1 of 100 DOCUMENTS

DON YOUNG, PETITIONER, v. DONCASTERS, D/B/A, MECO, INC., RESPONDENT.

NO. 10WC 20979

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COLES

12 IWCC 1188; 2012 Ill. Wrk. Comp. LEXIS 1231

October 29, 2012

JUDGES: Daniel R. Donohoo; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and the nature and extent of the permanent disability, and being advised of the facts and law, modifies the November 23, 2011 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.

This case was tried before Arbitrator Stephen Mathis on August 25, 2011, and the Arbitrator issued his Decision, finding no accident arose out of Petitioner's employment with Respondent on February 19, 2010 and denying all benefits, on November 23, 2011. Arbitrator Mathis found that Petitioner did suffer an injury to his rotator cuff in the course of his employment with Respondent on February 19, 2010, when he reached into a box to extract a spring clip for inspection. However, the Arbitrator concluded that the accident did not arise out of Petitioner's employment, based upon his finding that the mere act of reaching down for an item did not increase [*2] Petitioner's risk of injury beyond what he would experience as a normal activity of daily living. The Arbitrator therefore denied all benefits. The Commission affirms and adopts the Arbitrator's Decision on this basis. However, the Commission also strikes the penultimate paragraph of the Decision, in which Arbitrator Mathis opined that "[t]he chronology of the petitioner's left shoulder problem is much more consistent with natural degeneration rather than the result of any acute event," as no medical opinion supporting this conclusion appears in the record.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 23, 2011 is hereby modified as described above and is otherwise affirmed and adopted.

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.

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

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' [*3] Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

Don Young
Employee/Petitioner

v.

Doncasters, d/b/a Meco, Inc.
Employer/Respondent

Case # **10** WC **20979**

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 **Stephen J. Mathis**, Arbitrator of the Commission, in the city of **Mattoon**, on **8/25/2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
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?

FINDINGS

[*4] On **2/19/2010**, 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 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **30,954.56**; the average weekly wage was $ **595.28**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **1** dependent child.

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 $ **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 $ **1,794.84** under Section 8(j) of the Act.

ORDER

. Petitioner did not sustain an accident arising out of and in the [*5] course of his employment with the respondent.

. Petitioner's claim for compensation is denied.
. Determination of additional issues is moot.

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.

11-7-11

Date

The Arbitrator hereby makes the following findings of fact:

The petitioner testified that he has worked for the respondent as an inspector for the past few years. As an inspector he must examine parts of various shapes and sizes. For each and every part he must examine it, check the specifications, and complete the paperwork. He must then put each part into an appropriate container. The number of parts he may inspect each day or each week varies. [*6] No two days are the same.

Petitioner further testified that on the date of accident he had already inspected approximately 8 spring sets. He was reaching into the box to grab the last one when he felt a pop in his shoulder and a little bit of a burning sensation. This was at approximately 2:00 p.m. on a Friday. Petitioner was able to complete working that day. Later on that evening the pain worsened and by Monday he could barely raise his arm.

Sometime the following week the respondent asked the petitioner to recreate the situation which caused his shoulder to pop so that a photograph could be taken. (PX2). The only difference is that petitioner is reaching into the box with his right arm in the photograph, not his left.

At about the same time petitioner was asked by respondent to prepare a written description of the accident. (PX1). Petitioner testified that this is what he wrote after being asked by the respondent to prepare a statement. Petitioner admitted that his memory of what occurred was much better in February of 2010 as opposed to now.

Petitioner also admitted that PX1, his written statement of the accident, does not state that he felt a burning sensation in his shoulder. [*7] It also does not state that he had picked up the last part in the box and specifically states that he felt no pain. PX2 also states that he was reaching into the box when he felt the pop and does not mention feeling any burning sensation. PX2 also states that petitioner felt no pain in his shoulder at that time.

Petitioner testified that he was sent by the respondent to see Dr. Phipps on 2/25/2010. The history contained in Dr. Phipps' office note of that date is that petitioner reached into the box, stretched, and felt a pop in his shoulder and now has pain.

When the petitioner went to see Dr. Angelicchio on 4/20/2010 the history contained in those records was that he overstretched while reaching into a box and suffered a burning in his left shoulder. (PX4). Petitioner admitted that this history as provided to Dr. Angelicchio is not consistent with what he wrote when he prepared PX1.

Petitioner was then referred by the respondent to Dr. Kohlman for a Section 12 exam. Petitioner told Dr. Kohlman on 7/15/2010 that he was stretching as far as he possibly could and felt pain in his shoulder. (PX5). Petitioner admitted that this history is not consistent with what he wrote in PX1.

[*8] Petitioner also admitted that merely reaching down for something is an activity of daily living; something he does at home every day such as reaching for his shoes.

In order for the petitioner to be entitled to benefits he must prove that his injury was caused by an increased risk of injury unrelated to the activities of daily living. In other words, the injury must have been caused by a risk of injury peculiar to his job duties. If it is a risk to which the general public is exposed, then the injury cannot have arisen out of his employment. *Orsini v. Industrial Commission, 117 Ill.2d 38, 509 N.E.2d 1005 (1987).*

Other cases which are factually similar have resulted in a denial of benefits. In *Nardi v. Village of Harwood Heights, 05 IWCC 663,* the claimant, a police officer, was denied benefits when he injured his shoulder while reaching for a flashlight that was rolling off of the top of his squad car. The claimant was diagnosed with a rotator cuff tear. The Arbitrator's denial of benefits was affirmed by the Commission.

In *Mary Jo Blake v. Community Care Systems, 06 IWCC 0051* [*9] the claimant was a housekeeper whose job duties included grocery shopping for one of her clients. While performing this task she reached into the shopping cart and lifted a bag containing an unknown number of liters of soda when she heard a pop in her shoulder and felt pain. The claim for benefits was denied because the act of reaching and lifting a grocery bag is a normal daily activity in her employment did not create any increased risk of injury.

In *Crockett v. Casino Queen, 08 IWCC 1220* the Arbitrator denied benefits to a claimant who bent over to pick up an ashtray off of the floor when she felt a pop in her back. The denial of benefits was affirmed by the Commission because the act of bending over to pick up an item off the floor is a normal act of daily living and there is no increased risk of injury created by her employment.

The act of reaching for an item, without more, does not constitute an increased risk of injury peculiar to the petitioner's employment. It is a movement consistent with normal daily activity. The evidence describing petitioner's job duties proved that it was not repetitive in nature because the number of times he had to [*10] pick up or examine any item would vary from day to day and the parts were of various shapes and sizes. Moreover, petitioner's testimony that he had actually grasped the spring set from the box does not change the conclusion.

First of all, petitioner's testimony that he had actually grasped the part is completely negated by his own written description of the accident and the history he gave to three different doctors. None of the documents admitted into evidence corroborates this particular statement.

Secondly, petitioner's written description of the accident is inconsistent with the history he provided to Dr. Angelicchio and Dr. Kohlman. Petitioner saw Dr. Angelicchio two months after the incident and told him that he "overstretched" and felt a "burning sensation" in his shoulder, something that his written statement (PX1) does not contain. Five months after the incident the petitioner told Dr. Kohlman that he stretched his arm "as long as he possibly could" and then felt pain in his shoulder. Again, this is completely inconsistent with the petitioner's description of the incident in PX1 and shows that with each new doctor the petitioner embellished his description of the incident.

[*11] Thirdly, petitioner's left shoulder contained a significant amount of degenerative changes. The operative report stated that petitioner's left AC joint was grossly arthritic, there was a huge osteophyte present, part of the ligament was ossified, there was a tremendous amount of hypertrophic bursitis and there was an anterior acromial spur (PX5). Prior to surgery Dr. Kohlman reviewed the MRI films of petitioner's left shoulder and opined that the rotator cuff had degenerative changes as well as the arthritis noted in the operative report. The chronology of the petitioner's left shoulder problem is much more consistent with natural degeneration rather than the result of any acute event.

In summary, petitioner's claim is denied. All other issues are moot.

DISSENTBY: THOMAS J. TYRRELL

DISSENT: Respectfully, I dissent from the majority's decision to affirm the Arbitrator's finding that Petitioner failed to prove he sustained an accident arising out of and in the course of his employment with Respondent on February 19, 2010. The Arbitrator found that "[t]he act of reaching for an item, without more, does not constitute an increased risk of injury peculiar to the Petitioner's employment. It is a movement consistent [*12] with normal daily activity." I disagree with the Arbitrator's findings and his application of the law.

As I view the facts, it is undisputed that Petitioner injured his left shoulder while performing his work duties as an inspector of turbine engines parts. It is also undisputed that on the date of the accident, Petitioner's work duties included reaching into a box that was approximately 36 inches deep and 16 x 16 inches wide. The parts in the box were spring clips which weighed between 12 and 20 pounds and were about 14 inches in diameter. While reaching for the ninth and last part, Petitioner testified that he felt something "snap" or "pop" in his left shoulder.

I find that Petitioner has sustained an accident arising out of and in the course of his employment. Contrary to the majority's and the Arbitrator's opinions, I believe that, while the act of reaching may be a normal daily life activity, I do not believe that members of the general public routinely, as part of our daily lives, reach into narrow boxes three feet deep to pull out items weighing 12 to 20 pounds. I cannot equate any daily life activity that would require reaching into a box that narrowly fits the objects the [*13] box holds. Petitioner's work duties are not comparable to reaching into a grocery bag to retrieve groceries, as grocery bags are not three feet deep and do not narrowly fit the groceries, or reaching into a hamper to retrieve clothes as clothes generally do not weigh 12 to 20 pounds. Thus, I believe that Petitioner's employment duties exposed him to a greater risk than to what the general public is exposed.

Even though Respondent stipulated to the issue of causal connection, the Arbitrator made the following finding: "The chronology of the [P]etitioner's left shoulder problem is much more consistent with natural degeneration rather than the result of any acute event." I find that Petitioner has met his burden in establishing that his condition is causally related to the work accident. While Petitioner may have preexisting degenerative changes in his left shoulder, the work accident aggravated his condition and brought about his need for medical treatment. My finding is supported by Dr. Kohlman, Respondent's Section 12 examining doctor, who indicated in his July 15, 2010, Section12 report as follows:

> "It is my opinion, to within medical certainty, that he had significant degenerative [*14] changes in the left shoulder that may well have been asymptomatic prior to the onset of symptoms. The patient reports that the symptoms started happening when he reached into the box, which may well be the case. I am relying heavily on the history provided to me by the patient to conclude, with medical certainty, that the injury that he reports at work substantially aggravated a pre-existing, relatively or otherwise asymptomatic condition of shoulder arthritis and bursitis."

For the reasons noted above, I respectfully dissent from the majority's decision.

Legal Topics:

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

2014 IL App (4th) 130392WC

NO. 4-13-0392WC

FILED
July 7, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DON YOUNG, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Doncasters, d/b/a MECO, Inc., Appellee).	)	Appeal from Circuit Court of Edgar County No. 12MR62 Honorable Steven L. Garst, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 On June 2, 2010, claimant, Don Young, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, Doncasters, d/b/a MECO, Inc., and alleging a work-related injury to his left shoulder that arose out of and in the course of his employment on February 19, 2010. Following a hearing, the arbitrator denied claimant benefits under the Act, finding his injury was caused by a risk to which the general public was equally exposed.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission), with one commissioner dissenting, struck a portion of the arbitrator's decision but otherwise affirmed and adopted his decision and ultimate ruling in the case. On judicial review, the circuit court of

Edgar County confirmed the Commission's decision. Claimant appeals, arguing the Commission erred in finding his left shoulder injury did not arise out of his employment. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 At arbitration, claimant testified he began working for the employer in 2006. He worked as an inspector and "inspect[ed] parts that [came] through [his] area." Claimant testified he was required to look at and examine parts to make sure they were made according to specifications, complete paperwork on each part, place each part into an appropriate container, and enter data into a computer. Claimant agreed that the number of parts he inspected each day varied and was dependent "on the particular order."

¶ 5 Regarding his February 19, 2010, accident, claimant testified as follows:

> "I was in the process of checking some parts and I removed approximately eight of them from a box, and I was reaching for the last spring clip in the bottom of the box and as doing so I reached in and I felt a snap or a pop in my shoulder, a little bit of a burn, and I went on to finish what I was doing ***."

Claimant described the box he reached into as "about 36 inches deep or more and 16 by 16." He stated a "spring clip" was a piece of stainless steel formed into "a semi cone" and approximately 14 inches in diameter. The spring clips weighed between 12 and 20 pounds. Further, claimant testified he had to "bend over into the box" and "reach down deep into it to retrieve" the last part for inspection. He noted the box was not big enough to fit both of his hands and shoulders into at the same time. Claimant identified his left shoulder as the one injured.

