/11/11); steroid injection left knee 3/10/11
As to each: Certified NONE.

1/17/12 LESI 6/21/11; Lumbar Facet Injection 7/5/11
As to each: Certified NONE

1/19/12 Treatment West Chicago Chiropractic 6/9/11-10/17/11
(57 visits for the back, left knee and left ankle) --
Certified 21 visits to Left ankle only

The UR reviewer for the West Chicago Chiropractic care of 11/22/10-5/31/11, Dr. Polesky, was deposed. RX 5, RX 12. He clarified that his opinions in this report are "isolated to what the guidelines say with respect to chiropractic manipulation in these records as it pertains to the back only." He said he is giving no opinions as to the "physical therapy to the knee or ankle." He had "no opinions in this particular case in connection with the physical therapy [*40] treatment, ... [he is] only giving opinions in regards to the chiropractic manipulation." He has "not by this report intended to give any opinions as to utilization or review of the pure physical therapy modalities in these records." His "only opinion is in connection with what would be the ICD-9 coded treatment known as chiropractic manipulation." As such Respondent offers no review of ankle or knee treatment or this period by this provider nor of the therapy modalities to the back for 11/22/10-5/31/11.

Dr. Polesky explained that his report is an expression of the application of the ODG and ACOEM manuals to the records, not a reflection of his own personal opinions. In fact, he does not necessarily agree with the manual guidelines himself. While he cited to both, he is only trained in understanding one manual, being the ACOEM because his state adopted it in work injury cases. As for the ODG, he does not know if any practitioners use it for standard of care. He rarely uses the ODG to determine treatment in his private practice. Dr. Freeland also said neither he nor any physician he knows of uses the manuals to determine standard of care.

Dr. Polesky agreed that the mandate of utilizing [*41] the ODG according to its author is that it is "just a guideline, not inflexible prescriptions, and they should not be used as sole evidence for an absolute standard of care...[and] cannot take into account the uniqueness of each patient's clinical circumstance." He further agreed that the author admonishes that "a physical therapist's judgment is always a consideration in determining the appropriate frequency and duration of treatment."

Also the conclusions of these report that no MRI, no EMG and no spinal injections were certified based on these guidelines seems incredible. These same reports assign only 6 therapy visits for the ankle before the second surgery and 21 after, which based on the degree of fracture and two surgeries, is incredible.

Dr. Freeland also pointed out that even Respondent's own IME disagreed with the manuals' guidelines for therapy. Specifically on Page 5 of the IME's report (RX 3) he opined that as of March 13, 2011, the date of his report, Petitioner still needed more therapy to strengthen the ankle. In so doing the IME sanctioned the therapy so far which had been for 5 months and was recommending more. The IME envisioned that Petitioner should remain off [*42] work for "at least" another 6 - 9 weeks, necessarily requiring "at least" this much therapy.

Dr. Miller is asked to comment on "the bills," and on this point he speaks only in reference to the bills of Dr. Freeland and only as they pertain to the care for the back, and states "current guidelines initially allow for 1 month of chiropractic treatment for lumbar spine sprains.... Therefore...only the 1st month of Dr. Freeland's care can be justified. The multiple passive modalities cannot be justified... I can [sic] either confirm or deny the appropriateness of the exercise program." See RX, Par. 5. Thusly, he offered no criticism of the bills or treatment of Dr. Freeland for the therapy on the ankle and knee, nor of any care rendered Dr. Freedberg to that date, which include the prescription for all care rendered by Dr. Freeland.

Unpaid Medical Bills.

Petitioner submitted a list summary and the actual unpaid medical bills for each provider computed according to the Fee Schedule as Petitioner's Exhibit 26. The PX 26 shows credit for Respondent's payments up to a certain point, but Respondent has placed into evidence RX 14, which its lists some checks issued so recent that they were [*43] not yet confirmed received or cashed by the date of hearing. The parties have stipulated that the balances per the Fee Schedule (referring to Petitioner's Exhibit 26) after giving Respondent all due credit for the recent payments, is as follows:

11/23/10-10/17/11	West Chicago Chiropractic/Dr. Freeland [Ankle]	$ 15,138.28
11/22/10-10/17/11	West Chicago Chiropractic/Dr. Freeland [Back]	$ 32,108.68
10/24/10-10/24/11	Prescription Partners	$ 11,438.12
11/24/10-2/27/12	Suburban Orthopedics/Drs. Freedberg [Ankle]	$ 9,588.73
11/24/10-2/27/12	Suburban Orthopedics/Dr. McNally [Back]	$ 5,443.34
5/11/11; 2/22/12	Suburban MRI [Lumbar] [ankle]	$ 2,884.22
6/14/11-7/15/11	Chicago Pain & Orthopaedics [Back]	$ 1,139.82
6/21/11-7/5/11	Pinnacle Pain Management [Back]	$ 3,969.55
6/21/11-7/5/11	Accredited Ambulatory Care [Back]	$ 13,139.76
4/15/11	Neurodiagnostics [EMG Back]	$ 2,392.51

By reason of the above, the Arbitrator orders that Respondent pay to the Petitioner the sum $ 97,230 as and for the foregoing unpaid medical bills.

With respect to (K.)Is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner [*44] is entitled to receive all the medical care prescribed by Dr. McNally, including the discogram and the fusion surgery, should Dr. McNally still deem it recommended after the discogram, and any treatment that is reasonable and necessary to recover from the surgery. The Arbitrator finds that Dr. McNally's opinions and treatment recommendations are reasonable and necessary to cure or relieve the Petitioner from the effects of the accidental injuries in these claims.

Respondent offers no rebuttal expert testimony specifically addressing Dr. McNally's prescription for the discogram or possible surgery, nor addressing Dr. McNally's basis being the course of care to date, results from prior shots, findings on MRI and EMG and the current and ongoing physical complaints of Petitioner. The Arbitrator does not find the opinion of Dr. Miller of March of 2011 that Petitioner merely suffered a back strain to be credible.

With respect to (L.)What temporary benefits are in dispute, the Arbitrator finds as follows;

Based on the findings in F, J and K above the Arbitrator finds that the Petitioner was temporarily totally disabled as of October 8, 2010 through the date of hearing being September [*45] 6, 2012.

While Dr. Freedberg released him from care on October 24, 2011 for the ankle, Dr. Freedberg still prescribed permanent light duty restrictions for him by way of no lifting more than 20lbs, no stooping, bending, squatting, kneeling, climbing, etc. per his Work Duty Status slip. PX 7. Respondent therefore owed at least maintenance and vocational rehab at that point, even if the back condition was contested. Then again, Petitioner presented new in February due to increased symptoms in his ankle and Dr. Freedberg took him off work completely and ordered an ankle MRI. After Dr. Freedberg reported no operable lesions on the MRI as of February 27, 2012, he continued to issue the same light duty restrictions.

