2015 IL App (1st) 131856WC-U

Order filed: January 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CITY OF CHICAGO - DEPARTMENT OF AVIATION,	)	Appeal from the Circuit Court of Cook County, Illinois.
Plaintiff-Appellant,	)	
v.	)	Appeal No. 1-13-1856WC
	)	Circuit No. 12-L-51529, 50723
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Jeffrey Mazurkiewicz, Defendant-Appellee).	)	Honorable Eileen Burke, Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The Commission did not err in allowing into evidence a transcript of a deposition of the claimant's treating physician; and (2) the Commission's finding that the claimant's current condition of ill-being was causally related to his employment and its finding that the claimant was entitled to TTD benefits and medical expenses were not against the manifest weight of the evidence.

¶ 2 The claimant, Jeffrey Mazurkiewicz, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), seeking benefits for left ankle and leg injuries which he allegedly sustained while working for the City of Chicago,

Department of Aviation (employer) on April 20, 2007. After a section 19(b) hearing, the arbitrator found that the claimant's current condition of ill-being of his left ankle and leg was causally related to his employment. The arbitrator awarded temporary total disability (TTD) benefits for a period of April 21, 2007, through March 27, 2008, and July 16, 2008, through December 2, 2010 (the date of the hearing), for a total of 173 1/7 weeks. The arbitrator also ordered the employer to pay $5,708.07 for reasonable and necessary medical expenses and prospective medical expenses for treatment recommended by the claimant's treating physician. The employer sought review before the Illinois Workers' Compensation Commission (Commission), which modified the decision of the arbitrator to provide a slightly lower average weekly wage but affirmed the award in all other respects. The employer then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the decision of the Commission. The employer then filed a timely appeal with this court.

¶ 3 FACTS

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

¶ 5 On April 20, 2007, the claimant was working as a seasonal status tow truck driver at O'Hare Airport. The parties stipulated that the claimant sustained an accidental injury on that date. The claimant testified that his job required him to respond to calls to remove vehicles that had violated parking ordinances or became disabled at the airport. The claimant parked his tow truck to take a short restroom break and, upon returning to the truck, stepped in a pothole and twisted his left ankle. He reported the accident to his supervisor, Greg Kendrick, who instructed the claimant to report immediately to the emergency department at Resurrection Medical Center (Resurrection).

¶ 6 Records from Resurrection established that the claimant had soft tissue tenderness and swelling. X-rays revealed a mild deformity of the toes, but no breaks. He was given an air cast and crutches and told to follow up with MercyWorks, the employer's designated medical care provider. The claimant was also instructed to remain off work for two days.

¶ 7 After leaving Resurrection, the claimant reported immediately to MercyWorks where he gave a history of stepping into a pot hole and twisting his left ankle. A diagnosis was given of left ankle sprain as well as contusion of the left foot. The claimant was instructed to continue using the air cast and crutches and to return to MercyWorks in three days.

¶ 8 On April 23, 2007, the claimant returned to MercyWorks as instructed. Following an examination, the claimant was released to return to work under restrictions including sedentary work only, no climbing, and only minimal walking. The claimant testified that the employer had no work within those restrictions, and he remained off work. During this time, the claimant continued to treat at MercyWorks and received physical therapy at Athletic and Therapeutic Institute for Physical Therapy.

¶ 9 On June 6, 2007, the claimant underwent an MRI of the left ankle which showed continuing pathologies. The claimant was advised to seek treatment from a specialist.

¶ 10 On June 27, 2007, the claimant was examined by Dr. George Holmes, a Board certified orthopedic surgeon at the Midwest Orthopedics Institute at Rush Hospital in Chicago. Dr. Holmes noted pain with palpitation of the left ankle, but further noted no evidence of fracture of dislocation. Dr. Holmes prescribed electrical stimulation and the application of a Lidoderm patch, both for pain management, and suggested that treatment in this manner for a month might permit the claimant to return to work.

¶ 11 In compliance with the employer's policy, the claimant continued to treat at MercyWorks after being examined by Dr. Holmes. Medical records from MercyWorks from this time period established that the physicians at MercyWorks were aware of the treatment prescribed by Dr. Holmes and acquiesced in his treatment plan.

¶ 12 On August 16, 2007, the claimant underwent an EMG test ordered by Dr. Holmes. After reviewing the EMG results, Dr. Holmes diagnosed sinus tarsi syndrome (a condition in the area where the ankle and the heel bone meet). Dr. Holmes also strongly recommended that the claimant be examined by a knee specialist regarding knee and hamstring pain which the claimant had reported in the weeks following the accident. Dr. Holmes also referred the claimant to the Rush Hospital Pain Center for additional pain management treatment.

¶ 13 On September 14, 2007, the claimant was examined by Dr. Asokumar Buvanendran, a Board certified pain management and treatment specialist at Rush Pain Center. The claimant gave a history of severe left ankle pain, mild left posterior leg and knee pain, all following an industrial accident on April 20, 2007. Dr. Buvanendran diagnosed nerve damage, prescribed pain medication and ordered an MRI of the lumbar spine to evaluate the left leg pain. He also prescribed an IV regional bier block to be performed at a subsequent visit.

¶ 14 On September 24, 2007, the claimant underwent the IV bier block, which consisted of medication being introduced into the blood at the locale of the pain. A second bier block was performed on October 8, 2007. Subsequent blocks were administered on October 26, 2007, November 9, 2007, and November 12, 2007. The claimant reported minimal temporary relief from these procedures.

¶ 15 On October 24, 2007, the claimant had a follow up appointment with Dr. Holmes. Treatment notes from that appointment indicate that Dr. Holmes was aware of and agreed with Dr. Buvanendran's course of treatment.

¶ 16 On November 21, 2007, the claimant was again seen by Dr. Holmes, who opined that from an orthopedic perspective the claimant was at maximum medical improvement (MMI). He noted, however, that while nothing further could be done orthopedically, Dr. Buvanendran's pain management treatments should continue.

¶ 17 On January 9, 2008, Dr. Holmes again examined the claimant. Based upon the claimant's report of only minimal relief from the bier blocks, Dr. Holmes attempted a diagnostic block of sinus tarsi nerve, which resulted in complete relief of the claimant's pain. Dr. Holmes opined that the claimant could benefit from a cryoprobe procedure.

¶ 18 On January 23, 2008, Dr. Holmes noted that the claimant continued to report pain relief following the sinus tarsi nerve block and recommended that the claimant discuss a possible cryoprobe procedure with Dr. Buvanendran. The claimant was able to meet with Dr. Buvanendran that same day. Treatment notes from that appointment indicate that the claimant and Dr. Buvanendran discussed the possibility of a cryoprobe procedure as recommended by Dr. Holmes, as well as a trial with a spinal cord electrical stimulator.

¶ 19 On February 8, 2008, Dr. Buvanendran performed a trigger point injection in anticipation of scheduling the cryoprobe, which would require prior authorization by the employer.

¶ 20 On March 20, 2008, while continuing to await authorization for the cryoprobe procedure, the claimant contacted Dr. Holmes and requested a release to return to work without restriction. The claimant explained to Dr. Holmes that he was a candidate for promotion from seasonal to

full time and wanted to return to work in hopes of being able to secure the promotion. Dr. Holmes released the claimant to unrestricted work.

¶ 21 On March 27, 2008, the claimant returned to work.

¶ 22 On April 8, 2008, the cryoprobe procedure was performed. At a follow up visit with Dr. Buvanendran on April 28, 2008, the claimant reported significant pain relief following the procedure. The claimant was able to stop taking all pain medications. Dr. Buvanendran released the claimant from his care with instructions to return on an as needed basis.

¶ 23 On May 15, 2008, Dr. Holmes noted that cryoprobe was successful in managing and reducing the claimant's pain. Dr. Holmes opined that the claimant had, as a result of the cryoprobe procedure, reached MMI.

¶ 24 On June 4, 2008, the claimant reported to Dr. Holmes with severe left ankle pain. Dr. Holmes diagnosed an infection at the site of the cryoprobe procedure. Dr. Holmes ordered the ankle immobilized with a walker boot, prescribed antibiotics, and ordered diagnostic testing to determine the presence of possible abscess formation in the ankle or heel. He also advised an infectious disease consultation. The consultation revealed no abscess and the claimant was advised to continue a 10-day antibiotic treatment and then follow up with Dr. Holmes. The claimant continued to work during this course of treatment.

¶ 25 On June 11, 2008, Dr. Holmes recommended a brief course of physical therapy, which the claimant commenced on June 19, 2008, and completed on July 9, 2008. On July 10, 2008, Dr. Holmes observed no improvement in the claimant's condition following the physical therapy sessions. He noted that the claimant reported increasing levels of pain in the ankle with pain radiating up the leg from the ankle. Dr. Holmes opined that the claimant did not present a good case for surgical intervention. He further opined that the claimant's best course of treatment

would be to continue a pain management protocol under Dr. Buvanendran. Dr. Holmes also determined that the claimant should be completely off work. The claimant testified at the hearing that his last day of employment was July 16, 2008, and that he had not been able to work since that date.

¶ 26 On July 30, 2008, an MRI revealed significant left ankle sensory mononeuropathy. A Functional Capacity Evalatuation (FCE), previously ordered by Dr. Holmes revealed that the claimant could perform heavy work, but had significant pain when using the left ankle and foot.

¶ 27 On August 11, 2008, the claimant was again examined and treated by Dr. Buvanendran. Treatment notes from that appointment indicate that the claimant reported significant relief following the cryoprobe, but had since experienced significant pain. Dr. Buvanendran then began a regime of treatment, including a return to previous levels of pain medication, additional bier blocks and nerve blocks and a second cryoprobe, all with the goal of gradually increasing the claimant's pain tolerance.

¶ 28 On May 27, 2009, the claimant was examined at the request of the employer by Dr. Howard Konowitz. Dr. Konowitz opined that the claimant had sinus tarsi syndrome and was not a continuing candidate for pain management. Specifically, Dr. Konowitz opined that the claimant should discontinue the use of pain medications, such as Lyrica. He further opined that the claimant had reached MMI for pain management.

¶ 29 On July 22, 2009, the claimant was again examined by Dr. Holmes, who noted that Dr. Buvanedran's treatment plan had been suspended.

¶ 30 During the time period from July 2009 to May 2010, the claimant continued to receive periodic treatment from Dr. Holmes and Dr. Buvanendran with no improvement.

¶ 31 On May 17, 2010, the claimant was referred by Dr. Buvanendran to Dr. Steven Haddad, a board certified orthopedic surgeon, for a consultation. Dr. Haddad diagnosed possible left ankle Chronic Regional Pain Syndrome (CRPS), a condition of the autonomic nervous system secondary to soft tissue injury. Dr. Haddad recommended further testing.

¶ 32 Dr. Buvanendran agreed with Dr. Haddad's diagnosis of CRPS, but disagreed with the recommendation for further testing, noting that the tests themselves might increase or aggravate the claimant's pain. Instead, he recommended a series of lumbar epidural injections near L5-S1 with the goal of blocking pain reception.

¶ 33 On May 27, 2010, Dr. Buvanendran performed the first lumbar epidural injection and noted that the claimant reported pain relief of 50 to 60%. A second epidural injection was administered on June 4, 2010, with similar relief. The claimant was advised by Dr Buvanendran to continue with pain medication while awaiting future injections. Dr. Buvanendran also ordered the claimant to remain off work.

¶ 34 On June 7, 2010, the employer requested a medical documentation review by Dr. Elizabeth Kessler. Her report, entered into evidence by the employer, stated her opinion that the claimant did not have CRPS, but merely sustained an ankle sprain that would have completely resolved itself within a matter of a few weeks without the necessity of any of the treatments the claimant had received from Drs. Holmes and Buvanendran. Although the report was admitted into evidence, no curriculum *vitae* or any form of evidence establishing Dr. Kessler's credentials or expertise was provided. The arbitrator noted this lack of evidence in assigning no weight to the report.

¶ 35 On July 29, 2010, Dr. Buvanendran attempted to schedule the next epidural injection and order an EMG to evaluate the possibility of a spinal column stimulator. The employer refused to authorize any further treatment for the claimant.

¶ 36 On September 3, 2010, the claimant was examined by Dr. Buvanendran, who noted that no further treatment would be authorized for the claimant. Dr. Buvanendran then issued a report in which he opined that the claimant suffered from CRPS attributable to the April 20, 2007, accident and that the claimant could benefit from continuing pain management treatment including epidural injections.

¶ 37 The claimant testified at the hearing that he has ongoing symptoms including difficulty standing and walking for more than 15 minutes before needing to sit. He also reported problems with uneven surfaces and going up and down stairs or inclines.

¶ 38 On November 11, 2010, the claimant's attorney deposed Dr. Buvanendran, pursuant to notice to the employer's attorney. The record contains a copy of the employer's attorney's agreement to participate in the deposition. The record also contains a copy of a letter from the employer's attorney dated November 11, 2010, purporting to withdraw the agreement to the deposition. The record further indicated that the letter was sent via fax to claimant's counsel the morning of the scheduled deposition. According to the letter, the employer's attorney was not satisfied that all documents subpoenaed from Dr. Buvanendran had been received prior to the deposition. The claimant's counsel proceeded with the deposition, noting for the record that the deposition had been taken pursuant to notice and agreement by the parties.

¶ 39 When counsel for the claimant moved for admission of a transcript of the deposition at the hearing, the employer's counsel objected, arguing that the deposition had not been taken by agreement of the parties or order of the Commission as required Commission's Rules. Rule

7030.60(a)) of the Rules Governing Practice before the Illinois Workers' Compensation Commission provide that: "[e]vidence depositions of any witness may be taken, before hearing, only upon stipulation of the parties or upon order *** issued by the Arbitrator or Commissioner to whom the case has been assigned upon application of either party."

¶ 40 The arbitrator rejected the employer's argument that the deposition had not been taken upon agreement of the parties, finding instead that the purported "withdrawal" of agreement on the morning of the deposition was insufficient to negate the prior agreement. The arbitrator observed that if all subpoenaed documents had not been received, the appropriate course of action would have been to raise an objection at the deposition and at the hearing. The arbitrator allowed the evidence deposition to be admitted.

¶ 41 The arbitrator found that the claimant had established that his current condition of ill-being was causally related to the industrial accident on April 20, 2007. In so finding, he relied upon the medical records of Drs. Holmes, Haddad and Buvanendran, as well as the opinions of Drs. Haddad and Buvanendran that the claimant's current condition was CRPS attributable to the soft tissue injury incurred on April 20, 2007. The arbitrator gave more weight to the opinions of these treating physicians than to those of Drs. Konowitz and Kessler, particularly noting the lack of credentials presented for Dr. Kessler. The arbitrator found that $5,708.07 in medical expenses incurred at Rush Pain Center, physical therapy at Athletic and Therapeutic Institute, an MRI performed at Glenbrook Hospital, and prescriptions were reasonable and necessary. He further found that the treatment protocol proposed by Dr. Buvanendran for the claimant's CRPS diagnosis was reasonable and necessary. The arbitrator also determined that the claimant had been off work by order of Dr. Holmes as of July 16, 2008, and had not reached MMI as of the date of the hearing. The determination that the claimant had not reached MMI was based upon

the opinions of Drs. Holmes and Buvanendran, who opined that the claimant's pain from CRPS had yet to be completely treated by Dr. Buvanendran.

¶ 42 The employer sought review of the before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's findings of causation, past and prospective medical expenses, and period of TTD benefits. The Commission adjusted the amount of the claimant's average weekly wage for purposes of calculating the amount of TTD benefits. The employer raised an evidentiary objection to the admission of the transcript of Dr. Buvanendran's deposition, which the Commission rejected.

¶ 43 The employer sought judicial review of the Commission's decision in the circuit court of Cook County which confirmed the decision of the Commission.

¶ 44 **ANALYSIS**

¶ 45 1. Dr. Buvanendran's evidence deposition

¶ 46 The evidentiary rulings of the Commission will be overturned only where they resulted from an abuse of discretion. *Cassens Transport Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 327 (1994). An abuse of discretion occurs only when no reasonable person would take the view adopted by the Commission. *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d 197, 204 (2010). The employer argues that the evidentiary ruling at issue herein should be subject to *de novo* review as the issue involves whether the admission of Dr. Buvanendran's deposition violates the Commission Rule 7030.60(a). The employer maintains that administrative rules are akin to statutes and are thus subject to *de novo* review. See *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 391 (1990). While the employer is correct in observing that administrative rules are generally subject to *de novo* review, evidentiary rulings, such as whether to admit deposition testimony over objection, are reviewed for an abuse

of discretion. *Cassens*, 262 Ill. App. 3d at 327. We will therefore review the Commission ruling admitting Dr. Buvanendran for an abuse of discretion.

¶ 47 Here, the employer suggests that a fax sent on the morning of the deposition was sufficient to withdraw consent to the deposition and, therefore, because there was no agreement to take the deposition, the deposition was not admissible. The Commission rejected this argument and we cannot say that its ruling constituted an abuse of discretion. We note that the Commission followed its own prior precedent in ruling that an evidence deposition is admissible "by agreement" where the parties had previously agreed to the deposition but one party sought to withdraw that agreement shortly before the deposition was to be taken. The Commission found that a last minute withdrawal of agreement was not proper under Commission Rule 7030.60(a). The Commission held that, once an agreement to hold a deposition is given, the deposition must take place and any objections to the procedure or content of the deposition must be addressed by way of objection, particularly where, as here, the purported "withdrawal" of agreement is attempted the day of the scheduled deposition. In addressing the employer's objection to the admission of Dr. Buvanendran's deposition, the Commission was following a procedure instituted in its *Spilker* decision in 2006. We find the Commission's decision to follow its previously articulated interpretation of Rule 7030.60(a) was not an abuse of discretion. As the Commission made clear in adopting the arbitrator's evidentiary ruling, the proper procedure for the employer to object to Dr. Buvanendran's deposition was to attend the deposition as agreed and make specific objections during the deposition and at the time of hearing.

¶ 48 The employer also argues that the deposition was inadmissible surprise medical testimony in violation of our holding in *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). Specifically, the employer maintains that the claimant did not provide a complete set of

Dr. Buvanendran's treatment records prior to the deposition. The employer's argument fails in two respects. First, it is well settled that there is no discovery in workers' compensation and thus neither party is under an obligation to provide medical records to the other. *Boyd Electric v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 256, 259 (2010). Second, opinions of treating physicians are not subject to *Ghere* where the records in the employer's possession are sufficient to put the employer on notice that the treating physician will have an opinion as to causation. *Homebright Ace Hardware v. Industrial Comm'n*, 351 Ill. App. 3d 333, 339 (2004).

¶ 49 Simply put, the employer is responsible for obtaining whatever medical records it deems necessary by use of subpoenas served directly upon the medical provider. Commission Rule 7110.70(c) provides that "the employer shall have the initial responsibility to promptly seek the desired information for those providers of medical, hospital and surgical services of which the employer has knowledge." Here, the record indicates that the employer issued a subpoena to Dr. Buvanendran but failed to take steps to enforce the subpoena. The employer cannot claim that it was surprised by Dr. Buvanendran's opinion testimony when it: (1) had in its possession Dr. Buvanendran's treatment notes for all but the last three appointments; and (2) had issued a subpoena for the notes from those last three appointments but failed to take steps to enforce the subpoena. Given this record, it cannot be said that the Commission's admission of Dr. Buvanendran's deposition violated the principles articulated in *Ghere*.

¶ 50 Regarding Dr. Buvanendran's deposition, the employer lastly maintains that it was denied due process when the deposition was admitted without an opportunity to cross-examine the witness. This argument, of course, assumes that the employer had no opportunity to cross-examine Dr. Buvanendran at the deposition. The facts herein establish otherwise. The employer

had an opportunity to cross-examine Dr. Buvanendran but chose to forego that opportunity when it decided not to attend the deposition.

¶ 51 2. Causation

¶ 52 The employer next maintains that the Commission erred in finding that the claimant had established the existence of a causal connection between his current condition of ill-being and the April 20, 2007, accident.

¶ 53 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of

the evidence compels an opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993).

¶ 54 In this case, the Commission's finding that the claimant's CRPS condition in his left ankle was causally connected to his workplace accident is not against the manifest weight of the evidence. The Commission based its decision on the testimony and medical records of Drs. Buvanendran, Holmes and Haddad, as well as the various diagnostic tests, all of which combined to establish a chain of events showing a prior condition of good health, followed by a change after a work injury. The totality of this evidence established that the claimant had no ill-being associated with his left ankle prior to April 20, 2007, with a progressively worsening condition following the accident. It has long been established that a chain of good health, accident, and injury can establish causation. *Illinois Power Co. v. Industrial Comm'n*, 176 Ill. App. 3d 317, 327 (1998). Here, the medical testimony and records of the treating physicians established the chain from the accident to the soft tissue injury of the ankle sprain, though the infection resulting from the cryoprobe procedure to the diagnosis of CRPS, a condition which can develop from soft tissue injury. Based upon this record, it cannot be said that the Commission's causation finding was against the manifest weight of the evidence.

¶ 55 3. TTD benefits

¶ 56 The employer next maintains that the Commission erred in awarding TTD benefits after May 15, 2008, the date upon which Dr. Holmes originally found that the claimant reached orthopedic MMI.

¶ 57 A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 149

(1990). To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 148 (2010). The dispositive question is whether the claimant's condition has stabilized, *i.e.*, whether he has reached MMI. *Id.*

¶ 58 The factors to consider in assessing whether a claimant has reached MMI include a release to return to work, medical testimony or evidence concerning the claimant's injury, and the extent of the injury. *Id.* Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004).

¶ 59 The determination whether a claimant was unable to work and the period of time during which a claimant is temporarily and totally disabled are questions of fact to be determined by the Commission, and the Commission's resolution of these issues will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 119–20.

¶ 60 In this case, Dr. Holmes opined that the claimant had reached orthopedic MMI and was able to return to work without restriction by May 15, 2008. However, the record is clear that shortly after that opinion was issued, the claimant's neurological conditions traceable to the April 2007 accident began to appear. The employer completely ignores that, after the infection following the cryoprobe in April 2008, the claimant's treating physicians all removed the claimant from work and continued treatment which would have continued up to the date of hearing. Specifically, Dr. Holmes fully restricted the claimant from all work on July 16, 2008, and Dr. Buvanendran kept the claimant off from all work since October 13, 2008. No treating physician opined that the claimant had reached MMI as of the date of the hearing. In sum, there

was ample evidence supporting the Commission's conclusion that the claimant's condition had not stabilized by December 2, 2010, and that he was entitled to TTD benefits up to that date. Accordingly, the Commission's decision to continue TTD benefits after May 15, 2008, was not against the manifest weight of the evidence.

¶ 61 4. Medical Expenses

¶ 62 The employer next maintains that the Commission's award of medical expenses incurred by the claimant was against the manifest weight of the evidence. We disagree. Section 8(a) of the Act entitles a claimant "to recover reasonable medical expenses, the incurrence of which are *causally related to an accident arising out of and in the scope of her employment* and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." (Emphasis added.) 820 ILCS 305/8(a) (West 2006); see also *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (2011); *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1992) ("Under section 8(a) of the Act, an employee is only entitled to recover reasonable medical expenses which are causally related to the accident."). Whether medical treatment is necessary to cure or treat an injury that is causally related to a work-related accident is a question of fact for the Commission, and the Commission's determination of that issue will not be overturned unless it is against the manifest weight of the evidence. *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 389 (1982); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 51.

¶ 63 In this case, the Commission's finding that the medical treatment was reasonable and necessary was not against the manifest weight of the evidence. The record established that the claimant received short term relief from the bier blocks, physical therapy and nerve blocks for which medical expenses were awarded.

¶ 64 5. Prospective Medical Expenses

¶ 65 The employer lastly maintains that the Commission erred in awarding the prospective medical treatment prescribed by Dr. Buvanendran. Prospective treatment prescribed by a treating physician is compensable and the Commission has the authority to award payment for such treatment. *Plantation Manufacturing Company v. Industrial Comm'n*, 294 Ill. App. 3d 705, 709 (1997). Here, the Commission adopted the arbitrator's finding that Dr. Buvanendran prescribed a regime of treatment reasonably likely to relieve the claimant's continuing symptoms. There is nothing in the record to indicate that the Commission's reliance upon Dr. Buvanendran's opinion, given his expertise and familiarity with the claimant's condition, was against the manifest weight of the evidence.

¶ 66 CONCLUSION

¶ 67 For the foregoing reasons, we affirm the decision of the Commission and remand the matter to the Commission for further proceedings.

¶ 68 Commission affirmed and cause remanded.

1 of 44 DOCUMENTS

JEFFREY MAZURKIEWICZ, PETITIONER, v. CITY OF CHICAGO/DEPT. OF AVIATION, RESPONDENT.

NO: 07WC 44908

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 494; 2012 Ill. Wrk. Comp. LEXIS 562

May 8, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

The Arbitrator found an average weekly wage of $ 1,204.73. Petitioner stipulated to an average weekly wage of $ 1,204.73 and Respondent disputed Petitioner's calculation and stipulated to an average weekly wage of $ 1,058.88 (AX1). The parties agreed Petitioner was 43 years old, married with [*2] two dependent children at the time of injury (AX1). Respondent's calculation is based on the argument that Petitioner worked mandatory overtime but it was not regular and therefore should not be included in the calculation of average weekly wage. The Commission finds that Petitioner worked overtime regularly from September 2006 through March 2007 but the hours were not regular amounts each week. Petitioner however testified that if he refused to work overtime that he would not be offered the hours in the future and that his overtime requirements were dependent on the tasks at hand on a particular day.

The Courts have found that overtime is to be included in the calculation of Petitioner's average weekly wage if 1) the Petitioner were required to work overtime as a condition of his employment; 2) Petitioner consistently worked a set number of overtime hours each week; or 3) the overtime hours the Petitioner worked were part of his regular hours of employment. *See Tower Automotive v. Workers' Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011),* referencing *Airborne Express v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st Dist. 2007).* [*3]

The Commission in Weyker v. Imperial Crane Service found that overtime was to be included in the average weekly wage at the straight time rate because Petitioner worked mandatory overtime, despite his hours being irregular as Petitioner testified that he "wouldn't be there any longer if he refused to work the overtime." Petitioner was not allowed to abandon a job in progress even if his shift was over. *08 I.W.C.C. 0883.* In Lopez v. AGI Media, Petitioner was required to work overtime as needed and the Commission therefore found that overtime he worked was to be included in the average weekly wage at the straight time rate.*11 I.W.C.C. 0576.* The Commission has found that Respondent's requirement that Petitioner complete a task at hand constituted mandatory overtime, even if the hours varied from week to week if the Petitioner worked at least some overtime in most of the weeks in consideration *See Long v. Prairie Material Sales, 04 I.I.C. 0827* and *Baker v. Silver Cross Hospital, 06 I.W.C.C. 0311.*

In the present case, Petitioner's uncontested testimony is that [*4] he would "suffer consequences" if he refused overtime and was required to complete a task at hand even if his shift ended. Petitioner worked a varying amount of overtime each pay cycle but worked overtime twelve of the last sixteen weeks of wages submitted in the record. For the foregoing reasons, the Commission finds that overtime is to be included in the calculation of Petitioner's average weekly wage at the straight time rate.

Petitioner's Exhibit 9 is the wage records of Petitioner for the period April 30, 2006 through March 31, 2007. Respondent's Exhibit 1 is the wage records of Petitioner for the period January 2, 2006 through December 31, 2006. The date of accident is April 20, 2007 (AX1). The Commission finds that the correct period that the benefit rate should be computed from is April 20, 2006 through April 19, 2007. However, wages are only available in the record through March 31, 2007 for a total period of 46 weeks. The Commission notes that Petitioner's calculation of the benefit rate, which the Arbitrator adopted, does not use the correct straight time wage rates of $ 25.90 and $ 29.15, respectively. Further, the overtime hours on Petitioner's summary of wages included [*5] in PX9 are not complete. The Commission finds the total regular hours worked by Petitioner for the calculated period to be 1793.02 hours and the total overtime hours worked by Petitioner for that period 3541.74 hours. The Commission finds that straight time wages earned for the forgoing 46 weeks to be $ 54,114.67. The Commission therefore calculates the average weekly wage at $ 1,176.41 ($ 54,114.67/46 weeks) and awards benefits accordingly based on this rate.