¶ 6 Claimant testified he continued to work the rest of the day but noticed "a little bit"

of pain in his left shoulder. He stated the day of his accident was a Friday. That evening, he noticed his arm started hurting "quite a bit," and his condition worsened over the weekend. The following Monday, claimant returned to work but noticed he did not have much mobility in his shoulder. Claimant denied experiencing any left shoulder problems prior to his February 19, 2010, accident but acknowledged previous right shoulder problems as the result of a work-related injury while working for a different employer.

¶ 7 On February 25, 2010, the employer asked claimant to reenact his alleged work accident. He stated he was asked to reach into the box so that a photograph could be taken. Claimant submitted the photograph into evidence and noted the only difference between the photograph and his accident was that he was using his right arm instead of his left when the photograph was taken. The photograph was contained within an "Accident & Counter Measure Report" carrying the same date. That report identified the "cause analysis" for claimant's accident to include "over extended reaching limits" and "reaching into a deep box." Additionally, the report stated a "counter measure" for claimant's incident was "to establish [a] technique for lifting from a deep box, or to cut the size of the box down."

¶ 8 Claimant testified he was also asked to write a statement regarding his accident, which he believed he wrote the same day he was asked to reenact the accident. Claimant's typewritten statement was entered into evidence and states as follows:

> "On or about *** 2/19/10, *** while inspecting a 9 peace [*sic*] set of *** spring clips that were located in a 16X16X33 [inch] box, as I was reaching for the last one in the bottom of the box something in my left shoulder snapped. Not any pain at the time. I clocked out of work at about 1430/1500. Later that night my shoulder was

> in a little pain. But as the weekend went by the pain has gotten more intense. As Monday came around, I have been unable to lift my arm more than 12" to 18"."

On cross-examination, claimant agreed that his memory of what happened was better a few days after the accident, as opposed to the day of arbitration. He further testified that he had the part in his hand when he felt the "pop." Additionally, claimant agreed that he did not immediately feel any pain but asserted he did feel a burning sensation. He acknowledged that he did not include details about feeling a burning sensation in his typewritten statement.

¶ 9 Following his accident, claimant sought medical treatment. On February 25, 2010, he saw Dr. Leland Phipps, the employer's company doctor. According to Dr. Phipps's records, claimant reported he "reach[ed] into a box, 'stretched extra' felt a 'pop' in shoulder." Claimant testified Dr. Phipps took X-rays and recommended he return to work with the restriction that he not raise his arm above shoulder level. Claimant testified he returned to work but his job duties did not change. He stated he was unable to perform his job as he normally did, stating he slowed down a lot and had to have help lifting large objects. Claimant continued to follow up with Dr. Phipps and underwent a course of physical therapy. On April 1, 2010, Dr. Phipps recommended a magnetic resonance imaging (MRI). On April 8, 2010, he noted claimant's MRI showed a small tear in the supraspinatus.

¶ 10 Claimant testified Dr. Phipps referred him to Dr. Louis Angelicchio, whom claimant began seeing on April 20, 2010. Dr. Angelicchio noted claimant began having left shoulder problems on February 19, 2010, "when while working and reaching into a deep box [claimant] overstretched his left arm and shoulder, and suffered a burning in his left shoulder." He found claimant's MRI "consistent with a partial thickness tear of the rotator cuff, degenerative

changes at the AC joint, subacromial bursitis, and some mild degenerative changes." Ultimately, he recommended left shoulder surgery.

¶ 11 On July 15, 2010, claimant underwent an independent medical examination with Dr. James Kohlmann. He reported being injured when "he attempted to reach into a very deep, long box to get a part" and stated "he reached over into a long box and had to stretch his shoulder and arm way out as far as he could to reach down in to get the part." Claimant further reported that he felt pain, which gradually worsened. Dr. Kohlmann also recommended surgery, opining claimant "was a good candidate for an arthroscopic evaluation of the shoulder, an arthroscopic bursectomy acromioplasty, and rotator cuff repair if a significant thickness rotator cuff tear is identified at the time of surgery." He further stated as follows:

> "It is my opinion, to within medical certainty, that he had significant degenerative changes in the left shoulder that may well have been asymptomatic prior to the onset of symptoms. [Claimant] reports that the symptoms started happening when he reached into the box, which may well be the case. I am relying heavily on the history provided to me by [claimant] to conclude, with medical certainty, that the injury that he reports at work substantially aggravated a preexisting, relatively or otherwise asymptomatic condition of shoulder arthritis and bursitis."

¶ 12 On October 1, 2010, Dr. Kohlmann performed left shoulder surgery on claimant and, postoperatively, diagnosed claimant with left shoulder acromioclavicular joint arthritis, full-thickness rotator cuff tear, and supraspinatus tendon bursitis. Following surgery, claimant was off work, underwent physical therapy, and regularly followed up with Dr. Kohlmann. In January

2011, Dr. Kohlmann released claimant to return to work with no restrictions.

¶ 13 On November 23, 2011, the arbitrator issued his decision, denying claimant benefits under the Act. He concluded as follows:

> "The act of reaching for an item, without more, does not constitute an increased risk of injury peculiar to [claimant's] employment. It is a movement consistent with normal daily activity. The evidence describing [claimant's] job duties proved that it was not repetitive in nature because the number of times he had to pick up or examine any item would vary from day to day and the parts were of various shapes and sizes."

The arbitrator found claimant's testimony that he grasped a part in his hand when he was injured was contradicted by his typewritten description of the accident and unsupported by any other evidence. Further, he found claimant's typewritten statement was inconsistent with the accident histories contained in both Dr. Angelicchio's and Dr. Kohlmann's records, stating "that with each new doctor [claimant] embellished his description of the incident." Finally, the arbitrator found claimant's left shoulder injury was "more consistent with natural degeneration rather than the result of any acute event."

¶ 14 On October 29, 2012, the Commission, with one commissioner dissenting, struck the portion of the arbitrator's decision finding claimant's condition was consistent with degeneration rather than an acute event but otherwise affirmed and adopted his decision. Specifically, the Commission agreed "that the mere act of reaching down for an item did not increase [claimant's] risk of injury beyond what he would experience as a normal activity of daily living." On May 13, 2013, the circuit court of Edgar County confirmed the Commission's

decision.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, claimant argues the Commission erred in finding he failed to show his left shoulder injury arose out of his employment. He asserts the evidence regarding the mechanism of his injury was undisputed and showed he was exposed to a risk peculiar to his work for the employer. Claimant contends that, because the facts are undisputed and subject to only a single reasonable inference, the appropriate standard of review is *de novo*. Alternatively, he contends the Commission's decision was against the manifest weight of the evidence.

¶ 18 "Whether a claimant's injury arose out of or in the course of his employment is typically a question of fact to be resolved by the Commission, and the Commission's determination will not be reversed unless it is against the manifest weight of the evidence." *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13, 991 N.E.2d 868. "However, when the facts are undisputed and susceptible to but a single inference, the question is one of law subject to *de novo* review." *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 15, 998 N.E.2d 971. Here, the facts presented were subject to more than a single inference, in particular, whether claimant's act of "reaching" was one to which the general public was equally exposed or whether claimant was exposed to an increased risk by reaching beyond normal limits by virtue of his employment. Under these circumstances, we review the Commission's decision to determine whether it was against the manifest weight of the evidence.

¶ 19 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of

and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). " 'In the course of employment' refers to the time, place and circumstances surrounding the injury" and, to be compensable, an injury "generally must occur within the time and space boundaries of the employment." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. The parties do not dispute that claimant was injured "in the course of" his employment.

¶ 20 "The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 672.

> "Stated otherwise, 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.' " *Sisbro*, 207 Ill. 2d at 204, 797 N.E.2d at 672 (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989)).

¶ 21 "There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with her employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284.

"Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284; see also *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005, 1008 (1987) ("For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment."); *Caterpillar*, 129 Ill. 2d at 59, 541 N.E.2d at 667. ("[I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable.").

¶ 22 Here, claimant's injury arose out of an employment-related risk and is compensable. The record shows claimant was injured while performing his job duties, *i.e.*, inspecting parts. Evidence showed he was inspecting parts that were contained within a box that was approximately 36 inches deep and had an opening of 16 x 16 inches. Claimant testified he had to "bend over into the box" and "reach down deep into it to retrieve" the last spring clip for inspection. The box was too narrow to fit both of his arms or shoulders into. As claimant reached for the part, he felt a "pop" in his left shoulder. This evidence unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question. As a result, the manifest weight of the evidence supports a finding that claimant's injury arose out of his employment.

¶ 23 Nevertheless, the Commission denied claimant benefits under the Act after finding "that the mere act of reaching down for an item did not increase [claimant's] risk of injury beyond what he would experience as a normal activity of daily living." In other words, the Commission determined claimant was not exposed to a risk to a greater degree than the

general public. However, when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. A neutral risk has no employment-related characteristics. Where a risk is distinctly associated with the claimant's employment, it is not a neutral risk. Under the facts presented, the risk to which claimant was exposed had employment-related characteristics. He was performing acts the employer might reasonably have expected him to perform incident to his assigned duties and, as a result, his injury arose out of his work for the employer.

¶ 24 Further, although the Commission pointed out that claimant's job duties were not repetitive, such a finding is not dispositive of the issue presented. Whether claimant reached into a deep, narrow box only once or multiple times per day, he was, nevertheless, performing an act that was incidental to the fulfillment of his job-related duties at the time of his injury. Under these circumstances, claimant's injury was causally connected to his work.

¶ 25 We also find that the record does not support the Commission's finding that claimant embellished the accident descriptions he provided to his doctors by stating that he stretched "far" or "overstretched" when reaching into the box. In making such a finding, the Commission determined claimant's typewritten description of his accident was inconsistent with the accident histories he provided to Dr. Angelicchio and Dr. Kohlmann. It noted claimant reported to Dr. Angelicchio that he "overstretched" and to Dr. Kohlmann that he stretched his arm "out as far as he could," but provided no such information in his typewritten statement.

¶ 26 Although claimant's typewritten statement failed to reference the degree to which he stretched or reached into the box, the employer's "Accident & Counter Measure Report" identified causes for claimant's accident that included "over extended reaching limits" and

"reaching into a deep box." Additionally, the report noted a "counter measure" for the incident was "to establish [a] technique for lifting from a deep box, or to cut the size of the box down." The employer's report was dated February 25, 2010, the same date claimant testified he prepared his typewritten statement. That same day, claimant also saw Dr. Phipps and reported he was injured after he reached into a box and "stretched extra."

¶ 27 In this instance, the record shows the accident histories claimant provided to Dr. Angelicchio and Dr. Kohlmann were consistent with both the history of the accident contained in the employer's report and the history claimant provided to Dr. Phipps only days after the accident occurred. Through the statements in its report, the employer recognized (1) claimant was performing an employment-related activity and (2) the need to take measures to protect the safety of its employees when performing that activity in the future. The evidence presented supports a finding that claimant reached farther than he typically would have when reaching into the box to retrieve the last spring clip for inspection.

¶ 28 Here, the manifest weight of the evidence shows claimant's left shoulder injury arose out of his employment. Although the act of "reaching" is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury. His action in reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment.

¶ 29 We note our finding in this case is consistent with this court's recent decision in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, ¶ 18, 990 N.E.2d 901, wherein the claimant, a caregiver at an assisted living facility, was injured while assisting one of the facility's residents in the shower. The facts of that case were as

follows:

> "[The] [c]laimant testified that she was concerned that the resident might slip because the shower was producing an abundance of soap suds. As a result, claimant took hold of the resident with her right hand, turned left, extended her left arm, and removed the soap dish which was causing the suds to accumulate in the shower. As claimant was performing these activities, she felt a 'pop' in her neck and experienced pain travel down her right arm." *Autumn Accolade*, 2013 IL App (3d) 120588WC, ¶ 18, 990 N.E.2d 901.

Based upon those circumstances, this court held the Commission's finding that the claimant's injury arose out of her employment was not against the manifest weight of the evidence. *Autumn Accolade*, 2013 IL App (3d) 120588WC, ¶ 18, 990 N.E.2d 901.