At that point, the Petitioner was prescribed off work completely by Dr. McNally who had ordered a lumbar shot by Dr. Lipov and by December 22, 2011 a discogram and possible surgery. This restriction remains today without release, pending the further work up and possible surgery.

With respect to (O.) Petitioner's number of dependents, the Arbitrator finds as follows:

Respondent has additionally placed in dispute the number of alleged dependents of Petitioner.

At the [*46] time of hearing Petitioner testified that he had five (5) dependents living in his household. When questioned on cross-examination, Petitioner could not name all five children nor provide their ages and dates of birth. Nevertheless, Petitioner did testify that he did have three (3) minors with one turning 18 last year.

Based upon Petitioner's own testimony that he had three (3) dependents being with him at the time of the accident, Arbitrator hereby amends the Application and finds that Petitioner's minimum temporary total and permanency rates shall be $ 319.00.

With respect to (M.) Should penalties and fees be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that a legitimate dispute existed with respect to the severity of Petitioner's low back condition of ill-being and any treatment associated thereto. As such, Petitioner's request for penalties is hereby denied.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesNormal ExertionWorkers' Compensation & SSDICompensabilityInjuriesPreexisting Conditions

1 of 7 DOCUMENTS

ROBERT BORAK, PETITIONER, v. ASSOCIATED GLAZIERS, RESPONDENT.

NO. 09WC 36999

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

13 IWCC 998; 2013 Ill. Wrk. Comp. LEXIS 982

November 21, 2013

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, vocational rehabilitation and maintenance benefits 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 Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).*

The Commission modifies the Arbitrator's Decision finding that Petitioner failed to prove entitlement to vocational rehabilitation and therefore also failed to prove entitlement to maintenance benefits and vacates those awards. In *National Tea v. Industrial Commission, 97 Ill.2d 424, 454 N.E.2d 672 (1983),* [*2] the Illinois Supreme Court found that generally, "a claimant has been deemed entitled to rehabilitation where he has sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. (*Sidel v. Travelers Insurance Co., 205 Neb. 541, 288 N.W.2d 482 (1980)).* Related factors concern a claimant's potential loss of job security due to a compensable injury (*Aldrich v. Cianbro Corp., 387 A.2d 744 (Me.1978)),* and the likelihood that he will be able to obtain employment upon completion of his training. (*Lancaster v. Cooper Industries, 387 A.2d 5 (Me.1978)).*" Other factors considered by the Court to be appropriate are, "the relative costs and benefits to be derived from the program, the employee's work-life expectancy, and his ability to motivate and undertake the program, [and] his prospects for recovering work capacity through medical rehabilitation or other means. (*Lancaster v. Cooper Industries, 387 A.2d 5, 9 (Me. 1978).*" The Arbitrator noted that neither party offered into evidence [*3] an opinion of a vocational rehabilitation counselor regarding the appropriateness of a vocational rehabilitation program in this case. The Commission notes that it is Petitioner's burden to prove his case. The Commission notes that Petitioner presented no evidence that vocational assistance would increase his earning capacity or that vocational assistance was required to secure work. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's awards of vocational rehabilitation and maintenance benefits are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 981.90 per week for a period of 144-5/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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 [*4] notes that Respondent paid $ 127,647.00 for TTD benefits.

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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 14,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Robert Borak
Employee/Petitioner

v.

Associated Glaziers
Employer/Respondent

Case # **09** WC **36999**

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **3/15/12 and 8/14/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings [*5] to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
L. [X] What temporary benefits are in dispute?
[X] Maintenance
[X] TTD
O. [X] Other **Should Respondent be required to provide vocational rehabilitation?**

FINDINGS

On the date of accident, **6/26/09**, 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 $ **76,588.20**; the average weekly wage was $ **1,472.85**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $ **127,647.00** for TTD, $ **0** for [*6] TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **127,647.00**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ **981.90**/week for **144-5/7** weeks, commencing **7/16/09** through **4/23/12**, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $ **981.90**/week for **16-1/7** weeks, commencing **4/24/12** through **8/14/12 (the date of the hearing),** as provided in Section 8(a) of the Act.

Respondent shall provide vocational rehabilitation to the Petitioner, including all maintenance costs and expenses incidental thereto as provided in Section 8(a) of the Act.

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, [*7] 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

2/6/13

Date

FINDINGS OF FACT

The Petitioner, Robert Borak, was employed as a union glazier for the Respondent on June 26, 2009. The Petitioner's job as a glazier involved installing metalwork and glass. The Petitioner worked on lifts and ladders. He lifted weights without help up to 65 lbs. He used hammers, drills and screw guns in his job. The job of glass installation required the Petitioner to bend, squat, and lift.

On June 26, 2009, the Petitioner was carrying glass which weighed 147 lbs. with another co-employee. The terrain consisted of dirt and rocks. A plank was placed over a hole in the ground. The Petitioner and the co-employee carried the glass, and the weight of the glass shifted causing the Petitioner's right leg to go into the hole. The Petitioner [*8] testified that his right leg was bent sideways and he felt pain.

The Petitioner continued working until July 16, 2009. At that time, the Petitioner saw Dr. Regan at Southside Orthopedics. He advised the doctor that he had twisted his right knee at work three weeks earlier and had pain and swelling. Dr. Regan sent the Petitioner for an MRI which showed a tear of the ACL with buckling of the PCL (Px. # 1).

Dr. Regan subsequently performed right knee surgery on August 12, 2009 at Palos Community Hospital. The post-operative diagnosis was a torn medial meniscus and torn ACL and PCL (Px. # 1). Following the surgery, the Peti-

tioner underwent physical therapy at Heights Physical Therapy and Sports Institute. However, the Petitioner continued to have problems.

The Respondent sent the Petitioner to Craig Westin for a Section 12 examination on December 11, 2009. Dr. Westin felt that further surgery was appropriate (Px. # 7). The Petitioner returned to Dr. Regan and underwent a second surgery for an ACL reconstruction on February 24, 2010 (Px. # 1). Following the second surgery, the Petitioner again started therapy at Heights Physical Therapy and Sports Institute. Although the Petitioner made [*9] some improvements, he continued to have on-going problems with his leg.

On October 25, 2010, Dr. Regan noted that the Petitioner was still having difficulty with rehabilitation and pain and recommended another MRI. The Petitioner underwent the MRI on November 5, 2010, which showed post-surgical changes of the ACL repair and post partial medical meniscectomy without a definite re-tear. There was concern about a Cyclops lesion (Px. # 1).

The Respondent sent the Petitioner for a Section 12 examination with Dr. Brian Cole on December 16, 2010. Dr. Cole felt that the Petitioner needed additional surgery to remove the adhesions which had developed (Px. # 4). The Petitioner then elected to treat with Dr. Cole.

