Illinois Official Reports

Appellate Court

***Lenhart v. Illinois Workers' Compensation Comm'n*,**
2015 IL App (3d) 130743WC

Appellate Court Caption	KENNETH LENHART, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (USF Holland, Appellee).
District & No.	Third District Docket No. 3-13-0743WC
Filed	March 20, 2015
Decision Under Review	Appeal from the Circuit Court of Will County, No. 12-MR-1596; the Hon. Theodore Jarz, Judge, presiding.
Judgment	Reversed in part, affirmed in part, cause remanded.
Counsel on Appeal	David W. Olivero, of Louis E. Olivero & Associates, of Peru, for appellant. John Campbell, of Keefe, Campbell & Associates, LLC, of Chicago, for appellee.

Panel

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

OPINION

¶ 1 The claimant in a workers' compensation case, Kenneth Lenhart, appeals a finding by the Illinois Workers' Compensation Commission (the Commission) that he failed to prove that he is permanently and totally disabled because of a workplace accident. Alternatively, he argues that the Commission erred in failing to determine whether he was entitled to a permanent partial disability (PPD) benefit award based on a wage differential calculation, rather than a percentage of a person as a whole award. For the following reasons, we agree with the latter argument, reverse the Commission's PPD award, and remand for a determination of whether the claimant is entitled to a PPD award based on a wage differential calculation.

¶ 2 BACKGROUND

¶ 3 The claimant worked for the employer, USF Holland, as a dockworker and truck driver. In December 2004, the claimant injured his low back in a workplace accident, underwent a course of medical treatments, and filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)).

¶ 4 At the arbitration hearing, the parties disputed the extent of the claimant's injuries. The claimant presented evidence, including medical opinions from his treating physicians, in an attempt to show that he is permanently and totally disabled. The employer does not dispute that the claimant sustained a workplace accident, that he suffered conditions of ill-being to his back because of the accident, or that he can no longer perform the same physical demand level as a result of the accident. The employer stipulated that the claimant cannot meet the physical demands of a dockworker/truck driver as a result of his accident, but disputed the claimant's assertion that he is totally and permanently disabled. The employer presented evidence and opinions that the claimant exaggerated his physical limitations. The employer's evidence included videotape surveillance evidence showing the claimant engaged in various physical activities since the accident.

¶ 5 The claimant's workplace accident occurred on December 14, 2004, when he drove a forklift over a dock plate that buckled. The accident caused a jarring force to his low back. The claimant immediately experienced low back pain, which became worse over the next few days. He testified that prior to this accident, he was in good health. After the accident, the claimant underwent a significant amount of medical treatments, including injections, physical therapy, and two back surgeries, because of continuous low back pain. In addition, the claimant underwent multiple independent medical examinations (IMEs).

¶ 6 The record on appeal includes the surveillance video footage that the employer obtained and spanned an approximate three-year period from October 2007 through October 2009. The surveillance video footage showed the claimant engaged in numerous physical activities,

including riding a motorcycle, attending football games, yard work, and some lifting and bending activities.

¶ 7 One of the claimant's treating physicians, Dr. George DePhillips, concluded that the claimant was permanently and totally disabled from work even after viewing some of the surveillance videos. During his evidence deposition, Dr. DePhillips explained that the claimant could obviously perform some work, "but the question is, how many hours a day and what are his restrictions, and at some point a patient has restrictions that deem them unemployable." He admitted that he based his opinions about the claimant's restrictions, in part, on the claimant's subjective reporting of his condition.

¶ 8 The claimant's psychiatrist, Dr. Greg Hawley, diagnosed the claimant as having chronic pain disorder secondary to low back pain along with depression and impulse control disorder. Dr. Hawley believed that the claimant's conditions were causally related to the workplace accident.

¶ 9 At the request of the employer, Dr. Fransisco Espinosa conducted an IME of the claimant in January 2008, and he found that the claimant was at maximum medical improvement (MMI) at that time. He believed that the claimant was ready to work and could occasionally lift up to 25 pounds, could occasionally sit, and must avoid bending and twisting at the waist. In his opinion, these were permanent restrictions. Dr. Espinosa viewed some of the video surveillance of the claimant performing yard work on several occasions, and opined that the activities in the video did not "correlate with his alleged current symptoms." The doctor concluded that the claimant was capable of performing light- to medium-level work.

¶ 10 At the request of the employer, a clinical psychologist, Ronald Gahellen, also performed an IME. Gahellen examined the claimant, reviewed the claimant's medical records, and administered a number of objective tests to measure his personality, intellectual functioning, and emotional functioning. Gahellen concluded that during his examination, the claimant "responded in a guarded, self-favorable manner and made an effort to control the impression formed of him." He believed that the claimant's condition involved "a significant psychological component" and that the claimant "appeared invested in remaining in a role as an invalid due to medical problems." Gahellen also noted that the surveillance tapes that he reviewed showed the claimant "interacting in a comfortable, natural manner with other people." This raised a concern with Gahellen that the claimant's self-reported "limitations in functioning may be misleading and exaggerated."

¶ 11 The claimant underwent a functional capacity evaluation (FCE) in April 2009, which showed that the claimant could work at the "Very Light" physical demand level. He underwent a second FCE over a two-day period in May 2009. This FCE determined that the claimant could perform at the sedentary level with occasional lifting up to 15 pounds, walking limited to 10 minutes, and standing 30 minutes. The therapist commented that the claimant "demonstrated significant inconsistency of postural restriction and movement patterns throughout the course of the evaluation." He believed that the claimant had significant nonorganic components to his level of pain and disability.

¶ 12 During the course of the claimant's medical treatments, the employer hired a vocational rehabilitation company, E.P.S. Rehabilitation, which performs vocational rehabilitation services. E.P.S. Rehabilitation performed a "Limited Telephonic Employer Sampling" of 16 businesses from the claimant's general area. A vocational rehabilitation counselor at E.P.S. Rehabilitation, Duane Bigelow, testified in an evidence deposition that the sampling is only a

snapshot of employment opportunities, which may or may not be available at a point in time. Two of the sixteen businesses included in the sampling reported job openings, and both openings were for service/parts managers. One opening required lifting 30 to 40 pounds, and the other position required alternate sitting and standing all day.

¶ 13 The claimant hired his own vocational specialist, Ron Malik, who opined that the two jobs available in E.P.S. Rehabilitation's sampling were outside the claimant's physical limitations. He also opined that if the claimant was released to work, he needed to work at the light physical demand level with no significant postural functions such as bending, stooping, crouching, or crawling. According to Malik, the claimant required a job with low stress, simple and repetitive tasks, and limited contact with the public, coworkers, and supervisors. Malik concluded that the claimant was unemployable without education and/or training for a new career.

¶ 14 On June 15, 2009, Bigelow began assisting the claimant with a self-directed job search. In July 2009, upon Bigelow's recommendation, the employer approved an introductory computer class for the claimant. The claimant subsequently took two eight-week computer courses and received passing grades in both classes.

¶ 15 Another vocational rehabilitation counselor from E.P.S. Rehabilitation, Edward P. Steffan, testified that he believed that the claimant was employable in the current labor market within his restrictions. When asked to explain his opinion, he testified as follows: "His rehabilitation variables, which we describe as his age, which is approximately 40 years, his available physical capabilities as we've discussed, his level of education, his training, his previous experience and acquired skills and knowledge allow him access to a readily available and stable labor market at positions in which he could earn between $10 and $15 per hour." He opined that the top-earning capacity for the claimant was $33.65 per hour, but that he did not want to say that the claimant would be employable between $15 and $33.65 per hour because "that could be somewhat misleading."

¶ 16 During his deposition testimony, Bigelow testified that they established a broader range of $8 to $33.65 per hour as the claimant's earning potential based on a "snapshot" of the labor market at a particular time. However, he believed that "the more likely median" would be the $10 to $15 range. Likewise, Steffan testified that $10 to $15 per hour was the "median or mean extracted from" the larger range of $8 and $33.65 per hour. He was "confident" that $10 to $15 per hour was "a very realistic and achievable wage for [the claimant]." A report dated January 27, 2010, and signed by both Steffan and Bigelow stated that the claimant "is both placeable and employable in positions earning between $10.00 and $15.00 per hour."

¶ 17 Steffan testified that during the time that he assisted with the claimant's job search, the claimant told potential employers "inappropriate information regarding his available physical capabilities" which resulted in "sabotaging" any realistic chance of being considered as a valid applicant for employment. He believed that an individual who in good faith was trying to gain employment would not make these types of comments to potential employers.

¶ 18 At the conclusion of the arbitration hearing, the arbitrator found that the claimant's conditions of ill-being, including the condition of his low back and his mood disorder and depression, were causally related to the workplace accident. The arbitrator awarded the claimant medical expenses and TTD benefits.

¶ 19 With respect to the nature and extent of the claimant's injury, the arbitrator found that the claimant proved that he was permanently and totally disabled (PTD) as a result of the

work-related accident under an odd-lot theory. The employer appealed the arbitrator's decision to the Commission.

¶ 20 In its brief on review filed with the Commission, the employer asked the Commission to reverse the arbitrator's PTD benefits award and "enter judgment awarding [the claimant] wage differential benefits based upon the $30 per hour jobs Mr. Steffan testified [the claimant] would be currently capable of earning." The claimant did not argue that he was entitled to a PPD award based on a wage differential calculation, but instead requested the Commission to affirm the arbitrator's PTD award.

¶ 21 The Commission reversed the arbitrator's PTD award and modified the arbitrator's award with respect to the nature and extent of the claimant's injury. It affirmed and adopted all other aspects of the arbitrator's decision. The Commission unanimously found that the claimant failed to prove that he was permanently and totally disabled. The Commission noted that the record contains medical opinions that the claimant was unable to work, but it found that those opinions were contradicted by the surveillance videos "showing [the claimant] to be far more physically and mentally capable than his treating physicians were led to believe."

¶ 22 The Commission found that Dr. DePhillips's opinion that the claimant was permanently and totally disabled was unreliable in light of the surveillance footage, which was "counter to Dr. DePhillips's understanding of [the claimant's] capabilities." The Commission also noted that the claimant's psychiatrist, Dr. Hawley, reviewed some of the surveillance video and admitted that the claimant appeared significantly more mobile in the video footage than he was in his office and engaged in more social interaction than what the claimant reported being able to do.

¶ 23 The Commission concluded that the claimant exaggerated his functional incapacity to his treating physicians. It found that the most reliable medical opinions were the opinions of the employer's IME doctor, Dr. Espinosa, who concluded that the claimant could return to work with a 25-pound lifting restriction at the light end of the light-medium demand level. The Commission also relied on the report of the employer's IME psychologist, Gahellen, who administered a number of tests that indicated that the claimant was exaggerating his functional limitations. The Commission noted that Gahellen testified that the surveillance footage undermined the claimant's subjective reports of his capabilities.

¶ 24 The Commission found the claimant's testimony to be unreliable and that expert opinions based on the claimant's subjective reporting of his capabilities were, likewise, unreliable. The Commission stated:

> "We find it likely that [the claimant] is readily capable of pursuing additional training and job searching. While we note that the job search logs show that [the claimant] contacted a large number of potential employers, we also note numerous days when [the claimant] reported being in too much pain to pursue his job search. We note that [the claimant] focused a significant amount of time and energy on defending himself against perceived attacks from Mr. Steffan and [the employer]. After reviewing the evidence, particularly the surveillance footage, we find the discrepancy between what [the claimant] claims to be capable of doing and what he is actually capable of doing is vast, and therefore we decline to find that he is permanently and totally disabled under an odd lot theory."

¶ 25 The Commission noted that the claimant had a 25-pound lifting restriction and exhibited some difficulties obtaining work within his restrictions. As noted above, in its brief on

review, the employer requested the Commission to enter a wage differential award. The Commission, however, did not analyze whether the claimant was entitled to receive a wage differential award, but instead concluded that the claimant was "entitled to permanent partial disability benefits representing 75% loss of use of the whole person."

¶ 26 The claimant appealed the Commission's decision to the circuit court. The circuit court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment and raises two alternative issues on appeal. First, the claimant argues that the Commission's finding that he failed to prove that he was entitled to PTD benefits was against the manifest weight of the evidence. Second, the claimant advances an alternative argument that the Commission erred in failing to consider his right to receive PPD benefits based on a wage differential award.

¶ 27 ANALYSIS

¶ 28 I

¶ 29 Nature and Extent of Injury: Odd-Lot Theory

¶ 30 The first issue that the claimant raises on appeal is that the Commission's finding that he failed to prove that he was permanently and totally disabled pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2012)), under an odd-lot theory, was against the manifest weight of the evidence. The record, however, supports the Commission's finding that the claimant failed to prove that he was permanently and totally disabled under an odd-lot theory.

¶ 31 The claimant has the burden of establishing the nature and extent of his injury by a preponderance of the evidence. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770, 776 (1994). This is a factual question to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607, 608 (1980). Accordingly, the initial determination of whether a claimant is permanently and totally disabled under section 8(f) of the Act is a question of fact to be determined by the Commission, and its determination on this issue cannot be overturned on review unless it is against the manifest weight of the evidence. *Economy Packing Co. v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 283, 293, 901 N.E.2d 915, 924 (2008). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009).

¶ 32 An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845 (1983). Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "The focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability ***." *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534, 668 N.E.2d 21, 24 (1996). A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 176, 427 N.E.2d 103, 107 (1981).

¶ 33 As noted above, the issue the claimant raises on appeal concerns whether he established that he is permanently and totally disabled under the odd-lot category. The odd-lot category for purposes of a PTD award arises when a "claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159, 1163 (1981). In these situations, the claimant can establish that he is entitled to PTD benefits under the odd-lot category by proving the unavailability of employment to persons in his circumstances. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204, 904 N.E.2d 1122, 1133 (2009).

¶ 34 "The claimant ordinarily satisfies his burden of proving that he falls into the 'odd lot' category 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*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357. If the claimant establishes that he fits into the 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.*

¶ 35 In the present case, the Commission viewed the surveillance videos and detailed its findings based on the contents of the video footage. We have also viewed the surveillance videos and conclude that the videos support the Commission's findings with respect to their content. In assessing the claimant's credibility with respect to his capabilities, the Commission compared the claimant's self-reported limitations with the activities depicted in the surveillance videos. The Commission concluded that the claimant's activities shown in the videos were not "the activities of a man who is unable to stand or sit without great pain." The Commission found that the claimant significantly exaggerated his reporting of the extent of his injury and that he was not credible. The assessment of the claimant's credibility and the weight to be given to his testimony lies solely within the province of the Commission. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 184, 759 N.E.2d 979, 984 (2001).

¶ 36 Moreover, the Commission's finding with respect to the claimant's testimony was significant because, as the Commission found, much of the medical opinion testimony that the claimant relied on to meet his burden was based on his own subjective reporting of his capabilities to his medical providers. The Commission found the opinion testimony of Dr. DePhillips to be "unreliable" because the claimant's activities that he performed "in the surveillance videos runs counter to Dr. DePhillips's understanding of the claimant's disabilities." In addition, the Commission found it significant that after the claimant's treating psychiatrist, Dr. Hawley, viewed some of the surveillance video, he opined that the claimant appeared to be more mobile in the video than he was in his office. In addition, Dr. Hawley noted that the claimant engaged in social interaction more than he reported being able to do.

¶ 37 The Commission weighed the conflicting medical opinions and concluded that the opinions of Dr. Espinosa and the employer's psychologist, Gahellen, were the most reliable. Nothing in the record compels us to second-guess the Commission's assessment of this medical testimony. After viewing the surveillance video, Dr. Espinosa concluded that the claimant could return to work with a 25-pound lifting restriction at the light end of the light-medium demand level.

¶ 38 The surveillance videos support the Commission's finding with respect to its resolution of the conflicting medical opinions and its determination that the claimant failed to prove that he was permanently and totally disabled. Therefore, we affirm that portion of the circuit court's judgment that confirmed the Commission's denial of PTD benefits.

¶ 39 II

¶ 40 Calculation of PPD Benefits: Wage Differential

¶ 41 The claimant argues, alternatively, that the Commission erred in calculating his PPD benefits based on a percentage of the person as a whole rather than a wage differential calculation. We render no opinion on whether the claimant is entitled to a wage differential award; however, we believe that the Commission erred in failing to decide the issue on the merits. The employer raised the question of whether the claimant should receive a wage differential by arguing the issue in its brief before the Commission. In addition, it is an issue that appears from the evidence of record.

¶ 42 Section 8 of the Act governs the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." 820 ILCS 305/8 (West 2012). Section 8(d) details two types of compensation for employees who are permanently and partially disabled; subparagraph (1) provides for a wage differential award and subparagraph (2) provides for a percentage of the person as a whole award. 820 ILCS 305/8(d) (West 2012); *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 585, 888 N.E.2d 135, 138 (2008).

¶ 43 The supreme court has expressed a preference for wage differential awards. See *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487 (2000) (citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 674 (1982)). The supreme court explained that "[i]t is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage partial loss of use." *General Electric Co.*, 89 Ill. 2d at 437, 433 N.E.2d at 673-74. In *Gallianetti*, we held that "the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti*, 315 Ill. App. 3d at 728, 734 N.E.2d at 488.

¶ 44 In order to qualify for a wage differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment in earnings. *Id.* at 730, 734 N.E.2d at 489. The purpose of a wage differential award is "to compensate an injured claimant for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation." *Dawson*, 382 Ill. App. 3d at 586, 888 N.E.2d at 139. "A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment." (Internal quotation marks omitted.) *Id.*

¶ 45 Ordinarily, the issue of whether a claimant is entitled to a wage differential award is a question of fact for the Commission to determine, and its decision in the matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* However, we

review issues of statutory construction under the *de novo* standard of review. *Curtis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120976WC, ¶ 13, 987 N.E.2d 407.

¶ 46 In the present case, the employer stipulated that the claimant could no longer meet the physical demands of his usual and customary line of employment as a dockworker/truck driver. Also, the employer's medical expert, Dr. Espinosa, opined that the claimant could return to work with a 25-pound lifting restriction at the light end of the light-medium demand level, and the Commission found Dr. Espinosa's opinion to be credible. Therefore, the record conclusively establishes the first requirement for a wage differential award.

