2015 IL 118070

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 118070)

ELLEN FOLTA, Indiv. and as Special Adm'r of the Estate of James Folta, Deceased, Appellee, v. FERRO ENGINEERING, a Division of ON Marine Services Company, Appellant.

Opinion filed November 4, 2015.

JUSTICE THEIS delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Karmeier and Burke concurred in the judgment and opinion.

Justice Freeman dissented, with opinion, joined by Justice Kilbride.

Justice Thomas took no part in the decision.

OPINION

¶ 1 In this case we are asked to consider whether an employee can bring an action against an employer outside of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)) and the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2010)), when the employee's injury or disease first manifests after the expiration of certain time limitations under those acts. For the following reasons,

we hold that under these circumstances, the employee's action is barred by the exclusive remedy provisions of those acts.

¶ 2 BACKGROUND

¶ 3 For four years, from 1966 to 1970, James Folta was employed as a shipping clerk and product tester for defendant Ferro Engineering. During that time period, as part of his job duties, he was exposed to products containing asbestos. Forty-one years later, in May 2011, James was diagnosed with mesothelioma, a disease associated with asbestos exposure. One month later, he brought a civil action in the circuit court of Cook County against 15 defendants, including Ferro Engineering, to recover damages for the disease he developed allegedly as a consequence of his exposure to the asbestos-containing products while employed by Ferro Engineering. James specifically sought relief against Ferro Engineering under several theories, including, *inter alia*, negligence.

¶ 4 Thereafter, Ferro Engineering filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), arguing, *inter alia*, that James's claims against it were barred by the exclusive remedy provisions of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)) and the Workers' Occupational Diseases Act (820 ILCS 310/5(a), 11 (West 2010)). In response, James maintained that his action fell outside the exclusive remedy provisions because his claims were not "compensable" under the acts. He asserted that since the symptoms of his injury did not manifest until more than 40 years after his last exposure to asbestos, and any potential asbestos-related compensation claim was barred before he became aware of his injury under the 25-year limitation provision in section 6(c) of the Workers' Occupational Diseases Act (820 ILCS 310/6(c) (West 2010)), his cause of action in circuit court was not barred.

¶ 5 During the pendency of the litigation, James died and his widow, Ellen Folta (Folta), was substituted individually and as special administrator of James's estate. The complaint was later amended to assert a claim for wrongful death against Ferro Engineering and the other defendants under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2010)).

¶ 6 The circuit court granted Ferro Engineering's motion to dismiss, holding that the action was barred by the exclusive remedy provisions. Specifically related to this appeal, the court found that the running of the limitations period did not render the cause of action noncompensable under the acts. Following the resolution of the claims against the remaining defendants, which were dismissed after settlement or otherwise, Folta appealed from the dismissal of the claims against Ferro Engineering.

¶ 7 The appellate court reversed and remanded. 2014 IL App (1st) 123219. Relying on this court's ruling in *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455 (1990), the appellate court explained that an injured employee may bring a common-law action against his employer where "the injury is not compensable under the Act." (Internal quotation marks omitted.) 2014 IL App (1st) 123219, ¶ 27. The appellate court determined that the term "compensability" must relate to the "ability to recover under the Act." *Id.* ¶ 31. It found that Folta's injury was "quite literally not compensable" under the Workers' Compensation Act because all possibility of recovery was foreclosed due to the nature of his injury and the fact that his disease did not manifest until after the statute of repose expired. *Id.* ¶ 36 ("Through no fault of his own, [he] never had an opportunity to seek compensation under the Act."). Accordingly, the appellate court held that Folta's suit against Ferro Engineering was not barred by the exclusivity provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act, and remanded for further proceedings. *Id.* ¶ 44.

¶ 8 We allowed Ferro Engineering's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2013). We additionally allowed *amici curiae* briefs in support of both parties.[1] Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

[1]In support of Folta, we allowed briefs from the Illinois Trial Lawyers Association, the Asbestos Disease Awareness Organization, and the Illinois AFL-CIO. In support of Ferro Engineering, we allowed a joint brief from various businesses, including Caterpillar Inc., Aurora Pump Company, Innophos, Inc., Rockwell Automation, Inc., United States Steel Corporation, F.H. Leinweber Company, Inc., Driv-Lok, Inc., Ford Motor Company, and ExxonMobil Oil Corporation, as well as briefs from the Illinois Self-Insurers' Association, the Illinois Defense Trial Counsel, and a joint brief from the American Insurance Association, Property Casualty Insurers Association of America, and the Travelers Indemnity Company.

¶ 9 ANALYSIS

¶ 10 This case requires us to interpret the exclusive remedy provisions of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)), and the Workers' Occupational Diseases Act (820 ILCS 310/5(a), 11 (West 2010)). Specifically, we are asked to consider whether these provisions bar an employee's cause of action against an employer to recover damages for a disease resulting from asbestos exposure which arose out of and in the course of employment even though no compensation is available under those acts due to statutory time limits on the employer's liability. The question is one of law, which we review *de novo*. *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524 (2006).

¶ 11 To answer this question, we begin with a brief overview of the well-established purpose of the acts. The Workers' Occupational Diseases Act provides compensation for diseases arising out of, and in the course of, employment. 820 ILCS 310/1(d) (West 2010). That Act is modeled after and designed to complement the Workers' Compensation Act, which provides financial protection for accidental injuries arising out of, and in the course of, employment. See 820 ILCS 305/1(d) (West 2012). In enacting these statutes, the General Assembly established a new framework for recovery to replace the common-law rights and liabilities that previously governed employee injuries. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983); *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 44 (1994) ("[t]he [Act] reflects the legislative balancing of rights, remedies, and procedures that govern the disposition of employees' work-related injuries"); *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 18 (1969) (" 'The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all courts.' " (quoting *Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 382 (1918))).

¶ 12 In exchange for a system of no-fault liability upon the employer, the employee is subject to statutory limitations on recovery for injuries and occupational diseases arising out of and in the course of employment. The acts further provide that the statutory remedies " 'shall serve as the employee's exclusive remedy if he sustains a compensable injury.' " *Sharp*, 95 Ill. 2d at 326-27 (quoting *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 356 (1981)). Accordingly, both acts contain an exclusive remedy provision as part of the *quid pro quo* which balances the sacrifices and gains of employees and employers. *Meerbrey*, 139 Ill. 2d at 462.

¶ 13 The exclusive remedy provisions are embodied in two separate sections of the acts. Section 5(a) of the Workers' Occupational Diseases Act provides, in pertinent part, as follows:

> "§ 5. (a) There is no common law or statutory right to recover compensation or damages from the employer *** for or on account of any injury to health, disease, or death therefrom, other than for the compensation herein provided ***." 820 ILCS 310/5(a) (West 2010).

Similarly, section 11 of the same Act provides:

> "§ 11. The compensation herein provided for shall be the full, complete and only measure of the liability of the employer bound by election under this Act and such employer's liability for compensation and medical benefits under this Act shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise, to any employee or his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the course of the employment." 820 ILCS 310/11 (West 2010).

The corresponding exclusivity provisions in sections 5 and 11 of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)), have been viewed analogously for purposes of judicial construction. See *Dur-Ite Co. v. Industrial Comm'n*, 394 Ill. 338, 344 (1946) (stating that the acts are "homologous"); *James v. Caterpillar Inc.*, 242 Ill. App. 3d 538, 549-50 (1993); *Handley v. Unarco Industries, Inc.*, 124 Ill. App. 3d 56, 70 (1984). Thus, cases that have construed the exclusivity provisions in the context of the Workers' Compensation Act would also apply in the context of the Workers' Occupational Diseases Act.

¶ 14 In discussing the scope of the exclusivity provisions under the Workers' Compensation Act, this court has indicated that the Act generally provides the exclusive means by which an employee can recover against an employer for a work related injury. *Meerbrey*, 139 Ill. 2d at 462. However, an employee can escape the exclusivity provisions of the Act if the employee establishes that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the Act. *Id.* (citing *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980)).

¶ 15 With respect to the first three categories, we have explained that where an injury is intentionally inflicted by an employer or does not arise out of and in the course of the employment, it is outside the purview of the Act. Therefore, the exclusive remedy provisions are not implicated and do not bar the action. See, *e.g.*, *Collier*, 81 Ill. 2d at 239-40 (intentional torts fall outside the scope of the Act as they are not accidental and do not arise from the conditions of employment); *Handley v. Unarco Industries, Inc.*, 124 Ill. App. 3d 56, 72 (1984) ("we are not persuaded that this legislative balance was meant to permit an employer who encourages, commands, or commits an intentional tort to use the act as a shield against liability by raising the bar of the statute and then shifting liability throughout the system on other innocent employers").

¶ 16 Folta does not dispute that James's asbestos exposure resulting in mesothelioma was accidental and arose out of and during the course of his employment. To escape the exclusivity provisions in this case, Folta relies on the fourth category, equating "compensable" with the possibility to recover benefits. Folta contends that James's injury is not compensable because he never had an opportunity to recover any benefits under the Act. That is, through no fault of his own, the claim was time-barred before his disease manifested. In contrast, Ferro Engineering maintains that whether an injury is compensable is defined by the scope of the Act's coverage, and not on the particular employee's ability to recover benefits.

¶ 17 With respect to the fourth category, this court has had limited opportunity to address what we originally meant in *Collier* when we used the phrase "not compensable" to carve out a category of injuries for which the exclusive remedy provision would not be applicable.

¶ 18 In 1965, this court had previously explained that a "compensable" injury was one suffered in the line of duty, which meant that the injury arose out of and in the course of employment. *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43 (1965); see also *Unger v. Continental Assurance Co.*, 107 Ill. 2d 79, 85 (1985) (explaining that the "line of duty" test has been interpreted in the same way as the test of compensability: that is, an injury will be found to be compensable if it arose out of and in the course of employment).

¶ 19 Although this court equated "compensable" with "line of duty," the sole question raised in those cases was whether the plaintiff's injuries arose out of or in

the course of his employment. In another line of cases we further refined our inquiry as to what is meant by compensable by considering whether an employee was covered under the Act where the essence of the harm was a psychological disability, and not a traditional physical injury.

¶ 20 In *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556 (1976), an employee brought a claim for disability benefits under the Act as a result of the severe emotional shock she suffered after assisting a coemployee whose hand was severed in a machine. The court held that "a psychological disability is not of itself noncompensable under the Workmen's Compensation Act." *Id.* at 563. The court reasoned that this type of injury was within the concept of how we defined an accidental injury. The court found that the term "accident" was defined broadly and included anything that happened "without design or an event which is unforeseen by the person to whom it happens." *Id.* Therefore, the court concluded that an employee who suffered a sudden, severe emotional shock after witnessing the injury of a coemployee had suffered an accident within the meaning of the Act, even though the employee sustained no physical trauma or injury. *Id.* Thus, the workers' compensation claim could proceed.

¶ 21 Thereafter, in *Collier*, the court was asked to consider whether an employee could bring a common-law action to recover for the emotional distress arising from an employer's conduct in failing to provide medical assistance after he suffered a heart attack. In addressing whether the employee could escape the bar of the exclusivity provisions, the court set out four categories, without citation, including consideration of whether the injury was "compensable" under the Act. *Collier*, 81 Ill. 2d at 237. The court merely relied on the decision in *Pathfinder* to find that emotional distress was "compensable" under the Act and, therefore, a claim for emotional damages could not escape the bar of the exclusivity provisions. *Id.*

¶ 22 Lastly, in *Meerbrey*, the court considered whether emotional distress suffered as a consequence of false imprisonment, false arrest, or malicious prosecution was "compensable" under the Act. Although the court recognized that some jurisdictions had held that the type of emotional injuries suffered as a result of being falsely imprisoned were not the type of "personal injury" covered by workers' compensation laws, the court found they were compensable where the employee failed to differentiate the type of emotional injuries from those suffered in *Pathfinder* and *Collier*. *Meerbrey*, 139 Ill. 2d at 467-68.

¶ 23 Thus, *Pathfinder*, *Collier* and *Meerbrey* stand for the proposition that whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act. These cases do not stand for the proposition that whether an injury is compensable is defined by whether there is an ability to recover benefits for a particular injury sustained by an employee. In all of these cases, the exclusivity provisions barred a common-law cause of action.

¶ 24 Here, there is no question that based on the allegations in the complaint, James's disease is the type of disease intended to fall within the purview of the Act. An "occupational disease" is defined as one "arising out of and in the course of the employment." 820 ILCS 310/1(d) (West 2010). A disease arises out of the employment if there is a "causal connection between the conditions under which the work is performed and the occupational disease." *Id.* The disease "must appear to have had its origin *** in a risk connected with the employment and to have flowed from that source as a rational consequence." *Id.* There is no dispute for purposes of this appeal that James's disease was precipitated by occupational exposure to asbestos.

¶ 25 Moreover, the Act specifically addresses diseases caused by asbestos exposure and, indeed, employees and spouses have recovered for disabilities or death arising from workplace asbestos exposure, including mesothelioma. See, *e.g.*, *Kieffer & Co. v. Industrial Comm'n*, 263 Ill. App. 3d 294 (1994) (employee, who had been exposed to asbestos in the workplace for 40 years, died after being diagnosed with mesothelioma, and his widow was entitled to recover benefits); *Owens Corning Fiberglas Corp. v. Industrial Comm'n*, 198 Ill. App. 3d 605 (1990) (widow had an independent claim for death benefits arising from her husband's mesothelioma); *H&H Plumbing Co. v. Industrial Comm'n*, 170 Ill. App. 3d 706 (1988) (employee who was exposed to asbestos in the workplace as a pipefitter recovered under the Workers' Occupational Diseases Act for his lung disease); *Zupan v. Industrial Comm'n*, 142 Ill. App. 3d 127 (1986) (employee who was exposed to asbestos in the workplace for 22 years as a bricklayer recovered under the Workers' Occupational Diseases Act). Thus, it is evident that the legislature intended that occupational diseases arising from workplace asbestos exposure are the type of injury contemplated to be within the scope of the Act. Accordingly, under *Pathfinder*, *Collier* and *Meerbrey*, James's injury is the type of injury compensable under the Act.