While the Commission finds the remainder of the Arbitrator's decision sound, due to the modification of the benefit rate, the Arbitrator's award of temporary disability must also be modified. The Commission finds that the period of temporary total disability awarded Petitioner is correct, April 21, 2007 through March 27, 2008 and July 16, 2008 through December 2, 2010. The Commission finds the temporary total disability rate to be $ 784.27. As such, the Commission finds the Respondent shall pay Petitioner temporary total disability benefits of $ 784.27 per week for 173 1/7 weeks, as provided in Section 8(b) of the Act with Respondent receiving a credit for all amounts paid, if any.

All else is otherwise affirmed and adopted. [*6]

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 784.27 per week for a period of 173 1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 5,708.07 for medical expenses under § 8(a) and § 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent will authorize the treatment protocol as outlined by Dr. Buvanendran and pay such prospective medical expenses pursuant to the medical fee schedule.

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 a credit of $ 115,225.67 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, [*7] 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.

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

ATTACHMENT:

ARBITRATION DECISION

19(b)

JEFFREY MAZURKIEWICZ
Employee/Petitioner

v.

CITY OF CHICAGO/DEPT. OF AVIATION
Employer/Respondent

Case # 07 WC 44908

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 Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **December 2, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's [*8] current condition of ill-being causally related to the injury?
G. [X] What were Petitioner's earnings?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident, **4/20/2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **62,645.96**; the average weekly wage was $ **1,204.73**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

Respondent [*9] ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **115,225.67** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **115,225.67**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **803.15**/week for **173-1/7** weeks, commencing **4/21/2007** through **3/27/2008** and **7/16/2008** through **12/2/2010**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services and prospective medical expenses pursuant to the medical fee schedule (see attached).

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the [*10] 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.

STATEMENT OF FACTS

Petitioner, JEFFREY MAZURKIEWICZ, operated a tow vehicle for Respondent, CITY OF CHICAGO/DEPT. OF AVIATION. Mr. Mazurkiewicz drove the tow truck at O'Hare Airport. His job required him to maintain a standby status until he was called to remove vehicles that had violated parking ordinances and/or became disabled.

The parties stipulated that Petitioner sustained an accidental injury on April 20, 2007: Mr. Mazurkiewicz parked his tow vehicle to go for a bathroom break; when returning back to his truck, he stepped in a pothole and twisted his left ankle. He reported this to his foreman, Greg Kendrick, and was sent to Resurrection Medical Center Emergency Room. The records from that facility (Px 1) demonstrate that Petitioner had soft tissue tenderness and swelling and the x-rays demonstrated a mild hallux valgus [*11] deformity. He was given an air cast and crutches, and directed to follow up with the City's designated medical facility, MercyWorks, and to remain off work for two days. That same day, following this examination at the emergency room, he amended himself to MercyWorks where the history was as testified to. The examination disclosed that he had left ankle pain, his left lower leg was tight and he had left hamstring pain. He demonstrated swelling over the lateral malleolus as well as tenderness along the base of the foot below the lateral malleolus. His range of motion was painful and restricted. His diagnosis was a sprain of the ankle as well as contusion of the foot. He was continued in the air cast and directed to return in three days, on April 23, 2007.

Upon his return to MercyWorks on April 23, 2007, Claimant was directed to return to work with a sit down job, ground level work, no ladders or working at heights, minimum walking and climbing and to follow up in one week. Mr. Mazurkiewicz testified that Respondent could not accommodate these restrictions so he remained off work. Thereafter he continued to treat with the physicians at MercyWorks and received physical therapy at their [*12] facility at Bryn Mawr Physical Therapy. Ultimately, after an MRI of his left ankle on June 6, 2007 showed ongoing pathology, he was directed to seek the involvement of a lower extremity specialist. Although he was directed to see Dr. Kodros for evaluation, Petitioner selected Dr. George Holmes from Midwest Orthopaedics at Rush.

The initial evaluation with Dr. Holmes took place on June 27, 2007. The history of injury documented in the doctor's records is consistent with Mr. Mazurkiewicz's earlier description of the event. On exam, the doctor noted pain with palpation of the sinus tarsi; x-rays, however, showed no evidence of fracture or dislocation. The plan outlined by Dr. Holmes was for an RS4 stimulator and a Lidoderm patch; if these interventions adequately controlled Claimant's pain, he would be able to return to work in a month.

As per the policy of City of Chicago and without the benefit of the strictures of Section 12, Petitioner continued to see the physicians at MercyWorks. The company doctors acquiesced in Dr. Holmes' treatment recommendations and Petitioner continued to see that physician. Dr. Holmes directed that Claimant have an EMG which occurred on August 16, 2007. [*13] The study showed abnormal findings with evidence of distal peroneal mononeuropathy which also involved, to some degree, the superficial peroneal branch; it was felt that this was contributing to some of the patient's paresthesias. Furthermore, there were findings that indicated a more proximal peroneal neuropraxi but there did not appear to be any severe ongoing anoxal denervation of the peroneal nerve. Upon reviewing the EMG, it was Dr, Holmes' opinion that the findings were consistent with sinus tarsi syndrome. The doctor also strongly recommended that Mr. Mazurkiewicz be considered for evaluation by a knee specialist for his knee and hamstring pain which seemed to be persistent following this injury. He also directed that Claimant should follow up with a pain specialist and he was referred to the Rush Pain Center where he came under the care of Dr. Buvanendran.

Treatment at the Rush Pain Center began on September 14, 2007. Petitioner once more gave a consistent history of injury and reported severe left ankle pain, with burning and aching, ever since. After an exam, the assessment was that Petitioner had a history of a work-related injury with chronic left ankle pain as well as [*14] some mild left posterior leg and posterior knee pain. Dr. Buvannendran diagnosed Mr. Mazurkiewicz with superficial peroneal nerve neuralgia;

he prescribed Ultram, an MRI of the lumbar spine to evaluate the leg pain, and an IV regional bier block at the subsequent visit.

On September 24, 2007, Claimant underwent an IV regional bier block, a procedure where his left lower extremity was devascularized by a pneumatic tourniquet, blood flow was terminated and an IV solution containing medication was introduced; Mr. Mazurkiewicz described the procedure as lasting for about two and a half hours. A subsequent block was performed on October 8, 2007 and Petitioner then followed up with Dr. Holmes on October 24, 2007. Dr. Holmes' record indicates that he continued to recommend that Claimant remain under the care of Dr. Buvanendran. Thereafter, visits at the Pain Center occurred on October 26, 2007; November 9, 2007 and November 12, 2007. Petitioner continued off work and followed up with Dr. Holmes on the 21st of November, at which time the doctor opined that, from an orthopedic perspective, Claimant had reached MMI; however, Mr. Mazurkiewicz was to continue to treat with Dr. Buvanendran. Additional [*15] bier blocks were imposed and ultimately the patient returned to see Dr. Holmes on January 9, 2008. Because of Petitioner's persistent ongoing difficulties with no remediation using bier blocks, Dr. Holmes attempted a diagnostic block of the sinus tarsi; when the nerve block resulted in complete relief of Mr. Mazurkiewicz's pain, the doctor recommended that Claimant was a candidate for relief of his pain via a cryoprobe procedure. Dr. Holmes saw Petitioner on January 23, 2008 and because of the ongoing relief provided by the diagnostic nerve block, the doctor recommended that he see Dr. Buvanendran for the purpose of coordinating the cryoprobe. The appointment with Dr. Buvanendran took place later that day. The notes reflect that the doctor discussed two possible approaches to resolving Mr. Mazurkiewicz's ongoing pain problem: either the cryo denervation as recommended by Dr. Holmes, or perhaps a trial of a spinal cord stimulator. On February 8, 2008, Dr. Buvanendran performed a trigger point injection in anticipation of scheduling the cryoprobe, which required prior authorization. Subsequent to that visit and while awaiting authorization for the approval of the cryoprobe, Mr. Mazurkiewicz [*16] contacted Dr. Holmes on March 20, 2008 and requested a release to return to work with no restrictions: he was a candidate for promotion and wanted to return to work and hopefully be able to successfully continue his employment. Claimant returned to work on March 27, 2008. Petitioner again resumed the same level of activity but now instead of being a provisional employee, he would become a permanent employee.

The cryoprobe was ultimately performed on April 8, 2008 and at the follow up visit with Dr. Buvanendran on April 28, 2008, Petitioner reported that he had enjoyed significant relief from the procedure. The doctor released him from care and to return on an as needed basis. On May 15, 2008, when Petitioner again reported that subsequent to the cryoprobe he had significant relief, Dr. Holmes determined that Claimant would be considered being at maximum medical improvement.

Shortly thereafter Mr. Mazurkiewicz developed an infection at the site of the cryoprobe. He reported to Dr. Holmes on June 4, 2008. The doctor immobilized him with a Cam walker boot, prescribed antibiotics, directed that he get an x-ray as well as an MRI to determine if there was any abscess formation, and also [*17] recommended an infectious disease consultation. Petitioner was also told to curtail his activity as much as possible. However, Mr. Mazurkiewicz continued to work at his normal activity. He amended himself to the Advocate Medical Group for the purposes of determining the extent of the infection and their conclusion was he should get an MRI as soon as possible and to get some lab work done. The MRI demonstrated diffuse edema in the fat area, most likely representing cellulitis, however no abscess was apparent. When Claimant returned to the Advocate Medical Group, they examined his ankle and advised him to finish the 10 day course of antibiotics and to return and see his physician.

Petitioner returned to see Dr. Holmes on June 11, 2008. The doctor examined him and recommended a brief course of physical therapy, which commenced on June 19, 2008 and concluded on July 9, 2008. In follow up on the 10th of July, Dr. Holmes reported that the patient continued to do poorly following this regimen of physical therapy; he had developed increasing pain and now had pain radiating up the leg from the anterolateral aspect of the ankle. Because of the poor response to various treatment modalities such [*18] as the RS-34 stimulator, the Lidoderm patch and other modalities, Dr. Holmes did not consider the patient to be a candidate for surgical intervention. He strongly recommended that Mr. Mazurkiewicz would be best served by continuing to treat with Dr. Buvanendran under his pain management protocol. Further, he recommended an EMG and to finish out the course of physical therapy, and took Claimant off work. Claimant commenced losing time on July 16, 2008, and he remained off work from that date until the date of this hearing on December 2, 2010.

Petitioner continued to see Dr. Holmes from time to time as well as Dr. Buvanendran. Dr. Buvanendran's efforts to resolve Mr. Mazurkiewicz's ongoing difficulties proved to be unsuccessful, but it was felt that further treatments would be beneficial. Dr. Buvanendran continued to see the patient for various modalities, either nerve blocks and/or bier blocks, and also referred him to Dr. Steven Haddad for a second opinion. Dr. Haddad's diagnosis was that Petitioner

may have now developed CRPS in the ankle joint as well as possible Achilles tendonopathy or calcaneal contusion. Dr. Haddad's plan was to do some additional diagnostic studies to deal [*19] with both the mechanical issue as well as the neurological issue: he wanted a repeat MRI and a repeat EMG with a specific physician, Dr. Martin Lanoff. The EMG was never authorized by Respondent. The MRI, which occurred on May 25, 2010, showed mild posterior tibialis flexor hallucis longus tenosynovitis as well as mild degenerative changes apparent at the talonavicular joint. Petitioner testified that Dr. Buvanendran disagreed with the appropriateness of Dr. Haddad's recommendation for an EMG based upon the fact that this would possibly be an aggravating factor with regard to his pain condition given that the EMG involves electrical current being introduced into the nerves. Thus, Petitioner remained under the care of Dr. Buvanendran who wished to perform a series of lumbar epidural steroid injections near L5-S1. An injection was performed on the 27th of May and the doctor's records show that Mr. Mazurkiewicz had 50 to 60% relief. He was directed to continue with meds and if there was no improvement long term, he would need to undergo additional injections at the Surgicenter. Additionally, as his prior surgery may have disordered the anatomy for the epidural space, he was to remain [*20] off work. A further epidural steroid injection was performed on June 4, 2010 and a recommendation was made for a caudal epidural steroid injection in the future. Thereafter, on the 29th of June, Dr. Buvanendran decided to schedule the caudal injection and also now obtain an EMG with a consideration for possible spinal column stimulator.

Respondent terminated benefits in September of 2010 based upon a record review by their chosen physician, Dr. Elizabeth Kessler. Her report was offered with reservations by Petitioner but contained no curriculum vitae to determine the doctor's credentials. Dr. Howard Konowitz' deposition as well as his report was also offered on behalf of Respondent and the Arbitrator will consider the opinions of Dr. Konowitz as well as Dr. Kessler in the formulation of his opinion with regard to the issue which has arisen between the recommendations of the treating physicians over that of the record reviewer and Dr. Konowitz.

Because of Respondent's refusal to authorize continued care, the last visit to Dr. Buvanendran occurred on September 3, 2010. In that note Dr. Buvanendran continued to recommend ongoing epidural steroid injections and made his determination that [*21] the patient suffered from CRPS.

Petitioner has testified in a credible fashion and is seeking authorization for the treatment protocol as recommended by Dr. Buvanendran, both in his records as well as in his deposition testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With respect to whether or not Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator findings the following facts:

The Arbitrator has reviewed the testimony of Dr. Buvanendran as well as the medical records of Dr. Buvanendran, Dr. Holmes, Dr. Haddad and the various diagnostic studies, and concludes that Petitioner's current condition of ill-being is causally related to his injury. Dr. Kessler's report is given little credibility as it seems to be nothing more than criticism based upon treatment protocol, however, there is no indication that Dr. Kessler is an expert in or has any experience in pain management. It appears that she is a neurologist but no affiliation, no demonstration or evidence of her credentials have been offered. Therefore, in light of the significant difference in available information regarding the expertise of Dr. Buvanendran versus that of Dr. [*22] Konowitz and Dr. Kessler, the Arbitrator finds that he is compelled to find a causal connection predicated on the conclusions of Dr. Buvanendran as well as Dr. Holmes.

With regard to the issue of what were Petitioner's earnings, the Arbitrator finds the following facts:

Respondent and Petitioner offered into evidence exhibits containing wage records. This exhibit demonstrated earnings commencing with the pay period ending April 30, 2006 through March 31, 2007. It showed regular hours of 1,793.02 and overtime hours totaling 185.75. Petitioner testified that overtime was, in fact, mandatory as based upon the fact that if someone refused it, they would never be provided the opportunity to have it again, so essentially it was mandatory as Petitioner's unrefuted testimony was that there would be consequences if it was turned down. Therefore, pursuant to the holding in *Airborne Express, Inc. v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st Dist. 2007),* where the Court held that if the overtime is mandatory, then it is an essential part of his employment and those hours and earnings should be includible at the straight time rate, Petitioner's [*23] overtime hours are to be included in his wage calculation.

Petitioner's exhibit demonstrates that Petitioner had total earnings of $ 59,612.34 and he worked 49.48 weeks for an average weekly wage of $ 1,204.73. There was no contrary evidence to the fact that the earnings were what they were nor was there any evidence offered to refute the conclusion that Petitioner's overtime was anything other than mandato-

ry. The earnings for overtime at the straight time rate appear to be included in Respondent's exhibit also. Therefore, the Arbitrator finds that Petitioner's average weekly wage is $ 1,204.73 annualized to $ 62,645.96.
With regard to were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds the following facts:

Petitioner offered into evidence medical expenses totaling $ 5,708.07 which includes $ 220.00 of out of pocket expenses paid for by Petitioner. These medical balances are due to the Rush Pain Center, Glenbrook Hospital for an MRI, Athletic and Therapeutic Institute for physical therapy, as well as prescriptions to be reimbursed. The [*24] Arbitrator finds that these treatments were reasonable and necessary and awards Petitioner the sum of $ 5,708.07. This is corroborated by Petitioner's testimony as well as all the medical records offered on behalf of Petitioner at the time of hearing in this matter. Other than the out of pocket medical expenses, Respondent shall pay the submitted bills pursuant to the medical fee schedule.

With regard to whether or not the Petitioner is entitled to any prospective medical care, the Arbitrator finds the following facts:

In reviewing the lengthy treating records of Dr. Buvanendran as well as the records of Dr. Haddad and Dr. Holmes, the Arbitrator finds that Petitioner has sustained a significantly thorny injury. He seemed to be progressing and was, in fact, able to return to work for a brief period of time at his request. At no time leading up to the point where he contacted Dr. Holmes on March 20, 2008 and requested that he be released to full duty without restrictions was there any indication that his duty status should change. Petitioner should not be punished for trying to return to work, perhaps prematurely, in the hope that he could secure a permanent position.

Thereafter [*25] Mr. Mazurkiewicz continued to suffer increasing symptomology and Dr. Holmes was required to again take him off work. This status has yet to change. It is apparent to this Arbitrator, in reviewing the deposition of Dr. Konowitz as well as the tone and tenor of the report of Dr. Kessler, that Respondent is simply refusing to accept that Petitioner has a significant degree of physical damage, and that the complicated issue of CRPS is being addressed by a physician whose credentials demonstrate a high degree of expertise. The Arbitrator relies on the opinions of the treating physicians and concludes that Respondent shall authorize and pay for the treatment protocol as outlined by Dr. Buvanendran.

With regard to what temporary benefits are in dispute, the Arbitrator finds the following facts:

Respondent paid a significant sum of Temporary Total Disability benefits, commencing on April 21, 2007 until Petitioner returned to work effective March 28, 2008. Petitioner then returned to work until Dr. Holmes removed him from the workforce and there is no contrary medical evidence to demonstrate that this was not appropriate. Thus, Petitioner again began losing time from work on July 16, [*26] 2008 and has remained so disabled up to the date of the hearing. The Arbitrator continues to rely on the opinions of the treating physuicians over those of the examining physicians and the finds that Petitioner is entitled to Temporary Total Disability benefits commencing April 21, 2007 up to and including March 27, 2008 and then again commencing on July 16, 2008, up to and including the date

With regard to the issue of whether or not penalties or fees should be imposed upon the Respondent the Arbitrator finds the following facts:

The Arbitrator finds that there was a reasonable dispute as to causal relationship and entitlement to prospective medical treatment and therefore finds that Petitioner failed to prove he is entitled to penalties and attorney's fees under sections 19(k), 19(l) and attorney's fees under section 16 of the Act.

Legal Topics:

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

1 of 44 DOCUMENTS

JEFFREY MAZURKIEWICZ, PETITIONER, v. CITY OF CHICAGO/DEPT. OF AVIATION, RESPONDENT.

NO: 07WC 44908

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 494; 2012 Ill. Wrk. Comp. LEXIS 562

May 8, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

The Arbitrator found an average weekly wage of $ 1,204.73. Petitioner stipulated to an average weekly wage of $ 1,204.73 and Respondent disputed Petitioner's calculation and stipulated to an average weekly wage of $ 1,058.88 (AX1). The parties agreed Petitioner was 43 years old, married with [*2] two dependent children at the time of injury (AX1). Respondent's calculation is based on the argument that Petitioner worked mandatory overtime but it was not regular and therefore should not be included in the calculation of average weekly wage. The Commission finds that Petitioner worked overtime regularly from September 2006 through March 2007 but the hours were not regular amounts each week. Petitioner however testified that if he refused to work overtime that he would not be offered the hours in the future and that his overtime requirements were dependent on the tasks at hand on a particular day.

The Courts have found that overtime is to be included in the calculation of Petitioner's average weekly wage if 1) the Petitioner were required to work overtime as a condition of his employment; 2) Petitioner consistently worked a set number of overtime hours each week; or 3) the overtime hours the Petitioner worked were part of his regular hours of employment. *See Tower Automotive v. Workers' Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011),* referencing *Airborne Express v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st Dist. 2007).* [*3]

The Commission in Weyker v. Imperial Crane Service found that overtime was to be included in the average weekly wage at the straight time rate because Petitioner worked mandatory overtime, despite his hours being irregular as Petitioner testified that he "wouldn't be there any longer if he refused to work the overtime." Petitioner was not allowed to abandon a job in progress even if his shift was over. *08 I.W.C.C. 0883.* In Lopez v. AGI Media, Petitioner was required to work overtime as needed and the Commission therefore found that overtime he worked was to be included in the average weekly wage at the straight time rate.*11 I.W.C.C. 0576.* The Commission has found that Respondent's requirement that Petitioner complete a task at hand constituted mandatory overtime, even if the hours varied from week to week if the Petitioner worked at least some overtime in most of the weeks in consideration *See Long v. Prairie Material Sales, 04 I.I.C. 0827* and *Baker v. Silver Cross Hospital, 06 I.W.C.C. 0311.*

In the present case, Petitioner's uncontested testimony is that [*4] he would "suffer consequences" if he refused overtime and was required to complete a task at hand even if his shift ended. Petitioner worked a varying amount of overtime each pay cycle but worked overtime twelve of the last sixteen weeks of wages submitted in the record. For the foregoing reasons, the Commission finds that overtime is to be included in the calculation of Petitioner's average weekly wage at the straight time rate.

Petitioner's Exhibit 9 is the wage records of Petitioner for the period April 30, 2006 through March 31, 2007. Respondent's Exhibit 1 is the wage records of Petitioner for the period January 2, 2006 through December 31, 2006. The date of accident is April 20, 2007 (AX1). The Commission finds that the correct period that the benefit rate should be computed from is April 20, 2006 through April 19, 2007. However, wages are only available in the record through March 31, 2007 for a total period of 46 weeks. The Commission notes that Petitioner's calculation of the benefit rate, which the Arbitrator adopted, does not use the correct straight time wage rates of $ 25.90 and $ 29.15, respectively. Further, the overtime hours on Petitioner's summary of wages included [*5] in PX9 are not complete. The Commission finds the total regular hours worked by Petitioner for the calculated period to be 1793.02 hours and the total overtime hours worked by Petitioner for that period 3541.74 hours. The Commission finds that straight time wages earned for the forgoing 46 weeks to be $ 54,114.67. The Commission therefore calculates the average weekly wage at $ 1,176.41 ($ 54,114.67/46 weeks) and awards benefits accordingly based on this rate.

While the Commission finds the remainder of the Arbitrator's decision sound, due to the modification of the benefit rate, the Arbitrator's award of temporary disability must also be modified. The Commission finds that the period of temporary total disability awarded Petitioner is correct, April 21, 2007 through March 27, 2008 and July 16, 2008 through December 2, 2010. The Commission finds the temporary total disability rate to be $ 784.27. As such, the Commission finds the Respondent shall pay Petitioner temporary total disability benefits of $ 784.27 per week for 173 1/7 weeks, as provided in Section 8(b) of the Act with Respondent receiving a credit for all amounts paid, if any.

All else is otherwise affirmed and adopted. [*6]

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 784.27 per week for a period of 173 1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 5,708.07 for medical expenses under § 8(a) and § 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent will authorize the treatment protocol as outlined by Dr. Buvanendran and pay such prospective medical expenses pursuant to the medical fee schedule.

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 a credit of $ 115,225.67 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, [*7] 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.

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

ATTACHMENT:

ARBITRATION DECISION

19(b)

JEFFREY MAZURKIEWICZ
Employee/Petitioner

v.

CITY OF CHICAGO/DEPT. OF AVIATION
Employer/Respondent

Case # 07 WC 44908

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 Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **December 2, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's [*8] current condition of ill-being causally related to the injury?
G. [X] What were Petitioner's earnings?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident, **4/20/2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **62,645.96**; the average weekly wage was $ **1,204.73**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

Respondent [*9] ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **115,225.67** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **115,225.67**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **803.15**/week for **173-1/7** weeks, commencing **4/21/2007** through **3/27/2008** and **7/16/2008** through **12/2/2010**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services and prospective medical expenses pursuant to the medical fee schedule (see attached).

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the [*10] 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.

STATEMENT OF FACTS

Petitioner, JEFFREY MAZURKIEWICZ, operated a tow vehicle for Respondent, CITY OF CHICAGO/DEPT. OF AVIATION. Mr. Mazurkiewicz drove the tow truck at O'Hare Airport. His job required him to maintain a standby status until he was called to remove vehicles that had violated parking ordinances and/or became disabled.

The parties stipulated that Petitioner sustained an accidental injury on April 20, 2007: Mr. Mazurkiewicz parked his tow vehicle to go for a bathroom break; when returning back to his truck, he stepped in a pothole and twisted his left ankle. He reported this to his foreman, Greg Kendrick, and was sent to Resurrection Medical Center Emergency Room. The records from that facility (Px 1) demonstrate that Petitioner had soft tissue tenderness and swelling and the x-rays demonstrated a mild hallux valgus [*11] deformity. He was given an air cast and crutches, and directed to follow up with the City's designated medical facility, MercyWorks, and to remain off work for two days. That same day, following this examination at the emergency room, he amended himself to MercyWorks where the history was as testified to. The examination disclosed that he had left ankle pain, his left lower leg was tight and he had left hamstring pain. He demonstrated swelling over the lateral malleolus as well as tenderness along the base of the foot below the lateral malleolus. His range of motion was painful and restricted. His diagnosis was a sprain of the ankle as well as contusion of the foot. He was continued in the air cast and directed to return in three days, on April 23, 2007.

Upon his return to MercyWorks on April 23, 2007, Claimant was directed to return to work with a sit down job, ground level work, no ladders or working at heights, minimum walking and climbing and to follow up in one week. Mr. Mazurkiewicz testified that Respondent could not accommodate these restrictions so he remained off work. Thereafter he continued to treat with the physicians at MercyWorks and received physical therapy at their [*12] facility at Bryn Mawr Physical Therapy. Ultimately, after an MRI of his left ankle on June 6, 2007 showed ongoing pathology, he was directed to seek the involvement of a lower extremity specialist. Although he was directed to see Dr. Kodros for evaluation, Petitioner selected Dr. George Holmes from Midwest Orthopaedics at Rush.

The initial evaluation with Dr. Holmes took place on June 27, 2007. The history of injury documented in the doctor's records is consistent with Mr. Mazurkiewicz's earlier description of the event. On exam, the doctor noted pain with palpation of the sinus tarsi; x-rays, however, showed no evidence of fracture or dislocation. The plan outlined by Dr. Holmes was for an RS4 stimulator and a Lidoderm patch; if these interventions adequately controlled Claimant's pain, he would be able to return to work in a month.

As per the policy of City of Chicago and without the benefit of the strictures of Section 12, Petitioner continued to see the physicians at MercyWorks. The company doctors acquiesced in Dr. Holmes' treatment recommendations and Petitioner continued to see that physician. Dr. Holmes directed that Claimant have an EMG which occurred on August 16, 2007. [*13] The study showed abnormal findings with evidence of distal peroneal mononeuropathy which also involved, to some degree, the superficial peroneal branch; it was felt that this was contributing to some of the patient's paresthesias. Furthermore, there were findings that indicated a more proximal peroneal neuropraxi but there did not appear to be any severe ongoing anoxal denervation of the peroneal nerve. Upon reviewing the EMG, it was Dr, Holmes' opinion that the findings were consistent with sinus tarsi syndrome. The doctor also strongly recommended that Mr. Mazurkiewicz be considered for evaluation by a knee specialist for his knee and hamstring pain which seemed to be persistent following this injury. He also directed that Claimant should follow up with a pain specialist and he was referred to the Rush Pain Center where he came under the care of Dr. Buvanendran.

Treatment at the Rush Pain Center began on September 14, 2007. Petitioner once more gave a consistent history of injury and reported severe left ankle pain, with burning and aching, ever since. After an exam, the assessment was that Petitioner had a history of a work-related injury with chronic left ankle pain as well as [*14] some mild left posterior leg and posterior knee pain. Dr. Buvannendran diagnosed Mr. Mazurkiewicz with superficial peroneal nerve neuralgia;

he prescribed Ultram, an MRI of the lumbar spine to evaluate the leg pain, and an IV regional bier block at the subsequent visit.