¶ 47 With respect to the second requirement, reduced earning capacity, the employer's vocational rehabilitation experts, Steffan and Bigelow, opined that there was a readily available and stable labor market in which the claimant could obtain positions earning between $10 and $15 per hour.

¶ 48 The evidence in the record, therefore, supports a finding that the claimant was entitled to a wage differential award, *i.e.*, that he suffered a partial incapacity which prevents him from pursuing his usual and customary line of employment and that he has an impairment in earnings. The Commission, however, did not consider a wage differential award under section 8(d)(1), but instead awarded PPD benefits under section 8(d)(2). When the record establishes that an employee has suffered an impairment of earning capacity, section 8(d)(2) comes into play only when "the employee *elects to waive his right to recover* under *** subparagraph 1." (Emphasis added.) 820 ILCS 305/8(d)(2) (West 2012); *Gallianetti*, 315 Ill. App. 3d at 729, 734 N.E.2d at 488. Nothing in the record suggests that the claimant explicitly elected to waive his right to recover a wage differential award under section 8(d)(1).

¶ 49 Although the claimant did not request a wage differential award, we do not consider this a waiver of his right to recover a wage differential award. The claimant made no election concerning PPD benefits because he sought PTD benefits. The Commission should not consider the claimant's request for PTD to be an election with respect to unrequested PPD benefits, particularly when the employer itself asked the Commission to grant a wage differential award and when the record supports a wage differential award. As noted by the supreme court, a wage differential award is "often easier to calculate" than "a percentage partial loss of use." *General Electric Co.*, 89 Ill. 2d at 437, 433 N.E.2d at 673-74.

¶ 50 Furthermore, section 19(e) of the Act provides that the Commission shall "review the decision of the Arbitrator and all questions of law or fact which appear from the statement of facts or transcript of evidence." 820 ILCS 305/19(e) (West 2012). In the present case, the record shows that the claimant is functionally incapacitated and that his incapacitation resulted in a loss of earning capacity. Therefore, we believe that the question of the claimant's entitlement to an award under section 8(d)(1) appears from the evidence of record in this case and that the Commission erred in failing to consider a wage differential award.

¶ 51 The Commission found that the claimant carried his burden of showing his incapacitation. Also, the parties stipulated to the amount the claimant was earning at the time of his injury; the parties' request for a hearing included an agreement that the claimant's average weekly wage during the year preceding the injury was $1,339.66. The employer's vocational experts, in turn, supplied evidence that the claimant's post accident earning capacity was in the range of $10 to $15 per hour. See *Levato v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶ 28, 14 N.E.3d 1195 (in reversing the Commission's failure to consider a wage differential award, the court noted that "[o]n the

issue of earnings impairment, the Commission fixed the claimant's average weekly wage at $1,145.35, and [the employer's] own witness[ ] fixed the pay for positions appropriate for the claimant's present condition between $8 and $20 per hour").

¶ 52 We have previously held that if a claimant fails to present evidence regarding his entitlement to a wage differential award, then he implicitly waives his right to such an award. *Gallianetti*, 315 Ill. App. 3d at 729, 743 N.E.2d at 488. The present case is distinguishable, however, because even though the claimant did not pursue PPD benefits, the record, nonetheless, contains evidence relevant to the claimant's entitlement to a wage differential award. In addition, nothing in the record suggests that the claimant's request for PTD benefits should be construed as an election, express or implied, with respect to his rights to PPD benefits. In cases where a claimant unsuccessfully seeks PTD benefits and does not make an alternative request for PPD benefits, the claimant is still entitled to PPD benefits when the evidence supports such an award. Likewise, in such cases, we believe that the Commission is obligated to consider a wage differential award when there is evidence in the record that could support a wage differential award (regardless of which party presented the evidence), and when nothing in the record suggests that the claimant elected to waive his right to recover such an award.

¶ 53 Accordingly, we reverse that portion of the circuit court's judgment that confirmed the Commission's award of PPD benefits for 75% loss of the use of the person as a whole, vacate the Commission's PPD award, and remand the matter to the Commission with directions to decide the claimant's entitlement to a wage differential award on the merits. "In the event that Commission determines that the claimant is entitled to a wage differential award, it should make the award. If, on the other hand, the Commission decides that he is not entitled to a wage differential [a]ward under section 8(d)(1) of the Act, it is directed to reinstate its award of PPD benefits for [75]% loss of use of a person as a whole under section 8(d)(2)." *Levato*, 2014 IL App (1st) 130297WC, ¶ 30, 14 N.E.3d 1195.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, we reverse that portion of the circuit court's judgment which confirmed the Commission's award of PPD benefits of 75% loss of use of a person as a whole, affirm the circuit court's judgment in all other respects, vacate that portion of the Commission's decision which awarded the claimant PPD benefits pursuant to section 8(d)(2) of the Act, and remand this matter to the Commission with directions.

¶ 56 Reversed in part, affirmed in part, cause remanded.

2 of 100 DOCUMENTS

KENNETH LENHART, PETITIONER, v. USF HOLLAND, RESPONDENT.

NO: 05WC 04674

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

12 IWCC 672; 2012 Ill. Wrk. Comp. LEXIS 795

July 19, 2012

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

OPINION: [*1]

[EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT.]

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical, temporary total disability benefits, the nature and extent of the injury, and Petitioner's entitlement to mileage reimbursement, and being advised of the facts and law, modifies the Decision of the Arbitrator with regard to the nature and extent of the injury as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner failed to prove that he is permanently and totally disabled. We therefore modify the Arbitrator's nature and extent award, and find that Petitioner is entitled to $ 893.11 per week for a period of 375 weeks because the injuries sustained caused the loss of use of 75% of the whole person.

We find that Petitioner failed to prove that he is medically permanently [*2] and totally disabled. Although the record contains medical opinions that Petitioner is medically unable to work, we find these opinions to be contradicted by the surveillance footage showing Petitioner to be far more physically and mentally capable than his treating physicians were led to believe.

At the hearing, Respondent submitted into evidence three surveillance videos recorded by a private investigator. The first video contains footage recorded on October 4, 2007, October 5, 2007, and October 23, 2007. On October 4, 2007, Petitioner attended a homecoming parade and pep rally. On October 5, Petitioner attended a football game. Although Petitioner appeared to have a difficult time climbing the bleacher stairs, he was able to sit on the bleachers for the duration of the game. He occasionally clapped and stomped his feet and he spent time talking to people around him.

The second video contains footage from April 28, 2008, April 30, 2008, September 19, 2008, and September 21, 2008. The April 2008 footage captured Petitioner driving his car and attending a medical examination in Chicago. On September 19, 2008, Petitioner attended a football game and can be seen standing, walking, talking [*3] to people, and leaning on a fence. We note that Petitioner walked with a slight limp. On September 21, 2008, Petitioner attended a group motorcycle ride. He can be seen interacting with people prior to the start of the ride. While sitting astride his motorcycle, Petitioner engaged in jerky, full-body movements.

The third video contains footage from October 3, 2009, and October 4, 2009. On October 3, 2009, Petitioner attended a football game. He can be seen moving without difficulty, talking to numerous people, and standing and watch-

ing the game from the sidelines. Later, the footage shows Petitioner working on a truck engine. He bends over the engine, lies on a creeper on the ground to work under the truck, and kneels next to the truck. His son helps him stand, after which he appears to be walking stiffly. On October 4, 2009, Petitioner attends another football game. He walks throughout the bleachers and appears to be moving without difficulty.

Respondent also submitted into evidence video footage recorded by Petitioner's neighbor. On this series of videos, Petitioner can be seen using a leaf blower and a leaf vacuum, pushing a lawn mower, shoveling snow, and riding his motorcycle, [*4] all without any apparent difficulty. In one video, Petitioner stands next to a ditch being dug in the neighbor's yard. Petitioner bends over to pick up large pieces of wood without any difficulty. He walks without limping. He uses a rake to rake the dirt and is able to bend over, pick up debris, and throw it into a truck with ease.

The surveillance footage detailed above contradicts the medical opinions that Petitioner is medical permanently and totally disabled. Without having seen the surveillance footage, Petitioner's treating physician, Dr. DePhillips, opined on March 21, 2008, that Petitioner was permanently and totally disabled and unemployable. When confronted with the surveillance footage during his July 16, 2008, deposition, Dr. DePhillips testified that Petitioner's condition was progressively worsening, and that the Petitioner's activities on the surveillance videos could have occurred before his condition worsened. We note, however, that the video surveillance footage was recorded in October 2007, April 2008, September 2008, and October 2009, both before and after Dr. DePhillips rendered his opinion that Petitioner was unable to work. On cross examination, Dr. DePhillips [*5] admitted that he would not have recommended Petitioner ride his motorcycle for 100 miles in September 2007, nor would he have recommended that Petitioner engage in lifting or digging in the fall of 2007. He agreed that the medical records would suggest that Petitioner would not be able to perform those activities without significant pain and discomfort. While Dr. DePhillips never recanted his opinion that Petitioner is permanently and totally disabled, the activities Petitioner performs in the surveillance videos runs counter to Dr. DePhillips's understanding of Petitioner's capabilities. We therefore find his opinion unreliable.

Dr. Hawley, Petitioner's treating psychiatrist, also restricted Petitioner from working based on his mental condition, specifically irritability, self-reports of impaired concentration, attention, memory, and difficulty performing new or sustainable tasks. After reviewing some of the surveillance footage recorded by Petitioner's neighbor, Dr Hawley admitted that Petitioner appeared significantly more mobile on the video than he was in Dr. Hawley's office. He also noted that Petitioner engaged in more social interaction than he reported being able to do. After [*6] viewing still photographs taken from the neighbor's surveillance footage, Dr. Hawley noted the level of activity depicted in the photos is inconsistent with Petitioner's self-reported capabilities.

Comparing the treatment notes from counselor Pam Wolf to Petitioner's contemporaneous activities shown on the surveillance footage further supports our finding that Petitioner exaggerated his functional incapacity to his treating physicians. In October 2007, Petitioner reported being immobilized and unable to perform light tasks. He rated his pain level after performing light tasks at ten out of ten. In contrast, the surveillance footage from October 2007 shows Petitioner at a football game, talking to people, sitting on bleachers, and clapping and stamping his foot. In April, 2008 Petitioner expressed frustration to Ms. Wolf that he was unable to accomplish tasks and stated he was struggling to accept his physical limitations. In September 2008, Petitioner talked about his need to find new activities now that vigorous yard work and house maintenance were no longer realistic pursuits, and in October 2008, he discussed his need to stop doing yard work because he would physically "pay for [*7] it." Surveillance footage from these months show Petitioner attending football games, standing for long periods, walking with only a slight limp, talking to people, and participating in a long motorcycle ride during which he engaged in full-body movements while astride his motorcycle. The neighbor's footage from this time period shows Petitioner engaged in significant yard work. In October 2009, Petitioner reported being unable to stand on his feet or sit in one position for several hours without great trouble and pain. Surveillance footage from October 2009 shows Petitioner attending at least two football games. He moved well as he interacted with people. While he sometimes walked stiffly or with a slightly hunched posture, he was still able to bend over and work on a truck, lie down on a creeper, and kneel down. These are not the activities of a man who is unable to stand or sit without great pain.

We find the opinion of Respondent's Section 12 examiner, Dr. Espinosa, to be the most reliable. Dr. Espinosa initially determined that Petitioner was restricted from work activities based on his examination of Petitioner and the history Petitioner provided. However, after reviewing the [*8] video surveillance footage, he concluded that Petitioner appeared to be a "different person completely" than the person he had examined. Petitioner appeared "uplifted" and happy, which Dr. Espinosa felt demonstrated the success of Petitioner's treatment. However, Dr. Espinosa did not go so far as to say that Petitioner could return to work full duty. Instead, he concluded that based on Petitioner's two lower

back surgeries, he would be able to return to work with a twenty-five pound lifting restriction at the light end of the light-medium demand level.

We also rely on the report of Respondent's section 12 examiner, psychologist Dr. Glenellen. Dr. Glenellen administered a number of objective tests indicating that Petitioner had an investment in portraying himself as an invalid and was exaggeration his functional limitations. These results are borne out by the discrepancies between the surveillance footage and Petitioner's self reports. Dr. Glenellen testified during his deposition that the surveillance footage undermined Petitioner's subjective reports of his capabilities.

We further find that Petitioner failed to prove that he is permanently and totally disabled pursuant to an odd [*9] lot theory of disability. Based on the discrepancies between Petitioner's self-reports and his activities on the surveillance footage, we find Petitioner's testimony to be unreliable. Further, these discrepancies render expert opinions based on Petitioner's subjective reporting of his capabilities and limitations similarly unreliable. We find it likely that Petitioner is readily capable of pursuing additional training and job searching. While we note that the job search logs show that Petitioner contacted a large number of potential employers, we also note numerous days when Petitioner reported being in too much pain to pursue his job search. We note that Petitioner focused a significant amount of time and energy on defending himself against perceived attacks from Mr. Steffan and Respondent. After reviewing the evidence, particularly the surveillance footage, we find the discrepancy between what Petitioner claims to be capable of doing and what he is actually capable of doing is vast, and therefore we decline to find that he is permanently and totally disabled under an odd lot theory.

Because Petitioner has a permanent twenty-five pound lifting restriction and has exhibited some acknowledged [*10] difficulties obtaining work within his restrictions, we find that Petitioner is entitled to permanent partial disability benefits representing 75% loss of use of the whole person.

Regarding the award for mileage reimbursement, we find the Arbitrator properly relied on *General Tire v. Industrial Commission, 221 Ill. App. 3d 641 (1991).* We find nothing in the court's language that would limit mileage reimbursement to specific circumstances:

> "The record shows that the petitioner lived in the Mt. Vernon area and sought treatment from Dr. Marrese, who practiced first in Evansville, Indiana, and then in Wood River, Illinois. Evansville is approximately 100 miles from the petitioner's home and Wood River is approximately 90 miles away. The record also shows that Marrese had been the petitioner's treating physician since 1984.
>
> The Commission found that it was reasonably necessary for the petitioner to travel to and from Dr. Marrese's office and to and from the Wood River Hospital. As such, it included $ 1,588 in the petitioner's medical expenses award for travel. We find that the Commission's decision was not against the manifest weight of the evidence." [*11] *General Tire & Rubber Co. v. Industrial Comm'n, 221 Ill. App. 3d 641, 651 (1991).*

Like the claimant in *General Tire*, this Petitioner had to travel long distances for reasonable and necessary medical treatment, and so is entitled to reimbursement.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 893.11 per week for a period of 308-5/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 567.87 per week, the maximum permanent partial disability rate, for a period of 375 weeks, as provided in § 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 75% of the whole person.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 109,870.73 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 5,795.26 for mileage reimbursement.

IT IS FURTHER ORDERED BY THE COMMISSION [*12] that Respondent is entitled to a credit of $ 174,914.46 for temporary total disability benefits paid, $ 1,079.34 for temporary partial disability benefits paid, $ 49,531.55 for maintenance benefits paid, and $ 22,714.80 for other benefits paid, for a total credit of $ 248,240.15.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

Kenneth Lenhart
Employee/Petitioner

v.

USF Holland
Employer/Respondent

Case # **05** WC **04674**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice* [*13] *of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Joliet**, on **March 17, 2009, July 12, 2010 and October 20, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] Maintenance
[X] TTD
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?
N. [X] Is Respondent due any credit?
O. [X] Other **MILEAGE VOCATIONAL REHABILITATION**

FINDINGS

On **December 14, 2004**, 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 [*14] ***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 $ **69,662.58**; the average weekly wage was $ **1,339.66**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $ **174,914.46** for TTD, $ **1,079.34** for TPD, $ **49,531.55** for maintenance, and $ 22,714.80 for other benefits, for a total credit of $ **248,240.15**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits and maintenance of $ 893.11/week for 308-5/7 weeks, commencing 1/3/05 through 12/9/10 as provided in Section 8(b) of the Act, Respondent to receive credit for all sums previously paid hereunder.

Respondent [*15] shall pay Petitioner the temporary total disability benefits that have accrued from 12/14/04 through 12/09/10 and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $ 109,870.73, as provided in Section 8(a) of the Act and pursuant to the medical fee schedule, Respondent to receive credit for all sums previously paid hereunder.+9

Respondent shall pay Petitioner permanent and total disability benefits of $ **893.11**/week for life, commencing **12/09/10**, as provided in Section 8(f) of the Act.

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

Respondent shall pay Petitioner $ 5795.26 for mileage as set forth herein.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest [*16] at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

January 21, 2011

STATEMENT OF FACTS

Petitioner was hired by Respondent, to work as a semi-driver / dock-worker at their terminal in Joliet, Illinois. His previous employment consisted of driving a semi, loading trucks and warehousing. On December 14, 2004, petitioner was operating a forklift, when he drove over a dock plate that buckled, causing a jarring impact to his low back. He immediately experienced low back pain which gradually worsened over the next couple days.

On December 20, 2004, petitioner began treating with chiropractor, Dr. Joseph Donahue, for his ongoing low back pain which was now radiating down into his legs. Dr. Donahue provided spinal adjustments to petitioner for three weeks, but there was no noticeable improvement in his pain. On January 3, 2005, Dr. Donahue took employee off-work and recommended petitioner treat with his family physician so that he could order a MRI of his low back.

On January [*17] 5, 2005, petitioner saw his family physician, Dr. Ramon Inciong, for his low back pain and Dr. Inciong prescribed pain medication and an anti-inflammatory medication. When petitioner returned to Dr. Inciong with

persistent back pain, he then ordered a lumbar MRI, which the radiologist believed showed a central disc herniation at L4-5 and extruded disc material at L5, which was a competent cause for his back pain and the pain down the legs.