¶ 26 Nevertheless, those cases never addressed specifically whether the exclusivity provisions would bar a cause of action where there was no possibility of seeking compensation benefits under the Act because of certain time limitations on the employer's liability. In *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407 (1956), and *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15 (1969), however, this court had some opportunity to consider the interplay between certain provisions under the Workers' Compensation Act that limit the employer's liability and the exclusive remedy provisions.

¶ 27 In *Moushon*, an employee was injured while operating equipment at his workplace. The employer provided medical, surgical and hospital services related to the injury under the Act, but the employee brought an action to recover damages for his resulting permanent impotence. *Moushon*, 9 Ill. 2d at 410-13. This court held that the exclusivity provisions of the Act barred the employee's cause of action even though no compensation for his permanent injury was provided for under the Act. *Id.* at 410-12.

¶ 28 Notably, the *Moushon* court did not adopt the view articulated by the dissenting judge that where "no compensation benefits are provided in the act for the particular injury, so that no remedy is afforded the employee under the act for an injury caused by the employer's negligence, then a common-law action for damages should be allowed." *Id.* at 418 (Bristow, J., dissenting, joined by Davis, J.).

¶ 29 In *Duley*, the husband of a deceased employee who was fatally injured in a workplace accident brought a wrongful death action against the employer. The employer had paid for the burial expenses as a result of the death, but no other compensation benefits were payable to the husband under the Workers' Compensation Act because the Act limited compensation to those who were dependents of the injured employee. *Duley*, 44 Ill. 2d at 16-18. This court held that the exclusive remedy provisions of the Workers' Compensation Act barred his action even though the husband could not recover for his damages under the Act, other than the nominal amount of funeral expenses. *Id.* at 18.

¶ 30 Thus, since 1956, this court has held that despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries.

¶ 31 With this understanding, we now specifically address Folta's arguments. Essentially, Folta contends that the exclusive remedy provisions assume the *possibility* of a right to compensation. In this case, Folta argues that because of the latency of James's disease, various sections including 6(d) of the Workers' Compensation Act (820 ILCS 305/6(d) (West 2010)) and sections 6(c) and 1(f) of the Workers' Occupational Diseases Act (820 ILCS 310/6(c), 1(f) (West 2010)), precluded her from recovering compensation benefits or even filing an application for benefits because James's injury fell outside those limitations periods of the acts and, therefore, any possibility to even seek compensation benefits was foreclosed. Therefore, Folta maintains that under these circumstances, the employer should not enjoy the benefit of the exclusivity provisions.

¶ 32 We agree that section 6(c) of the Workers' Occupational Diseases Act does bar Folta's right to file an application for compensation. That section provides that, "[i]n cases of disability caused by exposure to *** asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred." 820 ILCS 310/6(c) (West 2010); see also 820 ILCS 305/6(d) (West 2010) (analogous 25-year limitation period under the Workers' Compensation Act). Section 6(c) further provides that "[i]n cases of death occurring within 25 years from the last exposure to *** asbestos, application for compensation must be filed within 3 years of death ***." 820 ILCS 310/6(c) (West 2010).

¶ 33 Based on the plain language of this section, this provision acts as a statute of repose, and creates an absolute bar on the right to bring a claim. In contrast to a statute of limitations, which determines the time within which a lawsuit may be brought after a cause of action has accrued, a statute of repose extinguishes the action after a defined period of time, regardless of when the action accrued. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006) (citing *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001)). It begins to run when a specific event occurs, "regardless of whether an action has accrued or whether any injury has resulted." *Ferguson*, 202 Ill. 2d at 311. Thus, the statute of repose limit is " 'not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.' " *CTS Corp. v. Waldburger*, 573 U.S. ___, ___, 134 S. Ct. 2175, 2182-83 (2014) (quoting 54 C.J.S. *Limitations of Actions* § 7, at 24 (2010)). The purpose of a repose period is to terminate the possibility of liability after a defined period of time. After the expiration of the repose period, there is no longer a

recognized right of action. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 16.

¶ 34 Thus, the General Assembly intended to provide an absolute definitive time period within which all occupational disease claims arising from asbestos exposure must be brought. Since James's last employment exposure to asbestos was in 1970, the 25-year period of repose has long since expired. The fact that Folta was not at fault for failing to file a claim sooner due to the nature of the disease is not a consideration that is relevant to a statute of repose. Although the statute barred Folta's claim before it had yet accrued, that is the purpose of such a provision.

¶ 35 To construe the scope of the exclusive remedy provisions to allow for a common-law action under these circumstances would mean that the statute of repose would cease to serve its intended function, to extinguish the employer's liability for a work-related injury at some definite time. Further, this interpretation would directly contradict the plain language of the exclusive remedy provision which provides that the employer's liability is "exclusive and *in place of* any and all other civil liability whatsoever, at common law or otherwise." (Emphasis added.) 820 ILCS 310/11 (West 2010).

¶ 36 Thus, the fact that through no fault of the employee's own, the right to seek recovery under the acts was extinguished before the claim accrued because of the statute of repose does not mean that the acts have no application or that Folta was then free to bring a wrongful death action in circuit court. Rather, where the injury is the type of work-related injury within the purview of the acts, the employer's liability is governed exclusively by the provisions of those acts.

¶ 37 We do not find that the provisions in section 1(f) of the Workers' Occupational Diseases Act would lead us to a different result. Generally, section 1(f) provides that "[n]o compensation shall be payable for *** any occupational disease unless disablement, *** occurs within two years after the last day of the last exposure to the hazards of the disease." 820 ILCS 310/1(f) (West 2010). Specifically, in cases of occupational disease caused by the inhalation of asbestos dust, no compensation is payable unless disablement occurs "within [three] years after the last day of the last exposure to the hazards of such disease." *Id.*

¶ 38 Folta maintains that since James's disease did not manifest until after the time limitation in section 1(f), and since she and James were both precluded from recovering any compensation benefits offered by the statute, the effect was to

essentially exclude this latent disease from coverage under the Act. Thus, Folta asserts that her recourse against the employer must be found in the common law.[2]

¶ 39 In support of her contentions, Folta relies in part on the Pennsylvania Supreme Court's decision in *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013). There, the court construed the Pennsylvania Workers' Compensation Act, which defined "injury" to include "occupational disease" provided that, if occupational disease was the basis for compensation, that Act only applied to disability or death resulting from such disease and occurring within a 300-week time window. The court held, over a dissent, that this time limitation "operate[d] as a *de facto* exclusion of coverage under the Act for essentially all mesothelioma claims," where the average latency period for mesothelioma was found to be 30 to 50 years. *Id.* at 863. Therefore, the court held that the common-law claims were not barred by the exclusivity provisions of the Pennsylvania Act. *Id.* at 865.

¶ 40 We do not believe that Illinois's statutory scheme operates as "a *de facto*" exclusion of coverage for latent occupational disease claims. Rather, under our statute, whether compensation benefits are awarded for an occupational disease depends upon the facts and circumstances of each particular case based on proof presented to the Workers' Compensation Commission of when a disability manifested. See, *e.g.*, *Plasters v. Industrial Comm'n*, 246 Ill. App. 3d 1 (1993) (Commission determined that employee proved disablement within two years of his last exposure based on testimony indicating that the claimant was impaired from the disease at the time he retired from mining.).

¶ 41 Given the plain language of the exclusive remedy provisions, which state that there is no right to recover damages from the employer for "*any* injury to health, disease, or death therefrom, other than for the compensation herein provided" (emphasis added) (820 ILCS 310/5(a) (West 2010)), and that the Act is exclusive with respect to "*any* disease contracted or sustained in the course of the employment" (emphasis added) (820 ILCS 310/11 (West 2010)), it would be a

[2]We note that Folta never raised section 1(f) as a basis to defeat Ferro Engineering's motion to dismiss in the trial court and, thus, the trial court never ruled on its impact. Traditionally, we have held that an issue not raised in the trial court is forfeited and cannot be raised for the first time on appeal. See *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994) (the theory upon which a case is tried in the lower court cannot be changed on review, and an issue not presented or considered by the trial court cannot be raised for the first time on review). Ferro Engineering did not address the impact of section 1(f) either in the appellate court or before this court, but has failed to bring defendant's forfeiture of the issue to the attention of the appellate court or this court. Therefore, we choose to address the argument.

radical departure to suggest that the exclusivity provisions apply only for certain occupational diseases in which the disability manifests within the time limitation.

¶ 42 Furthermore, this limitation on the employer's liability was originally enacted in 1936 (1935-36 Ill. Laws 40 (§ 5)). It has remained in the statute unchanged for the last 79 years despite numerous amendments to other provisions of the Act. Since 1936, section 1(f) has functioned as a temporal limitation on the availability of compensation benefits and not as a basis to remove occupational diseases from the purview of the Act. Consistent with *Collier* and *Meerbrey*, the litmus test is not whether there is an ability to recover benefits. Nothing in our statute or the history of our jurisprudence suggests that a temporal limitation removes a work-related injury from the purview of the Act.

¶ 43 We are cognizant of the harsh result in this case. Nevertheless, ultimately, whether a different balance should be struck under the acts given the nature of the injury and the current medical knowledge about asbestos exposure is a question more appropriately addressed to the legislature. It is the province of the legislature to draw the appropriate balance. It is not our role to inject a compromise but, rather, to interpret the acts as written. See *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 557 (2009) (this court does not "sit as a superlegislature to weigh the wisdom of legislation [or] to decide whether the policy which it expresses offends the public welfare" (internal quotation marks omitted)).

¶ 44 Finally, we reject Folta's assertions that to hold that the exclusive remedy provisions bar her cause of action would violate the Illinois Constitution's guarantees of equal protection (Ill. Const. 1970, art. I, § 2), prohibition against special legislation (Ill. Const. 1970, art. IV, § 13), and the right to a certain remedy (Ill. Const. 1970, art. I, § 12). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional. *People v. Hollins*, 2012 IL 112754, ¶ 13.

¶ 45 Equal protection guarantees that similarly situated individuals will be treated similarly, unless the government demonstrates an appropriate reason to do otherwise. *People v. Richardson*, 2015 IL 118255, ¶ 9. Equal protection prohibits the state from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation. *People v. R.L.*, 158 Ill. 2d 432, 437 (1994). A special legislation challenge is

generally judged by the same standards that apply to equal protection challenges. *In re Petition of the Village of Vernon Hills*, 168 Ill. 2d 117, 123 (1995).

¶ 46 In an underdeveloped argument, Folta contends that interpreting the exclusive remedy provisions to deprive the family of a right to recovery against the employer would arbitrarily create two classes of similarly situated injured workers who are treated unequally and without any rational basis. Folta argues that those workers who suffer from occupational diseases with short latency periods are eligible to receive compensation benefits, while those workers who suffer from occupational diseases with long latency periods are "categorically" prohibited from a right to recover compensation benefits and are additionally prohibited from seeking common-law damages. Folta maintains that this distinction is not rationally related to any apparent legitimate state interest.

¶ 47 We disagree. Under this court's interpretation, these classes of injured workers are indeed all treated equally in terms of the right to bring an action for damages. All of these workers are precluded from seeking common-law damages. Therefore, Folta has not established any disparate treatment in the application and scope of the exclusive remedy provisions.

¶ 48 Furthermore, Folta's premise that all employees who suffer from occupational diseases with long latency periods are "categorically" unable to recover benefits, is incorrect. For example, in *Stypula v. City of Chicago*, Ill. Workers' Compensation Comm'n No. 98-WC-062986 (Nov. 25, 2003), a city employee was exposed to asbestos from 1976 through 1998 as a garbage hauler. He then retired and three years later, in 2001, he was diagnosed with mesothelioma and died. Even though he had a long latency period, his widow was entitled to compensation where she filed within three years of the death because the employee's disability arose within 3 years of the last day of exposure. See also *Kieffer*, 263 Ill. App. 3d 294 (claimant, who had been exposed to asbestos in the workplace for 40 years, filed a claim within two years of his last exposure after being diagnosed with mesothelioma). Assuredly, there are examples where the particular facts and circumstances are such that they do not allow for recovery of benefits against the employer. But there is no "categorical" class without a right to seek benefits against their employer. Thus, we find Folta's equal protection and special legislation arguments lack merit.

¶ 49 Additionally, we reject Folta's argument that interpreting the scope of the exclusive remedy provisions to bar the wrongful death action would violate the

certain remedy clause of the Illinois Constitution. As Folta acknowledges, this clause is " 'merely "an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form." ' " (Internal quotation marks omitted.) *Cassens Transport Co.*, 218 Ill. 2d at 532 (quoting *Segers v. Industrial Comm'n*, 191 Ill. 2d 421, 435 (2000)). Additionally, this court has explained that the legislature "may restrict the class of potential defendants from whom a plaintiff may seek a remedy" without violating the certain remedy clause. *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 246 (1988).

¶ 50 The acts do not prevent an employee from seeking a remedy against other third parties for an injury or disease. Rather, in this case, the acts restrict the class of potential defendants from whom Folta could seek a remedy, limiting Folta's recourse for wrongful death claims to third parties other than the employer. In this case, Folta named 14 defendant manufacturers of asbestos related products. Folta was not left without any remedy. Thus, we find no merit to the constitutional claims raised by Folta.

¶ 51 CONCLUSION

¶ 52 For all of the foregoing reasons, Folta's action against Ferro Engineering for wrongful death is barred by the exclusive remedy provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act.

¶ 53 Appellate court judgment reversed.

¶ 54 Circuit court judgment affirmed.

¶ 55 JUSTICE FREEMAN, dissenting:

¶ 56 The majority today holds that plaintiff's common-law action against his former employer is barred by the exclusive remedy provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act. Plaintiff never had the right to file an application for compensation under either of these acts, whose time limitations expired long before plaintiff's mesothelioma was manifest. Plaintiff sought relief through the instant common-law action. However, in the

majority's view, the acts' exclusive remedy provisions preclude any such common-law claim. Plaintiff thus is completely barred from seeking any compensation from his former employer for his asbestos-related disease. I strongly disagree with the majority's decision. Accordingly, I dissent.

