1 of 100 DOCUMENTS

JORGE MERLOS, PETITIONER, v. THE LEVY COMPANY, RESPONDENT.

NO. 08WC 38667

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2010 Ill. Wrk. Comp. LEXIS 927

September 8, 2010

JUDGES: David L. Gore; Joann M. Fratianni; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2009 is hereby affirmed and adopted.

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

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

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

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

DATED: September 8, 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin** [*3] , arbitrator of the Commission, in the city of **CHICAGO**, on

10/14/09. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for temporary total disability?
L. Should penalties or fees be imposed upon the respondent?
N. Other **Prospective medical care, per Section 8(a) of the Act**

FINDINGS

. On **6/16/08** the respondent **The Levy Company** ***was*** operating under and subject to the provisions of the Act.

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

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

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

. In the year preceding the injury, the petitioner earned $ **71,862.96**; the average weekly wage was $ **1381.98**.

. At the time of injury, the petitioner was **39** years of age, ***married*** with **3** children under [*4] 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, $ **51 542.40** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **921.32**/week for **2.92 additional** weeks, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **0.00** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **1,345.13** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **269.03** in attorneys' fees, as provided in Section 16 of the Act.

. The arbitrator orders the respondent to authorize and to pay the reasonable cost of (pursuant to Sections 8(a) and 8.2 of the Act, as amended) the prospective medical care that Dr. Bergin has recommended.

. In no instance shall this award [*5] be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

December 21, 2009

DEC 22, 2009

I. FINDINGS OF FACT

Petitioner testified that he has been employed by the Respondent as a carpenter / drywall installer since 1998. Petitioner testified that prior to June 16, 2008, he never had any problems ever with his lower back. Petitioner testified that he had never sought any medical treatment for his lower back, had never taken any medication for his lower back, and had never missed [*6] any time from his job ever because of his lower back. Petitioner was asymptomatic with regard to his lower back prior to June 16, 2008. Petitioner testified in great detail about his job. Petitioner testified that his job is a heavy labor position where he installs drywall in new construction buildings. On June 16, 2008, at about 11:45 A.M., Petitioner was in the elevator shaft of a new-construction building installing drywall. As Petitioner was attempting to move a sixty-pound sheet of drywall into position, it struck the security system on the wall, which caused it to fall over. Petitioner grabbed the sheet to prevent it from falling down the shaft. As Petitioner regained control of the material, he felt a pop in his neck and experienced significant pain in his neck and lower back. Petitioner testified that the pain in the lower back went into his buttocks.

Petitioner reported the accident to his supervisor immediately and was sent to Sherman Family Work Clinic. The Petitioner reported to Sherman and complained of pain starting between the shoulder blades and radiating to the lower-back through the buttocks. At that point, the pain did not radiate into the Petitioner's thighs. At [*7] this initial visit, the Pain Diagram documents pain in the lower back into the buttocks. The notes specifically state sudden onset of pain while catching drywall from falling. At that point, the Petitioner was put on prescription medication and taken off work.

Petitioner returned to the Work Clinic on June 23, 2008. At that time, the Petitioner reported that the pain in the lower back now radiated into both of his thighs below the buttocks. (Please see Pain Diagram from Sherman Family Work Clinic, 6/23/08.) The Petitioner was prescribed physical therapy and ordered to remain off work. While the intensity of the pain would improve at times, the pain remained at all times in the lower back radiating through the buttocks into the thighs.

On July 21, 2008, a lumbar MRI was administered, which revealed abnormalities (annular tear) at L3-L4 and a herniated disk at L4-L5.

At that point, treatment remained physical therapy and medication.

On July 24, 2008, the Work Clinic transitioned the Petitioner into work conditioning.

On August 7, 2008, the Petitioner was released to work with light-duty restrictions. The Petitioner worked for the Respondent for about one week when the intensity of the [*8] pain dramatically increased.

On August 21, 2008, the Respondent laid the Petitioner off. Given the pain he was experiencing, the Petitioner elected to seek medical care with his own physician.

On September 4, 2008, the Petitioner began to treat with Christopher Bergin, M.D., a Board-certified orthopedic spine surgeon at Illinois Bone & Joint Institute. Petitioner gave the same history to Dr. Bergin of the injury on June 16, 2008. After conducting a physical examination and ordering x-rays, Dr. Bergin confirmed the diagnosis of a herniated disk at L4-L5 and intrascapular pain and noted that the pain in the lumbar spine was worse. Dr. Bergin prescribed Voltaren and ordered MRI's of both the cervical and thoracic spine in order to rule out herniations at those levels. Ultimately, the cervical and thoracic MRI's were interpreted as negative. Consequently, Dr. Bergin focused on the lumbar spine.

On September 18, 2008, Dr. Bergin prescribed a course of lumbar epidural injections and more physical therapy. The first epidural injection was administered in the beginning of October 2008. As of October 16, 2008, the injection and the therapy provided some relief. At that time, Dr. Bergin noted [*9] that if the pain returned he would recommend a repeat epidural injection and if all conservative measures failed, he may find the Petitioner to be a surgical candidate.

On November 13, 2008, the Petitioner returned to Dr. Bergin. At that point, he noted that the epidural injection did not provide much relief and that the radicular symptoms had gotten worse. Dr. Bergin prescribed a second epidural injection, more physical therapy, remain off work, and to return in four weeks.

On December 11, 2008, the Petitioner returned to see Dr. Bergin. At that point, Petitioner reported that the second epidural injection and therapy were helping quite a bit. Dr. Bergin prescribed a third epidural, more therapy, remain off work, and return in four weeks. Dr. Bergin again noted that if Petitioner failed to get better he would be a candidate for a posterior lumbar interbody fusion stabilizing the L3-4 and L4-5 levels after being decompressed.

On January 8, 2009, the Petitioner returned to Dr. Bergin and reported that he had not gotten any significant long-term relief from conservative measures. At that point, Dr. Bergin recommended surgical intervention and scheduled another appointment in the main [*10] office so that the various procedural options could be explained with models and Petitioner could meet the surgical coordinator.

On January 27, 2009, the Petitioner met Dr. Bergin at his primary office in Morton Grove, Illinois, and reviewed surgical models. At that time, in preparation for surgery, Dr. Bergin ordered a discogram.

On February 17, 2009, the Petitioner followed up with Dr. Bergin to review the results of the discogram. The discogram confirmed that the discogenic pain was originating from the L3-4 and L4-5 levels. At that point, all the various surgical options were further explained and discussed. The Petitioner requested thirty days to consider all options and make some decisions with his family.

As of April 14, 2009, the Petitioner consented to the interbody fusion. His request for surgical authorization was submitted to the Respondent. Petitioner has continued to follow-up with Dr. Bergin monthly as he awaits surgical authorization. While he waits, Petitioner's pain has remained significant in the same locations with no way of obtaining significant relief

On January 7, 2009, at the request of the Respondent, the Petitioner was seen by Michael Grear, M.D. for a Section [*11] 12 examination. Dr. Grear is not a spine surgeon and has never performed a single spinal surgery. Petitioner testified that the examination by Dr. Grear lasted between 3-5 minutes. Dr. Grear took the same history of the 6/16/08 accident. Dr. Grear did not dispute causation but he did dispute the treatment. Dr. Grear opined that surgical intervention would not be appropriate in view of the negative findings on the MRI, which was reported to be mild central bulging at L4-5 and no evidence of herniation or extrusion. In reaching these conclusions, Dr. Grear wrote that he did not review any of Dr. Bergin's office notes, only the prescriptions, and did not review the MRI films, only the report.

On February 9, 2009, in response to the Section 12 report of Dr. Grear, Dr. Bergin prepared a letter to the Respondent in which he identified the deficiencies in Dr. Grear's report. In addition, Petitioner attempted to amicably resolve this issue of surgical authorization by suggesting that the parties agree on a third physician, an independent physician, to examine the Petitioner and to render an opinion. The parties would then agree to follow this independent physician's treatment recommendations. [*12]

The parties agreed to on Alexander Ghanayem, M.D., Chief of Spinal Surgery, Loyola University Medical Center, as their independent physician. Petitioner waited patiently for one month for Respondent to schedule the examination. They never did. Accordingly, Petitioner scheduled the exam with Dr. Ghanayem, provided Dr. Ghanayem with all medical records, office notes, MRI films, and discogram results. On September 4, 2008, Dr. Ghanayem conducted a *truly* independent medical examination of the Petitioner. In his report, Dr. Ghanayem opined:

> **My impression is that Mr. Merlos has back pain, which appears to be discogenic in origin. His MRI scan is not normal, and his discogram confirms a discogenic source of pain. Given the lack of response from nonoperative care, Dr. Bergin's recommendations for a lumbar decompression and fusion at L3-4 and L4-5 are medically reasonable. The need for ongoing surgical care is related to his work accident of June 16, 2008.**

Following the results of the Dr. Ghanayem's examination, Petitioner made a demand for surgical authorization. The Respondent has never given a written reason for their denial.

II. CONCLUSIONS OF LAW

The Arbitrator concludes [*13] the following with regard to issue (F):

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

Petitioner testified that prior to June 16, 2008 his lower back was fine. Petitioner was asymptomatic with regard to his lower back prior to June 16, 2008. On June 16, 2008, at about 11:45 A.M., Petitioner was in the elevator shaft of a new construction building installing dry-wall. As Petitioner was attempting to move a sixty pound sheet of drywall into position, it struck the security system on the wall, which caused it to fall over. Petitioner grabbed this large sheet of drywall in an attempt to prevent it from falling down the shaft. As Petitioner regained control of the material, he felt a pop in his neck and experienced significant pain in his neck and lower back.

Petitioner then began his course of treatment as described above.

The radiologist offered the following impression of the lumbar MR images:

> **At L4-5 the patient has mild to somewhat moderate central and to a small extent right para-central focal disc herniation, there is narrowing of the spinal canal at L3-4 and L4-5 with the contribution from the hypertrophic changes, in the facts and ligamentous** [*14] **hypertrophy. The patient also has changes of congenitally short pedicles.**

With regard to an interpretation of the lumbar MRI, the Arbitrator places more weight on the opinions of the radiologist, the specialist, than he does on any of the other physicians.

The Arbitrator does not find Dr. Grear to be credible.

Based on the mechanics of Petitioner's accident, his course of treatment, the chain of events, the opinions of Doctors Bergin and Ghanayem and the law, the Arbitrator concludes that Petitioner's present condition of ill-being is causally related to accident of June 16, 2008.

The Arbitrator concludes the following with regard to issue (K):

What amount of compensation is due for temporary total disability?

Per Ax.1, Petitioner claims that he was temporarily totally disabled from 8/9/08 [first day of lost time] through 9/10/09 [last day of lost time], which is a period of 58-2/7, or 58.86, weeks (Petitioner wrote "62" weeks). The Respondent claims that Petitioner was temporarily disabled from 6/20/08 [first day of lost time] through 3/7/09 [last day of lost time], which is a period of 37-2/7 weeks. (Id.) The parties agree that the Respondent paid $ 51,542.40 in TTD [*15] and/or maintenance benefits. (Id.)

Petitioner was off work per the order of the Sherman Health Work Clinic from the date of the accident until August 7, 2008. Petitioner returned to work on a light-duty basis for one week before being laid off on August 18, 2008. From August 18, 2008 until September 4, 2008, the Petitioner remained on light-duty restrictions. As of September 4, 2008, his first visit with Dr. Bergin, Petitioner has been continuously under Dr. Bergin's orders not to work. The Arbitrator has found that the opinions of Dr. Grear are not credible.

However, the Petitioner is bound by its stipulation pursuant to *Walker v. Indus. Comm'n, 345 Ill. App. 3d 1084, 804 N.E.2d 135 (2004)* and *Roias v. Cummins-Allison Corp., 09 IWCC 1097.*

The Arbitrator notes that the total TTD amount of $ 51,542.40, divided by the TTD rate of $ 921.32, equals 55.94 weeks. So, 58.86 weeks minus 55.94 weeks equals 2.92 weeks.

The Arbitrator concludes that Petitioner is entitled to 2.92 more weeks of TTD benefits.

The Arbitrator makes the following findings on the issue of (L):

> **Should penalties and sanctions be imposed** [*16] **against the Respondent?**
>
> Based on the foregoing, the Arbitrator concludes that Petitioner is entitled to 19(k) penalties in the amount of $ 1,345.13 (= $ 921.32 x 2.92 x .50) and attorneys' fees in the amount of $ 269.03. The parties did not put the issue of medical bills in dispute, and the Petitioner has not sought penalties and fees on prospective medical bills.

The Arbitrator makes the following findings on the issue of (O):

> **Is the Petitioner entitled to prospective medical care, per Section 8(a) of the Act?**
>
> Based on the opinions of Doctors Bergin and Ghanayem, the radiologist's interpretation of the lumbar MRI and the testimony of the Petitioner, the Arbitrator concludes that Petitioner is entitled to the prospective medical care that Dr. Bergin has recommended.

Legal Topics:

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

2014 IL App (1st) 130974WC
No. 1-13-0974WC
Opinion filed December 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BOB RED REMODELING, INC.,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Cross-Defendant-Appellant,	)	
	)	
v.	)	Nos. 12-L-50727
	)	12-L-50742
ILLINOIS WORKERS COMPENSATION	)	
COMMISSION and ZENON LEMANSKI,	)	Honorable
	)	Patrick J. Sherlock,
Defendants-Cross-Plaintiffs-Appellees.	)	Judge, Presiding.

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

OPINION

¶ 1 I. INTRODUCTION

¶ 2 Respondent, Bob Red Remodeling, Inc., appeals an order of the circuit court of Cook County confirming the decision of the Illinois Workers' Compensation Commission (Commission). For the reasons that follow, we affirm.

¶ 3 II. BACKGROUND

¶ 4 It is undisputed that claimant, Zenon Lemanski, suffered a work-related accident on July 27, 2007, when he fell 11 feet from a rooftop while performing duties for respondent. He was

transported by ambulance to Advocate Illinois Masonic Hospital where a CT scan revealed small temporal lobe contusions and a seven millimeter acute hemorrhage. On August 3, 2007, claimant underwent a left craniotomy, performed by Dr. Leonard Kranzler. While in the hospital, claimant engaged in speech, physical, and occupational therapy. He was discharged on August 15, 2007, with the following diagnoses: frozen left shoulder; right knee pain; post-concussion syndrome; and traumatic brain injury. Claimant speaks Polish but not English.

¶ 5 Following his discharge, claimant followed up with Kranzler. He also sought care form Dr. Gourineni, an orthopedic specialist. Gourineni recommended physical therapy for claimant's shoulder and ordered an MRI of his knee. Gourineni further recommended arthroscopic surgery, but claimant declined. In January 2008, Gourineni released claimant from medical care and directed him to continue activities as tolerated.

¶ 6 Claimant was examined by Dr. Victor Forys, at the request of his attorney. Forys is board certified in internal medicine. He diagnosed traumatic brain injury, knee pain, and shoulder pain. Forys recommended Zoloft. Claimant continued to see Forys through the date of the arbitration hearing.

¶ 7 At respondent's behest, claimant was examined by Dr. Felise Zollman. She opined that claimant suffered a work-related accident in July 2008. She diagnosed a moderate brain trauma; a right-knee meniscus tear; and left shoulder pain and stiffness with no range-of-motion limitation. She also diagnosed mild degenerative lumbar spine changes and depression, "likely secondary to" traumatic brain injury. She believed claimant's condition was causally related to his at-work injury. She recommended a neuropsychological assessment—conducted by a doctor fluent in Polish—to evaluate residual cognitive impairment. Respondent authorized the course of treatment recommended by Zollman.

¶ 8 On February 19, 2009, Forys referred claimant to Dr. Anna Wegierek. Wegierek, a psychologist, opined that claimant's "neuropsychological instability" prevented him from continuing "his daily living activities without supervision" and rendered him unable to participate in occupational activities. Zollman reviewed and criticized Wegierek's methodologies. Based on Zollman's criticisms, respondent informed claimant's attorney that it would no longer authorize treatment with Wegierek. Forys also referred claimant to Dr. Chiappidi, a neurologist. Chiappidi evaluated claimant on March 20, 2009. Chiappidi diagnosed claimant with post-traumatic syndrome and recommended a change in claimant's medications, which Forys did not implement.

¶ 9 Claimant was evaluated by Dr. Jerry Sweet on November 10, 2009. Sweet conducted an interview and performed a number of tests. An interpreter translated Sweets instructions and questions into Polish. Sweet observed a number of measures indicating insufficient effort and opined that the test results generated likely did not validly reflect post-injury functioning. However, Sweet stated, "Despite the non-credible presentation in this evaluation, it is clear that [claimant] suffered a serious traumatic brain injury." Nevertheless, "present findings do not allow a clear appraisal" of the effect of that injury.

¶ 10 An evidence deposition of Dr. Forys was conducted on April 22, 2010. Forys testified that he is board-certified in internal medicine. Forys speaks Polish. Forys first saw claimant on January 22, 2008, about six months after his accident. Claimant was 57-years old. Claimant complained of headaches, heaviness, fatigue, dizziness, impulsiveness, anxiety, and decreased concentration. A physical examination revealed a depression in claimant's skull. Claimant had a decreased range of motion in his neck. Claimant's condition has remained essentially the same ever since (Forys had seen claimant a week before the deposition), though physical therapy

resulted in a minor, temporary improvement. Forys opined that claimant's condition was permanent and would not improve. Claimant would need assistance with all activities of daily living. At the time of the deposition, claimant's only caregiver was his wife. Forys believed claimant would benefit from home healthcare. He needs care around the clock. Forys testified that claimant is permanently disabled and unable to work.

¶ 11 In his most recent visit with claimant, claimant's wife reported that claimant was having trouble with memory. Forys believed claimant might be developing a degree of dementia. Forys continued claimant on Zoloft, which, he testified, is the only drug approved to treat traumatic brain injury. He also prescribed Wellbutrin, which he thought might give claimant more energy. Forys explained that claimant is not *per se* depressed; rather, he suffers from an organic brain injury. Forys believed claimant should have contact with medical personnel on a monthly basis.

¶ 12 Forys knows Wegierek. She speaks Polish fluently. Her assessments are more objective than those of Forys. He agreed with her opinion that claimant is permanently and totally disabled. Forys opined that claimant would continue to need total nursing care and medical supervision. Further, claimant's condition will deteriorate.

¶ 13 During cross-examination, Forys testified that he could not recall having referred claimant to a specialist in traumatic brain injury. While physical therapy helped for a while, claimant eventually "plateaued." On redirect, Forys testified that there was no treatment that would enable claimant to lead a normal life.

¶ 14 Claimant continued to treat with Forys. Zollman reevaluated claimant on July 8, 2010. She opined that any vertigo experienced by claimant was not due to a central nervous system lesion. Symptom magnification was possibly playing a "significant role in the claimant's current

presentation." Neither headaches nor vertigo could be objectively correlated. She recommended claimant stop treating with Forys.

¶ 15 Dr. Zollman was deposed on September 15, 2010. She testified that she specializes in neuro-rehabilitation and medical acupuncture. She is board certified in these areas. She examined claimant on two occasions—November 3, 2008 and July 8, 2010. At the first visit, in addition to claimant, his wife and a translator were present. Claimant reported left shoulder pain, right knee pain, dizziness, headaches, sensitivity to smell, and "some difficulty with misplacing items around his home." Claimant was "awake, alert, [and] oriented." He primarily spoke Polish. Watching claimant and the interpreter interact, Zollman concluded that claimant "was at least not grossly impaired." He was, on occasion, "very literal," and his affect was "a little bit blunted."

¶ 16 Zollman checked claimant's coordination. While it did not appear normal, "the manner in which it was not normal did not – was not consistent with any kind of recognized physical abnormality." Zollman explained, "[I]t appeared to me to be somewhat contrived or artificial."

¶ 17 Zollman opined that claimant's traumatic brain injury was related to his at-work accident. She believed claimant could return to work on a restricted basis. She recommended a neuropsychological assessment and possibly speech therapy.

¶ 18 Zollman authored a letter dated April 29, 2009, in which she reviewed and criticized Wegierek's methodologies. Zollman noted that Wegierek did not perform any validity testing; she used IQ tests that were originally written in English and translated to Polish; and she relied on only two tests. Zollman recommended that claimant be evaluated by a neuropsychologist who speaks Polish or had a translator available.

¶ 19 When Zollman reevaluated claimant, he reported dizziness and headaches. Knee and shoulder pain "were really not active issues." Claimant's wife stated he was forgetful. At home, claimant feeds and dresses himself (thought his wife lays out his clothes and prepares meals). He takes care of his basic grooming and can go to the bathroom by himself. He needs assistance in the shower. They take walks on a daily basis. Claimant's responses to specific questions were often vague, but he did not appear to suffer from short-term memory problems. Claimant's gait was normal, and he was able to do a deep-knee bend. Claimant described vertigo; however, what he described was not consistent with "benign positional vertigo," which Zollman had previously diagnosed. She agreed with Sweet that treatment "should be geared towards psychological and psychiatric care." Zollman believed that Forys was not providing appropriate care and that he was not "current in his understanding of traumatic brain injury." She disagreed that claimant's condition would worsen, as a traumatic brain injury is not a degenerative event.

¶ 20 On September 23, 2010, respondent moved, *inter alia*, to terminate payment of benefits under the Act, arguing claimant's failure to obtain appropriate care in accordance with Zollman's recommendations constituted an injurious practice. See 820 ILCS 305/19(d) (West 2010). The hearing in this case, which encompassed respondent's motion to terminate, was had on October 19, 2010. Respondent presented documentary evidence and the deposition of Zollman. Claimant called four witnesses. The first identified a video recording showing claimant engaged in daily activities.