The Petitioner underwent a third surgery to his right knee at Rush Medical Center on April 13, 2011. Dr. Cole performed an arthroscopy for a suprapatellar pouch release, plica excision, anterior Cyclops lesion excision, and a manipulation under anesthesia (Px. # 4).

The Petitioner started physical therapy following the third surgery. He began treating at Orland Therapy Specialists.

The Petitioner returned to Dr. Cole on July 21, 2011. Petitioner complained of medial joint line pain [*10] and discomfort with weight-bearing activities as well as some stiffness. Range of motion was 0 to 130 degrees with no effusion noted. The doctor discussed with him, on that date, three separate options:

1. Living with the pain.

2. Attempting to return to work with this pain.

3. A possible medial meniscal transplant with only a 50/50 chance of a guarantee that he may be able to return to construction type work.

Once given these three options, Petitioner questioned the doctor about the possibility of permanent restrictions.

The Petitioner admittedly made no attempt to return to work for Respondent in the performance of his glazier activities. In fact, he acknowledged that the Respondent shut its doors and is no longer in operation.

Dr. Cole, on July 21, 2011, felt that the Petitioner could only perform desktop activities at that time.

The Petitioner acknowledged on cross-examination and redirect that during the years of 2011 and 2012 from late April into July he would be a coach for his daughter's softball team for the 14 game regular season schedule and playoffs. He indicated that he would warm up, on occasion, three pitchers during the course of a game each, for 10 minutes [*11] each, for a total of 30 minutes.

The Respondent sent the Petitioner to Dr. Karlsson at M&M Orthopedics for a Section 12 examination on August 22, 2011. Dr. Karlsson reviewed the records of treatment, including the operative reports and MRI studies. Dr. Karlsson noted that it would be difficult for the Petitioner to carry on his regular duties through July 14, 2009 and to engage in fast-pitched batting practice for several weeks if, in fact, he sustained such injury on June 26, 2009. Dr. Karlsson indicated the MRI findings could be either chronic or acute. The doctor believed the patient likely had a chronic partial ACL tear that may have been made somewhat worse with the injury. Dr. Karlsson felt that the Petitioner could either proceed with an additional surgery or else he would be at maximum medical improvement. Although he indicated the Petitioner could be performing regular duties, he admitted there had not been a formal functional capacity evaluation (hereinafter "FCE") (Rx. # 13).

Dr. Cole then referred the Petitioner to Dr. Sporer regarding whether or not the Petitioner would need additional surgery. The Petitioner saw Dr. Sporer on November 11, 2011. Dr. Sporer was of the opinion [*12] that further surgery would not provide reliable benefit and, instead, recommended anti-inflammatories and steroid injections (Px. # 4).

The Petitioner returned to Dr. Cole on December 15, 2011 and was given a cortisone injection. He was also advised that he could return to work only with restrictions of no squatting, kneeling or climbing. Dr. Cole recommended Orthovisc injections if he did not improve.

The Petitioner returned to physical therapy on December 29, 2011. The therapist noted an antalgic gait pattern with decrease in right standing time, quadriceps atrophy and restricted range of motion (Px. # 3).

The Petitioner returned to Dr. Cole for two Orthovisc injections. On February 2, 2012, Dr. Cole recommended an FCE. He noted that the Petitioner could work with restrictions until this test had been completed.

The Petitioner underwent the FCE at Accelerated Rehab in Orland Park on April 6, 2012. The therapist noted that the Petitioner put forth a full effort and could function at a light-medium category of work indicative of a two hand occasional lift/carry of 38 lbs. from floor to waist and two hand frequent lift of 23 lbs. from floor to waist. The therapist noted that the Petitioner [*13] was employable but had significant limitations regarding kneeling, crawling, sustained squatting and ladder climbing (Px. # 5).

The Petitioner returned to Dr. Cole on April 23, 2012 at which time he felt the Petitioner had reached maximum medical improvement and could return to work but would have to modify his activities according to the FCE (Px. # 4).

The Petitioner was unable to return to work for Associated Glaziers. He testified that he was not allowed to return to work with restrictions. The employer eventually closed its doors.

The Petitioner testified that since his release from the doctor, he has conducted a job search (Px. # 6). He testified that he has done some odd jobs and has continued to look for work up through the date of the hearing.

The Petitioner testified that the week before the arbitration hearing, he went on a vacation where he engaged in fishing and boating activities.

Conclusions of Law

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

The Petitioner injured his right knee on July 16, 2009.

The Petitioner told all physicians, including Dr. Cole and Dr. Karlsson, that he never had any prior injury to the right knee. [*14] The Petitioner also testified on direct examination that he never had any prior injury or treatment relative to the right knee.

It was established on cross-examination that the Petitioner was seen at Palos Community Hospital on February 24, 2004 with a history of twisting his right knee between boxes on February 23, 2004 and having complaints to the inside of the knee with occasional movements. He was noted to be wearing a knee brace at that time. Physical examination revealed slight swelling with pain over the medial collateral ligaments. The Petitioner was instructed to use the knee sleeve and was prescribed Anaprox and to wear his knee sleeve at work and perform activity as tolerated. X-rays of February 25, 2004 showed moderate sized joint effusion noted on the lateral view.

At the time of the injury in 2004, the Petitioner was employed at Associated Glaziers, and only received emergency room treatment. He had no follow-up care with a doctor and never underwent any type of MRI. He returned to full, unrestricted work for his employer a few days after the injury of 2004.

There was no evidence that the Petitioner sustained any further injury to the right knee between 2004 up through [*15] the time he injured his right knee on June 26, 2009.

The Petitioner testified that on the date of accident, a co-employee stumbled and the weight of the glass he was lifting caused his right leg to go into a hole. His leg bent sideways and he injured his right knee.

The Petitioner sought treatment with Dr. Regan. He advised the doctor that he had twisted his right knee at work three weeks earlier and had swelling, pain and the feeling of the knee locking on him (Px. # 1). Dr. Regan felt the Petitioner had torn the medial cartilage.

The Petitioner subsequently underwent an MRI which showed a tear of the ACL and buckling of the MCL. Dr. Regan then performed surgery on August 12, 2009. The doctor repaired a torn medial meniscus as well as a torn PCL and MCL (Px. # 1). When the Petitioner did not improve, Dr. Regan performed a second surgery consisting of an ACL reconstruction.

The Respondent sent the Petitioner for a Section 12 examination with Dr. Craig Westin on December 11, 2009. Dr. Westin opined that the need for the reconstruction was appropriate. Dr. Westin noted that the problems began when the Petitioner injured his right knee on June 26, 2009 (Px. # 7).

The Petitioner subsequently [*16] underwent a third surgery with Dr. Cole. Dr. Cole reviewed all of the medical records and felt that this additional surgery would help with the Petitioner's anterior knee pain and flexion deficit.