Respondent, scheduled petitioner to be examined by orthopedic surgeon, Dr. Julie Wehner, before authorizing further treatment. On February 16, 2005, petitioner presented himself at Dr. Wehner's office where he completed a pain diagram indicating that his low back pain was radiating into his thighs. Petitioner also described to Dr. Wehner how he injured his low back at work and how his low back pain was going down into both legs. Dr. Wehner personally reviewed the lumbar MRI films and concluded that petitioner needed to immediately undergo back surgery. On March 1, 2005, Dr. Wehner admitted petitioner to Illinois Masonic Medical Center where she performed a two level back surgery consisting of a bilateral hemilaminectomy at L4-5 and L5-S1 and a diskectomy [*18] at L5-S1. Shortly after surgery, petitioner experienced some improvement in the severity of his back pain, but once he engaged in a physical therapy program, his back pain intensified to its previous level. Dr. Wehner then ordered another MRI to rule out the possibility of any new herniations and instructed petitioner to proceed with work hardening.

Before proceeding with work hardening, petitioner sought a second opinion from neurosurgeon, Dr. George DePhillips, to determine why he was experiencing so much back pain. On June 23, 2005, Dr. DePhillips examined petitioner, along with his medical records, and concluded that he had instability in his low back which was causing him to experience mechanical back pain. Dr. DePhillips believed that petitioner's work accident caused an injury to his lumbar discs which then inflamed the nerve thereby radiating pain down his back and into his thighs. Dr. DePhillips advised petitioner that the only surgical procedure that would potentially relieve his back pain, was a spinal fusion.

Respondent, would not approve spinal fusion surgery and scheduled petitioner to be examined by neurosurgeon, Dr. Marshall Matz. On August 31, 2005, after Dr. Matz [*19] examined petitioner, he determined that petitioner was at maximum medical improvement and was not in need back fusion surgery.

The dispute over petitioner's medical treatment was brought before the Arbitrator, who recommended resolving it by referring petitioner to Dr. Alexander Ghanayem, an orthopedic surgeon, for his opinion. On March 1, 2006, Dr. Ghanayem examined petitioner who complained of experiencing low back pain that radiated bilaterally into his buttock regions, thighs and groins. Dr. Ghanayem reviewed the lumbar MRI, which showed that there were disc herniations at L4-5 and L5-S1 and also an annular tear at L4-5. Dr. Ghanayem believed that petitioner was experiencing persistent mechanical back pain that had not been relieved by his back surgery and that petitioner was a candidate for lumbar fusion surgery. After the Arbitrator was advised of Dr. Ghanayem's opinions, Respondent, approved petitioner's back fusion surgery.

On July 21, 2006, Dr. George DePhillips admitted petitioner to Provena St. Joseph Medical Center where he performed a posterior lumbar interbody fusion surgery by first removing the discs at L4-5, L5-S1, then replacing them with spacers along with bone [*20] graft before securing the spine with screws and plates. During a follow-up visit on September 21, 2006, with Dr. DePhillips, petitioner complained that he was still experiencing low back pain which radiated into his left thigh. Over the course of the next couple months, petitioner continued reporting to Dr. DePhillips that he was still experiencing intense low back pain which radiated into his groin.

On January 5, 2007, when petitioner returned to see Dr. DePhillips, he complained of having severe lower back pain which now was radiating into his legs down to the knees. Dr. DePhillips believed that petitioner was developing a condition called sacroiliitis since his back fusion surgery involved part of the sacroiliac joint. Dr. DePhillips then referred petitioner to a pain management specialist, Dr. Gary Koehn, for a sacroiliac injection. Dr. DePhillips also determined at that time that petitioner was depressed from his persistent back pain, so he referred petitioner to a psychiatrist. Dr. DePhillips testified at his deposition on July 16, 2008, that petitioner's low back pain and radiating pain was caused from his nerve being injured. Dr. DePhillips also testified that petitioner was [*21] permanently and totally disabled and essentially unemployable.

On January 22, 2007, petitioner saw Dr. Gary Koehn, who administered a steroid injection into his left sacroiliac joint as recommended by Dr. DePhillips. After petitioner appeared to receive some pain relief from the first injection, Dr. Koehn followed-up by giving him a second injection into the sacroiliac joint. On April 18, 2007, Dr. Koehn also performed a radio-frequency neurotomies procedure on the sacral medial nerve branch to see if petitioner would receive longer lasting pain relief in the area of the sacroiliac joint.

On May 11, 2007, Dr. DePhillips referred petitioner to Dr. Samir Sharma, a pain management specialist, to evaluate whether petitioner would be a suitable candidate for a spinal cord stimulator. During the next couple months, Dr.

Sharma administered a series of three epidural steroid injections into petitioner's low back to provide him with some pain relief. Dr. Sharma also determined that during that petitioner was temporarily disabled from work.

On August 23, 2007, when petitioner returned to Dr. Koehn with persistent pain complaints, he administered an intralaminar epidural steroid injection at [*22] L2-3 level. Petitioner again saw Dr. Koehn on September 26, 2007, for an additional steroid injection at the L2-3 level. At that time, Dr. Koehn found petitioner to be depressed and recommended he undergo a psychiatric evaluation.

Petitioner continued to treat with Dr. Koehn on a monthly basis for his pain management and Dr. Koehn's medical records reflect that petitioner's pain level has remained relatively unaltered. At various times, Dr. Koehn adjusted petitioner's Methadone and Lithium levels, whenever petitioner experienced increased pain or depression symptoms. On June 9, 2008, Dr. Koehn recommended that petitioner be treated at a comprehensive pain treatment center, such as MarionJoy. During the entire time that Dr. Koehn has treated petitioner, he has restricted him from working due to his chronic low back pain and mood disorder.

On May 24, 2010, petitioner returned to Dr. Koehn for his monthly re-evaluation and medication refill at which time Dr. Koehn found that petitioner had been in a relatively fixed pain functional state for probably years. Dr. Koehn again restricted petitioner from work.

On October 23, 2007, petitioner was referred for a psychiatric evaluation by Dr. [*23] Mary Cherian of the Institute for Personal Development. During her detailed assessment of petitioner's mental status, Dr. Cherian diagnosed him with having a mood disorder, secondary to his chronic pain. Dr. Cherian initiated treatment by adjusting his existing medication and restricting him from work. After a few months of treatment with petitioner, Dr. Cherian left for a position at a university and was replaced by Dr. Greg Hawley, a physician trained in psychiatry and also board certified in physical medicine and rehabilitation.

On July 9, 2008, Dr. Hawley performed his own psychiatric evaluation on petitioner and diagnosed him with chronic pain disorder secondary to low back pain along with depression and impulse control disorder. Dr. Hawley testified at his deposition that petitioner's conditions were causally related to his work injury. Dr. Hawley's treatment plan consisted of medication management along with coordinating care with therapist, Pam Wolfe. During petitioner's regular visits, Dr. Hawley added the medication, Provigil, to try to reduce his chronic daytime fatigue and Dr. Hawley increased his Lithium to try to reduce his depression symptoms. Dr. Hawley testified at [*24] his deposition on January 20, 2009, that petitioner's depression was caused by his chronic pain.

On December 10, 2008, when Dr. Hawley examined petitioner, he believed that petitioner was suffering from a combination of both physical and psychological problems, he added the medication Nortriptyline, as another anti-depressant.

On January 7, 2009, petitioner returned to see Dr. Hawley because of increased irritability as well as chronic fatigue and weight gain due to his inability to exercise. Dr. Hawley testified at his deposition that petitioner's short-term prognosis was fair, meaning that his condition was unlikely to change with any clinical significance in the next three to six months and that petitioner's long-term prognosis was guarded due to the fact that it had been over 4 years since the injury and he had not been able to return to any type of occupation. Dr. Hawley also testified at his deposition, that the symptoms that prevented petitioner from returning to work were his irritability, impaired concentration and attention, along with difficulty performing new or sustainable tasks. Dr. Hawley suggested that petitioner would benefit from a multi-disciplinary program, such [*25] as MarionJoy or a regional pain center. Petitioner has continued to treat on a regular basis with Dr. Hawley, who restricts him from work.

On April 30, 2008, Respondent, requested that petitioner be evaluated by clinical psychologist, Ronald Ganellen. The majority of Ronald Ganellen's litigation evaluations are for employers and in the past, he performed four to six psychological evaluations for Respondent's attorney. Employer's attorney selected the medical records of petitioner that he wanted Ronald Ganellen to review. Employer's attorney only provided a few of Dr. Koehn's records and none of the off-work restrictions from Dr. Koehn, Dr. DePhillips or Dr. Cherian were provided to psychologist Ganellen.

After psychologist Ganellen performed his tests on petitioner, he believed it was difficult for him to determine whether petitioner's current difficulties reflected a new condition or exacerbation of a pre-existing condition. Psychologist Ganellen recommended that petitioner undergo a multi-disciplinary pain treatment center, such as MarionJoy or the Rehabilitation Institute of Chicago, since he believed that those institutions would have a better chance of managing petitioner's pain [*26] level in addition to determining his need for medication.

At his deposition, psychologist Ganellen agreed that a person with chronic pain can develop psychological difficulties and that some of petitioner's complaints were consistent with a mood disorder condition.

Respondent, scheduled petitioner to be examined by neurosurgeon, Dr. Francisco Espinosa. On February 19, 2007, petitioner presented himself to Dr. Espinosa complaining of back pain, as well as thigh pain and groin pain. Dr. Espinosa testified at his deposition that petitioner's thigh and groin pain was probably from pressure on the cutaneous nerve called the femoral cutaneous, which is the groin area and branches out to the thigh and buttock. According to Dr. Espinosa's testimony, it is very common to see this type of symptom after prolonged operations in the prone position. Dr. Espinosa believed that petitioner was experiencing pain because he was still healing from the back fusion surgery. Dr. Espinosa diagnosed petitioner with chronic pain syndrome. Dr. Espinosa recommended that petitioner switch to medication, Lyrica, and be restricted from work.

On August 27, 2007, Dr. Espinosa re-evaluated petitioner who was complaining [*27] of severe back pain that was radiating into his thigh area. Dr. Espinosa believed that petitioner was experiencing this pain because he was still in the healing phase. Dr. Espinosa also found petitioner to be depressed and recommended that he undergo a psychiatric evaluation.

On January 14, 2008, Dr. Espinosa again evaluated petitioner and found that petitioner appeared better and not in the distress that he was experiencing on the earlier occasions. Dr. Espinosa found him to be at maximum medical improvement and believed that he could occasionally lift up to 25 pounds, could occasionally sit and must avoid bending and twisting at the waist. Dr. Espinosa believed that petitioner would still need medication, such as the ones he was currently being prescribed. Dr. Espinosa also believed that petitioner's condition would not improve over time, but could worsen. At this time, Dr. Espinosa was provided video surveillance of Petitioner performing yard work on several occasions. Based on the video surveillance reviewed, Dr. Espinosa concluded that Petitioner was certainly capable of performing medium level work (page 33 of Dr. Espinosa deposition). The doctor noted that in the videos Petitioner [*28] could bend 55 degrees and had "absolutely no limping, no problems walking" (page 33 of Dr. Espinosa deposition). The doctor noted that when Petitioner presented to the exam he would walk with a slow deliberate gait, however upon the doctor's observations of the video the doctor noted "a dramatic difference" from Petitioner's physical exam and his presentation on the videos. (Page 34 of Espinosa dep). The doctor maintained his opinion that Petitioner was capable at least of working within a 25 pound lifting restriction based upon the prior fusion that was performed. However this is in direct contradiction to the vidseeotapes the Arbitrator viewed, which clearly show Petitioner at times walking slowly with a hunched gait.

On April 2, 2009, petitioner's family physician, Dr. Inciong, ordered that he undergo a functional capacity evaluation at St. Margaret's Hospital Center for Physical Rehab. The summary of the FCE test was as follows:

SECTION 1: TEST SYNOPSIS

Client Effort: Consistent
Client motivation: Good
Overt pain behaviors: Present
Physical Demand Level of the Client's Job: Medium/Heavy
Physical Demand Level Demonstrated by the Client: Very Light

Respondent, requested [*29] that petitioner undergo a functional capacity evaluation at City Center Physical Therapy, which took place over two days, May 21 and May 26, 2009. The reported results from City Center Physical Therapy was that petitioner could perform at the sedentary level with occasional lifting up to 15 pounds, walking limited to 10 minutes and standing 30 minutes. The therapist commented that he believed that petitioner had significant non-organic component to this level of pain and disability.

On April 25, 2008, employer. USF Holland, hired E.P.S. Rehabilitation, Inc., who conducted what they called a "Limited Telephonic Employer Sampling" of sixteen businesses from petitioner's general area that were in the transportation industry. Vocational rehabilitation counselor, Duane Bigalow, testified at his deposition that the "Limited Telephonic Employer Sampling" survey is only a snapshot of employment opportunities which may or may not be available at a point in time. Only two businesses out of the sixteen businesses surveyed, reported job openings and both of those jobs were for service/parts managers. At Bill Jacobs Chevrolet, the position of service/parts manager required lifting 30 to 40 pounds [*30] occasionally. The position at Ottawa Ford for a service writer required alternate standing and sitting all day. The physical demands of both jobs exceeded petitioner's physical capabilities as demonstrated by the FCE

and by Dr. Espinosa's medical opinion. None of the businesses contacted in the survey were asked if they could accommodate petitioner's restrictions. The telephone survey was never updated to determine whether the job market changed.

Petitioner hired a vocational specialist, Ron Malik, who testified that he has worked for both plaintiff and defendant. Ron Malik also testified that he reviewed the "Limited Telephonic Labor Survey" that was prepared by E.P.S. Rehabilitation and concluded that petitioner would not be hired for any of the positions identified in the labor market survey, nor would petitioner be able to successfully preform any of those positions. On August 26, 2008, vocational counselor, Ron Malik, prepared his report and stated the following:

> "If Mr. Lenhart is released to work it needs to be a light physical demand, with no significant postural functions (bending, stooping, crouching, crawling, etc.) low stress, simple and repetitive task, and limited [*31] contact with public, co-workers and supervisors. Due to the effects of the pain and the medication and the way it would affect Mr. Lenhart's ability to stay on task he would have difficulty meeting any employers productivity requirements.
>
> He requires additional formal education, such as a college degree.
>
> **Conclusion**
> Based on Mr. Lenhart's work history, education level, lack of transferrable skills, lack of computer skills, medical restrictions and current psychological issues, it is this Vocational Consultants opinion that Mr. Lenhart is unemployable without education and/or training for a new career."
> Mr. Steffan made it clear to Petitioner that he need not elaborate on his workers' compensation injury with regard to his pursuit of alternative employment and made Petitioner aware of the Americans With Disabilities Act prohibitions of employers with regard to individuals with physical restrictions. Generally, Mr. Steffan confirmed that Petitioner performed the tasks required of him including completion of the job seeker forms, completing application and completing coursework. However, Mr. Steffan also noted activities by Petitioner which he believed may be deemed to be [*32] *sabotage* by the potential applicant (Steffan dep p. 29). Specifically, Mr. Steffan noted that with one potential employer, Petitioner told her he had back surgeries and felt the job would be too dangerous for him (Steffan dep. p 31). Mr. Steffan also referenced other instances where Petitioner was found to have brought up his prior back problems to potential employers and continued to reference his medical restrictions when engaging in the application process (Steffan dep p. 33-35). Mr. Steffan was quoted as saying, "*Given what potential employers are stating, Mr. Lenhart is without question offering inappropriate information regarding physical capacities, we will again reinforce with him his rights and protections afforded him through the Americans With Disabilities Act.*" However the Arbitrator believes that it defies common sense not to inform potential employers of the limitations a prospective job seeker may have, and that it is not inappropriate to do so at any stage of the interview job seeking process. Mr. Steffan concluded that a person who was making a good faith effort to secure employment would *never* make such comments to potential employers (Steffan dep page [*33] 43). Mr. Steffan concluded that Petitioner continues to be employable in a stable job market within a 25 pound restriction in spite of the 403 job contacts Petitioner had which resulted in 0 job offers

On June 15, 2009, E.P.S. Rehabilitation, Inc., vocational counselor, Duane Bigalow of E.P.S. Rehabilitation, began assisting petitioner with a self-directed job placement. In determining petitioner's physical capabilities to work, E.P.S. Rehabilitation did not consider any of the medical opinions of petitioner's physicians, Dr. DePhillips, Dr. Koehn or Dr. Hawley. Instead, E.P.S. Rehabilitation considered only a portion of Dr. Espinosa's opinions:

> "In my opinion, he should be at least able to do light duty to medium capacity work. His lifting restrictions would be a maximum of 25 pounds."

Dr. Espinosa testified at his deposition that petitioner could only occasionally lift up to 25 pounds, could only sit occasionally and could not twist or bend at the waist. None of these restrictions were used by E.P.S. Rehabilitation, Inc. Also, the results from the FCE tests were not used in determining petitioner's physical capacity.

On July 29, 2009, vocational specialist, Duane Bigalow, [*34] recommended to Respondent, that they approve petitioner enrolling in introductory computer classes. After the request was approved, petitioner enrolled at Illinois Valley Community College to take two introductory computer courses, "Basic Computer Skills" and "Basic Keyboarding". Petitioner attended both of these classes and their labs for eight weeks and he received passing grades in both classes. In addition to his class work, petitioner continued pursuing job leads during the eight weeks that he was in school. During the time that petitioner was engaged in a supervised job search, he cooperated with Duane Bigalow of E.P.S. Rehabilitation on search for work. Petitioner applied for work at 403 businesses, which were documented in his logs, utilized the Skills Match program at the unemployment office and reviewed the local newspaper on a daily basis to find jobs.

On January 6, 2010, vocational rehabilitation counselor, Edward P. Steffan, owner of E.P.S. Rehabilitation, believed that petitioner needed further rehabilitation and indicated the following on the "Illinois Workers Compensation Commission Rehabilitation Plan" form IC31:

> "Is rehabilitation necessary for the employee to [*35] return to work?
>
> Yes X No Explain below:
>
> It is unlikely Mr. Lenhart will obtain employment maximizing his wage earning potential without the assistance of a Certified Rehabilitation Counselor to supervise his participation in a Self-Directed Search Program.
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> "

Shortly after preparing the Rehabilitation Plan for the Illinois Workers Compensation Commission, E.P.S. Rehabilitation, Inc., notified petitioner in late January 2010, that their rehabilitation services were placed on hold. The office notes attached to the deposition of Edward Steffan, document a telephone call made on November 12, 2009, by workers compensation insurance adjuster, Matt Yehling, stating that he would only authorize one more month of rehabilitative services.