¶ 21 Claimant's wife, Malgorzata Lemanski, then testified. She related that claimant had obtained vocational training in Poland and worked as a mechanic. They also operated a deli for 10 years. In 2003, they came to America. Claimant, who did not speak English, worked in construction until 2007.

¶ 22 She assists her husband, who is 59 years old, in the shower, and she cannot leave him alone for more than a few hours. He cannot drive or take the bus by himself. He gets confused and loses his way. She tried to get him to cook, but he would "just burn the pots and pans" or "turn on the stove" and forget he did that. He can dress himself. Prior to the accident, Malgorzata worked at a delicatessen. She no longer works because she has to take care of claimant.

¶ 23 Claimant also called Lisa Helma, a certified rehabilitation counselor who speaks Polish. She evaluated claimant on October 5, 2009. Claimant was still in treatment and taking medications. He used a cane and wore glasses. Claimant's wife related to Helma that she was trying to make claimant as independent as possible. She assisted claimant in almost all areas of his life. Claimant had difficulty sleeping, but he would sleep 10 to 12 hours per night and also during the day. Claimant slept a lot due to his depression. Helma reviewed claimant's medical records and educational history. Assuming Zollman is correct that claimant could return to work someday, given his skills, age, and language ability, he would only be able to work in an unskilled position. Moreover, he is only capable of sedentary work. Sedentary, unskilled positions comprise less than one percent of the jobs available in the United States. He does not drive and has no transferable skills. Helma opined that claimant could not work in his usual line of employment, that he was totally disabled, and that absent a "meaningful change in [his] medical status," his disability was permanent. There is no stable market for claimant. Helma did not believe that vocational training would be beneficial to claimant.

¶ 24 During cross-examination, Helma acknowledged that she also works as a veterinary technician. She met with claimant once. She also saw him "briefly in the hall" and asked him if there had been any change in his condition. Her opinions represented "a snapshot [of claimant]

as of October 5 of 2009." Helma agreed that it was difficult to assess claimant's abilities in light of his cognitive condition. She also acknowledged that she might not have had good data as it pertained to claimant's IQ score. Moreover, claimant had not undergone a functional capacity evaluation. Helma exemplified unskilled, sedentary labor by pointing to a cashier at a tobacco stand. She clarified that the classification would not apply to all cashier positions. A functional capacity evaluation was performed about a month prior to the hearing, and it indicated claimant was functioning below the sedentary level. Helma agreed that if claimant was returned to a condition where he could perform light to medium duty work and had no cognitive impairment, it was possible "some type of vocational training" would be appropriate.

¶ 25 Claimant then testified on his own behalf. He identified himself and stated he lived in Chicago, but could not recall the name of the street on which he lived. He stated that he is married and has two grown children. He could not recall the last time he saw them. He could not recall the accident or the names of the doctors who treated him. He knew he took medications, but not what type. He stated he could not take the bus by himself, cook, or take a shower. He sometimes needs assistance going to the bathroom. He cannot read or speak English. He thought he had a sandwich for lunch. He was unsure whether he had a telephone. When asked when his birth date was, he answered September of 1950. He thought he wanted to return to work. Claimant testified that he wanted additional treatment.

¶ 26 The arbitrator denied respondent's motion to terminate benefits, and he found that claimant was permanently and totally disabled. He noted that respondent was arguing that claimant's failure to follow Zollman's recommendations regarding appropriate treatment constituted an injurious practice (see 820 ILCS 305/19(d) (West 2010)). Specifically, Zollman recommended vestibular rehabilitation for vertigo; further neuropsychological testing; speech

therapy; and psychological testing and perhaps counseling for depression. The arbitrator then observed that claimant has, in fact, "undergone a long course of treatment by qualified physicians and therapists." Further, after stating the credentials of Zollman and Forys, the arbitrator expressly found Forys more credible. He also specifically credited Helma's testimony. As such, the arbitrator concluded that respondent had not shown that Zollman's recommendations offered a reasonable prospect of restoring claimant to a level at which he could perform work. Accordingly, he found that claimant's failure to follow her recommendations was not a basis for terminating benefits in accordance with section 19(d) of the Act (820 ILCS 305/19(d) (West 2010)).

¶ 27 The arbitrator next found that claimant's condition of ill-being was causally related to his at-work accident. He first stated that "[a]ll of the credible evidence indicates that [claimant's] present condition of ill-being is causally related to the accident." He noted that "[r]espondent has admitted that [claimant] sustained a serious brain injury due to this accident." The sole issue, according to the arbitrator, is whether claimant had engaged in an injurious practice. Having already rejected that argument, the arbitrator concluded that claimant's at-work accident caused his condition. The arbitrator also stated that he had observed claimant while testifying and seen the video documenting how claimant lives on a daily basis.

¶ 28 Turning to the nature and extent of claimant's injury and the need for prospective medical care, the arbitrator first acknowledged Sweet's observations about the reliability of the results of the tests administered to claimant. Even so, Sweet concluded that claimant suffered a "serious traumatic brain injury." The arbitrator noted that Sweet did not address claimant ability to return to gainful employment. He then relied on Helma's testimony to conclude that claimant is not employable in light of his age, education, training, and experience. Additionally, respondent did

not show that a stable labor market existed for claimant. As such, later citing an odd-lot theory, the arbitrator found that claimant was permanently and totally disabled. The arbitrator criticized Zollman's opinion in that she believed for claimant to be a "total care" patient, claimant would have to be unable to feed or toilet himself, needed to be turned in bed, and required constant supervision. The arbitrator pointed out that this does not coincide with the definition of total disability contained in section 8 of the Workers' Compensation Act (Act) (see 820 ILCS 305/8 (West 2010)). He further criticized Zollman's opinion that claimant could return to work in a "supportive employment model" as not referencing an identifiable occupation. The arbitrator then found that Forys's opinion that claimant was permanently and totally disabled was more credible than Zollman's opinion. Because claimant's wife had to give up her job to care for claimant, the arbitrator determined that home healthcare was needed and ordered respondent to pay for a provider for three, eight-hour shifts per week.

¶ 29 Finally, the arbitrator declined to impose penalties and fees against respondent or to order claimant to pay the costs of a deposition which was terminated purportedly due to the conduct of claimant's attorney. Respondent raised an issue as to the chain of referral. The arbitrator concluded that claimant was initially operated on by Kranzler who referred him to Gourineni. Claimant subsequently saw Forys, and all subsequent referrals flowed therefrom. Hence, the arbitrator held all doctors were within the chain of referral contemplated in the Act. The arbitrator also found that claimant had established that he had been entitled to temporary total disability from the date of the arbitration hearing.

¶ 30 After denying various motions for fees and sanctions filed by both parties and a motion to dismiss filed by claimant, the Commission reviewed the arbitrator's decision. Both parties sought review in the circuit court of Cook County (respondent's appeal is case No. 12-L-50727;

claimant's is 12-L-50742). The cases were consolidated. The trial court dismissed respondent's appeal, holding that respondent did not file an effective bond, which deprived the trial court of jurisdiction. Despite this initial finding, the trial court went on to find that the Commission did not abuse its discretion in denying respondent's motion to terminate benefits in accordance with section 19(d) of the Act (820 ILCS 305/19(d) (West 2010)). Respondent now appeals.

¶ 31 III. ANALYSIS

¶ 32 On appeal, respondent raises four main issues. First, it challenges the Commission's decision that claimant is permanently and totally disabled. Second, it contends that the Commission should have granted its motion to suspend benefits due to claimant's purported refusal to follow Zollman's recommendations regarding medical treatment. Third, it argues that Forys was not a "valid choice within [claimant's] chain of referral of doctors pursuant to section 8(a)" of the Act (820 ILCS 305/8(a) (West 2010)). Fourth, it contends that the trial court erred in dismissing its case for its alleged failure to file an appropriate bond.

¶ 33 Claimant's final point raises a question regarding our jurisdiction, and we will address it now. To perfect an appeal, a bond must be filed by "the one against whom the Commission shall have rendered an award for the payment of money." 820 ILCS 305/19(f)(2) (West 2010). Case law holds that a corporate officer need not disclose his office and authority when executing a bond and that evidence of that authority may be provided after the usual 20-day period for perfecting an appeal. *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 689 (1998). Here, the bond was executed simply by Bob Redlinski. Redlinski later submitted an affidavit stating that he is the president of Bob Red Remodeling, Inc., and that he has authority to bind the corporation to any financial obligation. As such, respondent complied with the requirements of the Act for perfecting an appeal.

¶ 34 A. PERMANENT TOTAL DISABILITY

¶ 35 Respondent first argues that the Commission erred in finding claimant permanently and totally disabled. We review this finding using the manifest-weight standard. *Mansfield v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120909WC, ¶ 35. Thus, we will not reverse unless an opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). This is not the case here.

¶ 36 The Commission found that claimant had proved he was permanently and totally disabled based on both the medical evidence and an odd-lot theory. See *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1129 (2007). Respondent contends that both findings are against the manifest weight of the evidence and, moreover, they are inconsistent. We first turn our attention to the odd-lot theory.

¶ 37 Pursuant to this theory, a claimant may establish that he or she is permanently and totally disabled by showing either a diligent but unsuccessful job search or that his age, training, experience, education, and condition prevent him from obtaining stable and continuous employment. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). If the employee is successful, the burden shifts to the employer to show that a stable job market nevertheless exists for the employee. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007).

¶ 38 Disingenuously, respondent contends that the Commission, having found claimant permanently and totally disabled based on medical evidence, erred by considering the odd-lot theory. According to respondent, since the odd-lot category presumes a claimant can return to work, the Commission should not have addressed it after finding that claimant could not return to work based on his medical condition. However, respondent also contends that claimant has not

actually shown he is permanently and totally disabled based on the medical evidence and that the Commission's finding based on the medical evidence is contrary to the manifest weight of the evidence. If respondent is correct that this finding is against the manifest weight of the evidence and the Commission had not addressed the odd-lot theory, we would have to remand to allow it to do so. *Cf. Westin Hotel*, 372 Ill. App. 3d at 545-46 (remanding for finding on permanent disability where odd-lot finding was determined to be contrary to the manifest weight of the evidence). Hence, we perceive no impropriety in the Commission's decision to address both theories in the first instance, as it prejudices no one and furthers the goal of judicial efficiency.

¶ 39 The Commission noted that following his accident, claimant was never offered a job of any sort. It further noted that respondent did not offer any evidence to establish that a job market existed for claimant. It discounted Zollman's testimony that claimant could return to work in a "supported employment model," as that did not describe an identifiable job. Moreover, the Commission cited the testimony of Helma, a certified rehabilitation counselor, who testified that a stable labor market did not exist for claimant. Helma opined that claimant would have to be restored to the light-medium level in order to be employable, qualifying her testimony as a "guarded prognosis" and assuming "no cognitive impairment." A functional capacity evaluation performed about a month prior to the hearing indicated that claimant was functioning below the sedentary level. Thus, the Commission's decision finds support in Helma's testimony.

¶ 40 Respondent attacks the bases underlying Helma's opinion. Such matters are relevant to the weight to which her opinion was entitled. *Cassens Transport Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 332 (1994). Hence, these questions are primarily for the Commission to resolve. *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1042 (1999). Moreover, the Commission's expertise in the area of workers' compensation is well established. *Mobil Oil*

Corp. v. Industrial Comm'n, 309 Ill. App. 3d 616, 624 (1999). We therefore owe such decisions substantial deference. *Id.* None of respondent's criticisms is so persuasive that we could hold that the Commission was not entitled to rely on Helma's opinion or that an opposite conclusion is clearly apparent.

¶ 41 Accordingly, assuming, *arguendo*, that respondent is correct that the Commission erred in finding claimant permanently and totally disabled based on the medical evidence, claimant was nevertheless entitled to prevail on an odd-lot theory.

¶ 42 B. REFUSAL TO SUBMIT TO MEDICAL TREATMENT

¶ 43 Section 19(d) of the Act provides, in pertinent part, "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee." 820 ILCS 305/19(d) (West 2010). In accordance with this provision, "benefits may be suspended or terminated if the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 235 Ill. 2d 132, 146 (2010). Our supreme court has stated, "If a claimant's response to an offer of treatment is within the bounds of reason, his freedom of choice should be preserved even when an operation might mitigate the employer's damages." *Rockford Clutch Division, Borg-Warner Corp. v. Industrial Comm'n*, 34 Ill. 2d 240, 247-48 (1966). Thus, the question before us is whether the course of treatment chosen by claimant was unreasonable. See *Allied Chemical Corp. v. Industrial Comm'n*, 140 Ill. App. 3d 73, 76-77 (1986). This issue presents a question of fact, which we review using the manifest-weight standard. *Id.* at 77.

¶ 44 Respondent complains that claimant did not follow Zollman's recommended course of treatment. Zollman recommended vestibular therapy for vertigo, neuropsychological testing, speech therapy, and psychological testing and counseling if indicated. The Commission noted that claimant had, in fact, "undergone a long course of treatment by qualified physicians and therapists." After reciting Zollman's and Forys's qualifications, the Commission found Forys more credible. It also noted Helma's testimony, and then found that respondent had not established that Zollman's recommended course of treatment offered "a reasonable prospect of restoration or relief from incapacity." We cannot say that this finding is contrary to the manifest weight of the evidence.

¶ 45 Indeed, we note that, in essence, respondent is complaining that claimant chose to follow the advice of his treating physician rather than that of Zollman. Admittedly, Zollman's credentials with respect to brain injuries are more substantial than those of Forys. However, Forys is board certified in internal medicine, and his credentials are not insignificant. We recognize that several other doctors agreed with Zollman's assessment. Nevertheless, the question is not which course of treatment was superior, it is whether claimant's behavior was reasonable under the circumstances. As claimant was following the advice of his own qualified physician, we could not say that his choices were unreasonable. At the very least, we certainly could not say that an opposite conclusion to the Commission's on this issue is clearly apparent.

¶ 46 C. CHAIN OF REFERRAL

¶ 47 Finally, respondent contends that Forys was not within the allowable chain of referral, as claimant had purportedly previously elected to treat with Kranzler and Gourineni, which would make Forys claimant's third chosen doctor. Section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)) limits an employer's liability to pay for medical services to (1) first aid and emergency

services and (2) two additional doctors chosen by an employee and any additional providers and services recommended by those two doctors. See *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 468-69 (2011). If either Kranzler or Gourineni was not a choice with the meaning of Section 8(a), Forys would be claimant's second choice and respondent would not be shielded from liability for his services. This issue presents a question of fact subject to review using the manifest-weight standard. *Id.*

¶ 48 The Commission found that claimant was transported by ambulance to Advocate Illinois Masonic Hospital. While there, he was operated upon by Kranzler. Subsequently, he was referred to Gourineni. It further found that Forys was claimant's first choice of a physician, which indicates that the Commission regarded Kranzler as providing emergency care. If either of these findings regarding Kranzler's and Gourineni's involvement in claimant's care is not contrary to the manifest weight of the evidence, respondent is liable for Forys's services.

¶ 49 Having reviewed the record, we cannot say that the Commission's conclusion that Kranzler was providing emergency services is against the manifest weight of the evidence. As noted, claimant was transported by ambulance to the emergency room on July 27, 2007. He was admitted to the hospital and remained in the intensive care unit from that day through the day on which Kranzler performed surgery (August 3, 2007). Kranzler's operative report states that claimant was monitored for several days and experienced a "progressively severe headache combined with nausea and vomiting." This "pattern persisted." The report of the surgery indicates that "dark red clotted blood was found" inside claimant's skull. Also, "a small bleeding point was coagulated." The Commission could readily conclude that Kranzler's treatment of claimant was in response to an ongoing emergency, which flowed continually from claimant's accident. Moreover, given that this is a medical issue, we owe increased deference to

the Commission due to its expertise in such matters. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979).

¶ 50 Respondent argues that Kranzler's care did not constitute emergency treatment. It points out that Kranzler did not operate on claimant until a week after claimant's accident. Moreover, claimant continued to follow up with Kranzler for over four months after the surgery. Respondent set forth a portion of a dictionary's definition of "emergency" in support of its argument: "an unforeseen combination of circumstances or a resulting state that calls for immediate action," "a pressing need," "a sudden bodily alteration such as is likely to require *immediate* medical attention (as a ruptured appendix or surgical shock)." (Emphasis added.) Webster's Third New International Dictionary 740 (2002). We note that the same dictionary defines "immediate" as "acting or being without the intervention of another object, cause, or agency." Webster's Third New International Dictionary 1129 (2002). Here, claimant's medical care following his accident was continuous, and Kranzler's surgery was a part of that course of care. Thus, claimant received medical care without the "intervention of another object, cause, or agency." As such, the Commission could reasonably determine that the surgery was "emergency treatment" within the meaning of section 8(a).

¶ 51 As for the follow-up visits, there is no indication that they consisted of any sort of treatment other than the type that ordinarily follows a surgical procedure. While we find no Illinois case law on this point, we find the following foreign authority persuasive. In *Ceco Steel, Inc. v. District of Columbia Department of Employment Services*, 566 A.2d 1062 (D.C. Cir. 1989), the District of Columbia Court of Appeals discussed what it termed "constructive selection." A claimant constructively selects a medical provider who has provided emergency treatment if follow-up care is "extended beyond reasonable limits." *Id.* at 1064. In other words,

if the treatment a claimant receives from a medical provider who has previously provided emergency services is of the sort that typically follows such emergency services, the medical provider does not constitute a choice of the claimant's. This rule is logically sound and bears obvious relevance to this case.

¶ 52 Here, nothing in the record indicates that the services provided by Kranzler were anything other than ordinary follow up to the surgery he performed following claimant's accident. Kranzler saw claimant on November 8, 2007, and December 5, 2007. Letters written by Kranzler to claimant's insurance carrier describe both visits as follow-ups to claimant's surgery. Nothing is discussed outside of claimant's head injury. Thus, the available evidence indicates that claimant's post-surgery visits with Kranzler were nothing more than ordinary follow-up appointments. As such, they are directly related to the emergency surgery and do not constitute a choice of a medical provider for the purpose of section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)).

¶ 53 Accordingly, Forys was, at most, claimant's second choice of doctors (we therefore need not address Gourineni's status). We affirm this portion of the Commission's decision.

¶ 54 IV. CONCLUSION

¶ 55 In light of the forgoing, the judgment of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 56 Affirmed.

1 of 100 DOCUMENTS

ZENON LEMANSKI, PETITIONER, v. BOB RED REMODELING, INC., RESPONDENT.

NO. 07WC 35515

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 229; 2012 Ill. Wrk. Comp. LEXIS 294

March 7, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, future medical services, temporary total disability benefits, permanent partial disability benefits, Respondent's motion for costs and fees under Supreme Court Rule 206(e), Respondent's motion to suspend benefits under Section 19(d) of the Illinois Workers' Compensation Act and Respondent's motion for sanctions under Supreme Court Rule 137 and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Arbitrator erred in making reference to the September 10, 2010 functional capacity evaluation report given the fact that the Arbitrator denied said exhibit from being submitted into the record. The Commission notes that on September 7, 2011 Petitioner's attorney filed a Petition for Penalties and Attorneys' Fees. The Petition was filed prior to the Commission's issuance of the November 10, 2011 Order [*2] in which it addressed Petitioner's June 10, 2011 Petition for Penalties and Attorneys' Fees but the November 10, 2011 Order did not address the September 7, 2011 Petition. On the February 16, 2012 Oral Argument date, Respondent's attorney filed Respondent's response to Petitioner's Second Petition for Penalties and Fees. Having reviewed the record anew, the Commission denies Petitioner's September 7, 2011 Petition for Penalties and Attorneys' Fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 466.67 per week for a period of 168-3/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 130,174.00 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner future reasonable and necessary medical expenses related to the traumatic brain injury and specifically pay for a home health care assistant three times a week for 8 hours a day under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing October 20, 2010 Respondent pay to Petitioner the [*3] sum of $ 466.67 per week for life under § 8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of the Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion for Costs and Fees under Supreme Court Rule 206(e), Respondent's Motion to Suspend Benefits under Section 19(d) and Respondent's Motion for Sanctions under Supreme Court Rule 137 are hereby denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $ 78,865.54 for temporary total disability benefits paid to 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

Zenon Lemanski
Employee/Petitioner

v.

[*4] **Bob Red Remodeling, Inc.**
Employer/Respondent

Case # **07** WC **35515**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 19, 2010, October 21, 2010 and November 18, 2010.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?
O. [X] Other **Prospective Medical, Respondent's Motion for Costs and Fees Under Supreme Court Rule 206(e), Respondent's Motion for Sanctions** [*5] **Under Supreme Court Rule 137, and Chain of Referral**

FINDINGS

On **July 28, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **36,400.00**; the average weekly wage was $ **700.00**.

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

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

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

Respondent shall be given a credit of $ **78,865.54** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **78,865.54**.

ORDER

Respondent's 19(d) Motion to terminate benefits is [*6] denied.

Respondent's dispute as to the chain of referral is denied since the Arbitrator finds that transportation by ambulance to Advocate Illinois Masonic Hospital does not constitute a "choice". Post-surgical follow-up with the physicians at Advocate Illinois Masonic Hospital does not constitute a choice. Thus, Dr. Forys is within the Petitioner's choice of physicians.