¶ 30 In so holding, we rejected the employer's contention that the claimant was "merely engaged in the act of 'reaching' at the time of the injury," an activity that the employer asserted was " 'personal in nature' and 'not in any way peculiar to [the claimant's] employment.' " *Autumn Accolade*, 2013 IL App (3d) 120588WC, ¶ 19, 990 N.E.2d 901. We held the employer's argument "ignore[d] the fact that, at the time of the occurrence, [the] claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties, *i.e.*, ensuring the safety of a resident of the assisted living facility." *Autumn Accolade*, 2013 IL App (3d) 120588WC, ¶ 19, 990 N.E.2d 901. Similar to *Autumn Accolade*, both the employer's position and the Commission's decision in the instant case ignore the fact that claimant was injured while performing acts he "might reasonably be expected to perform incident to his assigned duties." (Internal quotation marks omitted.) *Sisbro*, 207 Ill. 2d at 204, 797 N.E.2d at

672.

¶ 31 "Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when, as in this case, the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion." *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 119, 881 N.E.2d 523, 529 (2007). Under the facts of this case, an opposite conclusion from that of the Commission is clearly evident and its decision is against the manifest weight of the evidence.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the circuit court's judgment and remand to the Commission for further proceedings consistent with this decision.

¶ 34 Reversed and remanded.

1 of 100 DOCUMENTS

JOSE NUNEZ, PETITIONER, v. DIG RIGHT IN LANDSCAPING, RESPONDENT.

No. 09WC 05981

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 577; 2012 Ill. Wrk. Comp. LEXIS 514

May 29, 2012

JUDGES: Yolaine Dauphin; Charles J. DeVriendt

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, the necessity of medical treatment, Petitioner's entitlement to prospective medical care, and temporary total disability, and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below. 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).*

FACTS

At arbitration, Petitioner testified through a qualified Spanish language interpreter. On the request for hearing form the parties stipulated that Petitioner sustained accidental injuries to his right shoulder arising out of and in the course of his employment on July 14, 2008. At the time, Petitioner worked as a laborer and driver for Respondent.

On July 15, 2008, Petitioner [*2] sought treatment with Dr. Manish Pandya. Dr. Pandya noted that Petitioner injured himself at work, experiencing immediate, sharp pain. Petitioner complained of right shoulder pain rated 8 on a scale of 1 to 10, with 10 being extreme pain, as well as neck stiffness and pain rated 6 out of 10. Dr. Pandya diagnosed Petitioner with thoracic subluxation and rotator cuff syndrome and recommended diversified adjustive techniques at the thoracic spinal levels, E.M.S., trigger point therapy, and an ultrasound, of the right upper extremity.

Petitioner followed-up with Dr. Pandya on July 18, 2008, and reported frequent right shoulder pain rated 8 out of 10, and frequent neck stiffness rated 6 out of 10. On examination, palpation of the spinal area at the thoracic region produced mild discomfort; and the deltoids, the supraspinatus, and the neck flexors revealed moderate spasms. Petitioner tested positive in a supraspinatus test and had bilateral cervical distraction for nerve root compression. Dr. Pandya assessed that "patient is in a relief/repair stage of care and has a guarded prognosis," and renewed his recommendations from July 15, 2008.

On July 22, 2008, Petitioner treated with Dr. Ehtesham [*3] Ghani of Maple Medical Center, reporting a work related injury to his right shoulder requiring physical therapy three times per week. Dr. Ghani prescribed Celebrex and noted, "consider MRI." On August 5, 2008, staff at Maple Medical Center noted that Petitioner had 75 percent improvement in his right shoulder pain and returned Petitioner to work with no lifting greater than 5 pounds, and no repetitive pulling or pushing with the right hand. n1

On August 12, 2008, Petitioner severely injured his left hand in a work accident and sought treatment with Dr. H. Khan. On September 2, 2008, Dr. Khan returned Petitioner to work with restrictions of no lifting greater than 20 pounds with the left hand and scheduled a follow up appointment in one week. On September 10, 2008, Respondent terminated Petitioner's employment for cause. On October 6, 2008, Dr. Khan released Petitioner to work full duty with respect to his left hand.

Emergency room records from Saint Anthony dated March 26, 2009, show that Petitioner [*4] presented with complaints of right shoulder pain rated 8 out of 10 from a work related accident. Staff diagnosed him with shoulder pain, prescribed Ibuprofen and referred him to Dr. Mitchell Goldflies.

On July 6, 2009, Dr. William Vitello wrote a narrative letter describing his July 1, 2009, examination of Petitioner at Petitioner's attorney's request. Petitioner reported having anterior and posterior shoulder pain due to a work accident on July 22, 2008. He had an injection, and two physical therapy sessions, and had not worked in the past nine months. Petitioner rated his pain as 10 out of 10, and reported the pain awakened him at night. On examination, Petitioner had weakness with resisted internal and external rotation at 4/5 and positive cross and drop arm tests. Dr. Vitello diagnosed Petitioner with a possible right shoulder rotator cuff tear, recommended Petitioner undergo a right shoulder arthrogram, and released Petitioner to work with 10 pound weight restrictions and no overhead use.

Petitioner underwent a right shoulder MR arthrogram on August 12, 2009, which revealed supraspinatus tendinopathy without evidence of a rotator cuff tear, and degenerative and hypertrophic changes [*5] at the acromioclavicular joint possibly resulting in chronic impingement. On August 19, 2009, Dr. Vitello recommended Petitioner undergo physical therapy based on Petitioner's lack of improvement in symptoms.

Dr. Vitello reexamined Petitioner on November 11, 2009, noting that Petitioner made some progress in therapy but also continued to have some pain. Petitioner had limitation in flexion, extension and abduction, with pain at the end points. Dr. Vitello recommended a right shoulder arthroscopy and capsular release as Petitioner had failed conservative management.

On November 23, 2009, Dr. Jay Levin, Respondent's independent medical examiner, evaluated Petitioner's right shoulder with the help of a Spanish interpreter. Dr. Levin opined:

> "It is my opinion that the examinee's condition referable to an occurrence on July 14, 2008, was a **MILD RIGHT SHOULDER SUBACROMIAL BURSITIS** that improved (as outlined above) by early August of 2008 based upon his clinical course.
>
> He does not [require ongoing treatment for his right shoulder complaints]. The records outlined above indicate that even though he continued to work from the date of the occurrence on July 14, 2008, until August 5, [*6] 2008, he was 75% improved and had a normal examination other than some tenderness to internal rotation.
>
> He can work in a full unrestricted capacity referable to his right shoulder."

On June 4, 2010, Dr. Vitello prepared a narrative report of Petitioner's treatment. Dr. Vitello diagnosed Petitioner with right shoulder impingement and opined that Petitioner's July 2008 accident was causally connected to his current diagnosis. Petitioner required a right shoulder arthroscopy, subacromial decompression and debridement, and work restrictions of no overhead use with limited lifting, pushing, and pulling of 10 pounds or less.

Petitioner testified that he did not have right shoulder problems before the accident. Petitioner had not undergone surgery as of arbitration and had not worked since his termination.

On cross examination, Petitioner testified that he did not miss work while employed by Respondent and acknowledged Respondent accommodated his work restrictions. After his August 12, 2008, left hand injury, Petitioner mostly used his right hand to perform his job duties. When he had to use both hands to lift ramps weighing about 40 or 50 pounds, he complained to his supervisor, Mike [*7] Lofton (Lofton), of increased pain in the right shoulder.

On redirect examination, Petitioner testified that he did not seek medical treatment after his termination because he did not have money or insurance. He went to the Saint Anthony Hospital emergency room in March of 2009 for treatment. Emergency room staff diagnosed him with shoulder pain, prescribed Ibuprofen and referred him to Dr. Mitchell Goldflies. Petitioner testified that he did not seek treatment with Dr. Goldflies because he did not have money.

Jeff Swano (Swano), Respondent's owner and president, testified to being involved in the day-to-day management of Respondent's business. Respondent accommodated Petitioner's right shoulder and left hand light duty restrictions, and would have continued doing so had Petitioner not been terminated on September 10, 2008. Swano was not Petitioner's direct supervisor and had no knowledge of right shoulder pain complaints Petitioner may have voiced while working. If Petitioner had reported right shoulder pain or requested medical treatment to Lofton, it was possible that Lofton would not have told Swano. On cross examination, Swano acknowledged that he did not know what duties Petitioner [*8] performed while working for Respondent. Lofton left Respondent's employment in 2010.

DISCUSSION

The Arbitrator found Petitioner failed to prove by a preponderance of the evidence that a causal connection exists between Petitioner's July 14, 2008, injury and his present condition of ill-being. We disagree.

Petitioner sought medical treatment with Dr. Pandya for his right shoulder injury on July 15, 2008. Dr. Pandya diagnosed Petitioner with thoracic subluxation and rotator cuff syndrome. At a subsequent visit on July 18, 2008, Dr. Pandya noted a positive supraspinatus test. Petitioner also treated with Dr. Ghani for his right shoulder injury. On July 22, 2008, Dr. Ghani prescribed Celebrex and noted Petitioner should consider an MRI.

As of August 5, 2008, Petitioner was released to work with significant restrictions of no lifting greater than 5 pounds, and no repetitive pulling or pushing. On August 12, 2008, while still under restrictions for his right shoulder, Petitioner sustained a severe injury to his left hand for which he treated with Dr. Khan. On September 2, 2008, Dr. Khan released Petitioner to work with restrictions of no lifting greater than 20 pounds with the left hand. [*9] On September 10, 2008, Respondent terminated Petitioner's employment while Petitioner was still treating with Dr. Khan and was under restrictions for both the right shoulder and the left hand.

Petitioner testified that he lacked money to seek further treatment for his right shoulder injury. He resorted to treatment at the emergency room on March 26, 2009. On July 6, 2009, Dr. Vitello examined Petitioner at Petitioner's attorney's request, diagnosed Petitioner with a possible rotator cuff tear to the right shoulder, and recommended a right shoulder MR arthrogram. Petitioner's August 12, 2009, MR arthrogram revealed supraspinatus tendinopathy, and degenerative and hypertrophic changes at the acromioclavicular joint possibly resulting in chronic impingement.

On November 11, 2009, Dr. Vitello recommended Petitioner undergo a right shoulder arthroscopy and capsular release because Petitioner had failed conservative management. In his June 4, 2010, narrative report, Dr. Vitello diagnosed Petitioner with right shoulder impingement and opined that Petitioner's July 2008 accident was causally connected to his current diagnosis. Petitioner testified, without rebuttal, that he did not have right [*10] shoulder problems prior to the July 14, 2008, accident. We find Dr. Vitello's opinion credible and persuasive, and conclude that Petitioner proved by a preponderance of the evidence that his present condition of ill-being is causally related to the injury he sustained on July 14, 2008. Petitioner requires prospective medical treatment and has not reached maximum medical improvement.

We award Petitioner temporary total disability benefits from September 11, 2008, through March 26, 2009. On July 22, 2008, Dr. Ghani returned Petitioner to work with restrictions of no lifting greater than 5 pounds and no repetitive pulling or pushing with the right hand. On September 10, 2008, Respondent terminated Petitioner's employment while Petitioner was still on light duty. We note, pursuant to *International Scaffolding Inc. v. Ill. Workers' Comp. Comm'n, 236 Ill. 2d 132, 923 N.E.2d 266 (2010),* termination of employment is not a cause for ending temporary total disability benefits.

On March 26, 2009, Petitioner presented to Saint Anthony Hospital emergency room complaining of right shoulder pain rated 8 out of 10. Upon release, emergency room staff advised [*11] that Petitioner follow-up with Dr. Goldflies but did not place work restrictions on Petitioner. On July 6, 2009, Petitioner sought treatment with Dr. Vitello. Dr. Vitello released Petitioner to work with 10 pound weight restrictions and no overhead right shoulder use, renewing these restrictions on June 4, 2010. We find it appropriate to award Petitioner a second period of temporary total disability benefits from July 6, 2009, through May 13, 2011, the date of the arbitration hearing.

We award Petitioner all medical expenses for treatment related to Petitioner's right shoulder condition, including treatment by Dr. Manish Pandya at New Life Medical Center, Dr. Ehtesham Ghani and staff at Maple Medical Center, and Dr. William Vitello at Hand Surgery Associates. Also, we award Petitioner medical expenses incurred for treatment at Saint Anthony Hospital, including the cost of x-rays. We award physical therapy provided by Chicago Metro Hand Therapy, and the MR arthrogram performed at Saint Joseph Hospital.

We award Petitioner prospective medical care as recommended by Dr. Vitello, including right shoulder surgery and post-surgical physical therapy.