Vocational counselors, Duane Bigalow and Edward Steffan, both testified that they never documented in their reports to the insurance company, any problems that they had with petitioner's job search efforts. Vocational counselors, Bigalow and Steffan, testified that they never complained to petitioner that he was not adequately searching for work. During the entire time that E.P.S. Rehabilitation was assisting in vocational rehabilitation, petitioner cooperated [*36] with his vocational counselors to find work. Petitioner's weekly maintenance benefits were never terminated during his job search.

Mr. Edward Steffan testified that in his opinion, even though petitioner was unable to find work, he believed that he could earn up to $ 10 to $ 15 an hour based on the "Limited Telephonic Employer Sampling" conducted in 2008. Duane Bigalow testified that he believed it was speculative as to exactly how much petitioner could make in the range of $ 10 to $ 15 an hour.

Petitioner testified at the Arbitration hearing that he was in good health until December 14, 2004, when he injured his low back at work.

On March 21, 2008, Dr. George DePhillips concluded that petitioner was permanently and totally disabled from work. Dr. Gary Koehn, who evaluated petitioner monthly for pain management, has continually restricted him from work. Dr. Gregory Hawley, who also treats petitioner on a monthly basis for his mood disorder, has restricted him from work as well.

Petitioner testified that he was awarded Social Security disability for his medical conditions that were caused by his work injury. Petitioner also testified that he takes the following medications on a daily [*37] basis:

! Buspirone

! Methadone

! Provigil

! Klorcon (Potassium)

! Lasix (Water Pill)

! Synthroid (Thyroid)

! Lithium Carbonate

! Senna-s (Constipation)

! Topamax

! Trazodone (Sleep)

! Nortriptyline

! Clonazepam

! Miralax (Constipation)

! Cymbalta

Petitioner testified that he has been instructed by his treating physicians to be as active as possible, so he does perform such things like yard work. He testified that he does not cut his grass or landscape every week since his son helps when he can. Petitioner also stated that he does drive so long as it isn't too far. None of petitioner's physicians, nor Respondent's physicians, restricted him for riding a motorcycle. Petitioner testified that he rode is motorcycle occasionally in 2007 and in 2008, he rode his motorcycle in the Julie Taliani Memorial Ride.

Petitioner further testified that he was elected as a Village Trustee of Dalzell in 2003 and he resigned his position in 2009. As a trustee, he testified that he would at times obtain bids from contractors, but at no time did he have to engage in any of the physical work.

Petitioner testified Jennifer Passini, a neighbor who lived across the street, took pictures of [*38] him working in his yard because she was angry with certain actions that the Village Board took involving her property.

Petitioner testified that he has no formal training using software programs, such as spreadsheets and databases, and what he does know about computers, he learned from his children. The Village of Dalzell paid "Ken's Computers" a total of $ 194.90 as reimbursement for software and computer parts he bought for the Village of Dalzell. Petitioner testified that "Ken's Computers" has not received any money from any other source.

Petitioner also stated that E.P.S. Rehabilitation assisted him with making contact 403 times with businesses, either in person or by mailing a resume. Petitioner testified that most of the businesses he contacted, did not have any open positions. Petitioner testified that E.P.S. Rehabilitation never brought it to his attention in person or in writing, that there was any discrepancy with his job seeking efforts nor did they inform him in person or in writing, that he was not doing an adequate job attempting to secure employment. Petitioner testified that E.P.S. Rehabilitation discontinued their vocational assistance in January 2010, but it was [*39] not at his request. Since then, he has continued to search for work. He did apply for a position at Connecting Point Computer Center, but was informed that he was not qualified because he did not have the necessary certification or experience.

This case involves a relatively long history and comprehensive effort of surveillance spanning an approximate three year period from October of 2007 through October of 2009. Petitioner acknowledged the multiple dates of investigator video surveillance captured of his activities beginning in September of 2007 through 2009 including motorcycle rides and his regular attendance at his son's football games. Petitioner also acknowledged the video surveillance taken by his neighbor, Jennifer Passini whereupon he is shown to be performing landscaping activities, yard work, use of a blower, lawnmower, rake, and various lifting activities. Petitioner was also seen in later video through 2008 performing similar activities including snow shoveling in December of 2008. Petitioner acknowledged his identity in all of this video surveillance. Petitioner acknowledged his activities in the three year period of surveillance captured from September of 2007 through [*40] October of 2009 whereupon he engaged in the aforementioned yard work, the ability to drive a car, take motorcycle rides on his Harley Davidson, attend his son's football games and generally socialize in traditional ac-

tivities such as graduation parties, Fourth of July parties, etc. (TR at 24-26). The Arbitrator notes that there are numerous times on the videotapes wherein Petitioner appears to be walking slowly and is hunched over, and at times even seems to be walking in a shuffling manner, as well as times that Petitioner appears to be walking normally.

In regards to the surveillance video of petitioner in the summer/fall 2007, Dr. DePhillips testified that he would only have restricted petitioner from using a self-propelled lawnmower in the summer of 2006. As far as using a leaf blower, Dr. DePhillips would have only restricted petitioner from doing it immediately after the surgery in 2006. Dr. DePhillips also testified that in the summer 2007, petitioner could do some lifting and digging, depending on what it was that he was lifting and digging, and for how long. Dr. Francisco Espinosa testified that he restricts all patients with two level fusions from bending or twisting at [*41] the waist in order to prevent any more disc herniations. Dr. DePhillips also testified that as of September 2007, he would not have restricted petitioner from riding a motorcycle, so long as it was less than 100 miles and that he stopped to take breaks.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner testified that his ususal state of health was good until December 14, 2004, when he injured his low back at work. Dr. Joseph Donahue, a chiropractor, provided spinal adjustments for three weeks. Petitioner then treated with his family physician, Dr. Ramon Inciong, who ordered a lumbar MRI, which showed a disc herniation at L4-5 and extruded disc material at L5.

Respondent, scheduled employee to be evaluated by Dr. Julie Wehner, who believed that he needed immediate back surgery. Dr. Wehner's back operation did not alleviate petitioner's low back pain.

Petitioner next saw Dr. George DePhillips, who diagnosed him with mechanical back pain which he believed required fusion surgery. After his back fusion surgery, petitioner became depressed over his chronic back pain and was referred for a psychiatric consult. Dr. DePhillips testified that [*42] petitioner's low back pain and radiating pain was caused from his nerve being injured from the work accident. Dr. DePhillips also testified that petitioner was permanently and totally disabled and essentially unemployable.

Dr. Gary Koehn, provided petitioner with pain management and his office notes reflect that he believes that petitioner has chronic pain as a result of his work accident. Dr. Koehn also diagnosed him with depression.

On August 27, 2007, Respondent, scheduled petitioner to see Dr. Francisco Espinosa, a neurosurgeon, who found petitioner depressed and recommended that he undergo a psychiatric evaluation. Dr. Espinosa also found that petitioner was limited to lifting up to 25 pounds occasionally, sitting occasionally and no bending or twisting at the waist.

Petitioner was referred for a psychiatric evaluation at the Institute for Personal Development and came under the care of Dr. Gregory Hawley, a physician trained in psychiatry and also board certified in physical medicine and rehabilitation. Dr. Hawley treated petitioner on a regular basis and diagnosed him with chronic pain disorder secondary to low back pain, along with depression and impulse control disorder. Dr. [*43] Hawley testified that these conditions were related to his work injury and the long-term prognosis was guarded due to the fact that his conditions had been ongoing for over four years.

On April 30, 2008, Respondent, had clinical psychologist, Ronald Ganellen, evaluate petitioner. After psychologist, Ronald Ganellen, performed his tests on petitioner, he believed it was difficult for him to determine whether petitioner's current difficulties reflected a new condition or exacerbation of a pre-existing condition. Psychologist Ganellen recommended that petitioner undergo a multi-disciplinary pain treatment center, such as MarionJoy, which would have a better chance of managing his pain level. At his deposition, psychologist Ganellen agreed that some of petitioner's complaints were consistent with a mood disorder condition.

The Arbitrator finds from his careful consideration of the evidence in this case, including the opinions of petitioner's treating physicians, that his work accident on December 14, 2004, is the proximate cause for petitioner's current condition of ill-being.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?

Petitioner offered [*44] into evidence, the following exhibits regarding his medical expenses and reimbursement claims:

MEDICAL EXPENSE SUMMARY

MEDICAL EXPENSE SUMMARY

(PX. 40)	Dr. George DePhillips	$ 44,893.40
(PX. 41)	Perry Memorial Hospital	$ 576.88
	Reimbursement owed to group insurance	
(PX. 42)	Central Illinois Radiologists	$ 304.00
(PX. 43)	Dr. Schwartz / Gerald Levisay, MD	$ 205.00
(PX. 44)	St. Margaret's Health (Clinic)	
	Reimbursement owed to group insurance	$ 28.35
	Outstanding	$ 443.70
	St. Margaret's Health (Hospital)	$ 5,432.40
(PX. 45)	Marseilles Area Ambulance Service	$ 1,005.00
(PX. 46)	Kurtz Ambulance	$ 880.00
(PX. 47)	Institute for Personal Development	$ 510.00
(PX. 48)	Hospital Radiology	
	Reimbursement owed to IDPA	$ 37.95
	Outstanding	$ 174.00
(PX. 49)	Joliet Radiological Service	$ 35.00
(PX. 50)	Apria Healthcare	$ 274.00
(PX. 51)	Allied Counseling Group	$ 14,203.97
(PX. 52)	Morris Hospital	$ 8,296.40
(PX. 53)	RS Medical	$ 4,552.67
(PX. 54)	Peoria Tazewell Pathology	$ 7.50
(PX. 55)	Dr. Gary Koehn	$ 850.00
(PX. 56)	Community Hospital of Ottawa	$ 3,200.24
(PX. 57)	Tri-County Radiologists	$ 588.00
	Reimbursement owed to group insurance	
(PX. 58)	Central Illinois Radiological Associates	$ 304.00
(PX. 59)	Prescriptions	
	Family Pharmacy outstanding	$ 16,554.74
	Reimbursement to petitioner	$ 971.68
	Reimbursement to BlueCross BlueShield	$ 573.68
	Reimbursement to IL Dept. Public Aid	$ 975.07
(PX. 62)	Tempur-Pedic Bed	$ 4,512.50

[*45]

Respondent, did not object to the reasonableness of the medical expenses submitted into evidence by petitioner. Respondent's examiners, Dr. Francisco Espinosa and psychologist, Ronald Ganellen, did not have any criticism of the treatment petitioner received from his physicians.

In regards to Dr. DePhillips charges (PX. 40), the Arbitrator finds from Dr. DePhillips' medical records and deposition testimony, that petitioner received medical services related to his back injury and that Respondent, is liable for any outstanding balance in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule. Respondent, is entitled to a credit for all medical expenses actually paid.

In regards to Perry Memorial Hospital charges (PX. 41), the Arbitrator finds that the services provided to petitioner were for diagnostic tests prescribed by his treating physician. Petitioner's health insurance provider made payments totalling $ 576.88, for which Respondent, is required to reimburse.

In regards to Central Illinois Radiologists charges (PX. 42), the Arbitrator finds that the services provided to petitioner were for interpreting a lumbar CT scan prescribed by Dr. DePhillips. [*46] The Arbitrator finds from the medical records and bill, that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Dr. Schwartz/Dr. Levisay charges (PX. 43), the Arbitrator finds from reviewing Dr. Schwartz's office note date June 23, 2005 (PX. 23), that petitioner was referred by his family physician, Dr. Ramon Inciong, for low back pain with worsening bilateral groin pain. The Arbitrator also finds from reviewing Dr. Julie Wehner's office note for April 13, 2005 (PX. 24), that she also recommended that petitioner see a urologist for his left groin pain. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to St. Margaret's Health charges (PX. 44), the Arbitrator finds that the services provided to petitioner were for his low back condition. The Arbitrator finds from the medical records of St. Margaret's Hospital as well as the medical records from the treating physicians, that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 [*47] Medical Fee Schedule. Petitioner's group insurance made payments totalling $ 28.35, for which Respondent, is required to reimburse.

In regards to Marseilles Area Ambulance Service charges (PX. 45), the Arbitrator finds from reviewing the billing statement, that on May 13, 2007, the hospital staff at Community Hospital of Ottawa requested transport of petitioner to St. Joseph Medical Center. The Arbitrator finds from reviewing the Community Hospital of Ottawa medical records for May 13, 2007 (PX. 33), that petitioner was treated for back pain, post-surgery which was intractable. The emergency room physician, after speaking with Dr. DePhillips, transferred patient to St. Joseph Medical Center for pain control. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Kurtz Ambulance charges (PX. 46), the Arbitrator finds from reviewing the billing statement, that on May 14, 2007, ambulance services were provided to petitioner. The St. Joseph Medical Center medical records (PX. 32) reflect that petitioner was admitted for treatment on May 13, 2007. According to the chart notes [*48] for May 14, 2007, petitioner was taken by ambulance to an open MRI facility for a lumbar MRI and then returned to the hospital. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Institute for Personal Development charges (PX. 47), the Arbitrator finds from reviewing the medical records of Dr. Gregory Hawley as well as his evidence deposition, that the services provided to petitioner were for his mood disorder and depression which are related to the injuries he received from his work accident on December 14, 2004. Dr. DePhillips, Dr. Koehn and Dr. Espinosa all diagnosed petitioner with depression and recommended a psychiatric evaluation. The Respondent's IME psychologist, Ronald Ganellen, testified at his deposition that he had no criticisms of the treatment Dr. Hawley provided petitioner. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to the Hospital Radiology charges (PX. 48), the Arbitrator finds that the services provided to petitioner were for [*49] diagnostic tests ordered by his treating physicians for his conditions related to his work injury. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule. Illinois Department of Public Aid made payments totalling $ 37.95, for which Respondent, is required to reimburse.

In regards to Joliet Radiological Service charges (PX. 49), the Arbitrator finds that the services provided were for interpretation of a chest x-ray taken of petitioner during his hospitalization for back fusion surgery at St. Joseph Medical Center. The Arbitrator finds from the medical records that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Apria Healthcare charges (PX. 50), the Arbitrator finds from reviewing the billing statement, that on July 25, 2006, Dr. DePhillips ordered a walker to assist petitioner's mobility following his back fusion surgery on July 21, 2006. The Arbitrator finds from the medical records that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section [*50] 8.2 Medical Fee Schedule.

In regards to Allied Counseling charges (PX. 51), the Arbitrator finds from reviewing the counseling records (PX. 29) and the records from the Institute for Personal Development, that the counseling services petitioner received were part of the treatment plan for his mood disorder and depression. Dr. Gregory Hawley testified at his deposition that the counseling services provided by Pam Wolfe were an integral part of his treatment of petitioner. Respondent's IME psychologist, Ronald Ganellen, did not have any criticism of the counseling sessions provided to petitioner. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Morris Hospital charges (PX. 52), the Arbitrator finds from reviewing the billing statements and the hospital records (PX. 34), that the services provided to petitioner were for pain management. Dr. Gary Koehn admitted petitioner to Morris Hospital on various occasions for injections in his low back and sacroiliac joint for pain control. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section [*51] 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to RS Medical charges (PX. 53), the Arbitrator finds, after reviewing the billing statement and Dr. DePhillips' prescription for medical necessity, that the services provided to petitioner were for a low back TENS unit to control his low back pain. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Peoria Tazewell Pathology charges (PX. 54), the Arbitrator finds from reviewing the billing statement, that Dr. DePhillips, who ordered a sed-rate in his care and treatment of petitioner. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Dr. Gary Koehn's charges (PX. 55), the Arbitrator finds from reviewing the billing statement and Dr. Koehn's medical records (PX. 37), that the services provided to petitioner were for pain management. Dr. DePhillips' medical records (PX. 26) reflect that he referred petitioner to Dr. Koehn for pain management. Respondent's neurosurgeon, Dr. Francisco [*52] Espinosa, did not have any criticism of the treatment petitioner received from Dr. Gary Koehn. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Community Hospital of Ottawa charges (PX. 56), the Arbitrator finds from reviewing the hospital records (PX. 33), that the services petitioner received were for treatment of his low back pain. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Tri County Radiologists charges (PX. 57), the Arbitrator finds after reviewing the billing statement, that the services provided to petitioner was for interpretation of a spinal MRI ordered on June 27, 2005, by Dr. George DePhillips. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to Central Illinois Radiological Associates charges (PX. 58), the Arbitrator finds after reviewing the billing statement, that the service provided to petitioner was for interpretation [*53] of a lumbar spine CT scan of the lumbar spine ordered on March 12, 2008, by Dr. George DePhillips. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

In regards to prescription expenses (PX. 59), the Arbitrator finds from reviewing the medical records of Dr. Gary Koehn and Dr. Gregory Hawley, that they have been prescribing various medications to petitioner for his chronic back pain, as well as his mood disorder and depression. Dr. Koehn's records (PX. 37) indicate that his treatment of petitioner has been for his chronic back pain following his work injury. Respondent's examining neurosurgeon, Dr. Francisco Espinosa, stated at his deposition that petitioner would have to continue taking pain medication for his low back condition.

Dr. Hawley's records (PX. 36) and deposition (PX. 18) indicate that he has treated petitioner for chronic pain and depression which he relates to petitioner's back injury at work. Respondent's psychologist, Ronald Ganellen, could not determine the cause of petitioner's mood disorder. The Arbitrator finds the opinions of treating psychiatric physician, [*54] Dr. Gregory Hawley, more convincing. The Arbitrator finds that Respondent, is liable for these charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule. Petitioner is entitled to reimbursement of $ 971.68, BlueCross/BlueShield is entitled to reimbursement of $ 573.68 and Illinois Department of Public Aid is entitled to reimbursement of $ 975.07.