The Respondent had the Petitioner evaluated by Dr. Karlsson. Dr. Karlsson felt that the surgery performed by Dr. Cole was causally related to the original injury. He further stated that the injury started a cascade of events which necessitated the initial surgery followed by the ACL reconstruction (Rx. # 13).

Following the third surgery and subsequent therapy, the Petitioner continued to experience problems. He was referred to Dr. Scott Sporer to determine whether an additional surgery was warranted. Dr. Sporer did not feel further surgery was needed but felt the Petitioner would benefit from anti-inflammatories and injections. The Petitioner did undergo a cortisone injection and two Orthovisc injections. Dr. Cole noted that the Petitioner did have a moderate response to the first two Orthovisc injections and therefore did not feel a third injection would be necessary (Px. # 4).

Following the injection, Dr. Cole stated that the Petitioner had reached maximum medical improvement and needed [*17] to undergo an FCE to determine his restrictions. Dr. Cole placed the Petitioner on restrictions until the functional capacity evaluation was performed. The Petitioner subsequently underwent the FCE on April 6, 2012. The therapist noted the Petitioner was employable, but had significant limitations regarding kneeling, crawling, sustained squatting and ladder climbing. The Petitioner returned to Dr. Cole after the FCE. The doctor felt that the Petitioner could return to work performing light to medium work with limited squatting, kneeling and climbing, and that he would have to modify his activities per the FCE.

The Petitioner did sustain an injury to his opposite knee in 2007. Petitioner settled his LEFT knee case (June 15, 2007 date of accident), for which he underwent surgery, for 18.75% loss of use of the left leg. (Rx .# 1)

However, there was no medical evidence presented to suggest that the Petitioner's inability to return to work as a glazier was due to the prior left knee injury. After the 2007 injury to the left knee, the Petitioner returned to work as a glazier, performing all his job duties, until he sustained the injury to his right knee on June 26, 2009.

The Petitioner [*18] admitted that he also coached softball for his daughter's team. However, the only activity he performed was underhand pitching. He would stand at a mound which was level to the ground. He testified that he did not run whenever he coached. There was no evidence to suggest that the Petitioner injured his right knee during the time he coached softball.

After reviewing the evidence, the Arbitrator concludes that the Petitioner's condition of ill-being necessitating three surgical procedures was causally related to the injury of June 26, 2009. The Arbitrator further concludes that as a result of the surgeries, the Petitioner now has permanent restrictions, which prevents him from returning to work as a glazier.

L. What temporary benefits are in dispute? TTD and maintenance.

The Petitioner began losing time from work on July 16, 2009. The Respondent and Petitioner stipulated that the Petitioner was temporarily totally disabled from July 16, 2009 to August 25, 2011. During this period of time the Petitioner underwent three surgical procedures.

The Respondent claimed that the Petitioner was no longer entitled to temporary total disability benefits after August 25, 2011 which was the date [*19] of the Section 12 examination with Dr. Karlsson at M&M Orthopedics. Dr. Karlsson was of the opinion that the Petitioner could return to work full duty as a glazier at that time, even though a formal FCE had not been done. However, the report of Dr. Karlsson also stated that a meniscal transplant was an option and the Petitioner would be off work if further surgery was performed.

The Petitioner was then referred to Dr. Sporer for an evaluation on whether further surgery would be appropriate. Dr. Sporer examined the Petitioner on November 11, 2011. Dr. Sporer did not feel that a joint arthroplasty would provide reliable benefit for the Petitioner and did not feel a unicompartmental or total knee replacement needed to be done. However, Dr. Sporer recommended anti-inflammatories and injections. Dr. Sporer did not comment on the Petitioner's ability to work.

When Dr. Cole examined the Petitioner on July 21, 2011, after he offered the Petitioner three options, Dr. Cole opined that the Petitioner should be restricted to desktop activities only and that he would need an FCE to determine his limitations.

The Petitioner then returned to Dr. Cole for additional treatment after his evaluation [*20] with Dr. Sporer on November 11, 2011. The Petitioner restarted physical therapy and underwent a cortisone injection followed by two Orthovisc injections.

On January 19, 2012, Dr. Cole wrote in his report that the Petitioner would still need a functional capacity evaluation regarding potential restrictions. He also stated that the Petitioner had not as yet reached maximum medical improvement.

The Petitioner underwent two Orthovisc injections. On February 2, 2012, Dr. Cole re-evaluated the Petitioner. At that time he reviewed the report of Dr. Karlsson. Dr. Cole disagreed with Dr. Karlsson. Although Dr. Cole felt that further treatment would not be needed, he felt that before a determination of full duty could be made, an FCE was necessary. Dr. Cole stated that since the Petitioner worked as a glazier, he needed to undergo this FCE.

The Petitioner subsequently underwent an FCE on April 6, 2012. The results of the FCE were valid, and were based on the injury to the right knee. The therapist noted that the Petitioner could only function at a light-to-medium category of work indicative of a two-hand occasional lift/carry of 38 lbs. from floor to waist and a two hand frequent lift of 23 [*21] lbs. from floor to waist. The therapist recommended that the Petitioner could return to work but he had significant limitations regarding kneeling, crawling, sustained squatting and ladder climbing tasks and was to avoid those positions in any future employment (Px. # 5).

The Petitioner subsequently returned to Dr. Cole following the FCE on April 23, 2012. At that time Dr. Cole noted that he was at maximum medical improvement and that he could return to work within the restrictions outlined in the FCE. He also noted that Petitioner would have to avoid sustained squatting, kneeling and crawling (Px. # 4).

The Petitioner testified that he was unable to return to work for the Respondent as a glazier. This was a union position and he was not allowed back to work unless he could perform full-duty without restrictions. The Petitioner further testified that the Respondent is no longer in business.

The Petitioner testified that following his release from Dr. Cole, he began looking for work and performing a job search. Petitioner did not commence the job search until April 16, 2012. The Petitioner's job search in April showed him searching for a job on only 5 days with 11 inquiries, 7 days [*22] in May with 13 inquiries, 7 days in June with 11 inquiries, 8 days in July with 25 inquiries, and 3 days in August with 14 inquiries. So, during this 130-day period of time, Petitioner only searched for a job on 30 days. He applied for jobs doing maintenance, bartending, warehouse, delivery driver, sales and security officer and testified that he felt physically capable of performing all job activities. The Petitioner submitted into evidence Petitioner's Exhibit # 6, which are various contacts the Petitioner has made since April 16, 2012.

In addition, the Petitioner worked odd jobs between April and July, 2012. The Petitioner testified that he was paid cash for the work he performed. The jobs lasted anywhere from one to three days at a time. In the month of April, the Petitioner earned $ 400.00 to clean and paint an apartment which took approximately three days. In the month of May, the Petitioner earned a total of $ 465.00 for work which covered a period of approximately four to five days. In the month of June, the Petitioner earned $ 50.00 for making one delivery. Finally, in the month of July, the Petitioner earned $ 225.00 to clean and paint an apartment which took approximately [*23] two days. Other than those amounts, the Petitioner has continued looking for work within his restrictions, and has remained unemployed.