On September 24, 2007, Claimant underwent an IV regional bier block, a procedure where his left lower extremity was devascularized by a pneumatic tourniquet, blood flow was terminated and an IV solution containing medication was introduced; Mr. Mazurkiewicz described the procedure as lasting for about two and a half hours. A subsequent block was performed on October 8, 2007 and Petitioner then followed up with Dr. Holmes on October 24, 2007. Dr. Holmes' record indicates that he continued to recommend that Claimant remain under the care of Dr. Buvanendran. Thereafter, visits at the Pain Center occurred on October 26, 2007; November 9, 2007 and November 12, 2007. Petitioner continued off work and followed up with Dr. Holmes on the 21st of November, at which time the doctor opined that, from an orthopedic perspective, Claimant had reached MMI; however, Mr. Mazurkiewicz was to continue to treat with Dr. Buvanendran. Additional [*15] bier blocks were imposed and ultimately the patient returned to see Dr. Holmes on January 9, 2008. Because of Petitioner's persistent ongoing difficulties with no remediation using bier blocks, Dr. Holmes attempted a diagnostic block of the sinus tarsi; when the nerve block resulted in complete relief of Mr. Mazurkiewicz's pain, the doctor recommended that Claimant was a candidate for relief of his pain via a cryoprobe procedure. Dr. Holmes saw Petitioner on January 23, 2008 and because of the ongoing relief provided by the diagnostic nerve block, the doctor recommended that he see Dr. Buvanendran for the purpose of coordinating the cryoprobe. The appointment with Dr. Buvanendran took place later that day. The notes reflect that the doctor discussed two possible approaches to resolving Mr. Mazurkiewicz's ongoing pain problem: either the cryo denervation as recommended by Dr. Holmes, or perhaps a trial of a spinal cord stimulator. On February 8, 2008, Dr. Buvanendran performed a trigger point injection in anticipation of scheduling the cryoprobe, which required prior authorization. Subsequent to that visit and while awaiting authorization for the approval of the cryoprobe, Mr. Mazurkiewicz [*16] contacted Dr. Holmes on March 20, 2008 and requested a release to return to work with no restrictions: he was a candidate for promotion and wanted to return to work and hopefully be able to successfully continue his employment. Claimant returned to work on March 27, 2008. Petitioner again resumed the same level of activity but now instead of being a provisional employee, he would become a permanent employee.

The cryoprobe was ultimately performed on April 8, 2008 and at the follow up visit with Dr. Buvanendran on April 28, 2008, Petitioner reported that he had enjoyed significant relief from the procedure. The doctor released him from care and to return on an as needed basis. On May 15, 2008, when Petitioner again reported that subsequent to the cryoprobe he had significant relief, Dr. Holmes determined that Claimant would be considered being at maximum medical improvement.

Shortly thereafter Mr. Mazurkiewicz developed an infection at the site of the cryoprobe. He reported to Dr. Holmes on June 4, 2008. The doctor immobilized him with a Cam walker boot, prescribed antibiotics, directed that he get an x-ray as well as an MRI to determine if there was any abscess formation, and also [*17] recommended an infectious disease consultation. Petitioner was also told to curtail his activity as much as possible. However, Mr. Mazurkiewicz continued to work at his normal activity. He amended himself to the Advocate Medical Group for the purposes of determining the extent of the infection and their conclusion was he should get an MRI as soon as possible and to get some lab work done. The MRI demonstrated diffuse edema in the fat area, most likely representing cellulitis, however no abscess was apparent. When Claimant returned to the Advocate Medical Group, they examined his ankle and advised him to finish the 10 day course of antibiotics and to return and see his physician.

Petitioner returned to see Dr. Holmes on June 11, 2008. The doctor examined him and recommended a brief course of physical therapy, which commenced on June 19, 2008 and concluded on July 9, 2008. In follow up on the 10th of July, Dr. Holmes reported that the patient continued to do poorly following this regimen of physical therapy; he had developed increasing pain and now had pain radiating up the leg from the anterolateral aspect of the ankle. Because of the poor response to various treatment modalities such [*18] as the RS-34 stimulator, the Lidoderm patch and other modalities, Dr. Holmes did not consider the patient to be a candidate for surgical intervention. He strongly recommended that Mr. Mazurkiewicz would be best served by continuing to treat with Dr. Buvanendran under his pain management protocol. Further, he recommended an EMG and to finish out the course of physical therapy, and took Claimant off work. Claimant commenced losing time on July 16, 2008, and he remained off work from that date until the date of this hearing on December 2, 2010.

Petitioner continued to see Dr. Holmes from time to time as well as Dr. Buvanendran. Dr. Buvanendran's efforts to resolve Mr. Mazurkiewicz's ongoing difficulties proved to be unsuccessful, but it was felt that further treatments would be beneficial. Dr. Buvanendran continued to see the patient for various modalities, either nerve blocks and/or bier blocks, and also referred him to Dr. Steven Haddad for a second opinion. Dr. Haddad's diagnosis was that Petitioner

may have now developed CRPS in the ankle joint as well as possible Achilles tendonopathy or calcaneal contusion. Dr. Haddad's plan was to do some additional diagnostic studies to deal [*19] with both the mechanical issue as well as the neurological issue: he wanted a repeat MRI and a repeat EMG with a specific physician, Dr. Martin Lanoff. The EMG was never authorized by Respondent. The MRI, which occurred on May 25, 2010, showed mild posterior tibialis flexor hallucis longus tenosynovitis as well as mild degenerative changes apparent at the talonavicular joint. Petitioner testified that Dr. Buvanendran disagreed with the appropriateness of Dr. Haddad's recommendation for an EMG based upon the fact that this would possibly be an aggravating factor with regard to his pain condition given that the EMG involves electrical current being introduced into the nerves. Thus, Petitioner remained under the care of Dr. Buvanendran who wished to perform a series of lumbar epidural steroid injections near L5-S1. An injection was performed on the 27th of May and the doctor's records show that Mr. Mazurkiewicz had 50 to 60% relief. He was directed to continue with meds and if there was no improvement long term, he would need to undergo additional injections at the Surgicenter. Additionally, as his prior surgery may have disordered the anatomy for the epidural space, he was to remain [*20] off work. A further epidural steroid injection was performed on June 4, 2010 and a recommendation was made for a caudal epidural steroid injection in the future. Thereafter, on the 29th of June, Dr. Buvanendran decided to schedule the caudal injection and also now obtain an EMG with a consideration for possible spinal column stimulator.

Respondent terminated benefits in September of 2010 based upon a record review by their chosen physician, Dr. Elizabeth Kessler. Her report was offered with reservations by Petitioner but contained no curriculum vitae to determine the doctor's credentials. Dr. Howard Konowitz' deposition as well as his report was also offered on behalf of Respondent and the Arbitrator will consider the opinions of Dr. Konowitz as well as Dr. Kessler in the formulation of his opinion with regard to the issue which has arisen between the recommendations of the treating physicians over that of the record reviewer and Dr. Konowitz.

Because of Respondent's refusal to authorize continued care, the last visit to Dr. Buvanendran occurred on September 3, 2010. In that note Dr. Buvanendran continued to recommend ongoing epidural steroid injections and made his determination that [*21] the patient suffered from CRPS.

Petitioner has testified in a credible fashion and is seeking authorization for the treatment protocol as recommended by Dr. Buvanendran, both in his records as well as in his deposition testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With respect to whether or not Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator findings the following facts:

The Arbitrator has reviewed the testimony of Dr. Buvanendran as well as the medical records of Dr. Buvanendran, Dr. Holmes, Dr. Haddad and the various diagnostic studies, and concludes that Petitioner's current condition of ill-being is causally related to his injury. Dr. Kessler's report is given little credibility as it seems to be nothing more than criticism based upon treatment protocol, however, there is no indication that Dr. Kessler is an expert in or has any experience in pain management. It appears that she is a neurologist but no affiliation, no demonstration or evidence of her credentials have been offered. Therefore, in light of the significant difference in available information regarding the expertise of Dr. Buvanendran versus that of Dr. [*22] Konowitz and Dr. Kessler, the Arbitrator finds that he is compelled to find a causal connection predicated on the conclusions of Dr. Buvanendran as well as Dr. Holmes.

With regard to the issue of what were Petitioner's earnings, the Arbitrator finds the following facts:

Respondent and Petitioner offered into evidence exhibits containing wage records. This exhibit demonstrated earnings commencing with the pay period ending April 30, 2006 through March 31, 2007. It showed regular hours of 1,793.02 and overtime hours totaling 185.75. Petitioner testified that overtime was, in fact, mandatory as based upon the fact that if someone refused it, they would never be provided the opportunity to have it again, so essentially it was mandatory as Petitioner's unrefuted testimony was that there would be consequences if it was turned down. Therefore, pursuant to the holding in *Airborne Express, Inc. v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st Dist. 2007),* where the Court held that if the overtime is mandatory, then it is an essential part of his employment and those hours and earnings should be includible at the straight time rate, Petitioner's [*23] overtime hours are to be included in his wage calculation.

Petitioner's exhibit demonstrates that Petitioner had total earnings of $ 59,612.34 and he worked 49.48 weeks for an average weekly wage of $ 1,204.73. There was no contrary evidence to the fact that the earnings were what they were nor was there any evidence offered to refute the conclusion that Petitioner's overtime was anything other than mandato-

ry. The earnings for overtime at the straight time rate appear to be included in Respondent's exhibit also. Therefore, the Arbitrator finds that Petitioner's average weekly wage is $ 1,204.73 annualized to $ 62,645.96.
With regard to were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds the following facts:

Petitioner offered into evidence medical expenses totaling $ 5,708.07 which includes $ 220.00 of out of pocket expenses paid for by Petitioner. These medical balances are due to the Rush Pain Center, Glenbrook Hospital for an MRI, Athletic and Therapeutic Institute for physical therapy, as well as prescriptions to be reimbursed. The [*24] Arbitrator finds that these treatments were reasonable and necessary and awards Petitioner the sum of $ 5,708.07. This is corroborated by Petitioner's testimony as well as all the medical records offered on behalf of Petitioner at the time of hearing in this matter. Other than the out of pocket medical expenses, Respondent shall pay the submitted bills pursuant to the medical fee schedule.

With regard to whether or not the Petitioner is entitled to any prospective medical care, the Arbitrator finds the following facts:

In reviewing the lengthy treating records of Dr. Buvanendran as well as the records of Dr. Haddad and Dr. Holmes, the Arbitrator finds that Petitioner has sustained a significantly thorny injury. He seemed to be progressing and was, in fact, able to return to work for a brief period of time at his request. At no time leading up to the point where he contacted Dr. Holmes on March 20, 2008 and requested that he be released to full duty without restrictions was there any indication that his duty status should change. Petitioner should not be punished for trying to return to work, perhaps prematurely, in the hope that he could secure a permanent position.

Thereafter [*25] Mr. Mazurkiewicz continued to suffer increasing symptomology and Dr. Holmes was required to again take him off work. This status has yet to change. It is apparent to this Arbitrator, in reviewing the deposition of Dr. Konowitz as well as the tone and tenor of the report of Dr. Kessler, that Respondent is simply refusing to accept that Petitioner has a significant degree of physical damage, and that the complicated issue of CRPS is being addressed by a physician whose credentials demonstrate a high degree of expertise. The Arbitrator relies on the opinions of the treating physicians and concludes that Respondent shall authorize and pay for the treatment protocol as outlined by Dr. Buvanendran.

With regard to what temporary benefits are in dispute, the Arbitrator finds the following facts:

Respondent paid a significant sum of Temporary Total Disability benefits, commencing on April 21, 2007 until Petitioner returned to work effective March 28, 2008. Petitioner then returned to work until Dr. Holmes removed him from the workforce and there is no contrary medical evidence to demonstrate that this was not appropriate. Thus, Petitioner again began losing time from work on July 16, [*26] 2008 and has remained so disabled up to the date of the hearing. The Arbitrator continues to rely on the opinions of the treating physuicians over those of the examining physicians and the finds that Petitioner is entitled to Temporary Total Disability benefits commencing April 21, 2007 up to and including March 27, 2008 and then again commencing on July 16, 2008, up to and including the date

With regard to the issue of whether or not penalties or fees should be imposed upon the Respondent the Arbitrator finds the following facts:

The Arbitrator finds that there was a reasonable dispute as to causal relationship and entitlement to prospective medical treatment and therefore finds that Petitioner failed to prove he is entitled to penalties and attorney's fees under sections 19(k), 19(l) and attorney's fees under section 16 of the Act.

Legal Topics:

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

2015 IL App (2d) 130874WC
No. 2-13-0874WC
Opinion filed February 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

LANYON PRYOR,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Appellant,	)	
	)	
v.	)	No. 12-MR-821
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*	)	Honorable
	)	J. Edward Prochaska,
(Cassen Transport, Appellee).	)	Judge, Presiding.

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

OPINION

¶ 1 The claimant, Lanyon Pryor, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for an injury to his lower back which he sustained on July 21, 2008, while he was employed by Cassen Transport (employer). After conducting a hearing, an arbitrator found that the claimant had failed to prove that he sustained an accident that arose out of and in the course of his employment. In so ruling, the arbitrator rejected the claimant's argument that he was acting as a "traveling employee" at the time he was injured. The arbitrator also found that the claimant failed to prove that the injuries he sustained, if any, were causally connected to his employment.

¶ 2 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission), which unanimously affirmed and adopted the arbitrator's decision. The Commission found that the risk which resulted in the claimant's alleged injury was a personal risk that was "not sufficiently connected to [his] employment in order to be a risk peculiar to his work." Moreover, like the arbitrator, the Commission also found that the claimant's "travel for work had not yet begun when the accident occurred."

¶ 3 The claimant then sought judicial review of the Commission's decision in the circuit court of Winnebago County, which confirmed the Commission's decision. This appeal followed.

¶ 4 FACTS

¶ 5 The employer delivers new automobiles to various car dealerships for Chrysler. The claimant works for the employer as a car hauler. His responsibilities include loading automobiles onto an 18-wheel car-hauling truck at the employer's terminal in Belvidere, Illinois, driving the truck to various dealerships, and unloading the cars at those dealerships. Sometimes the claimant picks up vehicles on his return trip, loads them on the truck, and delivers them to another location on his way back to Belvidere. The claimant usually drives his personal vehicle from his home to the employer's Belvidere terminal and back.

¶ 6 One to two nights per week, the claimant spends the night at a hotel while he is on the road delivering cars to dealerships. The employer provides each car hauler with a list of motels so he can book an overnight stay at one of those hotels while he is on the road. When the claimant anticipates that he will be staying overnight at a hotel, he packs a suitcase with a change of clothes. The claimant usually drives to the employer's terminal in his personal vehicle, takes

the suitcase out of his vehicle, and puts it into an 18-wheeler. He then loads the 18-wheeler with cars and drives it to the various dealerships where he delivers the cars.

¶ 7 On July 21, 2008, the claimant arose at 4 a.m. to get ready for work. He testified that he planned to drive to the Belvidere terminal that morning to "start [his] work." Because he anticipated being out of town overnight for work that evening, the claimant packed a suitcase with a change of clothes and other items for the trip. The claimant carried the packed suitcase to his personal car, opened the car door, reached down to pick up the suitcase, and "bent and turned to the back seat of the car." At that moment, the claimant felt an "unbearable" pain through his back and down his legs which caused him to drop to his knees. The claimant stated that he had to "crawl into [his] house screaming for [his] wife" because he "thought [he] was paralyzed."

¶ 8 Later that day, the claimant's wife drove the claimant to his chiropractor, Dr. Irshad Kassim. Dr. Kassim's July 21, 2008, treatment record reflects that the claimant reported "severe," "sharp," and "burning" pain in his lower back radiating into his right leg. The claimant rated the pain as a 10 on a scale of 0 to 10. Dr. Kassim's treatment record notes that "since his last visit, [the claimant's] lower back pain has been worse."[1] The claimant reported feeling a

[1] The claimant had been treating with Dr. Kassim for lower back pain beginning on July 15, 2008. The claimant testified that this pain was triggered when he strained his back at work on July 10, 2008, while chaining a car onto a car-hauling truck. However, Dr. Kassim's July 15 and 17 medical records do not make any note of a work-related accident, and the claimant did not report a work-related injury to the employer until July 25, 2008. The claimant testified that he did not think that the July 10, 2008, work injury was serious and he was hoping to resolve it without involving the employer and without missing time at work. The claimant's alleged July

sharp burning pain in his lower back "while he was picking up a suitcase to go to work." Dr. Kassim noted that the claimant was "acutely inflamed and needed assistance to walk." The doctor recommended that the claimant go to the emergency room. He also noted that the claimant should "continue with the prescribed home care."

¶ 9 The claimant's wife then drove him to the emergency room at St. Alexis Hospital. At the emergency room, the claimant was given an injection for pain relief and told to follow up with his family doctor, Dr. Pocholo Florentino. On July 23, 2008, Dr. Florentino examined the claimant and ordered an MRI, which revealed disc bulging at L2-L5. The following day, Dr. Florentino reexamined the claimant and prescribed medication and physical therapy. During the initial physical therapy session, the therapist instructed the claimant in a home exercise program.[2] After performing these exercises at home, the claimant returned to Dr. Florentino, who released the claimant for work as of August 18, 2008. The claimant returned to work on that date. During the arbitration hearing on March 14, 2011, the claimant testified that his lower back was "fine."

¶ 10 The claimant testified that he never had lower back pain before July of 2008. However, Dr. Kassim's June 4, 2005, medical record indicates that, "[o]n this visit, [the claimant] stated that he was experiencing constant mild to moderate lower back pain which was sharp in quality."

10, 2008, work injury was the subject of a separate claim. Although that claim was consolidated with the instant claim, the arbitrator issued a separate decision addressing the former claim which is not included in the record.

[2] The claimant did not undergo any additional physical therapy sessions because he was denied insurance coverage for those sessions.

According to Dr. Kassim's June 4, 2005, medical record, the claimant's pain was radiating into his left leg, and the claimant rated the pain as a 5 on a scale of 0 to 10. Dr. Kassim diagnosed the claimant with "lumbar somatic dysfunction" and sciatica and prescribed biweekly chiropractic treatments. Dr. Kassim's June 10, 2005, medical record reflects that, although the claimant's lower back pain was getting better, the claimant was still experiencing "constant mild to moderate diffuse lower back pain which was sharp and tingling in quality." Dr. Kassim's June 24, 2005, medical record notes that the claimant's "lower back pain has remained unchanged."

¶ 11 The employer presented the evidence deposition of Charles Anderson, the employer's operations manager. Anderson testified that the claimant called in sick on July 14, 15, and 16 2008, and left a message stating that he was having "sciatic nerve problems due to a motorcycle ride." The claimant testified that he spoke with his employer on July 16, 2008, and reported that he had hurt his back while loading cars at work. However, when asked on cross-examination "[i]f the note or Mr. Anderson *** would testify that you called him and told him you were having sciatic nerve problems due to a motorcycle ride and you need to be off a couple days[,] would that be incorrect?", the claimant responded "I am not—I don't recall that. It could be and I don't remember because we are talking two and a half or three years ago." The claimant admitted that he rode his motorcycle approximately 250 miles to Wisconsin and back on July 12, 2008.

¶ 12 The arbitrator found that the claimant had failed to prove that he sustained an accident that arose out of and in the course of his employment on July 21, 2008. The arbitrator concluded that the claimant "would be considered a traveling employee from when he arrives at [the employer's] terminal, loads his vehicle, delivers his vehicles to a destination, and returns to the terminal." However, the arbitrator found that "lifting an overnight bag is not sufficient to put

[the claimant] in the course of his employment." In support of this finding, the arbitrator cited our supreme court's decision in *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 (1987). Summarizing the supreme court's holding in *Orsini*, the arbitrator noted that (1) "[f]or an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment"; and (2) "[i]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of [the employment]."

¶ 13 The arbitrator also found that, "[e]ven arguing that the [claimant's] activity was 'arising out of' [his employment], *** the [claimant] failed to prove that the low back condition at the time of this alleged injury was causally connected to a lifting incident on July 21, 2008." The arbitrator noted that "the medical records, the [claimant's] testimony, and the testimony of Chuck Anderson persuade the Arbitrator to find that [the claimant's] low back symptoms were causally connected to activities outside of his employment." Accordingly, in addition to his finding that the injuries the claimant suffered on July 21, 2008, did not arise out of and in the course of his employment, the arbitrator also specifically found that "the [claimant] failed to prove that the injuries he sustained on July 21, 2008, if any, were causally connected to his employment with [the employer]." The arbitrator denied benefits.

¶ 14 The claimant appealed the arbitrator's decision to the Commission. The claimant disputed both the arbitrator's finding that he failed to prove an accident arising out of and in the course of his employment and the arbitrator's finding of no causal connection. Regarding the accident issue, the claimant argued that he was a "traveling employee" because his job required him to travel. Accordingly, he was acting in the course of his employment from the moment he

left his house, not merely from the time he arrived at the employer's Belvidere terminal. Moreover, the claimant argued that his injury arose out of his employment under a traveling employee analysis because it was reasonable and foreseeable that he would load a bag into his car in preparation for his upcoming work trip. Regarding the causation issue, the claimant argued that: (1) the employer had stipulated that the claimant's current condition of ill-being is causally connected to the injury he suffered on July 21, 2008; and (2) the claimant "established his burden of proof regarding causation based upon a chain of events theory."

¶ 15 The Commission unanimously affirmed and adopted the arbitrator's decision. The Commission expressly noted that it had considered the issues of "accident" and "causal connection," among other issues. Although the Commission did not separately comment on the arbitrator's causation finding, it explained its finding on the accident issue as follows:

> "The Commission separately notes that *** [the claimant] admits that his accident occurred when he lifted his personal suitcase into his personal vehicle – [the claimant] had not left his home at the time of the accident. The risk of injury in this case was a personal risk, and was not sufficiently connected with the employment in order to be a risk peculiar to his work. [The claimant's] travel for work had not yet begun when the accident occurred."

¶ 16 The claimant then sought judicial review of the Commission's decision in the circuit court of Winnebago County. Although the claimant asked the circuit court to reverse the Commission's decision "in its entirety," his petition for administrative review expressly referenced only the Commission's finding that the accident did not arise out of and in the course of his employment. The employer's response brief in the circuit court addresses that issue only

and does not ask the court to affirm the Commission's finding of no causal connection. The circuit court affirmed the Commission's decision. The circuit court's order discusses only the traveling employee issue (*i.e.*, the "arising out of" issue) and does not address the causation issue. This appeal followed.

¶ 17 ANALYSIS

¶ 18 The issue raised by the parties to this appeal is whether the lower back injury that the claimant suffered on July 21, 2008, arose out of and in the course of his employment. Whether a claimant's injury arose out of or in the course of his employment is typically a question of fact to be resolved by the Commission, and the Commission's determination will not be reversed unless it is against the manifest weight of the evidence. *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13; *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 546 (2010). However, when the facts are undisputed and susceptible of but a single inference, as in this case, the question is one of law subject to *de novo* review. *Kertis*, 2013 IL App (2d) 120252WC, ¶ 13; *Joiner v. Industrial Comm'n*, 337 Ill. App. 3d 812, 815 (2003).

¶ 19 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2008). " 'The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable.' " *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 16 (quoting *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534, 537 (1981)). The rationale for this rule is that that the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest.

The Venture—Newberg-Perini, Stone & Webster, 2013 IL 115728, ¶ 16.

¶ 20 An exception applies, however, when the employee is a "traveling employee." *Id.* ¶ 17. A "traveling employee" is one whose work duties require him to travel away from his employer's premises. *Id.*; see also *Kertis*, 2013 IL App (2d) 120252WC, ¶ 16. Courts generally regard traveling employees differently from other employees when considering whether an injury arose out of and in the course of employment. *The Venture—Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶ 17; *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985). A traveling employee is deemed to be in the course of his employment from the time that he leaves home until he returns. *Kertis*, 2013 IL App (2d) 120252WC, ¶ 16; *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶ 14; *Cox*, 406 Ill. App. 3d at 545. An injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable, *i.e.*, conduct that "might normally be anticipated or foreseen by the employer." (Internal quotation marks omitted.) *Robinson v. Industrial Comm'n*, 96 Ill. 2d 87, 92 (1983); see also *Kertis*, 2013 IL App (2d) 120252WC, ¶ 16; *Cox*, 406 Ill. App. 3d at 545-46.

¶ 21 Whether a traveling employee was injured while engaging in conduct that was reasonable and foreseeable to his employer is normally a factual question to be resolved by the Commission, and where the facts or inferences are in dispute, we should affirm the Commission's determination unless it is against the manifest weight of the evidence. *Kertis*, 2013 IL App (2d) 120252WC, ¶ 17. However, where the relevant facts and inferences are undisputed, as here, we review this issue *de novo*. *Id.*; see generally *Joiner*, 337 Ill. App. 3d at 815.

¶ 22 In this case, the claimant argues that he is a traveling employee. It is undisputed that his job duties required him to travel away from his employer's premises at the Belvidere terminal to

deliver cars to various dealerships and that he typically stayed overnight at a motel from one to two nights per week while he was traveling for work. What is less clear is whether the claimant was traveling for work at the time of his injury. An injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, *i.e.*, during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee's home to the employer's premises. Otherwise, every employee who commutes from his home to a fixed workplace owned or controlled by his employer on a daily basis would be deemed a "traveling employee," and the exception for traveling employees would swallow the rule barring recovery for injuries incurred while traveling to and from work. Thus, the threshold question in this case is: had the claimant embarked on a work-related trip at the time he was injured on July 21, 2008, or was he merely beginning his regular commute to his employer's premises at that time?

¶ 23 The claimant argues that his work accident occurred in the course of his employment because he was injured after he had left his home and begun his work-related trip. In support of this argument, the claimant relies principally on our decisions in *Mlynarczyk* and in *Complete Vending Services, Inc. v. Industrial Comm'n*, 305 Ill. App. 3d 1047 (1999). We will address each of these cases in turn.

¶ 24 In *Mlynarczyk*, the employer operated a cleaning service. The claimant and her husband worked for the employer cleaning churches, homes, and offices in various locations. The claimant "did not work at a fixed jobsite." *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 16. The employer gave the claimant and her husband a minivan to use while driving to various jobs and for personal purposes. *Id.* ¶ 4. On the date of the claimant's injury, the claimant and her husband drove the minivan to clean a church and two homes. After they finished (at

approximately 2:30 p.m.), the employer told them that, if they were interested in assisting the evening crew on another job, they should return to the church at approximately 4:30 p.m. *Id.* ¶ 5. The claimant and her husband returned home and had lunch. Shortly after 4 p.m., the claimant left her house to return to work. As she walked around the rear of the minivan, which was parked in the driveway of the home where she and her husband resided, the claimant slipped and fell, fracturing her wrist. The claimant testified that the accident occurred adjacent to the driveway on a " 'public sidewalk' " leading from the house to the driveway. *Id.* ¶ 6. The employer did not rebut this testimony. We held that the claimant was a traveling employee. *Id.* ¶ 16. Applying the special rules applicable to traveling employees, we held that the claimant's injury occurred in the course of her employment because the injury occurred "after she left home, while walking to a vehicle used to transport her to work." *Id.* ¶ 19. Moreover, we held that the conduct leading to the injury was "reasonable and foreseeable" because: (1) the claimant testified that the accident occurred "as she was walking to the vehicle used to transport her to a work assignment for [the employer]"; and (2) the claimant's walk to the minivan "constituted the initial part of her journey to her work assignment." *Id.*

¶ 25 The employer argued that, even if the claimant was a traveling employee, her injury was not compensable "because she had not left her private property when the injury occurred and therefore had not yet been subjected to the hazards of the street or an automobile." *Id.* ¶ 20. In rejecting this argument, we held that "the evidence does not support the premise that claimant's fall occurred on private property" because the claimant's unrebutted testimony established that the accident occurred on a " 'public sidewalk.' " We found this testimony sufficient to establish that the accident "exposed [the] claimant to the hazards of the street." *Id.* Moreover, we noted that the employer had cited no authority in support of its claim that a traveling employee who has

"left the physical confines of his or her home on the way to a job assignment" and sustained an accident on private property cannot be subject to the hazards of the street. *Id.*

¶ 26 In *Complete Vending Services*, we held that an employee who was injured while driving from his home to his employer's office *en route* to an off-site service call was a traveling employee whose injury arose out of and in the course of his employment. *Complete Vending Services*, 305 Ill. App. 3d at 1050. The claimant worked for the employer as a service technician. He was on call 24 hours a day, 7 days a week, 365 days a year to repair the employer's vending machines in his designated service area. *Id.* at 1048. When he was not out on service calls, his duties included repairing vending machines and rebuilding equipment in one of the employer's shops. *Id.* The claimant drove a company vehicle to and from work and for all service calls. The employer paid for gas and the claimant was not allowed to use the vehicle for any personal uses. *Id.* The night before the accident, the employer's answering service contacted the claimant and informed him that Central Du Page Hospital needed a machine fixed. *Id.* The next morning, the claimant left home in the company vehicle. His intention was to "stop in at the [employer's] office on the way to Du Page Hospital to tell [the employer] where he was going and to see if any other service calls had come in that he could make while [he was] out." *Id.* at 1048-49. The office was directly on the route to the hospital. On the way to the office, the claimant rear-ended a garbage truck and suffered injuries.