In regards to petitioner's reimbursement for a Tempur-Pedic bed (PX. 62), the Arbitrator finds from reviewing Dr. DePhillips' office note on August 24, 2006 (PX. 26), that petitioner was having difficulty sleeping on a regular mattress following his surgery and that Dr. DePhillips recommended a Tempur-Pedic mattress for his post-operative recovery phase. The Arbitrator finds that the cost of the prescribed bed in the amount of $ 4,512.50 is reasonable. The Arbitrator finds that Respondent, is liable for the above stated charges in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims that from January 3, 2005 through December 9, 2010, for a period of 413-5/7 weeks, he was entitled to receive weekly TTD/maintenance [*55] benefits in the amount of $ 893.11 per week.

On December 14, 2004, petitioner was operating a forklift, when he drove over a dock plate that buckled, causing a jarring impact to his low back. He immediately experienced low back pain which gradually worsened over the next couple days.

On December 20, 2004, petitioner began treating with chiropractor, Dr. Joseph Donahue, for his ongoing low back pain which was now radiating down into his legs. Dr. Donahue provided spinal adjustments to petitioner for three weeks, but there was no noticeable improvement in his pain. On January 3, 2005, Dr. Donahue took petitioner off-work and that he treat with his family physician, Dr. Ramon Inciong, so he could order a MRI of his low back. Respondent, began paying TTD benefits as of January 3, 2005, in the amount of $ 893.11 a week.

On January 5, 2005, Dr. Inciong's office chart reflects that he took petitioner off-work until further notice.

On February 16, 2005, Respondent, scheduled petitioner with an appointment to be examined by Dr. Julie Wehner, who recommended surgery and took petitioner off-work.

On March 1, 2005, petitioner was admitted to Illinois Masonic Medical Center where Dr. Wehner performed [*56] back surgery. Following surgery, Dr. Wehner prescribed a course of physical therapy for petitioner and kept him off-work.

On June 23, 2005, petitioner came under the care of Dr. George DePhillips, who recommended a two level back fusion surgery and took petitioner off-work until his back fusion surgery.

Respondent, continued to pay weekly TTD benefits through August 17, 2005, when petitioner was scheduled to be examined by their IME, Dr. Marshall Matz. Once petitioner was examined by Dr. Matz, TTD benefits were suspended. Respondent, reinstated TTD benefits on March 1, 2006, when Dr. Alexander Ghanayem, an orthopedic surgeon, selected by the Arbitrator agreed that petitioner was a candidate for a back fusion surgery.

On April 10, 2006, Respondent, paid $ 15,371.04, claiming it as an advance, which in effect was to be considered as payment for back TTD.

On July 21, 2006, Dr. DePhillips performed a two level back fusion surgery on petitioner and restricted him from work. During this time, petitioner was receiving TTD benefits. At all times following surgery, Dr. DePhillips has restricted petitioner from work. On March 21, 2008, Dr. DePhillips determined that petitioner was permanently [*57] and totally disabled from work.

On January 5, 2006, Dr. DePhillips referred petitioner to Dr. Gary Koehn for pain management. Dr. Koehn restricted petitioner from work on January 5, 2006 and continued to restrict him from work up to the Arbitration hearing date.

On October 23, 2007, Dr. DePhillips diagnosed petitioner with depression and referred him to the Institute for Personal Development for a psychiatric evaluation. Petitioner came under the care of Dr. Mary Cherian, who as part of her

treatment, restricted petitioner from all work. After a months of treatment, Dr. Gregory Hawley took over petitioner's care and has also restricted petitioner from all work activities up to the Arbitration hearing date.

On April 25, 2008, Respondent, hired E.P.S. Rehabilitation, Inc., who conducted a "Limited Telephonic Employer Sampling" of sixteen businesses in the transportation industry. E.P.S. Rehabilitation considered only part of IME physician, Dr. Francisco Espinosa's opinions when considering petitioner's physical capabilities:

> "By now, he has reach maximum medium improvement. His lifting restrictions would be a maximum of 25 pounds. In my opinion, these restrictions are permanent. [*58] Therefore, I feel that he should be able to at least carry out light to medium capacity work."

On July 22, 2008, Dr. Francisco Espinosa testified at his evidence deposition that petitioner could occasionally lift up to 25 pounds, could occasionally sit during an eight hour day and could not bend or twist at the waist.

Also, E.P.S. Rehabilitation did not consider the medical opinions of Dr. DePhillips, Dr. Koehn or Dr. Hawley that petitioner was restricted from all work. Petitioner never had a functional capacity evaluation until April 2, 2009.

According to E.P.S. Rehabilitation's initial evaluation and rehabilitation plan report dated April 21, 2008, vocational counselor, Duane Bigalow, met with petitioner and had the following exchange:

> "- Following the exchange of introductions, Attorney Olivero inquired if we had explored re-employment options with USF Holland
> - We indicated we had not and we were engaged to assist Mr. Lenhart obtain alternate employment
> - Attorney Olivero stated USF Holland was a union shop and pursuant to the union contract, Mr. Lenhart was entitled to return to work with them if they could accommodate him
> - "This is a threshold issue"
> - We stated [*59] we could not speak to that and suggested this be addressed with Gallagher Basset Services, Inc. directly since we had no access to explore work alternatives at USF Holland
> - Attorney Olivero emphasized Mr. Lenhart was still employed there and under contractual obligations through the Teamster's Union
> - He indicated he would not approve Mr. Lenhart entering into a Self-Directed Job Search Program unless or until return to work options had been explored for his client through USF Holland
> - We stated we would communicate this to Gallagher Basset Services, Inc."

On June 19, 2009, petitioner met with vocational counselor, Duane Bigalow, concerning vocational rehabilitation. The E.P.S. Rehabilitation, Inc., Progress Report indicates that petitioner was cooperating with these efforts.

On August 28, 2009, petitioner hired vocational rehabilitation counselor, Ron Malik, who reviewed the "Limited Telephonic Employer Sampling" and concluded that petitioner would not be successful at those jobs and would have a very difficult time getting hired for one of those positions. Vocational consultant, Ron Malik, concluded that petitioner was unemployable without education and/or training for a [*60] new career.

E.P.S. Rehabilitation, Inc., never contacted the employers it surveyed to determine whether they would accept petitioner with his restrictions. Nor did they ever update the telephone survey to determine whether the job market had changed.

On September 10, 2008, Respondent, decided to reduce petitioner's weekly TTD benefits from $ 893.11 to $ 359.78, which was an arbitrary amount they selected. Respondent, paid these reduced TTD benefits until January 13, 2009, when it terminated all TTD payments to petitioner.

On April 2, 2009, petitioner underwent a FCE at St. Margaret's Hospital, which demonstrated that his physician capacity was very light.

On July 26, 2009, after pretrial discussions with the Arbitrator, Respondent, began paying weekly benefits of $ 893.11 and has continued to the Arbitration hearing.

Petitioner testified that he has at all times, cooperated with job placement efforts.

On June 19, 2009, petitioner and vocational counselor, Duane Bigalow, engaged in further job placement efforts. Within a short period of time, Duane Bigalow requested authorization from Respondent, to place petitioner in school to

increase his computer skills. Petitioner successfully [*61] completed these classes while still continuing to search for work.

The Arbitrator finds that the opinions of Ron Malik are convincing that petitioner would not be hired for any of the positions identified in the labor market survey done on April 25, 2008. Also, the opinion of Ron Malik that petitioner needed further training was supported by the fact that Duane Bigalow sought approval for petitioner to take two computer classes in the fall of 2009.

The Arbitrator finds that petitioner's TTD/maintenance benefits should not have been reduced or terminated and that he is, therefore, entitled to receive weekly benefits in the amount of $ 893.11 from January 3, 2005 through the date of Arbitration.

L. ODD-LOT PERMANENT TOTAL

It is generally accepted that when an employee is unable to make some contribution to industry sufficient to justify payment of a wage, then he is totally disabled. *A.M.T.C. of Illinois v. Industrial Comm'n, 77 Ill.2d 482, 487 (1979).* It is not necessary for the employee to be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n, 95 Ill.2d 278, 286-87 (1983).* [*62] Rather, the employee must show by a preponderance of the evidence, that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alamo v. Industrial Comm'n. 282 Ill.App.3d 531, 534 (1996).*

The employee satisfies his burden of proving that he falls into the odd-lot category 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. Once the employee establishes that he falls into the "odd-lot" category, the burden shifts to the employer to prove that the employee is employable in a stable labor market and that such a market exists. *Waldorf Corp. v. Industrial Comm'n, 303 Ill.App.3d 477, 484 (1999).*

After petitioner injured his low back at work, he was required to undergo two back surgeries, including a two level fusion. Dr. DePhillips testified that petitioner's low back pain and radiating pain are due to permanent nerve damage. Dr. DePhillips found [*63] petitioner to be permanently and totally disabled and essentially unemployable.

Since January 5, 2006, petitioner has been treating with Dr. Gary Koehn for pain management. Dr. Koehn has made adjustments to petitioner's pain medication, administered injections into his sacroiliac joint and performed radio-frequency neurotomies. Dr. Koehn has always restricted petitioner from work.

Petitioner has been diagnosed with depression by various physicians including Dr. DePhillips, Dr. Koehn and Dr. Espinosa. Dr. DePhillips referred petitioner to the Institute for Personal Development for psychiatric care. Petitioner was initially seen by psychiatrist, Dr. Mary Cherian, who diagnosed him with mood disorder, secondary to chronic pain and restricted him from all work. Following a few months of treatment, Dr. Cherian took a position at a university and Dr. Greg Hawley then became petitioner's treating psychiatrist. Dr. Hawley regularly treats petitioner for his depression and in conjunction with Dr. Koehn, prescribe petitioner with pain medication and anti-depressants. Dr. Hawley has always found petitioner disabled from all work activities.

Petitioner testified that he applied for Social Security [*64] disability and was approved.

On April 25, 2008, Respondent, hired E.P.S. Rehabilitation, Inc., who conducted what they called a "Limited Telephonic Employer Sampling" of sixteen business from petitioner's general area that were in the transportation industry. Vocational rehabilitation counselor, Duane Bigalow, testified at his deposition that the "Limited Telephonic Employer Sampling" survey is only a snapshot of employment opportunities which may or may not be available at a point in time. Only two businesses out of the sixteen businesses surveyed, reported job openings and both of those jobs were for service/parts managers. At Bill Jacobs Chevrolet, the position of service/parts manager required lifting 30 to 40 pounds occasionally. The position at Ottawa Ford for a service writer required alternate standing and sitting all day. The physical demands of both jobs exceeded petitioner's physical capabilities as demonstrated by the FCE and by Dr. Espinosa's medical opinion. None of the businesses contacted in the survey were asked if they could accommodate petitioner's restrictions. The telephone survey was never updated to determine whether the job market changed.

Petitioner hired [*65] a vocational specialist, Ron Malik, who testified that he has worked for both plaintiff and defendant. Ron Malik also testified that he reviewed the "Limited Telephonic Labor Survey" that was prepared by

E.P.S. Rehabilitation and concluded that petitioner would not be hired for any of the positions identified in the labor market survey, nor would petitioner be able to successfully perform any of those positions. Vocational consultant, Ron Malik, also concluded that petitioner is unemployable without education and/or training for a new career.

Petitioner engaged in an extensive self-directed job placement without success. He applied for work at 403 businesses, utilized the Skills Match program at the unemployment office and reviewed the local newspaper on a daily basis. Respondent, has failed to provide evidence that petitioner is employable in a stable labor market and that such a market exists. Even though Edward Steffan testified that petitioner could earn between $ 10 to $ 15 an hour, vocational counselor, Duane Bigalow, testified that it would be speculative as to what petitioner could earn.

The Arbitrator finds that Ron Malik's opinion was supported by petitioner's unsuccessful [*66] job search. Additionally, petitioner's physicians believe he is disabled from gainful employment. Petitioner has met his burden of falling into the "odd-lot" category. He demonstrated diligent but unsuccessful attempts to find work and established that because of his age, skills, training and work history, he would not be regularly employed in a well-known branch of the labor market. Respondent, shall pay petitioner the sum of $ 893.11 for life since he is permanently and totally disabled.

O. OTHER - MILEAGE

Petitioner submitted mileage reimbursement request for travel to attend appointment with his treating physicians, as well as for his job searches. Section 8(a) of the Illinois Workers Compensation Act states that the employer shall pay "physical. mental and vocational rehabilitation of the employee, including all maintenance costs, and expenses incidental thereto."

Petitioner submitted into evidence, his mileage log which documented his trips to out-of-town doctors, as well as his trips for job searches. The following is a year by year summary of his mileage:

	Mileage Claim
2005	2,330 miles
2006	1,490.2 miles
2007	3,672 miles
2008	3,748 miles
2009	709 miles
Subtotal	11,949.2 miles

[*67]

In accordance with the holding in General Tire v. Industrial Commission. 164 Ill.Dec.181 [ILLEGIBLE TEXT] traveled at a rate of 48.5 cents per mile, being the reimbursement rate for the State of Illinois or $ 5,795.26.

O. VOCATIONAL REHABILITATION

In light of the findings set forth above the Arbitraor finds that this issue is now moot.

Legal Topics:

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

Illinois Official Reports

Appellate Court

***Bell v. Illinois Workers' Compensation Comm'n*,**
2015 IL App (4th) 140028WC

Appellate Court Caption	JANET K. BELL, Administrator of the Estate of Mary J. Nash, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Dan Pilson Auto Center, Appellee).
District & No.	Fourth District Docket No. 4-14-0028WC
Filed Rehearing denied	May 1, 2015 June 26, 2015
Decision Under Review	Appeal from the Circuit Court of Coles County, No. 13-MR-123; the Hon. Teresa K. Righter, Judge, presiding.
Judgment	Circuit court's judgment reversed, Commission's decision vacated, and cause remanded.
Counsel on Appeal	Sandra K. Loeb and Matthew Duco, both of Spiros Law, P.C., of Danville, for appellant. Stephen J. Klyczek (argued), of Hennessy & Roach, P.C., of Springfield, for appellee.

Panel

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

OPINION

¶ 1 Mary J. Nash filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries she sustained while she was working for Dan Pilson Auto Center (employer). Prior to the arbitration hearing, Ms. Nash died of causes unrelated to her work accident. Janet K. Bell, Ms. Nash's sister and the administrator of her estate (claimant), filed an amended application for adjustment of claim substituting herself as the claimant. After conducting a hearing, an arbitrator awarded temporary total disability (TTD) benefits and medical expenses and found that the claimant had sustained a permanent partial disability from her work injury. However, the arbitrator ruled that any permanent partial disability (PPD) benefits that had accrued prior to Ms. Nash's death abated with her death and declined to award any such benefits to her estate.

¶ 2 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Coles County, which confirmed the Commission's ruling. This appeal followed.

¶ 3 FACTS

¶ 4 Mary J. Nash worked for the employer as a clerical worker for approximately 25 years. The parties stipulated that Ms. Nash sustained accidental injuries that arose out of the course of her employment on January 30, 2008, when she slipped and fell in the employer's parking lot. She was transported by ambulance to Sarah Bush Lincoln Medical Center, where she was diagnosed with an acute spiral fracture of the right distal femur. On February 1, 2008, Ms. Nash was admitted to the Carle Foundation Hospital, where she underwent a surgical procedure on her fractured femur that the medical records described as an "open reduction and internal fixation" with plates and screws.

¶ 5 Although Ms. Nash's femur healed properly and without complications in the months following the surgery, she remained too weak to walk without assistance. On July 16, 2008, Ms. Nash's surgeon, Dr. Alain Desy, noted that weakness in Ms. Nash's legs prevented her from "fully ambulating" and that she was still using a wheelchair. Dr. Desy also noted at that time that, although some of Ms. Nash's weakness had preexisted her accident, she was able to walk without any assistive device prior to the accident. On August 27, 2008, Brian J. Cummings, Dr. Desy's physician's assistant, noted that Ms. Nash was experiencing very slow recovery of strength despite very sincere ongoing physical therapy efforts. Cummings suspected that Ms. Nash had an underlying neurological or rheumatological condition

preexisting her work injury but not manifesting itself strongly enough to impede her lifestyle before August 2008. A neurology consult was recommended.

¶ 6 On September 23, 2008, Ms. Nash was evaluated by Dr. Russell Cantrell, the employer's section 12 examiner. After examining Ms. Nash and reviewing her medical records, Dr. Cantrell opined that Ms. Nash had reached maximum medical improvement (MMI) with regard to her work-related right femur fracture. Dr. Cantrell also opined that Ms. Nash's reported inability to resume ambulation without reliance on a wheelchair was not related to her work-related orthopedic injury but rather was "associated with an underlying neuropathic process." He recommended a more complete set of electrodiagnostic studies. However, Dr. Cantrell opined that Ms. Nash was capable of performing her regular work duties without restrictions as they related to her work-related right femur fracture.

¶ 7 On March 18, 2009, Ms. Nash filed an application for adjustment of claim with the Commission seeking benefits for work-related injuries to her right leg that she allegedly suffered on January 30, 2008.

¶ 8 On November 12, 2009, Ms. Nash was evaluated by Dr. Conrad Wiehl, a neurologist. Dr. Wiehl's examination revealed that Ms. Nash had diffuse weakness and more weakness proximally in her lower extremities than distal weakness. Dr. Wiehl suspected that Ms. Nash was suffering from "a muscular dystrophy of some sort." Accordingly, he ordered EMG/nerve conduction studies and blood tests.

¶ 9 Ms. Nash returned to Dr. Wiehl on January 28, 2010, after undergoing the recommended studies. Dr. Wiehl testified that the diagnostic testing confirmed that Ms. Nash had a myopathy, which Dr. Wiehl defined as "an underlying muscle weakness syndrome." He opined that Ms. Nash's January 30, 2008, work accident "accelerated the clinical symptoms associated with her muscle disease." Dr. Wiehl also testified that, based upon his review of the medical records, Ms. Nash had reached MMI from her work-related injury as of August 27, 2008.