The Arbitrator finds that the monies earned in these "odd jobs" were "occasional wages" and would not preclude a finding of benefits under the Act, since his employment was not in a stable, competitive labor market. Please see *Mechanical Devices vs. Indus. Comm'n, 344 Ill. App. 3d 752, 800 N.E.2d 819 (4th Dist. 2003),* and *Zenith Company v. Indus. Comm'n, 91 Ill. 2d 278, 437 N.E.2d 628 (1982).*

The Petitioner also admitted that he filed and received unemployment compensation. However, the fact that he obtained these benefits would not preclude a finding of maintenance benefits under the Workers' Compensation Act. Please see *Crow's Hybrid Corn Co. vs. Indus. Comm'n, 72 Ill. 2d 168, 380 N.E.2d 777 (1978).*

Although the Petitioner has not looked for work on a daily basis, his job search records show that he has contacted 75 prospective employers for jobs. His testimony revealed that he has been willing to perform odd [*24] jobs even though it is not steady employment.

The Petitioner has not received any assistance from the Respondent regarding job placement.

After reviewing the evidence, the Arbitrator concludes that the Petitioner was entitled to temporary total disability benefits from July 16, 2009 through August 25, 2011, which is the period stipulated to by both the Petitioner and Respondent.

In addition, the Arbitrator concludes that the Petitioner was entitled to additional temporary total disability benefits from August 26, 2011 through April 23, 2012, which was the date Dr. Cole felt the Petitioner had reached maximum medical improvement, and could return to work with permanent restrictions.

Thereafter, the Arbitrator concludes, the Petitioner is entitled to maintenance benefits commencing April 24, 2012 through August 14, 2012, the date of the hearing, since the Petitioner has conducted a valid job search on his own without assistance. The mere fact that the Petitioner earned some occasional wages does not preclude a finding of additional maintenance.

O. Should Respondent be required to provide vocational rehabilitation?

The Petitioner testified that based on his restrictions, he can no [*25] longer perform his job as a glazier. Dr. Cole said he could return to work within the restrictions as outlined in the FCE. The doctor also noted that Petitioner had to avoid sustained squatting, kneeling and crawling The Petitioner testified that he has a high school education and has been in the installation business for many years. He had been with the Respondent for approximately 17 years.

Since his release by Dr. Cole, the Respondent has not provided any assistance to the Petitioner with regard to job placement. He does not have any formal computer training, and does not know how to use Excel, a spreadsheet program, or WORD, a word processing program.

At the time of the arbitration hearing, the Petitioner was 51 years old.

The Petitioner testified that one of his family members helped him with his resume. He has contacted companies online to apply for jobs. He has also gone through his neighborhood and applied for jobs. His job search record shows that he has applied for jobs with 75 different employers. It is obvious that the Petitioner is in need of vocational rehabilitation assistance. The Petitioner was a large wage earner and the jobs he has worked to date are paying a minimal [*26] type of wage.

In the ADDENDUM TO FCE PERFORMED ON 4/6/12, Paul G. Sullivan, MPT, CEAS, opined that the Petitioner is not capable of meeting the lifting or the kneeling requirements for the job of a glazier. He further opined that the Petitioner is capable of meeting the squatting requirement for a glazier if the sustained squatting requirement is less than 35 seconds in duration. (Px. # 5)

The Arbitrator finds the opinions of Dr. Cole and FCE Evaluator Sullivan to be more persuasive than those of Dr. Karlsson.

Section 7110.10 (a) and (b) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission states:

> (a) The employer or his representative, in consultation with the injured employee and, if represented, with his representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs.
>
> [*27] (b) The assessment shall address the necessity for a plan or program which may include medical and vocational evaluation, modified or limited duty, and/or retraining, if necessary.

The Respondent has not prepared such vocational assessment of the Petitioner.

In *National Tea Co. v. Indus. Comm'n, 454 N.E.2d 672, 97 Ill.2d 424 (1983),* the Supreme Court of Illinois addressed the reasonableness of a rehabilitation award and set forth factors to consider. The court noted that whether vocational rehabilitation is appropriate depended on the particular circumstances and that a standard should not be inflexibly applied. Therefore, the court set forth flexible guidelines. It was acknowledged that, generally, a claimant is entitled to rehabilitation where he sustained an injury that caused a reduction in earning power and that there is evidence that rehabilitation will increase his earning capacity. Rehabilitation programs have been deemed inappropriate where a claimant has sufficient skills to obtain employment without further training or education.

The Arbitrator notes that neither party offered into evidence an opinion of a vocational rehabilitation [*28] counselor with regard to the appropriateness of a vocational rehabilitation program in this case.

The Arbitrator notes that Petitioner is 51 years old with a high school education and limited skills. He worked for the Respondent for 17 years. The odd jobs that Petitioner has been able to pick up pay significantly less than the wages he earned at Respondent. Although a family member helped the Petitioner prepare a resume', there is no evidence that he received any professional assistance with preparing for interviews. The Respondent never even put together a vocational assessment, pursuant to the Rules. Therefore, the Arbitrator finds that Robert Borak would benefit from vocational assistance, including job retraining, if necessary.

Based on the foregoing, the Arbitrator concludes that the Petitioner is a candidate for vocational rehabilitation. The Arbitrator orders the Respondent to provide the Petitioner with vocational rehabilitation, including all maintenance costs and expenses incidental thereto, as provided in Section 8(a) of the Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

1 of 100 DOCUMENTS

ILLINOIS WORKERS' COMPENSATION COMMISSION, INSURANCE COMPLIANCE DIVISION, PETITIONER, v. MOSES J. MILLER, INDIVIDUALLY AND D/B/A M&M BUILDERS, RESPONDENT.