IT IS THEREFORE ORDERED BY THE COMMISSION [*12] that the Decision of the Arbitrator filed on August 24, 2011, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 10,325.22 for medical expenses under § 8(a) of the Act, subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $ 333.33 per week for 124-6/7 weeks, from September 11, 2008, through March 26, 2009, and from July 6, 2009, through May 13, 2011, which are the periods of temporary total disability 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 authorize and pay for prospective medical care including surgery and post-surgical physical therapy as recommended by Dr. Vitello.

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

ATTACHMENT:

ARBITRATION DECISION

19(b)

Jose Nunez
Employee/Petitioner

v.

Dig Right In Landscaping
Employer/Respondent

Case # **09** WC **05981**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed [*14] to each party. The matter was heard by the Honorable **Robert Lammie**, Arbitrator of the Commission, in the city of **Chicago**, on **May 13, 2011.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
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
N. [X] Is Respondent due any credit?

FINDINGS

On the date of accident, **July 14, 2008,** 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 [*15] condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$ 26,000.00;** the average weekly wage was **$ 500.00.**

On the date of accident, Petitioner was **46** years of age, ***single*** 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 **$ 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 **$ 1,897.50** under Section 8(j) of the Act.

ORDER

See attached.

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 [*16] 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

August 23, 2011

Date

Findings of Fact, and Conclusions of Law

In regard to issue F: "Is the petitioner's present condition of ill-being causally related to the injury?" the Arbitrator makes the following findings:

The petitioner's present condition of ill-being is not causally related to the injury. In support of that finding, the Arbitrator notes the following testimony and evidence.

The petitioner was employed by the respondent as a laborer and driver on July 14, 2008. On that date, he was involved in an undisputed accident at work while putting a cultivator into a truck. He sustained an injury to his right shoulder.

The next day, the petitioner received treatment with Dr. Pandya, a chiropractor. According to the records, the petitioner reported a history of injuring his shoulder while lifting an object from the ground weighing approximately 20-40 pounds. At trial, however, the petitioner [*17] testified that the object he lifted only weighed 2-4 pounds. He also denied giving Dr. Pandya the above history

Dr. Pandya diagnosed subluxation of the thoracic spine and rotator cuff syndrome. The records of Dr. Pandya do not give any indication that the petitioner reported feeling a "pop" in his right shoulder at the time of the accident. The Arbitrator finds this significant as the petitioner testified at trial that he always reported feeling a "pop" in his shoulder to his medical providers. The petitioner testified that he would tell all of his medical providers how his accident occurred, and would expect them to keep an accurate record of the history of accident and his complaints.

The petitioner was seen for additional follow-ups with Dr. Pandya on July 16 and 18, 2008. He complained of continued pain in his right shoulder and neck stiffness. The petitioner was not seen again by Dr. Pandya after July 18, 2008. He continued working for the respondent. In fact, the petitioner never lost any time from work as a result of the right shoulder accident.

At trial, the petitioner testified that Mike Lofton and sent him for medical treatment, implying that Dr. Pandya was the company's [*18] choice. The doctor's records indicate otherwise.

After finishing treatment with the chiropractor Dr. Pandya on July 18, 2008, the petitioner then started treatment with Dr. Ehteshan Ghani on July 22, 2008. He reported a consistent history of injuring himself while putting away a cultivator. Significantly, as with Dr. Pandya, the petitioner did not make any allegations about feeling a "pop" in his shoulder. Dr. Ghani diagnosed shoulder pain. He noted he may "consider" a MRI. A MRI was not actually ordered at that time. Dr. Ghani released the petitioner to return to work with restrictions of no lifting with the right arm.

The petitioner confirmed at trial that he continued working for the respondent. He did not lose any time from work as a result of the July 14, 2008 accident. The respondent was able to accommodate the petitioner's restrictions.

The petitioner followed up with Dr. Ghani on July 28, 2008. The petitioner confirmed improvement. He received an injection. Dr. Ghani did not order an MRI.

On August 5, 2008, the petitioner reported a 75% improvement to Dr. Ghani. Dr. Ghani continued to diagnose shoulder "pain". Dr. Ghani still did not order an MRI. He released the petitioner [*19] to work with lifting restrictions for the shoulder. The respondent again accommodated those restrictions.

After his last visit with Dr. Ghani, the petitioner did not receive any further treatment to his shoulder for more than 7 months, until he was seen at Saint Anthony's hospital on March 26, 2009. (In the interim, the petitioner had been formally terminated on September 10, 2008 by the respondent for cause. Mr. Jeff Swano, the respondent's representative, testified concerning the circumstances of the petitioner's termination. He testified that the petitioner was terminated for performing "side jobs" with company property after the July 14, 2008 accident.)

During this visit to St. Anthony's hospital, the petitioner gave a history of a fall six months previously, which would be approximately September 2008. Again, there was no history of any popping in the shoulder, and the pain was described as "intermittent". He rated his pain level as 10 out of 10. It was recommended that he consulted Dr. Goldflies. Apparently he never did. But that history and complaints are totally inconsistent with his trial testimony and prior medical records.

Then after on other three months, and after [*20] retaining an attorney and filing a workers' compensation claim, the petitioner consulted with Dr. Vitello on July 1, 2009, on referral from that same attorney. Dr. Vitello authorized the petitioner off from work, and began a course of treatment. Subsequently, he recommended surgery.

On November 23, 2009, at the request of the respondent pursuant to Section 12, the petitioner was examined by Dr. Jay Levin. The petitioner again reported a history of falling backwards to Dr. Levin, as well as a history of feeling a "pop" in his shoulder. The petitioner also denied a history of immediate pain, contrary to his earlier medical records. The petitioner also confirmed that he continued to work full duty for the respondent from July through September 2008.

The petitioner stated he had constant right shoulder pain in the posterior and anterior biceps area. He rated his pain at 10 out of 10. However, on examination, he was not in any acute distress. A drop arm test was negative bilaterally. There was no pain over the AC joint area. There was no apprehension to anterior/inferior subluxation of either shoulder, no atrophy of the supraspinatus or deltoid, and no winging of the scapula.

Following [*21] his examination and review of the petitioner's medical records, Dr. Levin diagnosed mild right shoulder subacromial bursitis as a result of the accident on July 14, 2008. He concluded that the petitioner's condition had resolved by early August 2008 based on the petitioner's own medical treatment. He concluded that the petitioner did not require any further medical treatment. Dr. Levin also concluded that the petitioner could work in a full unrestricted capacity with respect to his right shoulder. The Arbitrator finds this release for full duty work to be effective as of early August 2008 when Dr. Levin concluded the petitioner's original injury had resolved.

Further, the respondent offered the testimony of the respondent's representative, Mr. Jeff Swano, at trial. He testified that the petitioner did not make known any oral complaints of right shoulder pain after August 5, 2008. Mr. Swano confirmed that he did not find any written record of continuing complaints. He confirmed that the respondent would have kept a record in the petitioner's personnel file, which Mr. Swano reviewed prior to trial. Mr. Swano also testified that the respondent would have definitely authorized additional [*22] treatment to the right shoulder if the petitioner requested additional treatment.

Finally, the petitioner sustained an intervening accident to his left hand on August 12, 2008. He was treated at LaGrange Medical Center for this. The Arbitrator notes the significance of the petitioner's intervening treatment from August 12 through October 6, 2008. Based on a review of the records from the petitioner's 10 visits, the petitioner never once reported any limitations or complaints regarding his right shoulder. Clearly, if the petitioner was placed on restrictions of no use of the left hand, and he had continuing complaints of the right arm and still had restrictions, he would have been taken off work completely. He was not.

In regard to issue J: "Were the medical services that were provided to the petitioner reasonable and necessary? Has the respondent paid all the appropriate charges for all reasonable and necessary medical services?" the Arbitrator makes the following findings:

The Medical Services that were provided to the petitioner prior to August 5, 2008 were reasonable and necessary. That is the point of maximum medical improvement. Those have been paid by the respondent. [*23] The Medical Services that were provided to the petitioner after August 5, 2008 were neither reasonable nor necessary. Those bills are not awarded. This includes all bills in petitioner's exhibit 1. See caption "F" concerning causal connection above.

In regard to issue K: "Is the petitioner entitled to prospective medical care?" the Arbitrator makes the following findings:

Having found that the petitioner's condition is not causally connected to the accident in question, then the Arbitrator does not award prospective Medical Care.

In regard to issue L: "What temporary benefits are in dispute?" the Arbitrator makes the following findings:

Having found that the petitioner's current condition of ill-being is not causally connected, the Arbitrator need not address this issue. However, the Arbitrator would note that the petitioner missed no time from work until he was termi-

nated for cause on September 9, 2008. At that time, he was at maximum medical improvement. Therefore, he is not entitled to any TTD.

In regard to issue N: "Is the respondent due any credit?" the Arbitrator makes the following findings:

The respondent is entitled to an 8(j) credit in the amount of [*24] $ 1897.50 by stipulation. It is unclear to what entity or entities to which this payment was made, but it is noted that the petitioner stipulated to it. If it was for payments made prior to August 5th, 2008, then the respondent is entitled to credit. In exchange, the respondent will hold petitioner harmless and indemnify him from any claim for reimbursement. If it was for medical expenses incurred after August 5, 2008, then they are not entitled to a credit as against some other liability. As noted above, medical expenses incurred after August 5, 2008 are not the responsibility of the respondent under workers compensation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsEmployee RightsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

n1 The note from Maple Medical Center is handwritten and it is unclear whether Petitioner was seen by Dr. Ghani or another physician.

2014 IL App (1st) 130410WC

Workers' Compensation
Commission Division
Opinion Filed: July 28, 2014

No. 1-13-0410WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DIG RIGHT IN LANDSCAPING, Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Jose Nunez, Appellant).	)	Appeal from the Circuit Court of Cook County, Illinois. Appeal No. 1-13-0410WC Circuit No. 12-L-50882 Honorable Margaret Brennan, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Jose Nunez, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for right shoulder injuries which he allegedly sustained while working for Dig Right In Landscaping (employer). After a section 19(b) hearing, the arbitrator found that the claimant's current condition of ill-being of his right shoulder was not causally related to his employment. The arbitrator denied the claim for benefits. The claimant sought review before the Illinois Workers'

Compensation Commission (Commission), which reversed the decision of the arbitrator and awarded the claimant temporary total disability (TTD) benefits, reasonable and necessary medical expenses, and prospective medical care. The employer then sought judicial review of the Commission's decision in the circuit court of Cook County. The circuit court found that the Commission's decision was against the manifest weight of the evidence and reinstated the arbitrator's award. The claimant then filed a timely appeal with this court.

¶ 2 On appeal, the claimant maintains that the Commission's finding that his current condition of ill-being was causally related to his employment was not against the manifest weight of the evidence. He asks this court to reverse the order of the circuit court and reinstate the Commission's decision.

¶ 3 FACTS

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on May 13, 2011. The evidence included the testimony of the claimant and the claimant's written medical records.

¶ 5 On July 14, 2008, the claimant was working as a laborer/driver for the employer. It was the claimant's testimony that he sustained an injury to his right shoulder while loading a piece of equipment onto a truck.

¶ 6 The following day the claimant sought treatment from Dr. Manish Pandya, a chiropractor. According to Dr. Pandya's treatment records, the claimant gave a history of injury to the right shoulder while lifting an object weighing approximately 20 to 40 pounds. The claimant complained of right shoulder pain rated as 8 on a scale of 1 to 10, with 10 being extreme pain. The records recorded no history of the claimant reporting a "pop" or popping sensation in his shoulder. Dr. Pandya diagnosed subluxation of the thoracic spine and rotator

cuff syndrome. The claimant treated with Dr. Pandya again on July 16 and July 18, 2008, at which time he complained of both right shoulder pain and neck stiffness. Dr. Pandya diagnosed mild discomfort upon palpitation of the spine in the thoracic region and moderate spasm in the neck. Dr. Pandya recommended trigger point therapy and an ultrasound of the right shoulder. The claimant did not treat with Dr. Pandya after July 18, 2008.

¶ 7 On July 22, 2008, the claimant sought treatment from Dr. Ehteshan Ghani, a general practitioner. Dr. Ghani's treatment notes report that the claimant gave a history of injuring himself while loading a cultivator onto a truck. Dr. Ghani diagnosed shoulder pain, prescribed Celebrex and entered a notation in his treatment records to "consider MRI." He released the claimant to return to work with a restriction of no lifting of more than five pounds with the right arm, and no repetitive pushing or pulling with the right hand.

¶ 8 The record established that the employer was able to accommodate the work restrictions imposed by Dr. Ghani. The claimant did not lose any time from work as a result of the July 14, 2008, accident.