¶ 10 On August 19, 2010, Ms. Nash died of causes unrelated to her work-related injuries. On April 12, 2011, the claimant, Ms. Nash's sister and the administrator of her estate, filed an amended application for adjustment of claim which substituted herself as the claimant in the place of Ms. Nash.

¶ 11 The arbitration hearing took place on June 25, 2012. During the hearing, the claimant testified that, prior to her January 30, 2008, work accident, Ms. Nash appeared able to walk without an assistive device, although she used a cane on occasion. The claimant also stated that Ms. Nash was able to stand up without assistance prior to the work accident. The claimant testified that Ms. Nash relied upon a wheelchair to get around at all times after the work accident, including when she returned to work. The claimant did not observe Ms. Nash stand up without assistance or walk on her own at any time after the accident.

¶ 12 The employer stipulated that Ms. Nash sustained accidental injuries that arose out of and in the course of her employment on January 30, 2008. The employer also stipulated that the claimant was entitled to a TTD underpayment of $99.79, and the arbitrator awarded that amount to the claimant. The claimant sought reimbursement of medical expenses incurred by Ms. Nash while she was alive, including the cost of medical treatment rendered on the date of the accident and the cost of modifying her home to allow her to use a wheelchair. The arbitrator ordered the employer to pay these expenses, finding that the medical evidence showed that Ms. Nash needed assistance to ambulate as a result of her work-related injuries.

¶ 13 The claimant also sought recovery of the PPD benefits that accrued from the date that Ms. Nash reached MMI until her death on August 19, 2010. The employer disputed the claimant's right to recover such benefits, arguing that any PPD benefits to which the claimant would have been entitled abated upon her death.

¶ 14 After reviewing relevant case law and Commission decisions, the arbitrator agreed with the employer and held that Ms. Nash's claim for PPD benefits had abated. The Commission apparently found that the claimant had established that Ms. Nash's work accident resulted in a permanent partial disability. (While discussing our holding in *Divittorio v. Industrial Comm'n*, 299 Ill. App. 3d 662 (1998), the Commission stated that "[l]ike the instant case, medical testimony along with testimony from a relative [in *Divittorio*] established the existence of a permanent partial disability.") However, the arbitrator ruled that sections 8(e)(19) and 8(h) of the Act (820 ILCS 305/8(e)(19), (h) (West 2008)), which authorize the surviving spouse and dependants of a deceased claimant to continue an injured employee's claim for PPD benefits after the employee's death, allow the recovery of PPD benefits only if one or more such eligible dependents exist at the time of the employee's death. Because Ms. Nash had no dependents, the arbitrator held that her estate was not entitled to recover any PPD benefits on her behalf, even PPD benefits that accrued before her death. The arbitrator noted that the Act "allows dependents to recover from the economic loss caused by [the claimant's] injury," and concluded that "[a]llowing [Ms. Nash's] estate to collect permanency benefits, where she had no dependents, really serves no purpose."

¶ 15 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission. The Commission unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Coles County, which confirmed the Commission's ruling. This appeal followed.

¶ 16 ANALYSIS

¶ 17 The issue presented in this appeal is whether the estate of an unmarried claimant who dies without leaving any dependents may recover PPD benefits that accrued prior to the employee's death, or, alternatively, whether any claim to such benefits abates with the employee's death. The answer to this question depends upon the proper construction of section 8 of the Act (820 ILCS 308/8 (West 2008)). Issues of statutory construction are questions of law, which are reviewed *de novo*. *Nationwide Bank & Office Management v. Industrial Comm'n*, 361 Ill. App. 3d 207, 209-10 (2005). The relevant facts are undisputed. Accordingly, we review the Commission's decision *de novo*.

¶ 18 In this case, the Commission found that "medical testimony along with testimony from a relative established" that Ms. Nash had a permanent partial disability. The Commission also found that Ms. Nash had reached MMI before her death. Accordingly, the Commission tacitly acknowledged that at least some PPD benefits accrued prior to Ms. Nash's death. Nevertheless, relying on sections 8(e)(19) and 8(h) of the Act, the Commission ruled that any claim to PPD benefits, even a claim to PPD benefits that accrued and were due and owing prior to the Ms. Nash's death, abated with her death and could not be recovered by Ms. Nash's estate because Ms. Nash died without any dependents.

¶ 19 That was error. Section 8(e)(19) provides:

> "In a case of specific loss and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before payment or payment in full for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency." 820 ILCS 305/8(e)(19) (West 2008).

Similarly, section 8(h) provides:

> "In case death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent (or any grandchild, grandparent or other lineal heir or any collateral heir dependent at the time of the accident upon the earnings of the employee to the extent of 50% or more of total dependency) such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7." 820 ILCS 305/8(h) (West 2008).

By their plain terms, these provisions merely establish *to whom benefits will be paid* if the employee dies with a spouse or dependents before he has been fully compensated for his work-related injury. They do not limit the ability of a deceased employee's estate to collect accrued, unpaid benefits that were due and owing to the employee while he was alive. Neither provision addresses what happens when an employee dies without leaving a surviving spouse or any surviving dependents, as in this case. Accordingly, neither provision should be read as barring an employee's estate to collect accrued benefits under such circumstances.

¶ 20 As the claimant notes, both our supreme court and this court have already reached a similar conclusion. In *Republic Steel Corp. v. Industrial Comm'n*, 26 Ill. 2d 32 (1962), the Commission found that the claimant sustained accidental injuries arising out of his employment which permanently and totally incapacitated him and ordered the employer to pay the claimant $40 per week for 281 weeks plus an annual pension for life of $1,350 payable in equal monthly installments. *Id.* at 34-35. While the employer's appeal of the Commission's award was pending, the claimant died. The administrator of the claimant's estate (his wife) moved to substitute the administrator as the claimant in place of the employee. The circuit court of Cook County granted the substitution and ordered the employer to pay the administrator the amount of workers' compensation benefits that had accrued as of the date of the claimant's death. *Id.* at 35-36. The circuit court abated any additional benefit payments awarded by the Commission's order. *Id.*

¶ 21 Our supreme court affirmed. The supreme court rejected the employer's arguments that the administrator of the employee's estate "ha[d] no standing to collect workmen's compensation benefits, which can be paid only to dependents," and that the benefits that had accrued from the date of the employee's work accident until the date of his death "should be abated." *Id.* at 46. Citing its prior precedents, the supreme court ruled that, although an employee's death "extinguishe[s] all payments falling due after [the employee's] death," an administrator of the claimant's estate may recover for "those payments accrued to the date of death." *Id.*

¶ 22 Applying *Republic Steel Corp.*, we reached the same conclusion in *Nationwide Bank & Office Management v. Industrial Comm'n*, 361 Ill. App. 3d 207 (2005). In that case, an employee filed a claim for TTD benefits and medical expenses but died of causes unrelated to his work injury prior to arbitration. *Id.* at 208. The employee's widow carried on the employee's claim but did not file a motion for substitution. *Id.* The arbitrator awarded TTD

benefits and medical expenses, and the employer filed a petition for review with the Commission. While the employer's petition was pending, the employee's widow died, and the claim was carried on by the widow's estate. *Id.* (The employee and his wife had no children and left no dependents.) The Commission affirmed and remanded the matter to the arbitrator with instruction to take further evidence regarding the proper calculation of the employee's average weekly wage.

¶ 23 On remand, the employer moved to dismiss the claim, arguing, *inter alia*, that the claim had been abated due to the employee's death. *Id.* The arbitrator declined to address this issue and issued a decision finding that the employee's average weekly wage was $0. On appeal before the Commission, the employer again argued that the employee's claim had been abated. The Commission rejected this argument and held that the employer was required to pay the medical expenses and TTD benefits ordered in the original award. *Id.* at 209. However, on appeal, the circuit court reversed and set aside the arbitrator's award, ruling that section 8(h) of the Act abated the claim upon the death of the employee's wife. *Id.* at 210.

¶ 24 We reversed the circuit court's judgment and reinstated the Commission's decision. In so ruling, we relied upon our supreme court's decision in *Republic Steel Corp.* which, we noted, had (1) rejected the argument that an employee's estate lacks standing to collect accrued benefits "which could only be paid to dependents"; and (2) "not[ed] that benefits which accrued up to the date of death were payable to the estate, *regardless of dependency*, while benefits which did not accrue until after the date of death were abated." (Emphasis added.) *Id.* at 211. We rejected the employer's argument that the supreme court's holding in *Republic Steel Corp.* had been legislatively overruled by the enactment of section 8(h) in 1975. We noted that "section 8(h) by its express language does not address accrued benefits." *Id.* We observed that section 8(h) only addresses benefits which are to be "distributed as provided in" section 7(g) of the Act, which provides for payment in installments; accordingly, we ruled that section 8(h) "specifically addresses benefits to be paid out in installments" and leaves *Republic Steel Corp.*'s holding regarding accrued benefits "untouched." *Id.* Because the accrued TTD benefits and medical expenses at issue in *Nationwide Bank* were accrued benefits that were payable to the defendant prior to date of his death (rather than future installment payments that would have accrued and been payable on some later date), we held that the benefits awarded by the Commission could be paid to the employee's widow's estate. *Id.* at 213.

¶ 25 We reach the same conclusion here. In this case, Ms. Nash's estate seeks only those PPD benefits that had accrued and were payable, due, and owing to Ms. Nash prior to her death. It does not seek future installment payments that would have accrued and become payable to Ms. Nash on some future date had she survived. *Republic Steel Corp.* and *Nationwide Bank* provide that such benefits may be collected by Ms. Nash's estate.

¶ 26 The Commission found *Republic Steel Corp.* and *Nationwide Bank* distinguishable because, "[i]n each of those cases, when the injured worker died, there were one or more eligible dependents as set forth by [sections 8(e)(19) and 8(h)] of the Act." We do not find this distinction dispositive. In *Republic Steel Corp.*, our supreme court rejected the argument that an injured employee's estate "has no standing to collect workmen's compensation benefits, which can be paid only to dependents." *Republic Steel Corp.*, 26 Ill. 2d at 46. The supreme court held that the administrator of the estate may collect benefits that had accrued prior to the defendant's death. Although the administrator of the employee's estate in *Republic Steel Corp.* happened to be the employee's widow, the fact that she was an eligible dependent under the

Act played no part in the supreme court's holding. The employer in *Republic Steel* argued that the employee's widow, who was suing in her capacity as the administrator of the employee's estate rather than in her personal capacity, lacked standing to collect workers' compensation benefits because such benefits were payable "only to dependents," not to the employee's estate. The supreme court expressly rejected that argument. Thus, as we noted in *Nationwide Bank*, *Republic Steel Corp.* stands for the proposition that benefits which accrued up to the date of death are payable to the employee's estate, "*regardless of dependency.*" (Emphasis added.) *Nationwide Bank*, 361 Ill. App. 3d at 211. In *Nationwide Bank*, we noted that this aspect of *Republic Steel Corp.*'s holding was not overruled by the enactment of section 8(h) of the Act because section 8(h) does not address accrued benefits.

¶ 27 Similarly, our holding in *Nationwide Bank* was not dependent in any way on the fact that the employee's widow was alive at the time of the employee's death. Like the employee, the employee's widow in *Nationwide Bank* had died during the pendency of her husband's claim (*i.e.*, before his workers' compensation award was final). Nevertheless, applying *Republic Steel Corp.*, we awarded accrued benefits to the widow's estate. *Nationwide Bank*, 361 Ill. App. 3d at 211-13. In so holding, we made it clear that benefits that accrue before the injured employee's death are payable to the estate "regardless of dependency." *Id.* at 211.

¶ 28 In this case, the Commission also found that allowing Ms. Nash's estate to collect PPD benefits when she had no dependents "really serves no purpose." The employer essentially argues the same point by asserting that, unlike medical expenses and TTD benefits (which could "allow[ ] the estate to recover debts incurred by the decedent while living"), PPD "is purely compensation for the injury and is personal to the claimant." We are not persuaded. Like TTD benefits, PPD benefits serve as compensation for the diminishment of the employee's earning capacity which was caused by a work-related injury. Thus, unpaid PPD payments that accrued while the claimant was alive are payable to his estate, just like unpaid but accrued TTD benefits. See *Republic Steel Corp.*, 26 Ill. 2d at 46. Moreover, contrary to the Commission's assertion, there are good policy reasons to allow estates to collect such unpaid, accrued benefits. As our supreme court noted in *Republic Steel Corp.*, a contrary rule would encourage employers to "litigate and delay the payment of compensation due a legitimately disabled individual to a point beyond his death and thereby defeat his right to compensation." *Id.* at 47.

¶ 29 The employer argues that our supreme court's holding was "rendered obsolete" by the subsequent enactment of sections 8(e)(19) and 8(h) of the Act, which "limit[ed] recovery of a deceased petitioner's benefits to only surviving spouses and dependents." In *Nationwide Bank*, we specifically rejected this argument with respect to section 8(h). *Nationwide Bank*, 361 Ill. App. 3d at 211. For similar reasons, we also reject the employer's argument with respect to section 8(e)(19). As noted above, both sections merely provide that, where an injured claimant dies leaving one or more eligible dependents, such dependents may recover his workers' compensation benefits, including any installment benefits that were to be paid on dates after the claimant's death. They say nothing about what happens when an injured employee dies without leaving any eligible dependents. Thus, these sections of the Act do not defeat the employee's estate's right to collect benefits that accrued before the claimant's death, as confirmed by *Republic Steel Corp.*

¶ 30 Like the Commission, the employer relies upon *Divittorio v. Industrial Comm'n*, 299 Ill. App. 3d 662 (1998), and *Peabody Coal Co. v. Industrial Comm'n*, 255 Ill. App. 3d 828 (1994),

in support of its argument that benefits owed to a deceased claimant may only be paid to his or her eligible dependents. However, these cases merely addressed the question of who was entitled to collect benefit payments where there may have been an eligible dependent. Neither case held or implied that an injured employee's estate may not collect accrued benefits where there are no such dependents.

¶ 31 We have considered the employer's remaining arguments and we find them meritless. Accordingly, we reverse the judgment of the circuit court, vacate the Commission's decision, and remand this matter to the Commission with instructions to determine what PPD benefits accrued prior to Ms. Nash's death and to award such benefits, if any, to the claimant.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we reverse the judgment of the circuit court of Coles County confirming the Commission's decision, vacate the decision of the Commission, and remand this matter to the Commission for further proceedings consistent with our decision.

¶ 34 Circuit court's judgment reversed, Commission's decision vacated, and cause remanded.

1 of 100 DOCUMENTS

JANET K. BELL, ADMINISTRATOR OF THE ESTATE OF MARY J. NASH, PETITIONER, v. DAN PILSON AUTO CENTER AND THE ACCIDENT FUND, RESPONDENT.

NO. 09WC 11915

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF CHAMPAIGN

13 IWCC 384; 2013 Ill. Wrk. Comp. LEXIS 491

April 11, 2013

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

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 issue of whether the claim for permanent partial disability abated upon the death of Mary J. Nash, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 30, 2012, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 1,200.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of [*2] the Commission.

ATTACHMENT:

ARBITRATION DECISION

Janet K. Bell, Administrator of the Estate of Mary J. Nash
Employee/Petitioner

v.

Dan Pilson Auto Center and the Accident Fund
Employer/Respondent

Case # **09** WC **011915**

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 **D. Douglas McCarthy**, Arbitrator of the Commission, in the city of **Urbana**, on **June 25, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Decedent's condition of ill-being at time of death causally related to the injury?
J. [X] Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
L. [X] What is the nature and extent of the injury?
O. [X] Other **Whether the claim for PPD benefits abated upon the death of Mary Nash**

FINDINGS

On **January 30, 2008**, [*3] Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Decedent, Mary Nash, 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.

On the date of accident, Decedent, Mary Nash, was **58** years of age, ***single*** with ***no*** dependent children or heirs.

Respondent stipulated that the estate is entitled to a TTD underpayment of $ 99.79.

The parties stipulate that Respondent is entitled to a credit under Section 8(j) of the Act for all related bills paid by the group health carrier.

ORDER

Respondent shall pay reasonable and necessary medical services of $ 990.00 to the estate, as provided in Sections 8(a) and 8.2 of the Act.

The claim for PPD abated upon the death of Mary Nash.

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.

[*4] **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.

July 25, 2012

Date

Statement of Facts

On March 18, 2009, Mary Nash filed an application for adjustment of claim with the Commission alleging a workplace accident of January 30, 2008. The Application states that Ms. Nash was single and had no dependent children. On August 19, 2010, Mary Nash died of causes unrelated to her workplace accident. On April 12, 2011, an amended application for adjustment of claim was filed by the Administrator of Mary Nash's estate, Ms. Nash's sister, Janet Bell. The

amended application substituted Ms. Bell in the place her deceased sister. Hereinafter, Ms. Bell will be referred to as the Petitioner.

On January 30, 2008, Mary Nash was employed by Respondent as a clerical worker and had been so employed for approximately 25 years. The parties stipulated that Mary Nash sustained accidental injuries that arose out of [*5] and in the course of her employment on that date when she slipped and fell in Respondent's parking lot.

Medical records were admitted into evidence showing that Ms. Nash was transported by ambulance to Sarah Bush Lincoln Medical Center where she was diagnosed with an acute spiral fracture of the right distal femur. (PX4) She was transferred and admitted to Carle Foundation Hospital on the same day for further orthopedic care. (PX6)

On February 1, 2008, Ms. Nash underwent surgery described in the medical records as "open reduction and internal fixation" with plate and screws. (PX6) The surgery was performed by Dr. Alain Desy at Carle Foundation Hospital without apparent complication. A discharge summary report from the Hosptal dated February 8, 2008 indicates that Ms. Nash also had a pacemaker placed while in the Hospital due to an episode of hypertension and bradycardia following the surgery. Id.

On February 8, 2008, Ms. Nash was transferred from the Hospital to an inpatient rehabilitation facility secondary to " significant deficits in her ADLs and mobility." Id. At that time, she was reported to be at "touch down weight bearing of the right lower extremity" with "no weight [*6] restriction in the left upper extremity." A rehab discharge summary report dated February 17, 2008 indicates that Ms. Nash required 24-hour supervision, a ramp, a slideboard, a tub transfer bench and a wheelchair with removable arms and legs upon discharge. Id. The report also indicates that she was discharged to stay at the home of Janet Bell, the Petitioner in this case. Id.