¶ 27 We held that the Commission's finding that the claimant's injuries arose out of and in the course of his employment was not against the manifest weight of the evidence for two separate and independent reasons: (1) the claimant was a traveling employee who was injured after he left his home "with the intention of making the service call" even though he had decided to "stop in" at the office first, which was on the way to the service call, for the employer's benefit; and

(2) the employer provided the claimant with a means of transportation to or from work for the employer's own benefit. *Id.* at 1049-50. In so holding, we rejected the dissenting Commissioner's opinion that the claimant was not a traveling employee at the time of the accident because the claimant's commute to the office the morning of the accident was "no different from any other employee's commute to work or, for that matter, the claimant's regular commute to work" and the claimant therefore "encountered *** risks which were no greater than those encountered by the general public each day traveling to and from work." *Id.* at 1050-51.

¶ 28 The claimant argues that *Mlynarczyk* and *Complete Vending Services* support his claim in this case. He contends that, like the claimant in *Mlynarczyk*, he had left his home and was injured while approaching the vehicle that he would use to drive to work. Moreover, like the claimant in *Complete Vending Services*, the claimant planned to stop at the employer's premises (the Belvidere terminal) *en route* to a job at a different location. In essence, the claimant argues that, like the injuries at issue in *Mlynarczyk* and *Complete Vending Services*, his injury occurred during the first leg of a continuous work trip to a distant job location away from the employer's premises. Moreover, because he was a traveling employee, the claimant argues that he was acting in the course of his employment from the time he left his home until the time he returned home, regardless of whether he stopped at the employer's premises in the interim. He notes, correctly, that the fact that he was injured while loading his personal car, rather than a company car, is irrelevant to the traveling employee analysis.[3] Thus, the claimant argues that the

[3] The fact that an employer provides an employee with a company car demonstrates that the employer "provide[d] [the claimant with] a means of transportation to or from work for the employer's own benefit." *Complete Vending Services*, 305 Ill. App. 3d at 1049. That constitutes

Commission erred as a matter of law in finding that his injury did not occur in the course of his employment.

¶ 29 We disagree. Even assuming that the claimant had "left home" at the time of his injury, (which is not entirely clear), he was preparing to begin his *regular commute* to his employer's premises at that time. Unlike the claimants in *Mlynarczyk* and *Complete Vending Services*, the claimant in this case did not drive to his various work locations directly from his home; rather, he was required to drive to the employer's Belvidere facility first, load an 18-wheeler truck with cars located at the employer's facility, and then drive the truck to various dealerships from there. Thus, when he drove to the Belvidere terminal, he was not making a brief and unnecessary stop at his employer's premises that was directly *en route* to his ultimate work destination (as was the claimant in *Complete Vending* Services). Rather, he was making a regular commute to a fixed jobsite as a necessary precondition to any subsequent work-related travel. This fact also distinguishes the claimant in this case from the claimant in *Mlynarczyk*, who had "no fixed job site" and who traveled directly from her home to the various homes and churches that she cleaned. Unlike the claimants in *Mlynarczyk* and *Complete Vending Services*, the claimant's trip to the Belvidere facility was not part of a continuous trip from his home to a jobsite away from

---

a separate exception to the general rule that an accident occurring while an employee is traveling to or from work does not arise out of or in the course of his employment. *Id.* By contrast, the "traveling employee" exception is predicated on entirely different facts, namely, facts demonstrating that the employee's job duties required him to travel away from the employer's premises. See, *e.g.*, *The Venture—Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶ 16.

the employer's premises.[4] Nor was the claimant injured during a trip from his employer's premises to a distant work location (as in *Kertis* and other cases) or during a trip from a remote jobsite to his home (as in *Cox*). Rather, the claimant was injured during a regular commute from his home to his employer's premises, before he embarked upon a work trip away from his employer's premises. Thus, the Commission's finding that the claimant's injury did not arise out of or in the course of his employment was not against the manifest weight of the evidence.

¶ 30 Because we uphold the Commission's decision on this basis, we do not need to address whether the action the claimant was performing while he was injured was reasonable and foreseeable to the employer or whether the Commission erred in finding that the claimant failed to prove causation.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County, which confirmed the Commission's decision.

¶ 33 Affirmed.

[4] Moreover, *Mlynarczyk* is distinguishable for the additional reason that the injury in *Mlynarczyk* occurred on a " 'public sidewalk' " in front of the claimant's house, thereby exposing the claimant to the "hazards of the street." *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 20. Further, we note that our holding in *Mlynarczyk* was based on a unique set of facts that is unlikely to recur.

1 of 15 DOCUMENTS

LANYON PRYOR, PETITIONER, v. CASSEN TRANSPORT, RESPONDENT.

NO: 10WC 29101

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

12 IWCC 1054; 2012 Ill. Wrk. Comp. LEXIS 1208

October 3, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

The Commission specifically notes that it is that Petitioner admits that his accident occurred when he lifted his personal suitcase into his personal vehicle - Petitioner had not left his home at the time of the accident. The risk of injury in this case was a personal risk, and was not sufficiently connected with the employment in order to be a risk peculiar to his work. Petitioner's travel for work had not begun when the accident occurred.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 31, 2011 is hereby affirmed and adopted.

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

The probable cost [*2] 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

LANYON PRYOR
Employee/Petitioner

v.

CASSEN TRANSPORT
Employer/Respondent

Case: **10WC 29101**

Consolidated cases: N/A

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Peter Akemann, Arbitrator of the Commission, in the city of Rockford, on 03/14/2011. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Where the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable [*3] and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?

FINDINGS ON THE ARBITRATOR

On 07/21/2008, Respondent was operating under and subject to the provisions of the Act.

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

The Arbitrator finds that the Petitioner failed to prove that he sustained an accident that arose out of and in the course of employment on 07/21/2008.

Timely notice of this incident was given to Respondent.

The Arbitrator finds that the Petitioner failed to prove that the injuries he sustained on July 21, 2008, if any, were causally connected to his employment with Respondent.

In the year preceding the injury, Petitioner earned $ 85,493.72; the average weekly wage was $ 1,644.11.

On the date of accident, Petitioner was 56 years of age, married with no dependent children.

Petitioner has received all reasonable and necessary medical services.

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

Respondent is entitled to [*4] a credit of $ N/A under Section 8(j) of the Act.

ORDERS OF THE ARBITRATOR

10WC 29101 IS DISMISSED

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.

Arbitrator Peter Akemann

March 30, 2011

In Support of the Arbitrator's finding under (C) ACCIDENT and (F) CAUSAL CONNECTION; the Arbitrator finds the following facts:

The instant case (10WC29101) alleges a date of accident of 07/21/2008. The instant case was consolidated *instantor* by the Arbitrator with 08WC36254, alleging a date of accident of 07/10/2008. Separate Decisions of the Arbitrator will be issued in each case.

The Petitioner testified that he was leaving his home and traveling [*5] to the headquarters of Cassens Transport to pick up a truck for an overnight trip on July 21, 2008. (The Arbitrator notes that the dates of 07/10/2008 through 07/20/2008 are the subject matter of 08WC36254. It is recommended that the facts in 08WC36254 be reviewed prior to the instant case.)

The Petitioner testified he packed an overnight case and was lifting the suitcase into his personal SUV when his back went out. The suitcase contained a change of clothes for his overnight trip. He testified he went to the chiropractor and the chiropractor referred him to the emergency room

The emergency room report from Alexian Brothers Medical Center dated July 21, 2008 reveals that the Petitioner's reason for this visit is not work-related. (Res. Ex. 5)

The Petitioner testified that physical therapy was recommended for July 21, 2008, the physical therapy was denied as not work-related. He obtained exercises from the doctor and performed the exercises at home. He returned to work on August 18, 2008.

The Petitioner testified that he never had any low back problems prior to the alleged work injury of July 10, 2008. (08WC36254)

The evidence deposition of the Petitioner's evaluating physician, Dr. [*6] Jeffrey Coe, was taken on June 1, 2009. Dr. Coe's testified that the Petitioner had no prior back problems. Dr. Coe was then asked if the Petitioner did have prior back problems or treatment for his back, could any of his opinions change. Dr. Coe goes on to testify that it is possible, pending on the additional information about prior back problems. (Pet. Ex. 3, pages 34 and 35)

ANALYSIS

With respect to the alleged work injury on July 21, 2010, the Petitioner testified that he is a car hauler for Cassens Transport. He drives an 18 wheeler from the terminal to his destination. He loads and unloads the 18 wheeler at the terminal, and unloads the vehicles at his destination.

The Arbitrator concludes Petitioner would be considered a traveling employee from when he arrives at the terminal, loads his vehicle, delivers his vehicles to a destination, and returns to the terminal.

In *Orsini v. Industrial Commission,* (117 Ill.2 38, 1987) the court informs us that an injury "arising out of " one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. [*7] For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. Risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of it.

The Arbitrator concludes that the Petitioner lifting an overnight bag is not sufficient to put Petitioner in the course of his employment.

Even arguing that the Petitioner's activity was "arising out of" , the Arbitrator concludes that the Petitioner failed to prove that the low back condition at the time of this alleged injury was causally connected to a lifting incident on July 21, 2008. The medical records, the Petitioner's testimony, and the testimony of Chuck Anderson persuade the Arbitrator to find that Petitioner's low back symptoms were causally connected to activities outside of his employment.

The arbitrator finds that the Petitioner failed to prove that he sustained an accident [*8] that arose out of and in the course of employment on 07/21/2008.

The Arbitrator finds that the Petitioner failed to prove that the injuries he sustained on July 21, 2008, if any, were causally connected to his employment with Respondent.

LEXSEE

LEONARD ORSINI, Appellee, v. THE INDUSTRIAL COMMISSION et al. (Wil-mette Texaco, Appellant)

No. 63505

Supreme Court of Illinois

117 Ill. 2d 38; 509 N.E.2d 1005; 1987 Ill. LEXIS 195; 109 Ill. Dec 166

June 10, 1987, Filed

PRIOR HISTORY: [***1] Appeal from the Industrial Commission Division of the Appellate Court; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Irwin Cohen, Judge, presiding.

DISPOSITION: Judgments reversed; Industrial Commission confirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant Industrial Commission (commission's) sought review of a decision from the Industrial Commission Division of the Appellate Court (Illinois), which affirmed a circuit court decision setting aside the commission's reversal of an arbitrator's award. Appellee injured [*9] employee had filed a claim under the Workers' Compensation Act. Ill. Rev. Stat. ch. 48, para. 138.1 et seq., for injuries sustained while he was employed by defendant company.

OVERVIEW: A commission arbitrator found that as a result of the accidental injuries arising out of and in the course of his employment the injured employee had lost 45 percent of the use of his right leg and 50 percent of the use of his left leg. Accordingly, the employee was awarded compensation benefits. The commission reversed the arbitrator's award, finding that the employee had failed to prove that he sustained accidental injuries arising out of and in the course of his employment. The issue presented in this appeal was whether the injury complained of arose out of and in the course of the employee's employment. The court held that it was the responsibility of the commission to determine from the evidence in this case whether the danger, which caused the injury to the claimant, was peculiar or incidental to his employment. The court could not say that the commission's finding that the employee's injury, caused by a malfunction in his personal automobile, did not arise out of his employment was against [*10] the manifest weight of the evidence. Accordingly, the court reversed the judgment of the appellate and circuit courts.

OUTCOME: The court reversed the judgment of the appellate and circuit courts, and confirmed the decision of the commission. The court held that, given that the employee's injury was caused by a malfunction in his personal automobile, it could not say that the commission's finding that the employee's injury did not arise out of his employment was against the manifest weight of the evidence.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
[HN1] If undisputed facts upon any issue permit more than one reasonable inference to be drawn therefrom, the determination of such issue presents a question of fact. and the conclusion of the Industrial Commission will not be disturbed on review unless it is against the manifest weight of the evidence.

Workers' Compensation & SSDI > Administrative Proceedings [*11] ***> Judicial Review > General Overview***
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time
Workers' Compensation & SSDI > Compensability > Course of Employment > Risks
[HN2] An injury is compensable under the Workers' Compensation Act only if it arises out of and in the course of the employment. Ill. Rev. Stat. ch. 48, para. 138.2. The phrase in the course of refers to the time, place, and circumstances under which the accident occurred.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries
[HN3] The words "arising out of" and "in the course of" are used conjunctively, and therefore both elements must be present at the time of the accidental injury in order to justify compensation.

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
[HN4] An injury arising out of one's employment may be defined as one which has its origin in some risk so connected with or incidental [*12] to, the employment as to create a causal connection between the employment and the injury.

Workers' Compensation & SSDI > Compensability > Course of Employment > Risks
Workers' Compensation & SSDI > Compensability > Injuries > General Overview
[HN5] For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of it. Thus, an injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment.

Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time
[HN6] The risk of injury in repairing or working on one's personal automobile is not ordinarily related or incidental to the duties for which he is employed, even though the work may be done on the employer's [*13] premises.

Workers' Compensation & SSDI > Compensability > Course of Employment > Risks
[HN7] Employer acquiescence alone cannot convert a personal risk into an employment risk.

Workers' Compensation & SSDI > Compensability > Course of Employment > Risks
Workers' Compensation & SSDI > Compensability > Injuries > Normal Exertion
[HN8] Where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable.

COUNSEL: Braun, Lynch, Smith, & Strobel, Ltd., of Chicago (Francis J. Lynch, of counsel), for appellant.

Edward J. Kionka, of Murphysboro, and John T. Bowman, of Murges, Bowman & Corday, Ltd., of Chicago, for appellee.

JUDGES: CHIEF JUSTICE CLARK delivered the opinion of the court. JUSTICE GOLDENHERSH look no part in the consideration or decision of this case.

OPINION BY: CLARK

OPINION

[*41] [**1006] Leonard Orsini filed a claim under the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 *et seq.*) (the Act), for injuries allegedly sustained while he was employed by defendant Wilmette Texaco. An Industrial Commission arbitrator found that as [*14] a result of the accidental injuries arising out of and in the course of his employment on July 3, 1981, Orsini lost 45% of the use of his right leg and 50% of the use of Iris left leg. Accordingly, Orsini was awarded compensation benefits. The Industrial Commission reversed [***2] the arbitrator's [**1007] award, finding that Orsini had failed to prove that he sustained accidental injuries arising out of and in the course of his employment. Orsini appealed to the circuit court of Cook County, which set aside the decision of the Industrial Commission. The Industrial Commission Division of the appellate court, with one judge dissenting, affirmed the circuit court *(142 Ill. App. 3d 540)*. and thereafter declared that the instant case involved a substantial question warranting consideration by this court. Wilmette Texaco filed a petition for leave to appeal in this court pursuant to our Rule 315(a) (94 Ill. 2d R. 315(a)), and we granted its petition.

The issue presented in this appeal is whether the injury complained of arose out of and in the course of Orsini's employment.

The material facts in this case are not in dispute. Leonard Orsini was employed as [*15] an automobile mechanic at the Wilmette Texaco service station in Wilmette, Illinois. [*42] On July 3, 1981, while awaiting the delivery of parts needed for the completion of a brake job he was performing for his employer. Orsini began to adjust the carburetor on his personal automobile. [***3] which was parked in one of Wilmette Texaco's service bays. The engine in his car was running. Orsini was standing in front of his car, leaning over to adjust the carburetor, when the car suddenly lurched forward, pinning both of his legs between the car and a work bench, and fracturing both of his femurs. It is these injuries which form the basis of Orsini's workers' compensation claim.

At the hearing before the arbitrator, Orsini testified that his car was a 1967 Oldsmobile 442, a "collector's item" which he used only in the summertime. In the wintertime, the car was stored in a garage. Orsini stated that lie had acquired the car secondhand in 1976, and that he had completely rebuilt the car's transmission in the spring of 1981, because its torque converter "blew up." Orsini denied having removed the parking mechanism, but acknowledged his removal of all parts of the transmission which activate [*16] the car forward and backward. Orsini stated that lie had put four "junkyard" transmissions into the car since 1976.

Orsini further testified that throughout the six-year period he had worked at Wilmette Texaco, his employer routinely permitted him to work on his personal automobile. On [***4] many of these occasions, he worked on his car during his normal 8 a.m. to 5 p.m. shift when business was slow or there was no station work to be done. On other occasions he would work on his car after he had completed the regular workday.

Peter Van Houten, the owner and manager of Wilmette Texaco, testified that he knew Orsini was working on his personal automobile on July 3, 1981. and that Orsini had done so on previous occasions with Van Houten's knowledge and permission. He stated that Orsini [*43] would work on his own car approximately once a month. 90% of the time after work hours, but occasionally during the workday while waiting for parts or when work was slow.

The record reveals that after the accident the car was taken to North Shore Automotive Transmission, where the transmission was inspected and repaired by William Dominic, the owner of North Shore Transmission. However, prior to [*17] Dominic's inspection and repair, the transmission was also inspected by an automotive engineer, Robert Tarosky, who prepared a written report detailing the results of his inspection. Tarosky's written report, together with the pictures of the transmission taken during his inspection, [***5] were admitted into evidence. At the hearing before the arbitrator, Tarosky testified that the absence of the retaining pin, a "failsafe" device designed to prevent a car from slipping gears from park to drive, was the cause of the accident. Dominic subsequently corroborated Tarosky's conclusion as to the cause of the accident. How or why the retaining pin was absent from the transmission was never determined.

The Industrial Commission reversed the arbitrator's award, finding that Orsini's accident did not arise out of his employment. [**1008] The Commission found that Orsini's injury arose from a risk peculiar to his car and not to his employment as a mechanic with Wilmette Texaco. It further found that no benefit in the form of additional knowledge, experience and skill as a mechanic accrued to Wilmette Texaco as a result of the repair activities Orsini was engaged in at the time of the accident. [*18] Lastly, the Commission determined that knowledge and consent of the employer to the activity out of which the harm arises does not convert a personal risk case into an employment case.

Wilmette Texaco challenges Orsini's characterization of the issue presented in this [***6] appeal as being one of law. [HNI] [*44] If undisputed facts upon any issue permit more than one reasonable inference to be drawn therefrom, the determination of such issue presents a question of fact, and the conclusion of the Industrial Commission will not be disturbed on review unless it is against the manifest weight of the evidence. (*Eagle Discount Supermarket v. Industrial Com. (1980), 82 Ill. 2d 331, 337*; see also *Union Starch v. Industrial Com. (1974), 56 Ill. 2d 272, 275.*) Since more than one reasonable inference can be drawn from the undisputed facts concerning the issue on appeal, we reject Orsini's argument that this case presents an issue of law to be determined by the reviewing court, and we will not reverse the decision of the Industrial Commission unless we find it to be contrary to the manifest weight of the evidence. We will not discard [*19] permissible inferences drawn by the Commission based upon competent evidence merely because other inferences might be drawn by us. *Brewster Motor Co. v. Industrial Com. (1967), 36 Ill. 2d 443. 448-49.*

The purpose of the Illinois Workers' Compensation Act is to protect the employee against risks and hazards which are [***7] peculiar to the nature of the work he is employed to do. (*Fisher Body Division, General Motors Corp. v. Industrial Com. (1968), 40 Ill. 2d 514, 517.*) [HN2] An injury is compensable under the Workers' Compensation Act only if it "aris[es] out of" and "in the course of" the employment. (Ill. Rev. Stat. 1983, ch. 48, par. 138.2.) The phrase

"in the course of" refers to the lime, place, and circumstances under which the accident occurred. (*Scheffler Greenhouses, Inc. v. Industrial Com. (1977), 66 Ill. 2d 361, 366.*) Although both parties to this appeal agree, and the Industrial Commission apparently found, that Orsini was in the course of his employment as a mechanic at the time of the accident, this fact alone, however, is insufficient to make the injury compensable. (*Greene v. Industrial Com. (1981), 87 Ill. 2d 1, 5.* [*20]) [HN3] The [*45] words "arising out of" and "in the course of" are used conjunctively, and therefore both elements must be present at the time of the accidental injury in order to justify compensation. (*Mazursky v. Industrial Com. (1936), 364 Ill. 445, 448.*) The question we must consider, therefore, is whether Orsini's injuries arose out of his employment [***8] at Wilmette Texaco.

[HN4] An injury "arising out of" one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. (*Greene v. Industrial Com. (1981), 87 Ill. 2d 1, 4;* see also *Chmelik v. Vana (1964), 31 Ill. 2d 272.*) [HN5] For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. (*Chmelik v. Vana (1964), 31 Ill. 2d 272, 277-78.*) A risk is incidental to the employment when it belongs to or is connected with [*21] what the employee has to do in fulfilling his duties. (*Fisher Body Division. General Motors Corp. v. Industrial Com. (1968), 40 Ill. 514, 516*; see also *Schwartz v. Industrial Com. (1942), 379 Ill. 139, 144.*) If the injury results from a hazard to which the employee would have been equally exposed [**1009] apart from the employment, then it does not arise out of it. (*Greene v. industrial Com. (1981), 87 Ill. 2d 1, 4.)* Thus, an injury is not compensable if [***9] it resulted from a risk personal to the employee rather than incidental to the employment. *Fisher Body Division, General Motors Corp. v. Industrial Com. (1968), 40 Ill. 2d 514, 517*; see also *Rogers v. Industrial Com. (1980), 83 Ill. 2d 221; Jones v. Industrial Com. (1980), 78 Ill. 2d 284.*

In our judgment, the determination as to whether Orsini's injury arose out of his employment at Wilmette Texaco is governed by our earlier decisions in *Mazursky [*46] v. Industrial Com. (1936), 364 Ill. 445*, and *Fisher Body Division, General Motors Corp. v. Industrial Com. (1968), 40 Ill. 2d 514* [*22] , wherein this court held that [HN6] the risk of injury in repairing or working on one's personal automobile is not ordinarily related or incidental to the duties for which he is employed, even though the work may be done on the employer's premises. (See also *Board of Education v. Industrial Com. (1926), 321 Ill. 23.*) In *Mazursky*, an employee suffered injuries on his employer's premises while attempting to repair a wheel which he had taken off his personal automobile. In *Fisher Body*, the employee was injured when a battery in his car exploded while he was attempting to recharge [***10] it in his employer's parking lot. This court denied compensation in both cases on the grounds that when the employee in question undertook the repair of his own automobile, he assumed risks which were strictly personal in nature and which were totally unrelated either to the duties of his employment or the condition of his employer's premises.

In the instant case, the risk of harm to Orsini was not increased by any condition of the employment premises. Unlike the situations presented in *Scheffler Greenhouses, Inc. v. Industrial Com. (1977), 66 Ill. 2d 361* [*23] , and *Union Starch v. Industrial Com. (1974), 56 Ill. 2d 272.* cited by the appellee, where the harm to the employee came about as a result of a defect in the employer's premises, the injury here came about solely as a result of a defect in Orsini's own car -- the missing retainer pin. It is undisputed that the malfunction on Orsini's car could have occurred anytime or anywhere, and only coincidentally occurred at the Wilmette Texaco service station. Nor is there any suggestion here that the tools provided by Wilmette Texaco and used by Orsini in repairing his car were in any way defective. Furthermore, under the terms [***11] of his employment, Orsini was [*47] not required to work on his personal automobile during working hours, and Wilmette Texaco could just as well have permitted him to do nothing while he was waiting for the additional brake parts needed to complete the job he was performing for his employer. As in *Mazursky*, Orsini's car served no purpose relative to his employment duties at Wilmette Texaco. Thus, we find here that Orsini voluntarily exposed himself to an unnecessary danger entirely separate from the activities and responsibilities [*24] of his job, and was performing an act of a personal nature solely for his own convenience, an act outside of any risk connected with his employment. Clearly, there is no evidence here of a causal connection between Orsini's employment at Wilmette Texaco and the accidental injury.

Appellee argues that an employee who is expressly permitted by his employer to do personal work of the same type as that which he is employed to do on the employer's premises during work time for which he is being paid is employed in an activity which is "incidental" to his employment, so that an accidental injury sustained during work hours "arises out of his employment. [***12] We reject this argument. [HN7] Employer acquiescence alone cannot convert a personal risk into an employment risk. (See *Yost v. Industrial Com. (1979), 76 Ill. 2d 548; Lynch Special Services v. Industrial Com. (1979), 76 Ill. 2d 81.*) This court has consistently held that [HN8] where the injury results [**1010] from a per-

sonal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable. (See, *e.g., Branch v. Industrial Com. (1983), 95 Ill. 2d 268* [*25] (claimant suffered back injuries while removing his coat); *Rogers v. Industrial Com. (1980), 83 Ill. 2d 221* (claimant's automobile, being driven by his wife, malfunctioned and struck claimant); *Jones v. Industrial Com. (1980), 78 Ill. 2d 284* (claimant closed car door on his hand); *Fisher Body Division, General* [*48] *Motors Corp. v. Industrial Com. (1968), 40 Ill. 2d 514* (claimant's car battery exploded); *Williams v. Industrial Com. (1968), 38 Ill. 2d 593* (claimant choked on a donut during meal break); *Schwartz v. Industrial Cont. (1942), 379 Ill. 139* (claimant ate contaminated food in a nearby restaurant).) Conversely, in those cases where liability was [***13] imposed, the injury to the employee occurred as a direct result of a defect in the employer's premises or was directly related to the specific duties of employment. (See, *e.g., Archer Daniels Midland Co. v. Industrial Com. (1982), 91 Ill. 2d 210* (claimant injured in employer's ice covered parking lot); *Eagle Discount Supermarket v. Industrial Com. (1980), 82 Ill. 2d 331* [*26] (claimant injured while engaged in a recreational activity occurring on the premises during an authorized lunch break); *Chicago Extruded Metals v. Industrial Com. (1979), 77 Ill. 2d 81* (claimant injured while showering in locker room provided by employer); *Scheffler Greenhouses, Inc. v. Industrial Com. (1977), 66 Ill. 2d 361* (claimant injured during lunch break in employer's swimming pool used by claimant for health reasons): *Union Starch v. Industrial Com. (1974), 56 Ill. 2d 272* (claimant injured during lunch break on employer's roof); *Material Service Corp. v. Industrial Com. (1973), 53 Ill. 2d 429* (claimant injured as a result of dangerous condition in employer's parking lot).) These cases are clearly distinguishable from the instant case, where the injuries here resulted from assumed risks, [***14] strictly personal and totally unrelated to the duties of employment or the conditions of the employer's premises.

Lastly, we note that, in support of his argument, appellee refers this court to the decisions of several of our sister States which have held contrary [*27] to our position in *Mazursky* and *Fisher Body*. (See, *e.g., Parker v. Travelers Insurance Co. (1977), 142 Ga. App. 711, 236 S.E.2d 915.*) We are not bound by these decisions (*Gorham v. [*49] Board of Trustees of the Teachers' Retirement System (1963), 27 Ill. 2d 593, 599)*, and we decline to follow them since we find *Mazursky* and *Fisher Body* dispositive of the issue presented in this case. (See *Northwestern University v. Industrial Com. (1951), 409 Ill. 216.*) Nor has appellee advanced any cogent reasons why *Mazursky* and *Fisher Body* should be overruled.

It was the responsibility of the Industrial Commission to determine from the evidence in this case whether the danger which caused the injury to the claimant was peculiar or incidental to his employment. In light of this court's holding in *Mazursky* and *Fisher Body*, we cannot say that the Industrial Commission's finding that the [***15] claimant's injury, caused by a malfunction in his personal automobile, did not arise out of his employment is against the manifest weight of the evidence.

For the [*28] reasons set forth, the judgments of the appellate and circuit courts are reversed and the decision of the Industrial Commission is confirmed.