¶ 9 The claimant was examined again by Dr. Ghani on July 28, 2008, and August 5, 2008. The claimant reported some improvement in shoulder pain at the July 28 examination and a 75% improvement at the August 5 examination. Dr. Ghani reiterated the previous restrictions. The August 5th examination was the last time the claimant treated with Dr. Ghani.

¶ 10 On August 12, 2008, the claimant sustained several laceration injuries to his left hand in a work-related accident. He was treated by Dr. Hasan Kahn at LaGrange Medical Center. Dr. Kahn's treatment records indicated that the claimant gave a medical history of diabetes, but made no mention of right shoulder pain or the July 14, 2008, accident. Dr. Kahn released the claimant with a restriction of no lifting of greater than 20 pounds with the left hand. The claimant

testified that he was able to work thereafter within the restrictions for both his left hand and his right shoulder.

¶ 11 The claimant continued to treat for his left hand injury at LaGrange Medical Center from August 12, 2008, through October 6, 2008, at which time he was released to return to work without any restrictions. The LaGrange Medical Center records list no complaints of right shoulder pain or any restrictions related to the right shoulder during the time the claimant treated there.

¶ 12 On September 10, 2008, while he was still treating at LaGrange Medical Center for his left hand injury, the claimant was terminated for cause. Unrebutted testimony from the employer established that the claimant was terminated for performing unauthorized "side jobs" using company equipment. The employer's representative further testified that the employer was not aware of any right shoulder complaints at the time of the claimant's termination. The record also established that, at the time he was terminated, the claimant made no requests for medical treatment or TTD benefits related to his right shoulder. The claimant claimed to have contacted the employer's workers' compensation insurance adjuster but he could not recall when he made this contact or what he said to the adjuster.

¶ 13 On March 26, 2009, the claimant sought treatment for right shoulder pain at St. Anthony's hospital. He gave a history of a backward fall six months previously (*i.e.*, approximately September of 2008). He reported intermittent right shoulder pain, rating his pain level as 8 out of 10. Treatment notes from the hospital indicated no observable deformity, bruising, swelling, hematoma, or tenderness to palpitation in the right shoulder. The claimant was given ibuprofen and referred to Dr. Mitchell Goldfleis, an orthopedic surgeon. The claimant

never consulted with Dr. Goldflies. He testified that he was unable to follow up with Dr. Goldflies due to a lack of money or insurance.

¶ 14 On July 1, 2009, the claimant filed an application for adjustment of claim regarding the July 14, 2008, accident. On the recommendation of his attorney, the claimant sought treatment from Dr. William Vitello, a board-certified orthopedic surgeon. Dr. Vitello first examined the claimant on July 6, 2009. According to Dr. Vitello's treatment notes, the claimant gave a history of injuring his right shoulder while falling backwards after putting away a shovel on July 22, 2008. The claimant denied giving a history of falling while putting away a shovel and maintained that he gave of history of injury while loading a cultivator onto a truck. The claimant reported a pain level of 10 on the 1-to-10 scale and an inability to sleep at night due to the pain. Dr. Vitello ordered an X-ray of the right shoulder. The X-ray appeared normal to Dr. Vitello. Dr. Vitello diagnosed a possible rotator cuff tear and placed the claimant on a restriction of lifting no more than 10 pounds with his right arm.

¶ 15 On August 12, 2009, Dr. Vitello ordered an MR arthrogram of the right shoulder, which revealed no acute pathology and no evidence of a rotator cuff tear. The test did reveal a degenerative impingement of the right clavicle joint. Dr. Vitello administered a pain injection in the right shoulder and prescribed a course of physical therapy.

¶ 16 On November 11, 2009, Dr. Vitello reexamined the claimant's right shoulder. The claimant reported that the pain injection provided only temporary relief. Dr. Vitello observed that the claimant had participated in physical therapy from August 19, 2009, to October 9, 2009, with no reduction in shoulder pain. Based on the claimant's lack of improvement following physical therapy, Dr. Vitello recommended arthroscopic surgery on the right shoulder.

¶ 17 On November 23, 20009, the claimant was examined at the request of the employer by Dr. Jay Levin, a board-certified orthopedic surgeon. The claimant gave a history of injuring his right shoulder in a fall. He reported feeling a "pop" in his shoulder at the time he fell. He further complained of constant pain in his right shoulder with a pain rating of 10 out of 10. Dr. Levin observed no objective signs of acute distress. He noted from the claimant's medical records that he continued to work from the July 14, 2008, until August 5, 2008, at which time he reported 75% improvement. After reviewing the claimant's medical records, Dr. Levin diagnosed mild right shoulder subacromial bursitis. He opined that the claimant's current condition of ill-being was not causally related to an employment related accident on July 14, 2008. Dr. Levin further opined that the claimant's condition had resolved by August 2008, and he was able work without restriction after that date.

¶ 18 On December 23, 2009, the claimant was again examined by Dr. Vitello, who continued to recommend surgery.

¶ 19 On June 14, 2010, Dr. Vitello issued a written report in which he diagnosed right shoulder impingement. He recommended right shoulder arthroscopy, subacromial decompression and debridement. He opined that the claimant's current condition of ill-being of the right shoulder was causally related to the July 2008 industrial accident.

¶ 20 Following the hearing, the arbitrator found that the claimant had failed to establish that his current condition of ill-being was causally related to the industrial accident on July 14, 2008. The arbitrator pointed out that: (1) after August 5, 2008, the claimant made no reports of right shoulder pain to his employer and received no treatment for right shoulder pain until March 26, 2009; (2) even when his employment was terminated on September 10, 2008, the claimant did not report that he still had right shoulder pain; (3) no medical records from August 12, 2008,

through October 6, 2008, had any notations regarding reported shoulder pain; and (4) from August 5, 2008, to September 10, 2008, the claimant worked under a restriction against the use of his left arm, relying entirely on the use of his right arm. The arbitrator noted that "[c]learly, if the [claimant] was placed on restrictions of no use of the *left* hand, and he had continuing complaints of the *right* arm and still had restrictions, he would have been taken off work completely. He was not." (Emphasis added.)

¶ 21 The claimant sought review before the Commission, which rejected the arbitrator's findings and issued an award of benefits to the claimant. The Commission noted that claimant sought medical treatment for right shoulder pain immediately following the July 14, 2008, accident. The Commission further noted that the claimant had consistently reported right shoulder pain after the accident and had been given pain medication on several occasions thereafter. It also noted that at the time of his termination for cause, the claimant was still under a work restriction limiting the use of his right arm due to the reported shoulder pain. The Commission found Dr. Vitello's causation opinion credible and persuasive. While the Commission made no express determination regarding the claimant's credibility, it implicitly found the claimant credible when it noted without negative comment his testimony that prior to July 14, 2008, he had suffered no right shoulder pain, but had experienced continual pain since that date. Finally, the Commission found it significant that the claimant was still on light duty for his right shoulder injury when the employer terminated him for cause. The Commission noted that termination of employment for cause does not terminate a claimant's eligibility for TTD benefits. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010). The Commission awarded the claimant TTD benefits from September 11, 2008, through March 26, 2009, and from July 6, 2009, through May 13, 2011, which was the

date of the arbitration hearing. It further ordered payment of all medical expenses related to the claimant's right shoulder condition, and it awarded prospective medical expenses for the right shoulder surgery and postsurgical treatment as recommended by Dr. Vitello.

¶ 22 The employer sought judicial review of the Commission's decision in the circuit court of Cook County. On March 5, 2013, the circuit court set aside the Commission's decision and reinstated the decision of the arbitrator. The circuit court explained that the Commission improperly relied upon Dr. Vitello's opinion that the claimant's right shoulder pathology was caused by the July 14, 2008, workplace accident. The court stated that the Commission failed to state the basis for its credibility determinations regarding the claimant and his treating doctors and failed to consider that the claimant reported 75% improvement in his shoulder condition approximately two weeks after the accident. The court also found that Dr. Vitello's causation opinion was based upon uncorroborated and unreliable medical history given to him by the claimant. The court particularly noted that the claimant gave several versions of when and how the shoulder injury occurred. Additionally, the court noted that the claimant went seven months without any treatment, yet reported his pain level as 8 or 10 out of 10. The claimant now appeals, arguing that the Commission's award of benefits was not against the manifest weight of the evidence.

¶ 23 **ANALYSIS**

¶ 24 Neither party has questioned the court's jurisdiction to review the Commission's decision in this case. It is our obligation, however, to consider, *sua sponte*, matters which related to the subject matter jurisdiction over final decisions of the Commission. *Consolidated Freightways v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1077, 1079 (2007). Moreover, subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties, and the failure

of a party to object to the lack of subject matter jurisdiction cannot confer jurisdiction upon the court. *Supreme Catering v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 111220WC, ¶ 7.

¶ 25 The record in this matter contains a decision and award of benefits to the claimant signed by only two commissioners. Section 19(e) of the Act provides in pertinent part: "In the event either party requests oral argument, such argument shall be had before a panel of 3 members of the Commission ***. *** A decision of the Commission shall be approved by a majority of Commissioners present at such hearing ***." 820 ILCS 305/19(e) (West 2010). While it is a jurisdictional requirement that three commissioners form a panel to hear oral arguments and a majority of that panel approve the resulting order, the writing and filing of the Commission's order is a ministerial act and does not impact the jurisdictional validity of the Commission's ruling. *Zeigler v. Industrial Comm'n*, 51 Ill. 2d 137, 142 (1972); *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1062-63 (2006). In this case, the record sufficiently established that oral argument was requested and had before a panel of three commissioners. However, at the time the Commission's decision was issued, the term of one of the Commissioners had expired. Since the remaining two commissioners who heard the oral argument were able to agree upon a disposition and signed the Commission's order, the record is clear that majority of the panel hearing the argument approved the resulting order. Had the two panel members not been in agreement, it would have been necessary for a replacement commissioner to concur with one of the decision of one of the commissioners who was present at the oral argument. *Zeigler*, 51 Ill. 2d at 142. That procedure was not necessary in this case. The fact that the order herein is signed by only two commissioners, therefore, does not impact the

validity of the order in this matter. We find that we have subject matter jurisdiction over this appeal.

¶ 26 Turning to the merits of the appeal, the claimant argues that the Commission correctly found that he proved a causal connection between the July 14, 2008, and his current condition of ill-being. He contends that the Commission correctly placed more weight on the opinion of Dr. Vitello and that it sufficiently weighed his credibility in light of the medical evidence. The employer counters that the Commission's decision was against the manifest weight of the evidence because the medical evidence clearly established that his shoulder condition had completely resolved by August 2008 as reported by Dr. Levin. Although this is a close case, we agree with the claimant and find that the Commission's award of benefits was not against the manifest weight of the evidence.

¶ 27 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather,

the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993).

¶ 28 In this case, the Commission's finding that the claimant's right shoulder pain and need for surgery was causally connected to his workplace accident is not against the manifest weight of the evidence. The Commission based its decision on: (1) Dr. Vitello's opinion that the claimant's right shoulder impingement manifested itself only after the July 14, 2008, accident; (2) the fact that the claimant's reports of right shoulder pain were consistent from the time of the accident until the date of the hearing; and (3) despite the fact that the claimant reported a 75% improvement within approximately two weeks after the accident he still was on a significant work restriction regarding his right shoulder when he was terminated for cause on September 10, 2008.

¶ 29 The Commission's award of benefits in this matter is based primarily upon its determination that the claimant's description of his symptoms to his treating physicians, particularly Dr. Vitello, was credible. We note that the circuit court found that the claimant was completely lacking in credibility, and that lack of credibility made Dr. Vitello's causation opinion unreliable according to the circuit court. It is well settled, however, that while a reviewing court may view the credibility of the claimant differently than did the Commission, it is the exclusive function of Commission to judge credibility and assign weight to medical opinion testimony. *O'Dette*, 79 Ill. 2d at 253. Here, while the claimant's testimony and descriptions of the accident

appear to be less than precise, the fact remains that he gave the same history and pain descriptions to both Dr. Vitello and Dr. Levin. Moreover, while it appears that there were no recorded reports of right shoulder pain while the claimant was treating for his left hand injury, the Commission correctly noted that on the last day of his employment, September 10, 208, the claimant was working under a severe lifting restriction imposed by Dr. Ghani relative to the claimant's right shoulder and there is no record that the restriction was ever lifted. Based on this evidence, and the inferences reasonably drawn from the evidence, the Commission's finding that the claimant's right shoulder impingement neuropathy was causally connected to his workplace accident of July 14, 2008, was not against the manifest weight of the evidence.