On March 18, 2008, Ms. Nash attended a follow-up visit with Dr. Desy. (PX7) Dr. Desy's examination revealed quadriceps atrophy among his other findings. X-rays on that date revealed that Ms.Nash's hardware was in good position and that the fracture segments were maintained in a good alignment with no angulation or displacement. Ms. Nash was given a prescription to begin physical therapy focusing on range of motion and strength at the right knee and hip. She was told she could advance to partial weight bearing of fifty pounds.

On April 15, 200, Ms. Nash was seen by Dr. Jared Zimmerman of the Carle Department of Orthopedics. Id. Dr. Zimmerman's report for that date indicates that Ms. Nash had remained essentially at touch down weight bearing and was using a wheelchair for mobility. Dr. Zimmerman's report [*7] also indicates that Ms. Nash was overall of poor musculoskeletal strength prior to her injury and that her presently injured right side was previously her stronger side. His examination revealed that Ms. Nash's overall musculature was "quite atrophied." X-rays revealed the anatomic alignment of the distal right femur to be stable with interval healing present. Ms. Nash was told to continue working in physical therapy, focusing on motion, strength and overall conditioning.

On May 20, 2008, Ms. Nash was seen by Brian J Cummings, a physician's assistant in the service of Dr. Desy at Carle's Department of Orthopedics. Id. Physical examination on that date showed quadriceps strength at 4/5. X-rays were stable with modest interval healing. Ms. Nash was advised to continue physical therapy and that she may advance her weight bearing to fifty percent.

On June 17, 2008, Ms. Nash returned to Dr. Desy. Id. X-rays on that date revealed that her fracture alignment remained anatomic with "very good interval healing" and only "a very very faint fracture line still visible." Physical examination revealed that her strength was still "quite lagging behind." Though Ms. Nash was able to hold [*8] her leg up against gravity, she could not do so with any additional resistance. She was not able to advance up to fifty percent weight bearing consistently and further physical exam revealed that her strength of the contralateral leg was also weak. The patient was advised to continue working on physical therapy and to return in four weeks to assess her progress.

On July 16, 2008, Ms. Nash was reevaluated by Dr. Desy. Id. At that time, Ms. Nash still had "significant weakness of her right and left lower extremities preventing her from being fully ambulating [sic.]" She was still using a wheelchair. Dr. Desy's record indicates that though some of Ms. Nash's weakness preexisted her accident, Ms. Nash was able to walk without any assistive device prior to the accident.

On August 27, 2008, Ms. Nash returned to P.A. Cummings for a final orthopedic consult. Id. It was reported in P.A. Cummings's record for that date that Ms. Nash's bony injury had healed. However, it was also reported that Ms. Nash had a very slow recovery of strength, despite very sincere ongoing physical therapy efforts. P.A. Cummings reported having a suspicion that Ms. Nash had an underlying neurological or rheumatogical [*9] condition, preexisting

her work injury but not manifesting strongly enough to impede her lifestyle before now. A neurology consult was recommended.

On September 23, 2008, Ms. Nash was evaluated by Respondent's Section 12 examiner, Dr. Russell Cantrell of Orthopedic and Sports Medicine, Inc. (RX1) Dr. Cantrell took a history of the workplace accident and reviewed records concerning Ms. Nash's subsequent medical care at Carle Clinic Association and Carle Foundation Hospital. Dr. Cantrell's history indicates that Ms. Nash was non-weight bearing for several weeks after her surgery and then allowed forty-five pounds of weight bearing on her right lower extremity. Dr. Cantrell's history also indicates that Ms. Nash was unable to progress in ambulation using either a walker or on the parallel bars due to weakness in both upper extremities and being unable to extend her right leg fully. Ms. Nash also reported that she had used a wheelchair as her primary mode of ambulation and that she had been released from Dr. Desy's care approximately one month prior, after her fracture was found to be healed. Ms. Nash also reported that she had resumed her regular work duties at Respondent's auto dealership. [*10] Ms. Nash advised Dr. Cantrell of a long-standing history of global weakness in both her lower and upper extremities. However, Ms. Nash also reported being able to do most of her activities of daily living without assistance prior to her workplace accident. Ms. Nash also denied seeking any medical care or evaluation for this symptom prior to her workplace accident.

Upon Dr. Cantrell's physical examination, Ms. Nash reported being unable to get out of her wheelchair into a standing position due to weakness in her lower extremities. She was found to have 4/5 strength in all major muscle groups of both upper and lower extremities. Dr. Cantrell also reviewed electrodiagnostic studies performed by Dr. Henry Bremer at Carle Clinic Association on October 8, 2008. Dr. Bremer performed an EMG study of the right lower extremity which was found to be abnormal. However Dr. Bremer's study was not considered to be of diagnostic value to Dr. Cantrell because it did not test the contralateral extremity or the upper extremities. After performing the examination of September 23, 2008 and reviewing Ms. Nash's post- injury medical records, Dr. Cantrell opined that Ms. Nash had reached maximum medical [*11] improvement with regard to her work-related right femur fracture. Dr. Cantrell also opined that Ms. Nash's reported inability to resume ambulation without reliance on a wheelchair was not related to her orthopedic injury, but "rather is associated with an underlying neuropathic process." Dr. Cantrell found no explanation for Ms. Nash's global weakness and recommended a more complete set of electrodiagnostic studies. However, Dr. Cantrell indicated that these studies would not be necessitated by Ms. Nash's work injury. Dr. Cantrell also opined that Ms. Nash was capable of performing her regular work duties without restrictions as they related to her work-related distal right femur fracture.

On November 12, 2009, Ms. Nash was evaluated by Dr. Conrad Weihl, a Board certified neurologist with subspecialty training in neuromuscular medicine, at Barnes Hospital. (PX10; PX12, p.5) Dr. Weihl took a history of Ms. Nash's work accident as well as her pre-existing generalized weak condition. (PX10; PX12, p.6) Dr. Weihl's examination revealed that Ms. Nash had diffuse weakness and more weakness proximally in her lower extremities than distal weakness. (PX10; PX12, p.9) Dr. Weihl's examination [*12] led him to suspect that Ms. Nash was suffering from "a muscular dystrophy of some sort." (PX12, p.10) He ordered EMG/nerve conduction studies as well as blood tests to further delineate her condition. (PX10; PX12, pp.9-10)

On January 28, 2010 Ms. Nash returned to Dr. Weihl's office after undergoing the recommended studies. (PX10;PX11;PX12) Dr. Weil testified that the diagnostic testing confirmed that Ms. Nash had a myopathy, which he defined as "an underlying muscle weakness syndrome." (PX12, p.10) He also testified within a reasonable degree of medical certainty that the work accident of January 30, 2008 "accelerated the clinical symptoms associated with her muscle disease." (PX12, p.12) He furthermore testified that based upon his review of her medical records, Ms. Nash had reached maximum medical improvement from her work-related injury as of August 27, 2008. (PX12, p.13)

Petitioner testified that prior to the January 30, 2008 workplace accident, she saw her sister on a weekly basis. Petitioner testified that though Ms. Nash used a cane on occasion, Ms. Nash appeared able to walk without an assistive device prior to January 30, 2008. Likewise, Petitioner testified that she observed [*13] that Ms. Nash was able to stand up without assistance prior to January 30, 2008. She testified that prior to January 30, 2008,Ms. Nash would use her right hand to push off her right leg in order to stand up.

Petitioner also testified that she had significant opportunity to observe Ms. Nash after her workplace accident. She testified that she did not observe Ms. Nash stand up without assistance or walk on her own at any time after January 30, 2008. She testified that Ms. Nash relied upon a wheelchair to get around at all times after January 30, 2008, including when she returned to work. Petitioner also testified that Ms. Nash did not drive her own vehicle after January 30, 2008 and that Ms. Nash paid someone else to drive her to work.

Conclusions of Law

In support of the Arbitrator's decision relating to disputed issues, the arbitrator finds the following:

The main issue in this case is whether Ms. Nash's estate is entitled to recover compensation benefits or whether the claim abated on the date of her death. In order to resolve the issue, the statute and several cases decided by both the Courts and Commission need to be analyzed.

Prior to 1975, the Arbitrator believes [*14] that the Petitioner would have no right benefits. The case of *Wilson-Raymond Construction Co.v. The Industrial Commission, 79 Ill. 2d 45 (1980),* stands for that proposition. The case involved a specific loss followed by the worker's death from unrelated causes. At the time of death, a final award on permanency had not been issued. Under the statute at the time, his death ended the claim, even if he had reached a point of maximum medical improvement prior to his death. The same result would have applied to an unscheduled loss under section 8 (d)(2).

After 1975, injured workers who died from unrelated causes prior to the formal determination of benefits could have their claims completed by their survivors, if they met the qualifications set forth in each provision of the statute. Section 8 (e)(19) provides that the surviving spouse or dependents can continue to pursue the claim and recover benefits. Section 8(h) goes a little bit further, allowing a surviving spouse or child take up the claim, along with other relatives who were able to show that they were dependent upon the injured worker.

In this case, no survivors as defined by either section of the Act [*15] exist. The Petitioner acknowledges that fact, but maintains that case law still would allow payment to the estate of the injured worker for all benefits which accrued prior to her death.

The Petitioner cites two cases as authority for her position. The cases, *Republic Steel Corporation v. The Industrial Commission, 26 Ill.2d 32(1962),* and *Nationwide Bank and Office Management v. The Industrial Commission, 361 Ill. App. 3d 207(2005),* also cite a number of other cases which the Petitioner believes support her argument.

There is, however, one significant difference between all of those cases and the case at hand. In each of those cases, when the injured worker died, there were one or more eligible dependents as set forth by the two relevant sections of the Act. In the instant case, there were no eligible dependents. The Arbitrator believes that this is a significant distinction.

In the case of *Peabody Coal Company v. The Industrial Commission, 255 Ill. App. 3d 828 (1994),* the injured worker was awarded by the Commission temporary and permanent benefits. While the case was on appeal to the Courts, he died [*16] from unrelated causes. The executor of his estate was allowed to substitute in as the proper Petitioner, and the Court said that the amounts set forth by the Commission would be due and owing. However, the Court further said that the question as to whom the award should be paid remained. They remanded the case back to the Commission "for a determination of dependency". *Id, at 832.*

Similarly in the case of *Divittorio v. The Industrial Commission, 299 Ill. App. 3d 662 (1998),* the Court required proof of dependency for a child who had substituted in on a specific loss claim. Like the case at hand, the injured worker had reached a point of maximum medical improvement prior to his death. Like the instant case, medical testimony along with testimony from a relative established the existence of permanent partial disability. The Court, in the first sentence of its opinion, stated "In order for a child to be entitled workers compensation benefits for her injured father who died from causes unrelated to his injury, she must prove that she was his dependent."*Id at 663*

The Commission has repeatedly followed the same [*17] reasoning, requiring dependency in order to recover benefits. In *Moore v. Harper-Wydman, 5 IWCC 277,* the claim was held to have been abated because the decedent's mother could not prove dependency. In *Thurmond v. City of Chicago, 09 IWCC 1113,* a mother was able to prove dependency. The Commission cited the Divittorio case and awarded benefits. Finally, in the case of *Cooper v. Borg Warner, 10 IWCC 1043,* the Commission awarded benefits to the decedent's sister, and stated that the Nationwide case stood for the proposition that payment should be made since dependency was shown.

The Petitioner argues that the Nationwide opinion calls for payment to Ms. Nash's estate without a showing of dependency. However, as stated above, the Nationwide case involved a worker who,at the time of his death, was survived by widow who could to take over the claim and recover under both sections of the Act. The Court's finding was not changed because the widow later died. The claim was brought by her estate. She was a proper beneficiary, and so her estate was entitled to recover the benefits which had accrued prior to her husband [*18] death. The effect of the Court's

ruling was to allow her to recover for some of the economic loss occasioned by the fact that temporary total disability was not paid to her husband when it was owed.

Both sections of the Act allowing survivors to complete claims serve one of the purposes of our law. The law allows dependents to recover from the economic loss caused by the injury. Here, Ms. Nash received temporary total disability benefits until she returned to her regular job. Allowing her estate to collect permanency benefits, where she had no dependents, really serves no purpose. The claim by the estate for payment of accrued benefits is hereby denied.

The parties stipulated that all of the temporary disability benefits were paid at the proper rate, except for an underpayment which the respondent agreed to pay. With respect to past medical, the Petitioner submitted two bills for payment. PX 5 is a bill for treatment on the date of the accident, and the Respondent is order to pay the bill, pursuant to the Fee Schedule. PX 13 represents a claim for reimbursement for modifications to the home to allow Ms. Nash to use her wheelchair. The medical evidence shows clearly that the decedent [*19] needed assistance to ambulate as a result of her accidental injuries, and the Arbitrator orders the Respondent to make the reimbursement.

Dated and Entered July 25 2012

Legal Topics:

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

2015 IL App (1st) 133233WC

FILED: June 26, 2015

NO. 1-13-3233WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JERRY DIBENEDETTO, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (City of Chicago, Appellee).	)	Appeal from Circuit Court of Cook County No. 13L50459 Honorable Eileen O'Neill Burke, Judge Presiding.

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

OPINION

¶ 1 On March 14, 2007, claimant, Jerry DiBenedetto, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2006)), alleging work-related injuries that arose out of and in the course of his employment on December 12, 2006, and seeking benefits from the employer, the City of Chicago. Following a hearing, the arbitrator determined claimant sustained compensable injuries under the Act and awarded him (1) temporary total disability (TTD) benefits of $1,073.33 per week for 106-4/7 weeks; (2) maintenance benefits of $1,073.33 per week for 129-1/7 weeks; and (3) wage-differential benefits of $982.67 per week from September 9, 2011, through the duration of his

disability.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's wage-differential award, reducing it from $982.67 to $840.65 per week—the maximum weekly benefit allowable under section 8(b)(4) of the Act (820 ILCS 305/8(b)(4) (West 2006)) based on claimant's December 2006 accident date. The Commission otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Cook County confirmed the Commission. Claimant appeals, arguing the Commission erred by finding the date of claimant's accidental injury (December 12, 2006), rather than the date of the arbitration hearing (May 25, 2012), controlled the maximum rate applicable to claimant's wage-differential award. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On appeal, the underlying facts are not in dispute and it is unnecessary to recite them in detail. Briefly stated, the record shows claimant filed his application for adjustment of claim in March 2007, alleging he injured his right arm, back, and neck at work on December 12, 2006. On May 25, 2012, an arbitration hearing was conducted in the matter. Evidence presented showed claimant worked for the employer as a hoisting engineer. While at work on December 12, 2006, he fell to the ground from a height of several feet and sustained injuries, including injuries to his right shoulder and cervical spine. Claimant received medical treatment and underwent surgery on his right shoulder in February 2007 and spinal fusion surgeries in December 2007 and June 2008.

¶ 5 In March 2009, a functional capacity evaluation was performed on claimant and showed he functioned at a light to medium level of work. Claimant's treating physician, Dr. Edward Goldberg, recommended permanent restrictions for claimant, including that he not return to

work for the employer in his former position as a hoisting engineer. Claimant then began vocational rehabilitation and a labor market survey showed he could be expected to earn between $8 to $10 per hour given his education, physical capabilities, and transferable skills. On September 9, 2011, claimant began working in an office position for Manak Insurance, earning $8.25 an hour. Evidence at arbitration showed claimant's injuries caused a decrease in his earning capacity and his job with Manak Insurance maximized his earning capacity. Evidence further showed that, at the time of arbitration, the rate of pay for a hoisting engineer with the employer was $45.10 an hour.

¶ 6 (We note the evidence and testimony at arbitration showed the current hourly rate of pay for claimant's position with the employer was $45.30. Both parties also rely on that figure in their briefs. However, in her decision, the arbitrator inexplicably found the current rate of pay for claimant's hoisting engineer position to be $45.10 an hour and used that latter rate in her wage-differential calculations. The record fails to reflect either party challenged that particular finding by the arbitrator. Thus, we abide by the $45.10 figure.)

¶ 7 On September 6, 2012, the arbitrator issued her decision, finding claimant sustained accidental injuries arising out of and in the course of his work for the employer on December 12, 2006, and awarding benefits as stated. Relevant to this appeal, the arbitrator found claimant's injuries "caused a loss of earnings rendering him *** permanently partially incapacitated from pursuing his usual and customary employment" and, as a result, he was entitled to wage-differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)). Specifically, the arbitrator awarded claimant $982.67 per week, beginning September 9, 2011, and for the duration of his disability.

¶ 8 The employer sought review with the Commission, seeking modification of the

arbitrator's wage-differential award. It argued that, based on the date of claimant's accidental injury (December 12, 2006), the maximum rate of wage-differential benefits he was entitled to receive was $840.65 per week. On April 18, 2013, the Commission entered its decision in the matter. It noted that, pursuant to section 8(b)(4) of the Act (820 ILCS 305/8(b)(4) (West 2006)), the maximum weekly wage-differential benefit "shall be 100% of the State's average weekly wage [(State AWW)] in covered industries under the Unemployment Insurance Act [(820 ILCS 405/100 *et seq.* (West 2006))]." The Commission found the State AWW at the time of claimant's accidental injury (December 12, 2006) was $840.65, and reduced his weekly wage-differential benefit to that amount. The Commission otherwise affirmed and adopted the arbitrator's decision. On October 8, 2013, the circuit court of Cook County confirmed the Commission's decision.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, claimant argues the Commission erred in its award of wage-differential benefits. Specifically, he contends the maximum rate applied to his award should have been based on the State AWW at the time of his May 2012 arbitration hearing ($966.72) rather than the State AWW at the time of his December 2006 accidental injury ($840.65).