Judgments reversed; Industrial Commission confirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentRisksWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

2015 IL App (1st) 131733WC

Workers' Compensation
Commission Division
Opinion Filed: February 27, 2015

No. 1-13-1733WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DANIEL J. SHARWARKO,	)	Appeal from the Circuit Court
	)	of Cook County.
Appellant,	)	
	)	
v.	)	No. 12-L-51346
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*,	)	Honorable
	)	Robert Lopez Cepero,
(Village of Oak Lawn, Appellee).	)	Judge, Presiding.

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

OPINION

¶ 1 The claimant, Daniel J. Sharwarko, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006) seeking benefits for injuries he received while working for The Village of Oak Lawn (Village). The claimant now appeals from the circuit court judgment confirming the decision of the Illinois Workers' Compensation Commission (Commission) which terminated his temporary total disability (TTD) benefits on October 31, 2006; found that he failed to prove that he was permanently and totally disabled; denied his request for an award of penalties and fees; and refused to answer the

questions he submitted pursuant to section 19(e) of the Act (820 ILCS 305/19(e) (West 2012)). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 The following factual recitation is taken from the evidence adduced at the arbitration hearing. At all times relevant, the claimant was employed by the Village as a water and sewer inspector. The claimant testified that, on April 6, 2006, his duties included replacing a water meter on a parcel of property in the Village. According to the claimant, as he reached down to replace the meter, the wrench he was using slipped, and he struck his right elbow against a concrete wall. The claimant felt an immediate onset of pain and reported the incident to his supervisor. The claimant was directed to seek treatment at Concentra Medical Center (Concentra).

¶ 3 The claimant was seen at Concentra on April 7, 2006, complaining of pain in his right elbow and numbness in the little finger of his right hand. An examination of the claimant revealed tenderness over the medial epicondyle, and he was diagnosed with medial epicondylitis and ulnar neuritis. The claimant's right elbow was placed in an air cast, and he was instructed to take Aleve for his pain. He was released to full-duty work.

¶ 4 The claimant returned to Concentra for two follow-up visits. The record of his visit on April 24, 2006, states that the claimant reported no pain or other symptoms, and his physical examination was unremarkable. The examining physician released the claimant from care on that date.

¶ 5 The claimant had also elected to seek treatment from his personal physician, Dr. John Elser, who referred him to Dr. I. Harun Durudogan at the Southwest Center for Healthy Joints.

Dr. Durudogan diagnosed the claimant as suffering from right median and ulnar nerve neuropraxia and prescribed physical therapy.

¶ 6 The claimant underwent physical therapy as prescribed. However, when the claimant saw Dr. Durudogan on June 6, 2006, he reported worsening pain and symptoms of paresthesias in the median and ulnar nerve distributions. On physical examination, Dr. Durudogan noted that the Tinel test was markedly positive at the right wrist and elbow, and the Fallon test was markedly positive at the wrist. Evidence of early ulnar atrophy was also noted. Dr. Durudogan recommended that the claimant undergo an anterior ulnar nerve transposition and a revision right carpal tunnel release. Dr. Durudogan restricted the claimant's work duties to no use of his right hand.

¶ 7 The Village accommodated the work restrictions imposed by Dr. Durudogan, and the claimant was assigned to routine maintenance and meter-reading duties.

¶ 8 At the request of the Village, the claimant was seen by Dr. David Tulipan on July 6, 2006. Following his examination, Dr. Tulipan opined that the claimant's elbow contusion was the likely cause of his cubital tunnel syndrome, but not his carpal tunnel syndrome. Although he was of the opinion that the claimant was capable of working, Dr. Tulipan believed that the claimant would be a surgical candidate in the future. In his report, Dr. Tulipan noted that, if the claimant had the recommended surgery, he would be able to do some light work within three to four months thereafter. He recommended that the claimant have an EMG/NCS test.

¶ 9 An EMG/NCS performed on the claimant on July 28, 2006, showed evidence of: right ulnar nerve neuropathy at the elbow; chronic right median nerve compression neuropathy at the

wrist; and abnormally slow nerve conduction in the forearm segments of the right median and ulnar motor nerves.

¶ 10 When the claimant saw Dr. Durudogan on August 1, 2006, he continued to complain of persistent pain and paresthesias in the median and ulnar nerve distributions. Dr. Durudogan again recommended surgery.

¶ 11 On August 21, 2006, Dr. Durudogan operated on the claimant, performing an open right carpal tunnel release and a right cubital tunnel release. Subsequent to his surgery, the claimant was directed to remain off of work, and he began physical therapy. The claimant acknowledged that, until he was taken off of work following his surgery, the Village had accommodated the one-handed work restriction imposed by Dr. Durudogan.

¶ 12 On August 28, 2006, Dr. Tulipan issued an addendum to the report of his examination of the claimant. He found that the surgery performed by Dr. Durudogan was reasonable and that the claimant's work-accident was probably the cause of his cubital tunnel syndrome. Dr. Tulipan opined that the problems which the claimant was experiencing with his median nerve were chronic in nature, dating back to his childhood.

¶ 13 The claimant continued under the care of Dr. Durudogan post-operatively. When he saw the doctor on September 19, 2006, the claimant complained of significant persistent pain and paresthesias in the median and ulnar nerve distributions and stated that the pain had become worse after his surgery. Dr. Durudogan prescribed continued physical therapy and splint use, and he released the claimant to work on September 20, 2006, with the one-hand restriction.

¶ 14 There is a note in the record written by Kathleen Fitzgerald, a nurse who was assigned as a case manager to the claimant's case by the Village's insurance carrier, which states that she

called the Village on September 19, 2006, and spoke to Sue Lanham. The note goes on to state: "Light duty cannot be accommodated at this time."

¶ 15 The Village offered certain of its employees an early retirement package which the claimant accepted on October 3, 2006.

¶ 16 On October 20, 2006, the claimant was seen by Dr. Durudogan. The record contains a copy of a note signed by the doctor stating that the claimant is unable to return to work until after his next office visit which was scheduled for December 1, 2006. The record also contains a copy of a letter from Dr. Durudogan to Dr. Elser, dated October 20, 2006, which states that Dr. Durudogan's "recommendations are for no work with the right upper extremity."

¶ 17 The claimant's request to retire was granted on October 31, 2006, and he began receiving a pension of $5,120.00 per month. There is no evidence in the record that, following the claimant's surgery on August 21, 2006, until his retirement on October 31, 2006, the Village offered him any work within his restrictions which he refused. However, Steven Barrett, the Director of Public Works for the Village, testified that, if the claimant had not retired, the Village would have accommodated his one-handed work restriction. According to Barrett, the Village had accommodated other employees working under light-duty restrictions, including one whose restrictions had been on-going for approximately eight years.

¶ 18 The Village paid TTD benefits to the claimant from the date of his surgery on August 21, 2006, until October 31, 2006, when it terminated those payments by reason of his voluntary retirement.

¶ 19 Following retirement, the claimant continued to receive medical treatment for problems with his right elbow, including ulnar nerve pain. His medical records reflect that he continued to

demonstrate persistent ulnar neuropraxia with muscle atrophy and paresthesias in the median and ulnar nerve distributions. Dr. Durudogan continued to prescribe physical therapy. The record contains a letter from Dr. Durudogan to Dr. Elser, dated December 12, 2006, in which Dr. Durudogan described the claimant's medical condition on that date and goes on to state: "No work with the right upper extremity until further notice."

¶ 20 Following an examination of the claimant on March 1, 2007, Dr. Durudogan noted that the Tinel test was markedly positive at the right elbow. He recommended that the claimant undergo revision ulnar release surgery and referred the claimant to Dr. Ramasamy Kalimuthu for a second opinion. Additionally, Dr. Durudogan restricted the claimant from performing any work with his right arm.

¶ 21 The claimant was seen by Dr. Kalimuthu on March 15, 2007. After examining the claimant, Dr. Kalimuthu diagnosed severe ulnar neuropathy in the motor and sensory branch of the ulnar nerve and muscle atrophy with sensory loss in the ulnar nerve distribution. Before formulating a treatment plan, Dr. Kalimuthu ordered an updated EMG, which was performed on March 26, 2007. The results of that test were consistent with severe right ulnar neuropathy and severe right median sensorimotor neuropathy across the carpal tunnel, and demonstrated a deterioration of ulnar nerve function when compared with the EMG/NCV of July 28, 2006.

¶ 22 After reviewing the results of the EMG, Drs. Durudogan and Kalimuthu both recommended that the claimant undergo revision ulnar release surgery. Following the recommendation, the Village requested that the claimant again be examined by Dr. Tulipan. On April 11, 2007, Dr. Tulipan examined the claimant and also recommended surgical intervention.

¶ 23 On May 11, 2007, the claimant underwent a second right elbow surgery performed by Dr. Tulipan. The surgery consisted of an exploration and compression of the ulnar nerve and a neuroma excision with Neurogen tube placement. The neuroma encompassed approximately 70% of the ulnar nerve and the ischemic nerve was removed. Dr. Tulipan was of the opinion that the claimant's prognosis was "poor" as the ulnar nerve was "badly damaged." It is clear that the claimant continued to treat with Dr. Tulipan post-operatively. However, none of the doctor's post-operative records were introduced in evidence.

¶ 24 On January 17, 2008, the claimant was seen by Dr. Demaceo Howard at the Advanced Pain Management Institute on referral from Dr. Tulipan. The claimant complained of pain and numbness in his right arm and the fourth and fifth fingers of his right hand. Dr. Howard provided pain management treatment. When the claimant presented for follow-up visits with Dr. Howard on February 15, 2008, and June 16, 2008, he continued complaining of pain and numbness and reported little or no improvement with medication. Dr. Howard recommended the use of a spinal cord simulator on a trial basis.

¶ 25 At the request of the Village, the claimant was examined by Dr. Peter Hoepfner, a hand surgeon, on September 18, 2008. Following his examination of the claimant, Dr. Hoepfner diagnosed persistent right upper extremity neuropathy and found the claimant's prognosis guarded. Dr. Hoepfner opined that the claimant suffered an ulnar nerve contusion as a result of his accident on April 6, 2006, which caused ulnar neuritis, muscular atrophy of the intrinsic musculature of the right arm, and sensory dysfunction. He also opined that the condition of the claimant's median nerve was chronic and unrelated to his work injury. According to Dr. Hoepfner, the claimant was capable of performing "light, sedentary work with his right upper

extremity **** [and] capable of using his right hand as a light assist to his dominant left hand." He concluded that the claimant "will likely never be capable of full, unrestricted activity with his right upper extremity."

¶ 26 On the recommendation of Dr. Hoepfner, the claimant received pain management treatments from Dr. Maria Pilar-Estilo, consisting of a right ulnar nerve block on December 4, 2008, and stellate ganglion blocks on January 15, 22 and 29, 2009.

¶ 27 The claimant was examined by Dr. Howard Konowitz, a pain specialist, on April 23, 2009. He complained of right arm dysesthesias in the ulnar nerve distribution along with the loss of muscle function and wrist pain. Following his examination, Dr. Konowitz concluded that the claimant had dense ulnar sensory motor neuropathy, which was the primary cause of his pain, and scarring of the median nerve, which also contributed to his pain. Dr. Konowitz recommended that the claimant undergo a diagnostic ultrasound and an EMG and prescribed medication.

¶ 28 The claimant had both of the recommended tests. The diagnostic ultrasound showed a "[v]ery significant recurrent post-operative ulnar nerve neuroma." Dr. Konowitz noted in his record of the claimant's visit of June 3, 2009, that his recent EMG showed complete ulnar neuropraxia, secondary to chronic severe ulnar neuropathy. He recommended that the claimant receive neurolytic block therapy and prescribed pain medication.

¶ 29 On June 24, 2009, Dr. Konowitz administered the prescribed ulnar neurolytic block to the claimant. When the claimant returned to see Dr. Konowitz on July 15, 2009, he reported improvement in his symptoms, although the sensitivity along the ulnar surface of his hand was

still present and he continued to experience numbness and tingling in the fourth finger of his right hand. Dr. Konowitz recommended another ultrasound and neurolytic block.

¶ 30 When the claimant saw Dr. Konowitz on October 8, 2009, he still reported sensitivity in the interior aspect of his right upper arm and numbness. On examination, Dr. Konowitz noted limited motion of the fourth and fifth fingers on the claimant's right hand and interosseous musculature. He also noted marked improvement following the ulnar nerve phenol injection. The doctor ordered an ultrasound and prescribed medication for the claimant.

¶ 31 The ultrasound, which was performed on October 21, 2009, revealed "significant ulnar nerve and median nerve entrapment."

¶ 32 When the claimant saw Dr. Konowitz for a follow-up appointment on November 19, 2009, he reported on-going pain in his right arm, but improvement in his elbow and fingers. Following his examination of the claimant, Dr. Konowitz noted marked improvement in the functionality of the claimant's right arm and the ulnar nerve distribution. He concluded that further ulnar neurolytic blocks were not warranted, but he recommended a median nerve injection and continued to prescribe pain medication for the claimant.

¶ 33 The claimant had a median nerve injection on December 16, 2009, and returned to see Dr. Konowitz on January 13, 2010. During that visit, the claimant continued complaining of pain and numbness over his right medial elbow. On examination, the doctor noted dysesthesias over the ulnar nerve at the elbow, decreased sensation on the ulnar nerve side of the claimant's right hand, and clawing in the fourth and fifth fingers of his right hand. Dr. Konowitz ordered a repeat ulnar neurolytic block and prescribed medication.

¶ 34 Following the repeat ulnar neurolytic block, the claimant returned to see Dr. Konowitz on February 17, 2010, reporting pain relief in the region of his right upper bicep, but no relief of the pain in his elbow. He also reported numbness in the first and third fingers of his right hand. On examination, Dr. Konowitz noted that the claimant's right arm was stiff and that he was unable to fully extend the fourth and fifth fingers of his right hand. Dr. Konowitz continued to prescribe medication.

¶ 35 When the claimant returned to see Dr. Konowitz, on March 31, 2010, he continued to report radiating pain in his right hand with numbness over the fifth digit. Following his examination of the claimant, Dr. Konowitz noted that the claimant's upper arm had improved, but found no improvement in the claimant's elbow and hand. Dr. Konowitz concluded that the claimant had reached maximum medical improvement (MMI) with respect to his ulnar neuropathy. Nevertheless, Dr. Konowitz continued to prescribe pain medication which he believed would be necessary to wean the claimant from the multiple medications he was taking.

¶ 36 The claimant continued under the care of Dr. Konowitz in the following months. When he saw the doctor in May and August of 2010, the claimant complained of pain over the ulnar nerve at the right elbow, along with pain and numbness in the fourth and fifth fingers of his right hand. Dr. Konowitz continued prescribing medication for the claimant and recommended home exercises.

¶ 37 On November 16, 2010, the claimant was examined at his attorney's request by Dr. Jeffrey Coe, a specialist in occupational medicine. On examination, Dr. Coe observed that the claimant had clawing in the fourth and fifth fingers of his right hand and difficulty gripping with the hand. Dr. Coe noted marked hypersensitivity over the scar along the medial border of the

claimant's right forearm; muscle atrophy at his right elbow, forearm and hand; and a clawing deformity of the fourth and fifth fingers of the right hand, with burning dysesthesias radiating to the fingers upon movement, stiffness and reduced range-of-motion. Dr. Coe opined that the claimant's condition was permanent and causally related to his work injury of April 6, 2006. He concluded that the claimant's injuries would have prohibited him from obtaining gainful employment from the time of his retirement on October 31, 2006, through the date of his examination. He also opined that the claimant is unable to carry out gainful employment because he cannot use his right arm. However, on cross-examination, Dr. Coe conceded that the claimant might be able to perform left-handed work as long as he did not need to travel much and his pain medication did not preclude his return to gainful employment.

¶ 38 The claimant was seen by Dr. Konowitz on March 2, 2011. At that time, the claimant reported significant improvement in his ulnar nerve symptoms and in his overall functioning. Dr. Konowitz noted that the claimant's right arm and hand functions were limited by both the underlying pathology and pain. Dr. Konowitz testified that he intended to continue weaning the claimant off of his pain medication, but anticipated that he would need some residual pain medication.

¶ 39 At the request of the claimant's attorney, Edward Pagella, a vocational rehabilitation expert, conducted a vocational assessment of the claimant on May 13, 2011. In his written report dated June 20, 2011, Pagella noted that the claimant stated that he had not looked for work since retiring from the Village. After interviewing the claimant, reviewing his medical records and the depositions of Drs. Coe and Konowitz, and considering the claimant's age, education, skills and

work history, Pagella opined that there is no stable labor market for him. From the evidence of record, it is clear that Pagella did not perform a job search.

¶ 40 On August 1, 2011, the claimant was examined by Dr. Michael Vender, a hand surgeon, at the request of the Village. In his report of that examination, Dr. Vender, noted that the claimant stated that he had experienced significant improvement in the pain and dysesthesia in the ulnar aspect of his right hand, but complained of continuing abnormal sensation in the ulnar nerve distribution and the volar aspect of his right wrist. On examination, Dr. Vender found the range-of-motion in the claimant's right elbow and wrist to be good, but with some pain at extremes. Dr. Vender noted that his findings on examination of the claimant were consistent with his complaints and the diagnosis of injury to his ulnar nerve. He concluded that the claimant was at MMI and that he has "residuals in the way of ulnar nerve abnormality and dysfunction." Dr. Vender opined that the claimant's work activity with his right arm would be "limited," but that he has function in the arm.

¶ 41 At arbitration, the claimant testified that he still experiences pain, tingling and numbness in his right arm and hand and that he has lost grip strength and fine motor skills. According to the claimant, he can lift only one-half pound with his right hand and his symptoms are aggravated when he attempts to use his right hand to perform household chores. The claimant testified that, since his accident, he has never been released to two-handed work. He admitted that he has not looked for work since retiring from the Village.

¶ 42 Following a hearing, the arbitrator found that the claimant suffered a work-related accident while in the employ of the Village on April 6, 2006. The arbitrator found that, as a result of the accident, the claimant suffered an injury to his right elbow and ulnar nerve, but not

to the median nerve. The arbitrator awarded the claimant 188 3/7 weeks of TTD benefits, ending on March 31, 2010, and 202.4 weeks of permanent partial disability (PPD) benefits for an 80% permanent loss of use of his right arm. Additionally, the arbitrator denied the claimant's petition for an award of penalties pursuant to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k),(l) (West 2010)), and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)).

¶ 43 Both the claimant and the Village filed for a review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission modified the arbitrator's decision by reducing the claimant's TTD award to 10 2/7 weeks of benefits, ending on October 31, 2006, the date upon which the claimant voluntarily retired. After concluding that the claimant failed to meet his burden of proving that he was permanently and totally disabled, the Commission affirmed the arbitrator's award of 202.4 weeks of PPD benefits for the claimant's 80% permanent loss of use of his right arm. The Commission also affirmed and adopted the arbitrator's denial of penalties and attorney fees, finding that the Village's termination of TTD benefits upon the claimant's retirement was neither unreasonable nor vexatious. Finally, the Commission declined to answer the five questions posed to it by the claimant pursuant to section 19(e) of the Act (820 ILCS 305/19(e) (West 2012)), finding that they were not timely filed.

¶ 44 The claimant sought a judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 45 For his first assignment of error, the claimant argues that the Commission's decision to terminate his TTD benefits on October 31, 2006, the day he retired, is against the manifest

weight of the evidence. He asserts that he is entitled to TTD benefits from August 21, 2006, the date of his first surgery, through March 31, 2010, the date upon which Dr. Konowitz found that he had reached MMI.

¶ 46 The Village argues, as the Commission found, that, by voluntarily retiring and not looking for work thereafter, the claimant indicated that he had no intention of returning to the workforce in any capacity, at any time. The Commission concluded that the claimant's voluntary retirement was the equivalent of refusing the accommodated duty which the Village had provided before the claimant's surgery, and as a consequence he was not entitled to TTD benefits after October 31, 2006. We agree.

¶ 47 An employee is temporarily and totally disabled from the time that an injury incapacitates him from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). According to our supreme court, the dispositive inquiry is whether the claimant has reached MMI. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142 (2010). There are, however, three recognized exceptions. TTD benefits may be suspended or terminated before an employee reaches MMI if he: (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146-47.

¶ 48 In this case, Dr. Durudogan imposed the one-handed work restriction following the claimant's first surgery, and there is no evidence that the claimant was taken off of work prior to his second surgery on May 11, 2007. Barrett testified that, if the claimant had not retired and

continued working, the Village would have accommodated his one-handed work restriction. Further, contrary to Dr. Coe's opinion, Drs. Hoepfner, Vedner and Konowitz opined that the claimant was able to do light, sedentary work with his right arm. Whether the claimant was capable of working within the restrictions imposed by Dr. Durudogan was a question of fact to be resolved by the Commission. See *Ester v. Industrial Comm'n*, 48 Ill. 2d 121, 125 (1971); *Whitney Productions, Inc. v. Industrial Comm'n*, 274 Ill. App.3d 28, 30 (1995)). While Dr. Coe offered a conflicting opinion from those of Drs. Hoepfner, Vedner and Konowitz on the question of the claimant's ability to work, it was the Commission's function to resolve the conflicting medical opinions. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). The Commission obviously relied upon the opinions of Drs. Hoepfner, Vedner and Konowitz in concluding that the claimant "did not prove that he could not work." And based upon the opinions of Drs. Hoepfner, Vedner and Konowitz, we cannot say that the Commission's determination of this issue is against the manifest weight of the evidence as a contrary conclusion is not clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 49 The purpose of the Act is to compensate an employee for lost earnings resulting from work-related injuries. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 99 Ill. 2d 487, 496 (1984). When, as in this case, work within an injured employee's medical restrictions is available and the employee does not avail himself of the opportunity by voluntarily retiring, continued payment of TTD benefits does not further that purpose. In such a case, the employees's lost earnings are the result of his volitional act of removing himself from the work force, not his work-related injuries. As we have held before, to establish entitlement to TTD benefits, an injured employee must prove not only that he did not work, but also that he was

unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832 (2002). We believe, as did the Commission, that when work for an injured employee falling within his medical restrictions is available, the employee's voluntary retirement is the equivalent to a refusal to work within those restrictions, authorizing the termination of TTD benefits before the employee has reached MMI. See *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090. (1996).

¶ 50 Just as the Commission, we are not unmindful that the claimant would have been off of work for some period of time following his second surgery for purely medical reasons. However, by failing to introduce any of Dr. Tulipan's post-operative records in evidence, or any other medical records authorizing the claimant to remain off of work following his second surgery, the claimant failed to meet his burden to prove the period of time following his second surgery when he could not work even within his restrictions.

¶ 51 Based upon the foregoing analysis, we find that the Commission's decision to deny the claimant TTD benefits following his retirement on October 31, 2006, is not against the manifest weight of the evidence. See *Lukasik v. Industrial Comm'n*, 124 Ill. App. 3d 609, 614-16 (1984).

¶ 52 Next, the claimant argues that the Commission's finding that he failed to meet his burden of proving entitlement to permanent total disability (PTD) benefits on an "odd lot" theory is against the manifest weight of the evidence. His argument in this regard rests upon the opinions of Dr. Coe and his vocational rehabilitation expert, Pagella. Dr. Coe opined that, from a medical perspective, the claimant would be unable to carry out gainful employment. Pagella opined that there is no stable labor market for an individual with the claimant's vocational profile and physical limitations.

¶ 53 An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify the payment of wages. *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). If, as in this case, a claimant's disability is of such a nature that he is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into an "odd lot" category; that being an individual who, although not altogether incapacitated, is so handicapped that he is not regularly employable in any well-known branch of the labor market. *Valley Mold & Iron Co. v. Industrial Comm'n.*, 84 Ill. 2d 538, 546-47 (1981). A claimant ordinarily satisfies his burden in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel v. Industrial Comm'n,* 372 Ill. App. 3d 527, 544 (2007). Once a claimant establishes that he falls within an "odd lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.* Whether a claimant falls within the "odd lot" category is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 54 Dr. Coe is the only physician to opine that the claimant is incapable of gainful employment from a medical perspective. However, his opinion was not based upon any conclusion that one-handed work would be harmful to the claimant's medical condition. Rather, Dr. Coe opined that the claimant was incapable of gainful employment because "he really can't use his right arm for anything." Nevertheless, Dr. Coe conceded in his deposition that the

claimant might be able to perform left-handed work. In contrast, Drs. Hoepfner and Vedner were of the opinion that the claimant is able to perform light, sedentary work with his right arm. Although the Commission made its own factual findings as to the nature and extent of the claimant's injuries, it also affirmed and adopted the arbitrator's conclusions in that regard. The arbitrator specifically credited the medical opinions of Drs. Hoepfner and Vedner for the finding that the claimant was able to work.

¶ 55 The claimant's vocational rehabilitation expert, Pagella, opined that there is no stable labor market for an individual of the claimant's vocational profile, including his physical limitations; and, as the claimant notes, the Village did not present conflicting evidence from a vocational rehabilitation expert. However, the Village accommodated the claimant's one-handed work restriction prior to his retirement, and Barrett testified that, had the claimant not retired, the Village would have continued to accommodate his restrictions as it had done for other employees. Further, it is undisputed that neither the claimant nor Pagella conducted a job search, and the claimant admitted that, since retiring, he has not looked for work.

¶ 56 It was the function of the Commission to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve the conflicting medical evidence. *O'dette*, 79 Ill. 2d at 253. Where conflicting inferences might be drawn from other evidence in the record, the Commission was not compelled to accept Pagella's opinion testimony simply because it was not rebutted by a vocational rehabilitation expert called on behalf of the Village. See *McRae v. Industrial Comm'n*, 285 Ill. App. 3d 448, 452 (1996).

¶ 57 For the Commission's finding, that the claimant failed to prove his entitlement to PTD benefits under the "odd-lot" theory, to be against the manifest weight of the evidence, an

opposite conclusion must be clearly apparent. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 536 (1996). The appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Based on the record before us, we believe that sufficient evidence exists.

¶ 58 From the time of his retirement until the arbitration hearing, the claimant made no attempt to find work and Pagella did not perform any job search. Consequently, in order to establish his entitlement to PTD benefits on an "odd lot" theory, the claimant was required to show that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. Dr. Coe and Pagella both opined that the claimant is incapable of gainful employment. However, we believe that the record contains sufficient evidence calling into question their opinions in this regard. The claimant was capable of working within his medical restrictions prior to his first surgery. Dr. Durudogan imposed the same one-handed work restriction following the claimant's first surgery, and Barrett testified that, had the claimant not retired, the Village would have continued to accommodate that restriction. Further, and contrary to Dr. Coe's opinion, Drs. Hoepfner and Vedner opined that the claimant is able to perform light, sedentary work with his right arm. We conclude, therefore, that there is sufficient evidence in the record to support the Commission's determination that the claimant failed to meet his burden of proving his entitlement to PTD benefits based on an "odd lot" theory. Stated otherwise, the Commission's resolution of the issue is not against the manifest weight of the evidence.

¶ 59 Next, the claimant argues that the Commission's decision to deny his request for an award of penalties pursuant to sections 19(k) and 19(l) of the Act and an award of attorney fees

pursuant to section 16 of the Act is against the manifest weight of the evidence. His argument in this regard is based solely upon the Village's termination of TTD benefits on October 31, 2006, the day he retired. The arbitrator denied the claimant's request for an award of penalties and attorney fees, reasoning that the Village's termination of TTD benefits on the day of his voluntary retirement was not unreasonable. The arbitrator noted that the termination of the claimant's TTD benefits on the day of his retirement came before the supreme court's decision in *Interstate Scaffolding* and was based upon a reasonable interpretation of the law existing at that time. For its part, the Commission denied the claimant's request for an award of penalties and attorney fees because it determined that the claimant's entitlement to TTD benefits ended when he voluntarily retired on October 31, 2006.

¶ 60 Based upon our earlier holding that the Commission did not err in its decision to terminate the claimant's TTD benefits on October 31, 2006, the date of his voluntary retirement; it follows that we reject the claimant's argument that the Commission erred in denying his request for an award of penalties and attorney fees.

¶ 61 Finally, the claimant argues that the Commission erred as a matter of law in failing to answer the five questions which he submitted pursuant to section 19(e) of the Act (820 ILCS 305/19(e) (West 2012)). Noting that the Commission's stated reason for refusing to answer the questions posed was that they were filed late, depriving the Village of an opportunity to respond, the claimant asserts that section 19(e) contains no time limit for submitting questions and makes no provision for a response by the opposing party.