¶ 30 Since the Commission's finding that the claimant was entitled to TTD and medical benefits for injuries sustained in a work-related accident on July 14, 2008, was not against the manifest weight of the evidence, we reverse the circuit court's judgment and affirm the Commission's award. The matter is remanded to the Commission for further proceedings consistent with this decision.

¶ 31 CONCLUSION

¶ 32 The Commission's finding that the claimant's current condition of ill-being is causally related to his employment is not contrary to the manifest weight of the evidence. The Commission found credible medical evidence supporting causation, and while it did not expressly find the claimant credible, the Commission's description of his testimony makes it clear that it found him credible. We therefore reverse the judgment of the circuit court, affirm the decision of the Commission and remand the matter to the Commission for further proceedings.

¶ 33 Circuit court reversed and Commission decision reinstated; cause remanded to the Commission for further proceedings.

1 of 100 DOCUMENTS

JACK CARTER, PETITIONER, v. OLD BEN/HORIZON NATURAL RESOURCES, RESPONDENT.

No. 08WC 38942

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF FRANKLIN

2011 Ill. Wrk. Comp. LEXIS 479; 11IWCC0469

May 11, 2011

JUDGES: Molly C. Mason; Yolaine Dauphin; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

This case comes before the Commission on Petitioner's timely review of the Decision of Arbitrator Dibble finding that Petitioner's occupational disease claim, filed on September 3, 2008, is barred by the statute of limitations set forth in Section 6(c) of the Illinois Workers' Occupational Diseases Act, and that all remaining issues are thus moot.

After considering the entire record, and for the reasons set forth below, the Commission affirms the Arbitrator's finding that Petitioner's claim was not timely filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified that he worked as a coal miner for Respondent for approximately twenty-two years. Petitioner testified that he spent approximately 90% of that twenty-two year period working underground. In 1973, he worked above ground for about a year. T. 10. He testified that he was exposed to coal dust during the entire time he worked for Respondent. He wore a mask "probably a quarter" of the time before he started noticing symptoms. T. 10. The masks he wore were made of cotton. They were "not really" effective in keeping the dust out of his lungs. T. 11.

2. Petitioner [*2] testified that he "ran a buggy" at the face of Respondent's mine "quite a bit." He described this particular job as the dustiest of his job assignments. In the worst dust conditions, he could see about 10 or 15 feet ahead of him. In lighter dust conditions, he could see about 30 or 40 feet ahead of him. T. 13.

3. Petitioner testified that he experienced a "hacking cough" during the time he worked for Respondent. He would cough up black and "grayish" phlegm after getting out of bed each morning and periodically throughout his work shifts. T. 11.

4. Petitioner testified that he last worked for Respondent on September 24, 2004. T. 11. He continued coughing after that date but denied any additional exposure to coal dust. T. 12. He used to be able to ride his bicycle long distances but, as of the hearing, was only able to ride a couple of miles at a slow pace without having to stop and gasp for air. T. 12.

5. Petitioner testified that he started smoking cigarettes in approximately 1963, when he joined the U.S. Navy. Thereafter, he smoked about a pack of cigarettes per day for about ten years. He quit smoking at age 27 or 28 and denied smoking thereafter. T. 12-13.

6. Petitioner testified [*3] that he voiced concerns about the dust conditions and his breathing to his supervisors, Larry Grizzell and Bruce Garrett, within the last forty-five days he worked for Respondent. T. 14.

7. Under cross-examination, Petitioner testified that September 24, 2004, the last day he worked for Respondent, was the day the mine shut down. T. 15. He filed his Application for Adjustment of Claim on September 3, 2008. Dr. Houser evaluated him for black lung. His union representative recommended that he see Dr. Houser for this evaluation. T. 16. He has reviewed Dr. Houser's report and agrees with the statements in the report concerning his ability to ride a bicycle. T. 16-17. He is now sixty-six years old. He still rides his bicycle when he has time and can still ride for about two miles before developing shortness of breath. T. 16-17. He acknowledged that it is dark underground and that, even if there were no dust underground, it would be difficult to see more than 30 or 40 feet. T. 17. He performed "rock dusting" every night, at the end of each shift. He described "rock dust" as the substance that, pursuant to law, is put on the walls and ceiling of a mine to reduce the risk of a gas explosion. [*4] T. 18. He did not tell his supervisors he had "coal workers' pneumoconiosis" because, back then, he had no knowledge of this term. He simply told his supervisors he had "congestion problems." T. 18.

8. Petitioner offered various medical records, including Dr. Houser's report of March 13, 2009. PX 2. In his report, Dr. Houser indicated he examined Petitioner on February 16, 2009 for purposes of Petitioner's federal black lung claim. Dr. Houser's report reflects that Petitioner worked in a coal mine for twenty-two years, with his last coal mining job described as "shuttle car operator." Dr. Houser described Petitioner as currently working for AISIN, loading auto parts on pallets. Dr. Houser indicated that Petitioner smoked about 1 1/2 packs of cigarettes per day from age 16 to age 30. Dr. Houser noted that Petitioner denied coughing, wheezing and sputum production, among other symptoms, but "notices some slight dyspnea when he bicycles uphill." Dr. Houser also noted that "in the summertime [Petitioner] rides a bicycle up to 10 miles per day three days per week."

On auscultation of Petitioner's lungs, Dr. House noted a "few crackles at the right base which improved with deep breathing [*5] and coughing." With the exception of some arthritic changes in the hands, Petitioner's examination was otherwise normal.

Dr. Houser reviewed various studies performed at Deaconess Hospital on February 16, 2009. He noted that a ventilation study performed that date showed "mild airway obstruction which involves primarily the small airways."

Dr. Houser reached two cardiopulmonary diagnoses: 1) COPD [chronic obstructive pulmonary disease]; and 2) arterial sclerotic heart disease with "age undeterminate anteroseptal myocardial infarct." Dr. Houser described Petitioner's COPD as "mild." He found Petitioner's COPD to be "secondary to inhalation of coal and rock dust arising from his 22-year history of coal mine employment and former cigarette smoking." He found Petitioner's arterial sclerotic heart disease to be "secondary to cigarette smoking." He noted that hereditary factors "could be contributing" to Petitioner's heart disease but indicated Petitioner's family medical history was not available because he is adopted. He provided Petitioner with a copy of his EKG and recommended that he see a cardiologist "for evaluation of abnormal EKG."

9. Petitioner also offered Dr. Mayer's report [*6] of March 31, 2010, along with Dr. Mayer's Curriculum Vitae. PX 1. Dr. Mayer is a physician who also holds a Ph.D. in epidemiology. In his report, Dr. Mayer summarized the medical literature addressing the question of whether there is a causal relationship between coal mining employment and the development of chronic obstructive pulmonary disease. In the last paragraph of his report, Dr. Mayer opined that, "from a medical and scientific viewpoint," no distinction should be drawn between coal workers' pneumoconiosis and chronic obstructive pulmonary disease for purposes of applying a statute of limitations.

10. Respondent offered Dr. Houser's report and other documents relating to Petitioner's claim for benefits under the Black Lung Benefits Act. RX 1-3. RX 2 is a United States Department of Labor form entitled "Schedule for the Submission of Additional Evidence." This form indicates that Petitioner applied for benefits under the Black Lung Benefits Act on October 20, 2008 and that, based on that application and supporting evidence, the Department concludes, on a preliminary basis, that Petitioner would not be entitled to benefits if a formal decision were to be issued. RX 3 is a United [*7] States Department of Labor document dated June 23, 2009 and entitled "Proposed Decision and Order" denying Petitioner's claim under the Black Lung Benefits Act.

Respondent also offered two excerpts from the Code of Federal Regulations pertaining to the United States Department of Labor. RX 4 is an excerpt from *20 CFR 718.102* relating to the use and interpretation of chest X-rays in claims brought pursuant to the Black Lung Benefits Act. RX 5 is an excerpt from *20 CFR 718.201* entitled "definition of pneumoconiosis."

11. Petitioner filed the instant claim under the Illinois Workers' Occupational Diseases Act. Section 6(c) of that Act provides that "in any case, other than injury or death caused by exposure to radiological materials or equipment or asbestos, unless application for compensation is filed with the Commission within 3 years after the date of the disablement, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred." Section 6(c) also provides [*8] that, "effective July 1, 1973, in cases of disability caused by coal miners pneumoconiosis unless application for compensation is filed with the Commission within 5 years after the employee was last exposed where no compensation has been paid, or within 5 years after the last payment of compensation where any has been paid, the right to file such application shall be barred." Petitioner filed his Application for Adjustment of Claim on September 3, 2008, more than three years after his alleged last day of exposure of September 24, 2004. As the Arbitrator correctly noted, Dr. Houser diagnosed Petitioner with two conditions and attributed only one of these conditions, mild COPD, to Petitioner's coal and rock dust exposure. Petitioner offered no evidence indicating that Respondent paid compensation after September 24, 2004.

Citing Dr. Mayer's opinions, Petitioner argues that "the medical literature establishes that COPD caused by exposure to coal dust is a form of CWP [coal workers' pneumoconiosis]" and that his claim should thus be governed by the five-year, rather than the three-year, statute of limitations. The Commission views itself as bound by the specific language of Section 6(c). [*9] That section contains no specific reference to COPD and does not define coal workers' pneumoconiosis so as to include COPD. The Commission finds, based on Dr. Houser's diagnosis and opinions, that Petitioner's occupational disease claim for COPD is governed by the three-year statute of limitations and was thus not timely filed. The Commission denies Petitioner's claim for benefits on this basis and finds all remaining issues to be moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for compensation is denied.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDIBlack Lung ClaimsGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

Illinois Official Reports
Appellate Court

***Carter v. Illinois Workers' Compensation Comm'n*,**
2014 IL App (5th) 130151WC

Appellate Court Caption	JACK CARTER, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Old Ben Coal Co./Horizon Natural Resources, Appellee).
District & No.	Fifth District Docket No. 5-13-0151WC
Filed	June 9, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	In claimant coal miner's action under the Workers' Occupational Diseases Act where the medical evidence showed that claimant was diagnosed with chronic obstructive pulmonary disease (COPD), the arbitrator's finding that the claim was barred by the three-year statute of limitations applicable to diseases other than coal workers' pneumoconiosis was affirmed, notwithstanding his contention that the five-year statute of limitations applicable to coal workers' pneumoconiosis applied, since applying the five-year statute to only claims for coal workers' pneumoconiosis and not claims for COPD arising from exposure to coal dust does not treat "similarly situated" individuals differently, especially when the conditions involve different disease processes affecting different parts of the lung, and the five-year statute did not mention COPD.
Decision Under Review	Appeal from the Circuit Court of Randolph County, No. 11-MR-25; the Hon. Richard A. Brown, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal	Darrell Dunham, of Darrell Dunham & Associates, of Carbondale, for appellant. Cheryl L. Intravaia, of Feirich/Mager/Green/Ryan, of Carbondale, for appellee.
Panel	PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion. Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Jack Carter, filed a claim against Old Ben Coal Co./Horizon Natural Resources (the employer) under the Workers' Occupational Diseases Act (the Act) (820 ILCS 310/1 *et seq.* (West 2008)) alleging coal workers' pneumoconiosis and claiming a last exposure date of September 24, 2004. Medical evidence presented at the hearing indicated that the claimant was diagnosed with chronic obstructive pulmonary disease (COPD) caused in part by exposure to coal dust but was not diagnosed with coal workers' pneumoconiosis. The arbitrator found that the claimant's claim was time-barred because it was not filed within the three-year statute of limitations applicable to claims alleging occupational diseases other than coal workers' pneumoconiosis. See 820 ILCS 310/6(c) (West 2008).

¶ 2 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission), arguing that the arbitrator erred by applying the Act's three-year statute of limitations to the claimant's claim rather than the five-year statute of limitations governing claims for disability caused by "coal miners pneumoconiosis." The Commission unanimously affirmed the arbitrator's decision.

¶ 3 The claimant then sought judicial review of the Commission's decision in the circuit court of Randolph County, which confirmed the Commission's ruling. The claimant filed a motion to reconsider the court's ruling in which he argued for the first time that the "statutory scheme devised by the Illinois legislature" (*i.e.*, the legislature's enactment of a five-year statute of limitations for "coal miners pneumoconiosis" and a three-year statute of limitations for other pulmonary conditions like COPD) "violates the Equal Protection Clause of the Illinois Constitution." The circuit court denied the claimant's motion to reconsider. This appeal followed.