No. 12INC 00537

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MADISON

13 IWCC 986; 2013 Ill. Wrk. Comp. LEXIS 1004

November 18, 2013

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

OPINION: [*1]

DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the office of the Illinois Attorney General, against the above captioned Respondent, alleging violation of Section 4(a) of the Illinois Workers' Compensation Act. Proper and timely notice was provided to Respondent and a hearing was held before Commissioner Daniel Donohoo in Collinsville, Illinois on August 20, 2012. Respondent Moses J. Miller, individually, and on behalf of all business entities, appeared *pro se.*

The Commission notes for the Record that Respondent presented an individual at hearing on August 20, 2012 named Gregory Morris. Mr. Morris introduced himself to the Commission as Respondent's "power of attorney". Mr. Morris is not a licensed attorney, member of Respondent's religious organization or in any way affiliated with Respondent's business. Pursuant to Commission Rules, Commissioner Donohoo declined to allow Mr. Morris to represent Respondent, but did allow Respondent the opportunity to continue the hearing to a later date so he could obtain proper legal representation. Respondent [*2] declined a continuance and proceeded *pro se.*

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance coverage from July 20, 2009 through August 20, 2012 in violation of Section 4(a) of the Illinois Workers' Compensation Act. There is no evidence Respondent has ever possessed the required insurance coverage through the date of hearing. Petitioner seeks the maximum fine allowed under the Act, $ 500.00 per day for each day Mr. Miller did business as M&M Builders and failed to provide coverage for its employees, in addition to the value of insurance premium for a similar business for the period July 20, 2009 through June 21, 2012, the date of issuance of Illinois Workers' Compensation Commission Insurance Compliance Citation to Respondent. Petitioner seeks a total fine of $ 549,515.67 (PX2).

The Workers' Compensation Commission Insurance Compliance Department Notice of Non-Compliance and Notice of Insurance Compliance Hearing states Respondent was not in compliance with the requirements of Section 4(a) of the Act from July 1, 2009 through July 2, 2012 (PX1). At hearing, Respondent did not dispute non-compliance with Section 4 of the Act during [*3] this time period and for all periods through the date of hearing, but maintained that he is exempt from the Act on the basis of his religious beliefs as a member of the Old Order Amish (Amish) religious group.

After considering the entire record, the Commission finds that Respondent knowingly and willfully violated Section 4(a) of the Act and § 7100.100 of the Rules Governing Practice before the Illinois Workers' Compensation Commission, from July 5, 2012, the date Respondent was served via certified mail with notice of non-compliance and insur-

ance compliance hearing, through August 20, 2012, the date of hearing. The Commission finds, after reasonable notice and hearing, Respondent knowingly and willfully failed or refused to comply with the provisions of Section 4(a) of the Act and Section 7100.100(b) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission. The Commission assesses the minimum civil penalty under Section 4 of the Act in the sum of $ 10,000.00 against Respondent for the reasons set forth below:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner presented Joseph Stumph, an investigator for the Insurance Compliance [*4] Division of the Illinois Workers' Compensation Commission, as a witness at hearing on August 20, 2012.

2. Mr. Stumph testified that in his official capacity as investigator he received a complaint on June 20, 2012 about a business having won a roofing contract bid for a residential building in Galatia, Illinois (T7).

3. Mr. Stumph testified that he personally visited the address cited in the complaint on June 21, 2012 and observed four people working on the roof hammering shingles. Mr. Stumph spoke with Mr. Moses J. Miller on site who stated that he was the owner of M&M Builders and was hired to perform roofing work at that location. Mr. Miller stated that he had been in business as M&M Builders since July of 2009. Mr. Miller asserted that he felt he was exempt from any law requiring insurance coverage as he was a member of the Old Order Amish. (T8-9, 20).

4. In investigating the claim, Mr. Stumph learned the home in which the work was being performed on June 21, 2012 was owned by a Mr. John Davis. Mr. Davis is not a member of the Old Order Amish. Mr. Davis told Mr. Stumph that he requested bids from three roofing companies and ultimately selected M&M Builders to perform work on his [*5] roof. (T21-22).

5. Mr. Stumph testified that he checked M&M Builders in the NCCI database for appropriate insurance coverage. He found no current insurance for Respondent on or around June 21, 2012 (T21). Mr. Stumph checked additional databases for appropriate insurance coverage and found no coverage from July 1, 2009 forward. (PX3).

6. An inquiry by Mr. Stumph to the Workers' Compensation Commission Office of Self-Insurance showed that Respondent was not self-insured by the State of Illinois. (T13-14, PX5).

7. Mr. Stumph testified that Mr. Miller stated he had been in business since July 2009 and worked both inside and outside the Amish community building sheds, pole buildings, additions, etc., as well as roofing (T20).

8. Mr. Stumph issued Respondent a State of Illinois Workers' Compensation Commission Insurance Compliance Citation on June 21, 2012 with a violation fine of $ 500.00 (PX4). Mr. Stumph testified that he advised Mr. Miller when issuing the ticket in person that he had until July 18, 2012 to obtain the required insurance and to pay the fine (T10). Mr. Miller testified that he did receive the ticket (T10).

9. Mr. Stumph testified that on June 29, 2012, he received a request [*6] from Respondent Miller for a formal hearing. (T13).

10. A Notice of Non-Compliance and Notice of Insurance Compliance Hearing was sent certified return-receipt USPS mail to Moses J. Miller, 8055 Brown Road, Galatia, Illinois on July 2, 2012. The Notice was delivered on July 5, 2012 and signed for by Atlee Miller. (PX1).

11. At hearing on August 20, 2012, Mr. Miller attested that no one from the State [of Illinois] had ever told him before that he needed insurance and he had no idea he needed insurance before meeting Mr. Stumph on June 21, 2012 (T25). Mr. Miller then stated that his church takes care of medical bills if someone in his Amish community is injured while working and therefore he did not want to obtain insurance (T25-26). Mr. Miller further stated that Amish do not pay income tax or have social security numbers and do not accept social security benefits (T26).

12. Mr. Miller testified that M&M Builders does work for and in the non-Amish community (T40-41). He receives requests for work by word of mouth (T33).

13. Mr. Miller was asked at hearing by the Commissioner how the other three employees who were on the roof working on June 21, 2012 were paid. Mr. Miller stated that [*7] he asks for volunteers in his religious community to help with a job if they are not committed to other projects and the laborers are paid for their work (T27). There are no formal records of payments and no taxes are collected (T31).

14. No injury in the scope and course of employment to any employee of Respondent has ever been reported to the Illinois Workers' Compensation Commission.

15. Mr. Miller testified that he has worked other jobs through M&M Builders since June 21, 2012 (T36). Mr. Miller evaded an answer as to even an estimate of the number of construction and/or roofing jobs he has completed as M &M Builders (T32-35). Mr. Miller also refused to answer how much income he made with M&M Builders since July 2009 (T37-38).

16. Mr. Miller testified that he has a checking account at Farmers State Bank but he does not have formal state identification (T39). The contents of the Farmers State Bank account are in his name personally and also as M&M Builders (T39).

17. Mr. Daniel Yoder, a deacon with Amish community to which Respondent Mr. Miller belongs in Galatia, Illinois, testified as to the community's religion and customs. Mr. Yoder testified that Respondent's small Amish community [*8] moved from the state of Wisconsin to Illinois five years ago. Mr. Yoder testified that the Amish religion teaches that its members should be separate from the world but there are certain things that must be done to make a living. If someone is injured and is in need of care, the church pays for that care and will solicit help from sister Amish communities in other states if necessary to fund the care. (T44-48).