¶ 62 Section 19(e) of the Act provides, in relevant part, as follows:

"In any case the Commission in its discretion may find specially upon any question or questions of law or fact which shall be submitted in writing by either party whether ultimate or otherwise; provided that on issues other than nature and extent of the disability, if any, the Commission in its decision shall find specially upon any question or questions of law or fact, whether ultimate or otherwise, which are submitted in writing by either party; provided further that not more than 5 such questions may be submitted by either party." 820 ILCS 305/19(e) (West 2012).

¶ 63 It is true, as the claimant argues, section 19(e) places no time limit on the submission of questions to the Commission. Nevertheless, we believe it is unreasonable to interpret the statute as limiting the Commission's ability to impose some reasonable time limit. The Commission is vested with the power to enact procedural rules governing practice before it. 820 ILCS 305/16 (West 2012). However, it has yet to promulgate a rule setting the time frame within which questions posed pursuant to section 19(e) must be submitted.

¶ 64 In this case, the Commission held that questions submitted three days before oral argument were untimely, because the Village was deprived of any reasonable ability to object. However, the Village states in its brief that it did object when the matter came for hearing before the Commission.

¶ 65 The record further reflects that the oral argument before the Commission in this case took place on August 2, 2012, and its written decision was not filed until October 1, 2012. We are at a loss to understand why questions posed to the Commission before oral argument would be found untimely. Nevertheless, we find whatever error that the Commission committed by failing to answer the five questions posed by the claimant does not require reversal as the claimant has

made no showing that he was prejudiced by the Commission's failure to answer the questions posed.

¶ 66 The first question posed by the claimant was: "Does the record contain evidence that any doctor, whether treating or otherwise, released Petitioner to return to full duty, unrestricted work?" In its decision, the Commission twice acknowledged that the claimant testified that he had not been released to full unrestricted work, and there is no reference to any contrary evidence in the decision. Further, it is undisputed that the claimant suffered a severe and permanent injury, resulting in very limited use of his right arm, as the Commission so found. In light of these findings contained within the Commission's decision, the claimant can show no prejudice by the Commission's failure to answer the first question.

¶ 67 The second question posed to the Commission was: "Did the Respondent comply with Section 7110.10 of the Illinois Administrative Code by providing for vocational rehabilitation of Petitioner when the period of total incapacity for work exceeded 120 continuous days?" The claimant can show no prejudice in the Commission's failure to answer this question as his entitlement to vocational rehabilitation services was not raised in his Statement of Exceptions before the Commission, nor was it raised as an issue in his opening brief with this court. By failing to raise the question of his entitlement to vocational rehabilitation services before the Commission and in his opening brief before this court, the claimant has forfeited the issue. See *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336 (1980) (failure to raise an issue before the Commission); *Archer Daniels Midland Co. v. City of Chicago*, 294 Ill. App 3d 186, 190 (1987) (failure to raise an issue in appellant's opening brief). Consequently, any answer that the

Commission may have made to the question would be totally irrelevant to the issues raised in this appeal.

¶ 68 For his third question posed to the Commission, the claimant asked: "How does the Commission rule regarding the Respondent's *Ghere* objection to Dr. Konowitz's testimony regarding Petitioner's ability to work?" The record discloses that, when deposed, Dr. Konowitz was asked: "[S]ince you first saw him [the claimant] on April 23rd, 2009, is there any type of gainful employment that you believe that Mr. Sharwarko could have been engaged in?" The Village's attorney interposed an objection based, *inter alia*, upon the holding in *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). See also 820 ILCS 305/12 (West 2010). Answering over the objection, Dr. Konowitz stated: "Beyond a sedentary type position, those are probably reasonable. Beyond that, from a use of the hand in his past employment type of function, I don't see that as ever occurring." The arbitrator sustained the Village's *Ghere* objection, and the claimant raised the propriety of the ruling in his Statement of Exceptions filed with the Commission on review. The Commission never specifically ruled upon the objection in its decision. However, a close reading of the Commission's decision reflects that the Commission did in fact rely upon the very testimony of Dr. Konowitz that was the subject of the Village's *Ghere* objection. On page 8 of its decision, the Commission wrote: "Dr. Konowitz testified that he did not see Petitioner [the claimant] employed beyond a sedentary type of position and from his employment history, he did not see that as a possibility. *** He opined that Petitioner would not be able to go back to work as a maintenance man." From this passage in the Commission's decision, it is clear that, by implication, the Commission overruled the Village's *Ghere* objection and considered Dr. Konowitz's testimony regarding the claimant's ability to

work. We fail to see, therefore, how the claimant was prejudiced by the Commission's failure to answer the third question which he posed.

¶ 69 The claimant's fourth question was: "Did the respondent present any evidence to contradict the vocational assessment report of Edward Pagella (Pet. Ex. No. 11) dated June 20, 2011?" Although the Commission declined to answer the question, the first one-half of page 10 of the Commission's decision is a recitation of the evidence which it relied upon in rejecting Pagella's vocational assessment that the claimant is unemployable. We find, therefore, that the claimant suffered no prejudice by the Commission's refusal to answer this question.

¶ 70 The fifth and final question posed to the Commission was: "Does the Commission find the Respondent's refusal to pay TTD benefits after October 31, 2006[,] to be unreasonable and vexatious entitling Petitioner to penalties and attorney fees?" In point of fact, the Commission did answer this question on page 10 of its decision when it held: "The evidence and testimony finds Respondent's termination of benefits not to be unreasonable or vexatious under the circumstances presented here."

¶ 71 Finding that the claimant can establish no prejudice in the Commission's failure to answer the first four questions he submitted pursuant to section 19(e) and that the Commission did in fact answer the fifth question, we conclude that no basis exists to disturb the Commission's decision for any violation of section 19(e) of the Act.

¶ 72 For the foregoing reasons, we affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 73 Affirmed.

15:17:43 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER ***

Case

Cour

CASE # 07 WC 040637 HEARING LOCATION

EMPLOYEE	SHARWARKO, DANIEL J	IWCC OFFICE
EMPLOYER	VILLAGE OF OAK LAWN	100 W RANDOLPH ST STE 8-200
SETTING	CHICAGO	CHICAGO IL 60601
ARBITRATOR	KELMANSON, SVETLANA	ACCIDENT DATE 04/06/06
COMMISSIONER	GORE, DAVID	CASE FILED 09/12/07
BODY PART	ELBOW(S) RIGHT	

EMPLOYEE ATTORNEY	EMPLOYER ATTORNEY
BOWMAN & CORDAY	KEEFE CAMPBELL & ASSOC LLC
20 N CLARK	118 N CLINTON
SUITE 500	SUITE 300
CHICAGO IL 60602	CHICAGO IL 60661

STATUS APPELLATE CT

STATUS CALL	FIRST	10/31/07	LAST	00/00/00	NEXT	00/00/00
REVIEW	FIRST	00/00/00	LAST	00/00/00	NEXT	00/00/00
RETURN	FIRST	02/24/12	LAST	00/00/00	NEXT	02/24/12
ORAL	FIRST	08/02/12	LAST	00/00/00	NEXT	08/02/12

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

1 of 1 DOCUMENT

DANIEL J. SHARWARKO, PETITIONER, v. VILLAGE OF OAK LAWN, RESPONDENT.

NO: 07WC 40637

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 1050; 2012 Ill. Wrk. Comp. LEXIS 1202

October 1, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

. Petitioner was a 53 year old employee of Respondent, who described his job as a water & sewer inspector. Petitioner currently resides in Henry, Illinois, about 30 miles north of Peoria. On the date of accident, Petitioner had been employed by Respondent for 34 years; he started with Respondent when he was 21 years old. Petitioner started as a maintenance worker which involved digging and repairing water breaks, fire hydrants and such things. Over the years Petitioner was promoted to water/sewer inspector for new residential and commercial construction; Petitioner held that position for 2-3 years.

. On the [*2] date of accident, April 6, 2006, Petitioner testified he was replacing water meters that were malfunctioning. Petitioner stated that at about 11:00-11:30am, he was replacing a water meter in a meter pit which was located in the front yard of a property. He stated that he was lying on the ground and was reaching down to replace the meter when the wrench slipped and he hit his right elbow against the concrete wall. Petitioner was working alone at that time. Petitioner testified that he reported the accident to his supervisor that day. Petitioner testified as a result of the accident, Respondent sent him to Concentra Medical Center (company clinic) at 7779 South Harlem in Bridgeview, Illinois. Petitioner went to that clinic 2-3 times and continued working during that time. Petitioner ultimately sought treatment from his own doctor, Dr. Durudogan, at the Southwest Center for Healthy Joints in Evergreen Park, Illinois. Treatment with Dr. Durudogan started there in May or June 2006. Petitioner testified Dr, Durudogan performed surgery, to his right hand and elbow, on August 21, 2006 at Little Company of Mary Hospital. Petitioner continued working for Respondent up to the Friday before the [*3] surgery. Following surgery, Petitioner continued care with Dr. Durudogan who sent Petitioner for physical rehab and physical therapy for his hand. Petitioner believed he was in therapy three times per week.

. Petitioner agreed that in October 2006, Respondent offered him and a number of other workers (about 20), an incentive to take early retirement. Petitioner accepted that offer and retired from Respondent effective October 31, 2006. Petitioner was receiving his temporary total disability (TTD) benefits at that time. Petitioner testified that after he retired, October 31, 2006, he received no further TTD benefits. Petitioner did continue with his medical treatment. Sometime in 2006, Petitioner was examined by Dr. Toulipan at Respondent's request (through the nurse case manager). Petitioner then asked to treat with Dr. Toulipan. After some additional treatment, Dr. Toulipan performed a decompression of the ulnar nerve at the elbow on May 11, 2007 at Salt Creek Surgical Center. Petitioner continued care with Dr. Toulipan after that surgery with office visits and physical therapy at home. Petitioner testified that he continued to have problems with his right upper extremity. Petitioner [*4] stated that he continued treating with different doctors and went to each doctor requested by Respondent's nurse case manager, Kathleen Fitzgerald.

. Sometime in 2007, Petitioner was seen by Dr. Howard Konowitz at Respondent's request for a § 12 examination. After that evaluation, Petitioner had discussions with Ms. Fitzgerald and they decided together that Petitioner be treated by Dr. Konowitz. Petitioner testified that Dr. Konowitz had been his main treating doctor regarding his right upper extremity for the prior 3-3.5+ years. Petitioner testified that Dr. Konowitz first ordered an EMG which showed he had nerve damage to the right upper extremity. Petitioner testified Dr. Konowitz wanted to go after the root cause of the problem and not just treat the symptoms of the problem, so he went after the nerve. Petitioner had numerous injections (about six) performed by Dr. Konowitz over the years, and Petitioner stated that he had minimal relief from those injections. Petitioner stated the doctor advised him to use the arm as much as possible. Petitioner had last seen Dr. Konowitz within three months prior to this hearing. Petitioner testified in all the time he had been treating with [*5] Dr. Konowitz, he had not been released to full unrestricted work.

. Petitioner testified that when he retired in October 2006, he had no idea how much additional treatment he would be having for his right arm. Petitioner testified at the time he retired from Respondent his intention was just to retire from Respondent; not work altogether, because he stated he was then too young to stop working altogether. Petitioner testified that since he had not been able to work for the last 5-5.5 years, getting by with only his retirement had been a financial hardship. Petitioner testified that there were positions in and around Peoria that he thought he was physically able to apply for; Petitioner stated there was a position open at Peoria Airport in transportation safety, which was checking people in and out prior to the flights and things like that. Petitioner stated he had training that he thought would qualify him for that job as he was listed with Respondent as a first responder; and had taken classes in CPR and basic first aid.

. Petitioner testified that he does currently drive his car around town in Henry, Illinois, which has a population of about 2,500. There are no traffic signals [*6] there, only four-way stop signs. Petitioner testified that he drives about six blocks to take his two grandkids to school. Petitioner stated that he does not drive with both hands on the steering wheel; he just uses his left hand to drive. Petitioner testified that he had not attempted to drive outside of Henry, Illinois in the past 5 years; when he comes back to the Chicago area to see Dr. Konowitz his wife drives. Petitioner's wife drove him up from Henry the day before the hearing and he took the train from his sister's home in Oak Lawn for the hearing. Petitioner testified that he does not drive outside of Henry because of the nerve; he stated he never knows when, but he will get like an electric jolt through there so it is not worth driving in traffic. He stated he never knows when it will happen or how long it will last.

. Petitioner testified in the past 2-3 years as a homeowner, he had performed tasks of vacuuming, dusting, and cleaning. He stated that his wife will bag up the garbage and he will take it out of the trash can to the garbage, carrying it with his left hand. He stated that he does try to use his right hand as much as he can. He has attempted to mow his lawn [*7] and he can do that one handed, but then the vibration will go through his arm and he has to stop after 10-15 minutes. He does not use a shovel to shovel snow; he does have a snow-blower, but he is not able to use it because it has two controls, one for the auger and one for the power forward, so he has to use both hands. He has not performed any painting or scraping or anything like that at his home. His home is made of brick. He has not undertaken any other maintenance like

chores around his home in the prior 3-4 years. Petitioner indicated that his grandchildren have lived with them; that was a reason they moved to Henry, but now his son has found a home in Henry. Petitioner testified that as far as playing with his grandchildren, he will throw the ball to them to hit and he will duck; he does not use his right hand for that.

. Regarding his current symptoms of his right upper extremity, Petitioner stated that it was "tingling like when you hit your funny bone". He stated even with the injections, it still goes down to the 4th and 5th fingers and he gets a very deep stinging like inside the little finger, but the outside is numb and the side of his hand is numb. Petitioner stated [*8] the rest of his hand is very, very sensitive. Petitioner stated that this is constant. Petitioner stated that when he does use it, it gets worse and his hand swells and he has to put it up to get the swelling down and he takes Vicodin to take the edge off of the pain. It was noted that Petitioner was wearing a compression type of glove which he stated he wears during the day and removes at night. Petitioner stated that he replaces the compression glove about every three months as it just wears out. He stated he usually orders two so he is not continually running to Peoria.

. Petitioner agreed the parties had stipulated that Respondent and their carrier had paid all of his medical expenses to date. Petitioner did have an appointment to see Dr. Konowitz January 26, 2012; he was not seeing any other doctors for treatment regarding his right upper extremity. Petitioner agreed that at the request of Respondent's carrier and their attorney, Petitioner was examined on August 1, 2011 by Dr. Michael Vender. Petitioner stated that the doctor only examined him and reviewed the records but did not treat Petitioner in any way. Petitioner stated that his right hand and arm does not work like it [*9] used to; he has lost grip strength and fine motor skills; he testified that he cannot lift a gallon of milk with his right hand. He indicated the heaviest he can lift unassisted with his right hand, is about a half a pound.

. Petitioner agreed that when he was a child he suffered a pretty severe laceration to his right hand and agreed he had problems with his right hand off and on since then. Dr. Toulipan's July 7, 2006 record noted that Petitioner had problems with the right wrist for decades; Petitioner agreed but stated that those problems were off and on and not constant. Petitioner agreed he was treating with Dr. Elser in March 2006 in regard to his right hand complaints. He agreed his right hand had long standing problems. He agreed his March 2006 treatment with Dr. Elser had nothing to do with this claimed work injury. Petitioner agreed he had not reported any right hand injury to Respondent; it was only his right elbow. Petitioner agreed he worked throughout May 2006 up until the time of his surgery and that he last worked August 18, 2006. Petitioner believed in early June 2006, Dr. Durudogan limited him to one-handed work using only his left hand. Petitioner agreed that [*10] Respondent accommodated that and provided one-hand work. He stated he was then doing things like reading water meters and some general maintenance now and then. Petitioner indicated reading meters required holding a device with one hand which he would attach to the home and read the meter. He worked the summer 2006 one handed, but he stated he ended up using both hands to the best of his ability to repair broken wires or replace water meters; he was not told to do that, he just took it upon himself to occasionally do that.

. Petitioner agreed he had the first surgery August 21, 2006 and he was off work and getting TTD from Respondent's carrier at that time. Petitioner agreed in the fall of 2006, Respondent offered employees with at least 20 years of service that were 55 years old an early retirement package. Petitioner agreed he exercised that right to take early retirement. Petitioner viewed RX 2 and identified it as the letter he received from IMRF which indicated they received his notice of intent to accept the early retirement. The early retirement was offered to anyone who met the criteria requirements and Petitioner agreed that it was a voluntary offer; they did not force people [*11] to take the retirement package. Petitioner agreed that he was 54 years old at the time and the package had a window of opportunity for them to elect the package. Petitioner stated that employees could buy up to 5 years of service time to put you over 55. Petitioner stated that he made a voluntary contribution of $ 15,563 from various unused sick days and vacation days to buy 5 years of time to rate him at 59 years old as far as the pension was concerned. Petitioner is currently 59 years old. He viewed RX 3 and agreed it was the notice he signed on October 3, 2006 authorizing, the $ 15,000 deduction. He agreed no one made him make that contribution, it was entirely up to him. Petitioner agreed when he learned of the retirement package he made a conscious effort and deci-

sion to move money around and sick days to buy the additional time and qualify; he bought as much time as he could (it was based on credits for sick days and vacation time; technically not money coming out of his pocket).

. Petitioner agreed since his various surgeries, he had never been released to two-handed work, but he believed that he was released for left-handed work only and he indicated that he could handle [*12] left-handed work. Petitioner agreed that he did the meter reading with the device using his left hand. Petitioner agreed he had never called Respondent to be brought back to one-handed work since he had retired, because he had taken the voluntary early retirement. Petitioner agreed no one at Respondent ever told him had he not retired they would not have let him come back to do one-handed work; he agreed prior to the first surgery he was allowed to work one-handed duty. Petitioner agreed no doctor ever told Petitioner that he could not perform any work ever in his life again. Petitioner's wife had worked before Petitioner retired, until her parents got ill and she basically moved in with them to take care of them. Petitioner agreed he was earning about $ 65,000 when he was injured and retired. Petitioner believed that his current monthly benefit was $ 5,120 so his pension is about $ 61,000 per year. He is allowed group health benefits with the retirement plan, until he reaches Medicare. Petitioner agreed that he wanted to apply for TSA but never did because he had restrictions; he did not know if he would have been hired or not. He agreed he did not even know if the classes he had [*13] through Respondent were enough to get him a job at TSA. Petitioner agreed that he had not applied for jobs anywhere. Petitioner agreed that he can drive a car; he does prefer to avoid driving long distances and traffic because it gives him problems in his shoulder. Petitioner did not recall when his wife stopped working (maybe before 2005-2006). He agreed since 2006, before he had retired, he was already living on his salary from Respondent. He agreed his pension was within $ 4,000 of his salary. At no time since 2006 had Petitioner come back to Respondent to look for one-handed or accommodated work.

. Petitioner agreed he had seen Dr. Elser in March 2006. Petitioner viewed PX12, a May 16, 2006 letter from Gallagher Bassett acknowledging Petitioner's injury of March 8, 2006 at Respondent, and agreed he had received it. Petitioner stated, regarding that incident, that he was replacing a meter and he hit on a concrete floor under a slot sink. He agreed he continued to work. Petitioner agreed at the time he retired he was living in Justice, Illinois in a mobile trailer home. When he moved to Henry, Illinois, they bought (about 5 years before, 3/07) a brick ranch type home.

. Mr. Barrett [*14] testified for Respondent. Mr. Barrett has worked for Respondent for 38 years and has been the public works director since November 2006. Mr. Barrett was aware Petitioner injured his right arm in April 2006. He agreed Petitioner had been released to one-handed work by his doctor about June 6, 2006. He testified that Respondent accommodated the restrictions and allowed Petitioner to work after June 2006 at the same pay rate. Mr. Barrett testified Petitioner's job duties were miscellaneous things like reading meters, working on water meters, and even answering the phone. Regarding meter reading, he stated they have a system with a gun you point at the water meter and it takes an electronic reading. Mr. Barrett testified that Respondent did not ask Petitioner to work with both hands when he was under the one-handed restrictions. He testified that throughout June, July and part of August 2006, Petitioner continued to work the one-handed job duties. He agreed after Petitioner had the surgery August 21, 2006, he had been taken off of work. Mr. Barrett viewed RX 1 and noted it as Respondent's time sheet for Petitioner for the period of May 2006 through October 31, 2006. Beginning August 21, [*15] it noted OJI (on the job injury) when Petitioner was taken off work after the surgery. Mr. Barrett agreed in the fall of 2006, Respondent offered their more senior employees a voluntary early retirement program for every department. He indicated to qualify you had to be 50 years old with 20 years of service. He testified that not every one that was offered the program accepted it. If a worker refused they were not penalized or demoted or treated differently in any way to his knowledge. Mr. Barrett testified that he had been offered the retirement package but did not accept it; he stated at the time he had a daughter in high school and planning to go to college and he had another daughter in college. To the best of his knowledge Petitioner had been offered the retirement package in October. He indicated Petitioner never mentioned that he felt pressured by Respondent to accept it and did not say he wished he could stay at Respondent and not retire. He stated to get the retirement package at 55 you could purchase years to make you reach 55, so if you were 52 you could purchase 3 years to put you at 55. He indicated if you

were 54 you could purchase one year or a maximum of 5 years just [*16] by buying the extra years. Mr. Barrett testified Petitioner elected to pay about $ 15,500 into the fund to buy additional years. He testified he was not aware of anyone at Respondent forced or pressured to pay into it. Mr. Barrett testified that since he had been director of public works, Petitioner had not asked him to return to any restricted duty. Mr. Barrett testified that had Petitioner not retired and continued treating with his doctors, Respondent would have allowed him to return to one handed work if he chose to do so. He testified that Respondent does have other employees on modified or light duty currently; Scott Krafft, Steve Garcia, and John Klimek for example. Mr. Barrett noted that John Krafft had been on accommodated restrictions for 7-8 years. He testified the Respondent will accommodate restrictions if they can and they had done so for many years for some employees.

The Commission finds Petitioner was injured April 6, 2006. Petitioner thereafter underwent extensive conservative medical treatment and was on restricted duty. Evidence and testimony finds Petitioner worked on restricted duty until the time of his initial surgery August 21, 2006 when he was first authorized [*17] completely off of work. Respondent's witness, Mr. Barrett, testified Respondent provided Petitioner with restricted work and would have continued to provide Petitioner with restricted work. He further testified of a number of Respondent's workers that had in fact returned with restrictions and were provided with work within their restrictions and at least one of whom that he named had been on restricted work for a number of years. Petitioner testified that Respondent provided him with the one handed work, reading meters. It is clear that Petitioner exercised his option of early retirement which was effective as of October 31, 2006; Petitioner testified his retirement was voluntary. Further, Petitioner 'bought' additional time to retire early using unused sick/vacation time. Petitioner clearly had not reached maximum medical improvement at that point. Respondent admits liability for that period of TTD and they paid that. Respondent terminated those benefits upon Petitioner's voluntary retirement. The records of Dr. Durudogan, the initial surgeon, from October 20, 2006 noted Petitioner slowly regaining function but had positive Tinel's at elbow and symptoms of persistent ulnar neuropraxia. [*18] Dr. Durudogan prescribed no work with the right upper extremity. Dr. Durudogan noted in his December 7, 2006 letter that Petitioner demonstrated persistent ulnar neuropraxia with muscle wasting and paresthesias in ulnar and median nerve distributions. Dr. Durudogan noted improved hand function, full fist band grip strength; but no demonstration of motor function regarding the interosseous innervations by the ulnar nerve. Dr. Durudogan prescribed continued occupational therapy and no work with the right upper extremity. Petitioner remained under care of Dr. Durudogan whose January 18, 2007 records indicate that Petitioner's CTS doing well but ulnar nerve continues to be problematic. Petitioner's sensations improving but motor function remains out and Petitioner unable to abduct and adduct fingers. Dr. Durudogan noted that Petitioner had muscle atrophy and prescribed continued occupational therapy and behavior modification as well as no work with the right upper extremity, and no heavy lifting. Dr. Durudogan's March 1, 2007 record noted marked positive Tinel's at elbow. Dr. Durudogan noted that Petitioner was 6 months post surgery and not improving and recommended neurolysis and revision [*19] decompression of the ulnar nerve. Dr. Durudogan restricted Petitioner from any work with right upper extremity. As Petitioner retired, he did not request left hand only work at any time. Petitioner clearly had not reached MMI during this period. Petitioner subsequently went under the care of Dr. Tulipan who on May 11, 2007 noted that Petitioner had an ulnar nerve transposition and has had worsening symptoms since with motor denervation. He prescribed right ulnar nerve re-exploration, neurolysis, and possible transposition. Dr. Tulipan's operative report noted a large neuroma of nerve with micro epineurolysis and neuroma excision with tube placement. Records thereafter note Petitioner is retired and do not contain medical opinions or statements either authorizing Petitioner off of work or restricting work; although clearly he would have been off work for some period of time following the second surgery. Once retired, Petitioner cannot un-retire. Petitioner also volitionally moved from Respondent's Chicago area village, to rural Henry, Illinois, about 35 miles north of Peoria, Illinois. Petitioner sold a motor home he owned (just renting the spot for about $ 350 per month) to purchase [*20] a home in Henry with a $ 1,100 per month mortgage. Petitioner testified that at no time had he even looked for work anywhere nor had he requested restricted duty from Respondent at any time after his voluntary retirement.

A Petitioner must show the condition has not yet stabilized to be entitled to temporary total disability (TTD) benefits per *Interstate Scaffolding, Inc. v. Workers' Compensation Commission, 236 Ill.2d 132 (2010).* A Petitioner must also show he did not work and could not work. The Supreme Court's issue there was to consider whether an employer's obligation to pay temporary total disability (TTD) ceased when the employer terminates the employee for conduct unrelated to the injury. The Supreme Court there noted that no reasonable construction of the Acts' provisions supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for "volitional conduct" unrelated to his injury. A thorough examination of the Act there revealed that the Act con-

tains no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by his employer.

[*21] The Commission notes that Petitioner retired, Respondent did not terminate Petitioner, so clearly Interstate is distinguished from the facts here, especially in light of the fact that Petitioner did not attempt nor even ask for accommodated work after the initial surgery (and one hand release). There was no discharge here at all, rather Petitioner voluntarily took early retirement. Respondent's witness', Mr. Barrett, unrebutted testimony was that Petitioner was provided restricted duty prior to the surgery and that Respondent would have continued to accommodate Petitioner's restrictions as Respondent has continued to do with a number of other employees (again at least one had been on restrictions for 6-8 years). Petitioner's retirement at that point clearly indicates Petitioner had no intentions of returning to the workforce in any capacity at anytime, and clearly is the equivalent of refusing the accommodated duty which Respondent provided before Petitioner's surgery and voluntary retirement. Petitioner had been receiving TTD benefits up to that time so the motivation (for retirement) was certainly not due to financial urgency. Clearly, Petitioner did not realize, at the time [*22] of his retirement, that he still had a long road ahead of him regarding extensive further treatment and ongoing pain management (with CRPS apparently developing), but his retirement was voluntary. Petitioner did not prove that he could not work. The evidence and testimony finds Petitioner met the burden of proving entitlement to TTD benefits from August 21, 2006 through October 31, 2006, but failed to prove entitlement thereafter. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence and herein modifies the Arbitrator's finding regarding total temporary disability to deny TTD benefits after his voluntary retirement, for a TTD award of August 21, 2006 through October 31, 2006 only (10-2/7 weeks @ $ 913.04 per week =$ 9,391.26--with Respondent entitled to credit for $ 9,391.26 paid in TTD benefits.)

The Commission finds in evidence the June 20, 2011 Employability report of Edward Pagella who opined Petitioner was unable to return back to his former work or utilize any transferable skills. He opined that no occupation exists with Petitioner only being able to use one arm and to avoid contact with the right arm. He stated employers would see Petitioner [*23] as a liability and not want to hire someone limited to using one extremity while trying to avoid any potential contact with the right hand. He noted with the economy, people with college diplomas and no disabilities are having a difficult time finding jobs let alone a 58 year old with a high school diploma and only capable of one hand work. Mr. Pagella finally opined there was no stable job market for Petitioner with his physical limitations. The later treating doctors noted in their records that Petitioner was retired. Dr. Konowitz testified he did not see Petitioner employed beyond a sedentary type of position and from his employment history, he did not see that as a possibility. Dr. Konowitz did not restrict Petitioner from driving. Dr. Konowitz had gone over details of Petitioner's job with him and noted that Petitioner had worked as an plumbing inspector. He opined that Petitioner would not be able to go back to work as a maintenance man, but he did not indicate that Petitioner was unable to perform any work.