¶ 4 FACTS

¶ 5 For more than 22 years, the claimant worked for the employer as a coal miner. Although he spent one year working above ground, 90% percent of his career with the employer was spent

underground. During his employment, the claimant was exposed to coal dust both underground and above ground. During the dustiest conditions he encountered underground, the claimant could only see 10 to 15 feet in front of him. In lighter dust he could see approximately 30 to 40 feet.

¶ 6 The employer's mine closed on September 24, 2004. That was the claimant's last day at the mine and his last exposure to coal dust. Before his last day, the claimant told two foremen that he was having breathing problems. He said that he was experiencing "congestion." He did not mention that he thought he had black lung or coal workers' pneumoconiosis.

¶ 7 On September 3, 2008, the claimant filed an application for adjustment of claim with the Commission seeking benefits under the Act for heart, lung, and breathing problems (including pneumoconiosis) caused by exposure to coal dust, rock dust, fumes, and vapor during the course of his employment. On December 15, 2008, the claimant filed a claim under the federal Black Lung Benefits Act (30 U.S.C. § 901 *et seq.* (2006)).

¶ 8 The claimant's union recommended that the claimant be evaluated by Dr. William Houser, who is board certified in internal medicine and pulmonary disease. On February 16, 2009, Dr. Houser examined the claimant in connection with the claimant's federal claim for black lung benefits. The claimant told Dr. Houser that he had smoked 1½ packs of cigarettes per day from age 16 through age 30. Dr. Houser noted that the claimant rode his bicycle up to 10 miles per day, 3 times per week in the summertime. An X-ray of the claimant's chest was interpreted as negative for coal workers' pneumoconiosis by Dr. Daniel Whitehead, a B-reader. The claimant's arterial blood gas testing levels were normal. However, a spirometry revealed mild obstruction in the claimant's airways, primarily in his small airways.

¶ 9 Dr. Houser diagnosed mild COPD and arterial sclerotic heart disease with an "age indeterminate anteroseptal myocardial infarct."[1] Dr. Houser opined that the claimant's COPD was secondary to the inhalation of coal and rock dust during his work as a coal miner and his smoking history. Dr. Houser opined that the claimant's arterial sclerotic heart disease was secondary to the claimant's cigarette smoking and possibly also to hereditary factors. Dr. Houser did not diagnose coal workers' pneumoconiosis.

¶ 10 On March 23, 2009, the United States Department of Labor (the DOL) issued a "Schedule for Submission of Additional Evidence" (the SSAE) in connection with the claimant's federal claim for black lung benefits. The SSAE indicated that: (1) the claimant did not have pneumoconiosis caused by exposure to coal mine dust; and (2) the claimant did not have a totally disabling respiratory or pulmonary impairment caused in part by pneumoconiosis. On June 23, 2009, the DOL issued a "Proposed Decision and Order" denying benefits and finding that "the evidence does not show that the [claimant] has pneumoconiosis (black lung disease)."

¶ 11 In the instant case, the claimant introduced into evidence the expert report of Dr. Lawrence Mayer, a physician who holds a Ph.D. in epidemiology. Dr. Mayer opined that the claimant's claim should be governed by the Act's five-year statute of limitations for claims involving coal workers' pneumoconiosis, rather than the three-year statute of limitations for other claims brought under the Act. Dr. Mayer acknowledged that coal workers' pneumoconiosis and

[1]A "myocardial infarction," commonly known as a heart attack, is a heart problem where part of the heart muscle dies and scars due to poor blood supply. When the patient suffers an "anteroseptal" infarction, the tissue damage is centered around the anteroseptal wall, the area between the left and right ventricles.

COPD affected different parts of the lungs. Specifically, he noted that pneumoconiosis involved scarring (fibrosis) on the lung tissue, whereas COPD involved damage to the broncho trachea tree. However, Dr. Mayer stated that, like coal workers' pneumoconiosis, COPD could be caused by long-term exposure to coal dust. He also noted that both conditions can significantly impair lung function and can result in death. Dr. Mayer concluded that there was "no evidence to support the suggestion that [coal workers' pneumoconiosis is] a more destructive disease than COPD." Based on these conclusions (which were drawn from Dr. Mayer's review of the relevant medical literature), Dr. Mayer opined that "from a medical and scientific viewpoint, no distinction should be made legally between a disease process that directly attacks the lung tissue [pneumoconiosis] *** and one that attacks that part of the lung that permits airflow in and out of the lung [COPD]." In other words, Dr. Mayer opined that no distinction should be drawn between coal workers' pneumoconiosis and COPD for purposes of applying a statute of limitations. He suggested that the distinction between the two conditions reflected in the Act's statute of limitations "has to be the product of thinking that COPD can never exist in a coal miner unless [there] is evidence that he or she has [pneumoconiosis]," a belief which, according to Dr. Mayer, has been proven false.

¶ 12 The arbitrator denied the claimant's claim as untimely. The arbitrator noted that the statute of limitations for claims filed under the Act (820 ILCS 310/6(c) (West 2008)) requires an employee to file his claim within three years of the last date of exposure or within two years of the last payment of compensation. The arbitrator observed that "the sole exceptions to [this] statutory requirement are for claims of coal workers' pneumoconiosis and radiological exposure, which allow for filing periods of five years and twenty-five years, respectively." The arbitrator found that there was no evidence of coal workers' pneumoconiosis or radiological exposure in this case, and no evidence that the claimant received any compensation from the employer after September 24, 2004 (the claimant's last date of exposure to coal dust). Accordingly, because the claimant filed his claim more than three years after his last date of exposure, the arbitrator found that the claim was time-barred under section 6(c) of the Act and found all remaining issues moot.

¶ 13 The claimant appealed the arbitrator's decision to the Commission, arguing that the arbitrator erred by applying the Act's three-year statute of limitations to his claim rather than the five-year statute of limitations governing claims for disability caused by "coal miners pneumoconiosis." Citing Dr. Mayer's opinion, the claimant maintained that "the medical literature establishes that COPD caused by exposure to coal dust is a form of *** coal workers' pneumoconiosis" and that his claim should therefore be governed by the five-year statute of limitations. The Commission rejected this argument. The Commission "view[ed] itself as bound by the specific language of Section 6(c)," which "contains no specific reference to COPD and does not define coal workers' pneumoconiosis so as to include COPD." Based upon Dr. Houser's diagnosis and opinions, the Commission found that the claimant's "occupational disease claim for COPD is governed by the three-year statute of limitations and was thus not timely filed." The Commission denied the claimant's claim on that basis and found all remaining issues moot.

¶ 14 The claimant then sought judicial review of the Commission's decision in the circuit court of Randolph County, which confirmed the Commission's ruling. The circuit court found that there was "insufficient evidence" for the court to find that "the [COPD] which the claimant suffers can be considered coal miner's pneumoconiosis." The claimant subsequently filed a

motion to reconsider the court's ruling in which he argued for the first time that the "statutory scheme devised by the Illinois legislature" (*i.e.*, the legislature's enactment of a five-year statute of limitations for "coal miners pneumoconiosis" and a three-year statute of limitations for other pulmonary conditions like COPD) "violates the Equal Protection Clause of the Illinois Constitution." The circuit court held that the evidence to support the claimant's equal protection claim was "insufficient" and denied the claimant's motion to reconsider. This appeal followed.

¶ 15 ANALYSIS

¶ 16 1. The Governing Limitations Period

¶ 17 The claimant argues that the Commission erred in applying the Act's three-year statute of limitations to his claim, rather than the Act's five-year limitations period governing claims for disability caused by "coal miners pneumoconiosis." The claimant contends that the phrase "coal miners pneumoconiosis" in section 6(c) of the Act should be interpreted to include COPD caused by exposure to coal dust. This argument turns on an issue of statutory construction, a question of law which we review *de novo*. *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12; *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 324 Ill. App. 3d 961, 965 (2001).[2]

¶ 18 The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Gruszeczka*, 2013 IL 114212, ¶ 12. The language used in the statute is normally the best indicator of what the legislature intended. *Id.* Each undefined word in the statute must be given its ordinary and popularly understood meaning. *Id.*; see also *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 270 (1998). Words and phrases must not be viewed in isolation but must be considered in light of other relevant provisions of the statute. *Gruszeczka*, 2013 IL 114212, ¶ 12; *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 320 (2003). If the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy as well as other sources, such as legislative history. *Gruszeczka*, 2013 IL 114212, ¶ 12. However, where the statutory language is clear, it will be given effect without resort to other aids for construction. *Id.*; see also *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC, ¶ 16.

¶ 19 Section 6(c) of the Act provides, in relevant part:

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[2]Although the employer concedes that the "interpretation of the statute of limitations found at 820 ILCS 310/6(c)" is subject to *de novo* review, it argues that we should apply a "clearly erroneous" standard of review to the Commission's "ultimate conclusion [as] to the facts in this case." In support of this argument, the employer cites *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 544-45 (2010). *Dodaro* involved a two-step analysis which required us to apply two standards of review: first, we reviewed the Commission's interpretation of the meaning of a statutory exclusion *de novo*; second, we reviewed the Commission's application of the statutory exclusion to the facts presented in that case under a more deferential "clearly erroneous" standard. *Dodaro* is inapposite. Unlike the situation presented in *Dodaro*, the facts essential to our analysis in this case are undisputed, and the case turns on a pure issue of statutory construction. Thus, our review is *de novo*. *Dodaro*, 403 Ill. App. 3d at 544-45.

> "In any case, other than injury or death caused by exposure to radiological materials or equipment or asbestos, unless application for compensation is filed with the Commission within 3 years after the date of the disablement, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred." 820 ILCS 310/6(c) (West 2008).

In 1973, the legislature amended section 6(c) by prescribing a five-year limitations period "in cases of disability caused by coal miners pneumoconiosis."[3] As noted, the claimant argues that the phrase "coal miners pneumoconiosis" in section 6(c) should be interpreted to include COPD caused by exposure to coal dust.

¶ 20 We disagree. By its plain terms, the five-year limitations period prescribed by section 6(c) applies only to claims for disability caused by "coal miners pneumoconiosis." It does not reference COPD. Nor does it apply to all disabilities or respiratory conditions caused by exposure to coal dust. To the contrary, it applies only to claims for disability caused by one specific medical condition, "coal miners pneumoconiosis." Had the legislature intended to include claims for COPD within the five-year limitations period prescribed in section 6(c), it could have explicitly referenced COPD in that provision. Alternatively, it could have drafted the provision broadly to include all disabilities or respiratory conditions caused by "exposure to coal dust," as it did for other types of occupational disease claims.[4] It did neither. Instead, the legislature decided to apply the five-year limitations period *only* to claims for disability caused by "coal miners pneumoconiosis." Accordingly, by its plain language, section 6(c)'s five-year limitations period does not apply to disabilities caused by any other conditions, not even to other respiratory diseases that can be caused in part by exposure to coal dust, like COPD.[5] It is undisputed that the claimant in this case was diagnosed with COPD but was not diagnosed with coal workers' pneumoconiosis. Thus, the Commission did not err in finding that section 6(c)'s five-year statute of limitations did not apply to his claim.

¶ 21 The claimant argues that, because "coal miners pneumoconiosis" is not defined in the Act, we should apply the "ordinary and popularly understood meaning" of that term, which, according to the claimant, includes COPD. The claimant asserts that the medical community

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[3] Specifically, section 6(c) now provides that claims for disability caused by "coal miners pneumoconiosis" shall be barred unless such claims are filed with the Commission "within 5 years after the employee was last exposed where no compensation has been paid, or within 5 years after the last payment of compensation where any has been paid." *Id.* In this case, the claimant's last exposure was on September 24, 2004, and the employer paid no compensation after that date.

[4] For example, the legislature prescribed a 25-year limitations period "[i]n cases of disability caused by exposure to radiological materials or equipment or asbestos." 820 ILCS 310/6(c) (West 2008).