18. Mr. Yoder testified that Respondent's Amish community does not apply for any government subsidies, social security benefits, or other government programs (T47). Mr. Yoder testified that Respondent's religious community does pay property taxes, and a portion of those taxes go to support state schools, but they do not use public schools (T48-49).

19. Mr. Yoder testified that Respondent's religious community does use bank accounts and maintain businesses (T 49).

20. Mr. Miller submitted Respondent's Exhibit 2, Affidavit of Specific Negative Averment, into the record. The document signed by Mr. Miller and witnessed by several persons on July 26, 2012, states that it is Mr. Miller's belief that he is an independent contractor and any other members of the Old Order Amish who [*9] participate in his affairs expect nothing in return for their labor but do accept donations or contributions. Mr. Miller further quoted Thomas Jefferson as well as the Constitution of the United States. In quoting these sources, Mr. Miller stated that the Old Order Amish have the right to contract *between one another* without interference from anyone who would be opposed to their religious beliefs [emphasis added].

21. Mr. Stumph testified that he calculated the amount of premium saved by Respondent at $ 5,478.99 per year, as that is the amount paid by similar roofing businesses with four employees in the same geographic area. The premium amount can be broken down to $ 15.01 per day. The total fine period for non-compliance requested by Petitioner is from July 20, 2009 to June 21, 2012, a total of 1,067 days. A fine of $ 500.00 per day for 1,067 days is $ 533,500.00 and the total amount of premium saved is $ 16,015.67, for a total fine requested of $ 549,515.67. (T17).

Section 4 of the Act was codified July 1, 2005 and requires all employers of at least one employee who come within the provisions of Section 3 of the Act, and any other employer who shall elect coverage under Section [*10] 2 of the Act, to provide workers' compensation insurance for the protection of their employees. *820 ILCS 305/4*. The Illinois workers' compensation insurance scheme replaces common law liability of employers to injured employees through insurance benefits.

Respondent admits he employs and pays persons in the State of Illinois to perform construction and roofing work and its employees have performed construction and roofing work in Illinois and outside Mr. Miller's Amish community. Respondent is an employer engaged in a business enumerated in Section 3 of the Act which is declared to be extra hazardous, namely construction and the erection, maintaining, removing, remodeling, altering or demolishing of a structure and construction work, and therefore, the provisions of the Act shall apply automatically and without election. *820 ILCS 305/3*.

Under Section 4(a) of the Act, Respondent may elect to apply for approval as a self-insurer, insure his liability to pay such compensation in some insurance carrier authorized to do such insurance business in the State or make some other provision, satisfactory to the [*11] Commission, for the securing of the payment of compensation provided for in the Act. Respondent in this case has not sought to obtain self-insurer status, obtain traditional workers' compensation insurance or make other provisions with the Commission.

Respondent's main objection to compliance with Section 4 of the Act is rooted in his religious beliefs. Respondent Moses Miller, doing business as M&M Builders, is a member of the Old Order Amish religion. Mr. Miller's particular community of Amish is located in Galatia, Illinois. Pursuant to the testimony of Mr. Yoder, a deacon in Mr. Miller's particular Amish community, the Amish religion teaches that its members should be separate from the world. If a member is in need of care, the church provides funds. Mr. Yoder testified that while Mr. Miller's Amish community does not apply for government programs, they do pay property taxes, use commercial banks and conduct business with persons outside the Amish community.

In *United States v. Lee*, the Supreme Court considered a similar objection raised by an Amish employer. *455 U.S. 252, 256-60, 71 L. Ed. 2d 127, 102 S.Ct. 1051 (1982).* [*12] In *Lee*, an Amish employer objected on religious grounds to receipt of public insurance benefits and payment of taxes, asserting that being forced to pay federal social security taxes on behalf of his employees violated his free exercise rights. While the Court held that the employer's beliefs must be accepted as sincere, and compulsory participation in the social security system does interfere with those beliefs, the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *455 U.S. at 256-58.* The Court went on to note that the social security program serves important public welfare interests and that mandatory participation is indispensable to the fiscal vitality of the social security system. Therefore, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high. *Id. at 258-259.* The Court in *Lee* further found that the broad public interest in maintaining a sound tax system is of such a high order, [*13] that religious belief in conflict with the payment of taxes affords no basis for resisting the tax. *Id. at 259.*

The Supreme Court in *Lee* noted that Congress has made an exemption, on religious grounds, for those who believe it a violation of their faith to participate in the social security system. Congress grants self-employed Amish an exemption to the tax if they have their own welfare system. However, the Court ruled that when followers of a particular religious sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Congress drew a line in exempting the self-employed Amish, but not all persons working for Amish employers. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as provided explicitly otherwise. *Id. at 259-61.*

In *South Ridge Baptist Church v. Industrial Commission of Ohio*, the United States Court of Appeals [*14] for the Sixth Circuit decided a case directly on point with the present one, and a review of that case is warranted here. In *South Ridge Baptist Church*, a church employer objected on religious belief grounds to Ohio's mandatory requirement that it participate in the state's workers' compensation program arguing that the law violated *42 U.S.C. § 1983* by unconstitutionally infringing on the Church's rights under the free exercise and establishment clauses. *911 F.2d 1203 (6th Cir. 1990).* The Court cited *Lee*, which held that when determining whether a governmental regulation impermissibly burdens individual rights under the *free exercise clause* of the first amendment, three factors must be weighed: the magnitude of the burden on defendant's exercise of religion; the existence of a compelling state interest justifying the burden; and the extent to which accommodation of the defendant would impede the state's objectives. *Id. at 1206* (Quoting *Lee* at 256-60). The Court went on to cite *U.S. v. Lee* and other cases in finding that the mere fact that a party's religious practice [*15] is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest. *Id.*

The Court in *South Ridge Baptist Church* stated:

> We find ourselves unable to distinguish in any meaningful way the issues in this case from the rationale of *Lee.* Just as the Supreme Court determined in *Lee*, so do we hold that payment of taxes in support of a public insurance program interferes with the Church's free exercise of its religious beliefs. Likewise, just as the Court found the federal government's interest in maintaining the fiscal vitality of its old age and unemployment benefits system through mandatory participation to be "very high," we have no hesitancy in holding Ohio's interest in the solvency of its workers' compensation fund to be of an equally high order. In fact, the state's interest is at least as great since it is based on the state's fundamental police power to safeguard the welfare of its citizens. *Id. at 1208.*

In *Lee*, Congress' exemption in the [*16] social security statute of the "narrow" and "readily identifiable" category of "self-employed persons in a religious community having its own 'welfare' system" does not impose the employer's religious faith on the employee. *455 U.S. at 261.* In *South Ridge Baptist Church*, the Court analyzed that likewise, the

fact that Ohio allows a limited exemption from the program for employers who qualify and choose to self-insure does not diminish the state's compelling interest in the state fund's solvency as the self-insurance option fully secures the state's interest in protecting its workers. *911 F.2d at 1209.*