The Commission notes that Dr. Coe testified Petitioner has had chronic pain for about 5 years and continues to be treated with a variety of pain medications and no treater [*24] had noted significant improvement in the condition of the right arm. On examination he stated that Petitioner guarded his right arm and could not stand to have much touch it. Dr. Coe considered Petitioner's complaints valid and consistent with every doctor findings in Petitioner's case. Dr. Coe stated for Petitioner to be able to work at this point he would need to do something with only his left arm where he really did not travel (either to/from work or driving for work) because of the potential jarring of the right arm. Dr. Coe opined that if Petitioner found employment where there would be little or no opportunity for Petitioner's right arm to be contacted he might possibly try it. Dr. Coe was aware Petitioner now lives in the country and as far as he knew was not restricted from driving; he indicated that Petitioner did get around to stores and such. Dr. Coe indicated that Petitioner's current medications were non-narcotic but they can have behavioral effects, but the medications do not preclude return to gainful employment.

The Commission notes that Respondent's § 12 IME examiner, Dr. Michael Vender, stated in his August 3, 2011 report that Petitioner presented with ongoing [*25] pain complaints to his right upper extremity post CTS release and right ulnar nerve surgeries at the elbow level. He noted the complex history and the complaints consistent with surgeries performed. He noted Petitioner on various medications. His treating diagnosis was of CRPS; he stated Petitioner does not have diffuse findings indicative of CRPS. He noted symptoms consistent with more localized changes consistent with suspected injury to the ulnar nerve. He did not suspect the injury at age 9 currently playing a role in Petitioner's current condition of ill-being. He opined Petitioner had reached MMI and suspected Petitioner may need injections in the future

until they were of no further benefit. He opined Petitioner's ability to work with his right upper extremity would be limited; but he has function of his right upper extremity; He would place Petitioner at a light work level.

> 'A Petitioner has the burden of proving permanent and total disability. In South Import Motors Inc. v. Industrial Commission case the Court stated, "A person is totally disabled when he cannot perform any services except those which are so limited in quantity, dependability, or quality that there [*26] is no reasonably stable market for them".
> In *Valley Mould and Iron co. v Industrial Commission, 84 Ill.2d 538, 546-547 (1981)* the Court stated, (and through many cases have held), "that an odd-lot employee is one, who though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market.". Two Commission decisions in support of that argument are, Leyer v. Residential Development Group, 15 ILWCL 137 (2007) and Burns v. Schrock Cabinets, 15 ILWCLB 22 (2007).'

The Commission finds in the evidence and testimony here that Petitioner suffered a significant right upper extremity injury that resulted in extensive treatment to include two surgeries and a number of injections and ongoing pain management (for possible Chronic Regional Pain Syndrome-CRPS). Petitioner did graduate high school but his entire work career had been with Respondent. Petitioner is in his late 50's with little to no apparent transferable skills. Since Petitioner retired he has moved to rural Illinois and has not pursued any job search efforts whatsoever. There is testimony from Respondent's Mr. Barrett, [*27] that but for Petitioner having retired Respondent would have continued to accommodate Petitioner's sedentary one-arm restriction; this is not rebutted by Petitioner in any way. Petitioner voluntarily took early retirement and moved to a rural area of Illinois; there is some indication via Petitioner that the area is actually better economically than other areas of the State but again Petitioner never pursued any job search efforts. It is difficult to find Petitioner to be permanently and totally disabled with the testimony and evidence presented here. Petitioner voluntarily retired and moved to a rural area. Prior to his first surgery, Respondent had been accommodating Petitioner's restrictions and presented unrebutted testimony that it would have continued to accommodate Petitioner's restrictions as it had for numerous other Respondent employees for many years. Petitioner clearly is significantly incapacitated, but it is clear with the evidence and testimony that Petitioner had no intention of returning to the work force in any shape or form, after he retired and there is no way to find he is not employable in a stable labor market when there is testimony he would be working but [*28] for his voluntary retirement and move to a rural area of the State. The evidence and testimony finds Petitioner failed to meet the burden of proving entitlement to 'odd-lot' permanent and total disability. The Commission again notes that Petitioner did suffer a significant injury and permanent disability as a result of this accident. Some argument can be made the award is somewhat excessive, but given the evidence and testimony with the possible CRPS and very limited use of his right arm, the award is supported with the evidence and testimony and, as such, Petitioner met the burden of proving entitlement to the awarded 80% loss of use of the arm. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence and, herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability awarded.

The Commission finds in evidence and testimony that Respondent terminated TTD when Petitioner took voluntary early retirement. Respondent's position that they were no longer liable for TTD benefits where, as here, a Petitioner essentially refuses accommodated work, (which Respondent witness' testimony stated they would have still been accommodating [*29] as they had for a number of other employees for a number of years) is well founded in case law. The evidence and testimony finds Respondent's termination of benefits not to be unreasonable or vexatious with the belief they were no longer liable for benefits under the circumstances presented here. Petitioner failed to meet the burden of showing Respondent acted in bad faith or wrongly in any way and as such failed to meet the burden of proving entitlement to penalties and attorney fees. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence and, herein, affirms and adopts the Arbitrator's finding denying penalties and attorney fees.

The Commission notes that Petitioner posed five (5) questions for the Commission to find specially on the questions of law or fact, however, Petitioner filed those questions shortly before oral arguments and the questions were not raised at the time of the hearing. Further, as Petitioner filed the questions late, Respondent had no opportunity to respond. The issues raised there were not properly preserved for Review in any event.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum [*30] of $ 913.04 per week for a period of 10-2/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act. Respondent entitled to credit for TTD benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 591.77 per week for a period of 202.4 weeks, as provided in § 8(e)(10) of the Act, for the reason that the injuries sustained caused the 80% loss of use of Petitioner's right arm.

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

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

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

ATTACHMENT:

ARBITRATION DECISION

Daniel J. Sharwarko
Employee/Petitioner

v.

Village of Oak Lawn
Employer/Respondent

Case # **07** WC **40637**

Consolidated cases: [*31]

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 **Svetlana Kelmanson,** Arbitrator of the Commission, in the city of **Chicago,** on **November 14, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?

FINDINGS

On **April 6, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

[*32] In the year preceding the injury, Petitioner earned $ **71,217.12**; the average weekly wage was $ **1,369.56**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $ **9,391.26** for TTD benefits.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 913.04 per week for 188 3/7 weeks, commencing August 21, 2006, through March 31, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 591.77 per week for a further period of 202.4 weeks, because the injuries sustained caused the 80% loss of use of the right arm, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from April 7, 2006, through November 14, 2011, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a party files a *Petition* [*33] *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.

12/5/2011

Date

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, a water and sewer inspector on April 6, 2006, testified that, as of that date, he worked for Respondent for 34 years. On April 6, 2006, Petitioner injured his right elbow while replacing a malfunctioning water meter. Petitioner described the accident as follows: "I was laying on the ground, reaching down to replace the meter, the wrench slipped, and I hit my elbow against the concrete wall."

Respondent sent Petitioner to Concentra Medical Center (Concentra). Petitioner testified that he went to Concentra two or three times, and continued to work. In May or June of 2006, Petitioner began [*34] treating with a physician of his choice, Dr. Durudogan at the Southwest Center for Healthy Joints. Petitioner continued working for Respondent until August 18, 2006. On August 21, 2006, Dr. Durudogan performed surgery on Petitioner's right hand and elbow. After the surgery, Petitioner underwent physical therapy.

Petitioner further testified that in October of 2006, Respondent offered early retirement to a number of employees, including him. Petitioner decided to take advantage of the offer and retired from Respondent's employ, effective October 31, 2006. Thereafter, Petitioner continued his medical treatment, but did not receive any temporary total disability benefits.

At Respondent's request, Petitioner was examined by Dr. Tulipan. After the examination, Petitioner asked to treat with Dr. Tulipan. On May 11, 2007, Dr. Tulipan performed a second surgery on Petitioner's right elbow. Postoperatively, Petitioner underwent another course of physical therapy. However, he continued to have problems with his right arm. At Respondent's request, Petitioner was also examined by Dr. Konowitz. After the examination, Petitioner asked to switch his care to Dr. Konowitz. Thereafter, Petitioner underwent [*35] extensive conservative treatment with Dr. Konowitz, but received minimal relief. Petitioner testified that Dr. Konowitz never released him to return to work full duty, and he had an upcoming appointment with Dr. Konowitz on January 26, 2012.

Petitioner further testified that when he made a decision to retire from Respondent's employ, he did not anticipate needing such extensive treatment for his right arm condition and did not intend to stop working altogether. Petitioner considered applying for a transportation safety position at Peoria Airport, thinking he might qualify because he had taken classes in CPR and first aid and was listed as a "first responder" with Respondent.

At the time of the arbitration hearing, Petitioner lived in Henry, Illinois, population 2,500, located 30 miles north of Peoria, Illinois. Petitioner explained that he and his wife moved to Henry from the Chicago area for personal reasons.

Petitioner testified that he drives his car around Henry, mostly taking his grandchildren to and from a nearby school. He steers only with his left hand because of the problems with his right hand. During the past five years, he has not attempted to drive outside of Henry. Petitioner's [*36] wife drives him to the Chicago area for medical appointments. Regarding his activities of daily living, Petitioner testified that he vacuums, mows the lawn and takes out the trash using only his left hand, although he tries to use his right hand as much as he can. He does not shovel snow or use a snowblower because it requires the use of two hands. He also does not perform any maintenance work on his house. When Petitioner plays with his grandchildren, he uses only his left hand. Regarding the symptoms in his right hand and arm, Petitioner testified that he suffers from constant numbness and tingling in the hand, as well as swelling and exquisite sensitivity. He wears a compression glove during the day and takes Vicodin to help alleviate the symptoms. The hand "doesn't work like it used to," and has lost grip strength and fine motor skill. Petitioner stated that he cannot lift a gallon of milk with his right hand, and estimated that he could lift "half a pound maybe." Petitioner stipulated that Respondent had paid all his medical bills to date.

On cross-examination, Petitioner admitted to longstanding problems with his right hand. Petitioner testified that he had suffered a severe [*37] laceration to his right hand as a child and had problems with it off and on ever since. He also had off and on problems with his right wrist for decades. In March of 2006, before the work accident on April 6, 2006, Petitioner treated with Dr. Eisner for problems with his right hand. Petitioner conceded that he only injured his right elbow on April 6, 2006, and did not injure his right hand.

Petitioner further testified on cross-examination that in June of 2006, Dr. Durudogan limited him to one-handed work, and Respondent accommodated the restrictions. Petitioner explained that he was able to read water meters with a device he could use with one hand. He occasionally performed repair work using both hands to the best of his ability. Petitioner clarified that Respondent did not ask him to perform repair work.

Regarding the retirement offer, Petitioner explained that Respondent offered early retirement to employees with at least 20 years of service who were at least 55 years old. Employees who were younger than 55 could buy up to five years of service credits. Respondent did not force anyone to take early retirement, and there was no pressure on Petitioner to retire. Petitioner, who [*38] was 54 years old at the time, decided to take the retirement package and made a voluntary contribution of $ 15,563.00 from his unused sick and vacation days to buy additional five years of service credits. Petitioner agreed that his annual earnings of approximately $ 65,000.00 near the time of his retirement were comparable to his annual pension of approximately $ 61,000.00. In addition, Respondent agreed to pay for group health insurance until Petitioner qualified for Medicare.

At the time of the arbitration hearing, Petitioner was 59 years old. Petitioner admitted that although he had never been released to return to two-handed work after his surgeries, he had been released to one-handed work. Because he had retired from Respondent's employ, he never contacted Respondent about returning to work on light duty. Petitioner acknowledged that Respondent never indicated to him it would not accommodate his restrictions. Petitioner admitted that he never applied for a transportation safety job and did not know whether his qualifications were sufficient. After retiring, Petitioner has not applied for any jobs.

On redirect and re-cross examinations, Petitioner testified that he had also suffered [*39] a similar work accident on March 8, 2006, which is not the subject of the instant claim. At the time of his retirement, Petitioner lived in Justice, Illinois, a suburb of Chicago. In March of 2007, Petitioner moved to Henry, Illinois.

Petitioner's wife, Susan Sharwarko, testified on Petitioner's behalf that Petitioner's "capabilities have diminished greatly" and he lost fine motor skills and grip strength after the work accident on April 6, 2006. Mrs. Sharwarko testified consistently with Petitioner that he limits his driving to Henry, Illinois, and she drives him to doctor's appointments. When Petitioner starts the car, he reaches over with his left hand to turn the key; he also shifts with his left hand. If Petitioner rides in a car longer than a few minutes, he "has to cradle his arm in a pillow because the vibration hurts." Mrs. Sharwarko further testified consistently with Petitioner that he performs household chores mostly with his left hand. Bumping his right arm causes "extreme amount of pain." Mrs. Sharwarko denied that Petitioner's preexisting right hand condition kept him from doing things around the house.

Steven Barrett, Respondent's director of public works, testified [*40] on Respondent's behalf that from May through August of 2006 Respondent accommodated Petitioner's restrictions at his usual rate of pay. Petitioner's modified duties included reading water meters, working on water meters, and answering the phone. Petitioner read water

meters using an electronic "gun." Mr. Barrett denied that Respondent asked Petitioner to use both hands while he was working on modified duty. Regarding the retirement offer, Mr. Barrett testified that in the fall of 2006, Respondent offered voluntary retirement to its senior employees in every department. To qualify, an employee had to be at least 50 years old, with at least 20 years of service. Employees younger than 55 had to purchase additional years of service credit. Employees were not penalized for not accepting early retirement. Petitioner elected to accept early retirement and paid approximately $ 15,000.00 to buy additional five years of service. Had Petitioner not retired, Respondent would have accommodated his restrictions. On cross-examination, Mr. Barrett testified that a retired worker could not "un-retire" and ask for light duty work. In support of Mr. Barrett's testimony, Respondent introduced into evidence [*41] Petitioner's timesheets from May through August of 2006, showing that Petitioner worked full-time during that time period. Further, Respondent introduced into evidence documents from the Illinois Municipal Retirement Fund corroborating Mr. Barrett's testimony and showing that Petitioner applied for early retirement on October 3, 2006.

The medical records and reports in evidence show that on March 15, 2006, prior to the work accident on April 6, 2006, Petitioner underwent an EMG/NCV on a referral from Dr. Elsner. Petitioner complained of numbness and tingling in the right digits three to five for the past couple of weeks and gave a history of six prior surgeries for carpal tunnel syndrome and scar tissue release. The EMG/NCV showed: severe right median sensorimotor neuropathy across the carpal tunnel, with electrodiagnostic evidence of extensive demyelination and axonal loss across the wrist; no electrodiagnostic evidence of right ulnar neuropathy; and slowing of right median nerve conduction velocity "most likely attributable to compression of fast conducting median motor nerve fibers across the wrist." A handwritten note on the EMG/NCV report states that Petitioner was referred to [*42] Dr. Durudogan. On April 4, 2006, Petitioner saw Dr. Durudogan. In the new patient questionnaire, Petitioner reported numbness in the right hand, and gave a history of striking his elbow on a concrete floor. In his clinical note, Dr. Durodogan noted that Petitioner was left hand dominant. Dr. Durudogan recorded the following history: "[The patient] admits to some 6 surgeries related to his right wrist. The patient has noted ulnar and median neuropraxia. He sustained a fall on his right elbow which acutely exacerbated his condition." On physical examination, Petitioner had mild ulnar and median atrophy "to motor branches to the right upper extremity," thenar atrophy related to the median nerve, and mild interosseous and first dorsal interosseous wasting indicative of ulnar nerve neuropraxia. Dr. Durudogan prescribed a nighttime extension splint for the right elbow, and physical therapy. He released Petitioner to return to work with no use of the right hand.

On April 7, 2006, Petitioner presented at Concentra with complaints of pain in his right medial elbow and numbness in his right little finger after striking his right elbow at work on April 6, 2006. On physical examination, he had [*43] tenderness in the medial epicondyle area. X-rays of the elbow were unremarkable. Dr. Ross diagnosed medial epicondylitis and ulnar neuritis, prescribed an elbow air cast, and released Petitioner to return to work full duty. On April 10, 2006, Petitioner reported improvement and stated that he had been working full duty. He complained of pain in the medial aspect of the elbow, described the pain as minimal and aching, and denied radiation. Physical examination findings remained unchanged. Dr. Ross continued to diagnose medial epicondylitis and ulnar neuritis, and kept Petitioner on full duty. On April 24, 2006, Petitioner followed up at Concentra and reported no pain or other symptoms. He further stated that he had been working full duty and not taking any medication. Physical examination was unremarkable. Dr. Ross discharged Petitioner from care.

In the meantime, on April 12, 2006, Petitioner began physical therapy at Southwest Hand Rehabilitation on a referral from Dr. Durudogan. The initial physical therapy note states the following history: "The patient was evaluated and treated today 2 weeks post work related injury which resulted in right median and ulnar nerve neuropraxia." [*44] Petitioner reported significant hypersensitivity to touch and pressure over the right carpal tunnel, explaining that he had had these symptoms since a childhood traumatic injury requiring multiple surgeries. The therapy focused on Petitioner's right elbow and wrist. On April 25, 2006, Petitioner followed up with Dr. Durudogan and reported considerable improvement with physical therapy. He complained of intermittent paresthesias in the ulnar and median nerve distributions. On physical examination, he had a full functional range of motion in the right arm, with a positive Tinel sign at the elbow. There was no evidence of thenar or hypothenar atrophy. Dr. Durudogan recommended continuing physical therapy. On June 6, 2006, Petitioner complained to Dr. Durudogan of worsening symptoms of right cubital tunnel syndrome and right carpal tunnel syndrome, and reported pain and paresthesias in the median and ulnar nerve distributions. On physical examination, the Tinel test was markedly positive at the wrist and elbow, and the Fallon test was markedly positive at the wrist. There was also evidence of early thenar atrophy. Dr. Durudogan recommended anterior ulnar nerve transposition and revision [*45] right carpal tunnel release. He restricted Petitioner's work duties to no use of the right hand. An EMG/NCV performed July 28, 2006, showed evidence of: right ulnar nerve compression neuropathy at the elbow; chronic right median nerve compression neuropathy at the wrist (carpal tunnel syndrome); and abnormally slow motor nerve conduction in the forearm segments of the right median and ulnar motor nerves, which "could be explained

by compromised large myelinated fibers at the wrist in case of median nerve and at the elbow in case of ulnar nerve." On August 1, 2006, Petitioner continued to complain of persistent pain and paresthesias in the median and ulnar nerve distributions, and Dr. Durudogan continued to recommend ulnar nerve transposition and carpal tunnel release surgeries.

On August 21, 2006, Dr. Durudogan performed an open right carpal tunnel release and a right anterior ulnar nerve transposition with sagittal sling and partial medial epicondylectomy. On August 29, 2006, he prescribed physical therapy. On September 19, 2006, Petitioner complained of significant, persistent pain and paresthesias in the ulnar and median nerve distributions, and stated that the pain worsened after [*46] the surgery. Dr. Durudogan continued physical therapy and released Petitioner to return to work with no use of the right hand. On October 20, 2006, Petitioner reported improvement. On physical examination, he had a positive Tinel sign at the elbow, with evidence of persistent neuropraxia. Dr. Durudogan kept Petitioner on one-handed duty. On December 7, 2006, Petitioner continued to demonstrate persistent ulnar neuropraxia, with muscle wasting and paresthesias in the ulnar and median nerve distributions. Dr. Durudogan continued physical therapy and Petitioner's work restrictions. On January 18, 2007, Dr. Durudogan stated that Petitioner's recovery from the carpal tunnel release surgery was going well; however, his ulnar neuropraxia continued to be problematic, with muscle atrophy and loss of motor function. Dr. Durudogan continued physical therapy and Petitioner's work restrictions. On March 1, 2007, Petitioner continued to complain of persistent ulnar paresthesias and motor dysfunction. On physical examination, the Tinel test was markedly positive at the elbow. Dr. Durudogan recommended a revision ulnar nerve release surgery, and continued physical therapy and Petitioner's work restrictions. [*47] Petitioner wanted to obtain a second opinion, and Dr. Durudogan referred him to Dr. Kalimuthu.

Petitioner consulted Dr. Kalimuthu, who recommended a repeat EMG. The EMG, performed March 26, 2007, showed severe right ulnar neuropathy, with deteriorating function, and persistent severe right median sensorimotor neuropathy across the carpal tunnel. On April 11, 2007, Petitioner was examined at Respondent's request by Dr. Tulipan, a hand surgeon. Dr. Tulipan had previously examined Petitioner in 2006. In a report dated August 28, 2006, Dr. Tulipan stated that he had compared the EMG/NCV findings from March 15, 2006, and July 28, 2006, and opined that the accident on April 6, 2006, could have produced a new ulnar nerve compression. Further, Dr. Tulipan opined: "The ulnar nerve problem *** does not appear to be related to the problem with the median nerve, which is chronic and dates back to [the patient's] childhood." Upon re-examining Petitioner, Dr. Tulipan recommended surgery to re-explore the ulnar nerve. On May 11, 2007, Dr. Tulipan performed the surgery and excised a large neuroma from the ulnar nerve, noting that the nerve was well transposed. However, "distal to the neuroma, the [*48] majority of the nerve fibers appeared to be atrophic and in fact were not visible. This made nerve grafting a concern in this individual. It was decided after neuroma excision to cover this with a Neurogen tube to hopefully preserve some comfort and then a decision will need to be made whether he wants to go ahead with nerve grafting *** or conversely if he would like to proceed with some sort of muscle transfer to try to restore function in his hand since he will clearly have relatively severe limitation." There are no postoperative medical records from Dr. Tulipan in evidence.

On January 17, 2008, Petitioner began treating with Dr. Howard, a pain management specialist, on a referral from Dr. Tulipan. Petitioner complained of considerable pain and numbness in his right arm and fourth and fifth fingers. Dr. Howard provided medical pain management and referred Petitioner to another provider for injections.

On September 18, 2008, Petitioner was examined at Respondent's request by Dr. Hoepfner, a hand and upper extremity surgeon. Petitioner complained of burning right medial elbow pain radiating to the hand, with inability to abduct/adduct fingers or extend the ring and small fingers, [*49] and numbness in the hand in the ulnar nerve distribution. On physical examination, the Tinel test was positive at the right medial epicondyle. There was obvious muscle wasting in the right forearm. The strength in the right wrist, hand and ring and small fingers was diminished. Dr. Hoepfner diagnosed persistent right upper extremity ulnar neuropathy and opined that Petitioner's prognosis for further recovery was guarded, explaining:

> "[The patient] has a very complex problem, involving multiple nerves in his right upper extremity. I do believe he suffered an ulnar nerve contusion at the time of his reported work injury in April 2006. He has now undergone two surgeries for persistent ulnar neuritis, and has muscular wasting of the intrinsic musculature of the right upper extremity, along with sensory dysfunction. Complicating this, he has also had a childhood injury to his right wrist that included a median nerve injury. This is chronic an unrelated to [his] reported work injury."

Dr. Hoepfner opined that Petitioner's right elbow neuropathy was related to the work accident on April 6, 2006, explaining that he compared the EMG/NCV study from March 15, 2006, to a subsequent study, [*50] and reviewed Petitioner's medical records. Dr. Hoepfner thought Petitioner was at maximum medical improvement with respect to

any intervention or treatment, other than pain management. Regarding permanent disability, Dr. Hoepfner opined that Petitioner was able to do "light, sedentary work with his right upper extremity. He appears to be capable of using his right hand as a light assist to his dominant left hand." Dr. Hoepfner qualified that Petitioner "will likely never be capable of full, unrestricted activity with his right upper extremity."

On April 23, 2009, Petitioner was examined at Respondent's request by Dr. Konowitz, a pain medicine specialist. Petitioner complained of right arm dysesthesias in the ulnar nerve distribution, with associated loss of muscle function and some wrist pain. Dr. Konowitz noted a history of two similar work-related injuries to the right elbow, which occurred in close time proximity. Dr. Konowitz opined that the ulnar neuropathy was the primary cause of Petitioner's symptoms, and scarring of the median nerve was the secondary cause of Petitioner's symptoms. He further opined that Petitioner had not yet reached maximum medical improvement, and recommended [*51] medication management and a possible injection. An ultrasound of the right elbow performed May 27, 2009, showed a "[v]ery significant recurrent post-operative ulnar nerve neuroma." On June 3, 2009, Dr. Konowitz noted that a recent EMG showed complete ulnar neuropraxia secondary to chronic severe ulnar neuropathy. Dr. Konowitz recommended pain medication and neurolytic block therapy. Thereafter, Dr. Konowitz assumed responsibility for Petitioner's pain management, and provided medication and injection therapy. An ultrasound of the right elbow and wrist performed October 28, 2009, showed very significant median and ulnar nerve entrapment. During the latter part of 2009, Petitioner's symptoms markedly improved with pain management. On March 31, 2010, Dr. Konowitz opined that Petitioner had reached maximum medical improvement, and stated that he planned to gradually wean Petitioner off the pain medication. During subsequent visits, Dr. Konowitz noted improved function.

Dr. Konowitz testified via evidence deposition on March 11, 2011, that he continued to provide pain management to Petitioner, whom he most recently saw on March 2, 2011. At that time, Petitioner reported significant improvement [*52] in his ulnar nerve symptoms after a neurolytic block, and his overall functioning had improved since April of 2009. Dr. Konowitz intended to continue weaning Petitioner off pain medication, but anticipated that Petitioner would need some "residual" pain medication. Dr. Konowitz noted that Petitioner's right arm and hand function was limited by both the underlying pathology and pain. Dr. Konowitz further noted that Petitioner was left hand dominant. The Arbitrator sustained Respondent's Ghere objection to Dr. Konowitz's testimony regarding Petitioner's ability to work.

Dr. Coe, an occupational medicine specialist who examined Petitioner at the request of his attorney on November 16, 2010, testified via evidence deposition on February 21, 2011. Petitioner complained to Dr. Coe of: pain and hypersensitivity in his right elbow, forearm and hand; numbness in his right fourth and fifth fingers; and weakness in the right hand. Petitioner also reported difficulty gripping with his right hand because of weakness and contractures in his right fourth and fifth fingers. Dr. Coe noted that Petitioner was left hand dominant. On physical examination, there was muscle atrophy in the right elbow, [*53] forearm and hand, and "a clawing deformity" of the fourth and fifth fingers, meaning Petitioner could not extend those fingers. Dr. Coe also noted hair loss, slight swelling and shininess in the fourth and fifth fingers, as well as slight swelling and shininess along the ulnar border of the hand. The findings were consistent with chronic neuropathic pain. Further, Petitioner had stiffness and a restricted range of motion in his elbow and wrist. Dr. Coe opined that the condition of the right arm and hand was permanent and causally connected to the work accident on April 6, 2006--indicating that he regarded the right hand and arm condition to be related to the ulnar nerve injury. Further, Dr. Coe opined that Petitioner was unable to work between October 31, 2006, and November 16, 2010, and Petitioner would not be employable in the future because "he really can't use his right arm for anything." On cross-examination, Dr. Coe testified that Petitioner's median nerve function "appears to be intact now," and did not play a role in Petitioner's disability. Dr. Coe conceded that Petitioner might be able to perform left-handed work, as long as he did not need to travel much, and his pain medications [*54] do not preclude his return to gainful employment.

Petitioner introduced into evidence a vocational assessment report dated June 20, 2011, from Edward Pagella, his vocational expert. Petitioner reported to Mr. Pagella persistent pain in his right hand and arm, and inability to drive long distances. He also stated that he had not looked for work, although he would like to work as a transportation safety security scanner. Mr. Pagella reviewed Petitioner's medical records and the evidence depositions of Dr. Konowitz and Dr. Coe, and opined, based on the deposition testimony, that Petitioner "would be unemployable." Mr. Pagella explained that prospective employers would consider Petitioner "a liability," and added: "Our economy is in such a recession that individuals who have college diplomas with no physical limitations are having a hard time finding work, let alone a 58 year old individual who only has a high school diploma and is only capable of performing one handed work."

Lastly, on August 3, 2011, Petitioner was examined at Respondent's request by Dr. Vender, a hand surgeon. Petitioner reported considerable improvement in pain and dysesthesia in the ulnar aspect of his right hand. [*55] However,

he continued to complain of abnormal sensation in the ulnar nerve distribution. He also complained of pain in the volar aspect of the wrist. Physical examination findings were as follows:

> "Range of motion [in the right elbow] is good. With full flexion, he notes a pulling sensation. The wrist area demonstrates scarring distal third volar forearm and extending into the proximal palm. Range of motion of the wrist is good though with some pain noted at extremes. Flexion of the fingers is normal. With full extension, there is normal range of motion of the thumb, index and middle fingers. The ring flexed at the IP and DIP joints actively. With passive extension, there is some improvement, though with a pulling sensation noted in the volar wrist. There is significant tenderness to touch in the distal third of the volar forearm and extending into the carpal tunnel. There is tenderness of the ring and small A1s, less so middle."

Dr. Vender noted that physical examination findings were consistent with Petitioner's complaints and the diagnosis of injury to the ulnar nerve. X-rays of the elbow showed postsurgical change at the medial epicondyle and calcified change in the medial [*56] soft tissues. X-rays of the wrist showed ulnar-positive variance and cystic change in the proximal ulnar corner of the lunate. Dr. Vender opined that Petitioner was at maximum medical improvement and "there are residuals in the way of the ulnar nerve abnormality and dysfunction." However, the median nerve appeared to function essentially normally. Dr. Vender did not think Petitioner's childhood traumatic wrist injury played a role in his symptoms. Dr. Vender felt Petitioner's medication use was appropriate. Regarding Petitioner's ability to work, Dr. Vender opined: "[The patient's] work activities with the involved right upper extremity would be limited. He has function of the right upper extremity. However, I put this more at a light level."

In support of the Arbitrator's decision regarding (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner contends that his condition of ill-being is causally connected to the work accident on April 6, 2006. Respondent concedes that Petitioner suffered work-related injuries to his right elbow on April 6, 2006, which led to two surgeries and extended conservative treatment. [*57] Further, Respondent agrees that Petitioner's "right elbow complaints" are related to the work accident. However, Respondent disputes that Petitioner's "carpal tunnel complaints" are related to the work accident, and attributes them to Petitioner's childhood injury.

Having carefully considered the entire record, the Arbitrator finds that the work accident on April 6, 2006, caused injuries to the ulnar nerve, but not the median nerve. Petitioner's treating and examining physicians agree that his condition of ill-being stems from ulnar nerve pathology. The Arbitrator finds that the symptoms and functional limitations for which Petitioner is seeking compensation are related to his ulnar nerve pathology and causally connected to the work accident on April 6, 2006.

In support of the Arbitrator's decision regarding (K), what temporary benefits are in dispute, the Arbitrator finds as follows:

Petitioner claims he was temporarily totally disabled from August 20, 2006, through the date of the arbitration hearing on November 14, 2011. Relying on *Schmidgall v. Industrial Comm'n, 268 Ill. App. 3d 845 (1994),* Petitioner contends he is entitled to temporary total [*58] disability benefits after October 31, 2006, because he was not at maximum medical improvement at the time of his retirement.

Respondent claims Petitioner is entitled to temporary total disability benefits only from August 21, 2006, through October 31, 2006, when he voluntarily retired. Respondent contends that Schmidgall is distinguishable. Relying on *Granite City v. Industrial Comm'n, 279 Ill. App. 3d 1087 (1996)* and *Land and Lakes Co. v. Industrial Comm'n, 359 Ill. App. 3d 582 (2005),* Respondent argues that the critical inquiry must center on whether the employee voluntarily removed himself from the workforce. Respondent asserts that Petitioner retired by choice, not because he needed income. Had Petitioner not retired, Respondent would have accommodated his restrictions. Respondent proposes that awarding temporary total disability benefits under these circumstances "would lead to the absurd conclusion that a worker can retire while on light duty and receive TTD benefits for the rest of [his] life."

In Schmidgall, the claimant began collecting Social Security retirement benefits while he was receiving temporary [*59] total disability benefits from the employer. The claimant had not been released to return to any type of work. The appellate court held the claimant was entitled to temporary total disability benefits until he reached maximum medical improvement, notwithstanding his contemporaneous receipt of Social Security retirement benefits.

In Granite City, the claimant, a police officer, was released to return to work on light duty and offered temporary light duty work. The claimant returned to work on light duty for a brief period of time before applying for a duty-related disability pension. The appellate court held the claimant was not entitled to temporary total disability benefits after his retirement, explaining: "The claimant was given light duty. He does not argue that his injury was not stabilized, that he was not released for light duty, or that he could not physically perform the light-duty assignment. Although the pension board may have eventually sought claimant's termination as a police officer, claimant was not entitled to anticipate that action by the board, terminate his employment when light-duty work was available to him, and still collect TTD benefits." *Granite City, 279 Ill. App. 3d at 1091.* [*60] Conversely, in Land and Lakes, the appellate court upheld an award of temporary total disability benefits because "there was competent evidence that claimant was unable to work and that he retired not by choice but because he needed income." *Land and Lakes, 359 Ill. App. 3d at 595.*

Neither party discusses the supreme court decision in *Interstate Scaffolding, Inc. v. Workers' Compensation Comm'n, 236 Ill. 2d 132 (2010),* which the Arbitrator believes is controlling. In Interstate Scaffolding, the employer terminated the claimant's employment for wrongful conduct unrelated to the work accident. At the time of the incident leading to the termination, the employee was working on light duty. The supreme court reversed the appellate court's decision denying temporary total disability benefits. The supreme court rejected the voluntary departure/volitional conduct inquiry employed by the appellate court, explaining: "Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for 'volitional [*61] conduct' unrelated to his injury." Rather, "when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable for returning to the work force. *** Benefits may *** be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor." *Interstate Scaffolding, 236 Ill. 2d at 146.* The supreme court interpreted Schmidgall and Granite City as holding that "the touchstone for determining whether the claimants were entitled to TTD benefits was not the voluntariness of their departure from the workforce ***. Rather, the touchstone was whether the claimants' condition had stabilized to the extent that they were able to reenter the work force." *Interstate Scaffolding, 236 Ill. 2d at 148.* The supreme court ultimately found the claimant was entitled to receive temporary total disability benefits following the termination of his employment (even though, but for the termination, the claimant presumably would have continued to work on [*62] light duty).

In the instant case, Petitioner applied for early retirement on October 3, 2006, while under a restriction of no use of the right hand. Petitioner's request to retire was granted, effective October 31, 2006. There is no evidence that after the surgery on August 21, 2006, and before the retirement, Respondent offered Petitioner light duty work, which Petitioner declined. Under these circumstances, the inquiry must center on whether Petitioner had reached maximum medical improvement. The record shows that Petitioner reached maximum medical improvement from the orthopedic standpoint by September 18, 2008, and from the pain management standpoint by March 31, 2010. The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from August 21, 2006, through March 31, 2010.

In support of the Arbitrator's decision regarding (L), what is the nature and extent of Petitioner's disability, the Arbitrator finds as follows:

Relying on the opinions of Dr. Coe and Mr. Pagella, Petitioner contends that he proved "odd-lot" permanent total disability. Respondent disagrees, asserts that Petitioner is able to work using his dominant, left hand, and points out [*63] that Petitioner had not applied for any jobs. Further, Respondent contends that Petitioner is not entitled to permanent total disability benefits because, had Petitioner not chosen to retire and move out of the Chicago area, Respondent would have accommodated his restrictions by assigning him to work as a meter reader.

The Arbitrator finds that Petitioner failed to prove "odd-lot" permanent total disability. Dr. Hoepfner, Dr. Coe and Dr. Vender opined that Petitioner could work using his left, dominant hand and with limited use of his right hand. Mr. Barrett testified that had Petitioner not retired, Respondent would have accommodated his restrictions. Petitioner admitted that Respondent had accommodated his one-handed restrictions from June 2006 until his surgery on August 21, 2006, and Respondent never indicated it would not accommodate his restrictions after the surgery. Petitioner further admitted that after retiring, he had not looked for work.

Having carefully considered the entire record, the Arbitrator finds that the injuries sustained caused loss of use of the right arm to the extent of 80 percent thereof.

In support of the Arbitrator's decision regarding (M), should penalties [*64] **or fees be imposed upon Respondent, the Arbitrator finds as follows:**

On July 7, 2011, Petitioner filed a petition for penalties under section 19(k) and attorney fees under section 16 of the Act, alleging that Respondent willfully, intentionally and vexatiously refused to pay temporary total disability benefits after October 31, 2006. In its response to the petition for penalties and attorney fees, Respondent asserted that it stopped paying temporary total disability benefits in good faith belief that no payment was due because Petitioner had voluntarily retired. During the arbitration hearing, Petitioner renewed his request for penalties under section 19(k) and attorney fees under section 16. Additionally, Petitioner seeks penalties under section 19(l) of the Act.

The Arbitrator finds that no penalties or attorney fees are warranted under the circumstances of the instant case. The denial of temporary total disability benefits pre-dated the supreme court decision in Interstate Scaffolding by more than three years, and Respondent's interpretation of the applicable case law at the time was not unreasonable.

2015 IL App (1st) 132609WC

Workers' Compensation
Commission Division
Opinion Filed: February 27, 2015

No. 1-13-2609WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THOMAS A. NEE,	)	Appeal from the Circuit Court
	)	of Cook County.
	)	
Appellant,	)	
	)	
v.	)	No. 12-L-51321
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Eileen O'Neil Burke,
(City of Chicago, Appellee).	)	Judge, Presiding.

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

OPINION

¶ 1 The claimant, Thomas A. Nee, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries he received while working for the City of Chicago (City). He now appeals from the circuit court order which confirmed the decision of the Illinois Workers' Compensation Commission (Commission) finding that he failed to prove that he sustained an injury which arose out of and in the course of his employment with the City. For the following reasons, we reverse

the judgment of the circuit court, reverse the decision of the Commission, and remand the cause to the Commission for further proceedings.

¶ 2 The following factual recitation is taken from the evidence adduced at the arbitration hearing.

¶ 3 At all times relevant, the claimant was a plumbing inspector in the employ of the City. His duties required him to travel throughout the City by car to inspect the plumbing in both residential and commercial buildings. The claimant testified that he reported to work each day at the filtration plant and received the day's inspection assignments. He inspected approximately five to seven sites each day, driving from location to location. The plaintiff contends, and the City admits, that he was a traveling employee.

¶ 4 The claimant testified that, on July 27, 2009, after finishing an inspection at 2007 North Sedgwick, he "tripped on a curb" and fell as he was walking back to his car to go to his next assignment. During the arbitration hearing, the claimant testified that he was not sure if the curb was level with the sidewalk, but he thought that it might have been higher. He was asked: "So you believe that the curb may have been higher than the sidewalk and that's where you tripped?". He responded: "Yes, I do." However, on cross-examination, the following exchange took place:

> "Q. On July 27, 2009, you stated that you don't really recollect the curb. Is that correct? Do you remember the street and the condition of the street in any way?"
>
> CLAIMANT: What I don't recollect is I didn't take a picture or even look, stare at the curb, to tell you if it was high or cracked. I don't know. I didn't take a look[;] all I know I tripped on it and I fell."

¶ 5 The claimant testified that, when he tripped, he twisted his knee and felt immediate pain. He stated that he reported the incident to his supervisor, Dan Nederbo, the City's Assistant Chief Plumbing Inspector, and that Nederbo directed him to go to Mercy Works, the City's occupational health clinic.

¶ 6 The claimant reported to Mercy Works, complaining of knee pain. The Mercy Works record of that visit reflects that the claimant gave a history of his injury which was consistent with his testimony at arbitration. The claimant was treated by Dr. Edward Bleier, who diagnosed him as suffering from an acute right-knee sprain. The claimant was given a knee brace and pain medication. He was advised to use ice packs at home and instructed to return to the clinic for follow-up treatment. Additionally, the claimant was restricted to only sit-down duties.

¶ 7 The claimant returned to Mercy Works on July 30, 2009, and August 6, 2009, as instructed. On each visit, he reported no improvement and complained of significant pain in his right knee.

¶ 8 On August 6, 2009, an MRI scan of the claimant's right knee was taken, revealing cartilaginous thinning in all three compartments.

¶ 9 The claimant next saw Dr. Bleier at Mercy Works on August 12, 2009. The doctor diagnosed an acute strain to the right knee with degenerative joint disease.

¶ 10 On August 14, 2009, the claimant sought treatment from Dr. Christopher Mahr, an orthopedic surgeon. The records of that visit reflect that the claimant gave a consistent history of having tripped at work, twisting his knee. Dr. Mahr diagnosed the claimant as suffering from a Grade I medial collateral ligament strain.

¶ 11 The claimant remained under the care of Dr. Mahr from August 2009 through November 2009. During that period, the claimant continued to complain of pain, and Dr. Mahr administered corticosteroid injections and a synovisc injection. When Dr. Mahr examined the claimant on October 22, 2009, he indicated that the claimant may be a candidate for a total knee arthroplasty in the future.

¶ 12 The claimant returned to Mercy Works on October 23, 2009, and November 3, 2009. Examinations of the claimant on those dates revealed tenderness at the medial joint line and limited flexion due to pain. The claimant was instructed to attempt to return to work on November 9, 2009.

¶ 13 The claimant returned to work on November 9, 2009, as instructed and continued working as a plumbing inspector for the City until his retirement on June 30, 2011.

¶ 14 At the arbitration hearing, the claimant testified that his right knee continues to bother him, especially when he climbs stairs, walks long distances, stands for long periods, squats, or uses a ladder. He stated that he uses ice packs, hot baths and ibuprofen for relief.

¶ 15 Following the hearing, the arbitrator found that the claimant suffered injuries as the result of an accident that arose out of and in the course of his employment with the City on July 27, 2009. The arbitrator awarded the claimant 14 5/7 weeks of temporary total disability (TTD) benefits and 16.125 weeks of permanent partial disability (PPD) benefits for the permanent loss of use of his right leg to the extent of 7.5%.

¶ 16 The City filed for a review of the arbitrator's decision before Commission. In a unanimous decision, the Commission reversed the arbitrator, finding that the claimant failed to prove that he sustained accidental injuries which arose out of and in the course of his

employment with the City. Consequently, the Commission denied the claimant benefits under the Act.

¶ 17 The claimant sought a judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 18 The claimant argues that the Commission's finding that he failed to prove that he sustained accidental injuries which arose out of and in the course of his employment with the City on July 27, 2009, is against the manifest weight of the evidence. We agree.

¶ 19 The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim, including proof that he suffered an accident which arose out of and in the course of his employment. 820 ILCS 305/2 (West 2008); *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (2011). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Whether an injury arose out of and in the course of a claimant's employment is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164 (2000). For a finding of fact to be against the manifest weight of the evidence, a conclusion opposite to the one reached by the Commission must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Although we are reluctant to disturb a factual determination made by the Commission, we will not hesitate to do

so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 Ill. App (3d) 110907WC, ¶ 10.

¶ 20 Injuries sustained at a place where a claimant might reasonably have been while performing his work duties are deemed to have been received in the course of his employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). In this case, it is undisputed that the claimant's injuries were sustained in the course of his employment with the City. He twisted his right knee when he tripped over a curb as he walked to his car to go to an inspection assignment. From the claimant's testimony, it is clear that the City was aware that he traveled to multiple inspection sites daily, driving by car from one to another. The City's protestations to the contrary notwithstanding, no reasonable argument can be made that the claimant's conduct in traversing a curb as he walked to his car was neither reasonable nor foreseeable. The only legitimate issue for analysis in this case is whether the claimant's injuries arose out of his employment.

¶ 21 For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment: (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007) (citing *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149, 162 (2000)).

¶ 22 In this case, the claimant tripped on a curb. There is no evidence in the record tending to show that the claimant suffered from some physical condition which caused him to fall. Nor is the risk associated with traversing a curb distinctly associated with employment as a plumbing inspector. Accordingly, the risk associated with his traversing a curb is neutral in nature. See *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014.

¶ 23 The determination of whether an injury suffered by a traveling employee, such as the claimant in this case, arose out of and in the course of his employment is governed by different rules than are applicable to other employees. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985). However, the fact that a claimant is a traveling employee does not relieve him of the burden of proving that his injury arose out of his employment. *Hoffman*, 109 Ill. 2d at 199.

¶ 24 Injuries resulting from a neutral risk, such as the injury here, do not arise out of the employment and are not compensable under the Act unless the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. The increased risk may be either qualitative, that is when some aspect of the employment contributes to the risk; or quantitative, such as when the employee is exposed to the risk more frequently than the general public. *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014.

¶ 25 Nothing in the record before us suggests that some aspect of the claimant's employment contributed to the risk of traversing a curb. Although there is evidence that the claimant carried a clipboard while performing plumbing inspections, there is no evidence that carrying a clipboard caused, or contributed to, his tripping on the curb. Further, there is nothing in this record to distinguish the curb on which the claimant tripped from any other curb. As noted earlier,

although the claimant testified that the curb may have been higher than the sidewalk, he readily admitted that he did not know. We are left then with the question of whether the claimant was exposed to the risk of tripping on a curb more frequently than the general public.

¶ 26 The risk of tripping on a curb is a risk to which the general public is exposed daily. Under the "street risk" doctrine, however, when, as in this case, the claimant's job requires him to travel the streets, the risks of the street become one of the risks of his employment. *Potenzo*, 378 Ill. App. 3d at 118 (citing *C.A. Dunham Co. v. Industrial Comm'n*, 16 Ill. 2d 102, 111 (1959); see also *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014-15. As our supreme court held in *C.A. Dunham Co.*, 16 Ill. 2d at 111, "where the street becomes the milieu of the employee's work, he is exposed to all street hazards to a greater degree than the general public."

¶ 27 No doubt curbs, and the risk attendant to traversing them, confront all members of the public. *Caterpillar Tractor Co.*, 129 Ill. 2d at 62. However, when a traveling employee, such as the claimant in this case, is exposed to the risk while working, he is presumed to have been exposed to a greater degree than the general public. *City of Chicago v. Industrial Comm'n*, 389 Ill. 592, 601 (1945); see also *C.A. Dunham Co.*, 16 Ill. 2d at 111; *Mlnarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App. (3rd) 120411WC; *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014-15.

¶ 28 Having been exposed to the risk of traversing a curb to a greater degree than a member of the general public by virtue of his status as a traveling employee at the time of his accident, the injury which the claimant suffered when he tripped over the curb was sustained not only in the course of his employment, it also arose out of his employment with the City.

¶ 29 The foregoing analysis leads us to conclude that the Commission's decision denying the claimant benefits under the Act by reason of his failure to prove that he sustained accidental injuries on July 27, 2009, which arose out of his employment with the City is against the manifest weight of the evidence. Consequently, we reverse the circuit court's judgment confirming the Commission's decision, reverse the Commission's decision, and remand this matter to the Commission for further proceedings consistent with this opinion.

¶ 30 Circuit court judgment reversed; Commission decision reversed; cause remanded to the Commission.

1 of 100 DOCUMENTS

THOMAS A. NEE, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO: 11WC 04864

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 994; 2012 Ill. Wrk. Comp. LEXIS 1035

September 13, 2012

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, and permanency, hereby reverses the Arbitrator's Decision and finds that Petitioner failed to prove that he sustained accidental injuries arising out his employment with Respondent on July 27, 2009.

The Commission notes that the court in *Metropolitan Water Reclamation Dist. Of Greater Chicago v. Illinois Workers' Compensation Commission, 407 Ill.App.3d 1010, 1013-1014 (2011),* explained that:

> "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989)*...The 'arising out of component refers to the origin or cause of the claimant's injury and requires [*2] that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co., 129 Ill. 2d at 58.* Courts have recognized three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n, 378 Ill. App. 3d 113, 116. 881 N.E.2d 523, 317 Ill. Dec. 355 (2007),* citing *Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162*...Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 163.* Such an increased risk [*3] may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Potenzo, 378 Ill. App. 3d at 117,* citing *Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000)* (Rakowski, J., specially concurring).

In reviewing the July 27, 2009 incident, the Commission finds that Petitioner did not establish that he was exposed to a risk not common to the general public. Petitioner testified that on July 27, 2009, he was returning to his car when he tripped on a curb, twisted his right knee, fell on his side, and struck his right knee on the ground. (T.23-24) Petitioner did not present any evidence indicating that the curb was defective or that he tripped on the curb due to a hazard in the curb.

As explained by the Illinois Supreme Court in *Caterpillar Tractor Co. v. Industrial Commission, 129 Ill.2d 52, 62 (1989),* "[c]urbs, and the [*4] risk inherent in traversing them, confront all members of the public." While the Commission acknowledges that Petitioner regularly confronted curbs due to his employment, the evidence does not indicate that Petitioner was exposed to curbs to a greater degree than the general public. Petitioner testified that his job entails inspecting plumbing systems both on public and private property, both indoors and outdoors. (T.10-11) However, Petitioner did not indicate that he was exposed to curbs to an extent that posed a danger to him more than the general public.

There is nothing on the record to distinguish the curb Petitioner encountered on July 27, 2009 from any other curb. And as noted above, the curb was not defective nor did Petitioner claim that his injury occurred due to a hazard created by the curb. Therefore, based on Petitioner's history of the accident and description of the location of the accident, the Commission finds that Petitioner was exposed to the neutral risk of traversing a non-defective curb on July 27, 2009. The Commission further finds that Petitioner was not exposed to this risk to a greater degree than the general public. Therefore, the Commission finds that Petitioner [*5] failed to establish that the injury he sustained on July 27, 2009 arose out of his employment with Respondent. Accordingly, we reverse the Decision of the Arbitrator and deny compensation.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator is reversed since Petitioner failed to prove he sustained an accidental injury arising out of his employment with Respondent, and, therefore, his claim for compensation is hereby denied.

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

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

ATTACHMENT:

ARBITRATION DECISION

Thomas Nee
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **11** WC **4864**

Consolidated cases: **08 WC 25779**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed [*6] to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **10/28/11 and 11/23/11.**. 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 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?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?

FINDINGS

On **July 27, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **91,549.12** [*7] ; the average weekly wage was $ **1760.56**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $ **17,429.60** for TTD, $ **0.00** for TPD, and $ **0.00** for maintenance benefits, for a total credit of $ **17,429.60**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **1,173.71**/week for **14-5/7** weeks, commencing **7/29/09** through **11/8/09**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ **664.72**/week for **16.125** weeks, because the injuries sustained caused the **complete and permanent loss of use of the right leg to the extent of 7.5% thereof.**

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.

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

Signature of Arbitrator

December 6, 2011

Date

Tom Nee,

Petitioner,

v.

City of Chicago,

Respondent.

11 WC 4864

MEMORANDUM OF DECISION OF ARBITRATOR

This decision relates to petitioner's right knee injury on **July 27, 2009**. A separate decision is being issued related to his left ankle injury, case no. 08 WC 25779.

FINDINGS OF FACT:

The Accident

Petitioner, Tom Nee, testified he worked for Respondent, The City of Chicago, for 33 years. For the last 10 years, he worked as a plumbing inspector. As an inspector, he was required to travel to different parts of the City of Chicago to inspect plumbing. He would drive himself between job sites and inspect multiple sites each day.

On July 27, 2009 he was working as an inspector. When walking back to his car to drive to another jobsite, he tripped [*9] over a curb and twisted his ankle. The curb was not level with the sidewalk.

Petitioner's Medical Treatment

Petitioner immediately reported his accident to his supervisor and was directed to seek treatment at the City of Chicago's occupational clinic, MercyWorks. Petitioner reported to MercyWorks the next day. (Pet. Ex. 1, p. 4). Nee gave a consistent history of tripping over a curb and twisting his right knee. He was given a knee support, medication and instructed to return to the clinic. (Pet. Ex. 1, p. 5). He was also given restricted duty of a sitting down job only.

Petitioner returned as instructed on July 30, 2009. At that time he reported no improvement and continued to complain of significant pain in the medial joint line. (Pet. Ex. 1, p. 5). An August 6, 2009 MRI demonstrated cartilaginous thinning in all three compartments. (Pet. Ex. 1, p. 24).

On August 14, 2009 Petitioner was seen by Dr. Christopher Mahr, an orthopedic surgeon. (Pet. Ex. 2, p. 4). Petitioner again gave a consistent history of tripping at work and twisting his knee. (Pet. Ex. 2, p. 4). Dr. Mahr diagnosed Petitioner with a Grade I medial collateral ligament strain, fitted him with a hinged knee [*10] brace and instructed him to perform range of motion exercises. (Pet. Ex. 2, p. 4). Dr. Mahr also took Petitioner off work.

Petitioner returned to Dr. Mahr on August 28, 2009 with continued pain complaints. (Pet. Ex. 2, p. 5). On September 11, 2009, Petitioner was again seen by Dr. Mahr. Dr. Mahr gave Petitioner a corticosteroid injection and prescribed physical therapy. (Pet. Ex. 2, p. 5). Petitioner was again seen by Dr. Mahr on October 8, 2009 and continued to complain of pain, especially when using stairs. He was given another coritcosteroid injection and was prescribed additional therapy. (Pet. Ex. 2, p. 6).

Dr. Mahr next examined Petitioner on October 22, 2009. At that time, Dr. Mahr indicated Petitioner may be a candidate for a total knee arthroplasty in the future. (Pet. Ex. 2, p. 7).

Petitioner returned as instructed to MercyWorks on October 23, 2009. The City's doctor's exam revealed tenderness at the medial joint line and limited flexion due to pain. (Pet. Ex. 1, p. 7). Petitioner was advised to discontinue physical therapy "due to lack of progress." (Pet. Ex. 1, p. 7).

The MercyWorks physician again examined Petitioner on November 3, 2009. His exam revealed "persistent pain [*11] and tenderness medial joint line." (Pet. Ex. 1, p. 7). He was instructed to attempt to return to work on November 9, 2009.

On November 5, 2009, Petitioner was given a synvisc injection by Dr. Mahr. (Pet. Ex. 2, p. 7).

Petitioner's Current Condition

Petitioner returned to work as instructed on November 9, 2009. He continued to work as an inspector from that time until June 30, 2011 when he retired.

Petitioner testified that his right knee continues to bother him. Specifically, he has problems with stairs, walking long distances, using ladders or squatting. He cannot stand for long periods of time. He uses ice packs, hot baths and Ibprofen because of his right knee.

The Arbitrator finds all of Petitioner's testimony to be credible.

CONCLUSIONS OF LAW:

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

The Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment. For an injury to arise out of the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental [*12] injury. The Arbitrator finds that Petitioner was exposed to an increased risk under the facts of the incident of July 27, 2009.

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

The Arbitrator finds that Petitioner's current r4ight knee condition is causally related to the accident of July 27, 2009, based on the chain of treatment set forth in the medical records.

K What is the extent of Petitioner's temporary total disability?

The parties agreed that Petitioner was temporary totally disabled from July 29, 2009 through November 8, 2009 and Respondent only disputed this period on liability. Based on the findings regarding accident and causation, the Arbitrator finds that Respondent is liable for this period of temporary total disability, which represents a correctly calculated period of 14-5/7 weeks. Respondent requested a credit for payment of this period, which is moot due to the finding on this issue.

L. What is the nature and extent of injury?

As a result of his accident, Petitioner was diagnosed with a right knee Grade I medial collateral ligament strain. He underwent seven (7) weeks of physical therapy, received two [*13] (2) corticosteroid injections and a synvisc injection. Therapy was discontinued "due to lack of progress." (Pet. Ex. 1, p. 7). Dr. Mahr indicated Petitioner is a candidate for future surgical intervention. The final examination by the MercyWorks physician revealed "persistent pain and tenderness medial joint line." (Pet. Ex. 1, p. 7).

The Petitioner testified his right knee continues to bother him. Specifically, he has problems with stairs, walking long distances, using ladders and squatting. He cannot stand for long periods of time. He uses ice packs, hot baths and Ibuprofen because of his right knee. The Arbitrator finds the Petitioner's testimony to be credible.

Based on the above, and after reviewing the entire record, the Arbitrator finds that Petitioner permanently lost 7.5% of the use of his right leg under section 8(e) of the Act.

Legal Topics:

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