[5] The claimant explicitly agreed with this conclusion in his motion for reconsideration before the circuit court. There, the claimant stated that "the legislature promulgated a statute of limitations that provides that a coal miner who has sustained damage to his lungs by means of coal dust exposure in the form of fibrosis (scaring [*sic*]) has five years to bring his or her claim," but "[a] miner who has sustained damage in the form of emphysema or other form of [COPD] has only three years to file his or her claim." As Dr. Mayer noted, coal workers' pneumoconiosis involves fibrosis (or scarring) of the lung tissue caused by exposure to coal dust.

recognizes that COPD caused by exposure to coal dust is a "form of" coal workers' pneumoconiosis. In support of this assertion, the claimant cites Dr. Mayer's opinion. However, contrary to the claimant's argument, Dr. Mayer did not opine that COPD was a type of coal workers' pneumoconiosis. To the contrary, he expressly acknowledged that they were different conditions. For example, Dr. Mayer noted that coal workers' pneumoconiosis is a "restrictive pulmonary impairment" of the lung tissue, whereas COPD is an "obstructive impairment" of the broncho trachea tree. Thus, Dr. Mayer acknowledged that the two conditions involve a different disease process and affect "different part[s] of the lung." Moreover, Dr. Mayer stated that the "strict medical definition of Coal Worker's Pneumoconiosis requires a finding of fibrosis (scaring) [*sic*] on the miner's lung tissue," and that this scarring "can frequently be seen on a chest x-ray." By contrast, Dr. Mayer noted that obstructive impairments like COPD are more readily diagnosed by pulmonary function testing and that a "chest x-ray is not a good diagnostic tool for detecting emphysema" (one of the two types of COPD). The only similarities between COPD and coal workers' pneumoconiosis noted by Dr. Mayer are that both conditions can arise from exposure to coal dust and both can result in major pulmonary impairment and death.

¶ 22 Further, one of the stated purposes of Dr. Mayer's report was to demonstrate that exposure to coal dust "can and does cause[ ] [COPD] *independent of any radiologic or other evidence of the existence of coal workers' pneumoconiosis.*" (Emphasis added.) Thus, Dr. Mayer's entire report is premised on the assumption that COPD is a different condition than coal workers' pneumoconiosis. Dr. Mayer's report reinforces this assumption by providing a detailed history of the current medical and epidemiological consensus that exposure to coal dust can cause COPD *even in the absence of coal workers' pneumoconiosis*. Accordingly, although Dr. Mayer opined that there was no scientific or medical reason to apply a different limitations period to claims by coal miners alleging COPD (as opposed to coal workers' pneumoconiosis), he never stated or implied that COPD was the same as coal workers' pneumoconiosis or that the former was a type of the latter. To the contrary, his report unequivocally provides that they are two separate conditions.[6]

¶ 23 The claimant points to two other legal provisions in support of his argument that "coal miners pneumoconiosis" includes COPD. First, he relies upon section 1(d) of the Act (820 ILCS 310/1(d) (West 2008)). That section provides, in relevant part, that "[i]f a deceased miner was employed for 10 years or more in one or more coal mines and died from a respirable disease there shall, effective July 1, 1973, be a rebuttable presumption that his or her death was due to pneumoconiosis." 820 ILCS 310/1(d) (West 2008). Contrary to the claimant's argument, this provision does not suggest that COPD is equivalent to (or a type of) coal workers' pneumoconiosis. It merely suggests that: (1) pneumoconiosis is one of multiple types of respirable diseases that can be caused by exposure to coal dust; (2) if a miner who worked in a coal mine for 10 years or more dies from a respirable disease before he is diagnosed with pneumoconiosis, there will be a presumption that his death was caused by pneumoconiosis;

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[6]Moreover, although we have never addressed the precise question presented in this case, our appellate court has treated COPD and coal workers' pneumoconiosis as separate conditions (*i.e.*, we have assumed without deciding that they were different diseases) based on the medical evidence provided in several cases. See, *e.g.*, *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 779 (2008); *Shelton v. Industrial Comm'n*, 267 Ill. App. 3d 211 (1994).

and (3) that presumption may be rebutted by evidence that the miner died from some other type of respirable disease, such as COPD.

¶ 24 The presumption cited by the claimant does not apply in this case, because the claimant is still alive. But even if there was a rebuttable presumption of pneumoconiosis in this case, the presumption was rebutted by Dr. Houser, the claimant's own independent medical examination physician, who opined that the claimant did not have pneumoconiosis.

¶ 25 The claimant also relies upon certain regulations promulgated by the DOL pursuant to the federal Black Lung Benefits Act (Black Lung Act) (30 U.S.C. § 901 *et seq.* (2006)). For purposes of the Black Lung Act, these regulations define "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a) (2009). This definition includes both medical (or "clinical") pneumoconiosis and statutory (or "legal") pneumoconiosis. "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(1) (2009). "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," including "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2) (2009). The regulation defines the phrase "arising out of coal mine employment" as including any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b) (2009).

¶ 26 The claimant correctly notes that these federal regulations define "legal pneumoconiosis" as including COPD caused by exposure to coal dust. However, this fact does not support the claimant's argument in this case because the Act does not define "pneumoconiosis" in a similar manner. Nor does it adopt or reference the federal regulations. As noted above, section 6(c) of the Act leaves the term "coal miners pneumoconiosis" undefined, and nothing in the Act suggests that the legislature intended that term to include COPD. In fact, the legislature's failure to include more expansive language supports the opposite inference, *i.e.*, that the term includes only diagnosed cases of pneumoconiosis, not COPD.[7]

¶ 27 In sum, by its plain terms, the Act's five-year statute of limitations applies exclusively to "coal miners pneumoconiosis," not to COPD. 820 ILCS 310/6(c) (West 2008). It is undisputed that the claimant was diagnosed with COPD but was not diagnosed with coal workers' pneumoconiosis. The claimant does not argue that section 6(c) is ambiguous. Thus, the claimant's claim for disability caused by COPD could be subject to the five-year limitations period only if "pneumoconiosis" is commonly understood as including COPD. However, Dr. Mayer's opinion does not support this conclusion. In fact, Dr. Mayer's expert report establishes the contrary proposition, *i.e.*, that COPD and pneumoconiosis are separate conditions.

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[7]Moreover, it should be noted that, applying the more expansive definitions of pneumoconiosis contained in the federal regulations, the DOL found that the claimant did not have either medical or legal pneumoconiosis.

¶ 28 Relying upon Dr. Mayer's opinion, the claimant argues that there is no medical or scientific reason for treating COPD and pneumoconiosis differently for purposes of the statute of limitations. However, this is an argument best addressed to the legislature. We must apply the Act's unambiguous statute of limitations as written, and we may not amend the statute under the guise of interpretation. *Hines v. Department of Public Aid*, 221 Ill. 2d 222, 230 (2006) ("Where, as here, the language of a statute is clear and unambiguous, the court must enforce it as written" and "may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express."); *In re Mary Ann P.*, 202 Ill. 2d 393, 409 (2002) (ruling that, where the legislature had not "seen fit to amend" a statute in the fashion advocated by the respondent, the supreme court would not "inject [that] provision into the statute" "under guise of statutory construction"); see also *Plasters v. Industrial Comm'n*, 246 Ill. App. 3d 1, 8 (1993).

¶ 29 2. Equal Protection

¶ 30 The claimant argues that interpreting the five-year limitations period under section 6(c) as applying to claims for coal workers' pneumoconiosis but not to claims for COPD caused by exposure to coal dust violates the equal protection clause of the Illinois Constitution because it treats similar classes of claimants differently without a rational basis. The claimant urges us to construe the statute in a manner that avoids this "constitutional infirmity" by applying the five-year limitations period to his claim.

¶ 31 We disagree. As an initial matter, the claimant presented an equal protection argument for the first time in a motion for reconsideration before the circuit court. Thus, the claimant forfeited the argument by not raising it before the Commission. See, *e.g.*, *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 397 (2002) (finding constitutional argument waived where it was raised before the circuit court but not before the administrative agency).[8] Although administrative agencies "lack[ ] the authority to invalidate a statute on constitutional grounds or to question its validity" (*id.*), it is " '[n]onetheless *** advisable to assert a constitutional challenge on the record before the administrative tribunal, because administrative review is confined to the proof offered before the agency' "(*id.* (quoting *McGaw*, 182 Ill. 2d at 278-79)). Such a practice avoids piecemeal litigation and allows opposing parties to present evidence and to build a record in opposition to a constitutional challenge. *Carpetland U.S.A.*, 201 Ill. 2d at 397; *McGaw*, 182 Ill. 2d at 279.

¶ 32 We recognize that the rule that issues or defenses not raised before an administrative agency will be deemed waived and will not be considered for the first time on administrative review is "an admonition to the parties, not a limitation on the court's jurisdiction," and that "the waiver rule may be relaxed in order to maintain a uniform body of precedent or *** where

[8]Moreover, the equal protection argument the claimant raised in the circuit court is different from the equal protection argument he raises on appeal. Before the circuit court, the claimant argued that the "statutory scheme devised by the Illinois legislature" in section 6(c) violated the equal protection clause. On appeal, he argues that the Commission's and the circuit court's *interpretation* of that statutory scheme to exclude his claim from the Act's five-year limitations period violates the equal protection clause, and he disavows any argument that the statute itself is unconstitutional. Accordingly, the claimant arguably forfeited the argument he makes on appeal by not raising it before either the Commission or the circuit court.

the interests of justice so require." *Daniels v. Industrial Comm'n*, 201 Ill. 2d 160, 172 (2002). However, this is not such a case. If we are to consider whether it would be unconstitutional to limit the Act's five-year limitations period to claims for coal workers' pneumoconiosis (as the Commission did in this case), the employer and the Commission should first be given the opportunity to build a record in response to the constitutional challenge. See *Carpetland U.S.A.*, 201 Ill. 2d at 397.[9]

¶ 33 In any event, if we were to address the claimant's constitutional argument, we would reject it. The equal protection clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2) requires the government to "treat similarly situated individuals in a similar manner." (Internal quotation marks omitted.) *Byrd v. Hamer*, 408 Ill. App. 3d 467, 490 (2011). It does not preclude the State from enacting legislation that draws distinctions between different categories of people, but it does "prohibit the government from according different treatment to persons who have been placed by a statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 322 (1996). In reviewing a claim that a statute violates equal protection, the court applies different levels of scrutiny depending on the nature of the statutory classification involved. *Id.* at 322-23. Classifications based on race, national origin, sex, or illegitimacy, and classifications affecting fundamental rights receive heightened scrutiny. *Id.* at 323. In all other cases, the court employs only a "rational basis review." *Id.* As the claimant correctly notes, rational basis review applies in this case.

¶ 34 Whether a rational basis exists for a classification presents a question of law, which we consider *de novo*. *Cutinello v. Whitley*, 161 Ill. 2d 409, 417 (1994). Under the rational basis test, a court's review of a legislative classification is "limited and generally deferential." *Jacobson*, 171 Ill. 2d at 323. The court simply inquires whether the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal. *Id.* at 323-24; see also *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 74 (1990). The legislation "carries a strong presumption of constitutionality," and "if any set of facts can reasonably be conceived to justify the classification, it must be upheld." *Jacobson*, 171 Ill. 2d at 324.

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[9]The employer also argues that the claimant violated Illinois Supreme Court Rule 19 by failing to serve an appropriate notice of his constitutional claim on the Attorney General or the Commission's attorney. Ill. S. Ct. R. 19(a) (eff. Sept. 1, 2006). We disagree. Supreme Court Rule 19 requires that such notice be provided when the State or the political subdivision, agency, or officer affected by the constitutional challenge "is not already a party" to the action. *Id.* The purpose of this notice requirement is "to afford the State *** [or] agency *** the opportunity *** to intervene in the cause or proceeding for the purpose of defending the law or regulation challenged." Ill. S. Ct. R. 19(c) (eff. Sept. 1, 2006). Here, the Commission is a named party to the action and has received the claimant's briefs before the circuit and appellate courts. Thus, Rule 19 does not require the claimant to provide additional notice to the Commission's attorney. Moreover, on appeal, the claimant is challenging the constitutionality of the Commission's and the circuit court's *interpretation* of section 6(c) of the Act (which he deems erroneous), not the constitutionality of the statute itself. Thus, the claimant does not need to provide notice of this argument to the Attorney General. The claimant arguably should have provided notice to the Attorney General when he challenged the constitutionality of section 6(c) of the Act before the circuit court. However, he has abandoned that challenge on appeal, so such notice is no longer required.

¶ 35 Interpreting section 6(c)'s five-year statute of limitations as applying only to claims involving coal workers' pneumoconiosis (and not to claims involving COPD caused by exposure to coal dust) does not violate the equal protection clause because this interpretation of the statute does not treat "similarly situated" individuals differently. All coal miners diagnosed with coal workers' pneumoconiosis have five years to file their claims, and all coal miners diagnosed with COPD (but not pneumoconiosis) have three years to file their claims. As noted above, coal workers' pneumoconiosis and COPD are different conditions which involve different disease processes that affect different parts of the lung and that are diagnosed through different procedures. Thus, miners suffering from pneumoconiosis are not "similarly situated" to miners suffering from COPD, even where the COPD is caused by exposure to coal dust. Because these miners are not similarly situated, the government may treat them differently without running afoul of the equal protection clause.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Randolph County, which confirmed the Commission's ruling.

¶ 38 Affirmed.