Respondent's motion for sanctions, pursuant to Supreme Court Rule 137, is denied

Respondent's motion for costs and fees, pursuant to Supreme Court Rule 206(e), is denied.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $ **466.67**/week for life, commencing on **10/20/10**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ **466.67**/week for **168-3/7** weeks, commencing on **7/29/07** through **10/19/10**, as provided in Section 8(b) of the [*7] Act. Respondent is entitled to a credit for amounts paid.

Medical benefits

Respondent is entitled to a credit of $ **130,174.00** for medical bills paid.

Prospective Medical Care

Petitioner is entitled to prospective medical as outlined on page 23 of addendum.

Penalties and Attorneys' Fees

The Arbitrator concludes that penalties and attorneys' fee are not warranted in this case.

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.

March 3, 2011

Date

ZENON LEMANSKI,
Employee/Petitioner,

v.

BOB RED REMODELING, INC.,
Employer/Respondent.

Case No.: 07 WC 35515

FINDINGS OF FACT:

On July 28, 2007, Petitioner, Zenon [*8] Lemanski, was employed as a construction worker for Bob Red Remodeling, Inc.. On that date, Mr. Lemanski fell from a roof that was approximately 11 feet above the ground, landed on a concrete driveway and struck his head. As a result of the fall, Mr. Lemanski sustained a traumatic brain injury, as well as injuries to his right knee and left shoulder. Mr. Lemanski was unconscious when an ambulance took him from the site of the accident to Advocate Illinois Masonic Hospital. Subsequent to surgery on his brain, the Petitioner was hospitalized for nearly three weeks.

TRIAL TESTIMONY

On October 19, 2010, the Arbitrator heard the testimony of the Petitioner and of three people who testified on behalf of the Petitioner: Malgorzata Lemanski, Petitioner's wife, Dagmara Kujawa, an employee of Petitioner's attorney who testified with regard to the day-in-the-life video and Lisa Helma, a Certified Vocational Rehabilitation Consultant. In support of their Motion to Terminate Benefits pursuant to 19(d), the Respondent offered, and the Arbitrator admitted into evidence, the deposition testimony of Felise S. Zollman, M.D.

On October 21, 2010, the parties offered the remaining exhibits into evidence, [*9] which included the deposition testimony of one of Petitioner's treating physicians, Victor Forys, M.D.

On November 18, 2010, the parties made closing statements. The Arbitrator then closed proofs.

DR. FELISE ZOLLMAN

Dr. Zollman testified that she is a neurologist and does not perform vocational rehabilitation. Dr. Zollman testified regarding two reports she generated after two examinations of the Petitioner pursuant to Section 12 of the Act. Dr. Zollman billed over $ 10,000.00. for the medical-legal consulting in this case.

The first Section 12 examination took place on November 3, 2008, and the second one on July 8, 2010. (Resp. Exhibit 1, Pg. 8). Dr. Zollman testified that she was of the opinion that the Petitioner's traumatic brain injury was related to the work accident that he suffered on July 28, 2007. *Id.* at 18.

In regard to the first examination on November 3, 2008, Dr. Zollman testified that Mr. Lemanski presented with left shoulder pain, right knee pain, dizziness and headaches. The orthopedic records she reviewed indicated Mr. Lemanski was diagnosed with a meniscus tear in his knee and a frozen shoulder. Dr. Zollman found that Mr. Lemanski suffered from a blunted mood [*10] secondary to the moderate traumatic brain injury and she recommended that the Petitioner undergo neuropsychological testing by a medical provider with expertise in traumatic brain injury cases. A Polish interpreter should be present for such testing. *Id.* at 15, 19, 27.

Dr. Zollman opined that Mr. Lemanski needed neuropsychological testing for his post-injury depression and she eventually provided two physicians with such expertise, Dr. Jerry Sweet and Dr. Robert Hanlon. *Id.* at 19, 29. Dr. Zollman also recommended vestibular rehabilitation, which was to be performed by a physical therapist. *Id.* at 19. Dr. Zoll-

man opined that should the knee pain persist, Mr. Lemanski would be a candidate for arthroscopic surgery to repair the meniscus tear. *Id.* at 20.

Dr. Zollman advised that at this time, Mr. Lemanski could not return to his prior occupation because of his vertigo as well as his residual problems with the left shoulder and right knee. *Id.* at 21. (Resp. Exhibit 1, Pg. 19).

Depending on the results of a neuropsychological testing, Dr. Zollman might also recommend speech therapy. *Id.* Lastly, she recommended that the Petitioner undergo periodic psychological evaluations. [*11] *Id.* at 21. The Petitioner presented to Dr. Jerry Sweet for this recommended testing on November 10, 2009. (Pet. Exhibit 8, Pg. 1).

Due to the Petitioner's vertigo and the consequent danger of falling, Dr. Zollman recommended that he only work at ground level. *Id.* Furthermore, she noted that the Petitioner had been released to sedentary duty by his orthopedist. *Id.* Lastly, Dr. Zollman testified that she recommended a Functional Capacity Evaluation and Vocational Rehabilitation. *Id.* Consequently, she was unable at that juncture to opine as to whether the Petitioner would ever be able to return to his prior occupation in an unrestricted fashion. *Id.* at 21.

Dr. Zollman testified with regard to her July 8, 2010 examination of the Petitioner. This was the second and last time that she examined Mr. Lemanski. *Id.* at 29. Dr. Zollman testified that she reviewed the neuropsychological testing performed by Dr. Sweet and found his evaluation to be adequate. *Id.* at 30. She agreed with Dr. Sweet's conclusion that the Petitioner's treatment should shift focus away from the physical and towards the psychological. *Id.* at 38-39. Upon a review of Dr. Sweet's report, and [*12] the balance of the Petitioner's medical records, Dr. Zollman testified that at the time of the second examination, she recommended cognitive behavioral therapy. *Id.* at 39. According to Dr. Zollman, the purpose of cognitive behavioral therapy is "to help someone to restructure their thoughts and expectations about what's going on, how they think about whether they're disabled or whether they're well . . . [and] their sort of attitude and outlook." *Id.* She also recommended that the Petitioner see a neurologist to address his headaches, as well as psychiatrists and psychologists to address his depression. *Id.*

Dr. Zollman diagnosed Mr. Lemanski's vertigo as "peripheral" and no longer "benign positional." She also noted that he complained of "daily posttraumatic headaches." *Id.* at 36.

Dr. Zollman testified that the Petitioner was capable of returning to work in a "supported employment model" with the participation of a vocational rehabilitation counselor and with management of his depression. *Id.* at 44. She testified that the Petitioner was in need of home health care assistance, but only on a three-times per week basis. She opined that constant supervision of the Petitioner [*13] was not necessary. However, she did not suggest that Petitioner be left alone for extended periods of time. *Id.* at 48. Lastly, Dr. Zollman opined that the Petitioner's treatment with his treating physician, Dr. Victor Forys, was causing Petitioner to become entrenched in the idea that he had a chronic disability. *Id.* at 49.

As of July 2010, the only treatment recommendations of Dr. Zollman were psychological and psychiatric management of depression and cognitive behavior therapy. Dr. Zollman noted that from an orthopedic standpoint, Mr. Lemanski has been returned to work only at a sedentary level of ability.

Dr. Zollman never testified that should the depression be treated, Mr. Lemanski would be capable of returning to gainful employment.

Dr. Zollman never testified that should the cognitive therapy be successful, Mr. Lemanski would be capable of returning to work at a greater than a sedentary level.

Dr. Zollman testified that in her frame of reference a "total care" or permanently, totally disabled person is a person who is:

"(R)eally dependent in all aspects of their daily needs, they need nursing care, they need help to go to the bathroom, they need help to be fed or they [*14] get fed through a tube, they need to be turned in bed, all the sort of basic essential family care needs of someone who can do nothing for themselves." *Id.* at 40.

DAGMARA KUJAWA

The first witness presented by the Petitioner was Dagmara Kujawa. Ms. Kujawa testified to her knowledge of a day-in-the-life video of the Petitioner. (Tr. Pg. 41). She indicated that she had personal knowledge of the events depicted in the video, and that the video accurately depicted those events. *Id.* at 40-41.

MALGORZATA LEMANSKI

Petitioner's wife, Malgorzata Lemanski, testified on behalf of her husband. Mrs. Lemanski testified that the Petitioner's accident occurred on July 28, 2007. *Id.* at 53. She also testified that the highest education level attained by the Petitioner was the completion of vocational school in Poland in the field of automobile maintenance. *Id.* at 51. She further testified that the entirety of the Petitioner's work history consisted of working as a taxi driver and running a delicatessen in Poland, as well as performing construction work in the U.S. *Id.* at 53.

Mrs. Lemanski testified to her experiences on the date of the accident. In response to a co-worker's telephone [*15] call, she arrived on the scene of the accident only to find that her husband had already been taken to the hospital. *Id.* at 54-55, 57, 71-72. Mr. Lemanski remained in the hospital for three weeks. *Id.* at 60. For about a month after discharge, a physical therapist came to the Petitioner's home to help him with his therapy. *Id.* at 65-66. After the period of in-house therapy, the Petitioner received care at an outpatient physical therapy clinic for approximately six months, two to three times a week. *Id.* at 66.

Mrs. Lemanski testified that throughout the course of the Petitioner's treatment, her husband's communication skills have not improved. *Id.* at 66. The Petitioner has never been able to enroll in English as a Second Language classes and does not speak English. *Id.* at 67. Lastly, the Petitioner's ability to ambulate on his own has only improved marginally over the course of his treatment. *Id.* Mrs. Lemanski also testified that the Petitioner needed a cane in order to walk.

Mrs. Lemanski testified to life before the accident, and how it has subsequently changed. Before the accident, Mrs. Lemanski worked at a store as a salesperson. *Id.* at 59-60, 72. [*16] Unfortunately, after the accident, Mrs. Lemanski was forced to leave her job in order to be able to care for her husband. *Id.* at 59-60, 72. Mrs. Lemanski testified that caring for her husband took up so much of her time that, from the date of the accident to the date of the trial, Mrs. Lemanski had not spent more than half an hour away from her husband. *Id.* at 69. Before the accident, the Petitioner was able to drive himself. *Id.* at 62-63. Mrs. Lemanski testified that after the accident, the Petitioner is no longer able to drive, or even take the bus, by himself. *Id.* The Petitioner is forgetful and easily confused, and he would not be able to make it home on his own without assistance. *Id.* Mrs. Lemanski further testified that the Petitioner is unable to find any location on his own. *Id.* at 68. Mrs. Lemanski testified that the Petitioner is unable to cook his own meals. When Mrs. Lemanski tried to force him to cook, he would simply burn the pots and pans or forget that he had turned the stove on. *Id.* Furthermore, Mrs. Lemanski testified that the Petitioner is unable to shower by himself, and that he had fallen several times when attempting to do so. *Id.* [*17] at 76.

Mrs. Lemanski testified that she wanted a home health care provider to help her care for her husband on at least one day a week. She would then have a moment to herself to go to the hairdresser, or to attend something by herself. *Id.* at 62. Mrs. Lemanski testified that she was unaware of any further treatment available that may improve her husband's condition, but of course, she would gladly take her husband to undergo such treatment if the opportunity arose. *Id.* at 69, 85, 88. She indicated that all of the treatment heretofore recommended, her husband has attempted. Unfortunately, none of it has seems to have helped him. *Id.* at 78. She further testified that it was her understanding that Dr. Zollman had not recommended any specific course of treatment for her husband. *Id.* at 85.

LISA HELMA

The next witness called was the Petitioner's vocational rehabilitation counselor, Lisa Helma. Ms. Helma testified that she is certified as a vocational rehabilitation counselor, and that it was her job to evaluate injured workers to determine if there is any stable job market for them. *Id.* at 93. Ms. Helma testified that she performed an analysis of the Petitioner, taking [*18] into consideration his age, education, work experience, physical capabilities, transferable skills, and any elements of acquired disability. *Id.* at 100. Petitioner has the equivalent of a high school education. The analysis provided that all of these factors would have a negative effect on any attempt by the Petitioner to redirect into a different job. *Id.* at 103-104. Ms. Helma further testified that, given Mr. Lemanski's physical and cognitive limitations, he would only be capable of sedentary, unskilled labor. *Id.* at 106-107. According to Ms. Helma, such jobs comprise less than one percent of the United States labor market. *Id.* at 107.

Consequently, it is Ms. Helma's opinion that there is no stable job market for the Petitioner. *Id.* at 110. She did indicate that it was theoretically possible for the Petitioner to be placed in a supported employment model such as a "shelter work place," where an organization may pay people with disabilities less than minimum wage based on production, but this type of work is not "substantial gainful activity" for which there is a stable labor market or would justify the payment of wages. *Id.* at 110-111.

Ms. Helma testified [*19] that she would not recommend vocational rehabilitation for the Petitioner. *Id.* at 112. She testified that she did not feel that vocational retraining would affect the employability of the Petitioner, and as a result undergoing vocational rehabilitation would be a waste of resources. *Id.* at 113. Furthermore, Ms. Helma testified that a job search would likewise not be helpful for the Petitioner because his eligible labor market comprises less than one percent of the United States labor market and there is no identifiable occupation in a stable labor market for the Petitioner. *Id.* at 115. Ms. Helma testified that if the Petitioner were normal neurologically, but everything else stayed the same, he would still have no labor market available to him. *Id.* at 151, 162.

ZENON LEMANSKI

The Petitioner had no recollection of the accident. Many of his answers to simple questions were "I don't know" or "I don't remember anything." He did testify that he cannot read or speak English, he does not drive and he doesn't know how to take the bus by himself. On cross-examination, Petitioner's memory seemed better. He testified that he has trouble walking because sometimes he is dizzy [*20] and loses his balance. He testified that he uses a cane. He testified that he is interested in getting more medical treatment, "hopefully to get well."

DR. VICTOR FORYS

The evidence deposition of Victor Forys, M.D., the Petitioner's primary physician, was admitted into evidence as Petitioner's Exhibit 19. Dr. Forys is a board-certified internal medicine doctor with focused training in orthopedic and occupational injuries. (Pet. Ex. 19, Pg. 8). Dr. Forys testified that he began treating the Petitioner on January 22, 2008, approximately six months after the date of the accident. *Id.* at 10, 12.

Dr. Forys testified that the Petitioner had suffered a skull fracture with a hematoma in the brain. *Id.* at 10. Dr. Forys further testified that the Petitioner had a brain surgery at Illinois Masonic Hospital, where they surgically evacuated the hematoma. *Id.* at 10-11. When Dr. Forys began treating the Petitioner, his complaints included "headache, heaviness, fatigue, dizziness, impulsiveness, anxiety, decreased concentration . . . ." *Id.* at 10. After performing a physical examination and assessing him neurologically, Dr. Forys diagnosed the Petitioner with a traumatic brain injury. [*21] *Id.* at 11.

Dr. Forys testified that, although some people do improve after a traumatic brain injury, it is unlikely that the Petitioner would be among them. *Id.* at 12, 14. Dr. Forys opined that victims of traumatic brain injuries that do not improve over the span of six to twelve months after the trauma have substantially diminished chances of recovery. *Id.* at 12. Dr. Forys testified that the Petitioner's mental condition, however, had not changed; as a result, the condition has most likely "plateaued." *Id.* at 12. In other words, the Petitioner's condition is permanent and will not change substantially over the years and he is at maximum medical improvement. *Id.* at 14.

As a result, Dr. Forys's opinion of the Petitioner is that he is a "total care" patient. *Id.* at 14. A total care patient is someone that needs assistance with almost all facets of daily life, including dressing, feeding, shopping, cleaning, etc. *Id.* at 14. Currently, Mrs. Lemanski provides all of these services for the Petitioner; however, Dr. Forys testified that he was concerned with how long she would be able to carry on in such a way. *Id.* at 15-16. Consequently, Dr. Forys recommended [*22] help in the form of a permanent home healthcare provider. *Id.*

Dr. Forys testified that the Petitioner was totally disabled and as a result is unable to work in any capacity; in other words, he is permanently and totally disabled. *Id.* at 17. Dr. Forys opined that the Petitioner's condition will not likely improve, and in fact will more than likely deteriorate. *Id.* at 32. Furthermore, Dr. Forys opined that there is no medical treatment available that would return the Petitioner to a normal life. *Id.* at 44.

Dr. Forys opined that the Petitioner was depressed, but that it was not a typical depression. *Id.* at 20. Dr. Forys testified that the depression exhibited by the Petitioner is the result of an organic brain injury. *Id.* 22. Many of the same symptoms commonly associated with depression are exhibited such as chronic tiredness, a lack of satisfaction from day-to-day activities, no modulation of their voice, etc. *Id.* at 20. However, the medication prescribed in an effort to treat this depression is more for the purpose of managing the symptoms rather than actually attempting to cure the depression. *Id.* at 22. Using a football analogy, Dr. Forys described [*23] the depression medication as a "Hail Mary pass." *Id.* at 23.

For the Petitioner's traumatic brain injury, Dr. Forys testified that he recommends monthly or bi-monthly follow-up visits with a rehabilitation doctor or an internist. *Id.* at 25. He would not recommend a neurologist because a neurologist would not be able to provide continued care for the Petitioner over an extended period of time. *Id.* The Petitioner does

not need a one-time consultation with a specialist, but rather continued and constant, stabilizing care such as that of a primary care physician. *Id.* at 25-26.

Dr. Forys's testimony then shifted to the Petitioner's injuries to his left shoulder and right knee. *Id.* at 26. Dr. Forys testified that the Petitioner had undergone an MRI of those injuries, and that he did not believe surgery was necessary for the Petitioner. *Id.* at 26-27. Dr. Forys testified that the Petitioner saw an orthopedist, Dr. Prasad Gourineni, for an evaluation of those injuries. *Id.* at 27. Dr. Gourineni sent the Petitioner for an MRI of his right knee. (Pet. Ex. 3). Dr. Gourineni determined that the Petitioner may have a meniscal tear that did not show up on the MRI, but the [*24] Petitioner declined surgical intervention. *Id.* Consequently, Dr. Gourineni indicated that the Petitioner should only follow-up as needed if he experiences any significant pain. (Pet. Ex. 3) (Pet. Ex. 19, Pg. 28-29). Dr. Forys opined that the Petitioner does not currently need any further treatment for his left shoulder or his right knee. (Pet. Ex. 19, Pg. 31).

Dr. Forys then testified as to his opinion related to the evaluation performed by the Petitioner's psychologist, Dr. Anna Wegierek. *Id.* at 29. Dr. Forys agreed with Dr. Wegierek's opinions that the Petitioner's neuropsychological instability requires supervision of his daily activities and that the Petitioner is unable to participate in any gainful employment or occupational activities. *Id.* at 30.

SUMMARY OF MEDICAL TREATMENT:
YEAR 2007

07/28/2007	Hospitalized at Advocate Illinois Masonic Hospital Traumatic Brain Injury, pain in left shoulder and right knee
08/03/2007	Brain surgery performed by Dr. Leonard Kranzler Procedure: left craniotomy with removal of epidural hematoma
08/04-08/14/07	Recovering after brain surgery Underwent physical, occupational and speech therapy
08/14/2007	Discharged from hospital care Instructed to follow up with Dr. Kranzler and Dr. Gourineni
09/04/2007	Follow-up visit to Dr. Kranzler Complaints: headaches
11/08/2007	Follow-up visit to Dr. Kranzler Reports less frequent headaches
11/12/2007	Follow-up visit to Dr. Gourineni Complaints: pain and stiffness in left shoulder as well as right knee pain that increases with bending and standing up from a sitting position Recommendation: physical therapy for the left shoulder and MRI of the right knee
12/06/2007	Neurological follow up with Dr. Leonard Kranzler Complaints: dizziness after three hours of lying down, occasional headaches, blurred vision, changes in personality (anger episodes), memory problems, sleepiness and impulsivity Recommendation: off work, follow up visit in four weeks
12/31/2007	Follow-up visit to Dr. Gourineni MRI of the right knee appears normal but clinical exam indicates possible meniscus tear Patient reports some improvement in regards to his left shoulder

	Recommendation: patient might have a meniscal tear but does not wish to proceed with any intervention; advised to follow up on a per-needed basis
YEAR 2008	
01/22/2008	Initial evaluation by Dr. Victor Forys Complaints: head heaviness, dizziness, fatigue, impulsiveness, anxiety and decreased concentration Additional complaints: Right knee pain, left shoulder pain Recommendation: off work for 1 month
01/28/2008	Follow-up visit to Dr. Gourineni Patient reports improvement in his left shoulder condition, pain appears with heavy lifting only Recommendation: continue present activity level, follow up as needed
02/21/2008	Follow-up visit to Dr. Forys Complaints unchanged since initial evaluation Recommendation: off work for one month
03/20/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
04/19/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
05/22/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
06/20/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
07/25/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
08/22/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
09/22/2008	Follow-up visit to Dr. Forys Complaints unchanged Removed from work for one month
10/30/2008	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month
11/03/2008	Section 12 Examination by Dr. Felise Zollman

	Opinion: neuropsychological assessment necessary to determine cognitive impairment, speech therapy.
11/27/2008	Follow-up visit to Dr. Forys Complaints: head heaviness, dizziness and knee pain Removed from work for one month
12/29/2008	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month
YEAR 2009	
01/26/2009	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month
02/19/2009	Referred by Dr. Forys for a psychological evaluation to Dr. Anna Wegierek
02/25/2009	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month
03/04/2009	Follow-up visit to Dr. Forys Complaints: knee pain, memory loss, visual impairment Removed from work for one month Referred to Dr. Ayzenberg (ophthalmologist), and Dr. Chappidi (neurologist)
03/20/2009	Neurological evaluation by Dr. Chappidi In Dr. Chappidi's opinion, client should be taken off Zoloft and started on Elavil for better control of headache episodes
03/24/2009	Neuropsychological evaluation by Dr. Anna Wegierek Opinion: Mr. Zenon Lemanski's neuropsychological instability does not permit him to continue his daily living activities without supervision. He is also unable to participate in any sort of competitive gainful employment situation due to severe cognitive disability. His inability to engage in occupational activities is certain
04/21/2009	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month
04/29/2009	Supplementary report provided by Dr. Felise Zollman Dr. Zollman comments on the report of Dr. Wegierek questioning her credentials, therefore questioning the validity of her evaluation as well Recommendation: repeat neurological evaluation
05/19/2009	Follow-up visit to Dr. Forys Complaints: head heaviness, knee pain Removed from work for one month

06/16/2009	Follow-up visit to Dr. Forys Removed from work for one month
07/14/2009	Follow-up visit to Dr. Forys Complaints: increased forgetfulness, total dependence on a caregiver Recommendation: removed from work from 1 month
08/04/2009	Neuropsychological re-evaluation by Dr. Wegierek Impression unchanged since last visit
08/11/2009	Follow-up visit to Dr. Forys Complaints: increased dementia Recommendation: removed from work for 1 month
09/08/2009	Follow-up visit to Dr. Forys Complaints unchanged Recommendation: removed from work for 1 month
10/06/2009	Follow-up visit to Dr. Forys Complaints: fatigue and dizziness Recommendation: removed from work for 1 month
11/02/2009	Follow-up visit to Dr. Forys Complaints: fatigue and dizziness Recommendation: removed from work for 1 month
11/10/2009	Neuropsychological evaluation by Dr. Jerry Sweet (Ph.D.) Opinion: future treatment should focus on proper psychological and psychiatric management of depression
12/07/2009	Follow-up visit to Dr. Forys Complaints: difficulty dealing with stress, memory loss Recommendation: removed from work for 1 month
YEAR 2010	
01/04/2010	Follow-up visit to Dr. Forys Recommendation: removed from work for 1 month
01/18/2010	Follow-up visit to Dr. Forys Complaints: continued fatigue and dizziness, unable to maintain proper posture Recommendation: off work for 1 month
02/18/2010	Follow-up visit to Dr. Forys Complaints unchanged Recommendation: off work for 1 month
03/18/2010	Follow-up visit to Dr. Forys Complaints: fatigue and dizziness, difficulty concentrating Recommendation: Zoloft, off work for 1 month
04/15/2010	Follow-up visit to Dr. Forys

	Complaints: head heaviness, weakness and dizziness Recommendation: removed from work for 1 month
05/14/2010	Follow-up visit to Dr. Forys Complaints: dizziness and fatigue Recommendation: home health care, off work for 1 week
05/21/2010	Follow-up visit to Dr. Forys Complaints: dizziness and fatigue Recommendation: removed from work for 1 month
06/18/2010	Follow-up visit to Dr. Forys Complaints: increased forgetfulness, dizziness and fatigue Recommendation: removed from work for 1 month
07/08/2010	Second Section 12 Examination by Dr. Felise Zollman Opinion: Dr. Zollman believes that treatment plan offered by Dr. Forys is inadequate and should be discontinued. She agrees with the treatment plan suggested by Dr. Jerry Sweet which gears towards psychological and psychiatric management of depression symptoms. In regards to Mr. Lemanski's ability to return to work, Dr. Zollman opines that he is capable of returning to work, although requires vocational rehabilitation to assist with supported employment as he reintegrates into the work setting
07/16/2010	Follow-up visit to Dr. Forys Complaints: increased forgetfulness Recommendation: removed from work for 1 month
08/17/2010	Follow-up visit to Dr. Forys Complaints: headaches and fatigue, condition is getting progressively worse Recommendation: removed from work for 1 month, PET scan
09/10/2010	Mr. Lemanski has Function Capacity Evaluation ("FCE")@ Vital Rehab. Recommendation: 1. Mr. Lemanski shows severe limitations with all activities due to deficits in standing dynamic balance and coordination. 2. Unable to perform work on any Physical Demand Level due to safety and decreased standing dynamic balance, as well as complaints of dizziness and headache, problems comprehending some of the tests and tasks due to cognitive status
09/13/2010	Follow-up visit to Dr. Forys Complaints: headaches, fatigue and dizziness Recommendation: continue supportive care, off work for 2 weeks
09/27/2010	Follow-up visit to Dr. Forys Complaints: headaches, fatigue and dizziness Recommendation: continue supportive care, off work for 2 weeks
10/06/2010	Dr Forys agrees to the conclusions and recommendations of the FCE as less than sedentary work status.

10/10/2010 Follow-up visit to Dr. Forys
Complaints: headaches, weakness and dizziness
Recommendation: off work for 2 weeks

[*25] **CONCLUSIONS OF LAW:**

IN SUPPORT OF THE ARBITRATOR'S DECISION WITH REGARD TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR CONCLUDES AS FOLLOWS:

In Arbitrator's Exhibit # 1, Petitioner claims that Respondent is liable for the following unpaid medical bills: $ 750.00, Central Medical Clinic of Chicago; $ 6,088.00, Golf Diagnostic Imaging; $ 1,868.40, Vital Rehabilitation; $ 4,222.00, Wegierek Psychology Center; $ 250.00, Affinity Home Health Services.

Respondent disputes such liability as they claim that all reasonable, necessary and related medical expenses, pursuant to the fee schedule and in accordance with Section 8, have been paid totaling $ 130,174.00. (Ax.1) Respondent has submitted a PAYLOG DISPLAY, which indicates all the medical bills that they paid, with dates of service from 7/29/07 - 9/16/10. The total amount is, indeed, $ 130,174.00. (Rx.4)

Petitioner conducted a Medical Fee Schedule analysis of all of the bills, paid and unpaid, and presented the following:

DATE	PROC. CODE	DESCRIPTION	COST	FEE SCHED.	AWARD
		ADVOCATE ILLINOIS MASONIC HOSPITAL			
07/28/07 to 08/14/07		Inpatient Services	$ 98,049.8	$ 74,517.48	$ 74,517.48
08/23/07		Outpatient Services	$ 304.00	$ 231.04	$ 231.04
10/07/07 to 10/31/07		Outpatient Services	$ 2,141.00	$ 1,627.16	$ 1,627.16
10/23/07		Outpatient Services	$ 1,157.00	$ 879.32	$ 879.32
11/01/07 to 11/30/07		Outpatient Services	$ 2,697.00	$ 2,049.72	$ 2,049.72
12/03/07 to 12/31/07		Outpatient Services	$ 1,123.00	$ 853.48	$ 853.48
12/22/07		Outpatient Services	$ 1,816.00	$ 1,380.16	$ 1,380.16
TOTAL			$ 107,287.80	$ 81,538.36	$ 81,538.36
		CENTRAL MEDICAL CLINIC OF CHICAGO			
09/27/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
09/13/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
08/17/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
07/16/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
06/18/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
05/27/10	G0180	Certification	$ 200.00	$ 145.32	$ 145.32
05/21/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68

DATE	PROC. CODE	DESCRIPTION	COST	FEE SCHED.	AWARD
05/14/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
04/15/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
03/18/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
02/18/10	99214	Office Visit/Established Patient	$ 250.00	$ 149.46	$ 149.46
01/18/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
01/04/10	99213	Office Visit/Established Patient	$ 150.00	$ 100.68	$ 100.68
12/07/09	99213	Office Visit/Established Patient	$ 150.00	$ 102.19	$ 102.19
11/02/09	99213	Office Visit/Established Patient	$ 150.00	$ 102.19	$ 102.19
10/06/09	99213	Office Visit/Established Patient	$ 150.00	$ 102.19	$ 102.19
09/08/09	99213	Office Visit/Established Patient	$ 150.00	$ 102.19	$ 102.19
08/11/09	99213	Office Visit/Established Patient	$ 150.00	$ 102.19	$ 102.19
07/23/09	99211	Office Visit/Established Patient	$ 60.00	$ 57.94	$ 57.94
07/23/09	36415	Blood Draw	$ 28.00	$ 15.81	$ 15.81
07/23/09	80053	Comp Metabolic Panel	$ 75.00	$ 62.16	$ 62.16
07/23/09	85651	ESR	$ 47.00	$ 31.61	$ 31.61
07/23/09	84443	TSH	$ 45.00	$ 113.79	$ 113.79
07/23/09	86701	HIV	$ 150.00	$ 88.50	$ 88.50
07/23/09	86038	ANA	$ 80.00	$ 75.96	$ 75.96
07/14/09	99214	Office Visit/Established Patient	$ 155.00	$ 151.71	$ 151.71
06/16/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
05/19/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
05/07/09	80053	Comp Metabolic Panel	$ 75.00	$ 62.16	$ 62.16
05/07/09	85025	CBC	$ 48.00	$ 45.72	$ 45.72
05/07/09	36415	Blood Draw	$ 28.00	$ 15.81	$ 15.81
04/21/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
03/25/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
03/04/09	99214	Office Visit/Established Patient	$ 155.00	$ 151.71	$ 151.71
02/25/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
02/18/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/17/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/16/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/11/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/10/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/09/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96

DATE	PROC. CODE	DESCRIPTION	COST	FEE SCHED.	AWARD
02/05/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/03/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
02/02/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/28/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/27/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/26/09	99213	Office Visit/Established Patient	$ 110.00	$ 102.19	$ 102.19
01/26/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/21/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/20/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/19/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/14/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/13/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/12/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/07/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/06/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
01/05/09	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/29/08	99213	Office Visit/Established Patient	$ 100.00	$ 102.19	$ 100.00
12/26/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/23/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/17/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/16/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/11/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
12/11/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
12/11/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
12/10/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
12/09/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
12/09/08	97112	Neuromuscular Re-Educ	$ 80.00	$ 54.99	$ 54.99
12/05/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
12/04/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
12/04/08	97112	Neuromuscular Re-Educ	$ 80.00	$ 54.99	$ 54.99
12/03/08	97001	PT Initial Evaluation	$ 165.00	$ 158.98	$ 158.98
11/28/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
10/30/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
09/22/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
08/22/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
07/25/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
06/20/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/20/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/20/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
06/20/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
06/18/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/18/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99

DATE	PROC. CODE	DESCRIPTION	COST	FEE SCHED.	AWARD
06/18/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
06/16/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/16/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/16/08	97110	PT Therapeutic Exercise	$ 150.00	$ 136.96	$ 136.96
06/13/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/13/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/13/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/11/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/11/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/11/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/09/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/09/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/09/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/09/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
06/06/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/06/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/06/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/06/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
06/04/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/04/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/04/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/04/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
06/02/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
06/02/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
06/02/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
06/02/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
05/29/08	97032	PT Electrical Stimulation	$ 70.00	$ 68.99	$ 68.99
05/29/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
05/29/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
05/29/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
05/28/08	97035	PT Ultrasound	$ 45.00	$ 45.00	$ 45.00
05/28/08	97140	PT Manual Therapy	$ 65.00	$ 64.99	$ 64.99
05/28/08	97001	PT Initial Evaluation	$ 165.00	$ 158.98	$ 158.98
05/28/08	97110	PT Therapeutic Exercise	$ 75.00	$ 64.99	$ 64.99
05/23/08	97212	Office Visit/Established Patient	$ 75.00	$ 57.00	$ 57.00
05/20/08	99214	Office Visit/Established Patient	$ 145.00	$ 143.98	$ 143.98
04/19/08	99214	Office Visit/Established Patient	$ 145.00	$ 143.98	$ 143.98
03/20/08	99213	Office Visit/Established Patient	$ 100.00	$ 96.98	$ 96.98
01/22/08	99203	Office Visit/New Patient	$ 205.00	$ 168.97	$ 168.97
TOTAL			$ 13,846.00	$ 11,680.45	$ 11,680.45

VITAL REHABILITATION

DATE	PROC. CODE	DESCRIPTION	COST	FEE SCHED.	AWARD
09/08/10	97750	Functional Capacity Evaluation	$ 1,868.40	$ 1,868.40 * (see below)	$ 1,868.40
TOTAL			$ 1,868.40	$ 1,868.40	$ 1,868.40
		GOLF DIAGNOSTIC & IMAGING CENTER			
08/20/10	78608		$ 3,255.00	$ 2,646.78	$ 2,646.78
	A9552		$ 1,500.00	$ 1,140.00	$ 1,140.00
	96374		$ 80.00	$ 60.80	$ 60.80
	96376		$ 45.00	$ 34.20	$ 34.20
	70551		$ 1,208.00	$ 1,162.52	$ 1,162.52
TOTAL			$ 6,088.00	$ 5,044.30	$ 5,044.30
		CENTER FOR NEUROLOGICAL DISORDERS			
03/20/09	99244	Office Visit	$ 350.00	$ 348.72	$ 348.72
TOTAL			$ 350.00	$ 348.72	$ 348.72
		AFFINITY HOME HEALTH SERVICES INC.			
05/27/10		Nursing Assessment	$ 250.00	$ 190.00	$ 190.00
TOTAL			$ 250.00	$ 190.00	$ 190.00
		WEGIEREK PSYCHOLOGY CENTER			
03/26/09	90801	Office Visit	$ 311.00	$ 263.38	$ 263.38
03/26/09	96118	Office Visit	$ 1,800.00	$ 1,368.00	$ 1,368.00
08/04/09	96118	Office Visit	$ 1,800.00	$ 1,368.00	$ 1,368.00
05/25/10	90801	Office Visit	$ 311.00	$ 263.38	$ 263.38
TOTAL			$ 4,222.00	$ 3,262.76	$ 3,262.76

* IWCC Medical Fee Schedule indicates a price of $ 77.85 per unit. Functional Capacity Evaluation consists of 24 units, which gives a total of $ 1,868.40.
[*26]

The Arbitrator notes that the total of the Petitioner-provided Fee Schedule amounts, which excludes the charges by Dr. Zollman, is $ 103,932.99.

Petitioner submitted the medical bills with the medical records.

The Medical Fee Schedule amounts claimed by Petitioner are $ 5,044.30 for Golf Diagnostics & Imaging, $ 1,868.40 for Vital Rehabilitation for a Functional Capacity Evaluation (FCE), and $ 190.00 for Affinity for nursing assessment. There appears to be a balance of 750.00 to Central Medical Clinic and $ 1,222.62 to Wegierek Psychology Center.

Yet, based on Petitioner's own calculations, Petitioner's medical bills total $ 103,932.99, plus approximately $ 10,000.00 to Dr. Zollman.

Respondent is entitled to a credit of $ 130,174.00.

The Arbitrator concludes that Respondent has paid all reasonable, necessary and related medical bills.

IN SUPPORT OF THE ARBITRATOR'S DECISION WITH REGARD TO ISSUE (O) RESPONDENT'S MOTION TO SUSPEND TTD BENEFITS PURSUANT TO SECTION 19(D) OF THE ACT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Section 19(d) of the Illinois Workers' Compensation Act states:

> If any employee shall persist in insanitary or injurious practices which tend to either imperil [*27] or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. However, when an employer and employee so agree in writing, the foregoing provision shall not be construed to authorize the reduction or suspension of compensation of an employee who is relying in good faith, on treatment by prayer or spiritual means alone,

in accordance with the tenets and practice of a recognized church or religious denomination, by a duly accredited practitioner thereof.

The Respondent claims that because Petitioner has not followed Dr. Zollman's recommendations for further testing and further treatment, he has refused to submit to medical treatment that is reasonably essential to promote recovery.

Dr. Zollman has prescribed (1) vestibular rehabilitation for his vertigo, which is to be performed by a physical therapist, (2) further neuropsychological testing to be performed by a neuropsychologist who specializes in traumatic brain injuries and who is accompanied by a Polish interpreter, (3) speech therapy, if [*28] indicated by the results of the neuropsychology tests, and (4) psychological testing and perhaps counseling for his depression.

In the context of a workmen's compensation claim, if an operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which a workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him. Mt. Olive Coal Company v. Indus. Comm'n, 295 Ill. 429, 129 N.E.103 (1920)

Section 19(d) of the Workmen's Compensation Act, Ill. Rev. Stat. chap. 48, para. 138.19(d) (1963) provides that if an injured employee refuses to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of such injured employee. Under Illinois decisions, however, in the absence of bad faith, it is for the claimant to choose whether to continue to suffer from a disability or to submit to a major operation designed [*29] *to cure it. Rockford Clutch Division v. Indus. Comm'n, 34 Ill. 2d 240, 215* N.E.209 (1966)

A claimant's refusal should be in good faith. The Workmen's Compensation Act is designed for employees with divergent personalities, beliefs and fears. If a claimant's response to an offer of treatment is within the bounds of reason, his freedom of choice should be preserved even when an operation might mitigate the employer's damages. Keystone Steel & Wire Company v. Indus. Comm'n, 72 Ill. 2d 474, 381 N.E.2d 672, 21 Ill. Dec. 345 (1978)

Unlike an intervening cause, there is no requirement that an injurious practice be the sole cause of a workers' compensation claimant's condition of ill-being for the Illinois Workers' Compensation Commission to reduce or deny compensation. 820 ILCS 305/19(d) (1998). Rather, the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. Section 19(d) vests the Commission's discretion on this subject, so the appellate court will only [*30] *overturn its decision if that discretion is abused. An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission. Global Products v. Workers' Compensation Comm'n, 392 Ill. App.3d 408, 911 N.E.2d 1042, 331 Ill. Dec. 812 (1st Dist. 2009)*

In the case at bar, Petitioner has undergone a long course of treatment by qualified physicians and therapists.

Yet, Dr. Zollman testified: "I think what's reasonable to expect in the claimant - - in this claimant's case is that if he gets adequate psychiatric and psychological treatment and the message is about the extent of his helplessness and disability are reversed, then he can make a further functional recovery and can return to work."

Then, the following exchange took place between Respondent's Counsel and Dr. Zollman:

Q: Do you believe Mr. Lemanski can return to work?

A: I do believe that he can return to work. I think that he's still going to be limited in terms of working at an elevation because he does continue to have complaints of dizziness, and even though it's not clear just what the dizziness is coming from at this [*31] point, it seems much more vague than it was previously. As long as he's feeling dizzy, it's probably not safe for him to be working on roofs, but I think he can certainly work at ground level. I think with the assistance of vocational rehabilitation he could re-enter employment in a supported employment model in which the vocational counselor works with him as he works with his employer and then he can reintegrate into a work setting again.

The FCE evaluator found that the Petitioner was capable of returning to less than sedentary work.

Felise S. Zollman, M.D., is board-certified in neurology and is a certified member of the American Society of Neurorehabilitation. She is an Assistant Professor at Northwestern University Feinberg School of Medicine and is the Brain Injury Fellowship Director at the Rehabilitation Institute of Chicago.

Victor Forys, M.D., is board-certified in internal medicine. He is Medical Director at Central Medical Clinic, is on staff at Our Lady of Resurrection Hospital and is Chairman of the Hospital-wide Peer Review Committee at Our Lady of Resurrection Hospital.

Yet, the Arbitrator finds Dr. Forys to be more credible than Dr. Zollman.

The Arbitrator also finds [*32] the testimony of Ms. Lisa Helma to be persuasive.

The Respondent has failed to prove that the testing/treatment that Dr. Zollman has prescribed offers a reasonable prospect of restoration or relief from the incapacity from which Mr. Lemanski is suffering. Furthermore, Respondent has failed to prove that Mr. Lemanski is doing things to retard his recovery.

Therefore, based on the facts and the law, the Arbitrator denies Respondent's Motion to suspend TTD benefits pursuant to Section 19(d) of the Act.

IN SUPPORT OF HIS DECISION WITH REGARD TO ISSUE (F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

To recover compensation under the Act, a claimant must prove by a preponderance of the evidence that he has suffered a disabling injury that arose out of and in the course of his employment. *Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003), 820 ILCS 305/2* (West 2004).

All of the credible evidence indicates that Mr. Lemanski's present condition of ill-being is causally related to the accident. The Respondent [*33] has admitted that Mr. Lemanski sustained a serious brain injury due to this accident. The proffered dispute is whether or not Mr. Lemanski's initial refusal to undergo additional medical testing/treatment offers a reasonable prospect of restoration or relief from the incapacity from which Petitioner suffers. Respondent has claimed that by refusing the additional treatment, Mr. Lemanski has engaged in an injurious practice.

The Respondent has not offered any substantive evidence that Dr. Zollman's testing/treatment plan would offer a reasonable prospect of restoration or relief from his incapacity.

The Arbitrator has denied Respondent's Motion to deny TTD benefits pursuant to Section 19(d).

Mr. Lemanski is being treated for his depression by Dr. Forys with the medication Wellbutrin. The Respondent has not shown how their differing/alternative treatment or counseling would then relieve Mr. Lemanksi of his depression.

Mr. Lemanski appeared in person to testify before the Arbitrator. The Petitioner offered into evidence a day-in-the-life video.

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of July [*34] 28, 2007.

IN SUPPORT OF HIS DECISION WITH REGARD TO ISSUES (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, AND (O) PROSPECTIVE MEDICAL CARE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Neuropsychologist Jerry J. Sweet, Ph.D., tested the Petitioner on November 10, 2009. In his report, Dr. Sweet wrote: "Failure on two of two effort measures, widespread impairment across nearly all measures, and the fact that there are numerous unrealistic performances require us to conclude that the present findings can not be relied upon in determining possible persistent effects of the July 2007 work-related brain injury." Dr. Sweet also wrote: "The description of normal mental status and normal upper extremity strength found by Dr. Zollman are also different than found at present. These type of discrepancies underscore the unrealistic nature of Mr. Lemanski's presentation during the present evaluation." Notwithstanding such observations, Dr. Sweet concluded:

> Despite the non-credible presentation in this evaluation, it is clear that Mr. Lemanski suffered a serious traumatic brain injury. This injury may have produced persistent mild cognitive and personality changes, but the present findings do [*35] not allow a clear appraisal of that possibility. It is also possible that headache and dizziness, and psychological reactions, such as depression, are involved in creating the appearance of someone who is now quite dysfunctional and overly dependent on his wife. It is recommendded that

> treatment efforts be targeted on psychological status and symptoms of pain and dizziness. Perhaps it would subsequently be reasonable to reassess his neurocognitive status if these other factor could be ameliorated, though the outcome functionally in this instance seems most likely to rely on whether pain, dizziness, and depression can be effectively treated. (Rx.11)

The Arbitrator notes that Dr. Sweet does not make any mention of Petitioner's ability or inability to return to gainful employment.

On cross-examination, Zenon Lemanski testified to the following:

Q: Are you aware that some of the doctors you have seen do believe that further treatment could help improve your condition?

A: Well, if it's going to help me, that's great.

Q: If you began to feel better, would you like to return to work?

A: I think so. I don't know though.

Q: Would you like additional treatment?

A: Yes.

Despite the [*36] fact that, at trial, Petitioner was willing to undergo Dr. Zollman's recommended testing/treatment, the Arbitrator has found that Respondent has failed to prove that such a regimen offers a reasonable prospect of restoration or relief from the incapacity from which Mr. Lemanski suffers.

Significantly, Respondent has failed to provide credible evidence that such a regimen would improve Petitioner's functionality to the point that he would be capable of returning to gainful employment. It is for this reason that the Arbitrator finds Dr. Forys and Ms. Helma to be more credible than Dr. Zollman.

On redirect examination of Lisa Helma, Petitioner's certified vocational rehabilitation counselor, the following exchange took place:

Q: All right. Assuming he was otherwise normal neurologically, with his skill set, transferable skills, language ability, identify for me the occupation for which there is a stable labor market for Mr. Lemanski?

A: What am I looking at again, education, transferable skills?

Q: Right.

A: Sedentary?

Q: Sedentary, language ability, average normal neurologically?

MS. GARVER: Objection, asked and answered.

THE ARBITRATOR: Okay. One person doing the examination [*37] here, that's not fair.

MS. Garver: Sorry, I apologize.

BY MR. BELCHER

Q: Now we are doing neurological, assuming normal neurologically, Mr. Lemanski, the complete package that he is, but normal neurologically, what is the identifiable occupation in the stable labor market?

A: He still would not have labor market available to him.

Q: So, assuming he completed the neurological test with flying colors, is there a stable labor market for Mr. Lemanski?

A: No, there is not.

Then, on re-cross of Ms. Helma, the following exchange took place:

Q: Okay. So all of this is hypothetical depending on what an FCE might say once Mr. Lemanski has plateaued in his medical treatment; is that correct?

A: Yes.

Q: Fine. So your opinion might or could change depending on his medical status and a resulting functional capacity evaluation; is that correct?

A: Yes. He would need to be at light/medium minimum.

Q: Assuming he was at a minimum of a light to medium, potential exists for some type of vocational training; is that correct?

A: Guarded prognosis.

Q: But that potential exists, correct?

A: Yes, given no cognitive impairment.

The Arbitrator finds that Mr. Lemanski has met his burden and established [*38] that he is unemployable given his age, education, experience and training. The employer did not meet their burden of establishing that a reasonably stable job market exists as they failed to offer any such evidence. With respect to the burden of production, case law provides that the claimant must initially establish by a preponderance of the evidence that he falls within the odd-lot category.

The Petitioner's burden may be satisfied by showing that because of age, skills, training, experience and education, he will not be regularly employed in a well-known branch of the labor market. Once the Petitioner establishes by a preponderance of the evidence that he falls into the odd-lot category, *the burden of production shifts to the employer* to show that the claimant is employable in a stable labor market and that such a market exists. Therefore, for the reasons which follow, the Arbitrator is compelled to find that the Petitioner is permanently and totally disabled.

The Petitioner, subsequent to this accident, was never offered any job at any level of functioning by the Respondent. The Respondent failed to comply with 7110.10 despite clear evidence that the Petitioner was not returning [*39] to his prior occupation. The Respondent failed to offer any evidence that the Petitioner is now, or at any time in the future could be, gainfully employed. The Respondent offered no evidence of the existence of a labor market for the Petitioner either now or subsequent to the successful completion of all proposed treatment. The Respondent offered no evidence of a proposed labor market survey or of the existence of an occupation for the Petitioner, in a stable labor market, should their treatment plan be accepted.

The Workers' Compensation Act provides for two types of permanent total disability awards. The first is a statutory permanent total and the second is a medical permanent total. Recovery under statutory loss is provided by Section 8(e)(18) of the Act. That section provides that the loss of multiple, specific body parts constitutes permanent and total disability.

The second type of permanent total disability award is a medical permanent total and is provided for in Section 8(f). Under 8(f), the claimant must prove a complete disability that renders the employee wholly and permanently incapable of work. An injured worker presents sufficient evidence to recover for permanent [*40] and total disability under Section 8(f) where the total disability is obvious or is established by medical evidence. In this instance, Mr. Lemanski's treating physician testified that Petitioner is medically permanently and totally disabled.

Dr. Zollman disagreed with the terminology of Mr. Lemanski as a "total care" patient.

Dr. Zollman's understanding of "total care" patient is one who is unable to feed themselves, one who needs help to go to the bathroom, needs to be turned in bed and needs constant supervision. Dr. Zollman does not apply the standard set forth by Section 8(f) to determine wither Mr. Lemanski is permanently and totally disabled.

Section 8(f) only requires a finding that Mr. Lemanski is medically unable to return to any job. That is not the same standard set forth by Dr. Zollman in her determination that Mr. Lemanski is not totally disabled. This is a vital point. Dr. Forys, who is occupationally trained, speaks the language of the Workers' Compensation Act, whereas Dr. Zollman seems to suggest that a person basically needs to be bedridden in order to be an 8(f) permanent total. This is inconsistent with both the Act and the case law.

Dr. Zollman opined that if Petitioner [*41] undergoes the testing/treatment that she has recommended, he could re-enter employment in a supported employment model in which the vocational counselor works with him as he works with his employer and then he can reintegrate into a work setting again.

The Arbitrator finds that a "supported employment model" is not an identifiable occupation in a stable labor market for which the payment of wages is to be expected. Leonard Kranzler, M.D., and referred for orthopedic follow up to Dr. Gourineni. The first choice of doctor by Mr. Lemanski appears to be Victor Forys, M.D., on January 22, 2008. All subsequent treaters were upon written referral from Dr. Forys and entered into evidence. As such, there is no evidence that any of the medical treatment offered into evidence, nor more importantly the bills thereto, were outside the choices allotted to Mr. Lemanski by the Act or the chain of referral.

IN SUPPORT OF HIS DECISION WITH REGARD TO ISSUE (K) WHAT TEMPORARY BENEFITS ARE IN DISPUTE (TTD), THE ARBITRATOR CONCLUDES AS FOLLOWS:

TTD is awarded for the period from the date on which the employee is incapacitated by injury to the date that his condition stabilizes or he has recovered [*42] as far as the character of the injury will permit. *Whitney Productions, Inc. v. Indus. Comm'n, 274 Ill. App. 3d 28, 30, 653 N.E.2d 965, 967 (2d Dist. 1995).* To be entitled to TTD benefits, the claimant must prove not only that he did not work but also that he was unable to work. *City of Granite City v. Indus. Comm'n, 279 Ill. App. 3d at 1090, 666 N.E.2d at 828-29 (5th Dist. 1996).*

Mr. Lemanski has met each of these burdens.

The Arbitrator finds that the Petitioner is at maximum medical improvement and therefore concludes that he is entitled to the payment of temporary total disability payments from July 29, 2007 through October 19, 2010. Mr. Lemanski is entitled to TTD benefits since the date he last worked at Bob Red Remodeling, Inc. through the date his testimony at arbitration. *Manis v. Indus. Comm'n, 230 Ill. App. 3d 657, 660, 595 N.E.2d 158, 160-61 (1st Dist. 1992).*

Legal Topics:

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

2014 IL App (1st) 132137WC

FILED: December 31, 2014

NO. 1-13-2137WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RG CONSTRUCTION SERVICES, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Alfredo Martinez, Appellee).	)	Appeal from Circuit Court of Cook County No. 12L51429 Honorable Robert Lopez-Cepero, 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 12, 2009, claimant, Alfredo Martinez, 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, RG Construction Services, for alleged work-related injuries to both knees. Following a hearing, the arbitrator determined claimant sustained injuries arising out of and in the course of his employment on December 15, 2008, to only his right knee and awarded him (1) 107-4/7 weeks' temporary total disability (TTD) benefits and (2) medical expenses associated with claimant's right knee/leg condition. Additionally, the arbitrator rejected the employer's contention that its fourteenth amendment (U.S. Const., amend. XIV) due process

rights were violated by the admission of medical records that contained the medical opinions of two of claimant's treating physicians.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's award, finding claimant injured both knees at work on December 15, 2008, and the current condition of ill-being in claimant's left knee was also causally connected to his work accident. The Commission determined claimant was entitled to (1) prospective medical expenses for the left knee arthroscopic surgery recommended by one of claimant's doctors, (2) an additional 17-3/7 weeks' TTD benefits, and (3) outstanding medical expenses related to both his left and right knees. Although in agreement with the arbitrator's rejection of the employer's due process argument, the Commission further addressed the issue, finding no due process violation and stating claimant's medical records were properly admitted at arbitration pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)). The Commission otherwise affirmed and adopted the arbitrator's decision. It also remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 3 On judicial review, the circuit court of Cook County confirmed the Commission's decision. The employer appeals, arguing (1) it was denied its due process right to cross-examine witnesses and present rebuttal evidence by the admission into evidence of claimant's medical records, which contained the opinions of two of claimant's treating physicians; (2) the Commission's finding that claimant's left knee condition of ill-being was causally connected to his December 2008 work accident was against the manifest weight of the evidence; (3) the Commission's TTD award was against the manifest weight of the evidence; and (4) the Commission's award of medical expenses was against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On October 18, 2011, an arbitration hearing was conducted in the matter. Prior to the presentation of evidence, the employer asked that the matter not proceed with a hearing on that day. It asserted that, pursuant to the fourteenth amendment to the U.S. Constitution (U.S. Const., amend. XIV), it was entitled to cross-examine two of claimant's treating physicians, orthopedic specialists Dr. Ellis Nam and Dr. Ronald Silver, with respect to opinions contained in their medical records, which claimant wanted to have admitted into evidence.

¶ 6 With respect to the employer's due process argument, the arbitrator stated as follows:

> "We had a long discussion about this before we went on the record here. We talked about it. I offered the compromise of allowing [the employer's counsel] to—I thought at that time it was just Dr. Silver's deposition, but now we have Dr. Nam's and Dr. Silver's. But I would be willing to allow a continuance here, but I had asked since it was at the [employer's] request and given that [claimant] is here and they have also rights and they also have fully conformed with the Statute with respect to the Section 19(b) request for immediate hearing, I had requested that [the employer] pay for the deposition ***. [The employer's counsel] *** has indicated he didn't feel it's his obligation to pay for the deposition of the treating witness.
>
> It's my opinion we have certain provisions under the Act, this is an administrative agency, it's supposed to be simple and summary proceedings. This is the second setting for this case for

> an individual who has properly filed a motion for immediate hearing. I offered the opportunity to take this deposition, but I felt it only fair that the [employer] pay for it since I think under the Act the only thing that [claimant] needs to do is have a certified record or have these records via subpoena which I understand [he has] adhered to those requirements."

The arbitrator noted the employer declined his offer and he would allow the matter to proceed. He further stated he did not believe the employer's fourteenth amendment rights were being impinged, noting the employer would have the ability to provide rebuttal evidence in the form of reports from its examining physicians.

¶ 7 The matter next proceeded with the arbitration hearing and the record reflects the parties agreed claimant sustained accidental injuries that arose out of and in the course of his employment on December 15, 2008. Claimant, who testified with the aid of an interpreter, stated he worked for the employer as a drywall finisher. On the date of his accident, he was performing his work on stilts, which were affixed to his feet and lifted him approximately four feet off the ground. While on the stilts, claimant stepped on a pipe or piece of trash and slipped and fell. He testified he struck the ground with both of his knees and his right shoulder.

¶ 8 Claimant testified he reported his accident and, the following day, the employer sent him to Concentra Medical Center (Concentra). Medical records reflect claimant was seen at Concentra on December 16, 2008. He reported falling at work from a height of five feet, "hit[ting] his knees," and "hurt[ing] [his] right shoulder and right knee." Records note claimant described mild pain in his shoulders but that his prominent pain was in his right knee. He underwent an x-ray of the right knee and was diagnosed with a knee contusion and shoulder pain.

Claimant was given Ibuprofen and modified activity restrictions of no prolonged standing or walking longer than tolerated, no climbing stairs or ladders, no squatting, and no kneeling. He returned to work for the employer in a light-duty capacity. Claimant continued to follow up at Concentra and, pursuant to recommendation, underwent physical therapy.

¶ 9 On December 22, 2008, Concentra records reflect claimant was progressing with therapy and reported "resolution of symptoms and restoration of pre-injury status." On January 2, 2009, records show claimant reported improvement but that he had "persiste[nt] pain of the medial side of the knee which [was] worse and severe with crossing [his] leg and walking." Claimant described his pain as moderate and aching and stated it radiated to his right thigh. He was again assessed as having a knee contusion and given modified activity restrictions of no prolonged standing or walking for longer than tolerated. A magnetic resonance imaging (MRI) was recommended. On January 20, 2009, an MRI was performed on claimant's right knee, which showed "[s]oft tissue edema at the infrapatellar fat pad with suggestion of calcification or possibly foreign body at the inferomedial aspect of the infrapatellar fat pad."

¶ 10 At a follow-up appointment on January 27, 2009, claimant reported his symptoms were the same and denied any knee pain or problem prior to his work accident. His doctor encouraged him to increase his activity level progressively but continued claimant's modified activity restrictions. He also referred claimant to an orthopedic surgeon.

¶ 11 On February 11, 2009, claimant returned to Concentra and saw Dr. James Cohen. Dr. Cohen recorded claimant's accident history as walking on stilts at work and falling "directly onto both knees." He noted claimant reported pain "at the anterior aspect of his knees" and that claimant had recently been laid off by the employer. Dr. Cohen examined both of claimant's knees and reviewed his x-ray and MRI, the latter of which he found to be "essentially normal

except for some edema in the patellar tendon fat pad area." His impression was that claimant "had a contusion to both knees and *** some mild chondromalacia patella." Dr. Cohen released claimant to return to full-duty work and recommended Ibuprofen. Claimant testified he did not return to work because he had been laid off. He described his condition at that time, stating both of his knees "were hurting *** a lot." He asserted he could not go up stairs because he experienced too much pain and his knees hurt more at night.

¶ 12 Claimant testified he did not seek medical treatment again until June 13, 2009, when he began seeing Dr. Nam. Then, beginning November 24, 2009, he sought treatment from Dr. Silver. At arbitration, claimant sought to admit exhibits containing both doctors' medical records. The record reflects the employer objected, raising the same arguments it raised at the outset of the arbitration hearing regarding its inability to cross-examine either doctor with respect to medical opinions contained within those records. The arbitrator overruled the employer's objections and the doctors' medical records were admitted into evidence.

¶ 13 Dr. Nam's records reflect he saw claimant on June 13, 2009, for a chief complaint of right knee pain. Claimant reported he fell onto his right knee at work in December 2008, and experienced persistent pain on a daily basis. Dr. Nam noted that, although he did not have the report from claimant's January 2009 MRI and the MRI was poor in quality, he did feel claimant had "evidence of abnormal medial meniscus." His impression was "[r]ight knee rule out medial meniscus tear." Dr. Nam stated claimant needed a better imaging study. He recommended an MRI arthrogram of claimant's right knee. Dr. Nam also determined claimant was unable to work "until further notice." On August 15, 2009, claimant underwent an MRI arthrogram.

¶ 14 On August 22, 2009, claimant returned to Dr. Nam who noted claimant continued to have persistent pain in his right knee "with some catching and giving away symptoms." Dr.

Nam stated he reviewed claimant's August 2009 MRI and noted as follows:

> "As I pointed out to [claimant], he does have abnormal appearance of the medial meniscus and I am not sure if this represents a true medial meniscus tear. He also has some abnormal appearance of patellofemoral joint representing a possible chondral lesion of the patellofemoral joint."

Dr. Nam's impression was "[r]ight knee possible medial meniscus tear with possible chondral lesion of the patellofemoral joint." He discussed his findings with claimant, whom he noted was "still having persistent pain despite physical therapy." Claimant and Dr. Nam discussed nonoperative management but elected to proceed with surgery. Dr. Nam recommended "a right knee arthroscopy, possible partial medial meniscectomy, and possible chondroplasty/abrasion arthroplasty." Further, he continued claimant's work restrictions.

¶ 15 The exhibit containing Dr. Nam's medical records also contains a letter dated October 5, 2009, which was authored by Dr. Nam and directed to "To Whom It May Concern." In the letter, Dr. Nam summarized his contact with claimant and additionally stated as follows:

> "To a reasonable degree of medical and surgical certainty, although I did not treat nor see [claimant] from January 27, 2009[,] up until June 13, 2009, given that [claimant] was suffering from the same magnitude of pain involving his right knee secondary to his injury from December 2008, I do feel that [claimant] would have not been able to work in a full duty capacity at that time."

¶ 16 On November 24, 2009, claimant began seeing Dr. Silver, who documented each one of claimant's visits in the form of a letter directed to the attention of Steven Borgstrom at

"Employers Claim Services." In the letter dated November 24, 2009, Dr. Silver noted claimant was injured "when he fell off stilts while doing dry walling [in December 2008,] injuring both knees." He stated claimant's right knee was "much worse" and "[t]he left one ha[d] recovered." Dr. Silver noted upon examination that claimant had "patellofemoral crepitation and medial joint line tenderness." His impression was that claimant had "damaged the articular cartilage of the patella due to his work injury and ha[d] a loose body in the right knee due to the *** work injury." Dr. Silver recommended arthroscopic surgery "[b]ecause of claimant's persistent symptoms of almost one years [*sic*] time." He stated he believed claimant was temporarily disabled. Dr. Silver's records show he took claimant off work pending surgery.

¶ 17 On August 10, 2010, claimant was examined by Dr. Charles Bush-Joseph at the request of both parties. Claimant reported falling on December 15, 2008, while wearing stilts and "suffering injuries to his back, both knees, [and] left shoulder and arm region." Dr. Bush-Joseph noted: "Apparently all symptoms have resolved except for residual pain of the right knee. He clearly, on repeated questioning stated that he had no residual symptoms of his back, left knee[,] or left arm and shoulder." Following an examination and review of claimant's medial records and previous diagnostic tests, Dr. Bush-Joseph's impression was "[r]esidual patellofemoral contusion, possible chondral injury with possible medial meniscal tear, right knee." He opined claimant suffered a work-related injury to his right knee in December 2008 with residual symptoms that warranted further treatment. Dr. Bush-Joseph found "[i]njuries to [claimant's] left shoulder and left knee ha[d] resolved with no residual." He further believed, "given the length and duration of symptoms," diagnostic arthroscopy was warranted. Finally, he stated as follows:

> "I believe that based on the initial reports of Dr. *** Cohen and current physical examination findings, [claimant] was most likely able to work on a full-duty basis with only limitations of kneeling in the interval. Certainly, his current examination would allow such work tolerance."

¶ 18 On November 13, 2010, approximately one year after their first meeting, Dr. Silver performed surgery on claimant's right knee in the form of an arthroscopic partial lateral meniscectomy and arthroscopic debridement. Surgical records reflect claimant's postoperative diagnoses were a "[t]orn lateral meniscus" and "[a]rticular cartilage fragmentation of the patellofemoral joint and medial femoral condyle." On November 23, 2010, Dr. Silver prescribed claimant physical therapy three times a week for 12 to 16 weeks. He also restricted claimant from working.

¶ 19 After his surgery, claimant underwent physical therapy and continued to follow up with Dr. Silver. He testified he also began to notice pain in his left knee. An initial physical therapy evaluation report, dated November 30, 2010, shows claimant provided a history of his work accident, stating "he was at work on stilts when he fell, landing directly on both knees." In addition to right knee symptoms, claimant complained "of left knee pain which he relate[d] to overuse since the time of injury."

¶ 20 In a letter directed to Borgstrom and dated December 21, 2010, Dr. Silver noted claimant "continue[d] to improve with regard to his right knee after arthroscopic surgery." However, he stated claimant's left knee was "deteriorating with medial joint line pain and peripatellar pain." Dr. Silver noted claimant also injured his left knee as a result of his December 2008, work accident and recommended an MRI of the left knee. He recommended claimant continue with

physical therapy for his right knee and limited him "to sedentary work only."

¶ 21 On January 6, 2011, claimant underwent an MRI of his left knee, which revealed as follows:

> "1. A small joint effusion.
>
> 2. Large horizontal tear involving the midbody and posterior horn of the medial meniscus.
>
> 3. Intact lateral meniscus, collateral and cruciate ligaments."

In a letter to Borgstrom dated January 22, 2011, Dr. Silver stated claimant's right knee continued to improve and his left knee MRI demonstrated what appeared to be a torn meniscus. He recommended left knee arthroscopic surgery once claimant's right knee had recovered. Dr. Silver continued claimant's work restrictions.

¶ 22 On January 25, 2011, Dr. Silver authored a letter to Borgstrom's attention, stating claimant's MRI demonstrated a large tear of the medial meniscus, which was "due to his work injury of [December 2008]." He further stated as follows:

> "As you know [claimant] injured both of his knees at that time. The right one was initially mores [*sic*] severely painful and underwent arthroscopic surgery and slowly the left knee pain has persisted to the point where he can no longer tolerate it. He will require arthroscopic surgery of his left knee."

On February 22, 2011, Dr. Silver authored a letter directed to Borgstrom's attention. He reiterated claimant's need for left knee surgery and stated claimant was limited to sedentary work with occasional walking and standing.

¶ 23 Claimant continued to follow up with Dr. Silver while awaiting approval for sur-

gery. Dr. Silver continuously noted improvement in claimant's right knee. He also recommended continued physical therapy for claimant's right knee, surgery for claimant's left knee, and that claimant remain off work. In a letter dated March 24, 2011, Dr. Silver stated claimant was temporarily disabled "[b]ecause of the tearing situation with regard to his left knee." Further, he consistently reiterated his belief that claimant's left knee condition was connected to his December 2008, work accident. On October 6, 2011, Dr. Silver authored a final letter directed to Borgstrom, stating as follows:

> "We are still awaiting approval for [claimant's] arthroscopic surgery of his left knee related to his work injury of December *** 2008[,] when he injured both knees causing torn medial meniscus in the left knee. Lacking appropriate arthroscopic surgery he will be permanently disabled."

¶ 24 On June 23, 2011, claimant was evaluated by Dr. Troy Karlsson at the employer's request. The employer submitted Dr. Karlsson's report, dated June 28, 2011, into evidence at arbitration. That report shows claimant provided a history of falling on stilts at work and "landing onto both knees, more so on the right than the left." Claimant reported having some pain in his left knee initially but that his left knee pain "got much worse after [his] right knee surgery when he favored that leg somewhat." He stated physical therapy made his left knee worse. Dr. Karlsson's report states claimant reported "no problems with the right knee at present" but that he complained of swelling in his left knee and pain "around the kneecap as well as medially." Claimant asserted his pain increased with walking or physical therapy.

¶ 25 Dr. Karlsson diagnosed claimant with right knee osteoarthritis, lateral meniscal tear, and chondral fissuring. He determined claimant's left knee had a medial meniscal tear that

was degenerative in nature. Dr. Karlsson opined that "at least a portion" of claimant's right knee problems were caused by his work accident and his right knee arthroscopic surgery was also "related to the occurrence of December 15, 2008." However, he did not believe the condition of ill-being in claimant's left knee "to be in any way related to that single fall." In particular, Dr. Karlsson noted claimant initially complained only of symptoms in his right knee and made no left knee complaints. Additionally, he noted claimant expressly denied experiencing any symptoms in his left knee to Dr. Bush-Joseph in August 2010. Dr. Karlsson found there was "simply too wide a period of symptom-free times with the left knee and normal exams of the left knee to relate it to" claimant's work accident. Rather, he opined claimant likely had "a degenerative tear of the medial meniscus in his left knee, unrelated to his action of December 15, 2008."

¶ 26 Dr. Karlsson further opined claimant was at maximum medical improvement (MMI) and could return to regular-duty work. He stated he would not recommend any restrictions for claimant whatsoever "other than times he may need off following arthroscopy of the left knee which is unrelated to the work injury."

¶ 27 Claimant testified that after Dr. Nam restricted him from working in June 2009, no doctor released him to return to work and he had not returned to work in any capacity. He was also continuing to wait for authorization for the left knee surgery recommended by Dr. Silver. Claimant testified he felt a lot of pain in his left knee, especially when ascending a staircase.

¶ 28 On December 28, 2011, the arbitrator issued his decision in the matter. He determined claimant sustained accidental injuries to his right knee that arose out of and in the course of his employment on December 15, 2008. However, relying on Dr. Karlsson's opinions, the arbitrator determined the condition of ill-being in claimant's left knee was not causally related his work accident. He found claimant entitled to medical expenses "relating solely to the right

knee condition." The arbitrator also awarded claimant 107-4/7 weeks' TTD benefits, finding claimant was temporarily totally disabled from February 5 to February 11, 2009, and from June 13, 2009, when he first saw Dr. Nam, "through June 28, 2011, or the date Dr. Karlsson found [claimant] had reached MMI with respect to his work[-]related right knee injury." Finally, the arbitrator's decision addressed the employer's due process argument, finding its rights had not been violated or abridged.

¶ 29 Both parties sought review of the arbitrator's decision with the Commission, which issued its decision in the matter on October 18, 2012. The Commission modified the arbitrator's decision to find the current condition of ill-being in claimant's left knee was causally connected to the work injury he sustained on December 15, 2008, and claimant was entitled to prospective medical expenses in the form of the arthroscopic left knee surgery recommended by Dr. Silver. It found claimant "sustained injuries to both knees" when he fell at work in December 2008. The Commission noted claimant's right knee arthroscopy, which had been recommended by two of claimant's treating physicians, was not authorized "for almost two years from the date of accident" and following "an agreed third opinion by Dr. Bush-Joseph" that "was favorable to [claimant]." It stated it also relied "on the credible record and the opinion of Dr. Silver that [claimant's] left knee injury from December 15, 2008[,] progressed with the overuse of his left leg over several years of right knee impairment, and that he now requires the left knee surgical treatment recommended by Dr. Silver."

¶ 30 As stated, the Commission awarded claimant an additional 17-3/7 weeks' TTD, "representing the time period [of] June 30, 2011 through October 18, 2011, during which time [claimant] remained temporarily totally disabled per Dr. Silver." Further, it stated as follows:

> "While we are in agreement with the decision of the Arbitrator on this issue, we further address [the employer's] constitutional argument. We find no violation [of the employer's] Fourteenth Amendment right to due process. The Arbitrator offered to continue the hearing if [the employer] elected to obtain the depositions of the Drs. Nam and Silver, but [the employer] declined. The treatment records were therefore properly admitted pursuant to Section 16 of the Act [(820 ILCS 305/16 (West 2008))]."

One Commissioner issued a concurring opinion, stating as follows:

> "I agree with the majority result; however, I do not agree that [the employer] is required to take depositions of [claimant's] witnesses at its own expense in order to protect its right to cross[-]examine these witnesses on opinions that go beyond treatment. The records should have been admitted only for those purposes permissible under Section 16 of the Act. I, nevertheless, concur in the result because the Commission could reach the same result without reliance on the objectionable opinions in the records of Drs. Silver and Nam."

¶ 31 On June 13, 2013, the circuit court confirmed the Commission's decision. This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, the employer first argues the Commission erred in finding its due process rights had not been violated. It notes the medical records of Dr. Nam and Dr. Silver were

admitted into evidence at arbitration and argues those records improperly included the doctors' opinions with respect to claimant's ability to work and causation. The employer contends allowing such medical opinions into evidence, when the doctors rendering the opinions had not first been subject to cross-examination, constituted a due process violation.

¶ 34 "Due process includes the right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence that is offered." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 49, 981 N.E.2d 25. In the context of administrative proceedings, "[d]ue process of law requires that all parties *** have an opportunity to cross-examine witnesses and to offer evidence in rebuttal." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 297 Ill. App. 3d 662, 667, 697 N.E.2d 934, 937 (1998) (citing *Paoletti v. Industrial Comm'n*, 279 Ill.App.3d 988, 998, 665 N.E.2d 507, 513 (1996)). "[A] party claiming that a due process violation has occurred must establish that it was prejudiced by the alleged violation." *All American Title Agency, LLC v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 113400, ¶ 36, 994 N.E.2d 636.

¶ 35 Additionally, "[e]xcept when the Act provides otherwise, the Illinois rules of evidence govern proceedings before the Commission or an arbitrator." *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561, 566, 816 N.E.2d 722, 726 (2004). "Evidentiary rulings made during a workers' compensation proceeding will not be disturbed on review absent an abuse of discretion." *National Wrecking*, 352 Ill. App. 3d at 566, 816 N.E.2d at 726.

¶ 36 To support its position in this case, the employer relies heavily on *Paoletti*, 279 Ill. App. 3d at 999, 665 N.E.2d at 514, wherein this court determined the Commission committed reversible error by refusing to allow the claimant to present rebuttal evidence to a video surveil-

lance tape. Although we agree with the propositions set forth in *Paoletti* regarding due process and the holding in that case, we find neither that case, nor the other cases cited by the employer, speak to the precise issues presented here. Initially, we note the record shows the employer was permitted to cross-examine the only witness to testify at arbitration—claimant. Neither Dr. Nam nor Dr. Silver were called as a witness at arbitration. Rather, the doctors' medical records were admitted into evidence. The record further reflects the employer had the opportunity to present evidence to rebut claimant's case and the employer does not assert otherwise.

¶ 37 The Commission found the employer's due process rights were not violated and the treatment records of Dr. Nam and Dr. Silver were properly admitted pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)). We agree. The Act provides:

> "The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of accidental injuries in question, certified to as true and correct by the hospital, physician, or other healthcare provider or by designated agents of the hospital, physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician, or other healthcare provider, *shall be admissible without any further proof as evidence of the medical and surgical matters stated therein*, but shall not be conclusive proof of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct. This paragraph does not restrict,

> limit, or prevent the admissibility of records, reports, or bills that are otherwise admissible. This provision does not apply to reports prepared by treating providers for use in litigation." (Emphasis added). 820 ILCS 305/16 (West 2008).

Thus, pursuant to section 16, the records and reports of a claimant's treating physician, which are certified as true and correct, are admissible "as evidence of the medical and surgical matters" contained within the records or reports. 820 ILCS 305/16 (West 2008).

¶ 38 Here, both Dr. Nam and Dr. Silver were claimant's treating physicians. Additionally, on appeal, the employer agrees their records were "subpoenaed and certified pursuant to section 16" of the Act. The employer does assert that "[i]t is undeniable that the doctors' records contain opinions beyond medical and surgical matters admissible pursuant to Section 16." However, it cites no authority for this statement other than section 16 itself. After reviewing the statutory language, we find no indication that the legislature intended to exclude a treating doctor's opinion, which was offered during the course of the doctor's treatment of the employee and memorialized in the doctor's treating records, from the phrase "medical and surgical matters."

¶ 39 It stands to reason that the records and reports of a treating physician are likely to contain medical opinions relating to a variety of aspects in the care, treatment, and evaluation of the employee. As a result, we are not persuaded by the employer's position that the simple inclusion of medical opinions within a treating physician's records is sufficient to exclude it from admission pursuant to section 16. Further, although the employer criticizes the arbitrator's comment that Commission proceedings should be "simple and summary," we note section 16 of the Act actually contains that explicit phrase. That section provides that "[t]he process and procedure before the Commission shall be as simple and summary as reasonably may be." 820 ILCS

305/16 (West 2008). The provisions of section 16 at issue in this appeal assist in accomplishing that goal by easing the foundational requirements for the admission of a treating physician's records. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 50, 976 N.E.2d 1 (stating the 2005 amendments to section 16 were meant "to ease the foundational requirements for the admission of medical bills and records").

¶ 40 We note section 16 does not apply to reports prepared by a treating medical provider for use in litigation. 820 ILCS 305/16 (West 2008). In a single sentence in its opening brief, the employer concludes that some of the opinions in the records of Dr. Nam and Dr. Silver were contained within "reports appearing to be prepared in the aid of litigation." However, the employer offers no basis or argument to support its conclusion, nor does it identify or cite to the offending "reports." "The 'failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.' " *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 33 (quoting *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37, 992 N.E.2d 103); Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008) (providing that points not argued in an appellant's brief are waived). We find any arguments by the employer that portions of Dr. Nam's and Dr. Silver's records were prepared in anticipation of litigation have been forfeited due to the employer's failure to present any reasoned argument to support such a position.

¶ 41 Despite the employer's forfeiture, we note Dr. Nam's letter, dated October 5, 2009, and addressed to "To Whom It May Concern," is the most suspect document for having been prepared in anticipation of litigation. In the letter, Dr. Nam provided an opinion that does not appear to have been relevant or necessary to his treatment of claimant as it concerned claimant's inability to work from January to June 2009, a period of time immediately prior to when his

own treatment and evaluation of claimant began. However, to the extent the Commission committed error by allowing the letter into evidence, we find no reversible error occurred. The record fails to reflect that either the arbitrator or the Commission relied on this particular opinion of Dr. Nam. In fact, although Dr. Nam opined claimant was unable to work from January to June 2009, and claimant was off work for much of that time, he was not awarded TTD benefits for that time period except for a short period in February 2009, when he was under work restrictions at Concentra and had been laid off by the employer. Thus, as Dr. Nam's opinion in his October 5, 2009, letter was not relied upon by the Commission, the employer did not suffer prejudice and any error was harmless.

¶ 42 Finally, we note that in the context of hearsay objections to medical records the supreme court has held that "under certain circumstances the probability of accuracy and trustworthiness [of a document] may serve as a substitute for cross-examination under oath." *United Electric Coal Co. v. Industrial Comm'n*, 93 Ill. 2d 415, 420, 444 N.E.2d 115, 117 (1982). In *United Electric*, 93 Ill. 2d at 417-18, 444 N.E.2d at 116, the employer objected to two exhibits the employee offered into evidence, each of which contained a physician's audiogram and a letter from the physician to the employee's attorney, containing the physician's opinions as to the nature and cause of the employee's condition. The exhibits were admitted into evidence over the employer's objections. *United Electric*, 93 Ill. 2d at 418, 444 N.E.2d at 116. On review, the employer asserted the exhibits contained hearsay and "should not have been admitted because [the employer] had no opportunity to subject [the physician] to cross-examination concerning the statements contained in the reports and because [the physician's] statements were not made under oath." *United Electric*, 93 Ill. 2d at 420, 444 N.E.2d at 117. In rejecting the employer's contentions, the supreme court stated as follows:

> "The reports and audiograms at issue here were based on examinations performed upon [the employee] by a specialist to whom he had been referred by his family physician for evaluation and treatment. There is no challenge to their authenticity. Moreover, the audiograms were examined by [the employer's] medical witness, whose evaluation of them, to some extent, formed the basis for his opinion concerning the cause of [the employee's] condition. Under the circumstances we believe the information contained in the challenged exhibits was trustworthy and conclude that the arbitrator did not err in admitting the exhibits into evidence." *United Electric*, 93 Ill. 2d at 420-21, 444 N.E.2d at 117-18.

¶ 43 Here, although the employer did not object to claimant's exhibits on hearsay grounds, we nevertheless find *United Electric* instructive. In particular, it stands for the proposition that the probability of accuracy and trustworthiness of an exhibit may substitute for cross-examination under oath. Cross-examination of claimant's doctors in this case was exactly what the employer was seeking. However, like the exhibits in *United Electric*, claimant's exhibits in this case included the records of physicians he saw for evaluation and treatment; the authenticity of the records was not challenged by the employer; and the records were reviewed by the employer's evaluating physician, Dr. Karlsson. The record reflects the employer had a sufficient opportunity to rebut claimant's evidence. Under the circumstances presented, we find the employer failed to show its due process rights were violated and the Commission committed no error in rejecting the employer's due process argument.

¶ 44 On appeal, the employer next argues the Commission erred in finding claimant's

left knee condition of ill-being was causally connected to his December 2008 work accident. He argues the evidence overwhelmingly shows claimant injured only his right knee in December 2008. The employer points out claimant initially sought and received treatment for only his right knee, did not begin making left knee complaints until almost two years later in November 2010, and the record contains no medical evidence to support claimant's overuse theory of causation with respect to his left knee.

¶ 45 Initially, the employer contends the Commission's decision, which reversed the arbitrator's finding as to causation and claimant's left knee injury, should be reviewed using an "extra degree of scrutiny." However, this court has previously declined to apply such a standard, even when reviewing the Commission's rejection of the arbitrator's credibility determinations. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 676, 928 N.E.2d 474, 483 (2009); see also *R & D Thiel v. Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010) (recognizing "the Commission exercises original jurisdiction and is not bound by an arbitrator's findings" and stating a reviewing court determines "whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence"). We similarly decline to apply the extra-degree-of-scrutiny standard in this case.

¶ 46 "Whether a causal connection exists between a claimant's condition of ill-being and h[is] work related accident is a question of fact to be resolved by the Commission, and its resolution of the matter will not be disturbed on review unless it is against the manifest weight of the evidence." *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 913, 851 N.E.2d 72, 79 (2006). "It is the Commission's duty to resolve conflicts in the evidence, particularly medical opinion evidence." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592,

834 N.E.2d 583, 592 (2005). "The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion." *Land & Lakes*, 359 Ill. App. 3d at 592, 834 N.E.2d at 592. "For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Land & Lakes*, 359 Ill. App. 3d at 592, 834 N.E.2d at 592.

¶ 47 Here, as stated, the Commission determined claimant's left knee condition of ill-being was causally connected to his December 2008 work accident. The record supports that decision, showing claimant fell while working on stilts on December 15, 2008, and landed on both of his knees. Prior to that date, he had no history of knee problems. Following his accident, claimant immediately began receiving treatment for his right knee where the pain was most prominent and, ultimately, underwent right knee surgery. He also consistently reported an accident history of falling onto both of his knees and, on February 11, 2009, Dr. Cohen diagnosed claimant with "a contusion to both knees." Claimant testified he experienced pain in both knees following his lay off from the employer in February 2009. In November 2010, after his right knee surgery, claimant's medical records show he began reporting worsening symptoms in his left knee.

¶ 48 Although the record does not support the Commission's statement that Dr. Silver opined claimant's left knee "progressed with overuse of his left leg over several years of right knee impairment," Dr. Silver's records do show he believed claimant's left knee condition was causally related to his December 2008 accident. As the employer points out, its examining physician offered an opposing opinion as to causation. However, conflicts in the medical evidence were for the Commission to resolve. We cannot say an opposite conclusion from that of the

Commission was clearly apparent from the record. Its decision as to causation was not against the manifest weight of the evidence.

¶ 49 The employer next challenges the Commission's TTD award. It argues that because claimant's left knee condition was not causally related to his work accident claimant was only entitled to TTD benefits from February 5 to February 10, 2009, and from November 13, 2010, the date of claimant's right knee surgery, to March 24, 2011, when the employer contends claimant's right knee had recovered from surgery and, per Dr. Silver, claimant remained off work due to only his left knee condition of ill-being.

¶ 50 "A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of her injury will permit." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. "The issues of whether an employee is temporarily totally disabled, as well as the period of such disability, are questions of fact for the Commission, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence." *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill. App. 3d 915, 925, 828 N.E.2d 283, 293 (2005).

¶ 51 Here, the arbitrator awarded claimant 107-4/7 weeks' TTD benefits, representing the time periods of (1) February 5, 2009, when claimant was laid off from the employer to February 11, 2009, when he was released by Dr. Cohen to return to full-duty work and (2) June 13, 2009, when Dr. Nam examined claimant and determined him unable to work to June 28, 2011, when claimant was evaluated by Dr. Karlsson and found to have reached MMI. After modifying the arbitrator's decision with respect to causal connection, the Commission awarded claimant an additional 17-3/7 weeks' TTD benefits, representing the time period of June 30, 2011, through October 18, 2011, "during which time [claimant] remained temporarily totally disabled per Dr.

Silver." The TTD periods awarded by the Commission were supported by the record, which contains the off-work restrictions of claimant's treating physicians. Additionally, the employer's main challenge to the Commission's TTD award is based on its contention that the Commission's causation decision was against the manifest weight of the evidence. As discussed, we disagree with that contention. We find the Commission's TTD award is supported by the record and not against the manifest weight of the evidence.

¶ 52 Finally, the employer argues the Commission's award of medical expenses is against the manifest weight of the evidence. "Whether medical expenses are reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1.

¶ 53 First, the employer again bases its challenge to the Commission's medical expenses award on the same due process and causation arguments already raised and rejected. For the same reasons already stated, its arguments fail. Second to the extent the employer argues claimant was required to present the testimony of his treating physicians to establish the reasonableness and necessity of his claimed expenses, we disagree.

¶ 54 In *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1, this court rejected a similar argument by an employer. Noting the reasonableness and necessity of medical expenses was a question of fact for the Commission, we pointed out that the claimant's medical records documented her injuries, symptoms, "and the medical procedures that her doctors believed were necessary and appropriate to treat her pain and injuries." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1. We then stated as follows:

> "The employer presented no evidence suggesting that these treatments were not necessary to cure or relieve the effects of [the] claimant's injury. Nor did it present any evidence showing that these bills were unreasonable in light of what other healthcare providers typically charge for the same services in the relevant geographical area. Thus, we cannot say that the Commission's finding that the medical treatments performed by the claimant's doctors and the prospective medical treatments they recommended were reasonable and necessary was against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51, 976 N.E.2d 1.

¶ 55 The same rationale set forth in *Shafer* applies here. Claimant's medical records documented his injuries, symptoms, and treatment. The employer presented no evidence showing the treatments claimant received were unnecessary or that amounts billed were unreasonable. As a result, the record contained sufficient evidence to support the Commission's award of medical expenses and its decision was not against the manifest weight of the evidence.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision and remand for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 58 Affirmed and remanded.

1 of 6 DOCUMENTS

ALFREDO MARTINEZ, PETITIONER, v. RG CONSTRUCTION SERVICES, RESPONDENT.

NO: 09WC 25019

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF DUPAGE

12 IWCC 1128; 2012 Ill. Wrk. Comp. LEXIS 1170

October 18, 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 Respondent and the Petitioner herein and notice given to all parties, the Commission, after considering the issues of benefit rates and wage calculations, temporary total disability, Respondent's objection to the admission of treatment records containing causal connection opinions, prospective medical care and penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).*

After considering the entire record, and for the reasons set forth below, the Commission modifies the Decision of the Arbitrator and finds that Petitioner's current condition of ill-being in the left knee [*2] is causally connected to the injury sustained on December 15, 2008 and that Petitioner is entitled to left knee arthroscopic surgery recommended by Dr. Silver. Respondent shall authorize and pay for the reasonable and necessary costs associated therewith per the fee schedule. The Commission finds that Petitioner sustained injuries to both knees on December 15, 2008 when he fell from a height of approximately five feet onto both knees.

We find that despite Petitioner's surgical recommendations by Drs. Nam and Silver, Petitioner's right knee arthroscopy was not authorized for almost two years from the date of accident. After an agreed third opinion by Dr. Bush-Joseph was obtained and was favorable to Petitioner, Petitioner finally had surgery on November 13, 2010. (RX # 7, # 8; PX # 4)

On December 21, 2010, Petitioner's surgeon, Dr. Silver, advised Respondent's insurance carrier that while Petitioner's right knee was improving after surgery, the left knee was causing increased medial joint line pain and peripatellar pain. Dr. Silver emphasized that Petitioner did injure his left knee at the time of accident on December 15, 2008. Dr. Silver recommended an MRI of the left knee for further [*3] examination. (PX # 3) The MRI on January 6, 2011 showed a large horizontal tear involving the mid body and posterior horn of the medial meniscus. (PX 3) Dr. Silver recommended left knee arthroscopic surgery and requested authorization from Respondent's insurance carrier, opining that surgery was necessary and related to the December 15, 2008 accident. (PX # 3)

Respondent sent Petitioner for a Section 12 examination with Dr. Tony Karlsson on June 28, 2011. Dr. Karlsson summarized his opinion as follows:

> "In summary, the patient had a fall onto both knees, more so onto the right than the left as he related it to me. He had ongoing problems with the right knee and required surgery, which I think are related to that single fall. He had multiple visits with physicians that found no abnormalities and no complaints for the left knee, and any treatment to the left knee at this point, which is over two years from the original injury, is not related to that injury but rather related to a degenerative meniscal tear." (PX # 9)

Dr. Karlsson found that Petitioner may require a left knee arthroscopy, but he opined that the need for any left knee treatment would not be causally connected to [*4] the December 15, 2008 accident. (PX # 9) We disagree. We rely on the credible record and the opinion of Dr. Silver that Petitioner's left knee injury from December 15, 2008 progressed with the overuse of his left leg over several years of right knee impairment, and that he now requires the left knee surgical treatment recommended by Dr. Silver.

The Arbitrator awarded 107 and 4/7 weeks of temporary total disability benefits representing the time periods February 5, 2009 through February 11, 2009 and June 13, 2009 through June 28, 2011, the date Dr. Karlsson found Petitioner to be at maximum medical improvement. (RX # 9) In accordance with our findings, we further award 17 and 3/7 weeks of temporary total disability benefits, representing the time period June 30, 2011 through October 18, 2011, during which time Petitioner remained temporarily totally disabled per Dr. Silver. (PX # 3)

While we are in agreement with the decision of the Arbitrator on this issue, we further address Respondent's constitutional argument. We find no violation Respondent's Fourteenth Amendment right to due process. The Arbitrator offered to continue the hearing if Respondent elected to obtain the depositions [*5] of the Drs. Nam and Silver, but Respondent declined. The treatment records were therefore properly admitted pursuant to Section 16 of the Act.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 1,005.70 per week for a period of 125 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay any outstanding amounts due to Petitioner's medical providers as documented in PX # 6 and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall authorize and pay for the reasonable and necessary left knee treatment recommended by Dr. Silver per Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request [*6] for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The 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)/8(a)

Alfredo Martinez,
Employee/Petioner

v.

R.G. Construction Services,
Employer/Respondent

Case # **09** WC **25019**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each [*7] party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 18, 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?
G. [X] What were Petitioner's earnings?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?
O. [X] Other **14th Amendment Due Process rights**

FINDINGS

On the date of accident, **12/15/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being with respect to his right knee/leg ***is*** [*8] causally related to the accident.

In the year preceding the injury. Petitioner earned $ 53,591.33; the average weekly wage was $ 1,508.55.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $ **21,409.47** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **21,409.47**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 1,005.70 per week for 107-4/7 weeks, commencing 2/5/09 through 2/11/09 and from 6/13/09 through 6/28/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 12/15/08 through 10/18/11, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $ 21,409.47 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable [*9] and necessary medical services associated with Petitioner's right knee/leg condition, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid for said right knee/leg condition, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of $ 0.00, as provided in Section 16 of the Act; $ 0.00, as provided in Section 19(k) of the Act; and $ 0.00, as provided in Section 19(1) of the Act.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision* [*10] *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.

12/19/11

Date

STATEMENT OF FACTS:

The Arbitrator notes that at the commencement of trial, Petitioner was allowed to amend the Application for Adjustment of claim to reflect a date of accident of December 15, 2008. Respondent had no objection.

However, Respondent did object to proceeding to trial in this matter, citing its 14th Amendment due process right to cross examine two treating physicians in this case, Drs. Nam and Silver. The Arbitrator overruled Respondent's objection in this regard, and allowed the matter to proceed to trial pursuant to § 19(b) of the Act. (See discussion re: issue "0", infra).

Petitioner, a 36 year old dry wall finisher, testified through an interpreter that on December 15, 2008 he was installing drywall and taping at the site of a new Burlington Coat Factory store in Elgin. He noted that at the time of the incident he was standing on stilts, elevating him four feet off the ground, while holding his pan, tray and knives. He indicated [*11] that while performing this task he stepped on a pipe or piece of trash and fell to the floor, landing on both knees and his right shoulder. Petitioner reported the incident to his supervisor on the date of the incident and was instructed to seek treatment at Concentra Medical Center, the company clinic.

Petitioner visited Concentra the following day and reported having fallen approximately five feet, hitting his knees and injuring the right knee; he also complained of mild shoulder pain, but his most prominent complaint was the right knee. (PX1). Exam revealed tenderness anteriorly and over the patella, moderate swelling, and limited range of motion with pain on flexion; x-ray showed no fracture or dislocation. (PX1). Mr. Martinez was diagnosed with a knee contusion and shoulder pain; the doctor prescribed Ibuprofen and a knee brace, ordered physical therapy, and restricted Petitioner to modified activity, no prolonged standing/walking longer than tolerated, no climbing stairs/ladders, no squatting/kneeling. (PX1). Respondent was able to accommodate these restrictions, so Petitioner worked light duty on a project at Lutheran General Hospital while undergoing the recommended course [*12] of physical therapy and attending routine follow up appointments with the company physicians throughout December. (PX1).

Mr. Martinez returned to Concentra on January 2, 2009. Upon noting Petitioner had persistent pain on the medial side of the knee, worse and severe with crossing the leg and walking, the company doctor ordered an MRI of the right knee. (PX1). In the interim, the doctor maintained Petitioner's light duty status, no prolonged standing/walking longer than tolerated. (PX1). The prescribed MRI was performed on January 20, 2009 revealing soft tissue edema at the infrapatel-

lar fat pad with suggestion of calcification or possibly foreign body at the inferomedial aspect of the infrapatellar fat pad. (PX1). At the follow-up appointment on January 27, 2009, the doctor recorded that Petitioner had no history of knee pain or problem prior to the accident, but was now having unremitting symptoms. (PX1). Upon review of the MRI, the doctor renewed Mr. Martinez's light duty restrictions and referred him to an orthopedic surgeon. (PX1).

In early February, Petitioner was laid off. When asked on cross examination if the date of his layoff was February 5, 2009, Petitioner noted that [*13] he could not recall the date, but agreed that he had been laid off.

On February 11, 2009, Mr. Martinez was evaluated by Dr. James Cohen, an orthopedist at Concentra. Dr. Cohen recorded that on December 15, 2008, Petitioner "... was walking up on stilts apparently taping for wallboard and fell and fell directly onto both knees. He complained of a pain. He states that he had shown continued improvement and has not noticed any popping or swelling. His pain is at the anterior aspect of his knees. He was recently laid off." (PX1;RX4). Upon examination, Dr. Cohen noted "... bilateral patellofeoral crepitus with stair stepping. He is able to stair step and squat well. There is no effusion of either knee. There is some mild tenderness over the anterior inferior patella on the right side, none of the left. On the left, there is no significant tenderness. No instability. McMurray testing is negative. Neurocirculatory intact." (PX1;RX4). Dr. Cohen reviewed the x-ray and MRI of the right knee and noted that both were essentially normal. (PX1;RX4). Dr. Cohen's impression was that the patient had a contusion to both knees and some mild chondromalacia patella. (PX1;RX4). Dr. Cohen prescribed Ibuprofen [*14] and released Mr. Martinez to return to work full duty. (RX4).

Petitioner testified that from the time he was laid off in February 2009 until he eventually saw Dr. Nam on June 13, 2009 his knees hurt a lot. He noted that he had difficulty going up stairs due to the pain, and that his knees hurt even more at night. On cross examination, Petitioner agreed that he saw no other doctors during this period for his complaints.

On June 13, 2009, Petitioner was evaluated by Dr. Ellis Nam of Chicago Orthopaedics & Sports Medicine. When asked how he found Mr. Nam, Petitioner testified that the doctor's office was near his home. The history recorded at the time of this visit notes that Petitioner "... fell at work injuring his right knee in December 2008. He was approximately five feet high when he fell onto his right knee. He has had immediate pain. He denies prior problems to this region. He has been having persistent pain..." (PX2)'. Following his examination, and given what he felt was the poor quality of the prior MRI, Dr. Nam recommended an MRI arthrogram of the right knee to rule out a medial meniscus tear. (PX2). Dr. Nam also completed a "Work Status" report at this time noting a diagnosis [*15] of "R[ight] knee rule out medial meniscus tear" and indicating that Petitioner was unable to work as of "06/13/09 until further notice." (PX2). Dr. Nam continued to keep Petitioner off work until further notice following a subsequent visit on June 27, 2009. (PX2).

Petitioner eventually underwent a right knee arthrogram on August 15, 2009. (PX2). This test was interpreted as revealing medial meniscal myxoid degeneration without discoid tear and Grade 3 chondromalacia of the patellar cartilage. (PX2). The ACL was noted to be intact, although there was some hyperintense signal anterior to the distal ACL which was noted well within the infrapatellar Hoffa's fat pad, likely due to prior surgery or represented fibrosis. (PX2). In addition, small joint infusion and a small medial Baker's cyst were noted, as well as a benign chondral lesion within distal femoral metaphysic. (PX2)

Petitioner returned to Dr. Nam on August 22, 2009 at which time it was noted that Mr. Martinez was still having persistent pain in his right knee with some catching and giving away symptoms since his injury in December of 2008. (PX2). Dr. Nam also indicated that Petitioner denied any prior problems with his right [*16] knee. (PX2). Following his examination, and review of the MRI, Dr. Nam noted that Petitioner "... does have abnormal appearance of the medial meniscus and I am not sure if this represents a true medial meniscus tear. He also has some abnormal appearance of the patellofemoral joint representing a possible chondral lesion of the patellofemoral joint." (PX2). Dr. Nam noted that Petitioner was still having persistent pain despite physical therapy. (PX2). Dr. Nam indicated that after discussing possible treatment options, Petitioner "would like to proceed with arthroscopic intervention." (PX2). Dr. Nam also continued to keep Petitioner off work until further notice. (PX2).

Petitioner returned to Dr. Nam on September 26, 2009 at which time the doctor reiterated Petitioner's desire to proceed with the recommended surgery. (PX2).

In a letter addressed "[t]o [w]hom [i]t [m]ay [c]oncern" dated October 5, 2009, Dr. Nam noted that Petitioner was currently treating for right knee pain and had a "history of a right knee injury [which] occurred in December 2008 when he fell approximately five feet high on to his right knee injuring his right knee." (PX2). Dr. Nam went on to opine that "[t]o a [*17] reasonable degree of medical and surgical certainty, although I did not treat nor see Mr. Martinez from January 27, 2009 up until June 13, 2009, given that he was suffering from the same magnitude of pain involving his right knee secondary to his injury from December, 2008, I do feel that Mr. Martinez would not have been able to work in a full duty capacity at that time." (PX2).

Petitioner testified that he subsequently visited Dr. Ronald Silver based on a friend's recommendation. Petitioner was evaluated by Dr. Silver on November 24, 2009. Petitioner noted that Dr. Silver's staff is Spanish-speaking, and that there was an interpreter available at the time of his visit. In a report dated November 24, 2009, Dr. Silver noted that Mr. Martinez "... injured his knees when he fell off stilts while doing dry walling on December 12 (sic), 2008 injuring both his knees. His right knee was much worse and became swollen, painful and stiff. The left one has recovered. The right one has been persistently painful since the injury. Prior to the injury his knee was normal without treatment or symptoms. He has been feeling clicking, popping and giving way of the right knee." (PX3). Exam revealed patellofemoral [*18] crepitation and medial joint line tenderness and mild effusion. (PX3). X-rays were noted to be normal except for a possible loose body in the infrapatellar fat pad and the MR1 was found to be consistent with a possible loose body as well as damage to the articular' cartilage in the patellofemoral joint. (PX3) Dr. Silver's impression was that Petitioner "... damaged the articular cartilage of the patella due to his work injury and has a loose body in the right knee due to the aforementioned work injury." (PX3). Dr. Silver recommended arthroscopic surgery and noted that Petitioner was temporarily disabled at that time. (PX3).

Pursuant to agreement of the parties, Petitioner was eventually evaluated by Dr. Charles Bush-Joseph on August 10, 2010. In a report on that date, Dr. Bush-Joseph noted a history of injury on December 15, 2008 when Petitioner "suffered a trip and fall [while] wearing stilts" suffering injuries to his back, both knees, left shoulder and arm region. Apparently all symptoms have resolved except for residual pain of the right knee. He clearly, on repeated questioning, stated that he had no residual symptoms of his back, left knee or left arm and shoulder." (RX8). [*19] Following his examination, and review of both MRI's, Dr. Bush-Joseph diagnosed residual patellofemoral contusion, possible chondral injury with meniscal tear, right knee. (RX8). Dr. Bush-Joseph opined that "[b]ased on review of the medical record, continued and ongoing treatment, it appears that the patient did indeed suffer a work related injury to the right knee with residual symptoms and that, in my opinion, do warrant further treatment. Injuries to his left shoulder and left knee have resolved with no residual." (RX8). Dr. Bush-Joseph also noted that "assuming the history presented to be true with also note of no prior injury, trauma or treatment to the involved right knee, I do believe that his condition is a direct result of the original work related injury of December 2008." (RX8). In addition, Dr. Bush-Joseph felt that the "... diagnostic arthroscopy is warranted" and that "[t]his would require six to ten weeks of postoperative rehabilitation before the patient achieves a maximum medical improvement." (RX8). Finally, Dr. Bush-Joseph opined that "... based on the initial reports of Dr. James Cohen and current physical examination findings, the patient was most likely able to [*20] work on a full-duty basis with only limitations of kneeling in the interval. Certainly, his current examination would allow such work tolerance..." (RX8).

Petitioner eventually underwent surgery at the hands of Dr. Silver on November 13, 2010 consisting of arthroscopic partial lateral meniscectomy and debridement. (PX4). The post-op diagnosis was torn lateral meniscus as well as articular cartilage fragmentation of the patellofemoral joint and medial femoral condyle. (PX4).

Respondent ceased the payment of pay workers' compensation benefits subsequent to June of 2009, but initiated TTD payments as of the November, 13, 2010 surgery date. Mr. Martinez testified that his benefits did not always come every two weeks, but instead arrived in a sporadic fashion.

Petitioner continued to follow-up with Dr. Silver and began physical therapy on November 30, 2010 at Rapid Rehab of Illinois. (PX5). Petitioner testified that after surgery he started noticing other problems with his body, including pain in his left knee.

An "Initial Knee Evaluation" form from Rapid Rehab dated November 30, 2010 contains a handwritten diagnosis of "R[ight] knee torn cartilage" and describes the current symptoms [*21] as "pain on inside of knee & back of knee -- c/o L[eft] knee pain." (PX5). A separate typewritten "Physical Therapy Initial Evaluation", also dated November, 30,

2010, noted that "[p]ostoperatively, the patient reports that aggravating factors include walking, going up and down stairs, and extending his knee. Ice and medication help to alleviate his symptoms. The patient describes having a sharp pain along the inside of the right knee, as well as in the back of the knee. He also has complaints of left knee pain which he relates to overuse since the time of injury." (PX5).

In a letter to Employers Claim Service dated December 21, 2010, Dr. Silver noted that Petitioner "continues to improve with regard to his right knee after arthroscopic surgery approximately five weeks ago; however, his left knee is deteriorating with medial joint line pain and peripatellar pain." (PX3). Dr. Silver went on to note that Petitioner "injured his left knee as well at the time of the accident on December 12 [sic], 2008. I would recommend obtaining an MRI of his left knee." (PX3). A "Work/School Status Report" dated December 21, 2010 diagnosed right knee lateral meniscal tear post surgery, and recommended [*22] that Petitioner could perform sedentary work only. (PX3). It was also noted that if the above restrictions could not be accommodated, the patient was to be off work. (PX3). A separate prescription slip by Dr. Silver ordered left knee MRI without contract, and noted a diagnosis of left knee cartilage damage. (PX3).

An MRI of the left knee performed on January 6, 2011 revealed a small joint effusion and large horizontal tear involving the midbody and posterior horn of the medial meniscus. (PX3).

In a letter to Employers Claim Service dated January 22, 2011, Dr. Silver noted that the MRI of the left knee appeared to demonstrate a torn meniscus and that "[w]e will plan arthroscopic surgery of his left knee once his right knee has recovered. He remains limited to sedentary work only." (PX3). In a separate "Work/School Status Report", also dated January 22, 2011, Dr. Silver diagnosed Petitioner with right knee cartilage damage and noted that Mr. Martinez could return to sedentary work as of January 24, 2011. (PX3). However, it was also noted that if the above restrictions could not be accommodated, the patient was to be off work. (PX3).

In a letter to Employers Claim Service dated January [*23] 25, 2011, Dr. Silver noted that Petitioner's "MRI demonstrates a large tear of the medial meniscus. This is due to his work injury of December 12 [sic], 2008. This is with regard to his left knee. As you know he injured both of his knees at that time. The right one was initially mores [sic] severely painful and underwent arthroscopic surgery and slowly the left knee pain has persisted to the point where he can no longer tolerate it. He will require arthroscopic surgery of his left knee. He is limited to sedentary work pending his surgical treatment." (PX3). Dr. Silver reiterated this recommendation for arthroscopic surgery on the left knee in a letter to Employers Claim Service on February 22, 2011. (PX3). Dr. Silver also noted, in a separate "Work/School Status Report" dated February 22, 2011, that Petitioner's diagnosis was right knee cartilage damage and that Mr. Martinez was capable of sedentary work with occasional walking and standing. (PX3).

In a letter to Employers Claim Service dated March 24, 2011, Dr. Silver noted that Petitioner's "right knee continues to slowly improve. His left knee is doing poorly and we will plan arthroscopic surgery in approximately six to eight [*24] weeks on his left knee for his torn lateral meniscus that he suffered when he injured both of his knees on December 12 [sic], 2008 when he fell off stilts while doing drywall. Because of the tearing situation with regard to his left knee, he is temporarily disabled." (PX3).

In a letter to Steven Borgstrom at Employers Claim Service dated April 21, 2011, Dr. Silver noted Petitioner "still has significant quadriceps atrophy and will continue physical therapy for the right knee as well as to regain full flexion. We are awaiting appropriate approval for his left knee arthroscopy which is doing poorly with severe pain and causing him to limp." (PX3).

In a letter to Steven Borgstrom at Employers Claim Service dated May 19, 2011, Dr. Silver noted Petitioner's quadriceps atrophy was lessening, and that "[h]e will continue physical therapy for the right knee and we are awaiting approval for his left knee which will require arthroscopic surgery for his tear of his medial meniscus." (PX3). Dr. Silver also noted that Petitioner remains temporarily disabled. (PX3).

In a letter to Employers Claim Service dated June 16, 2011, Dr. Silver noted Petitioner's "left knee MRI demonstrates a large tear [*25] of his medial meniscus. He will require arthroscopic surgery for his left knee. This is causally-connected to his work injury when he injured both knees on December 12 [sic], 2008. Lacking appropriate arthroscopic surgery for the left knee he will be permanently disabled." (PX3). For the first time, the "Work/School Status Report" that accompanied such a letter contains a diagnosis that does not solely refer to the right knee. (PX3). Instead,

the diagnosis in the "Work/School Status Report" dated June 16, 2011 notes a diagnosis of left knee cartilage damage and indicates that Petitioner is off work. (PX3). Dr. Silver reiterated his opinion along these lines in letters to Employers Claim Service and "Work/School Status Report[s]" dated July 14, 2011, August 11, 2001, September 8, 2011 and October 6, 2011. (PX3).

At the request of Respondent, Petitioner visited Dr. Troy Karlsson on June 28, 2011 for purposes of a § 12 examination. (RX9) In his report, Dr. Karlsson noted no prior history of problems with his knees and a history of injury on December 15, 2008 when Petitioner slipped on a pipe and fell 4 to 4-1/2 feet while working on stilts "... landing on both knees, more so on the [*26] right than the left." (RX9). Dr. Karlsson also noted that underwent right knee arthroscopy in November 2010 and that Petitioner "... said he did have some pain in the left knee initially, and this got much worse after the right knee surgery when he favored that leg somewhat. He said physical therapy made his left knee worse." (RX9). Following his examination, and review of the records, Dr. Karlsson diagnosed osteoarthritis to the right knee, a lateral meniscal tear to the right knee and chondral fissuring to the right knee, as well as a medial meniscal tear of the left knee, degenerative in nature. (RX9). Dr. Karlsson opined that "... at least a portion of his right knee problems were caused by the injury... [and] I would consider his arthroscopic surgery of the right knee to be related to the occurrence of December 15, 2008. I do not find his conditions to the left knee to be in any way related to that single fall." (RX9). Along these lines, Dr. Karlsson noted that Petitioner's "... initial evaluation in the emergency room mentioned fall onto the right knee. Multiple visits with several different providers mentioned only right knee complaints, and multiple notes even went as far as [*27] saying that examination of the contralateral left knee was normal. Dr. Bush-Joseph's [8/10/10 report] noted that there were no ongoing problems with the left knee. Dr. Bush-Joseph went on to say that, 'He clearly, on repeated questioning, stated that he had no residual symptoms of his back, left knee or left arm and shoulder.' A significant portion of patients over age 25 have meniscal tears without trauma, and this patient likely has a degenerative tear of the medial meniscus in his left knee, unrelated to his action of December 15, 2008. There is simply too wide a period of symptom-free times with the left knee and normal exams of the left knee to relate it to that single incident." (RX9). Dr. Karlsson went on to opine that Petitioner needed no further treatment for the accident in question given that "[i]n [Petitioner's] own words to me at the time of the exam his right knee is doing fine, and he had no further problems with it. The left knee is unrelated to that single incident. He is at maximum medical improvement and can be at regular duty at this time." (RX9).

Petitioner testified that he currently notices a lot of pain in his left knee, especially when he goes up a staircase. [*28] He also indicated that is taking prescription medication for his pain. He noted that he has not worked anywhere else since he was taken off work.

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

Petitioner testified that on the date of the accident he was carrying his tray and knives in his hands while walking on slits, about 4' off the ground, applying material on drywall tape, when he stepped on a pipe or piece of trash and slid, causing him to fall. He testified that his right knee then his left knee struck the ground, as well as his right shoulder.

Petitioner visited Concentra the following day, December 16, 2008. At that time the following history was recorded: "Patient states that he fell down yesterday at work from 5ft and ***hit his knees and injured the right knee***. Patient says has mild pain of the shoulders also, but the ***prominent pain is on the right knee***." (Emphasis added) (PX1). This same report contains the following "Patient Statement": "Patient states: 'While at work I fell 5ft and ***hurt my right shoulder and right knee***.'" (Emphasis [*29] added) (PX1). X-rays of the right knee and patella revealed no fracture or subluxation and no indication of effusion. (PX1). The assessment at that time was knee contusion and shoulder pain. (PX1). The Arbitrator notes that while this record reflects a history of hitting both knees, as well as his shoulder, the treatment at this time, including x-rays, concerned the right knee only.

The record further shows that subsequent complaints and treatment were limited to the right knee as well.

Specifically, therapy notes dated December 19, 2008 and December 22, 2008 refer exclusively to the right knee. (PX1). Likewise, Concentra records dated January 2, 2009 and January 13, 2009 refer to complaints of pain relative solely to the right knee. (PX1).

An MRI of the ***right knee*** performed on January 21, 2009 was interpreted as evidencing soft tissue edema at the infrapatellar fat pad with suggestion of calcification or possibly foreign body at the inferomedial aspect of the infrapatellar fat pad. (PX1). No MRI of the left knee was ordered or performed at this time.

Petitioner returned to Concentra on January 27, 2009 at which time it was noted that the "pattern of symptoms is the [*30] same. Patient denies any knee pain or problem before this incident... Patient has had physical therapy and feels better. ***The pain is located on anterior and medal aspect of the right knee...***" (Emphasis added) (PX1). Once again, there is no mention of any left knee complaints and/or treatment at that time.

On February 11, 2009, Petitioner was evaluated by Dr. James Cohen, an orthopedist at Concentra. While Dr. Cohen recorded that Petitioner "... fell directly onto both knees" and had complaints of pain at the anterior aspect of his knees following the accident, it was noted that Mr. Martinez had shown continued improvement and had not noticed any popping or swelling. (PX1;RX4). Upon examination, Dr. Cohen recorded "... bilateral patellofeoral crepitus with stair stepping. He is able to stair step and squat well. There is no effusion of either knee. There is some mild tenderness over the anterior inferior patella on the right side, none of the left. On the left, there is no significant tenderness. No instability. McMurray testing is negative. Neurocirculatory intact." (PX1;RX4). Dr. Cohen reviewed the x-ray and MRI of the right knee and noted that both studies were essentially [*31] normal. (PX1;RX4). Dr. Cohen's impression was that the patient had a contusion to both knees and some mild chondromalacia patella. (PX1;RX4).

Thus, it would appear that Dr. Cohen found little of note with respect to either knee at the time of his February 11, 2009 examination.

Petitioner did not seek treatment again for more than four (4) months, or until June 13, 2009, when he visited Dr. Ellis Nam. Once again, the history recorded at that time refers exclusively to complaints relative to the right knee. To wit, it was noted that Petitioner "... ***fell at work injuring his right knee*** in December 2008. He was approximately five feet high when he fell onto his right knee. He has had immediate pain. He denies prior problems to this region. He has been having persistent pain..." (Emphasis added) (PX2). Dr. Nam's diagnosis at that time was "***R[ight] knee rule out medial meniscus tear.***" (PX2). No mention of any left knee complaints or treatment were made at that time.

Petitioner eventually underwent a right knee arthrogram on August 15, 2009. (PX2). This test was interpreted as revealing medial meniscal myxoid degeneration without discoid tear and Grade 3 chondromalacia [*32] of the patellar cartilage. (PX2). Once again, no such testing was performed on the left knee.

Petitioner returned to Dr. Nam on August 22, 2009 at which time it was noted that Mr. Martinez was still having persistent pain in his ***right knee*** with some catching and giving away symptoms since his injury in December of 2008. (PX2). No left knee complaints were noted at that time. Dr. Nam noted that Petitioner was still having persistent pain despite physical therapy, and that after discussing possible treatment options, Petitioner "would like to proceed with arthroscopic intervention." (PX2).

In a letter addressed "[t]o [w]hom [i]t [m]ay [c]oncem" dated October 5, 2009, Dr. Nam noted that Petitioner was currently treating for right knee pain and had a "***history of a right knee injury*** [which] occurred in December 2008 when he fell approximately five feet high on to his right knee injuring his right knee." (PX2). Dr. Nam went on to opine that "[t]o a reasonable degree of medical and surgical certainty, although I did not treat nor see Mr. Martinez from January 27, 2009 up until June 13, 2009, given that he was suffering from the same magnitude of pain involving his [*33] right knee secondary to his injury from December, 2008, I do feel that Mr. Martinez would not have been able to work in a full duty capacity at that time." (PX2). No mention of any injury to the left knee was noted at that time.

Petitioner subsequently visited Dr. Ronald Silver on November 24, 2009. In a report dated November 24, 2009. Dr. Silver noted that Mr. Martinez "... injured his knees when he fell off stilts while doing dry walling on December 12 (sic), 2008 injuring both his knees. His right knee was much worse and became swollen, painful and stiff. ***The left one has recovered.*** The right one has been persistently painful since the injury. Prior to the injury his knee was normal without treatment or symptoms. He has been feeling clicking, popping and giving way of the right knee." (Emphasis added) (PX3). Thus, it appears that even Dr. Silver noted that Petitioner's left knee complaints had resolved by the time he first saw him on November 24, 2009. Indeed, Dr. Silver's impression at the time of this initial evaluation only con-

cerned the right knee -- specifically, he noted that Petitioner "... damaged the articular cartilage of the patella due to his work injury [*34] and has a loose body ***in the right knee due to the aforementioned work injury***." (PX3).

Pursuant to agreement of the parties, Petitioner was evaluated by Dr. Charles Bush-Joseph on August 10, 2010. In a report on that date, Dr. Bush-Joseph noted a history of injury on December 15, 2008 when Petitioner "... suffered a trip and fall [while] wearing stilts" suffering injuries to his back, both knees, left shoulder and arm region. ***Apparently all symptoms have resolved except for residual pain of the right knee. He clearly, on repeated questioning, stated that he had no residual symptoms of his back, left knee or left arm and shoulder.***" (Emphasis added) (RX8). Following his examination, and review of both MRI's, Dr. Bush-Joseph diagnosed residual patellofemoral contusion, possible chondral injury with meniscal tear, right knee. (RX8). Dr. Bush-Joseph opined that "[b]ased on review of the medical record, continued and ongoing treatment, it appears that the patient did indeed suffer a work related injury to the right knee with residual symptoms and that, in my opinion, do warrant further treatment. ***Injuries to his left shoulder and left knee have resolved with*** [*35] ***no residual.***" (Emphasis added) (RX8). Dr. Bush-Joseph also noted that "assuming the history presented to be true with also note of no prior injury, trauma or treatment to the involved right knee, I do believe that his condition is a direct result of the original work related injury of December 2008." (RX8). Thus, it appears that prior to surgery, Dr. Bush-Joseph was of the opinion that only Petitioner's right knee condition was causally related to the accident in question, and that any injury to the left knee and "left" shoulder had resolved.
Petitioner eventually underwent surgery at the hands of Dr. Silver on November 13, 2010 consisting of arthroscopic partial lateral meniscectomy and debridement of the right knee. (PX4). The post-op diagnosis was torn lateral meniscus as well as articular cartilage fragmentation of the patellofemoral joint and medial femoral condyle. (PX4).

It was not until after surgery, or almost two (2) years subsequent to the date of accident on December 15, 2008, that the record refers to complaints relative to the left knee. Along these lines, the record contains an "Initial Knee Evaluation" physical therapy form dated November 30, 2010 wherein Petitioner's [*36] current symptoms were described as "pain on inside of knee & back of knee -- ***c/o L[eft] knee pain***." (Emphasis added) (PX5). A separate typewritten "Physical Therapy Initial Evaluation", also dated November 30, 2010, noted that "[p]ostoperatively, the patient reports that aggravating factors include walking, going up and down stairs, and extending his knee. Ice and medication help to alleviate his symptoms. The patient describes having a sharp pain along the inside of the right knee, as well as in the back of the knee. ***He also has complaints of left knee pain which he relates to overuse since the time of injury***." (Emphasis added) (PX5).

Thus, it appears that at the time of the above physical therapy session, Petitioner himself may have equated the increase in his left knee pain to "overuse since the injury." However, this does not appear to be the basis of Dr. Silver's opinion to the effect that the left knee condition is causally related to the incident in question. Along these lines, Dr. Silver repeatedly states, in letter after letter to the Employer Claim Service, that Petitioner's left knee condition and need for arthroscopic surgery are due to the "December [*37] 12 [sic], 2008" work incident, when he fell off the stilts and fell on both knees. This is not, logically speaking, an opinion that necessarily relates Petitioner's current left knee condition to overuse or to any other factors that may have flowed out of post-surgical therapy relative to the right knee. Instead, it is an opinion that presupposes that Petitioner injured his left knee at the time of the undisputed accident on December 15, 2008 and that he continued to experience problems with that knee up to the present day. Unfortunately, as already noted, that is not the case here. Indeed, even Dr. Silver, at the time of his initial evaluation on November 24, 2009, noted that the left knee had recovered and that Petitioner's persistent pain concerned his right knee. (PX3).

As a result, the Arbitrator finds the opinion of Dr. Karlsson to be more persuasive on the issue of causation with respect to the left knee. Specifically, Dr. Karlsson rightly pointed out that "...[t]here is simply too wide a period of symptom-free times with the left knee and normal exams of the left knee to relate it to that single incident", and that as a result "I do not find his conditions to the left knee [*38] to be in any way related to that single fall." (RX9).

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his right knee is causally related to the accident on December, 15, 2008, but that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being with respect to his left knee is causally related to said incident.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

PX7 is a wage summary prepared by the employer, R.G. Construction. Petitioner reviewed the report and testified that it accurately reflected the hours worked as well as his earnings. The wage summary shows that Petitioner worked a total of 1,421 hours in 40 weeks during the 52-week period prior to his accident, for an average number of hours per week of 35.525. PX7 also shows that during this period Petitioner earned total of $ 53,591.33. Therefore, based on the above and the record taken as a whole, the Arbitrator finds that Petitioner's average weekly wage is $ 1,508.55 ($ 53,591.33 / 35.525 weeks).

WITH RESPECT TO ISSUE [*39] (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner offered into evidence medical bills as well as a spreadsheet purporting to show the amounts charged, payments and adjustments made and remaining balances for various providers. (PX6).

In light of the Arbitrator's ruling as to causation (issue "F", supra), and the Arbitrator's determination that Petitioner failed to prove that his current condition of ill-being with respect to his left knee condition is causally related to the accident on December 15, 2008, the Arbitrator finds that Petitioner is hereby entitled to those reasonable and necessary medical expenses relating solely to the right knee condition pursuant to § 8(a) and the fee schedule provisions of § 8.2 of the Act. The Arbitrator further finds that Respondent is entitled to a credit for any and all amounts paid on account of this injury, with respect to the right knee injury, and that Petitioner shall be held harmless from any claims by any providers of the services for which Respondent [*40] is receiving this credit, as provided in § 8(j) of the Act.

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

In light of the Arbitrator's ruling as to causation (issue "F", supra), and the Arbitrator's determination that Petitioner failed to prove that his current condition of ill-being with respect to his left knee condition is causally related to the accident on December 15, 2008, the Arbitrator finds that Petitioner is not entitled to prospective medical treatment prescribed by Dr. Silver in the form of arthroscopic surgery for said left knee. Accordingly, Petitioner's claim for same is hereby denied.

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

At the time of his layoff by Respondent, on or about February 5, 2009, Petitioner was working pursuant to the modified activity restrictions imposed by Concentra.

On February 11, 2009, Mr. Martinez was evaluated by Dr. James Cohen, an orthopedist at Concentra. Following his examination and review of the diagnostic tests, Dr. Cohen diagnosed Petitioner as having sustained [*41] a contusion to both knees and some mild chondromalacia patella. (PX1;RX4). Dr. Cohen prescribed Ibuprofen and released Mr. Martinez to return to work full duty. (RX4).

Petitioner agreed that he was released to full duty work by Dr. Cohen on February 11, 2009. Petitioner also agreed that when he was laid off he had a full duty release.. He noted that he returned to his union after the layoff and asked them to find him work, but that they did not find work for him at that time. In addition he conceded that he did not see any doctors from the date of his full duty release, on February 11, 2009, until he visited Dr. Nam on June 13, 2009.

On June 13, 2009, Dr. Nam noted a diagnosis of "R[ight] knee rule out medial meniscus tear" and noted that Petitioner was unable to work as of "06/13/09 until further notice." (PX2). Dr. Nam continued to keep Petitioner off work until further notice following subsequent visits on June 27, 2009 and August 22, 2009, at which time surgery was recommended. (PX2). Dr. Nam reiterated his surgical recommendation on September 26, 2009. (PX2).

In a letter addressed dated October 5, 2009, Dr. Nam noted that "[t]o a reasonable degree of medical and surgical certainty, [*42] although I did not treat nor see Mr. Martinez from January 27, 2009 up until June 13, 2009, given that he was suffering from the same magnitude of pain involving his right knee secondary to his injury from December, 2008, I do feel that Mr. Martinez would not have been able to work in a full duty capacity at that time." (PX2).

Petitioner subsequently visited Dr. Silver on November 24, 2009 at which time the latter noted recommended arthroscopic surgery for the right knee and noted that Petitioner was temporarily disabled at that time. (PX3).

Petitioner agreed that he did not visit any other doctor from November 24, 2009, when he saw Dr. Silver, until August 10, 2010, when he saw Dr. Bush-Joseph.

On August 10, 2010, Petitioner was evaluated by Dr. Charles Bush-Joseph by agreement of the parties. At that time, Dr. Bush-Joseph noted that he felt that "... diagnostic arthroscopy is warranted" and that "[t]his would require six to ten weeks of postoperative rehabilitation before the patient achieves a maximum medical improvement." (RX8). Finally, Dr. Bush-Joseph opined that "... based on the initial reports of Dr. James Cohen and current physical examination findings, the patient was [*43] most likely able to work on a full-duty basis with only limitations of kneeling in the interval. Certainly, his current examination would allow such work tolerance..." (RX8).

Petitioner eventually underwent surgery at the hands of Dr. Silver on November 13, 2010 consisting of arthroscopic partial lateral meniscectomy and debridement of the right knee. (PX4).

Petitioner continued to follow-up with Dr. Silver and began physical therapy on November 30, 2010 at Rapid Rehab of Illinois. (PX5). Petitioner testified that after surgery he started noticing other problems with his body, including pain in his left knee.

Dr. Silver continued to restrict Petitioner to sedentary work in "Work/School Work Status" notes dated December 21, 2010, January 22, 2011, January 25, 2011, March 24, 2011, April 21, 2011, May 19, 2011, June 16, 2011, July 14, 2011, August 11, 2001, September 8, 2011 and October 6, 2011. (PX3).

On June 28, 2011, Petitioner visited Dr. Karlsson at the request of Respondent for purposes of a § 12 examination. At that time, Dr Karlsson opined that Petitioner needed no further treatment for the accident in question given that "[i]n [Petitioner's] own words to me at the time [*44] of the exam his right knee is doing fine, and he had no further problems with it. The left knee is unrelated to that single incident. He is at maximum medical improvement and can be at regular duty at this time." (RX9).

Based on the above, and the record taken as a whole, including the Arbitrator's determination that Petitioner failed to prove that his current left knee condition was causally related to the accident in question, the Arbitrator finds that Petitioner was temporarily totally disabled from February 5, 2009 through February 11, 2009 and from June 13, 2009 through June 28, 2011, or the date Dr. Karlsson found that Petitioner had reached MMI with respect to his work related right knee injury, for a period of 107-4/7 weeks.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Respondent's conduct in the defense of this claim was not so unreasonable and/or vexatious so as to warrant the imposition of penalties in this matter. Therefore, Petitioner's request for additional compensation pursuant to § 19(k) and § 19(l) as well as attorneys' fees pursuant to § 16 of the Act is hereby denied.

[*45] **WITH RESPECT TO ISSUE (O), WHETHER RESPONDENT WAS DENIED ITS FOURTEENITH AMENDMENT DUE PROCESS RIGHTS, THE ARBITRATOR FINDS AS FOLLOWS:**

Respondent's counsel objected to proceeding to trial in this matter, citing his client's 14th Amendment right to cross examine treating physicians Dr. Nam and Dr. Silver. In support of his argument in this regard, Respondent's counsel cited the case of *Paoletti v. Industrial Commission, 665 N.E.2d 507, 279 Ill.App.3d 988, 216 Ill.Dec. 447 (1st Dist. 1996).* In that case, the Illinois Appellate Court determined that the Commission's refusal to allow the claimant an op-

portunity to present rebuttal evidence was in error. The Arbitrator notes that the *Paoletti* case is partially distinguishable by the fact that it involved an arbitration hearing conducted on January 18, 1988, or prior to the amendment of § 19(e) of the Act on December 18, 1989 prohibiting the admission of additional evidence on review.

Secondly, and more importantly, the Arbitrator notes that Respondent was in no way prejudiced in its ability to present rebuttal evidence in this case, as witnessed by the § [*46] 12 report of Dr. Karlsson, which the Arbitrator ultimately relied upon to find that Petitioner's left knee condition was not causally related to the accident in question. Thus, it cannot be said that Respondent was somehow denied its due process rights as a result of the Arbitrator's refusal to continue the matter for the taking of depositions. Instead, what defense counsel was denied was an absolute right to cross examine the treating physicians at the expense of Petitioner's right to an immediate hearing pursuant to § 19(b) of the Act.

Finally, the Arbitrator notes that Respondent was in fact offered an opportunity to depose the treating physicians in question, provided Respondent agree to pay for the cost of said depositions, a compromise the Arbitrator felt was only fair under the circumstances, given that Petitioner was under no obligation to depose same as part of his case in chief. Unfortunately, counsel for Respondent refused the offer.

Therefore, the Arbitrator finds that Respondent's 14th Amendment rights were not violated or abridged in any shape or form, and that the Arbitrator acted fully within his discretion by allowing the matter to proceed to trial.

CONCURBY: RUTH W. WHITE

CONCUR: [*47]

CONCURRING OPINION

I agree with the majority result; however, I do not agree that Respondent is required to take depositions of Petitioner's witnesses at its own expense in order to protect its right to cross examine these witnesses on opinions that go beyond treatment. The records should have been admitted only for those purposes permissible under Section 16 of the Act. I, nevertheless, concur in the result because the Commission could reach the same result without reliance on the objectionable opinions in the records of Drs. Silver and Nam.

Legal Topics:

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