¶ 12 The issue on appeal involves a matter of statutory interpretation, which presents a question of law and is subject to *de novo* review. *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature" and the statutory language "is normally the best indicator of what the legislature intended." *Gruszeczka*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "[W]here the statutory language is clear, it will be given effect without resort to

other aids for construction." *Gruszeczka*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. However, where the meaning of an Act is unclear from the statutory language, "the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy [citation], as well as other sources such as legislative history [citation]." *Gruszeczka*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "We interpret the Act liberally to effectuate its main purpose: providing financial protection for injured workers." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 419 (2006).

¶ 13 Section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)) provides for an award of wage-differential benefits to an injured employee. At the time of claimant's accidental injury, that section provided as follows:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall *** receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3 % of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2006).

¶ 14 By its own terms, section 8(d)(1) is subject to "limitations as to maximum amounts fixed in paragraph" 8(b) of the Act (820 ILCS 820 ILCS 305/8(b) (West 2006). 820

ILCS 305/8(d)(1) (West 2006). In particular, maximum rates set forth in section 8(b)(4) of the Act (820 ILCS 305/8(b)(4) (West 2006)) have long been held applicable to wage-differential awards. See *General Electric Co. v. Industrial Comm'n*, 144 Ill. App. 3d 1003, 1017, 495 N.E.2d 68, 77 (1986); *Bohannon v. Industrial Comm'n*, 237 Ill. App. 3d 989, 993, 606 N.E.2d 527, 529 (1992); *Fernandes v. Industrial Comm'n*, 246 Ill. App. 3d 261, 269, 615 N.E.2d 1191, 1197 (1993). Effective July 20, 2005, the legislature amended section 8(b)(4), adding express language concerning wage-differential awards and providing as follows: "For injuries occurring on or after February 1, 2006, the maximum weekly benefit under paragraph (d)1 *** shall be 100% of the [State AWW] in covered industries under the Unemployment Insurance Act." 820 ILCS 305/8(b)(4) (West 2006); Pub. Act 94-277 (eff. July 20, 2005) (amending 820 ILCS 305/8(b)(4) (West 2004)).

¶ 15 To support his position on appeal, claimant argues that the Act has consistently been interpreted to require that a wage-differential award be calculated based upon both the claimant's actual earnings *at the time of the hearing* and what the claimant would have been earning *at the time of the hearing* had he not been injured. He maintains that, given this consistent interpretation, the legislature must have intended the State AWW at the time of the arbitration hearing to be used to determine the maximum rate of wage-differential benefits. Claimant relies on the principle of statutory construction that "where the legislature chooses not to amend terms of a statute after judicial construction, it will be presumed that it has acquiesced in the court's statement of legislative intent." *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 404, 830 N.E.2d 584, 589 (2005); see also *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25, 986 N.E.2d 1139 ("We assume not only that the General Assembly acts with full knowledge of previous judicial decisions, but also that its silence on this issue in the face of decisions consistent

with those previous decisions indicates its acquiescence to them.").

¶ 16 First, we do not dispute that wage-differential calculations are based on circumstances as they exist at the time of arbitration. In particular, this court has held that a wage-differential benefit must be "based on the amount the employee would have been able to earn at the time of the arbitration hearing, not the amount he or she was actually earning at the time of the injury" (*Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061, 853 N.E.2d 40, 45 (2006)) and that a claimant must "establish[] his current earning capacity" (*Copperweld Tubing Products, Co. v. Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 634, 931 N.E.2d 762, 766, 341 Ill. Dec. 865, 869 (2010)). See also *United Airlines, Inc. v. Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 22, 991 N.E.2d 458 (holding a wage-differential award must "be determined as of the date of the arbitration hearing" as the Act "does not contemplate multiple figures to be computed and awarded at future dates"). However, we find that the calculation of a wage-differential award in the first instance presents a different situation than application of the appropriate maximum rate under the Act.

¶ 17 Here, claimant has failed to cite any authority which provides that the maximum rate applicable to a claimant's wage-differential award is determined as of the date of the arbitration hearing. In fact, the cases he relies upon do not address maximum rates of compensation as set forth in section 8(b)(4). Further, our review of the relevant case law reflects precisely the opposite position and shows that "[t]he date of injury *** controls the maximum rate applicable." *Bohannon*, 237 Ill. App. 3d at 994, 606 N.E.2d at 530 (finding the date of the claimant's work injury controlled the maximum rate applicable to the claimant's wage-differential award); see also *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 497, 867 N.E.2d 1063, 1071 (2007) (finding the maximum weekly rate allowable for a wage-differential award was the max-

imum rate in effect on the date of the claimant's accidental injury). The date of a claimant's accidental injury, rather than the date of hearing, has similarly been used to determine the maximum rate applicable for other benefit awards under the Act. See *Peabody Coal Co. v. Industrial Comm'n*, 259 Ill. App. 3d 356, 361, 631 N.E.2d 422, 426, (1994) (using the date of the claimant's accidental injury to establish the maximum rate for an award of permanent partial disability (PPD) benefits); *Organic Waste Systems v. Industrial Comm'n*, 241 Ill. App. 3d 257, 261, 608 N.E.2d 1243, 1246 (1993) (finding the claimant's accident date determined the maximum rate for PPD benefits under section 8(b)(4)); *George W. Kennedy Construction, Co. v. Industrial Comm'n*, 152 Ill. App. 3d 114, 121, 503 N.E.2d 1169, 1174 (1987) (using the date of an employee's accidental death to determine the maximum benefit rate under section 8(b)(4)).

¶ 18 Further, although not directly on point, we find the supreme court's decision in *Grigsby v. Industrial Comm'n*, 76 Ill. 2d 528, 530, 394 N.E.2d 1173, 1174 (1979), is instructive. There, the claimant was awarded benefits "based on the maximum rates applicable under the workmen's compensation statute in effect at the time of the injury." *Grigsby*, 76 Ill. 2d at 530, 394 N.E.2d at 1174. The claimant sought review, and the sole issue before the supreme court was "whether the Commission correctly applied the rate of compensation in effect at the time of [the] claimant's injury or whether it should have applied retroactively the rate in effect at the time of its decision." *Grigsby*, 76 Ill. 2d at 531, 394 N.E.2d at 1174. In affirming the Commission, the court noted that "[a] long line of Illinois decisions has held that the law in effect at the time of the injury determines the rights of the parties." *Grigsby*, 76 Ill. 2d at 531, 394 N.E.2d at 1174. The court also expressly referenced section 8(b)(4), indicating its provisions referred to "the time of the injury" rather than the date of either the arbitrator or Commission's decision. *Grigsby*, 76 Ill. 2d at 534, 394 N.E.2d at 1176.

¶ 19 After reviewing the relevant case authority, we find the principle of statutory construction relied upon by claimant actually works against him. Case law reflects a clear judicial determination that the limits on compensation set forth in section 8(b)(4) of the Act, including maximum rates applicable to wage-differential awards, apply with reference to the date of injury and not some later point in time. As stated, we must assume that the legislature has acted with full knowledge of this judicially determined position and, given its failure to amend section 8(b)(4) to provide otherwise, has acquiesced to it.

¶ 20 Additionally, as the employer points out, the portion of section 8(b)(4) at issue on appeal states it applies *"[f]or injuries* occurring on or after February 1, 2006." (Emphasis added.) 820 ILCS 305/8(b)(4) (West 2006). Although claimant dismisses this language as "only denot[ing] when the 2005 amendments to the Act would begin to apply," we find it is further evidence that that the legislature intended for the date of a claimant's injury to control the maximum rates set forth in that section.

¶ 21 Finally, on appeal, claimant argues that limiting an employee's wage-differential award based on the State AWW in effect at the time of injury rather than the time of hearing is inconsistent with the intent of the Act, which is to thoroughly compensate and financially protect injured workers. See *Cassens*, 218 Ill. 2d at 530, 844 N.E.2d at 422 (noting "the Act's overriding purpose" as being "early and thorough compensation for income lost due to job-related injuries"); *Interstate Scaffolding, Inc. v. Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146, 923 N.E.2d 266, 274 (2010) (stating "[t]he fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force"). In particular, claimant points out that the State AWW at the time of his hearing would place him "closer to the financial condition that he would have been in had the injury never occurred."

¶ 22 Here, we cannot dispute claimant's contention that application of the State AWW in effect at the time of his arbitration hearing would result in compensation closer to *his* actual wage differential. However, the purpose of section 8(b)(4) of the Act is to limit recoveries. *Modern Drop Forge Corp. v. Industrial Comm'n*, 284 Ill. App. 3d 259, 265, 671 N.E.2d 753, 757 (1996). Under either party's interpretation of section 8(b)(4), the maximum rate set forth therein will affect wage-differential awards to varying degrees. Depending upon the facts presented in each particular case, even claimant's interpretation could result in no change to a wage-differential award, a significant decrease to the award, or something in between. Given these circumstances, we find claimant's argument unpersuasive and reversal of the Commission's decision unwarranted.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court's judgment.

¶ 25 Affirmed.

1 of 100 DOCUMENTS

JERRY DIBENEDETTO, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO. 07WC 11194

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

13 IWCC 402; 2013 Ill. Wrk. Comp. LEXIS 449

April 18, 2013

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 Respondent herein and notice given to all parties, the Commission, after considering the issue of wage differential and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Petitioner sustained a work-related accident on December 12, 2006. As a result of the injury, the Arbitrator awarded the Petitioner a wage differential of $ 982.67 under Section 8(d)(1) of the Act. Pursuant to Section 8(b)(4) of the Act: Limits on Compensation, for injuries on or after February 1, 2006, the maximum weekly benefit under paragraph (d)(1) of this Section shall be 100% of the State's average weekly wage in covered industries under the Unemployment Insurance Act. The State's average weekly wage was $ 840.65 at the time of the December 12, 2006 injury. The Commission, therefore, modifies the Arbitrator's wage differential award from $ 982.67 to $ 840.65. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to [*2] Petitioner the sum of $ 1,073.33 per week for a period of 106-4/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary maintenance disability benefits of $ 1,073.33 per week for a period of 129-1/7 weeks, commencing March 16, 2009 through September 8, 2011, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 840.65 per week for the duration of his disability, as provided in § 8(d)(1) of the Act, for the reason that the injuries sustained caused a loss of earnings rendering the Petitioner to become permanently partially incapacitated from pursuing his usual and customary employment.

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 [*3] 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

JERRY DIBENEDETTO,
Employee/Petitioner

v.

CITY OF CHICAGO,
Employer/Respondent

Case # **07** WC **11194**

Consolidated cases: 06 WC 34372.

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Chicago**, on **May 25, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
L. [X] What is the nature and extent of the injury?
N. [X] Is Respondent due any credit?

FINDINGS

On **December 12, 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, [*4] 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 $ **83,720.00**; the average weekly wage was $ **1,610.00**.

On the date of accident, Petitioner was **47** 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 $ **116,480.16** for TTD, $ **0.00** for TPD, $ **137,469.78** for maintenance, and $ **8,000.00** for other benefits in the form of an advancement of permanent partial disability, for a total credit of $ **261,949.94**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **1,073.33**/week for **106-4/7** weeks, commencing **December 13, 2006** through **August 19, 2007**, and again commencing [*5] **October 2, 2007** through **March 15, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary maintenance disability benefits of $ **1,073.33**/week for **129-1/7** weeks, commencing **March 16, 2009** through **September 8, 2011**, as provided in Section 8(b) of the Act.

Commencing **September 9, 2011**, the respondent shall pay the petitioner the sum of $ **982.67**/week for the duration of his disability, as provided in Section **8(d)1** of the Act, because the injuries sustained caused **a loss of earnings rendering him to become permanently partially incapacitated from pursuing his usual and customary employment**.

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 [*6] or a decrease in this award, interest shall not accrue.

Signature of Arbitrator **JOANN M. FRATIANNI**

August 30, 2012

Date

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

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

Petitioner was working for Respondent as a hoisting engineer. The job duties of a hoisting engineer include operating and maintaining heavy equipment including road grinders, pavers, cranes, bulldozers and high lifts. In order to perform these tasks, Petitioner is required to lift in excess of 100 pounds on a regular basis.

On December 12, 2006, Petitioner injured his right knee, right shoulder, neck and back, when he fell 6-8 feet to the ground. At the time he was operating a highlift moving shelving units, and while climbing the unit to the highlift, the unit collapsed, causing his fall.

Following this injury, Petitioner received initial medical treatment from MercyWorks. X-rays were performed and Petitioner was prescribed to be off work. He was later prescribed an MRI which was performed on December 22, 2006. This revealed a rotator cuff tear to the right shoulder. Following the MRI, the clinic referred [*7] him to see Dr. Heller, an orthopedic surgeon. (Px3)

Dr. Heller initially treated the shoulder conservatively with physical therapy and cortisone injections. Finally, on February 28, 2007, Dr. Heller performed surgery in the form of an acromial decompression, right rotator cuff repair and repair of the labrum. Post surgery, Petitioner was prescribed no work and underwent physical therapy by Dr. Heller. (Px3)

During this period of time, Petitioner continued to complain of right arm numbness and neck pain. On August 20, 2007, MercyWorks released him to full duty work. (Px3)

Petitioner testified he returned to full duty work on August 29, 2007. While working, he experienced pain in his right shoulder and neck.

He then returned to MercyWorks on October 1, 2007 with complaints of constant right arm numbness and shoulder pain. He was excused from work, advised to use one arm only and was referred back to Dr. Heller. (Px3)

Petitioner saw Dr. Heller on October 2, 2007, who diagnosed cervical radiculopathy, and felt that work aggravated his symptoms of numbness and tingling in his right arm. Dr. Heller prescribed that he remain off work, commence physical therapy and prescribed an MRI. [*8] (Px1)

Petitioner was also sent by MercyWorks for an evaluation with Dr. Edward Goldberg, an orthopedic surgeon. Dr. Goldberg on November 12, 2007 reviewed the MRI and diagnosed a C5-C6 herniated disc that he felt was work related. Dr. Goldberg advised the need for a cervical fusion and that he remain off work.

On December 27, 2007, Petitioner underwent surgery with Dr. Goldberg in the form of a cervical fusion at C5-C6. Post surgery, Petitioner remained under the care of Dr. Goldberg and underwent physical therapy. (Px2, Px3)

Petitioner then suffered a lifting incident while in physical therapy on March 19, 2008, causing a return of radicular symptoms. Dr. Goldberg prescribed a new MRI. On May 2, 2008, Dr. Goldberg reviewed the MRI and felt that the physical therapy caused a C6-C7 herniation to become symptomatic. Dr. Goldberg prescribed another cervical fusion. (Px2)

On June 5, 2008, Petitioner underwent a second surgery with Dr. Goldberg in the form of C6-C7 and C7-T1 fusion. Post surgery, Dr. Goldberg prescribed physical therapy, which caused an increase in upper and middle back pain. On August 6, 2008, Dr. Goldberg discontinued therapy. Dr. Goldberg later administered epidural [*9] steroid injections to the upper back in October, November and December. In January of 2009, Dr. Goldberg prescribed a series of facet injections. (Px2)

Dr. Goldberg later prescribed a functional capacity evaluation that was performed on March 2, 2009. Petitioner was determined to be functioning at a light to medium level of work and it was determined that he was unable to meet the physical demands of his job. (Px2) On March 13, 2009, Dr. Goldberg reviewed the FCE and prescribed permanent medical restrictions including that Petitioner could not return to work in his former position as a hoisting engineer. Dr. Goldberg noted chronic pain and prescribed vocational rehabilitation. (Px3)

Petitioner testified that Respondent would not accommodate his medical restrictions and offered vocational rehabilitation. Petitioner testified that he graduated from Hubbard High School in 1977 and thereafter began an apprentice program with Chapter 150 of the Operating Engineers of Illinois, and started working for Respondent.

Petitioner was examined by Mercy Works on December 8, 2010. Following examination his medical restrictions were placed at no lifting over 25 pounds and no carrying over 32 pounds. [*10] (Px3)

Petitioner commenced vocational rehabilitation with Ms. Courtney Goodwin of Coventry, from January 2011 through May of 2011. A labor market survey requested by Respondent revealed Petitioner could be expected to earn $ 8.00-$ 10.00 per hour given his education, physical capabilities and transferable skills. (Px11)

On May 31, 2011, Petitioner began vocational rehabilitation with Ms. Natasha Gutman. On Spetember 9, 2011, Petitioner secured an office position with Manak Insurance which paid $ 8.25 per hour. His job duties include answering telephones, making deliveries and serving as an office clerk. All functions appear to be within his medical restrictions.

Mr. James Boyd, a vocational counselor, testified on behalf of Petitioner by evidence deposition. (Px19) Mr. Boyd performed vocational testing, reviewed his employment and educational history, and authored a report dated February 23, 2012. Mr. Boyd concluded that Petitioner suffered a loss of earning potential as a result of this accidental injury and found that his current job with Manak Insurance maximized his earning potential. (Px17)

Ms. Courtney Goodwin testified on behalf of Respondent. She testified that he was [*11] motivated to return to work, cooperated with all vocational efforts and wanted to find a new job. She also testified that Petitioner suffered a decrease in earning capacity as a result of his injuries and that his current job with Manek Insurance maximized his earnings capacity. The also testified that this position was appropriate for his restrictions, age and educational background.

The current rate of pay for a hoisting engineer with Respondent is $ 45.10 an hour. (Px10)

Based upon the above, the Arbitrator finds the above conditions of ill-being to be permanent in nature.

Based further upon the above, the Arbitrator finds the above conditions are causally related to the accidental injuries sustained on December 12, 2006.

Based further upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner has sustained a reduction in his current earnings capacity. The Arbitrator finds that the position with Manek Insurance is appropriate and represents Petitioners maximum earning capacity.

Based upon the above, the Arbitrator finds that Petitioner is entitled to receive an award pursuant to Section 8(d)1 of the Act in the amount of $ 982.67 per week representing [*12] difference in his current earnings and the difference in what he could have earned in his original occupation but for this accidental injury.

N. Is Respondent due any credit?

The parties have stipulated that Respondent is entitled to receive a credit in the amount of $ 261,949.94 as against the award rendered in temporary total disability benefits, maintenance benefits and permanent disability benefits. This credit includes an advancement of $ 8,000.00 in permanency benefits.

Legal Topics:

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