In *South Ridge Baptist Church*, the Court analyzed that many policies and practices of any civil government will from time to time be repugnant to even the best intentioned beliefs of a given group. However, it is difficult to say that a law unconstitutionally impacts upon one group where the burden of the law is spread equally and does not single out that group for separate or discriminatory treatment. *911 F. 2d at 1211.* The Court reasoned that the impact of [*17] the law on South Ridge Baptist Church is no different than the impact upon any other employer of individuals in the State of Ohio of the same premium rate class. Under such circumstances, the government is not required to yield its legitimate powers to provide for the general welfare out of deference to the particular views of one of many divergent religious or political sects. *Id.* The Court further noted that employees are not compelled to accept any of the benefits conferred by the workers' compensation law where he or she would be entitled to him. On the other hand, to preclude an employee from the benefits of the Act merely because the employer opposes them denies that employee of the equal protection of the state's law merely because of the personal religious beliefs of his employer. *Id.*

The Illinois Workers' Compensation Act promotes the general welfare of the people of the State by providing compensation for accidental injuries or death suffered in the course of employment within the State, and without the State where the contract of employment is made within the State; providing for the enforcement and administering thereof, and a penalty of its violation. *820 ILCS 305/1* [*18] et seq. The provisions of the Act shall apply automatically and without election to all employers and all their employees, engaged in any department of enterprise or business which are declared to be extra hazardous under Section 3 of the Act. *820 ILCS 305/3.*

Any employer, including but not limited to general contractors and their subcontractors, who shall come within the provisions of Section 3 of the Act, and any other employer who shall elect to provide and pay compensation provided for in the Act under Section 2 of the Act must obtain insurance pursuant to Section 4(a) of the Act. Section 4(a) of the Act provides for several methods in which to secure payment of compensation as provided for in the Act. The employer may file with the Commission an application for approval as a self-insurer or elect to provide and pay compensation as provided for in the Act as a member of a group workers' compensation pool under Article V 3/4 of the Illinois Insurance Code. The employer may also insure his entire liability to pay such compensation in some insurance carrier authorized, licensed, or permitted to do such insurance business in the State or make [*19] some other provision, satisfactory to the Commission, for the securing of the payment of compensation provided for in the Act. *820 ILCS 305/4.*

Respondent Miller, d/b/a M&M Builders, was issued an Illinois Workers' Compensation Insurance Compliance Citation on June 21, 2012 by an authorized investigator with that agency who observed Mr. Miller and three employees working on a residential roof outside the Amish community, work for which Mr. Miller had bid against non-Amish businesses to perform. On June 21, 2012, Respondent did not possess insurance pursuant to Section 4(a) of the Act. After refusing to pay the fine and submit to the Illinois Workers' Compensation Commission evidence of compliance with the provisions of Section 4(a) of the Act, a Notice of Insurance Compliance Hearing and Notice of Non-Compliance was properly sent to Respondent by the Commission and a formal hearing was held on August 20, 2012.

At hearing on August 20, 2012, Respondent admitted that he employed and paid persons to do roofing and other construction work which he bid as M&M Builders. Respondent acknowledged he regularly bid and performed construction work, and [*20] did so on June 21, 2012, in the State of Illinois and outside of the Amish community. Respondent further stated that he did not know he was required to have workers' compensation insurance before being cited on June 21, 2012. He did not believe he should have to obtain insurance as his Church, and the Old Order Amish in general, believe in being separate from the world. The Church takes care of medical bills if someone in the Amish community is injured while working.

The evidence shows Respondent had not pursued any option under Section 4(a) of the Act, including self-insurance or some other provision satisfactory to the Commission, and Respondent has performed other construction projects in Illinois as M&M Builders since June 21, 2012. A church elder of Respondent's community of Amish, Mr. Yoder, testified that Respondent's religious community does not apply for government programs but does maintain and do business outside of the Amish community, use bank accounts and pay property taxes.

As in *South Ridge Baptist Church* and *Lee*, the Commission here does not contest the sincerity of the religious grounding of Respondent's belief that it should not be compelled to participate [*21] in the workers' compensation system or that Respondent's required participation when employing others might burden Respondent's religious liberty.

However, the Commission, as in the cases cited herein, finds that the Illinois Workers' Compensation Act and its requirements on employers advances a compelling state interest in protecting workers and their dependents against the costs of workplace accidents. The limitation on Respondent's religious liberty as a member of the Old Order Amish is justified as the Workers' Compensation Act and its requirements for insurance under Section 4(a) serves important public welfare interests. Further, the State's interest in assuring mandatory participation of those enterprises or businesses which are extra hazardous under Section 3 of the Act is very high. The legislature has provided several options under Section 4(a) which provide alternatives to Respondent and any other employer who might object to obtaining insurance coverage through a traditional insurance carrier. Those who employ others may choose one of several methods, including applying for self-insured status or making other provisions with the Commission for securing of payment of compensation [*22] for their employees. Those who are self-employed or are officers of a company may choose not to be covered under the Act. As in *Lee*, the Commission and State of Illinois have exempted self-employed persons, including those of the Amish faith, but not all persons working for an Amish employer, from protection under the Act. No employee is compelled to accept any of the benefits conferred by the Act where he or she would otherwise be entitled to them but the Commission will not deny an employee equal protection under the law simply because of the personal religious beliefs of his employer. The Act provides for the least restrictive means to achieve the State's compelling interest in safeguarding the welfare of its citizens, does not impose Respondent employer's religious beliefs on the employee and still applies rules uniformly to all employers.

Further, as in *Lee*, when followers of a particular religious sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Respondent employs other persons in an [*23] enterprise deemed to be extra hazardous and enters into commercial dealings outside the Amish community, bidding for work against other non-Amish businesses who must abide by the laws of the State. To exempt an employer from the requirements of the Act based on the particular religious or political views of that employer provides for a competitive advantage as compared to similar employers in the same premium rate class.

For the forgoing reasons, and after considering the entire record, the Commission finds that Respondent is operating under and subject to the Illinois Workers' Compensation Act under Section 3 and is an employer as denoted in Section 1 of the Act. The Commission finds that Respondent has knowingly and willfully failed to comply with the requirements of Section 4(a) of the Act and shall be assessed penalties under Section 4(d) of the Act.

The Commission finds that Respondent knowingly and willfully was in non-compliance with Section 4 of the Act for a period of 47 days, encompassing the period July 5, 2012 through August 20, 2012 and shall pay the minimum penalty of $ 10,000.00 under Section 4 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent, Moses [*24] J. Miller, doing business as M&M Builders, pay to the Illinois Workers' Compensation Commission the sum of $ 10,000.00 pursuant to Section 4(d) of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 10,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityThird Party InsurersWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnesses