Illinois Official Reports

Appellate Court

***PPG Industries v. Illinois Workers' Compensation Comm'n*,**
2014 IL App (4th) 130698WC

Appellate Court Caption	PPG INDUSTRIES, Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Carrie Bond, Appellant).
District & No.	Fourth District Docket No. 4-13-0698WC
Filed	September 30, 2014
Rehearing denied	November 18, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	In an appeal from the award of medical expenses and permanent partial disability under the Workers' Compensation Act for claimant's repetitive-trauma injuries to her left shoulder while working in a glass factory for nearly 38 years, the appellate court, in answer to a question certified by the trial court pursuant to Supreme Court Rule 308 as to whether section 6(d) of the Act, which sets a three-year statute of limitations for filing workers' compensation claims, bars the presentation of evidence of work activities that took place more than three years prior to the date of accident, or manifestation date, of a repetitive-trauma injury, responded in the negative, since section 6(d) does not contain any evidentiary limitations but rather sets forth the time frames in which claimant's application for benefits must be filed; therefore, pursuant to *De Bouse* and in the interest of judicial economy, the appellate court vacated the trial court's judgment and remanded the cause for further proceedings consistent with its answer to the certified question.
Decision Under Review	Appeal from the Circuit Court of Macon County, No. 12-MR-845; the Hon. Albert G. Webber, Judge, presiding.
Judgment	Certified question answered; circuit court judgment vacated; cause remanded.

Counsel on Appeal

Timothy M. Shay (argued) and Katherine E. Wood, both of Shay & Associates, of Decatur, for appellant.

Robert E. Maciorowski (argued), of Maciorowski, Sackmann & Ulrich, LLP, of Chicago, for appellee.

Panel

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 April 28, 2010, claimant, Carrie Bond, 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, PPG Industries. Following a hearing, the arbitrator determined claimant sustained repetitive-trauma injuries to her left shoulder that arose out of and in the course of her employment on March 22, 2010. She awarded claimant $3,777 in medical expenses and permanent partial disability (PPD) benefits pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 2008)) for a 7.5% loss of use of claimant's left arm. The arbitrator also considered and rejected a statute of limitations argument raised by the employer at arbitration. She concluded the three-year limitations period set forth in section 6(d) of the Act (820 ILCS 305/6(d) (West 2008)) barred neither claimant's repetitive-trauma claim nor the presentation of evidence of claimant's work activities in excess of three years before the alleged manifestation date of her injury.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) made various minor corrections to the arbitrator's decision and converted the arbitrator's PPD award to an award under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2008)), finding claimant was entitled to compensation of 3.8% for the loss of use of the person as a whole. The Commission otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Macon County was persuaded by the employer's statute-of-limitations argument. The court "remanded the case to the Commission for reconsideration with the direction to not consider evidence of the injury occurring prior to April 28, 2007, the date three years prior to the filing of [claimant's] application for adjustment."

¶ 3 Additionally, the circuit court entered an order granting a motion by claimant for certification pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). It certified the following question for an interlocutory appeal:

> "Does section 6(d) of the *** Act, which sets forth a three[-]year statute of limitations for the filing of worker's [*sic*] compensation claims, act as a bar to the presentation of evidence of work activities that took place more than three years prior to the date of accident, or manifestation date, of a repetitive[-]trauma injury?"

¶ 4 This court granted claimant's application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). We answer the certified question in the negative, vacate the circuit court's judgment, and remand for further proceedings consistent with this opinion.

¶ 5 I. BACKGROUND

¶ 6 At arbitration, claimant testified she worked for the employer, a glass factory, for nearly 38 years. She began working for the employer in 1974 and, except for an approximately three-year period between 1979 and 1982 when the employer was closed, claimant continued to work for the employer through the February 2012 arbitration date. She described her work for the employer over those years. Claimant's testimony included descriptions of her various positions and job duties, as well as the extent to which she utilized her left upper extremity when working. Claimant stated in March 2010, her left shoulder began "popping quite a bit" and was sore. Thereafter, claimant began seeking medical treatment for her left shoulder. Claimant submitted her medical records into evidence.

¶ 7 The employer presented two witnesses who testified regarding the physical demands of some of the positions claimant held while working for the employer, including lifting requirements. It also submitted physical-demand checklists with respect to those positions, as well as the evidence deposition and reports of its evaluating physician, Dr. Prasant Alturi.

¶ 8 Additionally, the employer objected to claimant's testimony describing her nearly 38-year work history. It argued that only claimant's work activities in the three years prior to "the date of her alleged repetitive trauma" were relevant. Additionally, it asserted the Act's three-year limitations period prohibited consideration of "anything that occur[red] three years prior to the [accident or manifestation] date alleged." The arbitrator overruled the employer's objections, stating claimant's work history for the employer was relevant and it remained to be seen what weight would be placed on such evidence. However, at the employer's request, she allowed the request for hearing to be amended to include a statute-of-limitations issue.

¶ 9 On April 2, 2012, the arbitrator issued her decision in the matter, finding claimant sustained a repetitive-trauma injury to her left shoulder which manifested itself on March 22, 2010, and was causally related to her work for the employer. The arbitrator relied on claimant's testimony regarding her job duties and found "she credibly testified to the development of a painful left shoulder over time." The arbitrator noted that, after experiencing a painful "popping" in her left shoulder, claimant sought medical treatment and attributed her problems to her work.

¶ 10 The arbitrator also found claimant's application for adjustment of claim had been timely filed and her claim for benefits was not barred by the Act's three-year statute of limitations. Relying on various repetitive-trauma cases, she concluded that "the past work history of an employee should be considered" and was not confined, as suggested by the employer, to the three-year period preceding the alleged manifestation date. The arbitrator noted repetitive-trauma injuries may take years to develop and "[a]s such, it is imperative that an employee *** be allowed to explain and present evidence of the job duties performed over the course of her employment which she believes were causative of her condition of ill-being at the time the injury manifests itself." The arbitrator awarded claimant benefits as stated.

¶ 11 On October 24, 2012, the Commission issued its decision and, as discussed, modified and corrected portions of the arbitrator's decision. It otherwise affirmed and adopted the

arbitrator's decision, which, relevant to this appeal, included the arbitrator's findings with respect to the statute-of-limitations issue raised by the employer.

¶ 12 On April 17, 2013, the circuit court of Macon County issued its decision. The court found the statute-of-limitations issue was "a matter of first impression for Illinois courts" and agreed with the employer's position. It ordered the case "remanded to the Commission for reconsideration with the direction to not consider evidence of injury occurring prior to April 28, 2007, the date three years prior to the filing of [claimant's] application for adjustment." On August 9, 2013, the court entered an order granting claimant's motion for certification pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010), noting it "interpreted [section 6(d) of the Act] to include an evidentiary limitation" and certifying the following question for review before this court:

> "Does section 6(d) of the *** Act, which sets forth a three[-]year statute of limitations for the filing of worker's [*sic*] compensation claims, act as a bar to the presentation of evidence of work activities that took place more than three years prior to the date of accident, or manifestation date, of a repetitive[-]trauma injury?"

As stated, we granted claimant's application for leave to appeal pursuant to Rule 308.

¶ 13 II. ANALYSIS

¶ 14 The issue presented by this appeal concerns a matter of statutory interpretation. In particular, whether section 6(d) of the Act (820 ILCS 305/6(d) (West 2008)) limits the evidence a claimant may present regarding his or her work activities to only those activities occurring within the three years prior to the filing of the claimant's application for adjustment of claim or manifestation date of his or her repetitive-trauma injury.

¶ 15 "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Curtis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120976WC, ¶ 13, 987 N.E.2d 407. "The best indicator of the legislature's intent is the language of the statute itself, which must be given its plain and ordinary meaning." *Curtis*, 2013 IL App (1st) 120976WC, ¶ 13, 987 N.E.2d 407. Statutory construction issues are subject to *de novo* review. *Curtis*, 2013 IL App (1st) 120976WC, ¶ 13, 987 N.E.2d 407.

¶ 16 Section 6(d) of the Act (820 ILCS 305/6(d) (West 2008)) sets forth limitations periods for the filing of workers' compensation claims and, relevant to this appeal, bars the filing of an application for adjustment of claim "unless the application for compensation is filed with the Commission within 3 years after the date of accident." That section provides as follows:

> "In any case, other than one where the injury was caused by exposure to radiological materials or equipment or asbestos unless the application for compensation is filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred.
>
> In any case of injury caused by exposure to radiological materials or equipment or asbestos, unless application for compensation is filed with the Commission within 25 years after the last day that the employee was employed in an environment of hazardous radiological activity or asbestos, the right to file such application shall be barred." 820 ILCS 305/6(d) (West 2008).

¶ 17 "[T]he date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury 'manifests itself.' " *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531, 505 N.E.2d 1026, 1029 (1987). " 'Manifests itself' means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria County*, 115 Ill. 2d at 531, 505 N.E.2d at 1029.

¶ 18 Here, claimant alleged a repetitive-trauma injury to her left shoulder, which she asserted developed gradually over time as she utilized her left upper extremity when performing her work duties. As the employer points out, section 6(d) contains no exception for repetitive-trauma claims and, like claims involving a single definable accident, repetitive-trauma claims must be brought within three years after the claimant's manifestation date. Claimant alleged her repetitive-trauma injury manifested on March 22, 2010. The employer does not appear to dispute that date and, in fact, asserts in its brief that claimant "did not establish any manifestation of a left shoulder injury until March 22, 20[10]." Claimant filed her application for adjustment of claim on April 28, 2010, just over one month after her alleged manifestation date and, thus, well within section 6(d)'s three-year limitations period. Her claim for a repetitive-trauma injury to her left shoulder was timely filed.

¶ 19 Additionally, looking to the plain and ordinary language of section 6(d), we find no evidentiary limitation. Section 6(d) provides limits with respect to the *filing* of a claim for benefits, not what evidence may be presented to support any particular claim. A repetitive-trauma injury is one which "has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." *Peoria County*, 115 Ill. 2d at 529, 505 N.E.2d at 1028; see also *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 611, 531 N.E.2d 174, 176 (1988) ("By their very nature, repetitive-trauma injuries may take years to develop to a point of severity precluding the employee from performing in the workplace."). It stands to reason that a claimant's work history may be necessary and relevant to determining whether she sustained such a work-related, gradual injury. As noted by the arbitrator and the Commission, case law establishes that a claimant's work history has been routinely considered in repetitive-trauma cases, including work history that extended beyond three years prior to an alleged manifestation date. See *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill. App. 3d 915, 917-18, 828 N.E.2d 283, 287 (2005) (over 30 years); *Oscar Mayer*, 176 Ill. App. 3d at 608, 531 N.E.2d at 174-75 (15 years); *City of Springfield, Illinois v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 300-01, 901 N.E.2d 1066, 1069-70 (2009) (approximately 8 years); *Peoria County*, 115 Ill. 2d at 527, 505 N.E.2d at 1027 (6 years).

¶ 20 The real issue presented by the employer's challenge to claimant's testimony is whether evidence of her entire work history for the employer was relevant to her claim and admissible into evidence. This is an evidentiary issue that was for the Commission to resolve and was not governed by the Act's statute of limitations. We note "[t]he rules of evidence apply to all proceedings before the Commission or an arbitrator, except to the extent they conflict with the Act." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010, 832 N.E.2d 331, 340 (2005). Further, "[e]videntiary rulings made during the course of a workers' compensation proceeding will be upheld on review absent an abuse of discretion." *Greaney*, 358 Ill. App. 3d at 1010, 832 N.E.2d at 340. Similarly, upon its admission, the appropriate weight to be given such evidence was within the province of the Commission. *Roberson v. Industrial Comm'n*,

225 Ill. 2d 159, 173, 866 N.E.2d 191, 199 (2007) ("The Commission must weigh the evidence presented at the arbitration hearing and determine where the preponderance of that evidence lies.").

¶ 21 Under the circumstances of this appeal, neither the Commission's evidentiary rulings nor its weighing of the evidence is properly before this court. As a result, we do not address those issues on review. Instead, we find section 6(d) of the Act was not the proper basis to support the employer's objection to the evidence presented at arbitration. Section 6(d) is a statute of limitations that sets forth the appropriate time frames in which a claimant must *file* his or her application for benefits. That section bars only claims that are not *filed* within the stated time frames. Section 6(d) does not contain any evidentiary limitations.

¶ 22 Finally, we note the circuit court's specific interpretation of section 6(d) and ruling in this case could lead to absurd results. As stated, the court remanded to the Commission and directed it "not to consider evidence of injury occurring prior to April 28, 2007, the date three years prior to *the filing* of [claimant's] application for adjustment." (Emphasis added.) In the present case, claimant happened to file her application for benefits close in time to her alleged manifestation date. However, section 6(d) permits the filing of an application up to three years after an injury manifested itself. Had claimant waited until three years after her manifestation date to file her claim, the court's ruling would essentially have prevented her from presenting any evidence of her work history leading up to the manifestation of her injury.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we answer the certified question in the negative and find section 6(d) of the Act does not contain an evidentiary limitation that bars the presentation of evidence of a claimant's work activities which occurred more than three years prior to the alleged manifestation date of a repetitive-trauma injury (or the filing of the claimant's application for adjustment of claim). We vacate the circuit court's judgment and remand for further proceedings consistent with this opinion. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550, 922 N.E.2d 309, 313 (2009) (providing that once a court has answered a certified question, it may, "in the interests of judicial economy and the need to reach an equitable result, *** consider the propriety of the circuit court order that gave rise to [the] proceedings").

¶ 25 Certified question answered; circuit court judgment vacated; cause remanded.

1 of 100 DOCUMENTS

CARRIE BOND, PETITIONER, v. PPG INDUSTRIES, RESPONDENT.

No. 10WC 16545

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF SANGAMON

12 IWCC 1147; 2012 Ill. Wrk. Comp. LEXIS 1189

October 24, 2012

JUDGES: Yolaine Dauphin; Charles J. DeVriendt; Ruth W. White

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 jurisdiction, statute of limitations, accident, causal connection, medical expenses, and permanent disability, and being advised of the facts and law, modifies and corrects the decision of the Arbitrator as stated below and otherwise affirms and adopts the decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the permanent partial disability benefits awarded with respect to Petitioner's left shoulder. In *Will County Forest Preserve v. Illinois Workers' Compensation Commission, 2012 Ill. App. LEXIS 109, 18-19 (3d Dist. 2012),* the Illinois Appellate Court held that "[b]ecause the plain and ordinary meaning of the [Workers' Compensation Act] establishes that the arm and the shoulder are distinct parts of the body, if claimant sustained an injury to his shoulder, an award for a scheduled loss to the arm would be improper." Rather, when a claimant sustains a work related injury to the shoulder, "benefits are proper under the first [*2] subpart of section 8(d)2." *Will County, 2012 Ill. App. LEXIS at 21.*

Here, Petitioner sustained an injury to her left shoulder. The Arbitrator found that Petitioner's injury caused the loss of use of 7.5 percent of the left arm. In accordance with Will County, the Commission converts the permanent disability award to a person as a whole award under section 8(d)(2). Petitioner is therefore entitled to an award of 3.8 percent of the person as a whole.

With respect to the Arbitrator's decision, the Commission corrects the first paragraph of the Arbitrator's conclusions on page eight to reflect that Petitioner sustained an accident arising out of and in the course of her employment with Respondent on March 22, 2010.

The Commission corrects the last sentence of the fourth paragraph on page one of the Arbitrator's decision to state that Petitioner testified container processors do not lift glass.

The Commission corrects the fourth paragraph on page five of the Arbitrator's decision to state that Dr. Atluri testified in his deposition, "[t]he most common cause of symptomatic impingement syndrome in someone with an os acromiale is what we call idiopathic." [*3]

The Commission corrects the last sentence of the first partial paragraph on page seven to state that Mr. Wright agreed a shipper is required to lift one to ten pounds, eleven to twenty-five pounds, and twenty-six to fifty pounds occasionally, as well as fifty-one to one hundred pounds infrequently, as stated on Respondent's physical requirements

checklist. When asked what items a shipper would be required to lift that weighed more than 50 pounds, Mr. Wright stated that he could not think of any.

The Commission corrects the Arbitrator's reference to "1979" in the first full paragraph on page nine of the Arbitrator's decision to state "1974." The Commission also corrects the Arbitrator's reference to the "State of Limitations" in the same paragraph, to state "Statute of Limitations."

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed April 2, 2012, is hereby modified and corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 3,777.00 for medical expenses under § 8(a) and § 8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE [*4] COMMISSION that Respondent shall pay to Petitioner the sum of $ 420.00 per week for a period of 19 weeks, as provided in § 8(d)(2) of the Act, for the reason that the injuries sustained caused permanent partial disability equivalent to 3.8 percent loss of use of the person as a whole.

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 $ 12,000.00. 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

Carrie Bond
Employee/Petitioner

v.

PPG Industries
Employer/Respondent

Case # **10WC 16545**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, [*5] and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield, Illinois**, on **February 9, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
L. [X] What is the nature and extent of the injury?
O. [X] Other **Statute of Limitations**

FINDINGS

On **March 22, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

[*6] 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.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$ 420.00**/week for a period of **18.975** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **7.5 % loss of use of her left arm.**

Petitioner's testimony as to her job duties for the past thirty-eight years with Respondent is not barred by the statute of limitations.

Respondent shall pay reasonable and necessary medical services of $ 3,777.00, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **March 22, 2010**, through the [*7] **present** and shall pay the remainder of the award, if any, in weekly payments.

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

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

March 28, 2012

Date

Petitioner is a 55 year old right-handed female who has been employed by Respondent for 37 years. Petitioner began working for Respondent in the Labor Yard Pool in 1974. Petitioner testified that in the Yard Labor Pool she was responsible for general clean up, filling in for people in different departments, and performing work as needed. If Petitioner had been trained for the job she could perform it.

That same year Petitioner was moved to the glass process area where she worked as a "Glass [*8] Processor" removing glass off of the assembly line. Depending on the size of the glass Petitioner might remove it from the line by herself or with the help of another person. Once removed off the line, the glass was placed into boxes or containers. The glass could range from 4 x 6 inches to 22 x 40 inches in size and ten to twenty pounds in weight. Petitioner testified that when she picked up the glass and positioned it into a container she would have to lift each piece of glass at or above shoulder level. On cross-examination Petitioner testified that she lifted above or at shoulder level about six to seven times per day, depending on the job. Petitioner briefly stopped working for Respondent in 1979 when the plant closed.

After the plant closed, Petitioner worked at General Cable from 1979 through December of 1980. Her job there required some lifting at waist level. Petitioner testified that she received no injuries or medical care to her left shoulder while working at General Cable.

In 1982 Petitioner returned to Respondent as a Glass Processor. In September of 1982 Petitioner moved to the "Container Department." In the Container Department, Petitioner drove a fork truck to move [*9] containers of glass and closed wooden crates containing glass using hammers and nails. Petitioner testified that she used her right hand to hammer with and used her left hand to position the wood on the glass and to secure a band around the skid/pallet. On cross-examination, Petitioner was shown a physical requirement check list for a Container Processor. Petitioner disagreed that the job required occasional "reaching at or below shoulder level" or infrequent "lifting above shoulder." Petitioner testified that she frequently lifted above shoulder level as when she was taping the glass which was fifty percent of her job. Petitioner agreed that Glass Processors don't lift.

Petitioner became a "Coater Operator" in 1993. In that position, Petitioner was responsible for maintaining the coater machine. This required Petitioner to use torque wrenches and air ratchets to remove cathode tiles off the coater machine and rebuild the tiles. Petitioner testified that in order to rebuild the tiles she would use her left arm and left shoulder to torque the down the screws. Petitioner used both arm to perform this task as her arms tired while performing the job. As a Coater Operator Petitioner would [*10] also have to fix the coater machines if they broke down. This required Petitioner to clear jams and remove glass out of the machine by pumping the glass out. Petitioner would also have to do lifting at shoulder level when she was required to take out titanium tiles in order to position them on the cathode and torque them down. Petitioner testified that she left the position of a Coater Operator in 1997 because the torquing activity was too strenuous.

Petitioner next became a "Coater Processor." This required Petitioner to put varying sizes of sheets of glass in and out of a chamber machine (coater). Petitioner would insert the glass at one end of the machine and then remove it at the other end of the line. Petitioner testified that the glass sheets varied in size from 15 x 20 inches to 84 x 130 inches and weighed from five to ten pounds. Petitioner would also lift the glass into different sized containers. Petitioner testified that she would lift the glass into containers until the containers were full. Depending on the size of the glass and the containers Petitioner could lift up to 2,000 pieces of glass per day over an eight hour workday. Petitioner held this position until 2006 [*11] when the department was shut down.

After the Coater Processing Department was shut down Petitioner bid into the Shipping Department and became a "Stocker/ Zoner." This job required Petitioner to put steel fronts on glass containers in order to secure them and then move the secured racks to the zone. A photograph of the KS racks was introduced at arbitration as Petitioner's Exhibit 3 which illustrates the multicolored KS racks on top of a KS steel or skid. (PX 3)

Petitioner testified that the KS racks are made of steel and are approximately forty to fifty pounds each. There are also KS racks that weight sixty to sixty-five pounds. Petitioner would manually lift the U-shaped KS racks up and set them down in front of the skid using both hands and lift them up to her neck and at shoulder level. Petitioner testified that there were times where she would stack one hundred KS racks a day and other days where she would only stack fifteen. It was all dependent upon how quickly the glass comes off the line. Petitioner also had to lift 1-G arms which were large hook like devices made of steel that were 72 to 80 inches tall and designed to support larger pieces of glass. Petitioner testified [*12] that she would have to lift these and move them eighteen inches and lift them onto a rack which houses larges glass approximately 72 to 84 inches. Petitioner might use the IC arms 160 times during a shift.

In March of 2010, Petitioner was transferred back to the Yard Labor Pool. As before, Petitioner worked in whatever department needed her. Petitioner was responsible for general clean-up, picking up glass with a shovel, and "closing the glass" in the container unit. Petitioner described "closing the glass" as a process where the glass is put on a conveyor belt and bound with stretch wrap. Petitioner would have to tape the glass and band the glass together with a ratchet. Petitioner used her left arm and shoulder to maneuver the steel band and ratchet the glass together. Petitioner testified that she did have to perform lifting in the Yard Labor Pool and it wasn't limited to weights of eleven to twenty-five pounds. There were times when she had to lift up to fifty pounds such as when she worked in the container unit.

Petitioner testified that in March of 2010 she was bumped out of the Stocker position and returned to the Yard Labor Pool. Petitioner shoveled glass and went back and [*13] forth between the shipping department and stocking/zoning departments. After working in the Yard Labor Pool for about two to three weeks she noticed, around March 26, 2010, that her left shoulder was sore and popping. Petitioner noted that she was unable to lift her arm and was in a lot of pain. She testified that she presented to the first aid facility at Respondent. Petitioner testified that she presented to

the first aid facility when she was having problems with her left shoulder and went in during the weeks leading up to her presentation to the Bonutti Clinic. (PX 5)

According to the First Aid notes, Petitioner was seen on March 19, 2010, complaining of left upper arm, shoulder soreness with repetitive movement. Ice was applied and Petitioner returned to work.

Petitioner presented to Dr. Timothy Gray, an orthopedic surgeon, at the Bonutti Clinic on March 22, 2010. Petitioner, who is 5'4" tall, gave a history of left shoulder pain of approximately one month's duration and noted that when she was lifting a pipe she felt it pop. Petitioner reported that she had been lifting at work for years. Petitioner further noted that she was unable to sleep and had pain when reaching behind [*14] her back. Petitioner's physical examination was positive for impingement and weak abduction. There was no AC joint tenderness. X-rays were negative. Dr. Gray diagnosed Petitioner with left shoulder pain and rotator cuff pathology and ordered a MRI to rule out a rotator cuff tear. Petitioner was given medication for pain and inflammation and work restrictions (no pushing, lifting or pulling overhead and no outstretched activity). Petitioner was told to avoid high stress activity. Petitioner's MRI was performed on March 30, 2010, and revealed thickening of the supraspinatus tendon but no rotator cuff tears. Narrowing of the subacromial space as well and a meso os acromiale were noted. (PX 1)

Petitioner returned to Dr. Gray on April 5, 2010, complaining of continued difficulty using her left arm, despite being on restricted duty at work. Medication was helping. Dr. Gray described the MRI as showing impingement and irritation and, possibly, a small os acromiale. Petitioner was given a steroid injection into her left shoulder Petitioner's left arm and advised to continue limited duty, avoid high stress activity, and return in one to two weeks. (PX 1)

Petitioner testified that Respondent [*15] sent her to DMH Corporate Health in April of 2010. According to a DMH Corporate Health Services report dated April 12, 2010, Petitioner reported receiving a shot in her left shoulder because it was "locking up," undergoing a MRI, and returning to see Dr. Gray in one week. Petitioner indicated that when she lifts her arm it causes her shoulder to "catch." While it was still "catching," Petitioner reported it was better. Petitioner was noted to be on restrictions and "shredding paper." Petitioner remained on restricted duty and was told to return as necessary. (PX 7)

As instructed, Petitioner returned to Dr. Gray on April 19, 2010, reporting that her left shoulder was better. The injection had definitely helped and Petitioner was continuing to work with restrictions. She was taking Bayer Back and Body as needed. On physical examination, Petitioner was noted to have mild impingement, no instability, and good motion. Motor was 5/5 and she was considered neurologically intact. Petitioner was advised her restrictions could be lifted after the following week and she could increase her activity as tolerated. Petitioner acknowledged understanding the position that puts extra stress and irritation [*16] on her rotator cuff. She was released to return as needed. (PX 1)

Petitioner was seen in the First Aid Department on April 27, 2010, for a sore left shoulder/arm. She was given ice and returned to work. Petitioner returned again on June 7, 2010, noting both shoulders were sore. She was again given ice. According to the note, the doctor was to be contacted the next day. Petitioner returned again to the First Aid Department on October 1, 2010 and April 12, 2011, for a sore shoulder; however, which shoulder was sore was not noted. (PX 5)

Petitioner was again examined at DMH Corporate Health Services on April 25, 2011. While it appears the visit was primarily focused on right knee complaints, Petitioner's left shoulder pain was also noted and described as "better now." Petitioner had not undergone an evaluation by "Dr. Ivan" but had received an injection from Dr. Gray. Petitioner was noted to have "stiffness" in her left shoulder. She was scheduled for unrelated trigger finger surgery on April 28, 2011. (PX 6)

Petitioner lost no time from work on account of her left shoulder complaints and Respondent accommodated her work restrictions. In the three years prior to arbitration Petitioner [*17] has intermittently worked in the Tank Department uncoupling and coupling rail cars, taking the rail cars inside and releasing their contents, climbing up and down silos, dumping wheelbarrows, and cleaning conveyors. Petitioner testified that she tries not to use her left arm while performing these duties but she does use it. Petitioner also testified that she has started having problems with her right shoulder.

Petitioner testified on cross-examination that she does not recall any prior incidents from childhood to adulthood in which she injured her left shoulder. Petitioner further testified that her shoulder was popping quite a bit and was sore around March 22, 2010. The only activity she performed above shoulder level after returning to the Yard Labor Pool in March of 2010 was when she banded. According to Petitioner, right before she felt a pop in her shoulder she was paint-

ing lines, not lifting a pipe. She testified she was pulling the guard at ground level when she experienced her pain. Petitioner acknowledged she was never prohibited from going to First Aid for care and treatment.

Petitioner presented to Dr. Atluri for an Independent Medical Examination at the request of Respondent [*18] on October 4, 2010. Dr. Atluri later testified by way of evidence deposition on February 9, 2011. When initially seen, Petitioner reported the onset of shoulder symptoms in mid-March of 2010 and attributed her symptoms to repetitive chest-level and overhead use of her left arm at work. Dr. Atluri testified that Petitioner had a positive Hawkins sign on her left shoulder which was a test that identifies signs of impingement. (RX 4 p. 13) Dr. Atluri diagnosed Petitioner with left shoulder chronic impingement syndrome and a left shoulder os acromiale. Dr. Atluri believed Petitioner's left shoulder impingement syndrome had significantly improved after receiving an injection. He was further of the opinion that there was insufficient lifting, pushing, or pulling at or above shoulder level on a routine basis for her condition to be work-related. (RX 4)

Dr. Atluri is a board certified orthopedic surgeon with a certificate of added qualification in hand surgery. Dr. Atluri examined Petitioner on October 4, 2010, and noted that she had tenderness over the AC joint and the biciptal groove in both shoulders. He testified that Petitioner's left shoulder range of motion was a little diminished [*19] and she a little bit of rotator cuff strength weakness in her right shoulder. Petitioner's left shoulder was normal. He testified that Petitioner had a positive Hawkins' test for some impingement, a negative Yergason which is a test looking for labral tears, and a negative apprehension sign on the left, showing no signs of instability. X-rays of Petitioner's left shoulder revealed an os acromiale which Dr. Atluri explained refers to a developmental abnormality involving the acromion, which is part of the shoulder blade at the top of the shoulder.

Dr. Atluri testified that he reviewed Petitioner's treating medical records and her MRI. He testified that he looked at the physical requirement checklist that showed infrequent reaching above shoulder level or at shoulder level, and further indicated lifting of more than 51 to 100 pounds was not done above shoulder level. Dr. Atluri felt Petitioner had left shoulder chronic impingement syndrome and a left shoulder os acromiale. He testified that based upon the history that she provided, his review of the job description, the records of Dr. Gray and his examination of October 4, 2010, he did not did think Petitioner's work activities contributed [*20] to her left shoulder impingement syndrome. Dr. Atluri based his opinion on both the specific diagnosis of impingement syndrome and his understanding of Petitioner's work activities. Dr. Atluri testified that the development of chronic impingement syndrome is, almost always, a chronic degenerative condition. For it to be caused or aggravated by work duties, there needs to be a component of routine or frequent use of the upper extremity at or above shoulder level. He testified that if there is lifting at or above shoulder, it is a little bit more likely to cause it than if it is simply reaching at or above shoulder level which needs to be almost continuous to cause that kind of problem. Dr. Atluri opined that Petitioner's left impingement syndrome was caused by her os acromiale.

Dr. Atluri did not believe Petitioner needed any further care or treatment to her left shoulder as a result of her work activities.

On cross-examination Dr. Atluri testified that he assumed that during the time period Petitioner reported the onset of her symptoms she was doing the type of job reflected on the physical requirements checklist. Dr. Atluri was not provided with any information as to how long Petitioner [*21] had been performing the job reflected on the checklist and that can be an important factor. He further admitted he was not provided with any other physical requirement checklsits of any other jobs Petitioner might have performed while employed by Respondent. Dr. Atluri testified that the only thing he really knew about Petitioner's job for Respondent was that she had worked for the company since 1974. (RX 4)

Dr. Atluri testified that Petitioner was born with her os acromiale. He testified that circumducting activities, like that of a pitcher or truck driver on top of steering wheel, can impinge and cause inflammation. Dr. Atluri agreed that the os acrmiale may be significant in the etiology of an impingement syndrome when usage of one's arm at or above shoulder level is involved or there's shoulder rotation.When asked about whether or not her overhead activities would aggravate or play a part in the os acromiale and impingement syndrome, Dr. Atluri testified "no," indicating that if one is talking about development over a period of years, it is not actually activity dependent at all. Dr. Atluri testified that the most common cause of impingement syndrome in someone with an os acromiale [*22] is called "idiopathetic," which means they just get it, and we don't know for sure why. Sometimes people get it due to hormonal changes or hypertension, neither of which applied to Petitioner. According to the doctor, the majority of people who get impingement syndrome with an os acromiale do not have any other history of risk factors.

On cross-examination, Dr. Atluri testified that if there was evidence to demonstrate that the work Petitioner performed over her years at Respondent required overhead usage of the shoulder level with rotation, it would be fair to say

that such movement might or could be a causative factor in the impingement syndrome with the underlying os acromiale. He testified that picking up a guide board weighing 60 pounds could be the type of activity that could aggravate a pre-existing impingement syndrome, but he would have to have more detail. Dr. Atluri explained that lifting, up to a certain point, wouldn't necessarily be a factor so it must be above shoulder level with the arm twisted. He reaffirmed his opinion on cross-examination that in terms of the guide board you would have to be picking it up over the shoulder (p. 57). When asked about whether or not [*23] lifting a pipe and feeling a pop would be causative, Dr. Atluri testified that when someone with impingement syndrome feels a pop, that pop is not the cause of the impingement syndrome. The pop is caused by the inflammation underneath the acromion. Therefore, people with impingement syndrome often have popping in the shoulder regardless of the position of the arm. The popping is a sign of impingement. Even in Petitioner's case, the pop was a sign of her problem. (RX 4)

Dr. Atluri testified that he had previously reviewed approximately ten cases for the Respondent's counsel in the past seven years. Dr. Atluri never saw an injury report and admitted it might make a difference to him in forming his opinion as to Petitioner's injury. He also testified that viewing a videotape of Petitioner's job would be helpful to him in forming his opinion and that the job attributes sheet he was provided with did not explain how Petitioner performed her job. Dr. Atluri further testified that while it is important to know how long an individual performed a job when determining causation in repetitive trauma cases, he was not provided the length of time Petitioner had performed her job for the Respondent. [*24] He also testified that if he learned that the jobs she had performed required her to do overhead lifting on a regular basis, that information may have modified his opinion because impingement syndrome can be derivative in part of overhead work. (RX 4)

On redirect examination Dr. Atluri testified that in terms of an acute injury, it's important to know the job activities at the time the symptoms occurred as opposed to knowing the job activities over an extended period of time. Dr. Atluri also testified that none of the questions asked by Petitioner's counsel changed his opinion on lack of causal connection. (RX 4)

At arbitration, Respondent called Richard Wright, an employee of Respondent, to testify. Mr. Wright testified that he was aware of Petitioner from her time working in the shipping department. Mr. Wright is a senior engineer at Respondent and explained that his job duties include running the Shipping Department and handling special projects. Mr. Wright testified that he oversees the Shippers and Zoners and described a Zoner's job as putting away stock that is produced from the line. Mr. Wright testified that he was an author of the Physical Requirements Checklist introduced [*25] as Respondent's Exhibit 1. He testified that he disagreed with the requirement of frequent lifting of 51-100 and thought it should be infrequent; however, on cross-examination Mr. Wright testified that he had absolutely no involvement in its preparation because he did not work for Respondent when it was created). Contrary to Petitioner's description of the job she performs, Mr. Wright testified that he believed that over head lifting was infrequent. The Respondent also introduced a Physical Requirements Checklist for the job of shipper which was marked as Respondent's Exhibit 8. Mr. Wright testified on direct examination that he assisted in preparing the document. He testified that he only believes the job requires occasional lifting of eleven to one hundred pounds and no lifting above fifty pounds.

On cross-examination, Mr. Wright testified that he had only worked for Respondent for three and a half years. Mr. Wright worked during his first nine months as a Line Two Engineer and had no involvement with the employment of Petitioner. Mr. Wright testified that when he became head of the Shipping Department he worked in the shipping office at the west end of the plant and spent at least [*26] twenty-five percent of his time in his office. Mr. Wright testified that he only saw Petitioner perform her job two times a week. Mr. Wright testified that during Petitioner's shift, he would only see Petitioner performing her job for five to ten minutes at a maximum or twenty minutes per week. Mr. Wright testified that Petitioner was a hard worker and never refused to do any tasks that she was asked to perform. He also testified that where the Physical Attribute Sheet stated that Petitioner would be required to lift twenty five pounds at least two hours a day and up to five hours per day. Mr. Wright further testified that he would be unable to dispute Petitioner's accounting of lifting gates above shoulder level because he only spent twenty minutes per week watching Petitioner perform her duties and had never witnessed Petitioner picking up the gates. Mr. Wright also testified that he was unable to explain what over the shoulder activities or at shoulder activities Petitioner performed as a part of her job duties even though the physical requirements checklist delineated at least two hours per day of each activity.

Mr. Wright further testified that Petitioner performed the task of [*27] a Shipper, within the Shipping. Department approximately fifty percent of the time. Mr. Wright testified that as a Shipper Petitioner would be required to frequently reach above her shoulders from five to eight hours per day according to Respondent's Exhibit 8, Physical Requirements Checklist of a Shipper. Mr. Wright testified that as a Shipper she would be lifting a sling which each weighed fifteen to

twenty pounds five to eight hours per day. Mr. Wright explained further that the sling required Petitioner to lift and pull at the same time.

Respondent also presented the testimony of another Respondent employee, Mr. Scott Engmann. Mr. Engmann testified that he has worked for Respondent for four years and is the Glass Products Manager. Mr. Engmann's duties as Glass Products Manager included overseeing the Labor Yard. Mr. Engmann testified that he was involved in reviewing Respondent's Exhibit 9, which he described as an accurate depiction of the jobs in the Yard Pool. He testified that the duties in the Container Processor unit would include reaching at or above shoulder level for two to five hours a day. He described the jobs in the Labor Yard as including shoveling broken glass, [*28] picking up cardboard and working with paint brushes and painting.

On cross-examination, Mr. Engmann testified that he has never been Petitioner's immediate supervisor and has probably seen her perform her job but has no independent recollection of it. He also testified that as a part of her job duties in the Container Processing Department when banding glass together, Petitioner would have been required to use both arms to pull the bands tight and to use a ratchet to tighten the straps. He also testified that he would not be surprised if Petitioner had a difficult time using ratchets because it could be a tough job. He also noted that the shovels of glass that the Labor Pool workers would have to shovel would be ten to fifteen pounds.

Respondent submitted several Physical Requirements Checklists into evidence (RX 7,8,9 and Atluri Dep. Ex. 3) All indicate Petitioner was required to reach above her shoulders and at/below shoulders.

Petitioner's medical bills are found in PX 2. Petitioner's claim was denied by workers' compensation. (PX 1) Some of Petitioner's bills have been paid by Blue Cross.

The Arbitrator concludes:

> 1. Petitioner sustained an accident on March 26, 2010, that [*29] arose out of and in the course of her employment with Respondent and Petitioner's current condition of ill-being in her left shoulder is causally connected to that accident. This is based upon a chain of events. Petitioner had no problems with her left shoulder before going to work for Respondent. While Petitioner denied sustaining any specific injuries to her left shoulder while working for Respondent she credibly testified to the development of a painful left shoulder over time which, ultimately, led to her experiencing a painful popping in her left shoulder on March 26, 2010. Her injury manifested itself on March 26, 2010, when she felt a pop in her shoulder. Thereafter, she sought medical treatment and attributed her problems to her work.
>
> Respondent's witnesses did not undermine Petitioner's testimony as to how she performed her jobs. The Arbitrator is not persuaded by the testimony and opinions of Dr. Atluri as his opinions were based upon his misunderstanding of Petitioner's work duties. He had no knowledge as to the many jobs Petitioner performed for Respondent over the years and only reviewed one physical requirements checklist. The "pop," as acknowledged by Dr. Atluri, was [*30] a manifestation of her impingement syndrome and thereafter Petitioner reasonably sought medical treatment for it. Petitioner sustained a repetitive trauma injury to her left shoulder causally related to her work for Respondent.
>
> 2. Petitioner is awarded medical bills in the amount of $ 3,777.00 (PX 2). Respondent's objection was based upon liability. The parties agreed there was no 8(j) credit.
>
> 3. Petitioner is permanently partially disabled to the extent of 7.5% loss of use of the left arm. Petitioner was treated for impingement syndrome. She underwent one injection with good result. It is her non-dominant arm. She was released with no restrictions and has continued to work for Respondent.
>
> 4. Petitioner's claim is not barred by the Statute of Limitations. Respondent raised the Statute of Limitations as a defense during the hearing. When counsel for Petitioner questioned Petitioner about her work duties for Respondent from 1979 to the present, Respondent objected citing the Statute of Limitations and arguing that any work activities Petitioner engaged in more than three years before the alleged date of accident were beyond the State of Limitations and should not be considered in [*31] addressing liability. In support thereof, Respondent's counsel cited the Act's three-year statute of limitations.

Section 6(d) of The Workers Compensation Act provides that a case must be filed "within 3 years after the date of the accident." *820 ILCS 305/6*(d) (West 2004). The purpose behind the Statute of Limitations is to provide a deadline for the filing of a claim in relationship to a particular accident. However, "when the accident is a discrete event, the date of the accident is easy to determine: it is, obviously, the date that the employee was injured. When the accident is not a discrete event, this date is harder to specify. An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury" See *Durand v. Industrial Comm'n, 224 Ill.2d 53, 862 N.E.2d 918 (2006)* citing *AC & S v. Industrial Comm'n, 304 Ill.App.3d 875, 879, 238 Ill.Dec. 40, 710 N.E.2d 837 (1999); Nunn v. Industrial Comm'n, 157 Ill.App.3d 470, 480, 109 Ill.Dec. 634, 510 N.E.2d 502 (1987).*

[*32] In cases of repetitive trauma, the date of an accidental injury is the date on which the injury manifests itself, meaning the date on which both the fact of the injury and the casual relationship of injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n, 115 Ill.2d 524, 106 Ill.Dec. 235,* N.E.2d 1026 (1987). Contrary to the Respondent's position that the Statute of Limitations bars testimony or information regarding Petitioner's job duties for a period not to exceed three years from the manifestation date, case law clearly indicates that the past work history of an employee should be considered. In *General Electric Company v. Industrial Comm'n, 190 Ill.App.3d 847, 546 N.E.2d 987 (1989),* an employee of General Electric of twenty- six years filed a claim for repetitive trauma injuries including impingement syndrome of the right shoulder. *Id. at 851.* The testimony in evidence included work history describing her job sodering wires and pulling down [*33] ballasts with her arms over a twenty six year period. *Id. at 849.* Ultimately, the Appellate Court reversed the Industrial Commission and awarded Petitioner benefits in this case finding her conditions were aggravated by her work for the Respondent. *Id. at 854.* The Appellate Court relied on *Peoria County v. Industrial Comm'n,* in part explaining that "to deny an employee benefits for a work-related injury that is not the result of a sudden mishap or completely disabling penalizes an employee who faithfully performs job duties despite bodily discomfort and injury." *Id. at 857.* Similarly, Petitioner in this case is entitled to discuss the work duties she has had for thirty-five years which have resulted in her current condition of ill-being.

In *Oscar Mayer & Company v. The Industrial Comm'n, 176 Ill.App.3d 607, 531 N.E.2d 174,* the Appellate Court held that a claimant's last day of work at a hog slaughtering facility was the date of accident in a repetitive trauma case. The evidence before the [*34] court in this case explained that the claimant worked at a hog slaughtering facility for fifteen years and "[e]ach of his duties required arm, shoulder, and hand movements." *Id.* at 175. The facts of the case included past work duties about the claimant including the duties performed, the hours per day and week and held that repetitive trauma injuries "by their very nature... may take years to develop to a point of severity precluding the employee from performing in the workplace" *Id.* at 610. As such, it is imperative that an employee, such as Petitioner herein, be allowed to explain and present evidence of the job duties performed over the course of her employment which she believes were causative of her condition of ill-being at the time the injury manifests itself. Petitioner's Application for Adjustment of Claim was timely filed. Petitioner's counsel objected to the propriety of raising the Statute of Limitations defense after the arbitration hearing had begun. Petitioner's objection is overruled.

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Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

Illinois Official Reports

Appellate Court

***Farris v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130767WC**

Appellate Court Caption	DANNY FARRIS, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Phoenix Corp. of the Quad Cities, Appellee).
District & No.	Fourth District Docket No. 4-13-0767WC
Filed	October 28, 2014
Rehearing denied	November 26, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	In the matter of a workers' compensation claim for the injuries claimant suffered in an alleged unwitnessed accident that occurred while he was moving and placing large rip rap rocks along an embankment, the decision of the Illinois Workers' Compensation Commission that the claimant met his burden of proving that he sustained accidental injuries arising out of and in the course of his employment was affirmed by the appellate court, the trial court's decision that the Commission's decision was against the manifest weight of the evidence was reversed and the cause was remanded for further proceedings, since, in the absence of a record containing the claimant's testimony, the Commission would be presumed to have properly assessed the claimant's credibility, and any doubts arising from the incomplete record would be resolved in favor of the Commission's findings.
Decision Under Review	Appeal from the Circuit Court of Sangamon County, No. 12-MR-21; the Hon. John P. Schmidt, Judge, presiding.
Judgment	Circuit court reversed; Commission's decision reinstated; cause remanded.

Counsel on Appeal

M. Michael Waters (argued), of Vonachen, Lawless, Trager & Slevin, of Peoria, for appellant.

Matthew J. Daley (argued), of Odelson & Sterk, Ltd., of Evergreen Park, for appellee.

Panel

JUSTICE STEWART delivered the judgment of the court, with opinion.
Presiding Justices Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Danny Farris, worked for the employer, Phoenix Corp. of the Quad Cities, as a union laborer. The claimant maintained that on April 26, 2005, he was involved in a workplace accident as he was moving and placing large rip rap rocks along an embankment. He filed a claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)). No one witnessed the accident, and the employer disputed the claimant's assertion that the accident occurred. In October 2005, the matter proceeded to an expedited hearing before the arbitrator pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2004)).

¶ 2 The contested issue of whether a compensable accident occurred has generated a significant amount of procedural history beginning with the October 2005 expedited hearing and leading up to the present appeal. At the conclusion of the expedited hearing in October 2005, the arbitrator found that the claimant was not credible and did not sustain his burden of proving the accident. In April 2007, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. In January 2009, the circuit court reversed the Commission's decision and remanded the claim for further proceedings. The circuit court reversed the Commission for two reasons: (1) the Commission improperly considered impeachment testimony as substantive evidence and (2) the Commission improperly denied the claimant's request to reopen the proofs to submit a report of a CT myelogram that became available after the close of the proofs. Upon reversal, the Commission vacated the arbitrator's decision and remanded the claim to the arbitrator for further hearings consistent with the circuit court's directives.

¶ 3 On July 14, 2010, the arbitrator reconsidered the record in light of the new CT myelogram report and consistent with the circuit court's directions concerning the impeachment evidence. The arbitrator again denied the claimant benefits, finding that the claimant was not credible and failed to prove that a workplace accident occurred. The claimant again appealed the arbitrator's decision to the Commission. On June 27, 2011, the Commission reversed the arbitrator's decision, finding that the claimant was credible and proved that he sustained a workplace accident. The Commission stated that the claimant "met his burden of proving he

sustained accidental injuries arising out of and in the course of his employment with [the employer] on April 26, 2005." The Commission's decision was based on its assessment of the claimant's testimony as well as his medical records and reports, including the newly admitted CT myelogram report. One commissioner dissented because she agreed with the arbitrator's decision.

¶ 4 The employer appealed the Commission's decision to the circuit court. On August 13, 2013, the circuit court found that the Commission's decision was against the manifest weight of the evidence and entered a judgment reversing the Commission's decision. Specifically, the circuit court stated that it reviewed the record and the Commission's decision and agreed with the dissenting commissioner. The court, therefore, concluded that the ruling of the arbitrator "is to stand." This appeal ensued.

¶ 5 BACKGROUND

¶ 6 The central, disputed factual issue that the parties have litigated since October 2005 is whether the claimant was involved in a workplace accident. In the present appeal, the claimant argues that the Commission's finding that a workplace accident occurred was not against the manifest weight of the evidence; therefore, the circuit court improperly reversed its decision.

¶ 7 Our ability to review the merits of the Commission's decision in the present case is hampered by an incomplete record. The record consists of six volumes. Volumes I and II contain the exhibits that were admitted at the first expedited section 19(b) hearing held in October 2005, but do not include transcripts of the testimony of any of the witnesses who testified at that hearing. Volumes III and IV consist of duplicate copies of the exhibits included in volumes I and II. Volumes V and VI contain a third copy of most of the exhibits contained in volumes I and II. Volume VI also includes a complete copy of the transcript of the second hearing before the arbitrator and the pleadings filed in the circuit court proceedings.

¶ 8 As noted above, the Commission based its findings on its assessment of the claimant's testimony in light of the medical records. The record before us, however, does not include any of the testimony that the Commission considered in making its findings. The initial expedited section 19(b) hearing that took place in October 2005 is the only hearing during which witnesses testified. However, the record on appeal does not include any transcripts of the witnesses' testimony.

¶ 9 The claimant's separate appendix that he filed with his brief on appeal purports to include a complete record of the October 25, 2005, expedited arbitration hearing, including the transcripts of the witnesses' testimony. In their briefs, both parties have cited the transcripts contained in the claimant's appendix in support of their respective arguments. The parties, however, have not filed a stipulation pursuant to Illinois Supreme Court Rule 329 to supplement the record with the transcripts or otherwise moved to supplement the record on appeal with the transcripts. Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). During oral argument, this court gave the parties an opportunity to stipulate to the inclusion of the claimant's appendix in the record on appeal, but the parties declined to do so.

¶ 10 It is well settled that the record on appeal cannot be supplemented by attaching documents to a brief or including them in a separate appendix. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826, 748 N.E.2d 291, 294 (2001); *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679, 734 N.E.2d 144, 149-50 (2000); *Pikovsky v. 8440-8460 North Skokie*

Boulevard Condominium Ass'n, 2011 IL App (1st) 103742, ¶ 16, 964 N.E.2d 124 ("a reviewing court will not supplement the record on appeal with the documents attached to the appellant's brief on appeal as an appendix, where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the material").

¶ 11 The following background information is gleaned from the record on appeal without consideration of the transcripts contained within the claimant's appendix.

¶ 12 The initial expedited section 19(b) hearing took place on October 12, 2005. After the close of the proofs and before the arbitrator rendered his decision, the claimant filed a motion to reopen the proofs in order to submit a CT myelogram report that was ordered by the employer's independent medical examiner prior to the arbitration. The CT myelogram took place on October 4, 2005, and a report of the myelogram was prepared that same day. The report, however, was not made available to the claimant until after the close of the proofs.

¶ 13 On November 29, 2005, the arbitrator denied the claimant's motion to reopen the proofs and rendered his decision finding that the claimant failed to prove that he sustained an accidental injury arising out of and in the course of his employment.

¶ 14 With respect to the central issue of whether the claimant was involved with a workplace accident, the arbitrator stated that he considered the claimant's testimony as well as the testimony of the claimant's cousin, George Farris, who was working with the claimant on the day of the alleged accident. The arbitrator also stated that he considered all of the medical records and reports submitted by the parties.

¶ 15 The arbitrator's decision states that on the day of the incident, the claimant was laying rip rap rocks on 45-degree slopes underneath a bridge overpass. The rocks weighed as little as 20 pounds and as much as 300 pounds. The arbitrator noted that the claimant maintained that he fell while pulling and moving the rip rap rocks, but no one saw the fall. According to the arbitrator, the claimant testified that he landed on his right hip, knee, and shoulder, injuring his low back. The arbitrator wrote that the claimant testified that he did not land on his back, but admitted that he told an agent of the employer that he landed on his back.

¶ 16 According to the arbitrator, the claimant testified that he crawled up the slope in pain and called out for help. After reporting the incident to his foreman, he left work and drove his cousin home approximately 35 miles from the jobsite. The claimant's girlfriend took him to the hospital later that evening where he received injections and was sent home. The records from the hospital visit are included in the record on appeal. The records state that the claimant "threw a rock, lost his footing, twisted & fell." X-rays of the claimant's back did not reveal any abnormalities.

¶ 17 In discussing the emergency room records, the arbitrator noted that although the claimant testified that he fell on the rocky slope, the records from the hospital visit do not note any contusion, abrasion, laceration, bruising, or swelling. According to the arbitrator, there was "no evidence of any traumatic injury, anywhere on [the claimant's] body." The arbitrator found that the lack of evidence of any traumatic injury was "unlikely for a person who claims to have fallen several feet down a 45-degree slope, landing on his back, hip, knee and shoulder on rocky terrain."

¶ 18 The claimant's medical records contained within the record on appeal show that he saw his family doctor, Dr. Shaina Schiwitz, the following day on April 27, 2005. The arbitrator

highlighted Dr. Schiwitz's handwritten notes of this examination in which the doctor wrote, "Severe sudden onset pain & spasm [after] lifting heavy rocks." The arbitrator found that this history was inconsistent with the claimant's testimony because his testimony at the hearing was that his fall precipitated his pain, not lifting the rocks.

¶ 19 The medical records contained in the record on appeal show that in June 2005 the claimant saw a neurologist, Dr. Joshua Warach, who conducted EMG/NCV testing. Again, the arbitrator focused on that portion of Dr. Warach's report in which he described the claimant's history and compared Dr. Warach's history with the claimant's testimony. Dr. Warach's report stated that the claimant "was hit by a rolling rock on his right shin, abruptly twisted and fell onto the ground, landing on his low back" and that "he has experienced acute onset of severe sharp pain in the low back at the time of this injury." The arbitrator found that this history was inconsistent with the claimant's testimony because the claimant did not testify that he landed on his low back.

¶ 20 The claimant treated with a chiropractor, Dr. Douglas Reese, beginning in June 2005. Dr. Reese's medical records include a history of rip rap rocks rolling down an embankment, hitting the claimant's ankles, and knocking his legs out from under him. The claimant attempted to twist to the right so that he could catch himself, and he fell four feet. The arbitrator again found that this history was inconsistent with the claimant's testimony because, at the hearing, the claimant testified that he twisted to the left, not the right.

¶ 21 On September 22, 2005, at the request of the employer, the claimant submitted to an independent medical evaluation conducted by Dr. Robert Gordon. Dr. Gordon's report is included in the record on appeal. Dr. Gordon wrote in his report that the claimant gave a history that included being "hit in his feet/bilateral lower legs" as a result of two rocks rolling down the embankment as he was walking up the embankment carrying a 50-pound rock. When the rocks hit his lower extremities, he threw the rock he was carrying "in such a fashion that he twisted to his right while he was throwing the rock." Dr. Gordon reported that the claimant "ended up falling on to his right shoulder, right flank, and back in this incident."

¶ 22 Dr. Gordon opined that if the claimant was telling the truth about the accident, then he likely suffered a lumbar strain, superimposed on preexisting degenerative changes. The arbitrator noted, however, that Dr. Gordon referenced inconsistencies in the claimant's histories given to various medical providers. The arbitrator also noted that Dr. Gordon referenced inconsistencies between the claimant's claim of bilateral lower extremity radicular symptoms and the lack of diagnostic evidence of neural involvement. In his report, Dr. Gordon recommended that the claimant return to light duty work, continue with anti-inflammatory medication, and obtain the CT myelogram that was the subject matter of the claimant's motion to reopen the proofs. Dr. Gordon explained that the purpose of the CT myelogram was to "further assess for nerve root impingement at this time."

¶ 23 The arbitrator assessed inconsistencies within the claimant's testimony at the hearing, separate and apart from the medical records, as follows:

> "On the one hand, [the claimant] testified that, when he saw the two larger rocks rolling down the slope, he responded by turning to the left to get the 75-100 pound rock he was holding out of the way. On the other hand, he claimed the two rocks rolled only 5 or 6 inches before striking him. The Arbitrator finds it highly unlikely that both could be true, calling into question [the claimant's] credibility. If there were no other evidence casting doubt on [the claimant's] credibility, this doubtful testimony might

seem insignificant, but taking into consideration the evidence as a whole, it seems unlikely [the claimant] is telling the truth."

¶ 24 Again, as noted above, the record does not include a transcript of the claimant's testimony.

¶ 25 In further analysis of the claimant's credibility, the arbitrator found that the inconsistent histories that the claimant gave to various medical providers were significant. The arbitrator, however, believed that, "by far, the most damaging evidence against [the claimant] was the testimony of his own cousin, George Farris." A transcript of George's testimony is not included in the record.

¶ 26 George worked with the claimant on the day of the accident. According to the arbitrator, at the trial, George was asked about a conversation he had with the claimant just prior to the unwitnessed accident, and he testified that he could not recall the substance of the conversation. George admitted, however, that he gave detailed telephonic statements about the conversation to the employer's insurance adjuster, Sandra Herwig.

¶ 27 The arbitrator admitted the transcripts of George's statements to Herwig into evidence, and these transcripts are included in the record on appeal. The transcripts indicate that George told Herwig that shortly before the accident occurred, the claimant told him that he was going to fake an accident. George told Herwig that the claimant had a $23,000 balloon payment coming due for his farm and told him that he was going to fall in order to have the employer pay for the balloon payment.

¶ 28 According to the arbitrator, at the trial, the claimant denied making these statements to George and denied faking the accident. The arbitrator, however, concluded that the statements George made to Herwig were more likely true than not because "[George] had no apparent motive or incentive to lie, and in fact had a motive to be truthful in disclosing his cousin's attempted fraud; namely, to keep his job." The arbitrator found that the claimant failed to prove that he suffered a compensable accident and denied all of the compensation sought by the claimant.

¶ 29 The claimant appealed the arbitrator's decision to the Commission. The record on appeal does not include a copy of the Commission's decision on appeal, although a copy of the decision is included in the claimant's separate appendix. Other documents that are in the record, including a subsequent decision by the Commission, state that on November 13, 2007, the Commission affirmed and adopted the arbitrator's decision. The claimant then appealed the Commission's decision to the circuit court.

¶ 30 Again, the record on appeal does not include the circuit court's order on review. Other documents in the record indicate that the circuit court reversed the Commission on January 30, 2009, and remanded the proceeding to the Commission. Specifically, the Commission's order on remand from the circuit court, which is included in the record on appeal, quoted the circuit court's order as follows:

"1. This matter is remanded to the Workers' Compensation Commission for further proceedings.

2. On further hearing, the Workers' Compensation Commission:

a. Shall not substantively consider any evidence of prior inconsistent statements of George Farris, which purportedly relate to statements concerning [the claimant's] intent to stage an accident, but the [employer] may submit the transcript of George's statement for possible impeachment.

b. Shall allow the [claimant] to submit into evidence the radiology Reports of the MR myelogram performed on October 4, 2005, which were the subject of [the claimant's] Motion to Reopen Proofs.

c. Shall render a decision in the matter consistent with this Order."[1]

¶ 31 On March 2, 2010, pursuant to the circuit court's order, the Commission vacated the arbitrator's previous decision and remanded the matter to the arbitrator for further proceedings consistent with the circuit court's order.

¶ 32 On July 14, 2010, the arbitrator conducted a hearing on remand. The transcript for that hearing is included in the record on appeal. At that hearing, the arbitrator admitted the CT myelogram report into evidence and admitted the transcript of George's inconsistent statement to Herwig for the limited purpose of impeaching his in-court testimony. The arbitrator did not hear testimony from any witnesses on July 14, 2010.

¶ 33 On August 19, 2010, the arbitrator entered a decision after reconsidering the evidence in light of the circuit court's order. The arbitrator once again found that the claimant failed to prove that he was involved in a workplace accident. The arbitrator again emphasized inconsistencies in histories that the claimant gave to various medical providers as well as inconsistencies within his testimony. The arbitrator noted that his histories were inconsistent concerning whether he twisted his back to the left or to the right and whether he did or did not land on his back. The arbitrator concluded, "In short, [the claimant's] testimony as to accident, when compared to histories contained in the records, simply did not have the ring of truth to it." The arbitrator concluded that "the credibility of the [claimant was] the key to the determination of whether the unwitnessed work accident actually occurred. The inconsistencies of the [claimant's] testimony and the inconsistencies contained within the medical records leads to a finding that [the claimant] is not credible."

¶ 34 With respect to the newly admitted CT myelogram report, the arbitrator concluded that it lacked "any probative value on the issue of accident and causation as no opinions have been offered to explain differences with early diagnostic test results and the potential worsening of [the claimant's] condition months after the accident in question."

¶ 35 The claimant appealed the arbitrator's decision to the Commission, and on June 27, 2011, the Commission reversed the arbitrator's decision, finding that the claimant met his burden of proving that he sustained a workplace accident. The Commission found that the "medical records, while not precisely echoing [the claimant]'s testimony, in general support a work-related accident." The Commission found it significant that an EMG/NCV performed on June 2, 2005, showed evidence of "a right L5, S1 radiculopathy, electrophysiologically subacute." The Commission believed that the newly admitted CT myelogram report was too far removed from the accident to show acute postaccident findings, but the report was "consistent with the EMG/NCV insofar as it shows foraminal impingement at L5-S1." The Commission awarded the claimant temporary total disability benefits and medical expenses and remanded the claim to the arbitrator for further proceedings.

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[1]We note that the employer could have challenged the circuit court's initial reversal of the Commission in this appeal, but failed to do so. *Pace Bus Co. v. Industrial Comm'n*, 337 Ill. App. 3d 1066, 1069, 787 N.E.2d 234, 236-37 (2003). Therefore, the employer has waived any claim that the circuit court's initial reversal order was erroneously entered.

¶ 36 One commissioner dissented. The dissenting commissioner wrote that she "wholeheartedly agree[d] with the Arbitrator's assessment of [the claimant's] credibility." The dissenting commissioner noted inconsistencies between the accounts of the accident in the medical records and the claimant's testimony. The dissenting commissioner also believed that the presence of a subacute L5-S1 radiculopathy revealed in the June 2, 2005, EMG/NCV did not prove an accident occurred on April 26, 2005. The dissent also took issue with the Commission's temporary total disability award.

¶ 37 The employer appealed the Commission's decision to the circuit court. The employer filed its request for summons in the circuit court of Rock Island County. The Rock Island County circuit court issued the summonses that were served on the claimant and the Commission. The claimant moved to dismiss the review proceeding for lack of subject matter jurisdiction and advanced two arguments in support of his motion: (1) that the employer failed to name the Commission as a party in the caption of its request for summons, and (2) that because the claimant was a resident of Sangamon County, not Rock Island County, the Rock Island County circuit court did not have subject matter jurisdiction.

¶ 38 The circuit court denied the claimant's motion to dismiss, holding that the failure to include the Commission in the caption of the request for summons was a scrivener's error. The body of the request properly named the Commission as a party in interest. The court further held that the proper venue for the proceeding was Sangamon County, not Rock Island County. Therefore, the court transferred the case to the circuit court in Sangamon County.

¶ 39 On August 13, 2013, after reviewing the record and the Commission's decision, the circuit court of Sangamon County entered a docket entry finding "that the decision of the Illinois Commission is against the Manifest Weight of the Evidence." The circuit court wrote that it agreed with the dissenting commissioner, that the "ruling of the Commission is reversed," and that the arbitrator's decision "is to stand." The claimant now appeals the circuit court's judgment.

¶ 40 DISCUSSION

¶ 41 I.

¶ 42 Subject Matter Jurisdiction of the Circuit Court of Sangamon County

¶ 43 The first issue the claimant raises on appeal is that the circuit court did not have jurisdiction to review the Commission's decision because (a) the employer's request for summons did not name the Commission as a party in its caption and (b) because the circuit court in Rock Island County issued the summonses when it lacked subject matter jurisdiction. We disagree with the claimant's analysis and hold that the circuit court had jurisdiction.

¶ 44 a.

¶ 45 Caption of the Employer's Request for Summons

¶ 46 The claimant correctly asserts that Illinois courts have held that the Administrative Review Law (735 ILCS 5/301 *et seq.* (West 2010)) requires, as a jurisdictional prerequisite, that an administrative agency be named in the caption of a complaint for administrative review. *Bettis v. Marsaglia*, 2013 IL App (4th) 130145, ¶ 19, 2 N.E.3d 344. The Administrative Review Law, however, does not establish the requirements for invoking a circuit court's jurisdiction to review a decision of the Commission under the Act. "The Act clearly does not adopt the

Administrative Review Law." *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 324 Ill. App. 3d 961, 966, 755 N.E.2d 98, 102 (2001). Instead, the jurisdictional requirements are set out in section 19(f) of the Act. The interpretation of section 19(f) is a question of law to be reviewed *de novo*. *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 26, 981 N.E.2d 14.

¶ 47 "[O]n appeal from a decision of the Commission, the circuit court obtains subject matter jurisdiction only if the appellant complies with the statutorily prescribed conditions set forth in the Act." *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502, 879 N.E.2d 439, 442 (2007). Section 19(f) of the Act sets out the procedure for an appellant to file a request for summons and states that the circuit court "shall by summons to the Commission have power to review all questions of law and fact presented by such record." 820 ILCS 305/19(f)(1) (West 2010).

¶ 48 In the present case, the employer's request for summons did not include the Commission in the caption of the pleading. However, it is undisputed that the employer timely filed the request for summons with the circuit court, named the Commission as a party in interest in the body of the pleading, and listed its address and its attorney of record in the body of the pleading. The request for summons, therefore, complied with section 19(f)(1)'s requirement that the request contain the last known address of all parties in interest and their attorneys of record. 820 ILCS 305/19(f)(1) (West 2010). There is no jurisdictional requirement contained within the language of section 19(f) concerning the content of the caption for the request of summons.

¶ 49 It is further undisputed that the circuit court issued a summons to the Commission and that the employer timely served the summons on the Commission by certified mail. In addition, the employer filed the bond required by section 19(f)(2) on the same day as the request for summons, and it named the Commission as a respondent in the bond's caption. 820 ILCS 305/19(f)(2) (West 2010).

¶ 50 We agree with the circuit court that the employer's failure to name the Commission in the caption of the request for summons was merely a scrivener's error or clerical error that did not deprive the circuit court of subject matter jurisdiction because the employer properly named the Commission as a party in interest, listed its address and attorney of record in the body of the request, and timely served the summons. See, *e.g.*, *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 31, 976 N.E.2d 1 ("The claimant has cited no case (nor have we found any) suggesting that a clerical error in a timely and otherwise properly drafted petition for review strips the Commission of jurisdiction to hear the petition, particularly where, as here, the petition adequately notifies the opposing party and the Commission regarding which case is being appealed.").

¶ 51 The employer in the present case complied with all of the substantive requirements of section 19(f), and the clerical error in the caption of its request for summons did not deprive the circuit court of subject matter jurisdiction. See *Chambers v. Industrial Comm'n*, 213 Ill. App. 3d 1, 5, 571 N.E.2d 1001, 1004 (1991) (the claimant's "written request for summons substantially complied with the requirements of section 19(f)(1)"); *Forest Preserve District v. Industrial Comm'n*, 305 Ill. App. 3d 657, 662, 712 N.E.2d 856, 859 (1999) (employer's failure to include workers' compensation claimant's last known address in a request to issue summons did not deprive the circuit court of subject matter jurisdiction).

¶ 52 b.

¶ 53 Subject Matter Jurisdiction/Venue

¶ 54 Next, the claimant argues that the circuit court lacked jurisdiction to review the Commission's decision because the employer initially filed the request for summons in a county lacking subject matter jurisdiction. The employer filed the request for summons in the circuit court of Rock Island County. The claimant argued that the Rock Island County circuit court lacked subject matter jurisdiction because, at the time the employer filed the proceeding, the claimant resided in Sangamon County and had never worked in Rock Island County. The claimant moved to dismiss the review proceeding, but the Rock Island County circuit court transferred the case to Sangamon County instead of dismissing the case. The circuit court ruled correctly in transferring the case to Sangamon County.

¶ 55 Section 19(f) of the Act provides as follows: "[T]he Circuit Court of the county where any of the parties defendant may be found, or if none of the parties defendant can be found in this state then the Circuit Court of the county where the accident occurred, shall by summons to the Commission have power to review all questions of law and fact presented by such record." 820 ILCS 305/19(f)(1) (West 2010).

¶ 56 Rock Island County was not the county where the claimant could be found because he resided in Sangamon County. Therefore, we agree with the claimant that the employer should have filed the request for summons in the circuit court in Sangamon County. However, we believe that the circuit court properly transferred the case to Sangamon County.

¶ 57 In *Central Illinois Public Service Co. v. Industrial Comm'n*, 293 Ill. 62, 67, 127 N.E. 80, 81 (1920), the court noted that the Act provided for a review of a decision of the Commission in "[t]he circuit court of the county where any of the parties defendant may be found." (Internal quotation marks omitted.) The employer in that case sought a review of the Commission's decision in the circuit court of Coles County. *Id.* at 64, 127 N.E. at 80. The supreme court held that, under the facts of that case, the only court that had jurisdiction was the circuit court of Champaign County and that the circuit court of Coles County did not have subject matter jurisdiction. *Id.* at 67-68, 127 N.E. at 82.

¶ 58 The supreme court, however, quoted section 1 of "An Act in relation to the practice in the courts of record in this State" (Venue Act) as follows: " 'wherever any suit or proceeding shall hereafter be commenced, in any court of record of this State, and it shall appear to the court where the same is pending that the same has been commenced in the wrong court or county, *** the court shall change the venue of such suit or proceeding to the proper court or county.' " *Id.* at 68, 127 N.E. at 82 (quoting Ill. Rev. Stat. 1917, ch. 146, ¶ 36). The supreme court concluded that the legislature intended for the Venue Act to grant circuit courts the power to change the venue of each suit or proceeding to the proper court or county, including "those cases begun in courts not having jurisdiction of the subject matter." *Id.* at 68-69, 127 N.E. at 82. The supreme court, therefore, held that the circuit court in Coles County could not enter any orders affecting the rights of the parties under the Commission's award, but that the Venue Act empowered the court to "transfer the cause to the proper county, which in this case was Champaign county." *Id.* at 69, 127 N.E. at 82. The court concluded that the circuit court in Coles County properly transferred the proceedings to the circuit court of Champaign County. *Id.* at 69-70, 127 N.E. at 82.

¶ 59 Subsequent to the *Central Illinois Public Service Co.* decision, in 1955, the legislature repealed the Venue Act. *Ferndale Heights Utility Co. v. Illinois Commerce Comm'n*, 112 Ill.

App. 3d 175, 179, 445 N.E.2d 334, 338 (1982). The legislature replaced the Venue Act with section 10(2) of the Civil Practice Act (Ill. Rev. Stat. 1955, ch. 110, ¶ 10(2)), which expressly codified the concepts of venue and jurisdiction that were outlined by the supreme court in *Central Illinois Public Service Co. Ferndale Heights Utility Co.*, 112 Ill. App. 3d at 179, 445 N.E.2d at 338. The legislature subsequently eliminated the language of section 10(2) of the Civil Practice Act in 1976 (Pub. Act 79-1366, § 16 (eff. Aug. 6, 1976)), but this "deletion was not intended to change the substantive law but was merely a recognition of the fact that the courts of our State are now uniformly courts of general jurisdiction." *Ferndale Heights Utility Co.*, 112 Ill. App. 3d at 179-80, 445 N.E.2d at 338.

¶ 60 Currently, section 2-619(a)(1) of the Illinois Code of Civil Procedure provides for the dismissal of a cause of action for a lack of subject matter jurisdiction, but only if "the defect cannot be removed by a transfer of the case to a court having jurisdiction." 735 ILCS 5/2-619(a)(1) (West 2010). Section 2-104 of the Code of Civil Procedure also provides that no action shall "be dismissed because commenced in the wrong venue if there is a proper venue to which the cause may be transferred" and provides the procedure for filing a motion to transfer venue. 735 ILCS 5/2-104(a) (West 2010).

¶ 61 Although the Code of Civil Procedure generally does not apply to workers' compensation proceedings, "where the Act or Commission rules do not regulate a topic, civil provisions have been applied to workers' compensation actions." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 154, 731 N.E.2d 795, 800 (2000). See also *Wal-Mart Stores, Inc.*, 324 Ill. App. 3d at 965, 755 N.E.2d at 101 (applying section 2-619(a)(1) of the Code of Civil Procedure for the dismissal of a judicial review action that lacked jurisdiction).

¶ 62 Accordingly, we believe that the supreme court's holding in *Central Illinois Public Service Co.* is still applicable under the current statutory scheme of the Act. When a workers' compensation appeal is mistakenly filed in the wrong county, nothing in section 19(f) of the Act prohibits a circuit court from transferring the case to the proper county. Therefore, we hold that the circuit court of Rock Island County correctly transferred the employer's appeal to the circuit court of Sangamon County rather than dismissing the employer's appeal for a lack of subject matter jurisdiction.

¶ 63 The claimant's argument that the circuit court lacked jurisdiction has no merit.

¶ 64 II.

¶ 65 The Commission's Finding That a Compensable Accident Occurred

¶ 66 Having determined that the circuit court had jurisdiction to consider the employer's appeal, we next turn to the claimant's argument that the circuit court improperly reversed the Commission's finding that a compensable accident occurred. As noted above, the Commission found in favor of the claimant on the central, disputed issue of fact of whether a compensable accident occurred and based its decision largely on its assessment of the claimant's credibility.

¶ 67 Initially, we note that the employer argues that the arbitrator was in the best position to determine the claimant's credibility. This is not the law. The Commission is the finder of fact, and it is the Commission that we owe deference on factual issues. *Edward Gray Corp. v. Industrial Comm'n*, 316 Ill. App. 3d 1217, 1222, 738 N.E.2d 139, 143 (2000). "[O]ur supreme court has consistently held that when the Commission reviews an arbitrator's decision, it

exercises original, not appellate, jurisdiction and that the Commission is not bound by the arbitrator's findings." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 483 (2009). Accordingly, we reject the employer's request that we give deference to the arbitrator's decision, rather than the Commission's decision.

¶ 68 Whether the claimant suffered from a compensable accident is a question of fact to be determined by the Commission. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26, 993 N.E.2d 473. The Commission's findings with respect to factual issues are reviewed under the manifest weight of the evidence standard. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009).

¶ 69 In the present case, there were no witnesses to the accident. Therefore, the claimant was the only witness who testified that the accident occurred. In assessing the claimant's credibility, the Commission commented on inconsistencies in the claimant's testimony, but believed that they were insignificant, finding that "[t]he medical records, while not precisely echoing [the claimant's] testimony, in general support a work-related accident." One commissioner dissented because she "wholeheartedly agree[d] with the Arbitrator's assessment of [the claimant's] credibility." The circuit court, in turn, reversed the Commission's decision because, the court noted, it agreed with the dissenting commissioner. Assessment of the claimant's credibility was the common lynchpin of the different decisions of the arbitrator, the majority of commissioners, the dissenting commissioner, and the circuit court.

¶ 70 In the present appeal, we are faced with the task of reviewing the Commission's decision based on the manifest weight of the evidence standard, but the record on appeal does not contain the most crucial evidence that the Commission considered in reaching its decision, *i.e.*, the claimant's testimony.

¶ 71 In the present appeal, the claimant is the appellant, and it is the appellant's duty to provide the reviewing court with a sufficiently complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391, 459 N.E.2d 958, 959 (1984). Because the appellant has the duty to provide a complete record, a reviewing court will usually resolve any doubts caused by an incomplete record against the appellant. *Id.* at 392, 459 N.E.2d at 959.

¶ 72 However, when a party appeals to the appellate court following the entry of a judgment of the circuit court in a workers' compensation proceeding, it is the decision of the Commission, not the judgment of the circuit court, which is under consideration. *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 33, 967 N.E.2d 856 ("In a workers' compensation proceeding, the Commission, an administrative agency, is the ultimate decision-maker" and the appellate court "reviews the decision of the Commission, not the decision of the circuit court."). Therefore, our deference is afforded the Commission's decision, not the circuit court's or the arbitrator's decisions, and our review of the Commission's factual findings is "extremely deferential." *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 544, 950 N.E.2d 256, 261 (2010). Accordingly, in an appeal from the circuit court in a workers' compensation proceeding, a reviewing court will resolve any doubts caused by an incomplete record in favor of the findings made by the Commission.

¶ 73 In *Foutch*, the supreme court explained that "in the absence of [a complete] record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959. Extending this concept to our review in the present case, because it is the decision of the Commission that is under consideration, the lack of a complete record requires us to presume that the Commission's decision was in conformity with law and had a sufficient factual basis, not the circuit court's decision. The employer initially appealed the Commission's decision to the circuit court to challenge the Commission's factual finding with respect to whether a compensable accident occurred and, in the present appeal, continues to argue that the Commission's factual findings were against the manifest weight of the evidence.[2]

¶ 74 "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156, 839 N.E.2d 524, 532 (2005). The same is true with respect to factual findings made by the Commission. In the present case, the record does not include the testimony of the claimant. We must presume, therefore, that the Commission properly assessed the claimant's credibility and considered his testimony along with other competent evidence in finding that a compensable accident occurred. *Webster v. Hartman*, 195 Ill. 2d 426, 433-34, 749 N.E.2d 958, 963 (2001) (Because of an incomplete record, the supreme court "presume[d] that the trial court heard adequate evidence to support its decision and that its order granting defendant's motion to enforce settlement was in conformity with the law."). Without a transcript of the claimant's testimony, we cannot conclude that the Commission's findings based on his testimony were against the manifest weight of the evidence. Accordingly, we must affirm the Commission's decision and reverse the circuit court's judgment.

¶ 75 CONCLUSION

¶ 76 For the foregoing reasons, we reverse the judgment of the circuit court, reinstate the Commission's decision, and remand the claim for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 77 Circuit court reversed; Commission's decision reinstated; cause remanded.

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[2]In his brief, the claimant argues that we should reverse the circuit court because it did not have an adequate record before it to review the Commission's decision. As noted above, however, our task is to review the Commission's decision based on the record on appeal under the manifest weight of the evidence standard, not the circuit court's decision. Nonetheless, it is worthy of note that it was the employer that initially allowed the filing of an incomplete record upon review before the circuit court, which has also resulted in this court having an incomplete record. In addition, we are at a loss to understand how the circuit court could have found that the Commission's decision was against the manifest weight of the evidence, based on a determination that the claimant was not credible, after reviewing a record that does not include the claimant's testimony.

2 of 100 DOCUMENTS

DANNY FARRIS, PETITIONER, v. PHOENIX CORPORATION OF QUAD CITIES, RESPONDENT.

No. 05WC 26805

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MORGAN

2011 Ill. Wrk. Comp. LEXIS 665; 11IWCC0610

June 27, 2011

JUDGES: Yolaine Dauphin; Molly C. Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).*

PROCEDURAL HISTORY

On June 17, 2005, Petitioner, a 44 year old union laborer, filed an application for adjustment of claim alleging that on April 26, 2005, he sustained accidental injuries to his back when "[r]ocks shifted and Petitioner was knocked down" while he was performing work for Respondent.

On October 12, 2005, the Arbitrator held a hearing in this matter pursuant to section 19(b). On November 30, 2005, before the Arbitrator filed a decision, Petitioner filed a motion to reopen [*2] proofs "for the sole purpose of submitting the results of the MR Myelogram which was performed on October 4, 2005, at the request of Respondent's physician, Dr. Robert Gordon." Petitioner alleged that neither he nor his counsel had the results of the myelogram at the time of the arbitration hearing, and the myelogram demonstrated disc pathology consistent with the claimed work injury. The myelogram report, attached as an exhibit to the motion to reopen proofs, notes moderate diffuse disc bulges at L4-L5 and L5-S1 with some flattening/effacement of the thecal sac and foraminal impingement at L5-S1.

On December 1, 2005, the Arbitrator filed a decision denying Petitioner's motion to reopen proofs and finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent. The Arbitrator noted inconsistencies in Petitioner's testimony and the medical records. However, the Arbitrator found that "the most damaging evidence against Petitioner" were the statements Petitioner's cousin, George Farris, had given to Respondent's insurance adjuster, Sandra Herwig, on May 10, 2005, and May 12, 2005. George Farris had allegedly [*3] told Ms. Herwig that Petitioner intended to fake an accident because he had a balloon payment coming due on his farm. Petitioner allegedly stated minutes before the accident, "I'm gonna fall down and they're gonna pay for my farm." At the arbitration hearing, George Farris testified that he did not remember Petitioner telling him that he intended to stage an accident. George Farris did recall speaking with Ms. Herwig and testified that he "might have" told her Petitioner had intended to stage an accident. George Farris further testified that he was "all confused" when he

spoke with Ms. Herwig, but he did not believe he lied to her. No transcripts of George Farris's conversations with Ms. Herwig were introduced into evidence.

Petitioner timely appealed the Arbitrator's decision. Petitioner argued that the Arbitrator erred in treating any statements George Farris gave to Ms. Herwig as substantive evidence. Further, Petitioner argued that the Arbitrator erred in denying his motion to reopen proofs, given the evidence that Respondent deliberately withheld the myelogram report until after the arbitration hearing. On April 6, 2007, the Commission affirmed the Arbitrator's decision, with [*4] Commissioner Dauphin dissenting. Petitioner appealed the Commission's decision to the circuit court.

On review, the circuit court issued an order on January 30, 2009, stating:

> "1. This matter is remanded to the Workers' Compensation Commission for further proceedings.
>
> 2. On further hearing, the Workers' Compensation Commission:
>
> a. Shall not substantively consider any evidence of prior inconsistent statements of George Farris, which purportedly relate to statements concerning Petitioner's intent to stage an accident, but the Respondent may submit the transcript of George's statement for possible impeachment.
>
> b. Shall allow the Petitioner to submit into evidence the radiology Reports of the MR myelogram performed on October 4, 2005, which were the subject of Petitioner's Motion to Reopen Proofs.
>
> c. Shall render a decision in the matter consistent with this Order."

On March 2, 2010, the Commission vacated the Arbitrator's decision and remanded the matter for further proceedings consistent with the order of the circuit court.

On July 14, 2010, the Arbitrator held a hearing on remand and admitted into evidence the transcripts of George Farris's statements to Ms. Herwig and the myelogram [*5] report. On August 19, 2010, the Arbitrator filed a Decision stating that he reconsidered the record in light of the new evidence, consistently with the circuit court's directions. Once again, the Arbitrator found that Petitioner failed to prove a work accident, even though the Arbitrator found that George Farris was "not credible overall as a witness" and gave no weight to his testimony. Petitioner timely appealed the Arbitrator's Decision.

PETITIONER'S TESTIMONY

At the arbitration hearing on October 12, 2005, Petitioner testified that on April 26, 2005, Respondent was "laying black petrol matting to cover the steep slopes [on the banks of a waterway] so they wouldn't wash out, and then the Tracko company behind us covered it with riprap, which is big rock." Tr. pp. 15-16. The working conditions were wet and muddy, and so were Petitioner's boots. At approximately 4:45 p.m., Petitioner's supervisor asked Petitioner to move some rocks by hand. The rocks, which ranged "[f]rom the size of a hard hat to the size of a tire," were damp. Tr. p. 17, 19. On direct examination, Petitioner described the accident as follows: "I picked up a small rock, went to place it, and when I picked it up, [*6] two bigger rocks rolled into my feet, and as I started to fall, I spun and kind of moved the rock away from me and landed on my hip and shoulder, and that's how I hurt my back." Tr. p. 19. On cross-examination, Petitioner described the accident as follows: "I picked up a rock, and when I picked it up I was straightening up. As I did that, two rocks rolled down. The rock I picked up was holding the two bigger rocks, and I picked it up; they rolled down and hit my feet. As they did, I turned and throwed [*sic*] the rock and landed on my right side and shoulder." Tr. p. 43. Petitioner estimated that the rock he had picked up weighed between 75 and 100 pounds. The rocks that hit his feet were bigger. Petitioner further testified that he landed on his "[k]nee, then [his] hip, then [his] shoulder," explaining that he "went down as gently as [he] could." Tr. p. 50. He denied landing on his back, explaining that he "ended up on [his] back" after sliding four or five feet down the hill. Tr. p. 51-52. After the fall, Petitioner felt "[e]xcruciating pain." Tr. p. 20. He crawled up the bank and called for help.

Petitioner underwent conservative treatment for low back pain with radicular symptoms. [*7] Regarding his condition at the time of the arbitration hearing, Petitioner testified that his back still hurt, and he could not work as a union laborer because of the restrictions recommended by Respondent's section 12 examiner.

MEDICAL RECORDS AND REPORTS

On the evening of April 26, 2005, Petitioner sought emergency treatment at Passavant Area Hospital, where Dr. Mary Jones recorded the following history and complaints:

> "This [patient] states he was picking up large boulders today. He estimates weight of the boulders 50-200 pounds. He states he was preparing to throw one of the boulders when he lost his balance and fell. He twisted as he fell, but also may have hit his back on the ground. He complains of marked pain at lower back. He states both legs are tingly with a numb sensation. *** No history of previous back problems."

Dr. Jones described her examination of Petitioner's back and legs as follows: "He does have movement of legs but straight leg raising could not be tested. Patient declines [to] lie on cart." X-rays of the lumbar spine showed minimal degenerative changes and no acute findings. Dr. Jones diagnosed lumbar strain, prescribed medication, and released Petitioner [*8] to activity as tolerated.

On April 27, 2005, Petitioner followed up with his primary care physician, Dr. Shaina Schiwitz, who recorded the following history and complaints: "C/o lumbar strain while moving rocks under bridge @ work. Pain since yesterday @ 5:00 p.m." Dr. Schiwitz ordered an MRI. On April 29, 2005, Dr. Schiwitz took Petitioner off work. The MRI, performed May 2, 2005, showed a mild diffuse disc bulge with no significant central spinal canal or neural foraminal narrowing at L4-L5, and a moderate diffuse broad central disc bulge without significant central spinal canal or neural foraminal narrowing at L5-S1. On May 6, 2005, Dr. Schiwitz referred Petitioner to Dr. Joshua Warach, a neurologist. Thereafter, Dr. Schiwitz kept Petitioner off work through September 1, 2005.

On June 2, 2005, Petitioner consulted Dr. Warach, who recorded the following history and complaints:

> "[The patient] relates that he was hit by a rolling rock on his right shin, abruptly twisted and fell on the ground, landing on his low back. He experienced acute onset of severe sharp pain in the low back at the time of this injury. Since then, he has experienced persistent constant aching and sharp pain, [*9] variable in intensity, in the low back initially with radiation down the entire legs bilaterally, but within a few weeks after the accident, the pain radiating into the left leg had resolved. However, he still reports constant radiation of pain from the low back into the right buttocks and down the posterior aspect of the right leg to the ankle."

On physical examination, straight leg raise test was positive bilaterally at 10 degrees. However, the reverse straight leg raise test was negative bilaterally. Dr. Warach performed an EMG/NCV, which showed evidence of "a right L5, S1 radiculopathy, electrophysiologically subacute." He referred Petitioner to Dr. Douglas Reese for chiropractic treatment and instructed Petitioner to avoid heavy lifting or other provocative activities. Petitioner underwent chiropractic treatment with Dr. Reese on June 8, 2005, June 10, 2005, and June 11, 2005, after which time he cancelled or missed his appointments. On June 30, 2005, Petitioner followed up with Dr. Warach and reported no improvement. Dr. Warach referred Petitioner to Dr. Babu Prasad for pain management.

Dr. Prasad performed epidural steroid and trigger point injections at L4-L5 and L5-S1 [*10] on August 10, 2005, and September 1, 2005. Also on September 1, 2005, Dr. Prasad took Petitioner off work for 30 days, and on September 29, 2005, he kept Petitioner off work through November 2, 2005, due to severe low back pain.

On September 22, 2005, Dr. Robert Gordon, an occupational medicine specialist, examined Petitioner at Respondent's request. Petitioner complained of pain in his low back and right leg, with numbness in the right leg. Dr. Gordon recorded the following description of the alleged accident:

> "[The patient] states on one *** occasion [when he was moving rocks] he was walking up the incline with a rock in hand which weighed approximately 50 pounds and that two rocks came rolling at him from up the incline. The rocks did hit his feet/bilateral lower legs. As the rocks were striking his lower extremities, he threw the rock that he had in hands in such a fashion that he twisted to his right while he was throwing the rock. He ended up falling on his right shoulder, right flank and back in this incident."

On physical examination, Petitioner complained of tenderness with palpation of his bilateral lumbar paraspinal region. The range of motion was normal, with complaints [*11] of pain at the extremes of flexion and extension. The examination was otherwise unremarkable, with a negative straight leg raise test bilaterally. Dr. Gordon opined that Petitioner sustained a lumbosacral strain superimposed on preexisting degenerative changes. He recommended a CT myelogram

"to further assess for nerve root impingement at this time," and a return to work with a 10 pound lifting restriction. As noted, the myelogram showed moderate diffuse disc bulges at L4-L5 and L5-S1 with some flattening/effacement of the thecal sac and foraminal impingement at L5-S1.

Petitioner introduced into evidence his medical bills in the sum of $ 14,093.31. Respondent objected to liability, but not the reasonableness or necessity of the treatment.

DISCUSSION

On review, Petitioner maintains that his testimony is credible, unrebutted and consistent with the medical records. Petitioner asserts that any inconsistencies between his testimony and the medical records are minor and inherent in the history taking process. We find that Petitioner met his burden of proving he sustained accidental injuries arising out of and in the course of his employment with Respondent on April 26, 2005.

Although we [*12] review the evidence *de novo,* we note that in his original decision, the Arbitrator found the inconsistencies in Petitioner's testimony to be insignificant. We note further that in questioning Petitioner, Respondent referred to a recorded statement Petitioner made to Ms. Herwig on April 29, 2005, in which he described picking up a rock, which caused other rocks to roll, throwing the rock in his hands and falling. Respondent did not introduce into evidence a transcript of Petitioner's statement, however. The medical records, while not precisely echoing Petitioner's testimony, in general support a work-related accident. We find it significant that an EMG/NCV performed June 2, 2005, showed evidence of "a right L5, S1 radiculopathy, electrophysiologically subacute." Although the myelogram performed at Dr. Gordon's request is too far removed in time to show acute post-accident findings, it is consistent with the EMG/NCV insofar as it shows foraminal impingement at L5-S1.

We note that before each hearing, the parties completed a request for hearing form. In the original request for hearing form, dated October 12, 2005, the parties stipulated that: Respondent was given timely notice of [*13] the accident; Petitioner's average weekly wage was $ 1,068.90; Petitioner was temporarily totally disabled from April 26, 2005, through October 12, 2005, although Respondent denied liability; and Respondent paid no workers' compensation benefits. In the request for hearing form on remand, dated July 14, 2010, the parties' stipulations regarding notice, average weekly wage and Respondent's nonpayment of workers' compensation benefits remained unchanged. However, Respondent disputed the entire period of temporary total disability, which Petitioner now claimed spanned the time period from April 27, 2005, through October 12, 2005.

We find that Respondent's original stipulation regarding the duration of Petitioner's temporary total disability is binding. See *Walker v. Industrial Comm'n, 345 Ill. App. 3d 1084, 1088 (2004).* In any event, the medical records and the section 12 report from Dr. Gordon, considered together with Petitioner's testimony that he could not work as a union laborer if he was on restricted duty, establish Petitioner was temporarily totally disabled from April 27, 2005, through the date of the arbitration hearing on October 12, 2005.

Turning [*14] to the issue of medical expenses, at each hearing Petitioner claimed medical bills in the sum of $ 14,093.31. When Petitioner introduced into evidence his medical bills (during the first arbitration hearing), Respondent objected only "as to liability for accident and causal connection." Tr. 1. p. 8, 26. Accordingly, we award medical expenses in the sum of $ 14,093.31.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2010, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 712.60 per week for a period of 24 2/7 weeks, from April 26, 2005, through October 12, 2005, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 14,093.31 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be [*15] remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 31,500.00. 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.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision herein as it contains significant errors regarding accident, causal connection, and temporary total disability benefits. [*16]

The Majority's accident finding is simply not based upon a review of the evidence in the record pertaining to accident. Rather, it is based upon findings made in the Arbitrator's original decision, a recorded statement which is not in the record, and findings in medical records which are irrelevant to the issue of accident. As for the Arbitrator's original decision, it was based upon a different record. It is the Arbitrator's second 19(b) decision which is now before us. That decision should have been affirmed as I wholeheartedly agree with the Arbitrator's assessment of Petitioner's credibility. Not only do the medical records contain accounts of the accident inconsistent with Petitioner's testimony but there are additional reasons to find Petitioner less than credible. Petitioner, upon presentation at Passavant Hospital on April 26, 2005, denied any prior back problems. However, when seen by Dr. Warach on June 2, 2005, he alluded to a low back accident ten years earlier. In addition, there is the history given to Dr. Reese on June 8, 2005. At that time, Petitioner told Dr. Reese his presenting symptoms (back and leg pain) "began several months ago." Thus, Petitioner not only had [*17] a back injury ten years earlier but he was also experiencing symptoms immediately prior to his alleged April 26th accident. Petitioner's inability to be forthright regarding any prior back problems makes the discrepancies in his varying histories more significant, not less. He also told the emergency room doctors that he could not walk after his alleged accident. Yet, he was able to drive home before going to the emergency room.

Second, the Respondent's decision to not introduce a recorded statement into evidence should not be the basis of a finding of accident. The Majority is improperly changing the burden of proof by requiring Respondent to disprove accident rather than requiring Petitioner to prove one. Finally, there is the Majority's misplaced reliance on findings found in medical records. While medical records may be relevant on the issue of accident it is generally because of the histories contained therein. In this instance, those histories are different. While the Majority seems to have no problem overlooking those differences, it has found it "significant" on the issue of accident that Petitioner's emg/ncs revealed a subacute L5-S1 radiculopathy. However, the presence of [*18] a radiculopathy doesn't prove an accident occurred on April 26, 2005.

Even if one agrees with the Majority's accident finding, conspicuously absent from the Decision is any causation finding. That may be attributable to the fact there is no evidence in the record on that issue. Petitioner failed to present any evidence establishing a causal connection between Petitioner's current condition of ill-being in his low back and his alleged work accident. A chain of events analysis won't hold up, especially in light of Petitioner's history to Dr. Reese wherein he indicated back and leg problems pre-dating the alleged work accident.

Also unsupported by the evidence in the record is the Majority's temporary total disability award. In awarding temporary total disability benefits, the Majority has erroneously relied upon Respondent's stipulation as set forth in the Request for Hearing form submitted at the time of the original 19(b) hearing. At the time of the original 19(b) hearing, Respondent agreed with Petitioner's claimed period of temporary total disability but denied liability for it. At the time of the second 19(b) hearing, Respondent disputed both liability and the time period. Respondent [*19] was free to change its position on the issues, including temporary total disability, at the time of the second hearing. The Arbitrator clearly indicated on the record at the second hearing that temporary total disability was in dispute. Thus, it was Petitioner's burden to prove he was temporary totally disabled during the claimed period and as a result of his alleged work accident. Petitioner failed to meet his burden on this issue and the Majority has erroneously relied upon a stipulation and otherwise failed to explain how the evidence in the record supports the award. As reflected in many of the medical records, Petitioner had a pattern of telling one doctor another doctor had taken him off work or simply indicated he was off work. However, no one at Passavant Hospital took Petitioner off work on the day of the alleged accident. Petitioner then

went to Dr. Schiwitz and while she provided off-work slips, many of them are back-dated and unaccompanied by medical records showing visits with the doctor at the time the off-work slips were issued. Other doctors subsequently took Petitioner off of work but none of them ever indicated he was being taken off work on account of a work-related [*20] accident and condition. The Majority's award should be set aside.

Petitioner only worked for Respondent for three days. Near the end of his shift on the third day, he was asked to move rocks. He then allegedly had an un-witnessed accident. He often told the doctors he could not afford to fill his prescriptions or travel for certain appointments (Dr. Reese and physical therapy). Dr. Reese's records suggest he missed a visit due to unrelated illness or provided no reason. Dr. Reese's records suggest Petitioner was having back complaints before the alleged un-witnessed accident. The Majority's Decision must be given heightened scrutiny as it is overturning an Arbitrator's well-reasoned credibility determination and for reasons not entirely clear or based upon the evidence. It is for these reasons, I respectfully dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

1 of 100 DOCUMENTS

DANNY FARRIS, PETITIONER, v. PHOENIX CORPORATION OF THE QUAD CITIES, RESPONDENT.

NO. 05WC 26805

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MORGAN

7 IWCC 409; 2007 Ill. Wrk. Comp. LEXIS 440

April 6, 2007

JUDGES: Ilonka Ulrich

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident and 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.

On review Petitioner argues the testimony of George Farris, Petitioner's cousin, should not have been admitted. It is noted that Petitioner's counsel did not object to the disputed testimony at the Arbitration hearing. The Illinois Industrial Commission Rules provide that "Illinois common law rules of evidence" apply. *50 Ill. Admin. Code 7030.70.* In *Rush-Presbyterian-St. Luke's Medical Center v. Industrial Commission, 258 Ill. App. 3d 768, 630 N.E.2d 1175 (1st Dist. 1994),* the Appellate Court noted the employer argued that certain testimony was inadmissible hearsay. However, no timely objection was made to admission of the statement and it was therefore waived. In the case before the Commission because no timely objection to the testimony was presented [*2] on Arbitration, the issue was waived on review before the Commission. All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 12, 2005 is hereby affirmed and adopted.

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

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

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.

APR 6 2007

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 **Jeffery Tobin,** arbitrator of the Commission, in the city of **Jacksonville** on **10/12/2005.** After reviewing all of the evidence presented, the [*3] arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

FINDINGS

. On **4/26/05,** the respondent **Phoenix Corporation of the Quad Cities *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 not*** 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 **$ 55,582.80;** the average weekly wage was **$ 1068.90.**

. At the time of injury, the petitioner was **44** years of age, ***single*** with **0** children under 18.

. Necessary medical services [*4] ***have not*** been provided by the respondent.

. To date, **$ 0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 0**/week for **0** weeks, from through , 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** for medical services, as provided in Section 8(a) of the Act.

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

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

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

. In no instance shall this award 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 [*5] 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 of 4.15% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

11/29/05

Date

DEC 1 2005

Petitioner filed a motion to reopen proofs after the close of the evidence on 10/12/05 and that motion is denied.

On the issue of (C), *did an accident occur that arose out of an in the course of the petitioner's employment by the respondent,* the arbitrator finds and concludes as follows:

Petitioner Danny Farris ("Petitioner") testified that he suffered an unwitnessed accident while working for Respondent Phoenix Corporation of the Quad Cities ("Respondent") shortly before 5:00 pm on Tuesday, April 26, 2005. The Arbitrator heard and considered his testimony, as well as the testimony of Petitioner's cousin, George Farris, who was working with Petitioner on the date of the alleged accident; [*6] and William Miller, another worker on site on April 26, 2005. In addition, the Arbitrator reviewed and considered all of the medical records and reports submitted by the parties. Having considered the foregoing evidence, and having carefully evaluated the credibility of the witnesses' testimony, the Arbitrator finds and concludes that Petitioner has failed to prove, by a preponderance of the evidence that an accident occurred on April 26, 2005 that arose out of and in the course of his employment. Accordingly, all compensation sought by Petitioner herein is denied, for the reasons set forth below.

Petitioner, a union laborer for nearly 20 years, testified that he began working for Respondent on Thursday, April 21, 2005. The work involved laying black petrol matting on slopes underneath a bridge overpass, then arranging "rip rap" rocks to cover the matting. Petitioner testified that the rocks weighed as little as 20-25 pounds, and as much as 200-300 pounds, and ranged from the size of a hardhat to the size of a tire. He testified that a back hoe was used to dump the rocks onto the slope, and that he and other employees would re-position them by hand. Petitioner estimated the angle [*7] of the slope to be 45 degrees.

Petitioner testified that he spent the entire shifts on April 21, 2005 and April 25, 2005, and most of the shift on April 26, 2005, placing matting. He testified that he first began pulling rocks between 4:45 pm and 4:50 pm on April 26, 2005, and that, 10-15 minutes later, he fell, injuring his low back. Petitioner acknowledged that nobody saw him fall.

Petitioner testified that conditions on April 26, 2005 were wet and muddy, and that the "rip rap" rocks were slippery and unstable. Petitioner testified that when he picked up one rock weighing between 75-100 pounds, two larger rocks rolled down the slope towards him. Petitioner testified that he when he saw the rocks rolling towards him, he started to spin to his left to move the rock he was holding out of the way, but the rocks struck his feet and ankles, knocking him off his feet. Petitioner testified that he fell 4 or 5 feet down the slope, landing on his right hip, knee and shoulder. At trial, Petitioner testified that he did not land on his back, but he admitted telling Respondent's agent that he did land on his back, 4-5 feet down the rocky slope.

Petitioner testified that he crawled up the slope [*8] in excruciating pain, calling out for help. After reporting the incident to his foreman, Petitioner left work, driving his cousin George home, a distance of 35 miles. Petitioner testified that his girlfriend took him to Passavant Area Hospital later that evening, where he was examined, given injections and sent home. Petitioner testified that he has neither worked, nor looked for work, since April 26, 2005.

The records of Passavant Area Hospital indicate that Petitioner was seen shortly before 8:00 pm on April 26, 2005. (Px. 1; Rx. 1-2). According to the Nurse Assessment, Petitioner reported: "Picking up lg rocks 50-200 #s - threw a rock, lost his footing, twisted & fell." The hospital's "Fast Track Report" prepared the same day indicated the following history:

"This 44-year-old white male states he was picking up large boulders today. He estimates the weight of the boulders 50-200 pounds. He states he was preparing to through (sic) one of the boulders when he lost his balance and fell. He twisted as he fell, but also may have hit his back on the ground."

Petitioner's low back was x-rayed, revealing no abnormalities. Although Petitioner testified that his ankle was scraped, and that [*9] he showed it to the doctor at Passavant, there is no indication of any bruising, swelling, contusion or abrasion to either lower extremity. In fact, there is no mention of the rolling rocks Petitioner testified about at trial. In addition, although Petitioner reported hitting his back on the rocky slope, there is no evidence to suggest he did, or that his back exam revealed contusion, abrasion, laceration, bruising or swelling. There is, in fact, no evidence of any traumatic injury, anywhere on Petitioner's body. The Arbitrator finds this unlikely for a person who claims to have fallen several feet down a 45-degree slope, landing on his back, hip, knee and shoulder on rocky terrain.

Petitioner testified, and the records submitted by the parties indicate, that he has also been seen and treated by: (1) his family doctor, Shaina Schiwitz, D.O.; (2) Joshua D. Warach, M.D.; (3) Douglas Reese, D.C.; and (4) Babu Prasad, M.D. In addition, Petitioner obtained a lumbar MRI on May 2, 2005, and an EMG/NCV on June 2, 2005. Petitioner testified that he submitted to a myelogram approximately 2 weeks prior to trial, but the results of that test were not known.

According to the records, Petitioner [*10] initially saw Dr. Schiwitz on April 27, 2005, where he complained of "lumbar strain while moving rocks under bridge @ work." (Rx. 3). Dr. Schiwitz' handwritten notes state: "Severe sudden onset pain + spasm after lifting heavy rocks." (Rx. 3). The Arbitrator finds this history to be inconsistent with Petitioner's trial testimony, in that it suggests Petitioner was claiming that the act of lifting and moving rocks, not the act of falling, precipitated his pain. In fact, there is no mention of any fall, or of any rolling rocks or loss of balance.

Dr. Schiwitz prescribed medications and a lumbar MRI, which was completed on May 2, 2005. According to the MRI report, Petitioner was complaining of "severe low back pain and bilateral lower extremity radiculopathy, worse on the right than the left." (Px. 1). The MRI revealed only degenerative changes at L4/5 and L5/S1, without any neural involvement whatsoever.

Petitioner saw Dr. Warach, a neurologist, on June 2, 2005 for EMG/NCV testing, which was completed on June 2, 2005. (Px. 3). Dr. Warach found the NCV to be entirely unremarkable, and the EMG demonstrated only subacute findings. Dr. Warach's neurologic exam on June 2, 2005 demonstrated [*11] non-focal findings. According to Dr. Warach's 6/2/05 report, Petitioner told him he "... was hit by a rolling rock on his right shin, abruptly twisted and fell onto the ground, landing on his low back." (Px. 3). Again, the Arbitrator notes this history is inconsistent, in that Petitioner testified at trial that he did not land on his low back.

Petitioner testified that Dr. Warach referred him to Babu Prasad, M.D., and the records reflect that Dr. Prasad has performed a series of epidural steroid injections, and has continued to keep Petitioner off of work through the trial date. (Px. 6).

Petitioner also treated with a chiropractor, Douglas Reese, D.C., whom he had seen years earlier for low back pain. According to Dr. Reese's records, Petitioner was first seen on June 8, 2005. (Px. 4; Rx. 7). According to Dr. Reese's report, Petitioner gave the following history:

"Rip rap rocks rolled down an embankment hitting his ankles knocking his legs out from under him, he attempted to twist to the right so that he could catch himself. He fell about four feet."

(Px. 4). The Arbitrator again notes inconsistency, in that, at trial, Petitioner claimed he twisted to the left, not the right. Petitioner [*12] testified that he saw Dr. Reese 4-5 times, but that the treatments made him worse.

On September 22, 2005, at Respondent's request, Petitioner was seen and evaluated pursuant to Section 12 by Robert L. Gordon, M.D. (Rx. 9). Petitioner testified that Dr. Gordon took a history from him and examined him thoroughly. According to Dr. Gordon's report, Petitioner reported that he was working on a 45-degree incline, and that:

"... he was walking up the incline with a rock in hand which weighed approximately 50 pounds and that two rocks came rolling at him from up the incline. The rocks did hit his feet/bilateral lower legs. At the rocks were striking his lower extremities, he threw the rock that he had in hands in such a fashion that he twisted to his right while he was throwing the rock. He ended up falling on to his right shoulder, right flank, and back in this incident."

(Rx. 9). After reporting on the contents of Petitioner's medical records in detail, as well as his physical findings upon examination, Dr. Gordon opined that, if Petitioner was telling the truth about his accident, he likely suffered a lumbar strain, superimposed on pre-existent degenerative changes. He noted, however, [*13] inconsistencies in the histories given by Petitioner to various medical providers, including himself. Dr. Gordon also noted inconsistency between Petitioner's claims of bilateral lower extremity radicular symptoms and the lack of diagnostic evidence of neural involvement. Dr. Gordon did not recommend further epidural injections. Instead, he recommended that Petitioner return to work in at least a light duty status, that he continue with anti-inflammatory medication, and that he obtain a CT myelogram.

The Arbitrator does not find Petitioner's trial testimony regarding his description of the accident to be credible. On the one hand, he testified that, when he saw the two larger rocks rolling down the slope, he responded by turning to the left to get the 75-100 pound rock he was holding out of the way. On the other hand, he claimed the two rocks rolled only 5 or 6 inches before striking him. The Arbitrator finds it highly unlikely both could be true, calling into question Petitioner's credibility. If there were no other evidence casting doubt on Petitioner's credibility, this doubtful testimony might seem insignificant, but taking into consideration the evidence as a whole, it seems unlikely [*14] Petitioner is telling the truth.

The Arbitrator also finds the histories contained within Petitioner's medical records, and the history he gave to Respondent's examining physician, Dr. Gordon, to be materially inconsistent and suspicious. Initially, at Passavant Area

Hospital on the evening of the alleged incident, the records indicate Petitioner had either thrown a rock, or was preparing to throw one, when he lost his footing and fell. There is no mention of the rolling rocks he later claimed caused the accident. The history he gave to his family doctor, Dr. Schiwitz, the next day, was that he strained his back lifting and moving rocks. There is no mention of any fall, loss of balance or rolling rocks.

The history Petitioner gave to Dr. Warach on June 2, 2005, six weeks after the alleged accident, was that he was hit by a rolling rock in the shin, twisted and fell, landing on his back. This is the first time there is any history of a rolling rock hitting Petitioner in the leg, and there is no other evidence to suggest Petitioner was struck in the leg by a rock. Petitioner's history eventually evolved to a claim that two rolling rocks struck him, taking his feet out from under him. [*15]

On cross examination, when confronted by the fact that there was no apparent injury to his legs, Petitioner claimed the rocks only oscillated a few inches. This is inconsistent with his report to Dr. Reese that rocks "rolled down an embankment," (Rx. 7), and it is inconsistent with his report to Dr. Gordon that "two rocks came rolling at him from up the incline." (Rx. 9). Petitioner's histories were also inconsistent as to whether he twisted to the left or right, and whether he did or did not land on his back. In short, Petitioner's testimony as to accident, when compared to the histories contained in the records, simply did not have the ring of truth to it.

By far, the most damaging evidence against Petitioner was the testimony of his own cousin, George Farris. George Farris admitted he was working with Petitioner on April 26, 2005, and he admitted that he had a conversation with Petitioner just minutes before Petitioner had his unwitnessed accident. At trial, George Farris testified that he could no longer recall the substance of that conversation with Petitioner, but he admitted giving detailed telephonic statements to Respondent's insurance adjuster, Sandra Herwig, on May 10, [*16] 2005 and May 12, 2005. When George Farris was confronted with the contents of the transcripts of those recorded statements, he agreed that whatever was contained within the transcripts was what he told Ms. Herwig, and that what he told Ms. Herwig was the truth.

According to the statements George Farris made on May 10 and 12, 2005, Petitioner told George Farris that he was going to fake an accident, just moments before it allegedly happened. On May 10, 2005, George Farris was asked whether the following exchange took place between himself and Ms. Herwig:

Q: OK. Did you have a conversation with your cousin, Danny, regarding his back injury at all?

A: Yes, ma'am. He told me straight out. The boss man asked me to go up and pull some rocks. He told me straight out. If I've got to do that, I'm gonna fall down and they're gonna pay for my farm.

Q: What kind of farm does he have?

A: He has a little farm that's got about seven or eight acres out there on his ... And he's got a balloon payment coming up, it's like $ 23,000. The man told me straight out, he said, if I gotta go up there and move them rocks, I'm gonna fall down and they're gonna pay for my farm.

Q: Now why would he make a comment [*17] like that? What was so ...

A: Because he's had the balloon payment coming up. He didn't want to do it in the first place.

Q: So he didn't want to move the rocks in the first place, you're saying?

A: He didn't want to move the rocks in the first place. And he, he's got a balloon payment coming up on his farm, like $ 23,000. That's what, he said, I'm gonna fall down and they're gonna pay my farm off.

Q: OK.

A: The man stood right there and told me that. And I told him, I wasn't gonna put up with it.

When asked what he meant when he said he was not going to put up with it, George Farris testified that Respondent's foreman was "fire-happy," and that he was concerned about losing his job. George Farris acknowledged he also told the foreman, Don Smallwood, about Petitioner's statements regarding faking an accident. At trial, George Farris testified that he no longer worked for Respondent, and that he could not recall what was said.

Petitioner denied making the statements to George Farris, and denied faking an accident. He did, however, admit that there was a balloon payment coming due on the farm around the time of the alleged accident, and that he and his fiancee were in the process of [*18] trying to re-finance the farm.

William Miller, an employee of U.S. Contractors Midwest, was also on site on April 26, 2005, and he testified for Petitioner. Mr. Miller testified that he saw Petitioner and George Farris walking up the slope, and that Petitioner was limping. He admitted, however, that he did not see Petitioner fall, and that he could not tell whether Petitioner's limp was real or feigned. The Arbitrator finds Mr. Miller's testimony to be of no probative value.

In denying compensation, the Arbitrator specifically finds the testimony of George Farris, and in particular the statements he acknowledged making to Sandra Herwig on May 10, 2005 and May 12, 2005, to be more likely true than not. George Farris had no apparent motive or incentive to lie, and in fact had a motive to be truthful in disclosing his cousin's attempted fraud; namely, to keep his job. Petitioner, on the other hand, did have an apparent financial motive to make a false workers' compensation claim; namely, to pay for the farm that was in the midst of being re-financed. In light of the statements made by George Farris, and considering the inconsistencies contained throughout Petitioner's medical records, [*19] the Arbitrator finds and concludes that Petitioner failed to prove accident. All compensation sought by Petitioner is, therefore, denied.

On the issue of (F), *is the petitioner's present condition of ill-being causally related to the injury,* the arbitrator finds and concludes as follows:

The medical evidence submitted by the parties includes diagnostic studies which reveal degenerative changes in Petitioner's lumbar spine, without evidence of acute injury. Having found that Petitioner failed to prove by a preponderance of the evidence that he suffered compensable accidental injuries on April 26, 2005, the Arbitrator further finds that Petitioner's present condition of ill-being, if any, is not causally related to the accident alleged. All compensation sought by Petitioner is, therefore, denied.

On the issue of (J), *were the medical services that were provided to petitioner reasonable and necessary,* the arbitrator finds and concludes as follows:

The Arbitrator, having found that Petitioner failed to prove accident, further finds that no medical services provided to or sought by Petitioner on or after April 26, 2005 are payable under the Act, and Respondent is not [*20] liable for any medical expenses, past or future, in regard to Petitioner's alleged accident of April 26, 2005. All compensation for medical services sought by Petitioner is, accordingly, denied.

On the issue of (K), *what amount of compensation is due for temporary total disability,* the arbitrator finds and concludes as follows:

The Arbitrator, having heard the testimony of the witnesses regarding accident, finds that Petitioner failed to prove by a preponderance of the evidence that he sustained a compensable accidental injury as alleged on April 26, 2005. Having found no compensable accident, the Arbitrator further finds that Petitioner is not entitled to temporary total disability benefits for his period of lost time, and Respondent is not liable for payment of same.

CONCURBY: BARBARA A. SHERMAN

CONCUR: I concur with Commissioner Ulrich that the Decision of the Arbitrator finding Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment should be affirmed. However, I concur with Commissioner Dauphin that the Arbitrator erred in relying on statements allegedly made by George Farris to a claims adjuster or his supervisor in arriving [*21] at his decision. At most, Respondent impeached the credibility of Mr. Farris, but the Arbitrator erred in relying on the alleged statements, which were never introduced into evidence, as substantive evidence. I rely instead on the inconsistencies in Petitioner's descriptions of the accident to various medical providers, and the findings of medical providers upon examination, as set forth more fully in the Arbitrator's decision, in concluding that Petitioner's testimony lacks credibility and that he consequently failed to prove that he sustained accidental injuries that arose out of and in the course of his employment.

I am further of the opinion that the Arbitrator properly exercised discretion denying Petitioner's motion to reopen proofs. Petitioner was aware that he had undergone the MR myelogram and CT myelogram on October 4, 2005 and that he did not have the radiological reports of those studies at the time he elected to proceed to trial on October 12, 2005. It was Petitioner's choice to proceed to hearing and close proofs without those reports. He did not request a continuance to obtain the reports before proofs were closed. Additionally, in my opinion there is nothing in those [*22] reports, in and of themselves, that is probative of the issue of whether Petitioner sustained accidental injuries which arose out of and in the course of his employment or of the relationship of those findings to Petitioner's alleged symptomatology.

DISSENTBY: YOLAINE DAUPHIN

DISSENT: I cannot join the Decision and Opinion on Review because I believe the Arbitrator committed error in denying Petitioner's Motion to Reopen Proofs, thereby excluding the results of the myelogram, and in allowing certain testimony into evidence. In light of the results of the myelogram, and further discounting the improper testimony allowed into evidence, I believe that Petitioner is entitled to benefits under the Workers' Compensation Act.

Section 12 of the Workers' Compensation Act provides in part:

"In all cases where the examination is made by a surgeon engaged by the employer, and the injured employee has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employer to deliver to the injured employee, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employer, said [*23] copy to be furnished the employee, or his representative as soon as practicable but not later than 48 hours before the time the case is set for hearing."

On September 22, 2005, Dr. Gordon, Respondent's Section 12 Examiner, ordered that Petitioner undergo a myelogram. The myelogram was performed on October 4, 2005, eight days before the October 12, 2005, arbitration hearing. A report outlining the results of the myelogram was prepared on October 4, 2005, within hours of the test. Presumably, the report of the myelogram was communicated to Respondent shortly thereafter. It appears, however, that the report was faxed to Petitioner's counsel on November 10, 2005, almost a month after the October 12, 2005, arbitration hearing. Petitioner promptly filed the Motion to Reopen Proofs at issue on review.

At the arbitration hearing, Dr. Gordon's report, dated September 22, 2005 was entered into evidence. Dr. Gordon opined that Petitioner may have suffered a lumbosacral injury/strain. Dr. Gordon based his opinion on an MRI performed on May 2, 2005, which, according to Dr. Gordon, did not demonstrate findings consistent with radiculopathy. The MRI did not show any disc herniation, spinal canal [*24] or neuroforaminal impingement. However, the myelogram Dr. Gordon ordered supports Petitioner's complaints of back and radicular leg pain, and squarely contradicts Dr. Gordon's conclusions. In addition to disc bulges, the myelogram revealed bilateral foraminal impingement, more so on the left, at the L5-S1 level. One can only hope that the results of the myelogram Dr. Gordon ordered would have affected his opinion regarding Petitioner's condition and the cause of the condition.

There were no witnesses to Petitioner's accident. The medical evidence was the only unbiased evidence presented. Thus, it was important to have the myelogram report available for consideration. The Arbitrator excluded a significant piece of evidence, vital to Petitioner's recovery under the Act.

I am particularly appalled by the sequence of events leading to the exclusion of the myelogram report. It appears that the results of the myelogram were available as early as the afternoon of October 4, 2005. The Workers' Compensation Act clearly requires that a medical report be furnished to the petitioner, or his representative, "as soon as practicable but not later than 48 hours before the time the case is set for [*25] hearing." The myelogram report, although transcribed and presumably available, was not delivered to Petitioner or Petitioner's attorney 48 hours before the arbitration hearing as required by the Act. Further, Respondent did not avail itself of the opportunity presented by the arbitration hearing on October 12, 2005, to give the report to Petitioner's counsel. Rather, Respondent waited weeks after the hearing to fax the report to Petitioner's counsel.

I also find troubling the admission into evidence of certain statements attributed to George Farris, Petitioner's cousin and co-worker. George Farris was called as a witness for Respondent. At the arbitration hearing, George Farris testified that he might have told Herwig, the insurance claims representative, that Petitioner told him Petitioner was going to fake an accident and Respondent would have to pay for Petitioner's farm. Respondent was then allowed to impeach George Farris by reading from an alleged transcript of the conversation between George Farris and Herwig.

In Edward Don Company vs. Industrial Commission, 344, Ill. App. 3d 643, 652 (2003), the court explained the boundaries to the impeachment of a witness:

"[t]he credibility [*26] of a witness may be tested by showing that, at a prior time, he made a statement which is inconsistent with his trial testimony on a material matter. This is true even if the prior inconsistent statement was not made under oath or in a court proceeding. If, upon questioning, the witness denies having made the prior inconsistent statement or gives equivocal answers to questions regarding the prior statement, the impeachment must be completed by later offering evidence of the inconsistent statement. While evidence of a witness' prior inconsistent statement may be

used to impeach the witness' credibility, the statement is not admissible as substantive evidence." [Internal citations omitted.]

George Farris was unable to give unequivocal answers regarding the substance of the conversation he allegedly had with Petitioner. His testimony was vague and dubious. In order to complete the impeachment, Respondent was required to offer evidence of the inconsistent statements. The Arbitrator allowed Respondent to read from an alleged transcript of the conversation between George Farris and Herwig. However, the alleged transcript was never introduced into evidence, and nothing in the record even [*27] shows that the Arbitrator saw the transcript at the hearing. The Arbitrator then used the statements in the alleged transcript purportedly impeaching George Harris as substantive evidence at hearing.

In denying Petitioner benefits, the Arbitrator relied significantly on the alleged transcript. The Arbitrator explained:

"If there were no other evidence casting doubt on Petitioner's credibility, this doubtful testimony might seem insignificant, but taking into consideration the evidence as a whole, it seems unlikely Petitioner is telling the truth."

The Arbitrator went on to explain:

"By far, the most damaging evidence against Petitioner was the testimony of his own cousin, George Farris. George Farris admitted he was working with Petitioner on April 26, 2005, and he admitted that he had a conversation with Petitioner just minutes before Petitioner had his unwitnessed accident. At trial, George Farris testified that he could no longer recall the substance of that conversation with Petitioner, but he admitted giving detailed telephonic statements to Respondent's insurance adjuster, Sandra Herwig, on May 10, 2005, and May 12, 2005. When George Farris was confronted with the contents of [*28] the transcripts of those recorded statements, he agreed that whatever was contained within the transcripts was what he told Ms. Herwig, and that what he told Ms. Herwig was the truth.

According to the statements George Farris made on May 10 and 12, 2005, Petitioner told George Farris that he was going to fake an accident, just moments before it allegedly happened. On May 10, 2005, George Farris was asked whether the following exchange took place between himself and Ms. Herwig:

Q: OK. Did you have a conversation with your cousin, Danny, regarding his back injury at all?

A: Yes, ma'am. He told me straight out. The boss man asked me to go up and pull some rocks. He told me straight out. If I've got to do that, I'm gonna fall down and they're gonna pay for my farm.

Q: What kind of farm does he have?

A: He has a little farm that's got about sever or eight acres out there on his... And he's got a balloon payment coming up, it's like $ 23,000. The man told me straight out, he said, if I gotta go up there and move them rocks, I'm gonna fall down and they're gonna pay for my farm.

Q: Now why would he make a comment like that? What was so...

A: Because he's had the balloon payment coming up. [*29] He didn't want to do it in the first place.

Q: So he didn't want to move the rocks in the first place, you're saying?

A: He didn't want to move the rocks in the first place. And he, he's got a balloon payment coming up on his farm, like $ 23,000. That's what, he said, I'm gonna fall down and they're gonna pay my farm off.

Q: OK.

A: The man stood right there and told me that. And I told him, I wasn't gonna put up with it.

When asked what he meant when he said he was not going to put up with it, George Farris testified that Respondent's foreman was "fire-happy", and that he was concerned about losing his job. George Farris acknowledged he also told the foreman, Don Smallwood, about Petitioner's statements regarding faking an accident. At trial, George Farris testified the he no longer worked for Respondent, and that he could not recall what was said."

The Arbitrator stated further:

"In denying compensation, the Arbitrator specifically finds the testimony of George Farris, and in particular the statements he acknowledged making to Sandra Herwig on May 10, 2005, and May 12, 2005, to be more likely true than

not. George Farris had no apparent motive or incentive to lie, and in fact had [*30] a motive to be truthful in disclosing his cousin's attempted fraud; namely, to keep his job."

The Arbitrator concluded that Petitioner failed to prove by a preponderance of the evidence that he sustained a compensable accidental injury as alleged on April 26, 2005.

The Arbitrator cited Respondent's counsel's reading of the alleged transcript in his decision and based his decision on this alleged transcript of the alleged conversation between George Farris and Herwig. It is clear that, through the impeachment process, Respondent was able to introduce highly inflammatory and prejudicial evidence at hearing.

I note the special concurrence's reliance upon the "inconsistencies in Petitioner's descriptions of the accident to various medical providers" in concluding Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment. The Arbitrator specifically discounted these "inconsistencies," noting that they "might seem insignificant" in the absence of what the Arbitrator believed to be "the most damaging evidence against Petitioner," "the testimony of his own cousin, George Farris."

Having reviewed the record and the results of the [*31] myelogram report, and excluding the improper testimony of George Farris, I conclude that the Arbitrator erred in denying Petitioner benefits under the Act. I respectfully dissent.

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 & SSDICompensabilityInjuriesAccidental Injuries

Illinois Official Reports

Appellate Court

***Omron Electronics v. Illinois Workers' Compensation Comm'n*,**
2014 IL App (1st) 130766WC

Appellate Court Caption	OMRON ELECTRONICS, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Craig Bauer, Deceased, by E. Belinda Bauer, Special Administrator, Appellee).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-13-0766WC
Filed	November 14, 2014
Rehearing denied	December 22, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	In the matter of a claim for the death of claimant's husband as a result of Neisseria meningitides shortly after he returned from a business trip to Brazil, the appellate court upheld the Workers' Compensation Commission's reversal of the arbitrator's denial of compensation based on the finding that the wife, as special administrator, failed to prove that her husband's death was caused by his exposure to the disease during the business trip, and the trial court's judgment confirming the Commission's finding that the special administrator did prove by a preponderance of the evidence that her husband contracted the disease during his business trip was affirmed, since the Commission's decision was not contrary to the manifest weight of the evidence.
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 12-L-51148; the Hon. Eileen Burke, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal

Michael E. Rusin and Jigar S. Desai, both of Rusin, Maciorowski & Friedman, Ltd., of Chicago, for appellant.

Anthony Cuda, of Cuda Law Offices, Ltd., of Oak Park, for appellee.

Panel

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

OPINION

¶ 1 This matter involves a claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) and the Workers' Occupational Diseases Act (Occupational Diseases Act) (820 ILCS 310/1 *et seq.* (West 2006)) filed by E. Belinda Bauer, wife and special administrator for Craig Bauer (employee), for benefits in connection with the death of the employee due to alleged exposure to Neisseria meningitides while on a business trip to Brazil for the employer, Omron Electronics. The arbitrator denied compensation finding that the special administrator had not proven causation and exposure arising out of and in the course of the decedent's employment with the employer. The special administrator appealed to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously reversed the arbitrator's decision and held that the special administrator had proven by a preponderance of the evidence that the employee had contracted Neisseria meningitides during his business trip to Brazil. The employer filed a timely petition for review in the circuit court of Cook County, which confirmed the Commission's decision. The employer appeals.

¶ 2 BACKGROUND

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on May 24, 2011.

¶ 4 The special administrator testified that the employee had worked for the employer for four years as the company's president and chief operating officer. She testified that the employee traveled to China and Japan on June 7 through June 14, 2006. He then returned to Chicago and worked from his office in Schaumburg. The employee's travel itinerary was admitted into evidence. On June 20, 2006, he left Chicago at 2:55 p.m. and flew to Sao Paolo, Brazil. He arrived at 7:52 a.m. on June 21, 2006. He left Brazil on June 22, 2006, at 9:50 p.m. and arrived in Chicago at 9:30 a.m. on June 23, 2006.

¶ 5 The special administrator testified that when the employee returned home on June 23, 2006, she noticed that he was pale. They drove to their second home in Lake Geneva, Wisconsin. Instead of going out to dinner like they normally did, they opted to eat at home because the employee did not feel well. She stated that the employee was very tired, felt a little

achy, and thought he might have the flu. On June 24, 2006, the employee awoke early and went to have his hair cut. When he returned home he laid on the couch because he had a fever and was feeling very achy. She testified that throughout the day he continued to get worse. By late afternoon he developed little black spots all over his face and down his arms. The employee asked the special administrator to take him to the hospital. She took him to the Mercy Walworth Hospital and Medical Center emergency room in Walworth, Wisconsin. By the time they arrived at the hospital the employee's rash had spread all over his body. The employee continued to get worse and the medical staff decided to move him to an intensive care unit in Janesville, Wisconsin. He was taken by ambulance to St. Mercy Health System in Janesville, Wisconsin. He died there on June 25, 2006. The special administrator testified that the employee died of Neisseria bacterial meningitis.

¶ 6 The medical records from the Mercy Walworth Hospital and Medical Center emergency department were admitted into evidence. In patient notes written by Dr. Kevin Parciak, he noted that the employee was examined on June 24, 2006, for a complaint of a rash. The employee told Dr. Parciak that he had started to feel some mild upper respiratory tract illness symptoms approximately one week prior consisting of general malaise, nonproductive cough, and intermittent low-grade temperatures. He told Dr. Parciak that his symptoms had improved somewhat over the course of the week. The employee reported that at about 5 p.m. on June 24, 2006, reddish-purplish spots started appearing on his bilateral lower extremities and gradually ascended throughout the rest of his body over the course of the ensuing hours up until the time of presentation. The employee told Dr. Parciak that his only medication was Mucinex that he started taking that afternoon for a cough. The employee denied any specific bug bites, exposure to exotic foods, or exposure to any sick contacts specifically when travelling. Dr. Parciak noted diffuse nonpalpable purpuric rash lesions. His impression was purpuric rash due to infectious etiology. Dr. Parciak wrote that he "entertained the possibility of this patient having meningococcemia," but did not have a "high suspicion" of meningitis because the employee did not have a significant headache, neck pain, neck stiffness, or photophobia, although meningitis was still possible. He opined that it was likely that the employee was "septic from some unknown bacteria or viral cause which is especially concerning because of his recent travel history." The ambulance was contacted to transport the employee to St. Mercy Health System in Janesville, Wisconsin, and Dr. Parciak noted that the employee did not exhibit any signs of deterioration.

¶ 7 Dr. Badar Kanwar treated the employee on June 25, 2006, at St. Mercy Health System in Janesville. In his patient notes he wrote that the employee had been sick with cold-like symptoms since he returned from Japan, but that he only developed a rash, generalized malaise, and weakness that day. When the employee arrived at the hospital after transfer from the emergency room at Mercy Walworth Hospital and Medical Center, he was able to talk and answer Dr. Kanwar's questions appropriately. Dr. Kanwar noted that the employee appeared to be in respiratory distress. The employee appeared very cyanotic and had a diffuse purpuric rash all over his body. He wrote that the employee was intubated and sedated when he became bradycardic, went into asystole, and died. Unsuccessful efforts were made to resuscitate the employee. Dr. Kanwar noted that his total time caring for the employee was 90 minutes.

¶ 8 The autopsy report from St. Mercy Health System in Janesville was admitted into evidence. The final diagnosis was hemorrhagic adrenals consistent with Waterhouse-Friderichsen Syndrome, and premortem blood culture positive for Neisseria meningitides.

¶ 9 Dr. Charles Stratton testified by evidence deposition on behalf of the special administrator. He is the clinical director of the microbiology laboratory, an associate professor of pathology and medicine, and an associate director of the pathology residency program at Vanderbilt University in Nashville, Tennessee. He is board certified in internal medicine, infectious diseases, medical microbiology, and public health and medical microbiology. He testified that he had treated people with Neisseria meningitides since 1971.

¶ 10 Dr. Stratton testified that he had reviewed the employee's medical records from Mercy Walworth Hospital and Medical Center in Lake Geneva, Wisconsin, St. Mercy Health System in Janesville, Wisconsin, the death certificate, the autopsy report, and his itinerary. He stated that the report from Mercy Walworth Hospital that the employee had a purpuric rash that was even on his palms and soles of his feet was very significant because one of the few illnesses that causes a rash on a person's palms and soles is meningococcemia. Dr. Stratton testified that the clinician at Mercy Walworth Hospital diagnosed the employee with disseminated intravascular coagulation, which means sepsis syndrome. He stated that sepsis involves a cytokine storm, which makes blood vessels leaky as evidenced by the purpuric rash. Once the employee arrived at the hospital in Janesville, the medical records indicate that he had acute respiratory failure. Dr. Stratton stated that leaky blood vessels in the lungs caused this acute respiratory distress. He stated that the employee was intubated and sedated, then his heart stopped.

¶ 11 Dr. Stratton testified that the premortem blood cultures on June 24, 2006, grew Neisseria meningitides, which was significant because it confirmed the clinical impression from the first physician who examined the employee that he indeed had Neisseria meningitides in his blood. Dr. Stratton testified that Neisseria meningitides is another term for meningococcemia.

¶ 12 Dr. Stratton testified that he reviewed the autopsy report, which indicated that the employee died of meningococcemia. The death certificate listed the cause of death as Neisseria meningitides bacterium. He agreed with the cause of death listed on the death certificate.

¶ 13 Dr. Stratton testified that humans are the only natural reservoirs of Neisseria meningitides meaning that it is not something a person could get from drinking water, petting a cat, or cleaning a chicken coop. A person can only contract the infection from another human. Dr. Stratton testified that an individual can be exposed to meningococcal disease and become colonized, but not infected. These people are then carriers of meningococcal disease. Dr. Stratton stated that the most common method of transmission of Neisseria meningitides is airborne respiratory droplets. He stated that if a person is in an area with other people and someone who has colonized Neisseria meningitides coughs, sneezes, talks, or sings, the aerosolized droplets from his nasopharnyx get into the air and can be inhaled by someone else causing that person to contract the organism. The droplet nuclei remain in the room and circulate until the air system replaces the air with other air. He stated that depending on the air circulation, the droplet nuclei can float around for weeks, as was learned from the spread of diseases on submarines during World War II. He opined that, more likely than not, the Neisseria meningitides was transmitted to the employee through airborne respiratory droplets.

¶ 14 Dr. Stratton testified that the early symptoms of Neisseria meningitides are nonspecific, meaning the patient does not feel good, may have a low-grade fever, and has malaise. The symptoms do not include a sore throat, runny nose, cough, or sneezing, and it does not act like a cold or upper or lower respiratory tract infection. Dr. Stratton stated that a person who already had an upper respiratory tract infection is at greater risk to develop Neisseria

meningitides. Dr. Stratton noted that the employee's medical records show that he had a mild respiratory tract infection. Dr. Stratton testified that because the employee had a respiratory tract infection he was "primed or he had a cofactor that would make the likelihood of him not only becoming colonized but becoming infected with the Neisseria meningitides more likely."

¶ 15 Dr. Stratton testified that the incubation period for meningococcemia is 2 to 10 days. He stated that in the employee's case the concomitant respiratory tract infection acted as a cofactor and facilitated the meningococcemia so he thought the incubation period would be 2 days rather than 10 days.

¶ 16 Dr. Stratton testified that it was well known that international travel increases the risk for Neisseria meningitides infections. He stated that "Sao Paolo is well known in the medical literature, as well as among infectious disease specialists, as an area where there's an increased prevalence of Neisseria meningitides." He stated that the endemic rate of Neisseria meningitides is 2 to 5 per 100,000 people in Sao Paolo versus 1 per 100,000 in the United States.

¶ 17 Dr. Stratton testified that the employee was in Sao Paolo from June 21 to June 23, 2006, and became ill on June 24. He stated "the respiratory tract infection plus the likelihood of acquiring this organism while in Sao Paolo is the perfect–it's very good timing for the acquisition and dissemination of this organism, which became clinically apparent by June 24th." Dr. Stratton testified that "My opinion is that it was his international travel, specifically the trip to Sao Paolo, that allowed the meningococcemia that he died from to occur. Had he not gone to Sao Paulo or had any international travel, then it's my opinion that he wouldn't have died of Neisseria meningitides." He further stated that it was his opinion to a reasonable degree of medical certainty that the employee acquired meningococcemia in Sao Paolo as a result of his travel to that city. He stated, "I think that's the most likely source given the incidence of this pathogen in Sao Paolo as well as the timing of the trip and the subsequent meningococcemia. It all fits together quite nicely with acquisition of the organism while he was in Sao Paolo, probably facilitated or even accelerated due to a cofactor of the respiratory tract infection he was known to have–or reported to have, and that the timing is very consistent with acquisition of this organism." Dr. Stratton stated that while the most likely location that the employee contracted Neisseria meningitides was Sao Paolo, "[o]bviously, anything is possible."

¶ 18 Dr. Stratton testified that his opinions were based on his experience and training, and his ability to interpret the medical literature. He stated that he provided medical articles to support that he used evidence-based medicine in terms of coming to his decisions. The articles were admitted into evidence.

¶ 19 Dr. William Lawrence Drew testified by evidence deposition on behalf of the special administrator. He is the director of the virology laboratory at the University of California at San Francisco and the chief of infectious disease at the University of California San Francisco Medical Center. He has a Ph.D. in experimental pathology with an emphasis on virology and is board certified in internal medicine with a subspecialty in infectious disease.

¶ 20 Dr. Drew testified that he reviewed records from Mercy Walworth Hospital and Medical Center in Lake Geneva, Wisconsin, and St. Mercy Health System of Janesville, Wisconsin. Dr. Drew testified that as soon as he saw that the employee had been to Brazil, it was "a very major red alert to someone in [his] field because Brazil is known for an ongoing problem with meningococcus, this organism from which he expired, and they have had an ongoing problem

for years and years, and the estimates are they have at least three to six times the amount of problems with this organism in Brazil than we have in the U.S."

¶ 21 Dr. Drew testified that the employee's death certificate listed the cause of death as Neisseria meningitides bacterium and he agreed with this finding. He found it significant that the death certificate noted an interval between onset and death of one to two days. He felt this supported a very brief incubation period and a connection to the employee's exposure in Brazil. Dr. Drew stated that Neisseria meningitides is transmitted by the respiratory route. He testified that "there's no debate that he had meningococcal infection, and meningococcal infection is more prevalent in Brazil than it is here in the U.S. and his incubation period is completely compatible with having acquired it in Brazil. So, putting those two pieces of evidence together, yes, my opinion is that it's more probable than not that that is what took place." He stated that he believed that the employee acquired Neisseria meningitides as a result of his travel to Sao Paolo. He testified that the last day that the employee could have contracted the Neisseria meningitides bacteria was on June 22 or early on June 23, 2006, and the earliest he could have contracted it would have been June 14, 2006. Dr. Drew testified that "I can say that [the employee] would not have died at this time in his life from this infection had he not made that trip [to Brazil]."

¶ 22 Dr. Drew testified that typically a person who is infected with the Neisseria meningitides bacteria does not develop the clinical disease. A small subset may develop respiratory symptoms such as a pharyngitis, a sinusitis, or a runny nose. An exceedingly small subset will develop a more serious disease such as meningococcemia or meningococcal meningitis. Dr. Drew testified that the mild upper respiratory tract symptoms that the employee told Dr. Parciak about could have been due to Neisseria meningitides, but in his opinion were likely to have been a separate illness acquired before going to Brazil. He stated that it is the opinion of many experts that an ongoing prior infection may weaken a person's defenses against Neisseria meningitides. He stated it would be "hard to sort out whether this was really due to–all of it due to Neisseria meningitides or there was another process and then superimposed Neisseria meningitides acquisition in Brazil."

¶ 23 Dr. Drew testified that he reviewed Dr. Stratton's report and he agreed that he is someone who has sufficient expert qualifications to write opinions concerning Neisseria meningitides. He further averred that he agreed with Dr. Stratton's opinions.

¶ 24 A report from Dr. Jeffrey Coe dated November 15, 2006, was admitted into evidence. Dr. Coe is board certified in occupational medicine. He wrote that he reviewed medical records at the request of the employer relating to the care of the employee. Dr. Coe wrote that the employee became acutely ill with symptoms and clinical findings consistent with bacterial meningitis following his return from a business trip. He stated that Neisseria meningitides is spread through direct hand contact or droplets spread by coughing or sneezing from an asymptomatic carrier. He noted that the incubation period varies from 2 to 10 days. He opined that based on the information reviewed, it was his opinion that it would be impossible to state to a reasonable degree of medical certainty that the employee contracted bacterial meningitis during his business trip to Brazil in June 2006. He based this opinion on the fact that because the incubation period ranges from 2 to 10 days, it would be impossible to determine whether the employee was exposed to the bacteria before or during his trip to Brazil.

¶ 25 A report from Dr. Fred Zar dated August 22, 2007, was admitted into evidence. He is a professor of medicine, the vice head for medical education, and the program director for

internal medicine at the University of Illinois at Chicago. Dr. Zar wrote that after reviewing the employee's medical records at the request of the employer, it was clear that the employee died of meningococcal meningitis despite receiving timely and appropriate care. He wrote that carriers transmit the bacteria to another person via respiratory secretions. He wrote that the typical clinical manifestations of infection include an acute onset of fever, nausea, vomiting, headache, altered mental state, and severe muscle aches, and about 50% of infected people will have a rash. Dr. Zar noted that the incubation period for Neisseria meningitides is 4 days with a range between 2 and 10 days. The first symptom specific to meningococcal meningitis in the employee appeared to have been the rash which occurred on the evening of June 24, 2006. Dr. Zar opined that the bacterium was acquired 2 to 10 days prior to the appearance of the rash or sometime between June 14 and June 22, 2006. Because the average incubation period is four days, he opined that June 20, 2006, was most likely the date that the employee contracted the bacterium. Because of the incubation period, Dr. Zar opined that it was impossible for him to tell with any degree of medical certainty whether the employee contracted this bacteria in the United States or Brazil.

¶ 26 On December 3, 2008, Dr. Zar amended his report. He wrote that because the employee was only in Brazil for about 36 hours, the time period represents only 19% of the total range of known incubation for the disease, thus making it statistically more likely than not that it was not acquired in Brazil. He further noted that it was unlikely that the employee contracted his meningococcal infection on his flight to or from Brazil. Furthermore he provided printouts of information appearing on the Centers for Disease Control website that provides advice to travelers on risks of infectious diseases in Brazil. He noted that the website did not list an increased risk of meningococcal infection from travel to Brazil, nor did it recommend that travelers to Brazil receive the meningococcal vaccine.

¶ 27 Ricardo Moura testified by telephonic evidence deposition. He testified that he worked as a general manager for the employer in Sao Paolo, Brazil. He stated that he was interviewed for this position by the employee on June 22, 2006. He stated that he met with the employee at an employment agency's office. The meeting took about one-half hour. Mr. Moura testified that the employee "looked like a person that was a hundred percent fit and one that makes sports."

¶ 28 Marcos Ito testified by telephonic evidence deposition. He stated that he worked as the technical support manager for the employer in Sao Paolo, Brazil. Approximately 30 people worked at that office. He stated that on June 21, 2006, he met with the employee and Eduardo Penteado. Later the three had dinner together at a restaurant. Dinner lasted 45 minutes to one hour. The next day, the employee arrived at the office around noon after conducting interviews at the employment agency's office. Mr. Ito testified that the employee left the office at around 3 p.m. to go to the airport.

¶ 29 Eduardo Penteado testified by telephonic evidence deposition. He stated that he is the marketing and technology manager for the employer. He stated that he picked the employee up from the airport on June 21, 2006, and took him to the employer's office. Fifteen to twenty people worked inside the office. Mr. Penteado testified that the employee met with him and Mr. Ito, and possibly someone named Adriana. The meeting lasted two to three hours. He stated that he had dinner with the employee and Mr. Ito. They arrived at 8 or 9 p.m. The restaurant was two stories and it was not full. They talked among themselves and the only other person the employee spoke with was the waitress. He estimated that they were at the restaurant for two hours. He then drove the employee to his hotel and dropped him off. Mr. Penteado

testified that he picked the employee up from the hotel at about 9 a.m. the next morning and took him to the employer's office. He stated that he did not remember what the employee did that morning. He stated that the employee interviewed Mr. Moura, but he did not remember if that took place at the office or somewhere else. Mr. Penteado testified that if the employee went to the employment agency's office, he probably took a taxi. The interview was confidential and none of the employees at the employer's Sao Paolo office knew about it. Mr. bPenteado did not have breakfast or lunch with the employee and did not know if he ate with anyone else. The employee's expense report was admitted into evidence. It showed that he went to McDonald's on June 22, 2006. Mr. Penteado drove the employee to the airport on June 22, 2006. He did not remember how early the employee arrived at the airport. He stated that typically the employee arrived four to five hours prior to his flight. Mr. Penteado testified that the employee did not look like he had any symptoms that might have been the start of meningitis. He looked tired like a long-distance traveler.

¶ 30 The special administrator testified that the employee's health prior to June 25, 2006, was very good and that he was not under the care of a doctor for any reason. The special administrator testified that she helped the employee pack for his trip to China and Japan. She testified that he was physically fine and was excited about the trip because it involved an acquisition. She stated that she did not observe any physical problems or ailments on his return from China and Japan. She testified that before he left for Brazil, he did not have any physical problems or ailments that she was able to notice.

¶ 31 Stephen Kozik testified that he had been employed by the employer for 19 years. He stated that the employee was his mentor. He communicated with the employee daily by telephone, in person, and by email. He testified that on June 20, 2006, in an email he asked the employee how he was feeling and the employee responded "fine, but I think I got the bird flu in China." Mr. Kozik testified that he did not "know if it was tongue-in-cheek." He further testified that because the bird flu was news at the time, "he may have been joking around about being in China."

¶ 32 The arbitrator held that the employee did not sustain an accident/exposure that arose out of and in the course of his employment. He found that the special administrator failed to prove, by a preponderance of the evidence, that the employee was infected with Neisseria meningitides while in Brazil. He found that the evidence in total supported a finding that the employee contracted meningitis while in the United States before he left for Brazil.

¶ 33 The special administrator sought review of this decision before the Commission. The Commission unanimously reversed the arbitrator's decision. It found that the special administrator proved by a preponderance of the evidence that the employee acquired Neisseria meningitides during the course of his travels to Brazil. It found that the opinions of Dr. Stratton and Dr. Drew were more persuasive than the opinions of Dr. Coe and Dr. Zar. The Commission awarded the special administrator death benefits, burial expenses, and reasonable and necessary medical expenses in the amount of $10,359.69. The employer sought judicial review of the Commission's decision in the circuit court of Cook County. The circuit court confirmed the Commission's decision. The employer appealed.

¶ 34 ANALYSIS

¶ 35 The employer argues that the Commission's decision was contrary to law as the evidence presented was legally insufficient to establish exposure. It argues that the Commission's

decision was based on the mere and remote possibility that the employee was exposed to Neisseria meningitides at some unknown time, in an unknown location in Sao Paolo, Brazil. It argues that the Commission's decision was thus based on speculation and conjecture. The employer's argument is not a legal argument, but one based on the sufficiency of the evidence. The Commission's factual findings are reviewed under the manifest weight of the evidence standard. *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17, 956 N.E.2d 543.

¶ 36 An occupational disease is a disease arising out of and in the course of employment. 820 ILCS 310/1(d) (West 2006). The claimant in an occupational disease case has the burden of proving that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120564WC, ¶ 21, 999 N.E.2d 382. Whether there is a causal connection between the disease and the employment is a question of fact. *Id.* It is the function of the Commission to decide questions of fact and its determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence if an opposite conclusion is clearly apparent. *Id.*

¶ 37 In the instant case there is no dispute that the employee died as a result of contracting Neisseria meningitides. The issue is whether there was a causal connection between the disease and his employment.

¶ 38 The Occupational Diseases Act provides:

> "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence." 820 ILCS 310/1(d) (West 2006).

"Nothing in the statutory language requires proof of a direct causal connection." *Sperling v. Industrial Comm'n*, 129 Ill. 2d 416, 421, 544 N.E.2d 290, 292 (1989). A causal connection may be based on a medical expert's opinion that an accident "could have" or "might have" caused an injury. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892 (1994). "In addition, a chain of events suggesting a causal connection may suffice to prove causation even if the etiology of the disease is unknown." *Id.*

¶ 39 The employer argues that the opinions of Dr. Stratton and Dr. Drew were not based on relevant factual data concerning Neisseria meningitides infection rates in Brazil. It argues that the articles provided by Dr. Stratton and Dr. Drew did not support an increased risk of meningococcal infection for travelers to Brazil. The articles were admitted into evidence and were considered by the Commission in making its determination. Dr. Drew testified that Brazil is known for an ongoing problem with meningococcus. Dr. Stratton testified that Sao Paolo was well known among infectious disease specialists as an area where there is an increased prevalence of Neisseria meningitides. He testified that the endemic rate of Neisseria meningitides infection in Sao Paolo is 2 to 5 per 100,000 people and in the United States it is 1 in 100,000. Dr. Drew testified that Brazil has "3 to 6 times the amount of problems with this

organism" than in the United States. The Commission was aware of the statistical chance for an individual to contract Neisseria meningitides in Brazil.

¶ 40 The employer argues that the Commission's decision was based on the mere and remote possibility that the employee was exposed to Neisseria meningitides at some unknown time, in an unknown location in Sao Paolo, Brazil. It argues that the special administrator did not present any evidence that the employee was exposed to a specific carrier of Neisseria meningitides or that he was in any crowded areas in Brazil where there might have been an increased risk of infection.

¶ 41 Dr. Stratton, Dr. Drew, Dr. Coe, and Dr. Zar all agreed that Neisseria meningitides is transmitted through airborne respiratory droplets. Dr. Stratton and Dr. Drew testified that most people who are infected with Neisseria meningitides do not develop the disease, but are carriers. Dr. Zar wrote in his report that "once a new person acquires the organism, the vast majority of the time the person makes proteins (antibodies) to prevent the bacterium from penetrating the nasopharynx and entering the blood stream. Individuals who successfully create antibodies will not develop the symptoms but will become carriers." The employer argues that there was no evidence that the employee was in a crowded setting. It is true that a crowded setting increases a person's risk of contracting Neisseria meningitides because there is greater exposure to carriers. However, a person only needs to come into contact with respiratory droplets from one carrier to become infected. While in Brazil, the employee interviewed candidates for the position of general manager of the Sao Paolo office, traveled to the employment agency's office, most likely by taxi, stayed in a hotel, ate at McDonald's and one other restaurant, spent hours at the employer's Sao Paolo office, and spent several hours at the Sao Paolo airport. He was in contact with numerous people during his trip to Brazil, any one of whom may have been infected with Neisseria meningitides.

¶ 42 The employer argues that the employee had an upper respiratory tract infection before he left for Brazil and that it was a manifestation of meningitis. It asserts that these symptoms support a finding that the employee contracted Neisseria meningitides before he left for Brazil. Dr. Stratton testified that the early symptoms of Neisseria meningitides are nonspecific and do not include upper or lower respiratory tract infection symptoms. Dr. Zar wrote in his report that the clinical manifestations of the infections are an acute onset of fever, nausea, vomiting, headache, altered mental state, severe muscle aches, and in 50% of infected people a rash. He did not indicate that the symptoms include symptoms similar to those in respiratory tract infections. Dr. Drew testified that a small subset of people who are infected with Neisseria meningitides may develop respiratory symptoms such as pharyngitis, sinusitis, or a runny nose. Dr. Stratton testified that had respiratory tract infection symptoms been symptoms of Neisseria meningitides, the employee would have been sick in Brazil. No one testified that the employee was ill in Brazil. In fact, Mr. Moura testified that the employee "looked like a person that was a hundred percent fit and one that makes sports." Dr. Parciak testified that the employee told him his respiratory tract symptoms had been improving. Based on this evidence, the Commission could infer that the employee's upper respiratory tract infection was not a manifestation of Neisseria meningitides.

¶ 43 Both Dr. Stratton and Dr. Drew testified that a respiratory tract infection would weaken a person's defenses against Neisseria meningitides. Dr. Stratton testified that the employee's respiratory tract infection "facilitated or even accelerated" his development of Neisseria meningitides.

¶ 44 All four doctors agreed that the incubation period for Neisseria meningitides is 2 to 10 days. Dr. Stratton opined that, to a reasonable degree of medical certainty, the employee acquired meningococcemia in Sao Paolo. He felt that Brazil was the most likely location that the employee contracted Neisseria meningitides based on when the employee became ill, the timing of the trip to Sao Paolo, and the fact that the employee had a respiratory tract infection that facilitated or accelerated his contraction of the bacterium. Dr. Stratton averred that the incubation period in the employee's case was 2 rather than 10 days. Dr. Drew testified that the interval between the onset of the employee becoming ill and his death supported a very brief incubation period. He opined that the employee contracted Neisseria meningitides as a result of his travel to Sao Paolo. Dr. Coe and Dr. Zar testified that, based on an incubation period of 2 to 10 days, it was impossible to determine whether the employee was exposed to Neisseria meningitides before or during his trip to Brazil.

¶ 45 The Commission found that the opinions of Dr. Stratton and Dr. Drew were more persuasive than those of Dr. Coe and Dr. Zar. The Commission is charged with resolving conflicts in medical opinion evidence. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 312 (2005). It is the function of the Commission to judge the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). We cannot say based upon the record before us that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court confirming the decision of the Commission.

¶ 48 Affirmed.

1 of 100 DOCUMENTS

CRAIG BAUER, DECEASED BY E. BELINDA BAUER, SPECIAL ADMINISTRATOR, PETITIONER, v. OMRON ELECTRONICS, RESPONDENT.

No. 07WC 33463

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 799; 2012 Ill. Wrk. Comp. LEXIS 740

July 25, 2012

JUDGES: Yolaine Dauphin; Charles J. DeVriendt; Ruth W. White

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, death benefits, and burial expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

FACTS

On July 27, 2007, Petitioner, E. Belinda Bauer (hereinafter Belinda) filed an application for adjustment of claim, alleging that on June 25, 2006, Craig Bauer (hereinafter Craig) sustained accidental injuries, resulting in his death. In addition to the employment relationship and an average weekly wage of $ 5,737.16, the parties stipulated that Craig was 55 years old and married with no children under the age of 25.

PETITIONER'S TESTIMONY

Belinda, Craig's wife of 32 years, testified that prior to his death on June 25, 2006, Craig was in good health, with no active medical care or work restrictions.

Craig worked as Respondent's chief operating officer for four years. He traveled outside of the United States often, and in June 2006 alone, traveled to China, Japan, and Brazil. On June 7, 2006, Craig traveled [*2] from Chicago to China and Japan. Belinda recalled Craig was excited about the trip, as it involved a business acquisition. He appeared to be in good health when he left for China and Japan. Craig returned to Chicago on Wednesday, June 14, 2006, and worked at Respondent's Schaumburg office for two days. He did not appear to have any physical ailments when he returned from China and Japan.

On Tuesday, June 20, 2006, during the late evening, Craig traveled to Sao Paulo, Brazil. When he left for Sao Paulo, Craig appeared healthy, without physical ailment. In contrast, when he returned from Brazil on Friday, June 23, 2006, he "seemed tired," and "kind of pale, not feeling great." That evening, they drove to their home in Lake Geneva, Wisconsin. Rather than dining out as usual, they stayed in because Craig felt ill. He was extremely tired, said he felt a little achy, as if he had the flu, and went to bed early.

On the morning of June 24, 2006, Craig awoke early for a haircut and returned to the house only to lie down on the couch. He developed a fever, said he felt "very achy," and refused food and drink. Craig's flu-like symptoms continued to worsen, and in the late afternoon, he developed [*3] a rash that looked like "little black spots all over his face and down his arms." The rash became progressively worse.

Belinda drove Craig to the emergency room. When Craig removed his shirt so the doctors could examine him, the "rash was everywhere." Craig's condition continued to worsen and he died of Neisseria meningitides an hour after being transferred to the intensive care unit of another area hospital. Belinda and her children tested negative for Neisseria meningitides, but took a course of preventative antibiotics.

On cross-examination, Belinda confirmed that in March 2006, Craig fell while doing landscaping at their home in Lake Geneva, fracturing his ribs. Belinda could not recall Craig coughing before he left for Brazil on June 20, 2006.

On redirect examination, Belinda testified that by the time Craig left for Brazil on June 20, 2006, he was no longer taking Vicodin for his rib injury. Craig took prescription blood pressure medication.

RESPONDENT'S WITNESSES

Stephen Kozik --Integration Manager

Stephen Kozik, an integration manager employed by Respondent for 19 years, reported directly to Craig.

Kozik and Craig exchanged emails on June 20, 2006, and when Kozik asked [*4] Craig how he was feeling, Craig replied, "Fine, but I think I got the bird flu in China." n1 Kozik testified he did not know whether Craig's statement was tongue-in-cheek or true.

On cross examination, Kozik testified he has never traveled to Brazil. Since Craig's death, Respondent has not changed its policy regarding employee travel to Brazil.

Ricardo Moura -- General Manager, Brazil Office

Ricardo Moura, a general manager in Respondent's Brazil office, testified by telephonic deposition that Craig interviewed him on June 22, 2006 for the general manager position. The interview took place at the office of Korn/Ferry, a recruiting company. Outside of the thirty minute interview, Moura did not know how Craig spent his time in Brazil. He recalled that Craig complained about pain in his ribs due to an accident. Craig "looked like a person that was 100 percent fit and one that makes sports." (Sic.)

Marcos Ito -- Technical Support Manager, Brazil Office

Marcos Ito, a technical support manager [*5] in Respondent's Brazil office for ten years, testified via telephonic deposition that Craig came to the Brazil office in June 2006 to interview candidates for a general manager vacancy. During his stay, he spoke with Ito at the office and joined Ito and another employee for dinner at a local restaurant, "the Fifties." The group traveled from the office to the restaurant, and then from the restaurant to Craig's hotel. Ito did not know whether Craig went sightseeing during his trip. On Craig's last day in Brazil, he arrived at the office at approximately noon.

On cross examination, Ito testified that Craig did not visit Respondent's factory, which is located outside Sao Paulo, during his trip. At the time of Craig's visit to the Sao Paulo office, there were about 30 employees working in the office.

Eduardo Penteado, Marketing and IT Manager, Brazil Office

Eduardo Penteado, a marketing and IT manager in Respondent's Brazil office, testified via telephonic deposition that Craig visited the Sao Paulo office regularly, with the last visit in June 2006, when Sao Paulo hosted the World Cup.

Penteado and Ito dined with Craig at "the Fifties" restaurant. After dinner, Penteado drove Craig [*6] directly to his hotel. As he was in Brazil "strictly [for] business," Craig spent his time between the office and his hotel. Craig did not discuss any health concerns with Penteado. Penteado drove Craig to the airport on the date of his departure to the United States.

On cross examination, Penteado testified that at the time of Craig's visit, fifteen to twenty employees worked at Respondent's Brazil office. Penteado learned Craig passed away from Jake Roberts, Respondent's vice president of human resources. Roberts did not state the cause of death, but later, Penteado discovered Craig died as a result of meningitis. Penteado educated himself about the disease. In light of the time Craig spent with him, Penteado was concerned and contacted his doctor. Penteado did not seek actual testing or treatment. Penteado's doctor advised him such was not needed as he appeared to be symptom-free.

Penteado elaborated that after picking Craig up from the airport on June 21, 2006, he drove Craig straight to the office. Craig then interviewed Moura and other candidates at Korn/Ferry. Craig may have taken a taxi to Korn/Ferry. Lat-

er, Craig held a department meeting that Penteado and Ito attended. At [*7] about 8:00 p.m., Craig, Ito, and Penteado traveled to "the Fifties" restaurant. The restaurant is in a two-story building and is similar to a TGI Friday's restaurant. The restaurant was fairly empty and Craig spoke only to the waitress, Ito and Penteado during their two hour dinner. After dinner, Penteado took Craig to his hotel, the Quality Inn. The next morning, Penteado picked Craig up at the hotel and drove him to Respondent's office. Penteado did not know how Craig spent his time at the office on June 22, 2006, and admitted it was possible Craig took a taxi to Korn/Ferry to conduct the remaining interviews. Toward the end of the day on June 22, 2006, Penteado drove Craig to the airport. Penteado could not recall how many hours Craig spent at the airport before his flight, but typically, Craig left for the airport four to five hours prior to departure.

PRE- ACCIDENT MEDICAL RECORDS

On March 25, 2006, Craig sought emergency treatment with Dr. Radak at Mercy Walworth Hospital for "injur[ies] related to [a] fall." A chest X-ray showed fractures at the 7th, 8th, and 9th "left posterolateral ribs," with "no significant pneumothorax" or "pulmonary infiltrate." Dr. Radak completed a [*8] return to work report indicating, "Mr. Bauer is not allowed to either fly or travel at this time due to his injury. 4-6 week healing time." Dr. Davis acted as Craig's primary care physician. On March 27, 2006, Dr. Davis' staff made a note in Craig's chart reflecting out of state treatment for a rib injury, and a request for a refill of a prescription for Vicodin. Dr. Davis refilled the prescription.

ACCIDENT MEDICAL RECORDS

On June 24, 2006, Craig presented to Mercy Walworth Hospital, where he saw Dr. Parciak. Craig reported traveling to China and Japan one week before, with more recent travel to Brazil. Dr. Parciak noted:

> "The patient states that he started to feel some mild upper respiratory tract illness symptoms approximately 1 week ago consisting of general malaise, cough, which was nonproductive, [and] intermittent low-grade temperatures. Patient states his symptoms somewhat improved over the course of the week; however, he also started to develop a rash which began tonight at approximately 5 p.m. The patient noted reddish-purplish spots that started on his bilateral lower extremities and gradually ascended throughout the rest of his body over the course of the ensuing hours [*9] up until the time of presentation. His only medications include Mucinex DM which was started earlier in the afternoon for the patient's persistent cough. While the patient was traveling to the above geographical areas, he denied any specific bug bites, exposure to exotic foods, or exposure to any sick contacts specifically."

Examination revealed "diffuse nonpalpable purpuric rash lesions ranging in size of 4 to 8 mm in size." (Sic.) Dr. Parciak diagnosed "[p]urpuric rash due to infectious etiology, cause uncertain," "renal insufficiency," and "sepsis/disseminated intravascular coagulopathy." Based on "the infectious etiology and purpuric rash, [Craig] was given broad-spectrum antibiotics." Dr. Parciak noted further:

> "I do not have a high suspicion of the patient having meningitis at this time as he does not have a significant headache, neck pain, neck stiffness, photophobia, etc. though meningococcemia is still possible. It is likely that the patient is septic from some unknown bacteria or viral cause which is especially concerning because of his recent travel history."

Dr. Parciak transferred Craig to the intensive care unit at Mercy Janesville Hospital to treat with Dr. [*10] Kanwar, the internist on call. Prior to transport, Craig had developed an episode of hypotension, which stabilized. He did not "exhibit any signs of deterioration in his condition" at the time of transport.

When Craig arrived at Mercy Janesville Hospital, Dr. Kanwar noted, "he was still talking and he was getting all my questions appropriately, but he appeared to be in respiratory distress." Craig reported "having [a] problem with [a] cough and upper respiratory tract symptoms for almost a week." He "had been sick since he came from Japan with these cold symptoms, but today he started having [a] rash and generalized malaise and weakness." Shortly after he arrived at Mercy Janesville Hospital, Craig went into acute respiratory failure. Dr. Kanwar intubated Craig, but Craig became "bradycardic and went into asystole." Dr. Kanwar initiated an unsuccessful code blue protocol.

On June 25, 2006, Dr. Salisbury, a pathologist, completed an autopsy report. Dr. Salisbury noted the cause of death as "[h]emorrhagic adrenals, consistent with Waterhouse Friderichsen syndrome," "premortem blood culture positive for Neisseria Meningitides." He described the clinical course:

> "This 55-year-old white [*11] male was admitted to Mercy Hospital on June 25, 2006, for evaluation and treatment of acute respiratory failure and purpuric rash all over the body....The patient also had

been having trouble with cough, intermittent low-grade fevers and upper respiratory illness symptoms for almost a week. There was [a] recent travel history to China, Japan and Brazil. The patient's clinical course was rapid and despite treatment with antibiotics, intubation and IV fluids, the patient became hypotensive and expired at 3:30 am on June 25, 2006."

Dr. Davis spoke with Belinda on June 25, 2006, and June 26, 2006. He noted:

"Phone conversation with [Craig's] wife. I had talked to her on 6/25/06 around 11:30 p.m. She had brought him to the emergency room because he had flu-like symptoms for a couple of days and was developing a purpuric rash over his entire body. I talked to the physician up there who had arranged for transfer to Mercy Hospital in Janesville and talked with an intensive care doctor there who was on duty. [Craig's] platelets were slightly down. His INR was up. He had received two doses of antibiotics and I concurred with what was being done at that time. Subsequently, turned out to [*12] have meningococcal meningitis and rapidly went downhill and became hypotensive and died within three hours. I talked [to] his wife and gave her prophylaxis with Cipro 500 mg a day. This was on June 26. I also talked to the Health Department who was going to follow up about this."

The Rock County Register of Deeds, Randal Leyes, issued a death certificate on July 7, 2006, in which medical certifier, Dr. Kerry Henrickson, listed "Neisseria Meningitidis Bacterium" as the cause of death. Dr. Henrickson noted "1-2 days" as the interval between onset and death.

SECTION 12 REPORTS

Dr. Jeffery Coe

On November 15, 2006, Dr. Jeffrey Coe prepared a Section 12 report for Respondent. Dr. Coe is board certified in occupational medicine and serves as the Director of Occupational Medicine Associates of Chicago. He reviewed Craig's medical records and the autopsy report. Dr. Coe explained:

"[Neisseria meningitides] is found worldwide and is not uniquely endemic to South America. The incubation period for Meningococcal meningitis varies from 2 to 10 days...The mortality rate from Meningococcal infection ranges from 5 to 15 percent, although it may exceed 50 percent with late diagnosis."

Dr. [*13] Coe did not believe Craig contracted Meningococcal meningitis in Brazil, and opined:

"Based on the information reviewed, in my opinion it would be impossible to state to a reasonable degree of medical certainty that Mr. Bauer contracted bacterial meningitis during his business trip to Brazil in June 2006. Because the incubation period for this infection ranges from 2 to 10 days, it would be impossible to determine whether his exposure to the bacteria was before or during his business trip to Brazil."

Dr. Arthur Zar

On August 22, 2007, Dr. Arthur Zar prepared a Section 12 report at Respondent's request. A Professor of medicine, vice head of medical education, and program director at the University of Illinois Chicago, Dr. Zar reviewed Craig's medical records and travel history. Initially, Dr. Zar discussed the local and global occurrence rates of Neisseria meningitides:

"In the United States each year there are approximately 1,400 cases of meningococcal meningitis reported (1,361 cases in 2004) to the Centers for Disease Control. Approximately 1/3 of these are in persons under 2 years old, 1/3 are 2-30 years old and 1/3 are over 30. Only 3% [of Neisseria meningitides] cases [*14] are associated with a known outbreak and thus 97% are sporadic cases that are not associated with a known other infected patient as we see in the case of Mr. Bauer. There are occasional epidemics in other countries but there have been no recent epidemics in Brazil. The bacterium is endemic in a belt across sub-Saharan Africa that is known as the 'meningitis belt.' Otherwise, there are no constant areas of increased risk in the world. Once acquired, and even with appropriate treatment, the mortality rate is 10%."

Dr. Zar then opined that Craig did not acquire the disease in Brazil, explaining:

"With respect to attempting to determine whether Mr. Bauer acquired Neisseria meningitides during his trip to Brazil it is important to understand the incubation period....The known incubation period is 4 days with a range between 2-10 days. The first symptom specific to meningococcal meningitis in Mr. Bauer appears to have occurred on the evening of 6/24/2006 with the development of a rash. Thus, the bacterium was acquired from 2-10 days prior to this (sometime between June 14th and June 22nd). The average incubation period of 4 days would place the date of acquisition of the organism on [*15] June 20th, a day when he was both in the United States and in Brazil. The 8 day range during which the organism could have been acquired has 4 of them occurring during his trip to Brazil and 4 of them occurring while he was still in the United States. Thus, unfortunately, it is impossible for me to tell with any degree of medical certainty whether this bacteria was acquired in the United States or in Brazil.

***

Mr. Bauer had a separate and discrete office at Omron Electronics and thus he would not be at high risk of acquiring the organism by close contact with another worker at his work place... I know of no further testing that would facilitate our ability to know at which time and in which country Mr. Bauer acquired his infection."

On December 3, 2008, after reviewing the report of Petitioner's Section 12 examiner, Dr. Charles Stratton, and Craig's flight records, Dr. Zar prepared an addendum report. In the report, Dr. Zar stated:

"Based on the flight information you provided...Mr. Bauer arrived in Brazil at 7:52 AM on 6/21/06 and departed Brazil at 9:50 PM on 6/22/08. Thus he was physically in Brazil for only a 36 hour period during the 8 day range of possible times of acquisition [*16] of Neisseria meningitides...This 36 hour period represents only [approximately] 19% of the total rank of know[n] incubation of this disease thus making it statistically more likely than not that it was not acquired in Brazil.

***

I also provided you with a review article, 'Transmission of infectious diseases during commercial air travel,'... The summary...shows that even though 21 persons have been known to have meningococcal disease when they boarded a commercial aircraft, no other passengers have gotten sick from this exposure. Thus, I think it more likely than not that Mr. Bauer did not acquire his meningococcal infection from his flights to or from Brazil. (Citation omitted.)

***

Lastly, I provided you with copies from the Centers for Disease Control website that gives advice to travelers on risks of infectious diseases in Brazil. Of note is that an increased risk of meningococcal infection is not listed anywhere on this document, nor is it recommended that travelers to Brazil receive the widely available and effective meningococcal vaccine."

Dr. Charles Stratton

On January 15, 2008, Dr. Charles Stratton prepared a Section 12 report at Petitioner's request. Dr. Stratton [*17] is an Associate Professor of Pathology and Medicine and the Director of Clinical Microbiology Laboratory at Vanderbilt University Medical Center. He is board certified in internal medicine, the practice of medicine, infectious diseases, and medical microbiology; "make[s] Clinical Microbiology/Infectious Disease Rounds five days per week with Pathology Residents and Infectious Disease Fellows;" and performs "Clinical Microbiology Infectious Disease [c]onsultations as requested." He reviewed Craig's medical records, death certificate, and trip itinerary. Initially, Dr. Stratton explained:

"Meningococcemia is characterized by an abrupt onset of a petechial or purpuric rash...and is often associated with the rapid onset of hypotension, acute adrenal hemorrhage (the Waterhouse- Friderichsen syndrome), multiorgan failure, and death. Meningococcemia is caused by Neisseria meningitides... Humans are the only natural reservoir of Neisseria meningitides, which colonizes the nasopharynx of humans who usually do not suffer invasive infection, but instead become carriers. These carriers then serve to transmit the Neisseria meningitides from their colonized nasopharynx by aerosol or secretions [*18] to others....Rates of carriage and transmission are increased among lower socioeconomic populations living in crowded areas."

Dr. Stratton noted that "prior to the onset of [the] purpuric rash [Craig] had been in Sao Paulo from June 21, 2006 to June 23, 2006." Further, "[d]uring these travels, [Craig]...suffered from a mild respiratory tract infection." Taking into consideration the incubation period, the impact of the respiratory tract infection, and the prevalence rates, Dr. Stratton opined "[w]ithin a reasonable degree of medical certainty," that Craig acquired Neisseria meningitides in Brazil and died of "acute meningococcal sepsis." He explained:

> "a concurrent viral or mycoplasma infection of the upper respiratory tract increases the risk of invasive meningococcal disease in the susceptible individual. Invasive meningococcal disease usually occurs within several days to one week after the new acquisition of Neisseria meningitides in the nasopharynx of a susceptible individual. International travel is a recognized risk for meningococcal disease. Moreover, meningococcal disease is known to be endemic in Sao Paulo, Brazil with a suspected outbreak of meningococcal disease reported [*19] as recently as July 2007. [Craig] was in Sao Paulo from June 21-23, 2006 and became ill at around 5 pm on June 24, 2006 after returning home. Therefore, within a reasonable degree of medical certainty, [Craig] acquired this meningococcemia in Sao Paulo as a result of his travel to this city. The mild respiratory tract infection that [Craig] was suffering from may also have facilitated the acquisition and dissemination of the Neisseria meningitides." (Citations omitted.)

Dr. Stratton cited several scholarly articles in support of his opinion, which he attached to the report.

Dr. William Drew

On January 7, 2008, Dr. William Drew prepared a Section 12 report at Petitioner's request. Dr. Drew is a Professor in Residence in the Department of Laboratory Medicine and Medicine at the University of California San Francisco. He is board certified in internal medicine, infectious disease, and microbiology. He also serves as the chief of infectious disease at the University of California San Francisco Mount Zion Medical Center. After reviewing Craig's medical and travel records, he opined:

> "[I]t is highly likely that [Craig] acquired [Neisseria meningitides] in Brazil from which he returned [*20] on June 23, 2006.
>
> ***
>
> I base this opinion on the following:
>
> Infection with Neisseria meningitides spreads by respiratory transmission and begins with colonization of the upper respiratory tract. The incubation period until meningococcemia occurs ranges from 2 to 10 days but is commonly 3 to 4 days. Given the onset of his disease on June 24, I estimate that he is likely to have acquired this organism on June 20 or 21 while still in Brazil.
>
> ***
>
> There has been an ongoing outbreak of Neisseria meningitides infection in Brazil since the early 1920's until present day. Please see attached...especially the paper by deLemos et al. In the United States the rate of infection is 1-2 cases per 100,000 people while in Brazil it has typically been approximately 6.0 per 100,000." (Citation omitted.)

Dr. Drew attached to his report the scholarly articles he cited, including the deLemos article. The article, entitled "Clonal Distribution of Invasive Neisseria meningitidis Serogroup C Strains Circulating from 1976 to 2005 in Greater Sao Paulo, Brazil," states that in greater Sao Paulo (GSP), Brazil, "four epidemic periods of meningococcal disease (MD) have been reported and documented in the last [*21] 80 years." The authors identified and discussed each epidemic period by serotype.

DEPOSITION TESTIMONY

Dr. Stratton

Dr. Stratton testified via deposition on July 10, 2009, that Neisseria meningitides is transmitted by droplets, such as those "sprayed" when one coughs or talks. Crowding, more prevalent in lower socioeconomic populations, is a "big factor" in the rate of transmission. Dr. Stratton explained that international travel increases the risk of acquiring Neisseria meningitides. He noted:

"the bottom line is that there are areas in the world that have a high prevalence of Neisseria meningitides and that if you go to those areas, you are at risk for getting this infection. And if you know you're going to those areas, then it would behoove you to be immunized against Neisseria meningitides before you go."

Comparing Sao Paulo, Brazil to the United States, Dr. Stratton testified that while the incidence rate of Neisseria meningitides in the United States is 1 in 100,000, the rate in Brazil is 2 to 5 in 100,000. Sao Paulo is "infamous," and "well known in the medical literature, as well as among infectious disease specialists, as an area where there's an increased prevalence [*22] of Neisseria meningitides."

The medical records from Mercy at Lake Geneva and Mercy at Janesville showed Craig suffered from a mild upper respiratory tract infection before acquiring Neisseria meningitides, which "facilitate[d] the organism" getting into Craig's bloodstream. Dr. Stratton explained:

"So if you go to certain areas, you're at risk for getting the organism into your -- onto your own respiratory mucosa, your nasopharynx, et cetera. So then the issue becomes, okay, so you're at risk for colonization. The organism is on your throat -- in your throat or nasopharynx because you've just breathed in some aerosolized droplets that contain the organism. So what then -- so you're colonized, but that doesn't mean you're infected. Colonization doesn't mean infection. So if you have the organism and you've been colonized, now what is it that allows the organism to end up in your bloodstream or in your central nervous system if you get meningitis? And one of the things that has been looked at, and indeed found to be in this case, is that *if you have an infection, say from a virus or mycoplasma -- if your upper respiratory tract is infected and you end up with Neisseria meningitides* [*23] *on top of a respiratory tract infection, then you're actually at a greater risk that -- this is called a cofactor.*" (Emphasis added.)

Dr. Stratton concluded that but for Craig's travel to Sao Paolo or other international travel, he would not have died from Neisseria meningitides. Sao Paulo was "the most likely source" of the disease.

On cross-examination, Dr. Stratton acknowledged he did not know the serogroup of Neisseria meningitides Craig suffered from, as it was not identified in the medical records. Asked whether identifying the serogroup would help determine the origin of the infection, Dr. Stratton replied, "No... *[Y]ou can find different strains in different parts of the world. Prevalent doesn't mean only.*" (Emphasis added.)

Dr. Stratton agreed that Craig's medical records indicated he began experiencing upper respiratory and flu symptoms one week before he presented to the emergency room on June 24, 2006. Dr. Stratton also agreed symptoms of Neisseria meningitides, including malaise, fatigue and low-grade fever, can mimic symptoms of an upper respiratory tract infection. He explained, however, that Neisseria meningitides develops to include other symptoms:

"the [*24] early symptoms [of Neisseria meningitides]...are very nonspecific: malaise, myalgia maybe, low-grade fever, you know, that's quite nonspecific, and that can be similar with meningococcemia as well as a cold. But again, *Neisseria meningitides doesn't give you a sore throat and sneezing and runny nose, watery eyes. It doesn't give you a cough. It doesn't give you the things we associate with a respiratory tract infection.*" (Emphasis added.)

Dr. Stratton disagreed vigorously that the upper respiratory infection symptoms Craig experienced on or about June 17, 2006, signaled Neisseria meningitides, and testified, "if he were getting meningococcemia as early as the 17th, he wouldn't have made it to Sao Paulo." Dr. Stratton believed Craig's upper respiratory tract infection started with nonspecific symptoms on June 17, 2006. By June 21st or 23rd, given the upper respiratory tract infection he already had, Craig was "primed" or "had a cofactor that would make the likelihood of him not only becoming colonized but becoming infected with the Neisseria meningitides more likely so."

As to the transmission of Neisseria meningitides, Dr. Stratton testified that droplets from the nasopharynx [*25] of a colonized individual will become airborne and float. Craig was likely in the same room with an infected individual who coughed or sneezed.

The following colloquy then occurred:

"Q: In this case, is it your opinion that [Craig] contracted his Neisseria meningitides among the public at large?

> A: Yeah, I mean, he -- in other words, when he's in Sao Paulo -- and I don't know how he spent every minute of every day, but he -- his risk starts when he gets off the airplane and he's walking through the airport. I mean, there's probably a crowded situation, you know. And short of getting in a protective bubble and going to his hotel room and not interacting with anyone, just being in Sao Paulo puts you at increased risk. And yes... you're among the public at large."

Dr. Stratton did not believe Craig acquired Neisseria meningitides on his flights to or from Brazil, and explained that due to circulated air passing through the plane's engine, which serves as a little "incinerator," air travel is actually safer than the airport or other locales in Sao Paulo. Dr. Stratton did not know of a vaccination requirement for travel to Brazil, and surmised Brazil would not likely institute such [*26] a requirement because it would detract from tourism dollars.

Dr. Stratton agreed with the literature stating the incubation period for Neisseria meningitides is two to ten days. Dr. Stratton testified he would "lean more towards" an incubation period of two days, as opposed to ten, in a situation like Craig's where a "concomitant respiratory infection" acted as a "cofactor and facilitated" transmission.

Dr. Drew

Dr. Drew testified via deposition on July 24, 2009, that he performs eight to ten infectious disease consultations per month and spends about twenty percent of his time teaching. Eighty percent of the work he performs as an expert witness is on behalf of defendants, and twenty percent on behalf of plaintiffs.

Dr. Drew explained Craig's infection was an "exceedingly rapid, fatal disease unresponsive to antibiotics." Noting Craig's travel itinerary to Brazil, Dr. Drew testified:

> "as soon as I saw that he had been to Brazil and he had meningococcus, *that is a very major, red alert to someone in my field because Brazil is known for an ongoing problem with meningococcus*, this organism from which he expired, and they have had an ongoing problem for years and years, and [*27] the *estimates are they have at least three to six times the amount of problem with this organism in Brazil than we have in the U.S.*" (Emphasis added.)

As to the incubation period, Dr. Drew testified:

> "the usual incubation period for this disease is two to ten days, *but the most common would be about three to four days*, and so the timing fits perfectly with acquiring an organism that we know is more prevalent and more seriously a public health problem than is the case in the U.S." (Emphasis added.)

Dr. Drew reviewed Craig's autopsy report and death certificate. He found it significant that the medical certifier listed Neisseria meningitides as the only cause of death on the death certificate, and further listed the "interval between onset and death" as one to two days. Dr. Drew explained:

> "this is an explosive infection that [in] my own experience with it in prior patients, or in this case, a patient presents [and]...less than 24 hours later, they're dead, and I think it supports a very brief incubation period and a connection to his exposure in Brazil."

Summarizing his causation opinion, Dr. Drew testified:

> "there's no debate that he had meningococcal infection, [*28] and meningococcal infection is more prevalent in Brazil than it is here in the U.S. and his incubation period is completely compatible with having acquired it in Brazil. So, putting those two pieces of evidence together, yes, my opinion is that it's more probable than not that this is what took place."

On cross-examination, Dr. Drew acknowledged that the emergency room doctor, Dr. Parciak, noted Craig began experiencing "mild respiratory tract illness symptoms approximately 1 week" prior to admission, "consisting of general malaise, cough, [and] intermittent low-grade temperatures." Asked whether the symptoms fit into the subset of symptoms associated with Neisseria meningitides, Dr. Drew replied:

> "Well, if that was due to Neisseria meningitides, they would. It's equally possible, and I believe likely, that [it] was another process, perhaps one acquired even before going to Brazil, and it is, I believe, the opinion of many experts in this field that if you have an ongoing prior infection, it could be viral, it could be some other agent, that may weaken your defenses against a Neisseria meningitides."

Dr. Drew confirmed that the incubation period is two to ten days. On average, [*29] the figure is closer to three or four days, but admittedly, the predominance is somewhere in the middle -- between four and six days. Dr. Drew believed, given the rapid progression of Craig's symptoms, his incubation period was shorter. Dr. Drew agreed that the earliest Craig could have contracted the disease was June 14, 2006, and the latest he could have contracted it was June 23rd. He admitted that he had no actual knowledge of Craig's activities in Brazil, but agreed with Dr. Stratton's statement that but for the trip to Brazil, Craig would not have died.

Dr. Drew admitted that in his narrative report, he incorrectly noted that Craig was in Brazil from June 20-21, 2006. In fact, Craig traveled from Chicago on June 20, 2006, and did not arrive in Brazil until the morning of June 21, 2006. Asked whether it was possible Craig contracted the disease on June 20th, while in the United States, Dr. Drew replied, "it's possible." He also admitted that there was no actual way to definitively pinpoint where, how, or when Craig contracted the disease. Dr. Drew was uncertain of the serotype of Craig's Neisseria meningitides, but agreed serotypes C and B are most prevalent in Brazil.

On redirect [*30] examination, Dr. Drew concluded:

> "It is more likely than not, and earlier I think I had said to you that when I started to review this case, the moment I saw meningococcemia as the problem and the trip to Brazil, it was a huge red flag of a likely connection. Because of what's known about meningococcal disease in Brazil, the incubation period being compatible, to me it added up without any hesitation or doubt in my mind."

MISCELLANEOUS RECORDS

Travel Itineraries

Belinda introduced into evidence the itineraries for Craig's trips to China, Japan, and Brazil, which reflected the following schedules:

- June 7, 2006, through June 8, 2006: Flight from Chicago to Shanghai, China

- June 10, 2006: Flight from Shanghai to Japan

- June 14, 2006: Flight from Japan to Chicago

- June 20, 2006, through June 21, 2006: Flight from Chicago to Brazil (with arrival in Sao Paulo at 7:52 am)

- June 22, 2006, through June 23, 2006: Flight from Brazil to Chicago (departing Sao Paulo at 9:50 p.m. on June 22nd, and arriving in Chicago at 9:30 a.m. on June 23, 2006.)

Expense Report: Sao Paulo June 21, 2006 through June 22, 2006

On June 21, 2006, Craig purchased food at "the Fifties" restaurant. [*31] On June 22, 2006, he ate at McDonald's. Craig stayed at the Quality Inn from June 21, 2006, through June 22, 2006.

Centers for Disease Control and Prevention (CDC) Report

Respondent introduced into evidence the CDC report documenting the agency's investigation of Craig's case. The investigation, which focused on passengers on Craig's flight home from Brazil, identified no passengers with symptoms similar to Craig's.

Medical Bills

Belinda introduced into evidence the following medical bills:

- Mercy Walworth Medical Center, for services on June 24, 2006, in the amount of $ 2,231.83

- Delevan Rescue Squad, for ambulance services to Mercy Janesville Hospital on June 25, 2006, in the amount of $ 1,044.63.

- Mercy Health System, for services on June 25, 2006, in the amount of $ 3,944.83

- Mercy Physician Services, for services from June 24, 2006, through June 26, 2006, in the amount of $ 3,138.40

DISCUSSION

The Arbitrator found that Belinda failed to prove that Craig was infected with Neisseria meningitides while in Brazil. We disagree. Having thoroughly reviewed the record, including the expert opinions submitted by the parties, we believe Belinda proved by a preponderance [*32] of the evidence that Craig acquired Neisseria meningitides during the course of his travels to Sao Paulo, Brazil. We find the opinions of Dr. Stratton and Dr. Drew more persuasive than the opinions of Dr. Coe and Dr. Zar.

As explained by the Illinois Supreme Court in *Sperling v. Industrial Commission, 129 Ill.2d 416, 544 N.E.2d 290 (1989),* under the Occupational Diseases Act, an employee need not prove his or her case by direct evidence. "Nothing in the statutory language requires proof of a direct causal connection. Further, the legislature explicitly changed this requirement in 1975 when it deleted the word 'direct,' which had preceded 'causal connection,' from the statutory language." *Sperling, 129 Ill.2d at 421, 544 N.E.2d at 292.* Rather, "[t]he relevant portion of the statute provides:

> 'A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected [*33] but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.' Ill. Rev. Stat. 1983, ch. 48, par. 172.36(d)." *Sperling, 129 Ill.2d at 421, 544 N.E.2d at 292.*

Turning to the facts at bar, the medical records support a finding that Craig had a mild upper respiratory tract infection as of June 17, 2006. As noted by Dr. Parciak, Craig reported "he started to feel some mild upper respiratory tract illness symptoms approximately 1 week ago consisting of general malaise, cough, which was nonproductive, [and] intermittent low-grade temperatures." Craig traveled from Chicago to Brazil on June 20, 2006, arriving in Sao Paulo at 7:52 a.m. on June 21, 2006. Penteado picked Craig up at the airport and took him to Respondent's office. Craig then went to Korn/Ferry to conduct interviews. He returned to Respondent's office where he held a department meeting. That evening, Craig, Penteado, and Ito went to "the Fifties" restaurant where they spent approximately two hours over dinner. After their meal, Penteado drove Craig to his hotel [*34] where Craig spent the night. The next morning, Penteado picked Craig up at his hotel and drove him to Respondent's office. Penteado testified he did not know how Craig spent his time at the office on June 22, 2006, but believed Craig took a taxi to Korn/Ferry to conduct the remaining interviews. Toward the end of the day on June 22, 2006, Penteado drove Craig to the airport, and Craig left Sao Paulo at 9:50 p.m.

That Craig traveled to Brazil immediately before he acquired Neisseria meningitides was significant to Dr. Stratton, the Director of Clinical Microbiology Laboratory at Vanderbilt University Medical Center, and a physician with board certifications in the fields of infectious disease, microbiology, and internal medicine. Dr. Stratton listed the incidence rate of Neisseria meningitides in the United States as 1 in 100,000, and in Brazil as 2 to 5 in 100,000. Dr. Stratton noted further that Brazil is "well known in medical literature and among infectious disease specialists as an area where there's an increased prevalence of Neisseria meningitides." Dr. Drew, who is Associate Chief of Medicine in charge of Infectious Diseases at Mount Zion Medical Center and a Professor in Residence [*35] in the Department of Laboratory Medicine and Medicine at the University of California San Francisco board certified in infectious disease, microbiology and internal medicine, agreed with Dr. Stratton. Dr. Drew testified:

> "[A]s soon as I saw that he had been to Brazil and he had meningococcus, *that is a very major, red alert to someone in my field because Brazil is known for an ongoing problem with meningococcus...* they have had an ongoing problem for years and years, and the estimates are they have at least three to six times the amount of problem with this organism in Brazil than we have in the U.S." (Emphasis added.)

The expert witnesses all agreed the incubation period for Neisseria meningitides is two to ten days, with the average being three to four days. Dr. Stratton testified he would "lean more towards" an incubation period of two days, as opposed to ten, in a situation like Craig's where a "concomitant respiratory infection" acted as a "cofactor and facilitated" transmission. Dr. Drew characterized Craig's course of Neisseria meningitides as "explosive," and opined the rapid progression of his illness supported "a very brief incubation period."

Dr. Coe and Dr. Zar [*36] opined Craig did not contract Neisseria meningitides during his travels to Brazil. Dr. Coe, however, is not an expert in infectious diseases. Rather, he is board certified in occupational medicine. Dr. Zar's letterhead shows he is a Professor of Medicine and the Program Director of Internal Medicine at the University of Chicago. Of concern, neither Dr. Coe nor Dr. Zar seems to have taken into consideration the role played by Craig's mild upper respiratory tract infection. Because Craig had an upper respiratory tract infection, he was more susceptible to acquiring Neisseria meningitides. As explained by Dr. Stratton, the presence of a cofactor decreased the average incubation period from three to four days, to approximately two days.

Respondent argues Craig had early symptoms of Neisseria meningitides as of June 17, 2006. Respondent notes Craig's symptoms included "general malaise, cough, [and] low-grade temperature." Dr. Stratton and Dr. Drew refuted Respondent's assertion. They explained that symptoms of Neisseria meningitides do not include the "symptoms we associate with an upper respiratory tract infection," including a cough. Dr. Stratton testified that "if [Craig] were getting [*37] meningococcemia as early as June 17, 2006, he wouldn't have made it to Sao Paulo."

While Respondent argues that Belinda failed to offer evidence that Craig came into contact with a person known to be infected with Neisseria meningitides, Dr. Stratton testified that Neisseria meningitides is transmitted by droplets "sprayed" when one coughs or talks, and "most patients acquire their invading strain of the disease from an *asymptomatic* carrier." (Emphasis added.) He explained further, "short of getting in a protective bubble and going to his hotel room and not interacting with anyone, just being in Sao Paulo [put] [Craig] at increased risk." We note that Craig had significant contacts with the general public while in Brazil. He interviewed an unknown number of candidates, including Moura, at Korn/Ferry. As Penteado did not take Craig to Korn/Ferry, a reasonable inference is that Craig took a taxi to that location. Craig spent several hours at Respondent's Brazil office where he held a department meeting that Ito and Penteado attended. He stayed at a public hotel, and ate at least two restaurants, "the Fifties," and McDonald's. Craig also spent several hours at the Sao Paulo Airport [*38] interacting with an unknown number of persons. With respect to Craig's contacts with carriers of Neisseria meningitides, we note Dr. Zar's statement that "[Craig] had a separate and discrete office at Omron Electronics and thus he would not be at high risk of acquiring the organism by close contact with another worker at his work place." While Craig may have had a "separate and discrete office at Omron," he interacted with numerous individuals at Respondent's Sao Paulo office. There is no basis for Dr. Zar's statement that Craig "would not be at high risk of acquiring the organism by close contact with another worker at his work place."

We find that Belinda gave Respondent timely notice of Craig's death. By statute, notice of disablement must be given "as soon as practicable after the date of disablement, and within two years after the last day of the last exposure to the hazards of the disease." *820 ILCS 310/6(c)*. Craig passed away on June 25, 2006. Belinda timely notified Respondent when she filed an application for adjustment of claim on July 27, 2007.

In summary, the evidence leads to the rational conclusion that Craig acquired Neisseria [*39] meningitides in Brazil, a country where the incidence rate of the Neisseria meningitides is 2 to 6 times higher than the rate in the United States. Craig's pre-existing upper respiratory infection made him more likely to acquire Neisseria meningitides and shortened the incubation period from two to ten days, to approximately two days. We reverse the Arbitrator's Decision and find that Belinda is entitled to an award of death benefits under Section 7(a), burial expenses under Section 7(f), and reasonable and necessary medical expenses in the amount of $ 10,359.69 under Section 8(a).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 8, 2011, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $ 1,096.27 per week to Petitioner, E. Belinda Bauer, widow of the employee/decedent, Craig E. Bauer, commencing June 25, 2006, until $ 500,000.00 has been paid or until twenty five (25) years of benefits, whichever is greater, have been paid, because the injury caused the employee's death, as provided in Section 7 and 8(b) 4.2. of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that if Petitioner remarries, Respondent [*40] shall pay her a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner or to the person or persons who incurred the burial expenses of Decedent the sum of $ 8,000.00 under Section 7(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses in the amount of $ 10,359.69, subject to the medical fee schedule, for treatment related to Neisseria meningitides under Section 8(a) of the Act.

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

IT IS FURTHER 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 [*41] 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

FATAL+

Craig Bauer, Deceased, By E. Belinda Bauer, Special Administrator
Employee/Petitioner

v.

Omron Electronics
Employer/Respondent

Case # 07 WC 33463

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 David A. Kane of the Commission, in the city of Chicago, on 5/24/11. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. [X] Did an accident or exposure to occupational disease occur that arose out of and in the course of Decedent's employment by Respondent?
D. [X] What was the date of the accident or exposure?
F. [X] Is Decedent's current condition of ill-being causally [*42] related to the injury?
L. [X] What compensation for permanent disability, if any, is due?

FINDINGS

On the date of accident, 06/25/06, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Decedent did not sustain an accident/exposure that arose out of and in the course of employment.

Timely notice of this accident/exposure was given to Respondent.

Decedent's death is not causally related to the accident/exposure.

In the year preceding the injury, Decedent earned $ 308,254.18, and the average weekly wage was $ 5,737.16.

On the date of accident, Decedent was 55 years of age, married, with 0 children under 18.

Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services through group medical insurance.

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

Respondent is entitled to a credit of $ 10,359.69 under Section 8(j) of the Act.

The Arbitrator finds that [*43] Decedent died on 6/25/06, leaving 1 survivor(s), as provided in Section 7(a) of the Act, including E. Belinda Bauer.

ORDER

Petitioner's claim for compensation is denied. Petitioner failed to prove that the decedent suffered an accident as a result of exposure to Neisseria meningitis as a result of work. Petitioner failed to prove a causal relationship between the decedent's work duties and his death. See attached findings of fact and conclusions of law.

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

Signature of arbitrator

June 8, 2011

Date

Findings of Fact

Petitioner, the widow of Mr. Craig Bauer, alleges that Mr. [*44] Bauer died as a result of contracting Neisseria meningitis at some unknown point during a business trip to Brazil from June 21, 2006 (the date Mr. Bauer arrived in Brazil) through June 22, 2006 (the date Mr. Bauer departed Brazil).

Mr. Bauer was employed as the President and Chief Operating Officer ("COO") of Respondent for approximately 4 years prior to his death. Mr. Bauer died of meningococcemia due to Neisseria meningitides on June 25, 2006. (Px. 11, p. 20, 27).

Trial Proceedings

The Petitioner, Belinda Bauer, provided testimony on her behalf. She testified that Mr. Bauer travelled extensively in his position as President and COO of the Respondent. He regularly travelled to Asia and Brazil where Respondent conducted business.

Petitioner testified that prior to June 25, 2006 Mr. Bauer was in very good health. She alleged he was not under anyone's medical care. Petitioner testified that Mr. Bauer had no physical restrictions and no work restrictions.

With respect to Mr. Bauer's travelling, Petitioner stated that Mr. Bauer was on a business trip from June 7 to June 14, 2006 to China and Japan. Petitioner confirmed Mr. Bauer was present in the United States from June 14 [*45] to June 20, 2006. She testified that when Mr. Bauer was home during that time he had no physical problems and no physical illness.

Petitioner confirmed Mr. Bauer left from Chicago on June 20, 2006 for a business trip to Brazil. She admitted that Mr. Bauer was scheduled to arrive in Brazil at approximately 8:00 a.m. on June 21, 2006. She admitted that Mr. Bauer departed from Sao Paulo, Brazil in the late afternoon of June 22, 2006 and travelled back to Chicago where he arrived on June 23, 2006.

Petitioner testified that she first saw Mr. Bauer when he returned home Friday night on June 23, 2006. She testified he looked tired and pale. Petitioner stated that Mr. Bauer was not feeling great.

Nevertheless, Petitioner and Mr. Bauer drove from their home in Illinois up to their home in Lake Geneva, Wisconsin. Petitioner testified her and Mr. Bauer normally went out to dinner but that he was not feeling well so they stayed home for dinner. Petitioner stated that Mr. Bauer felt tired and achy.

Petitioner testified that on Saturday, June 24, 2006, Mr. Bauer got up early and went and got a haircut. After that he laid on the couch all day, which was unusual behavior for Mr. Bauer according [*46] to Petitioner. Petitioner testified that she tried to get him to eat or drink but Mr. Bauer was not interested.

Mr. Bauer reported flu symptoms to Petitioner that worsened in the afternoon. Petitioner testified that Mr. Bauer developed a rash on his face and arms. Petitioner then drove Mr. Bauer to the emergency room of Mercy Hospital in Walworth, Wisconsin.

Petitioner testified that Mr. Bauer's condition worsened in the hospital and the hospital recommended transferring him to an ICU unit. Mr. Bauer was then taken by ambulance to Mercy Hospital in Janesville, Wisconsin. While at Mercy Hospital, Petitioner testified that Mr. Bauer died of heart failure caused by bacterial meningitis. After Mr. Bauer's death, Petitioner testified that her and her children were tested for bacterial meningitis and proved negative.

Petitioner testified that before Mr. Bauer left for Brazil she was not aware of him contracting meningitis. Petitioner denied that she ever contracted meningitis.

On cross examination, Petitioner reiterated that Mr. Bauer was feeling well and had no complaints before he left for Brazil. However, Petitioner admitted that Mr. Bauer fell on March 25, 2006 while doing some [*47] landscaping at their home in Wisconsin. Petitioner admitted that Mr. Bauer broke several ribs and received treatment from Dr. Richard Davis, his family doctor.

Mr. Steven Kozik was called as a witness by Respondent. Mr. Kozik has been employed by Respondent for 19 years. He testified that he was employed as an Integration Manager in 2006. He testified that Mr. Bauer was his mentor. Mr. Kozik stated that he and Mr. Bauer remained in contact with each other frequently. He stated they would talk approximately twice a day. He admitted that both he and Mr. Bauer travelled frequently for work.

Mr. Kozik testified that on June 20, 2006 he exchanged a series of e-mails with Mr. Bauer. Significantly, this date was prior to Mr. Bauer's arrival in Sao Paulo, Brazil, which occurred on June 21, 2006.

Mr. Kozik testified that he asked Mr. Bauer how he was feeling towards the end of the e-mail exchange. Mr. Kozik claimed that Mr. Bauer responded that he was doing okay but thought he may have contracted "bird flu" while in China. Mr. Kozik testified that he did not know whether Mr. Bauer seriously felt ill or was making a "tongue in cheek response."

Significantly, Petitioner's attorney admitted [*48] at trial that Petitioner's theory of the case rested upon Mr. Bauer contracting meningitis while in Brazil. Petitioner did not allege that Mr. Bauer contracted meningitis during his earlier travel to Asia.

Mr. Kozik denied recalling any other e-mails or conversations with Mr. Bauer about his personal health. Mr. Kozik stated that Mr. Bauer would go to Brazil quarterly or semiannually. Mr. Kozik also specifically denied that Respondent instituted any changes regarding the policy on travel to Brazil after Mr. Bauer's death.

Exhibits and Medical Records Submitted at Trial

According to Petitioner's Exhibit 8, Mr. Bauer arrived back in Chicago from Japan at 6:55 PM on June 14, 2006. Mr. Bauer remained in the United States until he departed on a flight from Chicago at 2:55 PM on June 20, 2006. Mr. Bauer then took a connecting flight from Dallas-Ft. Worth on June 20, 2006, and arrived in Sao Paulo, Brazil at 7:52 AM on June 21, 2006. (Px. 8).

Testimony concerning Mr. Bauer's activities while in Brazil was obtained via telephonic depositions. Three of Respondent's employees who work at Omron in Brazil provided testimony: Ricardo Moura; Marcos Ito; and Eduardo Penteado. (Rx. 1, [*49] 2, 3).

Mr. Moura testified on March 1, 2010. He works for Respondent in Brazil as a General Manager, and has been employed by Omron for 3.5 years. He knew, based on information received from other employees, that Mr. Bauer frequently visited Brazil for business prior to his death. (Rx. 1, p. 5).

He confirmed he only met Mr. Bauer for approximately 1.5 hours for an interview in June 2006. He had never met Mr. Bauer prior to June 2006. (Rx. 1, p. 6). He confirmed that he was interviewed by Mr. Bauer at a headhunter's office in Brazil, and that Mr. Bauer was at that office for approximately 2-3 hours. (Rx. 1, p. 7). He confirmed that Mr. Bauer did not mention participating in any kind of recreational activities while in Brazil. (Px. 1, p. 8).

He also recalled that Mr. Bauer was complaining about pain in his ribs due to an accident. He recalled Mr. Bauer telling him that he broke his ribs and that he was feeling pain. (Rx. 1, p. 8).

Marcos Ito testified on March 1, 2010. Mr. Ito has worked for Respondent in Brazil for 10 years. (Rx. 2, p. 5). Mr. Ito confirmed that Mr. Bauer regularly visited Brazil for business. (Rx. 2, p. 6). He confirmed that he met with Mr. Bauer at Respondent's [*50] office in Brazil on June 21, 2006, and he accompanied Mr. Bauer to dinner that evening. (Rx. 2, p. 7). He testified that Mr. Bauer met with only 2 individuals when Mr. Bauer was in the Omron Brazil office on June 21, 2006. He testified that Mr. Bauer did not meet with anyone other than himself and Mr. Eduardo Penteado. (Rx. 2, p. 14).

He testified that he and Mr. Bauer, along with Mr. Penteado, went straight to dinner from the office, and that they did not make any stops in between the office and the restaurant where they ate on the evening of June 21, 2006. He recalled that they ate at a restaurant called The Fifties. (Rx. 2, p. 8).

He confirmed that dinner lasted approximately 45 minutes to 1 hour, at which point Mr. Bauer returned to his hotel. He confirmed that he dropped Mr. Bauer off at the hotel, and that they did not make any stops between the restaurant and the hotel Mr. Bauer was staying at, a Quality Inn Suites. (Rx. 2, p. 9).

He testified that Mr. Bauer arrived on June 22, 2006 at the Omron office around 12:00 PM. Ito confirmed that prior to arriving at the Omron office, Mr. Bauer was conducting interviews at Korn/Ferry, the headhunter's office, (Rx. 2, p. 11), for [*51] approximately 3 hours. (Rx. 2, p. 15). Mr. Ito testified that Korn/Ferry is a recruitment company, not a factory. (Rx. 2, p. 12). He confirmed that Respondent does have a factory located in Brazil, but that Mr. Bauer did not visit the factory during his June 2006 visit. (Rx. 2, p. 13).

He confirmed that Mr. Bauer then left for the airport on June 22, 2006 from the Omron Brazil office at approximately 3:00 PM. (Rx. 2, p. 9-10). He confirmed that Mr. Bauer was accompanied to the airport by Mr. Penteado. (Rx. 2, p. 10).

The final employee to provide testimony was Mr. Eduardo Penteado, who testified on May 21, 2010. Mr. Penteado has been employed by Respondent in Brazil for approximately 6 years. He works as a Marketing and IT Manager. (Rx. 3, p. 4).

He confirmed that Mr. Bauer would visit the Brazil office approximately every 3-5 months. He recalled Mr. Bauer's final trip to Brazil "very well," because it was during the World Cup for soccer. (Rx. 3, p. 6).

He testified that he picked Mr. Bauer up at the airport on June 21, 2006, and that he and Mr. Bauer went straight to the office. (Rx. 3, p. 19). He testified that as of June 2006, only 15-20 people were working in the Brazil office. [*52] He confirmed that the only occupant of the office building was the Respondent. (Rx. 3, p. 20).

He testified that Mr. Bauer did not meet with any other individuals other than himself and Mr. Ito, and possibly Mr. Moura and an individual named Adriana, on June 21, 2006. (Rx. 3, p. 21). Adriana was the Comptroller of Respondent's Brazil operations. (Rx. 3, p. 21-22).

He testified that he accompanied Mr. Bauer to dinner on June 21, 2006 with Mr. Ito. (Rx. 3, p. 7). He testified that the restaurant, The Fifties, was two floors, and that they arrived at approximately 8:00 or 9:00 PM. He confirmed that the restaurant was "fairly empty." (Rx. 3, p. 28-29). He testified that upon arriving the restaurant, he, Mr. Bauer and Mr. Penteado went straight to their table -- they did not sit at the bar or have any conversations with other people, other than to order from the waiter/waitress. (Rx. 3, p. 29).

He confirmed that following dinner, he dropped Mr. Bauer off at his hotel via his personal automobile. (Rx. 3, p. 8). He testified that Mr. Bauer had previously stayed at that hotel. (Rx. 3, p. 31). He testified that he dropped Mr. Bauer off at the hotel by 11:00 PM at the latest. (Rx. 3, p. [*53] 32).

He testified that Mr. Bauer did not perform any recreational activities while in Brazil, and that Mr. Bauer's trip was for "strictly business" purposes. (Rx. 3, p. 8). He testified that he did not ask Mr. Bauer how he was feeling or otherwise inquire about his health. However, he confirmed that Mr. Bauer looked tired. (Rx. 3, p. 40).

The next morning, June 22, 2006, Mr. Penteado testified that he picked up Mr. Bauer from his hotel and drove him to Respondent's office. He confirmed that he was separated from Mr. Bauer for approximately 9-10 hours. (Rx. 3, p. 32). He did not recall what Mr. Bauer did after he brought him to the office on June 22, 2006. (Rx. 3, p. 33).

Mr. Penteado confirmed that Korn/Ferry was located at a separate location from the Respondent's Brazil office. (Rx. 3, p. 24). He confirmed it was located approximately 30 minutes to 1 hour from the Respondent's Brazil office depending on traffic. He testified that he did not know how Mr. Bauer got to or returned from the Korn/Ferry office from Respondent's office on June 22, 2006. (Rx. 3, p. 38). He confirmed that if Mr. Bauer did take a taxi, it was very easy to locate a taxi. (Rx. 3, p. 39).

He confirmed that [*54] he personally drove Mr. Bauer to the airport on June 22, 2006 via his personal automobile. He testified that they did not make any stops between the Respondent's Brazil office and the airport. (Rx. 3, p. 10). He testified that the streets were "totally empty" during the drive to the airport as a result of the World Cup. (Rx. 3, p. 34). He testified that he normally took Mr. Bauer to the airport approximately 4-5 hours before his flight. (Rx. 3, p. 36).

He testified that the Brazil office of Respondent learned of the cause of Mr. Bauer's death. (Rx. 3, p. 16). However, he also confirmed that Respondent did not institute any precautionary measures for the Brazilian employees. (Rx. 3, p. 16-18).

He also confirmed, on cross-examination, that the only office in Sao Paulo was a Sales Office. It was not a manufacturing facility. (Rx. 3, p. 19).

Petitioner's Exhibit 8 shows Mr. Bauer departed from Sao Paulo, Brazil on June 22, 2006 at 9:50 PM. After taking a connecting flight in Miami, Florida on June 23, 2006 at 7:26 AM, Mr. Bauer arrived back at O'Hare International Airport on June 23, 2006 at 9:30 AM. (Px. 8).

Respondent's Exhibit 4 which is Mr. Bauer's Expense Report, confirms that [*55] Mr. Bauer only made charges while in Brazil for his stay at Quality Inn Suites. There was no indication on the Quality Inn Suites bill or the other documents attached to Respondent's Exhibit 4, that Mr. Bauer charged breakfast or any meals while staying at the hotel. A review of the Expense Report and attached receipts also confirms that Mr. Bauer did not engage in any recreational activities while in Sao Paulo. (Rx. 4).

Respondent's Exhibit 5 are Records from the Department of Health and Human Services -- CDC. Its report was prepared of all known reported instances of infected passengers on Mr. Bauer's flight from Brazil. The only known passenger infected with meningitis was Mr. Bauer. (Rx. 5).

Medical Records

Upon returning back from Brazil, Mr. Bauer and Petitioner went to their home in Lake Geneva, Wisconsin. On June 24, 2006, Petitioner and Mr. Bauer arrived at the emergency room of Mercy Walworth Hospital. He was evaluated by Dr. Kevin Parciak. (Px. 2).

The admission notes indicate that Mr. Bauer reported recent international travel. Mr. Bauer stated "that he started to feel some mild upper respiratory tract illness symptoms approximately 1 week ago consisting of [*56] general malaise, cough, which was nonproductive, [and] intermittent low-grade temperatures." (Px. 2). The Arbitrator notes this would place the onset of Mr. Bauer's upper respiratory tract symptoms around June 17, 2006, a date when Mr. Bauer would have been within the United States.

The Emergency Room report further indicates that "while the patient was traveling to the above geographical areas, he denied any specific bug bites, exposure to exotic foods, or exposure to any sick contacts specifically." He was noted to have reddish-purplish spots over the rest of his body. (Px. 2).

Petitioner was admitted. The impression of Dr. Parciak was that Mr. Bauer may have meningococcemia. He discussed the case with Dr. Badar Kanwar at Mercy Health System, who agreed to have Mr. Bauer transferred to the intensive care unit. (Px. 2).

According to Petitioner's Exhibit 1, Mr. Bauer's personal doctor, Dr. Richard Davis, received a call from Petitioner on June 25, 2006. This record indicates that Petitioner reported that Mr. Bauer "had flu-like symptoms for a couple of days and was developing a purpuric rash over his entire body." (Px. 1). The Arbitrator notes that Petitioner trial testimony contradicts [*57] this medical record as Petitioner specifically denied at trial that Mr. Bauer had any health problems prior to returning from Sao Paulo, Brazil.

Petitioner was transported by ambulance from Walworth, WI to Janesville, WI. Petitioner's Exhibit 3 are the ambulance records from Delavan Rescue Squad. According to the history in the ambulance records, petitioner reported that he had cold and flu like symptoms for the past few weeks. Petitioner specifically reported that he began to feel worse **"4 days ago."**

That places the onset of petitioner's symptoms on June 20, 2006 while he was still in the United States.

Mr. Bauer was admitted to Mercy Health System on June 25, 2006. He was evaluated by Dr. Kanwar at the time of his admission. Dr. Kanwar specifically noted, in Mr. Bauer's Death Summary, that Mr. Bauer had "been having problem[s] with cough and upper respiratory tract symptoms for almost a week." (Px. 4). This would place the onset of Mr. Bauer's upper respiratory tract symptoms at June 18 or 19, 2006, a date when Mr. Bauer would have been within the United States.

Dr. Kanwar noted Mr. Bauer's extensive international travel to both Asia and Brazil. He also specifically noted [*58] that Mr. Bauer reported that he had "been sick since he came from Japan with these cold symptoms." Dr. Kanwar wrote that "by the time I saw" Mr. Bauer, "he was still talking and he was getting all [his] questions appropriately, but he appeared to be in respiratory distress." (Px. 4).

He further noted, in the Death Summary, that Mr. Bauer subsequently got bradycardic and then went into asystole. A code blue was initiated and resuscitation was attempted for approximately 20 minutes. Mr. Bauer was pronounced dead in the early morning of June 25, 2006. (Px. 4).

Expert Testimony and Reports

Dr. Jeffrey Coe

Dr. Jeffrey Coe, Respondent's initial expert, prepared a narrative report at Respondent's request on November 15, 2006 following a review of Mr. Bauer's medical records. Dr. Coe is Board Certified in Occupational Medicine. (Rx. 7).

Dr. Coe noted that the strain Mr. Bauer was infected with, Neisseria meningitidis, is found worldwide and is not endemic to South America. He confirmed, similar to all the experts used by both Petitioner and Respondent, that the incubation period varies from 2 to 10 days. (Rx. 7).

Based on the records Dr. Coe reviewed, he concluded that "it [*59] would be impossible to state to a reasonable degree of medical certainty that Mr. Bauer contracted bacterial meningitis during his business trip to Brazil in June 2006." He noted that since the known incubation period of 2-10 days, it would be "impossible" to determine whether the exposure occurred before or during the trip to Brazil. (Rx. 7). Dr. Coe's report was admitted in evidence without objection. Petitioner did not demand the deposition of Dr. Coe.

Dr. Fred Zar

On August 22, 2007, a narrative report was also prepared by Dr. Fred Zar, Professor of Medicine, at the University of Illinois at Chicago. Dr. Zar is also the Vice Head for Medical Education and the Program Director for Internal Medicine. Dr. Zar also performed a review of Mr. Bauer's records and also provided general information meningitis. (Rx. 8).

He confirmed that Mr. Bauer died as a result of contracting Neisseria meningitidis. He wrote that the only know reservoir is in the back of the nose of humans. He wrote that the bacteria are transmitted to other persons via respiratory secretions. He noted that this bacterium is only known to spread via individuals. He noted that transmission rates increase in known [*60] crowded settings. (Rx. 8).

He noted that in the United States there are approximately 1,400 cases of meningococcal meningitis reported each year to the CDC. Approximately 1/3 of these reported cases involve individuals over 30 years of age. (Rx. 8).

He wrote that the known incubation period is 2-10 days. He noted that Mr. Bauer first had symptoms on June 24, 2006, and therefore he likely acquired meningococcal meningitis sometime between June 14 and June 22, 2006, based on the 2-10 incubation range. He also noted an average incubation period of 4 days, which would have placed the date of infection on June 20, 2006, (Rx. 8), a date when Mr. Bauer was most definitely not in Brazil. (Px. 8).

Based on the 2-10 day incubation period, Dr. Zar, similar to Dr. Coe, concluded it was impossible for him "to tell with any degree of medical certainty" whether Mr. Bauer acquired meningitis in the United or Brazil. He noted that Respondent's Brazil office was not a high risk location given its separate and discrete office. (Rx. 8).

On December 3, 2008, Dr. Zar prepared an addendum report, which also included a copy from the Centers from Disease Control web site concerning advice to travelers [*61] on risk of infectious diseases in Brazil. He noted that Mr. Bauer was only physically present in Brazil for a 36-hour period. Therefore, Mr. Bauer was only in Brazil for a 36-hour period over the 8 day incubation range, or 19% of the total range of known incubation of Neisseria meningitides. (Rx. 9).

He also noted that Mr. Bauer did not obtain meningitis during his flights to or from Brazil. (Rx. 9). This position was also supported by Petitioner's experts. (Px. 9, 11). Finally, Dr. Zar noted that the CDC does not have any warnings for travelers of increased risk of meningococcal infection in Brazil. The CDC also did not recommend that travellers to Brazil obtain any immunizations for meningitis. However, the CDC did recommend vaccinations and immunizations for a number of other diseases and conditions including Yellow Fever, Hepatitis A, Hepatitis B, Typhoid, and Malaria. Meningitis is not mentioned anywhere by the CDC as even a remote concern for travellers to Brazil. (Rx. 9).

At trial, both of Dr. Zar's reports were admitted without objection. Petitioner did not demand the deposition of Dr. Zar.

Petitioner offered two expert reports obtained from out of state physicians.

[*62] **Dr. Charles Stratton**

The deposition of Petitioner's first expert, Dr. Charles Stratton, was conducted in Nashville, Tennessee on July 10, 2009. (Px. 9). Dr. Stratton also prepared a narrative report at Petitioner's request on January 15, 2008. (Px. 10).

Dr. Stratton is the Associate Professor of Pathology and Medicine at Vanderbilt University. He is also the Director of the Clinical Microbiology Laboratory at Vanderbilt. (Px. 9, p. 6). Dr. Stratton no longer treats patients, (Px. 6, p. 7), but was involved in the treatment of individuals with Neisseria Meningitis in patients since 1976. (Px. 6, p. 17).

Dr. Stratton evaluated the following materials in connection with his testimony and the report he authored on January 15, 2008: Mercy Wallworth Hospital records; St. Mercy Health System records; Death Certificate of Craig Bauer; Autopsy Report; and Mr. Bauer's flight itinerary. (Px. 6, p. 17). He prepared a written report following his review of those records on January 15, 2008. (Px. 6, p.18).

He confirmed that blood cultures completed during Mr. Bauer's admission were positive for Neisseria Meningitides. (Px. 6, p. 29). He confirmed that it was his opinion that Mr. Bauer died [*63] of Neisseria Meningitides Meningococcemia. (Px. 6, p.33).

Dr. Stratton confirmed that humans are the only natural reservoirs of Neisseria Meningitides. He stated that approximately 10% of the world's population is colonized with Neisseria Meningitides. (Px. 6, p. 34). He confirmed that if someone were to get an infection, it would be from another human. (Px. 6, p. 35).

He testified that the infection would be transmitted by "droplets." The infection is essentially transmitted by a cough or spray of droplets that contain the organism. (Px. 6, p.35).

Dr. Stratton stated that carriers of the organism and rates of infection are higher among lower socioeconomic populations. (Px. 6, p. 35). He felt that "crowding" was a big factor -- meaning that individuals among large, dense crowds of people may be at higher risk for infection. (Px. 6, p. 34-36). Dr. Stratton cited University students or Muslims on pilgrimage to Mecca, who congregate in groups of "hundreds of thousands of people" as examples of "crowding." (Px. 6, p. 36).

Dr. Stratton also testified that a concurrent viral infection of the upper respiratory tract could increase the risk of invasive meningococcal disease in susceptible [*64] individuals. (Px. 6, p. 37). However, he continued to confirm, during his deposition testimony, that "crowding" is the main cause of infection. (Px. 6, p. 38-39).

Dr. Stratton acknowledged that Mr. Bauer reported a sickness for approximately 1 week prior to his admission to Mercy Walworth, but interpreted those records to indicate that Mr. Bauer had a mild respiratory tract infection, (Px. 6, p. 39), even though Mr. Bauer did not specify a diagnosis at the time of his admission. (Px. 1). It was Dr. Stratton's opinion that this facilitated the meningococcemia. (Px. 6, p. 39).

Dr. Stratton testified that Mr. Bauer was in Sao Paolo from June 21, 2006 through June 23, 2006. (Px. 6, p. 40). The Arbitrator notes this is incorrect, as Mr. Bauer was only in Sao Paolo from June 21, 2006 at approximately 8:00 AM through June 22, 2006 at approximately 9:50 PM. (Px. 8). Dr. Stratton testified that the known incubation period for Neisseria meningitides is 2-10 days. (Px. 6, p. 67). Dr. Stratton testified that Mr. Bauer was in Brazil within the know incubation period for meningococcemia. (Px. 6, p. 40).

Dr. Stratton testified that international travel increases the risk of infection. He cited [*65] the U.S. Army as an example, as they require troops who are being deployed to certain parts of the world to have Neisseria meningitides immunizations. (Px. 6, p. 40). He also cited travellers to Saudi Arabia for pilgrimage as examples. (Px. 6, p. 40-41). However, and significantly, he did not cite any similar requirements for travel to Brazil issued either by Brazil or the United States Centers for Disease Control (CDC). In fact, he acknowledged that he was not aware of any similar requirements by Brazil that travellers obtain vaccinations for Neisseria meningitides for travel to Brazil. (Px. 6, p. 66).

Curiously, Dr. Stratton testified that he was not sure whether the CDC recommended vaccinations for Neisseria meningitides for travel to Brazil. He testified that he was not sure whether "they're in that business." (Px. 6, p. 67). The Arbitrator notes this lack of knowledge on the part of Dr. Stratton, a self reported infectious disease specialist, is surprising as the CDC is commonly known to provide recommendations to travellers for the necessary vaccinations when travelling outside the United States. In addition, Respondent's Exhibit 9 clearly shows that the CDC does recommend [*66] certain vaccinations for travel to Brazil. Notably absent from the CDC recommendations are any advisories or concerns about Neisseria meningitides. (Rx. 9).

Dr. Stratton concluded that Mr. Bauer's infection was caused specifically by Mr. Bauer's trip to Sao Paulo, Brazil. (Px. 6, p. 41). He testified that Mr. Bauer contracted meningococcemia in Sao Paulo, Brazil. (Px. 6, p. 41-42). He noted that a number of articles supported his position that international travel increased the risk of infection. (Px. 6, p. 42-47).

He testified that approximately 2 to 5 people out of 100,000 are carriers in Sao Paulo, whereas the United States has a prevalence of 1 out of 100,000 people. (Px. 6, 48).

Dr. Stratton, on cross-examination, acknowledged that after a 2-10 day incubation period of meningococcal disease, symptoms do mimic an upper respiratory tract infection. He confirmed that early on, following infection, the symptoms of Neisseria meningitides meningitis are nonspecific. (Px. 6, p. 55). He confirmed that Mr. Bauer reported flu-like symptoms during his initial admission to Mercy since approximately June 17, 2006, and that Mr. Bauer's complaints were non-specific. (Px. 6, p. 56).

He acknowledged [*67] based on one of the articles he cited in his narrative report, that someone could have meningococcal disease for weeks and not show any symptoms. (Px. 6, p. 65).

Dr. Stratton acknowledged that meningitis is less contagious than the flu. (Px. 6, p. 60). He also acknowledged that Mr. Bauer may have been a carrier of Neisseria meningitides. (Px. 6, p. 64). Dr. Stratton testified that he did not believe Mr. Bauer was infected during either his flights to Brazil or his flights home from Brazil. (Px. 6, p. 63).

Finally, Dr. Stratton acknowledged that "anything was possible," when asked whether there was any other possible location, other than Brazil, that Mr. Bauer contracted Neisseria meningitides. (Px. 6, p. 70).

Petitioner's Deposition Exhibit 8 was an article titled "Meningococcemi" by Drs. Mark Salzman and Lorry Rubin, published in December 1996. (Dep. Dr. Stratton, Px. 8). In that article, the authors indicate that acute meningococcemia is "frequently preceded by an acute upper respiratory tract infection. The most common initial symptoms are fever, chills, malaise, myalgias, arthralgias, vomiting, and headache." (Dep. Dr. Stratton, Px. 8, p. 712). The Arbitrator notes that Petitioner [*68] reported mild upper respiratory' tract symptoms for approximately one week beginning on June 17, 2006, which specifically included complaints "general malaise" and "intermittent low-grade temperatures." (Px. 2). The article goes on to indicate that "patients to not always initially appear toxic and differentiation from a self-limited viral illness can be difficult. (Dep. Dr. Stratton, Px. 8, p. 712).

Petitioner's Deposition Exhibit 9 was an article titled "Meningococcal Disease and Travel" by Ziad Memish published in November 2001. (Dep. Dr. Stratton, Px. 9). In that article, it was specifically noted that "data on the true risk of meningococcal infection for travelers are rare, but it is accepted that the risk to travelers is generally low and cases are rare. Risk increases as the length of stay in risk areas and the level of contact with local populations increases." (Dep. Dr. Stratton, Px. 9, p. 86). Significantly, the article makes no mention of any risk of increased infection to persons travelling to Sao Paulo, Brazil.

Finally, the Arbitrator finds it significant that, despite Dr. Stratton's testimony concerning the prevalence of Neisseria meningitides, not a single article [*69] attached to the deposition transcript of Dr. Stratton indicated the actual prevalence of Neisseria meningitides in Sao Paulo, Brazil, or that there were any recent outbreaks of Neisseria meningitides in Sao Paulo, Brazil.

Dr. William Drew

The deposition of Dr. William Drew, Petitioner's second expert, was taken on July 24, 2009. (Px. 11). Dr. Drew also prepared a narrative report at Petitioner's request on January 7, 2008. (Px. 12).

Dr. Drew is board certified in Internal Medicine with a subspecialty of Infectious Diseases. (Px. 11, p. 8-9). Dr. Drew confirmed that he has not given any lectures or authored any publications on Neisseria meningitides. (Px. 11, p. 36). Dr. Drew confirmed that he had treated patients with Neisseria meningitides, but admitted that the patients he treated were in San Francisco. None of his patients contracted Neisseria meningitides in Brazil. (Px. 11, p. 26). He specifically confirmed he could "not recall" ever treating a patient who had travelled to a foreign country and returned with Neisseria meningitides. (Px. 11, p. 48).

Dr. Drew prepared a narrative report at the request of Petitioner following his review of Mr. Bauer's medical records and [*70] trip itinerary. (Px. 11, p. 14-15, 21). He testified that Mr. Bauer died from a classic case of meningococ-

cemia, or bacteremia due to Neisseria meningitides. (Px. 11, p. 20, 27). He stated that Neisseria meningitides is primarily transported by humans, and that it is primarily transmitted either by "direct personal contact with someone who is carrying it in their respiratory tract or indirect[ly] in crowded conditions." (Px. 11, p. 27). Dr. Drew confirmed that he had no evidence of how Mr. Bauer spent his 37 hours in Brazil. He, similar to Dr. Stratton, did not believe Mr. Bauer contracted Neisseria meningitides while on his flights aboard American Airlines. (Px. 11, p. 46, 49).

Dr. Drew confirmed that the usual incubation for Neisseria meningitides is 2-10 days. He testified that Mr. Bauer's recent travel to Brazil likely caused Mr. Bauer to contract Neisseria meningitides. (Px. 11, p. 22). (Px. 11, p. 22). However, he later admitted that he concluded in his report that Mr. Bauer likely contracted Neisseria meningitides on June 20 or June 21, 2006. (Px. 11, p. 42). The Arbitrator notes that Mr. Bauer was in Chicago, Illinois until approximately 3:00 PM on June 20, 2006. (Px. 8).

[*71] Dr. Drew acknowledged during his testimony that he was wrong to write in his narrative report of January 7, 2008 that Mr. Bauer could have contracted Neisseria meningitides on June 20, 2006. However, and significantly, Dr. Drew then testified that, to a reasonable degree of medical certainly, it was possible Mr. Bauer contracted Neisseria meningitides on June 20, 2006. He confirmed there was no way to definitively pinpoint where or how Mr. Bauer got Neisseria meningitides. (Px. 11, p. 43).

He also later testified that the earliest possible date Mr. Bauer could have contracted Neisseria meningitides was on June 14, 2006. (Px. 11, p. 46). The Arbitrator notes Mr. Bauer was in the United States from June 14 through June 20, 2006. (Px. 8).

Dr. Drew also confirmed that no testing was done to determine the actual serogroup of Neisseria meningitides Mr. Bauer had. He confirmed this kind of testing -- determine the actual serogroup -- would have aided him in determining if Mr. Bauer contracted Neisseria meningitides in Sao Paulo. (Px. 11, p. 43-44). He testified that Neisseria meningitides has a prevalence of 1-2 people per 100,000 in the United States, versus approximately 6 out of 100,000 [*72] in Brazil. (Px. 11, p. 44). He confirmed that certain serogroups are not endemic to Brazil. He testified that serogroups C and B are more prevalent in Sao Paulo, but he was unable to say "with any certainty" that Mr. Bauer had serogroup C or B due to the lack of testing. (Px. 11, p. 45).

Dr. Drew noted that Mr. Bauer's death certificate noted an "interval between onset and death" of 1-2 days, which in his opinion supported a finding that Mr. Bauer contracted Neisseria meningitides while in Brazil. (Px. 11, p. 25). He opined that the death certificate showed a "very brief incubation period." However, Dr. Drew did not make any mention of how Mr. Bauer's complaints of a mild respiratory tract infection over the last weeks, and since June 17, 2006, would factor into his opinion.

In fact, Dr. Drew acknowledged that individuals typically "show no symptomatology at all" after infection. (Px. 11, p. 36). Significantly, he confirmed that a small percentage of infected patients "develop some respiratory symptoms, which might include pharyngitis or even a sinusitis or a runny nose." (Px. 11, p. 36). The Arbitrator notes that Mr. Bauer had respiratory symptoms approximately 1 week prior to [*73] his admission to Mercy based on the history obtained by Mr. Bauer at Mercy Walworth, (Px. 2), during transport by Delavan Rescue Squad (Px. 3) and again confirmed by Mr. Bauer to Dr. Badar Kanwar at Mercy Health System on June 25, 2006. (Px. 4).

Significantly, Dr. Drew confirmed in his testimony that Mr. Bauer's mild upper respiratory tract illness symptoms, as indicated in the Mercy Walworth records, (Px. 2), could have been "due to Neisseria meningitidis." (Px. 11, p. 39). He confirmed that it would be "hard to sort out whether [the mild upper respiratory tract illness symptoms were] really due to -- all of it due to Neisseria meningitidis or there was another process and then superimposed Neisseria meningitidis acquisition in Brazil." (Px. 11, p. 39).

Nevertheless, Dr. Drew concluded, similar to Dr. Stratton, that Mr. Bauer contracted Neisseria meningitides during his international travel to Sao Paulo. He testified his opinion was based on two things. First, he testified that there is an increased prevalence of Neisseria meningitides in Brazil. Second, he testified that the incubation period of Neisseria meningitides of 2-10 days fit with Mr. Bauer's recent travel to Brazil. (Px. [*74] 11, p. 28). Dr. Drew, like Dr. Stratton, did not based his opinion on any evidence of direct exposure or proof showing Mr. Bauer was in "crowded" situations.

Dr. Drew acknowledged that Petitioner's Deposition Exhibit 9, "Meningococcal Disease and Travel", only addressed infection rates in South America generally, not Sao Paulo, or even Brazil, specifically. (Dep. Dr. Drew, Px. 9). Significantly, the Arbitrator also notes that the graph of outbreaks from 1971 through 2000 within the article does not show any known outbreaks in Brazil since 1974. (Dep. Dr. Drew, Px. 9, p. 85).

Dr. Drew acknowledged that Petitioner's Deposition Exhibit 10, "Meningococcal Disease," an article from the New England Journal of Medicine published May 2001, did not address the actual likelihood of whether Mr. Bauer obtained Neisseria meningitides in Brazil. He also confirmed that the article just addressed infection rates in South America generally, not Sao Paulo specifically, (Dep. Dr. Drew, Px. 10), which is also confirmed by the Arbitrator's review of the article. Notably, this article also confirmed that outbreaks of Neisseria meningitides have been increasing in the United States since 1991. (Dep. Dr. [*75] Drew, Px. 10, p. 1378-1379).

Dr. Drew acknowledged that Petitioner's Deposition Exhibit 11, "Meningococcal Disease and Travel," published in 2002, did not address Sao Paulo specifically, or even Brazil generally, but only addressed Singapore and Saudi Arabia. (Px. 11, p. 31; Dep. Dr. Drew, Px. 11).

Dr. Drew did testify that one article, Petitioner's Deposition Exhibit 13, dealt specifically with Neisseria meningitides outbreaks in Sao Paulo, Brazil. (Px. 11, p. 33). That article, titled "Clonal Distribution of Invasive Neisseria meningitidis Serogroup C Strains Circulating from 1976 to 2005 in Greater Sao Paulo, Brazil," was written by a number of researchers and published in February 2007. (Dep. Dr. Drew, Px. 13). This article indicates that the last known epidemic occurred from 1988 through 2005 with an incidence of 6 cases per 100,000 individuals of either serogroup B or C. (Dep. Dr. Drew, Px. 13, p. 1266). Again, Dr. Drew confirmed no serogroup testing was done on Mr. Bauer. (Px. 11, p. 43). The Arbitrator also notes that this article makes no mention of any epidemic levels of Neisseria meningitides after 2005.

Dr. Drew acknowledged that Petitioner's Deposition Exhibit 14, [*76] an article titled "Critical Analysis of Old and New Vaccines Against N. Meningitidis Serogroup C, Considering the Meningococcal Disease Epidemiology in Brazil" published in January 2003, only addressed Neisseria meningitides in Brazil and the state of Sao Paulo generally, not the city of Sao Paulo specifically. Dr. Drew also confirmed this article was not authoritative for doctors in the treatment of Neisseria meningitides. (Px. 11, p. 34; Dep. Dr. Drew, Px. 14). There is no mention of infection rates of adults in the city of Sao Paulo based on the Arbitrator's review of the article. (Dep. Dr. Drew, Px. 14).

Dr. Drew also testified that Petitioner's Deposition Exhibit 15, an article titled "Serosubtypes and P or A Types of Neisseria Meningitides Serogroup B Isolated in Brazil during 1997-1998: Overview and Implications for Vaccine Development," did specifically address Sao Paulo, Brazil. He testified that the article did mention a "large epidemic of meningococcal disease due to meningococcus type B in greater Sao Paulo, Sao Paulo State, since 1998." This article was published in 2001. In fact, based on the Arbitrator's review, the article does not mention any epidemics after 1998. [*77] Significantly, the authors specifically note that "the actual trend in the rate of meningococcal disease in greater Sao Paulo has been *declining*, reaching 5.5 per 100,000 inhabitants per year in 1999." (Dep. Dr. Drew, Px. 15, p. 2897) (*Emphasis added*).

n1 Respondent did not introduce the email into evidence.

Illinois Official Reports

Appellate Court

***The Levy Co. v. Illinois Workers' Compensation Comm'n*,**
2014 IL App (1st) 131338WC

Appellate Court Caption	THE LEVY COMPANY, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION and JORGE MERLOS, Defendants-Appellees.
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-13-1338WC
Filed	November 14, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	Where claimant had three consolidated workers' compensation claims pending against his employer, the trial court's decision confirming the Workers' Compensation Commission's approval of lump-sum settlement contracts resolving two of the claims was affirmed by the appellate court, notwithstanding plaintiff employer's contentions that only one condition of ill-being existed as a result of all three injuries, that the three cases should remain consolidated, and that the arbitrator's rejection of the settlement contracts was a way of circumventing his ruling denying severance of the claims; furthermore, the employer's failure to meet its burden as appellant to produce a sufficiently complete record to support its claims of error led the appellate court to presume that the Commission's order conformed with the law and had a sufficient factual basis.
Decision Under Review	Appeal from the Circuit Court of Cook County, Nos. 12-L-51141, 12-L-51142 cons.; the Hon. Eileen O'Neil Burke, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal

Lindsey Beukema, of Slavin & Slavin, of Chicago, for appellant.

Larry J. Coven, of Coven Law Group, of Chicago, for appellees.

Panel

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

OPINION

¶ 1 The claimant, Jorge Merlos, appeals from the circuit court judgment confirming the decision of the Illinois Workers' Compensation Commission (Commission) which approved two lump-sum settlement contracts resolving his claims filed under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) for injuries he sustained while in the employ of The Levy Company (Levy). For the reasons that follow, we affirm the circuit court judgment.

¶ 2 The following facts are discernible from the record presented on appeal. After filing the two claims arising from his shoulder injuries, the claimant returned to work on May 31, 2007, subject to permanent restrictions. He apparently was engaged in full and unrestricted duty on June 16, 2008, when he suffered the back and neck injury that was the subject of claim number 08 WC 38667. In his motion to sever that claim from the earlier claims, the claimant argued that the prior claims involved injuries that were separate and distinct from those which formed the basis for claim number 08 WC 38667. He contended that, while he is continuing to undergo vocational rehabilitation for his neck and back and is receiving ongoing benefits from those injuries, he has completed treatment for the shoulder injuries, has returned to full duty, and is seeking to settle the shoulder claims without affecting his rights in claim number 08 WC 38667. According to the claimant, the shoulder claims involved many disputed issues with two different insurance carriers which likely would lead to years of reviews and appeals if not resolved. Accordingly, because those claims are "wholly unrelated" to the back and neck claims, the claimant requested that they be severed to enable settlement.

¶ 3 In response to the motion to sever, Levy contended that, at the time the claimant sustained his back injury in 2008, he was performing full duty while subject to permanent work restrictions that Levy was never informed were in place. In light of this fact, Levy argued, there exists evidence that only one condition of ill-being exists as a result of all three injuries, and it is appropriate for the three cases to remain consolidated to enable the arbitrator either to delineate and apportion the nature and extent of permanency attributable to each accident, or to find that only one condition of ill-being exists.

¶ 4 The parties then presented the arbitrator with the proposed settlement contracts. Under the contract for claim number 06 WC 00534, the parties agreed, on a "completely disputed basis," that Levy, through its insurance company, would pay the claimant a lump-sum

settlement of $118,500, representing approximately 40% of a person as a whole "in a full, final and complete settlement for any and all of [claimant's] claims under the [Act] for injuries allegedly sustained on or about September 23, 2005," for repetitive trauma to the claimant's shoulders. In exchange, the claimant agreed to release Levy and its insurer from any and all claims relating to the above injury under the Act. The contract with regard to number 06 WC 7848, stated that Levy, while denying all liability, agreed to pay the claimant $25,000 as a full, final and complete settlement of any and all claims due or to become due as a result of the accident of June 14, 2003. The amount represented approximately 6.63% loss of person as a whole arising from the loss of the claimant's left shoulder, plus $7,000 for medical expenses. The contract expressly stated that the settlement pertained exclusively to the incident of June 14, 2003, and that any other workers compensation claims then pending against Levy would remain pending for adjudication separate and apart from this claim.

¶ 5 As a basis for his rejection of the settlement contracts, the arbitrator stated that he viewed the "presentation of [those contracts] as a way of circumventing" his ruling denying severance. The arbitrator further noted that Levy objected to the approval of the settlement contracts. In a notice to the Commission on July 19, 2012, Arbitrator Cronin reiterated this finding.

¶ 6 On August 1, 2012, the Commission entered an order approving each of the settlement contracts, making no reference to the severance issue.

¶ 7 On August 20, 2012, Levy sought judicial review of the Commission's approval of both of the respective settlement contracts before the circuit court of Cook County. The cases were consolidated for review, and on March 21, 2013, following a hearing, the court entered an order (1) confirming the Commission's jurisdiction to approve the settlement agreements; (2) denying Levy's motion to set aside the agreements; (3) noting that case No. 08 WC 38667 is not settled and remains active; and (4) remanding that case to the Commission for further proceedings. Levy now appeals.

¶ 8 Levy first argues that the Commission was without jurisdiction to approve the settlement contracts for two of the three consolidated cases. According to Levy, the arbitrator's denial of the motion to sever caused all three cases to remain pending; accordingly, the submission to the Commission of settlement contracts in two of those cases, without a reversal of the order denying severance, constitutes an impermissible interlocutory "appeal." This argument is unsupported and without merit.

¶ 9 We note first that Levy's brief fails to reference any authority to support its argument, and as such, is in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). As appellant, Levy must provide this court with authority and citations to the record to support each of its claims of error, and the failure to do so renders the argument forfeited. *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 364 (2007). And in any event, the argument is without merit. It is axiomatic that the Commission has jurisdiction, upon presentation by the parties, to review and approve a settlement contract. See generally 50 Ill. Adm. Code 7070.10, 7070.40 (2004). In this case, the claimant filed three separate applications for adjustment of claim. Although the claims were consolidated, they were nonetheless three individual and separate actions with three different injury dates, and the parties were free to settle two of those actions while the third remained pending. The Commission's consideration and approval of the settlement contracts involved issues separate and distinct from those underlying the arbitrator's severance determination, and in

no way constituted an "appeal" of that determination; rather, the severance issue simply became moot upon the disposition pursuant to settlement of the other two claims.

¶ 10 Next, Levy argues that the Commission erred in accepting the settlement agreements without hearing testimony or reviewing evidence by the parties as to all three consolidated cases. Specifically, Levy contends that it will now be foreclosed on remand from presenting evidence or testimony in support of its theory of case number 08 WC 38667, that the claimant's condition of ill-being was the cumulative result of all three injuries, as opposed to a separate and unrelated injury as maintained by the claimant. Levy also suggests that it was not given a full opportunity to present its case to the Commission.

¶ 11 Again, Levy provides no legal support whatsoever for its perception that it will be prejudiced in its efforts to defend case number 08 WC 38667 before the arbitrator. Further, this court has not been provided with any record of proceedings to support Levy's claim of error, apart from the settlement contracts stamped "approved" by the Commissioner. Rather, Levy's brief is replete with references to alleged arguments before the Commission, many of which are disputed by the claimant on appeal. Its assertion regarding the Commission's "speculation" as to the permanency attributable to the earlier injuries is completely unsupported. As appellant, it was Levy's burden to produce a sufficiently complete record to support its claims of error. In the absence of such a record, we will presume that the order entered by the Commission was in conformity with law and had a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Accordingly, there is no reason to conclude that Levy was prejudiced by the Commission's approval of the settlement contracts and no basis to disturb the Commission's determination.

¶ 12 Affirmed.