¶ 57 Plaintiff James Folta was employed by defendant Ferro Engineering (Ferro) from 1966 to 1970. During that time, as part of his job duties, he worked with various asbestos-containing products, allegedly on a daily basis. Forty-one years later he was diagnosed with mesothelioma, a disease associated with asbestos exposure. He subsequently brought a civil action in circuit court against 15 defendants, including Ferro, to recover damages for his asbestos-related disease.[3] Ferro filed a motion to dismiss the counts against it, arguing that plaintiff's claims were barred by the exclusive remedy provisions of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)) and the Workers' Occupational Diseases Act (820 ILCS 310/5(a), 11 (West 2010)). Plaintiff argued, in response, that his action fell outside the exclusive remedy provisions under an exception for claims that are "not compensable under the Act." Plaintiff noted that any potential asbestos-related claim was barred before he became aware of it under the 25-year limitation provision in section 6(c) of the Workers' Occupational Diseases Act (820 ILCS 310/6(c) (West 2010)),[4] and his action in circuit court was not barred. The circuit court granted Ferro's motion to dismiss, concluding the action was barred by the exclusive remedy provisions. Following resolution of the claims against the remaining defendants, plaintiff appealed from the dismissal of the claims against Ferro.

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[3]During the pendency of the litigation, James died and his widow, Ellen Folta, was substituted as plaintiff. The complaint was subsequently amended to assert a wrongful death claim against Ferro and the other defendants.

[4]Section 6(c) of the Workers' Occupational Diseases Act provides: "In cases of disability caused by exposure to *** asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred." 820 ILCS 310/6(c)(West 2010). Section 1(f) of the same act provides: "[I]n cases of occupational disease caused by *** the inhalation of *** asbestos dust [no compensation shall be payable unless disablement occurs] *** within 3 years after the last day of the last exposure to the hazards of such disease ***." 820 ILCS 310/1(f) (West 2010). Finally, section 6(d) of the Workers' Compensation Act, which is similar to section 6(c) of the Workers' Occupational Diseases Act, provides: "In any case of injury caused by exposure to *** asbestos, unless application for compensation is filed with the Commission within 25 years after the last day that the employee was employed in an environment of *** asbestos, the right to file such application shall be barred." 820 ILCS 305/6(d) (West 2010).

¶ 58 In a unanimous opinion, the appellate court reversed and remanded. 2014 IL App (1st) 123219. Regarding the exclusivity provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act, the court noted the scope of these provisions is not absolute. The court pointed to *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 463 (1990), which listed four exceptions to the Workers' Compensation Act's exclusivity provisions. Under those exceptions, an injured employee may still bring a common law action against his employer if he can prove that: (1) the injury was not accidental; (2) the injury did not arise from his employment; (3) the injury was not received during the course of his employment; or (4) the injury is " 'not compensable under the Act.' " 2014 IL App (1st) 123219, ¶ 27 (quoting *Meerbrey*, 139 Ill. 2d at 463); accord *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980). Plaintiff argued that the fourth exception, for injuries "not compensable under the Act," should apply to enable him to bring a common-law claim against his former employer, where any potential claim for recovery under the Workers' Compensation Act or the Workers' Occupational Diseases Act was time-barred before he became aware of his injury. Ferro argued, in response, that the appellate court should adopt a narrow reading of "not compensable under the Act," and find that an injury is not compensable only if it does not arise out of and in the course of employment. 2014 IL App (1st) 123219, ¶ 29. The court rejected Ferro's argument, correctly noting that Ferro's proposed definition of compensability "would render the fourth *Meerbrey* exception superfluous, since *Meerbrey* already contains explicit exceptions for injuries that did not arise from a worker's employment and injuries that were not received during the course of employment." *Id.* ¶ 30. The court held that the fourth *Meerbrey* exception applied to allow plaintiff to bring a common law suit against Ferro. *Id.* ¶ 36. In the court's view, plaintiff's injury was "quite literally not compensable under the Act, in that all possibility of recovery is foreclosed because of the nature of plaintiff's injury." *Id.*

¶ 59 Here, the majority correctly notes that this case is about the interpretation of the exclusive remedy provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act. Those exclusivity provisions are set forth in sections 5 and 11 of each Act. Section 5(a) of the Workers' Occupational Diseases Act provides, in relevant part:

> "§ 5. (a)There is no common law or statutory right to recover compensation or damages from the employer *** for or on account of any injury to health,

disease, or death therefrom, other than for the compensation herein provided ***." 820 ILCS 310/5(a) (West 2010).

¶ 60 Similarly, section 11 of the same Act provides:

> "§ 11. The compensation herein provided for shall be the full, complete and only measure of the liability of the employer bound by election under this Act and such employer's liability for compensation and medical benefits under this Act shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise, to any employee or his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the course of the employment." 820 ILCS 310/11 (West 2010).

The corresponding exclusivity provisions in sections 5(a) and 11 of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)) are viewed analogously for purposes of judicial construction. *James v. Caterpillar Inc.*, 242 Ill. App. 3d 538, 549-50 (1993) (exclusivity provisions of Workers' Compensation Act and Workers' Occupational Diseases Act "are homologous for purposes of judicial construction").

¶ 61 In interpreting these exclusivity provisions, the majority looks, as did the appellate court, to the *Meerbrey* exceptions, particularly the fourth exception, under which an injured employee may still bring a common law action against his employer if he can prove that "the injury was not compensable under the Act." *Meerbrey*, 139 Ill. 2d at 463. However, the majority's interpretation of the fourth exception is quite different from that of the appellate court, which held that the exception applied here because plaintiff's injury was "quite literally not compensable under the Act, in that all possibility of recovery is foreclosed because of the nature of plaintiff's injury." 2014 IL App (1st) 123219, ¶ 36. In contrast, the majority appears to agree with Ferro that whether an injury is compensable is defined by the scope of the Act's coverage, and not on the particular employee's ability to recover benefits. See *supra* ¶ 16. After looking at several of this court's decisions, including *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407 (1956), the majority states: "[S]ince 1956, this court has held that despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries." *Supra* ¶ 30.

¶ 62 In *Moushon*, the plaintiff alleged that during the course of his work, a safety device on the man-lift he was riding failed and he suffered internal injuries, including a ruptured urethra, and was left impotent. The employer provided medical, surgical and hospital services related to the injury under the Workers' Compensation Act. The employer also paid, and the plaintiff received, compensation for the period of his temporary disability, in accordance with the Workers' Compensation Act. *Moushon*, 9 Ill. 2d at 409. However, the plaintiff also filed a common-law negligence suit against the employer seeking additional damages for his resulting permanent impotence. This court held that the plaintiff's suit for additional damages was barred by the Workers' Compensation Act's exclusive remedy provision. The court further concluded that even if it were assumed that the plaintiff could not recover statutory compensation for every element of damages (*i.e.*, his impotence), "[h]e still is covered by the act and sustained an accidental injury for which he received compensation benefits." *Id.* at 410-11.

¶ 63 *Moushon* fits within the majority's statement that "despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries." *Supra* ¶ 30. In *Moushon,* the plaintiff's injury was within the Workers' Compensation Act's "coverage formula" (*id.* at 411) and the plaintiff received compensation for that injury. That the plaintiff might not have been able to recover statutory compensation for a particular element said to arise from his injury does not entitle him to file a common-law action against his employer for additional damages.

¶ 64 But that is not the situation in the case at bar, where plaintiff was barred from recovering *any* compensation from his former employer for his injury. As the appellate court stated: "[P]laintiff's injury is quite literally not compensable under the Act, in that all possibility of recovery is foreclosed because of the nature of plaintiff's injury." 2014 IL App (1st) 123219, ¶ 36. Plaintiff's "injury" was mesothelioma, which has an average latency period of 30 to 50 years. *Tooey v. AK Steel Corp.*, 81 A.3d 851, 863 (Pa. 2013). Plaintiff's mesothelioma was not manifest until 41 years after he left Ferro, far beyond the 25-year statutory limitation in effect. "Through no fault of his own, plaintiff never had an opportunity to seek compensation under the Act." 2014 IL App (1st) 123219, ¶ 36.

¶ 65 At a minimum, *Moushon*, which formed a basis for the majority's "exclusive remedy" assertion, *supra*, ¶¶ 26-28, is inapposite to the case at bar.

¶ 66 Another difficulty with the majority's analysis is that, while acknowledging that this case requires interpretation of the exclusive remedy provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act, the majority's interpretation of these provisions includes, at most, only scant mention of the canons of statutory construction.

¶ 67 The construction of a statute is guided by familiar principles. The primary objective in construing a statute is to ascertain and give effect to the intention of the legislature. *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15. The most reliable indicator of that intent is the statutory language, which must be given its plain and ordinary meaning. *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 268 (2010). A statute is viewed as a whole, with all relevant parts considered. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232 (2001). Each word, clause and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Chicago Teachers Union*, 2012 IL 112566, ¶ 15; *Sylvester*, 197 Ill. 2d at 232. The court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Hubble*, 238 Ill. 2d at 268. In construing a statute, courts presume that the General Assembly did not intend absurdity, inconvenience, or injustice. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000); *Sylvester*, 197 Ill. 2d at 232.

¶ 68 There is also a principle that expressly applies to the construction of the Workers' Compensation Act. "In construing the provisions of the Workmen's Compensation Act, all portions thereof must be read as a whole and in such manner as to give to them the practical and liberal interpretation intended by the legislature." *Vaught v. Industrial Comm'n*, 52 Ill. 2d 158, 165 (1972); *K. & R. Delivery, Inc. v. Industrial Comm'n*, 11 Ill. 2d 441, 445 (1957).

¶ 69 Of particular importance here is the rule that, in construing a statute, the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Hubble*, 238 Ill. 2d at 268.

¶ 70 This court has described the Workers' Compensation Act as "a humane law of a remedial nature whose fundamental purpose is to provide employees and their dependents prompt, sure and definite compensation, together with a quick and

efficient remedy, for injuries or death suffered in the course of employment." *General American Life Insurance Co. v. Industrial Comm'n*, 97 Ill. 2d 359, 370 (1983); see also *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 563 (1976) ("The Act is remedial in nature in that it is intended to provide financial protection for the injured worker."); *cf. Collier*, 81 Ill. 2d at 241 ("[T]he basic purpose of workmen's compensation [is] to place the cost of industrial accidents upon the industry.").

¶ 71 The benefits of the Workers' Compensation Act are not limited to workers, however. Advantages accrue to both sides. The Workers' Compensation Act "imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer." *Meerbrey*, 139 Ill. 2d at 462. The Workers' Compensation Act's exclusive remedy provision thus "is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts." 9 Arthur Larson *et al.*, Larson's Workers' Compensation Law § 100.01(1) (2015). This is naturally a two-way proposition.

> "[T]he employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place." *Id.* § 100.04.

¶ 72 It is instructive to look at the majority's interpretation of the exclusive remedy provisions in terms of the consequences of that interpretation. According to the majority, the acts are the employee's exclusive remedy for workplace injuries, even where, as here, plaintiff never had an opportunity to seek such compensation because his occupational mesothelioma was not manifest until long after the statutory time limitations had elapsed. As the appellate court stated, "plaintiff's injury is quite literally not compensable under the Act, in that all possibility of recovery is foreclosed because of the nature of plaintiff's injury." 2014 IL App (1st) 123219, ¶ 36. "Through no fault of his own, plaintiff never had an opportunity to seek compensation under the Act." *Id.* Under the majority's interpretation of the exclusivity provisions, plaintiff is barred not only from recovering compensation benefits under the acts, but from recovering against his former employer under the common law as well. The majority's interpretation runs directly counter to the acts'

purpose (see *General American Life Insurance*, 97 Ill. 2d at 370 (describing Workers' Compensation Act as "a humane law of a remedial nature whose fundamental purpose is to provide employees and their dependents prompt, sure and definite compensation")), as well as the assertion (regarding the *quid pro quo*) that "rights of action for damages should not be deemed taken away except when something of value has been put in their place" (9 Arthur Larson *et al.*, Larson's Workers' Compensation Law § 100.04 (2015)). In addition, the majority's interpretation contradicts the principle that, in construing a statute, courts presume that the General Assembly did not intend absurdity, inconvenience, or injustice. *Michigan Avenue National Bank*, 191 Ill. 2d at 504; *Sylvester*, 197 Ill. 2d at 232.

¶ 73 In my view, the majority's interpretation cannot be the law. In elaborating on that interpretation, the majority asserts that section 6(c) of the Workers' Occupational Diseases Act—which imposes a 25-year time limit on applications for compensation in asbestos cases—"acts as a statute of repose, and creates an absolute bar on the right to bring a claim." *Supra* ¶ 33. The majority explains that the purpose of a repose period is to terminate the possibility of liability after a defined period of time. "After the expiration of the repose period, there is no longer a recognized right of action." *Id.* That is exactly the point. If there is no longer a recognized right of action, then the employee's injury is not compensable under the Act, and the employee may bring (under the fourth *Meerbrey* exception) a common-law cause of action against his employer. As the appellate court below noted: "[P]laintiff's injury is quite literally not compensable under the Act, in that all possibility of recovery is foreclosed because of the nature of plaintiff's injury." 2014 IL App (1st) 123219, ¶ 36.

¶ 74 I find support for this view in Larson's Workers' Compensation Law, which sharply criticizes a case which, unlike *Moushon*, is almost exactly on point with the case at bar. In *Kane v. Durotest Corp.*, 182 A.2d 559 (N.J. 1962), the employee, Gloria Kane, worked for defendant Durotest from May 1946 to June 1950, except for a short interval in November and December 1947. During the course of her work, she was exposed to highly toxic beryllium compounds, the fumes and dust of which are capable of producing a pulmonary disease known as beryllium poisoning. The disease first manifested itself in her in January 1958, seven and a half years after she left Durotest. Gloria died one year later, in January 1959, at the age of 34, leaving surviving her husband and three children.

¶ 75 New Jersey's Workmen's Compensation Act provided, in pertinent part: " '[A]ll claims for compensation for compensable occupational disease hereunder shall be forever barred unless a petition is filed ***, within *five years* after the date on which the employee ceased to be exposed in the course of employment with the employer to such occupational disease; ***.' " (Emphasis added.) *Kane*, 182 A.2d at 560. Since Gloria's last employment exposure to beryllium was in June 1950, and her occupational disease did not manifest until January 1958, the five-year statutory time limitation elapsed long before she was aware of her illness.

¶ 76 Gloria's husband brought a common-law action individually and as administrator of her estate to recover damages against Durotest for its negligence in exposing her to beryllium poisoning during the course of her employment. Defendant moved for judgment, arguing the case was governed by the Workmen's Compensation Act. The trial court granted the motion and dismissed the case, and the Supreme Court of New Jersey affirmed, citing the exclusivity of the Workmen's Compensation Act. *Id.* at 560-62. The court stated:

> "[W]hen compensation benefits for occupational diseases, including berylliosis, were authorized and brought within the substantive and administrative scheme of the Workmen's Compensation Act, that remedy, with its advantages and its qualifications, was exclusive and in lieu of the former common law right. The legislative action must be considered as occupying and preempting the field; all other remedies were thereby abrogated." *Id.* at 561.

Professor Larson's treatise scathingly censures this case:

> "Other jurisdictions, including Illinois and Pennsylvania, have refused to follow the *twisted logic* (emphasis added) in Kane that would (1) bar the claim because it was unknown at the time the statute of repose expired and (2) bar the civil action because of the exclusive remedy provisions of the state's workers' compensation law." 9 Larson's Workers' Compensation Law § 100.05(3)(b) (2015).

¶ 77 The treatise cites four Illinois cases and one Pennsylvania case that "refused to follow the twisted logic of Kane." The first Illinois case cited is the appellate court decision in the case at bar, followed by *Meerbrey* and two additional appellate court decisions. The Pennsylvania case is *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013), which is briefly discussed in the majority's opinion, extensively discussed in

plaintiff's (appellee's) brief, and mentioned in a footnote in defendant Ferro's (appellant's) brief.

¶ 78 *Tooey* is a consolidation of two appeals. In the first case, John Tooey worked for Ferro Engineering (apparently the same defendant as in the case at bar) as an industrial salesman of asbestos products from 1964 until 1982, during which time he was exposed to asbestos dust. In December 2007, Tooey developed mesothelioma and died less than one year later. In the other case, Spurgeon Landis worked for Alloy Rods, Inc., from 1946 until 1982. He, too, was exposed to asbestos throughout his employment, and in July 2007 was diagnosed with mesothelioma.

¶ 79 Section 301(c)(2) of the Pennsylvania Workers' Compensation Act (Workers' Compensation Act) provided that " 'whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which [the employee] was exposed to hazards of such disease.' " (Emphasis omitted.) *Tooey*, 81 A.3d at 857. Both Tooey's and Landis's mesothelioma manifested some 25 years after their last date of employment where they were exposed to asbestos, far beyond the 300-week limitation period in section 301(c)(2) of the Workers' Compensation Act.

¶ 80 In 2008, Tooey, Landis, and their spouses (appellants) filed separate tort actions against multiple defendants, including their employers (collectively, employers). The employers filed motions for summary judgment, alleging that appellants' causes of action were barred by the exclusivity provision of section 303(a) of the Workers' Compensation Act. The appellants responded that a tort action is permitted against an employer where, as here, a disease falls outside the jurisdiction, scope, and coverage of the Workers' Compensation Act. The trial court agreed with the appellants and denied the employers' motions for summary judgment. On appeal, the Superior Court reversed the trial court's decision. In the instant consolidated appeal, the Pennsylvania Supreme Court reversed the decision of the Superior Court and remanded.

¶ 81 The Supreme Court held that claims for occupational disease which manifested outside the 300-week period prescribed by the Workers' Compensation Act did not fall within the purview of the Workers' Compensation Act, and, therefore, the

Workers' Compensation Act's exclusivity provision did not preclude injured employees from filing common-law claims against their employers. In reaching this conclusion, the court stated:

> "[T]he consequences of Employers' proposed interpretation of the Act to prohibit an employee from filing an action at common law, despite the fact that [the] employee has no opportunity to seek redress under the Act, leaves the employee with *no remedy* against his or her employer, a consequence that clearly contravenes the Act's intended purpose of benefitting the injured worker. It is inconceivable that the legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who have suffered the most serious of work-related injuries without any redress under the Act or at common law." (Emphasis in original.) *Tooey*, 81 A.3d at 864.

¶ 82 The *Tooey* decision is persuasive, as is the decision of the appellate court below which, in the words of Professor Larson's treatise, "refused to follow the twisted logic *** that would (1) bar the claim because it was unknown at the time the statute of repose expired and (2) bar the civil action because of the exclusive remedy provisions of the state's workers' compensation law." 9 Arthur Larson *et al.*, Larson's Workers' Compensation Law § 100.05(3)(b) (2015).

¶ 83 For the reasons set forth above, I strongly disagree with the majority's decision in this case, and I therefore dissent. I would affirm the judgment of the appellate court.

¶ 84 JUSTICE KILBRIDE joins in this dissent.

2015 IL App (5th) 140445WC

NO. 5-14-0445WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CONTINENTAL TIRE OF THE AMERICAS, LLC,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Washington County.
	)	
v.	)	No. 13-MR-9
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Curtis Oltmann, Appellee).	)	Honorable Daniel J. Emge, Judge, presiding.

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 only issue raised in this workers' compensation appeal concerns the nature and extent of the claimant's injury to his left wrist. The claimant, Curtis Oltmann, worked as a labor trainer for the employer, Continental Tire of the Americas, LLC, at its manufacturing plant in Mt. Vernon, Illinois. He was involved in a workplace slip and fall accident that resulted in an injury to his left wrist. He filed a claim for benefits pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2012)). An arbitrator found that the claimant sustained a 5% loss of use of his left hand

as a result of the accident. The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission affirmed and adopted the arbitrator's decision. The employer appealed to the circuit court, and the circuit court confirmed the Commission's decision. The employer now appeals the judgment of the circuit court that confirmed the Commission's decision. The employer argues that the claimant failed to prove that he suffered any permanent partial disability as a result of the workplace accident. We affirm.

¶ 2 BACKGROUND

¶ 3 The parties do not dispute that the claimant suffered a workplace accident on January 31, 2012. He tripped and fell while taking trash to a dumpster, landing on his left hand and arm. Subsequent X-rays revealed a left wrist fracture. On February 1, 2012, an orthopedist, Dr. David Brown, examined the claimant, placed his arm in a splint, and restricted him to light duty. The claimant followed up with Dr. Brown on February 29, 2012. On that day, Dr. Brown opined that the claimant was at maximum medical improvement and released him to full duty work with no restrictions. Dr. Brown told the claimant to return to his care if he had any further complications. The claimant returned to work full duty with no restrictions and has not sought any further medical treatment as a result of the fall.

¶ 4 At the December 6, 2012, arbitration hearing, the only disputed issue was the nature and extent of the claimant's injury. The claimant testified that after he reached maximum medical improvement, he returned to work earning the same rate of pay that he did prior to the accident and worked more hours. The week before the arbitration

hearing, he worked 57 hours. He testified that he continued to experience pain from time to time in his left wrist. He told the arbitrator that when he is required to grab tires at work, he sometimes experiences pain in his left hand. In addition, when he carries something heavy, he can feel pain in his left wrist. After reaching maximum medical improvement, he played golf in the plant's golf league, which required him to play nine holes of golf one day per week. His team came in first place out of 16 teams in the league. He also played nine additional holes of golf each week. He testified that he sometimes has difficulties with his wrist when playing golf.

¶ 5 Dr. Brown testified that his initial examination of the claimant's left wrist revealed a dorsal triquetral avulsion, which is also called a chip fracture of the triquetral bone in the wrist. He described the chip as being approximately three or four millimeters and located on the back or top of the wrist. For treatment, he recommended a removal splint to rest the wrist and allow the swelling to go down and a home exercise program.

¶ 6 Dr. Brown testified that when the claimant returned on February 29, 2012, his wrist was doing great and was much better. Dr. Brown's examination of the wrist was negative, with good range of motion and no tenderness. He discharged the claimant from active care with instructions to return if he had any further issues. He released the claimant to work full duty and opined that the claimant should not suffer any residual functional loss or difficulties with his left hand or wrist. He believed that there would be some soreness for some time, usually four to six months, but the soreness would go away. He noted that typically there was no long-term negative sequelae from this type of injury.

¶ 7 On March 15, 2012, Dr. Brown prepared a written report containing a disability rating based upon American Medical Association guidelines, which is required by section 8.1b(a) of the Act (820 ILCS 305/8.1b(a) (West 2012)). Dr. Brown opined in his report that there was no permanent impairment in the claimant's left extremity as a result of the chip fracture. He explained in the report that at the time of the last examination, the claimant was doing great functionally. He had full range of motion, no tenderness, and no impairment.

¶ 8 At the conclusion of the hearing, the arbitrator found that the claimant sustained a 5% loss of use of his left hand as a result of the accident, and the Commission affirmed and adopted the arbitrator's decision. The employer appealed to the circuit court, and the circuit court confirmed the Commission's decision. In the present appeal, the employer argues that the Commission's award of permanent partial disability benefits was improper.

¶ 9 ANALYSIS

¶ 10 The determination of permanent partial disabilities for workplace accidents occurring after September 1, 2011, is governed by section 8.1b of the Act, which became effective on June 28, 2011. Pub. Act 97-18, § 15 (eff. June 28, 2011). Section 8.1b(a) requires a licensed physician to prepare a permanent partial disability impairment report setting out the level of the claimant's impairment in writing. 820 ILCS 305/8.1b(a) (West 2012). The report must "include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury;

and any other measurements that establish the nature and extent of the impairment." 820 ILCS 305/8.1b(a) (West 2012). Section 8.1b(a) requires the physician to use "[t]he most current edition of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment' *** in determining the level of impairment." 820 ILCS 305/8.1b(a) (West 2012).

¶ 11 In determining the level of a claimant's permanent partial disability, section 8.1b(b) directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b) (West 2012).

¶ 12 In the present case, the arbitrator considered each of the factors contained in section 8.1b(b) and made the following findings: (i) that Dr. Brown found an impairment rating of 0% of the left wrist; (ii) that the claimant was employed as a labor trainer for the respondent and has continued in his usual and customary employment as of the trial date; (iii) that the claimant was 49 years old as of the date of loss; (iv) that the claimant was released to his regular job by his treating physician and continues to work in that position as before the incident; and (v) that the claimant described some minor residual symptoms in the wrist.

¶ 13 Despite Dr. Brown's 0% impairment rating, the arbitrator found that the claimant sustained a 5% loss of use of his left hand as a result of the accident. The arbitrator stated

that he determined the nature and extent of the claimant's injury by considering "the totality of the evidence adduced."

¶ 14 In the present appeal, the employer argues that, by adopting the arbitrator's decision, the Commission misinterpreted section 8.1b of the Act. The employer argues that, as a matter of law, the claimant's request for permanent partial disability should have been denied because he did not present a physician's report pursuant to section 8.1b(a) that would support a finding of a permanent partial impairment. The employer also argues, alternatively, that, under the manifest weight of the evidence standard, the Commission failed to give proper weight to Dr. Brown's impairment report, the claimant's extremely limited treatment, and his return to full duty at his prior earning capacity. We disagree with each of the employer's arguments.

¶ 15 First, the employer asks us to interpret section 8.1b under a *de novo* standard of review and hold that the claimant was required under section 8.1b to submit a medical report in support of his disability. The employer emphasizes that the claimant did not offer any subsection (a) report that supported a permanent impairment; instead, the only report in the record is the report that it obtained from Dr. Brown, which contains a 0% impairment rating. Therefore, the employer argues that we must reverse the Commission's award as a matter of law under a *de novo* statutory interpretation of section 8.1b of the Act.

¶ 16 Issues involving the interpretation of a statute present questions of law that we review *de novo*. *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." *Id.* "The language used in the statute is normally the best indicator of what the legislature intended." *Id.*

¶ 17 The language of section 8.1b(b) requires the Commission to consider a report prepared by a physician that includes an opinion concerning the level of the claimant's impairment. The record in the present case establishes that the Commission considered Dr. Brown's impairment report in determining the claimant's permanent partial disability. The Commission's consideration of this report complies with section 8.1b's requirements. The statute does not require the claimant to submit a written physician's report. It only requires that the Commission, in determining the level of the claimant's permanent partial disability, consider a report that complies with subsection (a), regardless of which party submitted it. In addition, section 8.1b does not specify the weight that the Commission must give to the physician's report. Instead, section 8.1b(b) states that "[n]o single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b) (West 2012).

¶ 18 Therefore, nothing within the statutory language of section 8.1b requires the Commission to automatically adopt Dr. Brown's reported level of impairment merely because the parties submitted only one subsection (a) report. To the contrary, the Commission is obligated to weigh all of the factors listed within section 8.1b(b) and make a factual finding with respect to the level of the injured worker's permanent partial disability with no single factor being the sole determinant of disability. The Commission in the present case properly followed section 8.1b(b)'s requirement by weighing Dr.

Brown's report along with the other listed factors. Therefore, the Commission's award does not violate the language of the Act as a matter of law.

¶ 19 Second, the employer argues, alternatively, that the Commission's decision is improper under the manifest weight of the evidence standard. We disagree.

¶ 20 It is the province of the Commission to determine disputed facts and draw reasonable inferences from the evidence in workers' compensation cases, and the Commission's "findings regarding the nature and extent of a disability will not be set aside unless they are contrary to the manifest weight of the evidence." *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 71 Ill. 2d 476, 479, 376 N.E.2d 1014, 1016 (1978). In addition, "[i]t is well settled that because of the Commission's expertise in the area of worker's compensation, its findings on the question of the nature and extent of permanent disability should be given substantial deference." *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624, 722 N.E.2d 703, 709 (1999). A decision is against the manifest weight of the evidence when the opposite conclusion is clearly apparent. *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15, 19 (1996). The Commission's decision is not against the manifest weight of the evidence if there is sufficient factual evidence to support it. *Id.* A reviewing court should not overturn the Commission's findings simply because a different inference could have been drawn, nor should it substitute its judgment for that of the Commission. *Old Ben Coal Co. v. Industrial Comm'n*, 217 Ill. App. 3d 70, 84, 576 N.E.2d 890, 899 (1991).

¶ 21 Under the manifest weight of the evidence standard, we must give proper deference to the weight that the Commission gave to each of the factors listed in section

8.1b(b). There was sufficient evidence to support the Commission's findings with respect to each of the factors, and nothing in the record indicates that it gave improper weight to any one factor. Therefore, we cannot reverse its finding that the claimant sustained permanent injuries to the extent of 5% loss of use of his left wrist under the manifest weight of the evidence standard.

¶ 22 The Commission outlined its findings on all of the factors listed within section 8.1b(b), including a finding that the claimant had some minor residual symptoms in his wrist, including occasional pain in his left hand and some problems with his wrist when he worked around the house, played golf, or lifted something heavy. In its analysis, the circuit court correctly concluded that the claimant's reported symptoms are corroborated by Dr. Brown's opinion that it is "not uncommon to have some residual soreness for a time after this."

¶ 23 The accident occurred on January 31, 2012, and Dr. Brown opined that the claimant would have some soreness for four to six months after the accident. During his deposition testimony taken on September 25, 2012, he testified that the claimant's residual soreness should have resolved by that point. However, at the December 6, 2012, arbitration hearing, the claimant testified that he still had pain in his wrist at times. Prior to the accident, he never had any problems with his left wrist. Dr. Brown admitted during his testimony that the bone chip in the claimant's wrist had not reattached to the bone when he last saw him and that sometimes a bone chip will not reattach.

¶ 24 Although Dr. Brown opined that the claimant did not have any permanent impairment because of the accident, the weight to be given to his opinion as well as the

conclusions and inferences to be drawn from the claimant's testimony and medical evidence are matters for the Commission to determine. Nothing in the record compels us to second-guess the Commission's factual findings with respect to the nature and extent of the claimant's disability.

¶ 25 CONCLUSION

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

¶ 27 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Curtis Oltmann,
Petitioner,

vs. NO: 12WC 11777

Continental Tire the Americas, LLC.,
Respondent,

13IWCC0744

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 nature and extent 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 January 14, 2013 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.

13IWCC0744

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 1 2013

o073013
CJD/jrc
049

Charles J. DeVriendt

Ruth White

Michael P. Latz

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OLTMANN, CURTIS
Employee/Petitioner

Case# **12WC011777**

CONTINENTAL TIRE THE AMERICAS LLC
Employer/Respondent

13IWCC0744

On 1/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above 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.

A copy of this decision is mailed to the following parties:

1459 LEVENHAGEN LAW FIRM PC
T FRITZ LEVENHAGEN
4495 N ILLINOIS ST SUITE E
BELLEVILLE, IL 62226

0299 KEEFE & DEPAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

13IWCC0744

CURTIS OLTMANN,
Employee/Petitioner

v.

CONTINENTAL TIRE THE AMERICAS, LLC,
Employer/Respondent

Case # 12 WC 11777

Consolidated cases: none

The only disputed issue is the nature and extent of the injury. 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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **12/05/2012**. By stipulation, the parties agree:

On the date of accident, **01/31/2012**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained 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 **$54,741.96**, and the average weekly wage was **$1,052.73**.

At the time of injury, Petitioner was **49** years of age, ***married*** with **1** dependent child.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$631.64**/week for a further period of 10.25 weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **5% loss of use of the left hand.**

Respondent shall pay Petitioner compensation that has accrued from **02/29/2012 (MMI)** through the present, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

January 10, 2013
Date

13IWCC0744

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CURTIS OLTMANN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 12 WC 11777**
	)	
CONTINENTAL TIRE THE AMERICAS, LLC.,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner, a right hand dominant labor trainer, injured his left wrist on January 31, 2012, when he tripped and fell over a guard rail landing on his left hand. He sought medical care that day and x-rays noted a nondisplaced fracture. He was splinted and referred to Dr. David Brown, an orthopedist. Dr. Brown saw him on February 1, 2012. Dr. Brown concurred with the diagnosis, applied a splint and released the petitioner to one-handed duty. The petitioner returned to work on light duty at that point.

On February 29, 2012, the petitioner returned to Dr. Brown. He reported he was "a lot better." Dr. Brown noted good range of motion, noted residual symptoms would likely resolve and discharged him to return to full duty at MMI. RX 2.

On March 15, 2012, Dr. Brown prepared an AMA rating report, in which he opined the claimant had a 0% impairment at the level of the left wrist. RX2. Dr. Brown testified in deposition in support of his findings and treatment course, as well as the bases for his impairment rating. See generally RX1.

The petitioner continues to work in his pre-injury position for the respondent. He notes some occasional discomfort in his left wrist but continues to engage in his recreational activities, including his 4-handicap golf game. He acknowledged that he plays in the plant league, and his team came in first out of sixteen after he achieved MMI.

OPINION AND ORDER

Nature and Extent of the Injury

Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five

enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

The Arbitrator notes the following relevant evidence as to each factor:

(i): Dr. Brown found a PPI rating of 0% of the left wrist.

(ii): The claimant was employed as a labor trainer for the respondent and has continued in his usual and customary employment as of the trial date.

(iii): The claimant was 49 years old as of the date of loss.

(iv): The claimant was released to his regular job by his treating physician and continues to work in that position as before the incident.

(v): The claimant described some minor residual symptoms in the wrist.

The petitioner had a fracture to the wrist, which was splinted. He worked light duty and engaged in home exercise, and had minimal treatment. He was released from care at MMI thirty days after the injury. Given the above, and considering the totality of the evidence adduced, the respondent shall pay the petitioner the sum of $631.64/week for a further period of 10.25 weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused loss of use to the petitioner's left hand to the extent of 5% thereof.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marque M. Smart,
Petitioner,

vs. NO. 12 WC 08366

Central Grocers,
Respondent.

14IWCC0374

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering, the issues of the nature and extent of Petitioner's disability and penalties and attorneys' fees for Petitioner, and permanent partial disability, average weekly wage, and impairment rating for Respondent 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 on January 14, 2013 is hereby affirmed and adopted.

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

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

14IWCC0374

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 20 2014

Daniel R. Donohoo

o-03/19/14
drd/wj
68

Charles J. DeVriendt

DISSENT

I do not believe the Arbitrator had the authority to determine permanent partial disability because no impairment rating based on the AMA Guides was submitted into evidence. Accordingly, I respectfully dissent from the affirmation of that award by the majority. P.A. 97-18, the Workers' Compensation reform legislation enacted in 2011, added the new section 8.1b, which established that the AMA Guides regarding impairment shall be considered in the determination of permanent partial disability. The new section provides (emphasis added):

"For accidental injuries that occur on or after September 1, 2011, permanent partial disability **shall** be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order."

It is cardinal rule of statutory construction that the word "shall" is mandatory, as opposed to the word "may" which is directory. *See, Schultz v. Performance Lighting, Inc., 984 N.E.2d 569* (2nd Dist. 2013). In addition, in debate in the Senate, the sponsor of the bill, Senator Kwami Raoul, informed the body (emphasis added):

"For the first time ever, the State of Illinois will be embracing the AMA's guidelines with regards to rating impairment. So the Illinois Workers' Compensation Act will have a provision in there that says physicians' impairment shall be rated by physicians that are certified to apply AMA guidelines to rate impairment and that will be the only way that rating of impairment will take place within the Illinois Workers' Compensation System. Thereafter, **rating of disability by arbitrators will take into account the rating impairment**, the occupation of the injured employee, the age of the injured employee, and the employee's future earning capacity and finally, evidence of disability corroborated by the treating medical records."

In addition, although the language of the new section specifies that no single factor shall be the sole factor in establishing determining permanent partial disability, the section also specifies that "the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." That provision does not apply to any other of the specified factors. Therefore, while the impairment rating is not the exclusive factor, it is a factor of such importance that the relevance and weight of any other factor must be "explained in a written order." That language indicates to me that the General Assembly intended the impairment rating to be a fundamental basis for a disability award and deviation from that rating shall be explained. In my opinion the impairment rating becomes a preeminent piece of evidence, similar to a proper utilization review report, which presumptively absolves an employer from the imposition of penalties and fees if it acts in accordance with the report.

Finally, I believe the interpretation of the new section 8.1b is of sufficient importance that it should be addressed by the Appellate Court or the General Assembly. I hope this dissent brings this issue to their attention for possible clarification or amendment. For these reasons, I respectively dissent from the decision of the majority.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMART, MARQUE
Employee/Petitioner

Case# **12WC008366**

CENTRAL GROCERS
Employer/Respondent

14IWCC0374

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above 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.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
DEREK S LAX
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

3998 ROSARIO CIBELLA LTD
LAURA D HRUBEC
116 N CHICAGO ST SUITE 600
JOLIET, IL 60432

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Marque Smart
Employee/Petitioner

Case # 12 WC 8366

v.

Consolidated cases:

Central Grocers
Employer/Respondent

14IWCC0374

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **February 13, 2013**. 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

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ 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. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other The need for an impairment rating

FINDINGS

On 1/11/12, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, the Petitioner *did* sustain 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, the Petitioner earned $51,480.00; the average weekly wage was $990.00

On the date of accident, Petitioner was 40 years of age, *single* with 2 children under 18.

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

Respondent shall be given a credit of $23,833.63 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $23,833.63.

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of **$577.50** commencing **1/24/2012** through **2/16/2012**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$660.00**/week for **41-2/7** weeks, commencing **2/17/2012** through **12/2/2012**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $145.32 to Physician's Immediate Care, $739.30 to Midwest Orthopedics at RUSH, $1,223.34 to Instant Care, $1,855.00 to Advance Physical Medicine and $5,110.08 to Accelerate Rehabilitation as provided in Sections 8(a) and 8.2 of the Act. Consistent with the stipulation of the parties, Respondent shall receive a credit for all bills paid.

Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of **$594.00** per week for **125** weeks because the injuries sustained caused **25%** loss to the Person as a Whole as provided in Section 8(d)(2) of the Act.

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

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

Signature of Arbitrator

5/23/13
Date

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MAY 29 2013

14IWCC0374

STATEMENT OF FACTS

Petitioner, Marque Smart, worked for Respondent, Central Grocers, as an Order Picker. Petitioner testified that he was as an Order Selector in the frozen foods department who goes around the warehouse and select orders for stores. Petitioner testified that his responsibilities include repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. Petitioner testified this is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Petitioner testified that he is a Union Steward for Respondent as well, and his responsibilities also include training new employees on how to be an Order Selector.

Petitioner testified that on January 11, 2012 he was selecting an order of 90 lbs when he felt a sharp pain in his lower back. Petitioner testified it was his first or second day back to work from being released from a previous injury he sustained. Petitioner testified he was accommodating his supervisor's request to work in the meat department, an area that Petitioner doesn't normally work in. Petitioner testified that he stopped for a minute or two finished his shift and went home. The next day the pain got worse and when he came into work, which was actually that same day as he works the evening shift, he reported it to his supervisor Ozzie, and a report was initiated. Petitioner testified that he continued to work because he felt that he could work through the pain.

Petitioner testified that he began his treatment on January 18, 2012 after he could no longer continue to work because of the pain. Petitioner was sent by Respondent to Physicians Immediate Care. The doctor noted "[Petitioner] had just returned to full-duty work on January 10, 2012 after being off of work for a year with other work-related injuries. He worked as a picker for Central Grocers and he reports that at the end of his shift on Tuesday, January 10, 2012 he was lifting several 90-pound cases of meat when he felt a pain in his left low back. He was able to finish his shift. This incident occurred about a half hour prior to the end of his shift that day. [He] returned to work the next day and reported his back pain to his supervisor. He was offered evaluation at the clinic. He declined and took what he described as a personal day... He stated that he did return to work on Thursday and Friday and worked 8 hours of full duty on each of those days. He was then off Saturday, Sunday and Monday because of the holiday and returned to work again yesterday, which was Tuesday, January 17, 2012. He said that he had persistent pain in his lower back. He says it is much worse in the morning after being in bed. He denies any radiation into his buttock or leg, except for today, he felt for the first time, tingling down his left leg to his foot. [He] denies any non-work-related incident or event correlating with the development of that condition. He rates his pain at a constant 8/10 which is worse at times, sore in quality." Petitioner was given a back support, and diagnosed with a lumbar strain. He was given the day off and told to report back to full duty the next day. (PX 7)

Petitioner followed up with Physicians Immediate Care on January 24, 2012. He again was diagnosed with a lumbar strain, released to full duty but was told to work reduced hours of 4-6 hours. (PX 7)

On February 8, 2012, Petitioner sought the care of Dr. Kern Singh at Midwest Orthopedics at Rush. Petitioner provided a consistent history. After performing an examination, Dr. Singh diagnosed a lumbar muscular strain. The doctor ordered physical therapy and returned Petitioner to full duty on a four-hour per day basis. (PX 13) From February 10, 2012 through March 5, 2012, Petitioner underwent Physical Therapy at Advanced Physical Medicine.

On February 20, 2012 Petitioner returned to Dr. Singh. The doctor noted that Petitioner had started therapy and was experiencing increased pain especially in the refrigeration unit at work. It extended in the axial

low back down the left leg into the posterior thigh and posterolateral calf. His pain was increasing. He was diagnosed with a lumbar strain and was taken off work and prescribed an MRI. On February 27, 2012 Dr. Singh took Petitioner off work until March 7, 2012. (PX 9)

On February 28, 2012, Petitioner underwent an MRI at Instant Care which showed: (PX 9)

1. L3-4 subligamentous posterior disc herniation with extruded nucleus pulposus measuring 5-6 mm indenting the ventral surface of the thecal sac with generalized spinal stenosis and bilateral neuroforaminal narrowing slightly greater on the left.

2. L4-5 6-7 mm broad-based subligamentous posterior disc herniation with extruded nucleus pulposus elevating the posterior longitudinal ligament and indenting the thecal sac with generalized spinal stenosis greater on the right with bilateral neuroforaminal narrowing also greater on the right.

3. At L5-S1 there is a 3-4 mm subligamentous posterior disc protrusion herniation also elevating the posterior longitudinal ligament and indenting the ventral surface of the thecal sac without spinal stenosis with mild bilateral neuroforaminal narrowing, slightly greater on the right.

On March 7, 2012, Dr. Kern Singh noted that he reviewed the MRI which he felt demonstrated a large central disc herniation at L4-5 causing severe spinal stenosis. He also noted there was a central disc osteophyte at L3-4 with moderate to severe stenosis. Dr. Singh diagnosed L3-L5 spinal stenosis and opined that Petitioner needed a minimally invasive L3-5 laminectomy. (PX 10)

At Respondent's request Petitioner underwent an IME with Dr. Carl Graf on March 12, 2012. Dr. Graf obtained a history, and reviewed medical documentation through Dr. Singh's February 8, 2012 visit. After performing an examination, Dr. Graf opined that Petitioner suffered from a lumbar strain. He opined that four weeks of therapy prescribed by Dr. Singh would be considered reasonable and appropriate and further opined that after that point Petitioner would be at maximum medical improvement. The doctor did not feel there was any reason Petitioner required limited hours and stated that he agreed with Physician's Immediate Care that Petitioner could have worked full duty throughout this time. He felt Petitioner could return to work at full duty in an unrestricted fashion. (RX 3)

On May 2, 2012 , Petitioner followed up with Dr. Singh. The doctor continued Petitioner's off work status and prescribing an L3-5 laminectomy/discectomy pending approval. (PX 10)

On May 10, 2012, a deposition of Dr. Singh was performed. Dr. Singh testified that the initial history Petitioner provided was consistent with the injury that he presented with. Dr. Singh stated " ...I would say this is definitely an acute event that there appears to be a causal connection in the sense that lifting heavy objects in a forward flexed position would result in a disk herniation which I do believe was reasonable in [Petitioner's] case." The doctor provided that his provisional diagnosis was L4-5 central disk herniation, L3-L5 spinal stenosis. He recommended a L3-L5 laminectomy and an L4-5 discectomy. Dr. Singh added "[Petitioner has a large disk herniation that would be unlikely to be asymptomatic. His mechanism of injury is a plausible source for a disk herniation. His symptoms are progressive and correlate with an L5 radiculopathy. He develops motor weakness over a period of six to eight weeks once again suggesting an acute change..." (PX 13)

Petitioner testified that following the deposition testimony of Dr. Kern Singh, Respondent authorized the surgical procedure and paid TTD forward from the date of the procedure until he returned to work. Petitioner testified that he did not receive TTD benefits until this time, nor did he receive TPD for reduced shift hours.

On July 6, 2012, Petitioner underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. (PX 10)

On August 6, 2012 Petitioner was seen by Dr. Singh. Petitioner provided that he had complete resolution of his left leg pain and only had residual low back pain but felt significantly improved. He was to continue off work and start therapy three times a week for four weeks. Documents submitted also provide that Petitioner could work with a ten pound lifting, pushing and pulling restriction. As well as minimum bending and stooping. (PX 9)

On August 14, 2012, Petitioner began therapy at Accelerated on referral from Dr. Singh. (PX 8)

On September 10, 2012, Petitioner returned to Dr. Singh stating he had complete resolution of his leg pain and occasional lower back pain. He did still have some symptoms but they were mainly improved. He had been attending therapy and noted increased strength in his low back as well. The diagnosis was the same. The doctor at this time recommended he remain off work and attend a functional capacity evaluation and work conditioning. He would return to the office in six weeks. (PX 10)

On September 21, 2012, Petitioner underwent a FCE at Accelerated Rehabilitation which indicated he provided consistent performance and gave maximum effort. The FCE indicated that he could only perform 91.6% of the physical demands of his job as an order picker. It was determined that Petitioner was unable to successfully achieve occasional squat lifting, occasional overhead lifting, occasional bilateral carrying, frequent power lifting and frequent shoulder lifting. The FCE determined that he was functioning at a medium-heavy level of work which did not meet the requirements of an Order Selector. It was recommended that Petitioner participate in a daily Work Conditioning program 4hrs/day for 3-4 weeks. (PX 8)

On October 22, 2012 Petitioner returned to Dr. Singh in follow-up. Dr. Singh noted that he had a functional capacity evaluation exam on September 21, 2012 that showed valid, consistent effort and put him at the medium to heavy category of work when his job is heavy duty in nature. The doctor also noted that Petitioner's last work conditioning note placed him at 97.6% of his job demand level. Petitioner reported that overall he was doing quite well but still had some increased axial back pain with bending and squatting. The therapist suggested four more weeks of work conditioning. The doctor recommended that he complete the course of work conditioning and remain off work. He was also prescribed Mobic. (PX 10)

On November 26, 2012, Petitioner returned to Dr. Singh. The doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was only having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. He was also having trouble with the occasional bilateral carry of more than 60 pounds. Dr. Singh provided that Petitioner was at maximum medical improvement and was to return to work in the medium to heavy physical demand level as of December 3, 2012. Dr. Singh provided that if Petitioner had an increase in symptoms he could return to the office as needed. The doctor also added that Petitioner had permanent restrictions per his last work conditioning note dated November 21, 2012. (PX 10) (The November 21, 2012 work conditioning functional progress note indicates Petitioner demonstrated the ability to perform 97.3% of the physical demands of his job as an order picker. The test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. Petitioner was discharged from work conditioning. (PX 8))

On November 28, 2012 Dr. Singh prepared a work status note indicating that per the last work conditioning note dated November 21, 2012 Petitioner was placed at the heavy demand level and could return to full-time work. (PX 10)

Petitioner testified that he returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

Petitioner testified that when he returned to work in January of 2012 he was earning $24.95/hour and that was based on his union contract (Pet. Ex. #1). Petitioner testified that all Central Grocers employees that are full time are guaranteed 40 hours per week, and that on May 1st every year based on their union contract, all Central Grocers full time employees receive a pay increase based on the type of shift they work day or night, and the type of department that they work in. Petitioner testified that all employees in the same classification would receive the same rate of pay. Further, Petitioner testified that all overtime is mandatory.

Petitioner testified that he received a back TTD check dated November 14, 2012 paying him from his first day off of February 17, 2012 to June 3, 2012. Petitioner testified that he never received his TPD benefits at all during the time that he worked reduced hours and that he followed all company policies and procedures. Petitioner testified he was given no justification for why he did not receive his TPD benefits after he was placed on a reduced shift schedule by both the company doctor at Physicians Immediate Care and his treating physician, Dr. Kern Singh.

Petitioner testified that he currently does not experience a lot of pain, "just stiffness in [the] lower back from time to time." Petitioner stated that he was unable to "do any heavy lifting below my waist." He provided that lifting anything over 50 lbs "really bothers my lower back" and he was unable to participate in sports.

Petitioner offered the testimony of both Dominic Rossi and Robert Ryske who are also union stewards for Central Grocers, Union 703. Mr. Ryske has more than 27 years of experience along with Mr. Rossi who are full time employees of Central Grocers. Both of these witnesses testified that Articles 10 and 11 of the Collective Bargaining Agreement, or Union Contract cover hours worked, wages earned, and talk about mandatory overtime. Both witnesses testified that all full time employees of Central Grocers earn a wage increase on May 1st of each contract year. (Pet. Ex. #1) Both witnesses testified that the wage is based on the department classification and that all employees in the same classification would receive the same rate of pay. Both witnesses testified that they were aware that Petitioner was injured on January 11, 2012, and that it is not a requirement that any employee sign any written statements regarding an injury. Further, both testified that it is Management's responsibility to fill out the accident report. It is only the job of the injured employee to report it to their supervisor.

Respondent offered the testimony of Jorge A. Villadares who is the safety supervisor at Central Grocers. Mr. Villadares testified that he was aware that Petitioner was injured on January 11, 2012. Mr. Valladeres confirmed Petitioner's testimony that he did not seek medical attention initially and that he attempted to return to work. Mr. Valladeres testified that it is his job to fill out to prepare all of the injury report documentation for injuries that occur on the night shift. Mr. Valladeres testified that Petitioner complied with all procedures of reporting the accident.

WITH REGARD TO ISSUE (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he worked for Respondent as an order selector. As an order selector, Petitioner "picks" orders, which involves lifting boxes to fulfill orders. Petitioner testified while selecting an order on January 11, 2012, while working in the meat department, he lifted between 90 and 95 pounds of boxes containing meat when he felt a sharp pain in his lower back. Petitioner testified that he reported this accident the next day, January 12, 2012, to his supervisor, Ozzie. An accident report was initiated at that time. Petitioner testified that he attempted to continue to work, but could not do so due to severe pain. Petitioner was sent by Respondent for treatment with Physician's Immediate Care on January 18, 2012. Petitioner's initial visit to Physician's Immediate Care on January 18, 2012 contains a history of the accident that is consistent with his testimony at trial. Additionally, the histories provided to his medical providers as well as Respondent's IME physician are also consistent with his testimony at trial. The Arbitrator finds Petitioner's testimony credible.

Accordingly, the Arbitrator finds that Petitioner has proved that he was injured in an accident that arose out of and in the course of his employment by Respondent on January 11, 2012.

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

Petitioner testified that he had returned to his employment with Respondent following a period of absence due to a previous work related injury. The injury was adjudicated in 11 WC 07226. According to that award, Petitioner was temporarily totally disabled from December 21, 2010 through January 10, 2012, the day before this accident. Accordingly, Petitioner did not accrue any wages for the 52 week period immediately preceding this injury.

The Illinois Supreme Court has held that when it is impractical to determine average weekly wage by calculating the total amount of wages earned prior to an injury, one must look to the wages earned or those that would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. Sylvester v. Indus. Comm'n., 197 Ill. 2d 225, 231 (2001). Accordingly, the fourth method of average weekly wage calculation is applicable to this case. (*Id.*)

Petitioner introduced a copy of the Labor Agreement with Respondent that was in place at the time of Petitioner's January 11, 2012 injury. (Pet. Ex. #1) According to Article 10 of that document governing "hours", Petitioner is guaranteed 40 hours of work per week. Further, workers for Respondent receive an increase in hourly every May 1. Petitioner testified that fellow employees employed on the same pay scale were making $24.30 per hour prior to May 1, 2011. After May 1, 2011 and according to Petitioner's pay stubs introduced as Petitioner's Exhibit #3, Petitioner's pay at the time of the accident was $24.95. Therefore, taking the hourly rate of $24.30 in conjunction with pay raise to $24.95 that a worker in Petitioner's position would earn after May 1, 2011, Petitioner's average weekly wage at the time of the accident was $990.00, or the average that a worker in Petitioner's position would have made during the 52 weeks immediately preceding this work related injury.

IN REGARD TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims entitlement for TPD benefits for the period between January 24, 2012 and February 16, 2012 for 3-2/7 weeks. Petitioner was released by Dr. Jim Kell of Physician's Immediate Care on January 24, 2012 with restrictions of only working four to six hour shifts. These restrictions were initially accommodated by Respondent. Petitioner's Exhibit 4 outlines that of the 3-2/7 weeks he is claiming TPD he was paid for working a full day on January 25, January 30 and February 6. He testified that some days he can be a floater; this is an excused absence for which he receives full compensation. He was a floater, and thus paid full salary, on February 2, 7 and 14. He was not scheduled to work on January 28 or 29, February 1, 3, 4, 5, 11 or 12. He

had an excused absence on February 8th. Thus, 6 of the days he is claiming TPD he was paid full salary and 8 of the days he was not scheduled to work, 1 day was an excused absence, for a total of 10 of the 23 days. (PX 4)

Petitioner worked partial days on January 24 (6 hours), 26 (5 hours), 27 (4 hours), 31 (5 hours), February 9 (4 hours), 10 (4.5 hours), 13(4 hours), 15 (4 hours) and 16 (.5 hours) for a total of 9 days. This results in a net of TPD rate of 35 hours. Applying an average weekly wage of $990.00, that results in an hourly wage of $24.75. Two-thirds of those hours at the regular rate is $577.50 that he would be owed in TPD. (PX 4) The Arbitrator notes that Petitioner submitted three pay stubs into evidence for the period between January 21, 2012 and February 9, 2012. (PX 3) Since he is claiming benefits between January 24, 2012 and February 16, 2012, these stubs are not helpful in calculating the proper TPD. Lastly, the Arbitrator notes Petitioner received 8 hours of floater compensation on February 18th. (PX 4) Petitioner received TTD between February 17, 2012 and December 2, 2012. (RX 5) The Respondent therefore is awarded a credit of one day, or $81.91.

With respect to TTD benefits from February 17, 2012 through December 2, 2012, Petitioner was provided work restrictions on February 8, 2012 by Dr. Kern Singh. (Pet. Ex. #10) Petitioner testified that Respondent initially accommodated these work restrictions. However, after February 17, 2012 Respondent was unable to provide further accommodation. Thereafter, Petitioner was taken off work completely by Dr. Singh during his next appointment of February 20, 2012. (*Id.*) Petitioner was kept in an off work status by Dr. Singh until being released on November 28, 2012 consistent with the last work conditioning note dated November 21, 2012 placing him at the heavy demand level. (*Id.*) Petitioner returned to work for Respondent on December 2, 2012.

Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 17, 2012 through December 2, 2012, a period of 41-2/7 weeks, less the stipulated credit for TTD benefits previously paid.

WITH REGARD TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE PETITIONER'S INJURIES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a permanent partial disability can and shall be awarded in the absence of an impairment rating or impairment report being introduced. The plain language of Section 8.1(b) reads that, "In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity, and; (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability."

It is axiomatic that the plain and ordinary meaning of statutory words be used in determining how to construe the law. The plain language of the Act dictates that an impairment rating is but one of the factors to be use in determining permanent partial disability. Further, the use of the word "factor" merely shows that it is to be considered. Further, the fact that the Act dictates that no single factor shall be determinant shows that logically, the converse is also true. This means that the absence of one of the enumerated factors cannot be determinant of the permanent partial disability award.

Further, Petitioner's Exhibit #14, a memorandum from the Illinois Workers' Compensation Commission dictates that "If an impairment rating is not entered into evidence, the Arbitrator is not precluded from entering a finding of disability." The plain language of this memorandum indicates that an Arbitrator is not precluded from entering a finding of disability in the absence of an impairment rating. The language is definitive and leaves no room for misinterpretation. Accordingly, the Arbitrator finds that the absence of an impairment rating does not preclude this Arbitrator from making a finding as to disability.

Based on the factors enumerated in Section 8.1b of the Act, the Arbitrator finds the follow:

i. Neither party submitted evidence of a reported level of impairment.

ii. On the date of accident Petitioner worked for Respondent as an Order Picker. As an Order Picker Petitioner's responsibilities included repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. This is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Subsequent to the accident, Petitioner returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

iii. Petitioner at the time of the injury was 40 years old.

iv. Petitioner's future earning capacity is likely unimpaired by his accident. His future earnings is dictated by his Union contract.

v. There is evidence of disability corroborated by the treating medical records. Petitioner was diagnosed with L4-5 central disk herniation, L3-L5 spinal stenosis. As a result he underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. Petitioner last saw his treating physician, Dr. Singh on November 26, 2012. At that time the doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. The work conditioning functional progress note indicated that the test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. The Arbitrator observed the demeanor of Petitioner while he was testifying and finds his current complaints to be credible and consistent with the treating records.

Based on the above criterion, the Arbitrator finds that as a result of accidental injuries sustained on January 11, 2012, Petitioner is permanently disabled to the extent of 25% under Section 8(d)2 of the Act.

WITH REGARD TO ISSUE (M), SHOULD PENALTIES AND FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Arbitrator finds that Respondent's conduct in this matter was not unreasonable. A legitimate dispute existed as to whether Petitioner sustained an accident on the first day he returned to work after being off for a previous work accident. As such, Petitioner's request for penalties are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jamie Lind,

Petitioner,

vs.

NO: 12 WC 39539

14IWCC0651

Corn Belt Energy Corp.,

Respondent,

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 accident, medical expenses, temporary total disabiltiy, and permanent disablity, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that Section 8.1b of the Act states, in pertinent part, that "permanent partial disability **shall** be established using the following criteria" and then lists the criteria, which includes an AMA rating report. 820 ILCS 305/8.1b (2013) (emphasis added)

The Commission finds that a complete reading of this section of the Act indicates that a party is not required to provide an AMA rating report for the purpose of determining permanent disability. Instead, we find that the Act simply requires that if an AMA rating report has been provided, then the Commission must consider it, along with all the other criteria listed, when determining permanent disability.

In following the criteria laid out in Section 8.1b on review, the Commission notes that:

(i) *the reported level of impairment pursuant to subsection (a):*
An AMA report was not provided.

(ii) *the occupation of the injured employee;*
Petitioner worked as a lineman. As a lineman, Petitioner was required to drive out to different locations in order to string electrical wires. Because Petitioner was required to work at different locations in order to do his job, he would find himself parking, as he did on August 30, 2012, in ditches on the side of the road. As such, getting out of his truck was awkward, as in the day of the accident, when Petitioner had to twist his body in a certain way in order to exit his vehicle.

(iii) *the age of the employee at the time of the injury;*
Petitioner was 42 years old at the time of the accident.

(iv) *the employee's future earning capacity; and*
Petitioner testified that he now works as a serviceman and makes more than he did as a lineman. (T.21)

(v) *evidence of disability corroborated by the treating medical records.*
During his last visit with his chiropractor, Dr. Dennis Farrell, Petitioner complained of ongoing right lower lumbar pain and paresthesia that radiated into the right hip, thigh, knee and calf, which Petitioner described as mild, continuous burning. (PX2) Dr. Farrell recommended that Petitioner continue treatment. At hearing, Petitioner testified that he continues to have pain and discomfort in the low back and that his low back, on the right hip area, stiffens and becomes painful daily. (T.17, 19-20) Petitioner testified that his continued symptoms do not affect his ability to work, but explained that he now works as a serviceman, a different position than the one he worked when the accident occurred. (T.20) Petitioner testified that his new position does not require him to lift as much as before and is less stressful on his body that his previous job.

After considering the facts and following the criteria listed in Section 8.1b of the Act, the Commission agrees with the Arbitrator that Petitioner has suffered a 3% loss of use of the person as a whole under Section 8(d)2 of the Act. Therefore, the Commission affirms the Arbitrator's award of permanent disability benefits and medical expenses.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 3% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,480.00 for medical expenses under §8(a) & §8.2 of the Act. Respondent is entitled to credits of $390.91, paid by Respondent's Workers' Compensation Carrier, and $536.00, paid by Petitioner's group insurance. Respondent shall hold Petitioner harmless from any claims by an providers of the services for which Respondent is receiving credit under §8(j) of the Act.

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

14IWCC0651

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 $11,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 0 1 2014
MJB/ell
o-06/02/14
52

Michael J. Brennan

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. I disagree with the majority's interpretation of Section 8.1b of the Act. The lack of an AMA report regarding a level of impairment leaves the Trier of fact no evidence of level of impairment. To determine the level of disability in the present case, the weight and relevance of the remaining factors placed into evidence must be weighed. I find that petitioner has suffered a 1% loss of use of the person as a whole under Section 8(d)2 of the Act.

Kevin W. Lamborn

14IWCC0651

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jamie Lind,
Employee/Petitioner

v.

Cornbelt Energy Corp.,
Employer/Respondent

Case # 12 WC 39539

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa, Illinois**, on **September 26, 2013**. 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

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ 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. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0651

FINDINGS

On **August 30, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$78,000.00**; the average weekly wage was **$1,500.00**.

On the date of accident, Petitioner was **42** years of age, *single* with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,480.00, less $390.91 paid by Respondent's Worker's Compensation Carrier and $536.00 paid by Petitioner's group insurance, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $536.00, as provided above, for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 15 weeks, because the injuries sustained caused the 3% loss of the person as a whole, as provide in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

October 28, 2013
Date

NOV - 4 2013

14IWCC0651

FINDING OF FACTS

On August 30, 2012, Jamie Lind, a/k/a James, was working as a lineman for the Respondent, Corn Belt Energy Corp. As part of his job, he was required to perform a number of tasks. These included the operation of bucket trucks for use in the installation and repair of elevated electrical wiring. On August 30, 2012, he was assisting in the stringing of primary heavy voltage electrical supply wiring on three spans to a transformer. Each span represents the distance between one utility pole and the next. Number 2 aluminum wiring was being placed between the poles and is about as thick as the Petitioner's pinkie.

On this day, the Petitioner drove a bucket truck with its trailer containing a spool of wire. In the days and weeks prior to the accident, Mr. Lind testified he had no complaints of pain or discomfort. However, this changed after he parked the bucket truck off the side of the road and in a ditch. This placed the bucket truck at a significant angle with the right side being lower than the left.

After parking the vehicle, the Petitioner said he attempted to get out of the same by turning his body and placing his right hand on the outside of the steering wheel closest to the driver's side window. His left hand was placed on the rear area of the door opening. The Petitioner then attempted to turn and pull himself out of the door opening at the same time. While doing this, he experienced pain principally in his back and neck.

Mr. Lind explained the pain he experienced immediately following the occurrence was noticeable but not severe. The Petitioner testified he reported this injury to Jerry Henning, his supervisor. The Petitioner continued his work but did so in pain and discomfort.

When Mr. Lind returned to his employer's shop, he wrote on his timecard that he was injured. He also testified to noting the injury in his work on the computer. This testimony was not rebutted.

Because the pain and discomfort continued to grow overnight in severity, the Petitioner reported to Dr. Farrell at Farrell Chiropractic on August 31, 2012. Px 2 & Rx 1.

At various times prior to the Petitioner's August 30, 2012 accident, he had seen Dr. Farrell for a variety of ailments. Id. He did not recall dates but testified almost two months prior, on July 6, 2012, he treated for pain in the center of his lower lumbar spine which was mild, intermittent and aching. Id. Pain on his last pre-accident visit was a 2 out of 10. Id. At that time, he was rendered chiropractic treatment and reported feeling better immediately. Id. Although he was told to return the following week, the Petitioner did not. Id. He states he felt better and did not seek additional care until after his August 30, 2012 work accident.

At the Petitioner's August 31, 2012 visit with Dr. Farrell, he complained of pain and paresthesia radiating into the left knee and down the lateral side of the left calf. Id. This pain was described as aching and sharp. Id. Pain, as well as, paresthesia with tingling was found throughout the entire neck and was moderate, intermittent and accompanied by soreness and stiffness. Id. Additional pain in the mid thoracic spine was reported. Id. Testing found issues at C2, C6, T4 and L5 spinal levels that included joint fixation, hypermobility and point tenderness. Id. After his examination, Dr. Farrell wrote the Petitioner had been better since his last visit, approximately two months prior, but experienced a marked deterioration of his condition due to an acute flare up. Id.

On September 5, 2012, Mr. Lind followed with his physician. Id. At that visit, Dr. Farrell wrote the Petitioner continued to experience pain and paresthesia in the center of his lower lumbar spine. Id. Since his last treatment, he felt somewhat better and rated his pain as a 5 out of 10. Id. He reported Mr. Lind's pain increases when moving from sitting to standing or from a laying down to a sit or stand position. Id. The Petitioner's pain and paresthesia is a constant ache that can be sharp at times. Id. His principle pain involved mid thoracic and cervical spine. Id. Subluxations, joint fixation, hypermobility and point tenderness at the C2, C6, T4 and L5 levels was found on examination. Id. Dr. Farrell reported Mr. Lind's condition showed improvement but it remained inadequately controlled. Id.

During Mr. Lind's September 10, 2012 visit, 11 days after his initial injury, he saw Dr. Farrell's notes failed to mention his work injury. Mr. Lind testified he then reminded Dr. Farrell about the accident. As a consequence, Dr. Farrell corrected his notes and provided a history of the Petitioner's August 30, 2012 work accident. Id. He wrote the Petitioner was injured getting out of his truck and twisting. Id. He felt pain at the time but it was not too bad. Id. By the time he woke up the next morning, it was severe. Id. His pain and paresthesia was moderate, intermittent and sharp. Id.

Mr. Lind revisited Dr. Farrell on September 7, 2012. Id. At that time, the Petitioner's pain and paresthesia was principally in the center of the lower lumbar spine. Id. Since his prior visit, he experienced some improvement in his low back pain. Id. His present pain was approximately a 4 out of 10 with discomfort occurring 50% of the day. Id. When laying down, his pain and paresthesia is constant with the pain principally located in his mid thoracic and lumbar spine. Id. The pain appeared to be centered at C2,

C6, T4 and L5 and demonstrated joint fixation, hypermobility and point tenderness. Id. Chiropractic manipulation was performed with the Petitioner reporting improvement.

During his September 10, 2012 visit, Mr. Lind reported his pain and discomfort to be a 4 out of 10. Id. The pain that had been going down his left leg was now gone. Id. His lumbar pain remained and was worse in the morning. Id. If he sits too long and tries to get up the pain is worse. Id. Testing demonstrated lumbar flexion and extension caused mild to moderate pain. Id. Kemp's testing was positive bilaterally with moderate lumbar pain. Id. Straight Leg Raising testing on the right was positive with mild pain located in the center of the Petitioner's lumbar spine. Id.

The Petitioner continued to follow with Dr. Farrell several times a week throughout September of 2012. Id. Thereafter, Mr. Lind's treatment regimen slowed as his condition improved. Id. By his visit of October 8, 2012, the Petitioner's subluxation, joint fixation and hypermobility with point tenderness was now limited to C6, T4, T 10 and L5. Id. However, his pain still could reach a 5 out of 10 with the pain and paresthesia being intermittent but sharp at times. Id.

By the Petitioner's October 15, 2012 visit, his lumbar and thoracic pain and paresthesia was mild and intermittent in nature. Id. He had continued complaints of pain in the cervical spine. Id. At this visit, Dr. Farrell reported subluxations at C6, T4 and L5 which he adjusted due to joint fixation, hypermobility and point tenderness. Id.

At his October 23, 2013 visit, Dr. Farrell wrote the Petitioner had pain and paresthesia in the center of his lower lumbar spine but indicated his low back pain was much improved. Id. Pain in the center of his mid thoracic spine was also improved but remained moderate and intermittent. Id. Cervical spine pain continued. Id. Dr. Farrell

reported the Petitioner felt improved after his last treatment but wrote his pain and paresthesia has been exacerbated. Id.

The Petitioner testified he continued to treat with Dr. Farrell through April 26, 2013 for his work injuries. Since that last visit, he has continued to experience pain which is principally located in his lower back. The Petitioner explained that since his last visit with Dr. Farrell, he has tried to live with his pain and discomfort.

Mr. Lind explained he has daily pain and discomfort in his lower back that he relates to the accident. Although he had pain at various points in his back prior to the accident, he indicated this was relieved by the chiropractic care and treatment received. Mr. Lind testified his work accident reinjured his spine and continues to cause pain through the present.

Mr. Lind testified his pain is now better than what it was after the accident but reports it occasionally backtracks. He does have pain on a daily basis and his low back stiffens up. He explained his pain does not hinder his ability to work and he has now transferred to another job that places less physical stress on him.

Following the Petitioner's injury, he treated with the Farrell Chiropractic Clinic and incurred bills of $1,480.00. Px 1. Of this amount, the Respondent has paid $391.00. Id. Petitioner's group insurance paid $536.00 in bills while Mr. Lind paid $40.00 out of pocket. Id. Discounts in billing of $42.35 have been provided. Id. There remains $470.74 in unpaid bills due the Farrell Chiropractic Clinic. Id.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent; F. Is Petitioner's current condition of ill-being causally related to the injury?

On August 30, 2012, the Petitioner was employed by the Corn Belt Energy Corporation. Prior to this date, he had multiple minor injuries to, among other things, his cervical and lumbar spine. Px 2 & Rx 1. To reduce the pain and discomfort from these injuries, the Petitioner obtained intermittent chiropractic care over the course of several years. Id. For a past injury or flare up, the Petitioner might see his chiropractor, Dr. Dennis Farrell, for a few visits. Id.

As a lineman for the Respondent, Mr. Lind was required to perform a variety of heavy physical tasks. This included climbing utility poles, placement of electrical wire, operating bucket trucks at various heights and working on high voltage wires. On August 30, 2012, the Petitioner was involved in stringing 3 spans of Number 2 aluminum wire to a transformer.

At his work site, Mr. Lind parked the Respondent's truck off the side of the road and in a ditch as depicted in the photographs contained within Petitioner's Exhibit 3. The vehicle was parked at a significant angle. This placed the passenger side of the utility truck at the bottom end of the angle and the driver's side at the top end. In order for the Petitioner to exit the truck, he unbuckled his seat belt and began his efforts to exit.

The Petitioner next opened the driver's side door and placed his left hand on the body of the vehicle just beyond his driver's seat. He also placed his right hand on the outside portion of the steering wheel that was furthest from him and closest to the

driver's side door. Mr. Lind then attempted to twist and pull himself up and out in a fluid motion. While attempting to pull his body toward the door and twist at the same time, he felt pain in his back and neck. Id. The accident was reported to his foreman, Jerry Henning, who was also at the job site. Mr. Lind documented this injury on his timecard and on a computer that tracked his work activities for the day.

As the Petitioner's pain continued to increase, he saw his chiropractic physician, Dr. Farrell, the next day. Id. Mr. Lind testified he discussed his work injury with his chiropractor. Dr. Farrell's notes indicate Mr. Lind's pain included the lower lumbar spine with pain and paresthesia radiating into the left knee and down the lateral side of the left calf. Px 2. It was described as a constant ache that could be sharp at times. Id. Pain and paresthesia throughout the entire neck was moderate, intermittent with accompanying soreness and stiffness. Id. An additional complaint of midthoracic pain reported. Id. Chiropractic testing confirmed subluxations in these areas of the spine. Id.

After his examination, Dr. Farrell provided chiropractic care and treatment. Id. He indicated Jamie Lind experienced an acute marked deterioration of his condition. Id. Although there is no initial reference in the doctor's records to the accident, 11 days later it was noted. Id. In the September 10, 2012 appointment notes, Dr. Farrell refers to Petitioner's August 30, 2012 work injury. Id. Dr. Farrell wrote the Petitioner's pain began on August 30, 2012 when he was getting out of a truck and twisted. Id. He felt pain after the occurrence but by the time he woke up the next morning, it was severe. Id. At this visit, he had moderate, intermittent and sharp pain at a 4 on a scale of 1 to 10. Id. Mr. Lind was having pain down the back of his left leg originally that was now gone. Id. His

remaining pain is worse in the morning. Id. If he sits too long and tries to get up and move, the pain becomes more severe. Id.

Additional testing at the Petitioner's September 10, 2012 visit demonstrated a positive Straight Leg test. Id. Pain and paresthesia continued in the same areas with ongoing subluxations noted in the cervical, thoracic and lumbar spine. Id. Chiropractic testing indicated joint fixation, hypermobility and point tenderness in these areas. Id. Chiropractic treatment on this date provided some relief. Id. The Petitioner continued to follow with Dr. Farrell 3 times a week. Id. This progressed to once a week and occasionally thereafter. Id.

Mr. Lind explained he last saw Dr. Farrell in April of 2013 for this injury. At that time, he was still having pain and discomfort. Px 2. Dr. Farrell noted the Petitioner received improvement from treatment following his accident but the condition has again manifested. Id. The Petitioner was noted to have continuing thoracic subluxations, cervical sprain/strain along with cervical subluxations. Id. He was provided chiropractic treatment and received some relief. Id.

Testimony of the Petitioner indicates he has not seen Dr. Farrell since April of 2013 for his work injury. He explained his present pain is better on some days and worse on others. He still has ongoing issues with his low back remaining stiff but a job change with the Respondent has had the effect of reducing his symptoms.

Following consideration of the testimony of the Petitioner and the medical records and bills in evidence, this Arbitrator finds the Petitioner did have an accident on August 30, 2012 that occurred and arose out of the course of his employment by the Respondent. The injury was in the form of a cervical, thoracic and lumbar strain along with

subluxations throughout his spine. Id. It is also found, following a review of the evidence, that Mr. Lind's current condition of ill-being is causally related to the injury.

J. 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?

On August 31, 2012, the day after the Petitioner's work accident, he sought medical care with Dr. Dennis Farrell, his chiropractic physician. Px 2. Dr. Farrell indicated Mr. Lind experienced a marked deterioration of his condition. Id. As a result of the Petitioner's injury, Dr. Farrell began a regimen of chiropractic care. Id. The cost of chiropractic services rendered totals $1,480.00. Px 1. Of this amount, the Respondent paid $391.00, the Petitioner's group insurance satisfied $536.00, discounts of $42.35 have been received and the Petitioner paid an additional $40.00 out of pocket. Id. There remains $470.74 in unpaid bills. Id.

Following consideration of the chiropractic records, Px 2 and Rx 1, this Arbitrator finds the medical services provided to the Petitioner were reasonable and necessary. The Respondent has not paid all appropriate charges for these reasonable and necessary medical services.

Consistent with this decision, the Respondent shall repay the Petitioner's out of pocket expense of $40.00 and satisfy the outstanding chiropractic bills of $470.74 pursuant to the Medical Fee Schedule. It shall further hold the Petitioner harmless from payments made by the Respondent's group insurance in the amount of $536.00. Id.

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

Following the Petitioner's work injury of August 30, 2012, he obtained chiropractic care and treatment in an attempt to relieve himself of the discomfort caused by his injury. Although he had prior minor work injuries, many of which no claim was brought, he testified that he had improved but would occasionally seek chiropractic care for a flare up.

It was after his August 30, 2012 work injury that he sought regular care and attention. Mr. Lind continues to report he lives with daily discomfort due to this accident. Because of a change in his job and his own efforts to deal with the continuing effects of his August 30, 2012 accident, he testified he has not felt it necessary to see his doctor for additional care.

Following consideration of the testimony and evidence presented, this Arbitrator finds the Petitioner experienced a loss of 3% loss of a man pursuant to Section 8(d)2.

M. Should penalties or fees be imposed upon Respondent?

Following consideration of the testimony and evidence presented, this Arbitrator finds the imposition of penalties is not warranted.

Illinois Official Reports

Appellate Court

***Sunrise Assisted Living v. Banach*, 2015 IL App (2d) 140037**

Appellate Court Caption	SUNRISE ASSISTED LIVING, Plaintiff-Appellee, v. HEATHER BANACH, Defendant-Appellant (The Illinois Workers' Compensation Commission, Defendant).
District & No.	Second District Docket No. 2-14-0037
Filed	June 26, 2015
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 11-MR-1348; the Hon. Jorge L. Ortiz, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Efi Poziopoulos James, of Baum, Ruffolo & Marzal, Ltd., of Chicago, for appellant. James P. Roach II, of Hennessy & Roach, P.C., of Chicago, for appellee.
Panel	JUSTICE BURKE delivered the judgment of the court, with opinion. Justices Jorgensen and Hudson concurred in the judgment and opinion.

OPINION

¶ 1 An arbitrator found defendant Heather Banach to be permanently partially disabled (PPD) and temporarily totally disabled (TTD). The Illinois Workers' Compensation Commission (Commission) approved and adopted the arbitrator's decision, and plaintiff, Sunrise Assisted Living (Sunrise), paid installments according to the award. The circuit court and the appellate court affirmed the Commission's decision.

¶ 2 During appellate review, Banach petitioned to increase the arbitration award under sections 19(h) and 8(a) of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/19(h), 8(a) (West 2012)), claiming that her condition had worsened. Thereafter, Banach filed in the circuit court an application for judgment pursuant to section 19(g) of the Act (820 ILCS 305/19(g) (West 2012)), arguing that she is entitled to interest under section 2-1303 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1303 (West 2012)). The circuit court denied the application, ruling that section 2-1303 of the Code does not apply, because Sunrise satisfied the arbitration award by tendering all ordered payments, including interest under section 19(n) of the Act (820 ILCS 305/19(n) (West 2012)), before Banach applied for judgment under section 19(g).

¶ 3 On appeal, Banach argues that she is entitled to interest under section 2-1303 of the Code. Sunrise responds that the trial court did not have jurisdiction to consider Banach's section 19(g) application, and that this court lacks jurisdiction to review the denial, because her petition to increase the arbitration award under sections 19(h) and 8(a) was pending when the application was filed. Sunrise alternatively argues that Banach is not entitled to interest under section 2-1303 of the Code because (1) the Commission's award, by itself, is not a judgment, and (2) Sunrise timely paid the amounts due under the arbitration award, including interest under section 19(n) of the Act. We hold that the trial court had jurisdiction to consider the section 19(g) application, this court has jurisdiction to review the denial, and the trial court did not err in denying Banach interest under section 2-1303.

¶ 4 ### I. BACKGROUND

¶ 5 Banach filed a workers' compensation claim against Sunrise, seeking benefits pursuant to the Act, for a work-related injury that occurred on March 6, 2007. On June 17, 2010, the arbitrator entered a decision finding that Banach's injury arose out of and in the course of her employment and that her current condition was causally related to the accident. The arbitrator ordered Sunrise to pay Banach (1) TTD benefits in the amount of $250 per week for $107^{5}/_{7}$ weeks; (2) PPD benefits in the amount of $225 per week for 225 weeks, because the injury caused the PPD to her person as a whole to the extent of 45% thereof; (3) $322,922 for her medical expenses; and (4) $1,520 in interest under section 19(n) of the Act.

¶ 6 On July 5, 2011, the Commission affirmed and adopted the arbitrator's decision, and the trial court confirmed the Commission's decision on March 15, 2012. Sunrise timely appealed on April 11, 2012, and the appellate court affirmed the trial court's order on February 5, 2013. *Sunrise Assisted Living v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120424WC-U. On March 7, 2013, before the appellate court issued its mandate, Sunrise tendered three payments: $310,695 for medical expenses (after applying a $12,227 credit), $63,630 in TTD and PPD benefits (after applying a $13,924 credit), and $1,520 in interest under section 19(n) of the Act.

¶ 7 On October 29, 2012, while the appeal was pending, Banach filed a petition to modify the arbitration award under sections 19(h) and 8(a) of the Act. Section 19(h) allows, where there is a material change in the employee's disability, either the employee or the employer to petition the Commission to review an installment award within a limited period of time. *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 527 (2006). Similarly, section 8(a) provides for review if additional medical expenses are incurred after the award.

¶ 8 On April 1, 2013, while her petition for modification under sections 19(h) and 8(a) was pending before the Commission, Banach filed an application in the trial court for a judgment on the original award, pursuant to section 19(g) of the Act. Generally, section 19(g) provides that, "when no proceedings for review are pending," either party may present a copy of the award to the appropriate circuit court, "whereupon the court shall enter a judgment in accordance therewith." 820 ILCS 305/19(g) (West 2012). Banach contended that section 2-1303 of the Code entitled her to an additional $56,395, representing 9% interest from July 5, 2011, the date of the Commission's decision, to March 7, 2013, the date on which Sunrise tendered its first payment.

¶ 9 On April 12, 2013, Sunrise moved to dismiss the application for judgment, arguing that the trial court lacked jurisdiction under section 19(g), because Banach's petition for modification was pending before the Commission. Sunrise further argued that Banach was not entitled to interest under section 2-1303 of the Code from the date of the award, because (1) the award, itself, is not a judgment for which interest would be owed under the Code and (2) Sunrise paid all the interest due under section 19(n) of the Act.

¶ 10 On December 11, 2013, the trial court denied Banach's section 19(g) application, concluding that, "since the full tender of the [Commission's] award and proper section 19(n) interest was tendered by [Sunrise] before Banach filed any type of petition under section 19(g) of the Act, the Commission's award was never reduced to a judgment under section 19(g) of the Act. Therefore, section 2-1303 interest at 9% was never applicable to the [Commission's] decision." Banach filed a timely notice of appeal from the order.

¶ 11 II. ANALYSIS

¶ 12 On appeal, Banach argues that she is entitled to interest under section 2-1303 of the Code. Sunrise responds that the trial court did not have jurisdiction to consider Banach's section 19(g) application, and this court lacks jurisdiction to review the denial, because her petition to increase the arbitration award under sections 19(h) and 8(a) was pending when the application was filed. Sunrise also renews its argument that Banach is not entitled to interest under section 2-1303 of the Code, because (1) the Commission's award, by itself, is not a judgment, and (2) Sunrise timely paid the amounts due under the arbitration award, including interest under section 19(n) of the Act.

¶ 13 A. Jurisdiction

¶ 14 Sunrise contends that the trial court lacked subject matter jurisdiction to consider Banach's application for a judgment under section 19(g) of the Act, because her petition to modify the award under sections 19(h) and 8(a) was pending.[1] Resolving the jurisdictional issue requires

[1]Sunrise has moved to dismiss the appeal on the ground that we lack jurisdiction because the trial court lacked jurisdiction, and we have taken the motion with the case.

the interpretation of the statutes. The primary objective of statutory interpretation is to give effect to the intent of the legislature, and the most reliable indicator of legislative intent is the language of the statute given its plain, ordinary, and popularly understood meaning. *Gardner v. Mullins*, 234 Ill. 2d 503, 511 (2009). The statute " 'should be read as a whole with all relevant parts considered.' " *Gardner*, 234 Ill. 2d at 511 (quoting *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990)). If the statutory language is clear, a reviewing court need not resort to extrinsic aids of construction, such as legislative history. *Northern Kane Educational Corp. v. Cambridge Lakes Education Ass'n*, 394 Ill. App. 3d 755, 758 (2009). In such a situation, a court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are inconsistent with the express legislative intent. *Landheer v. Landheer*, 383 Ill. App. 3d 317, 321 (2008). Nonetheless, when reviewing a statute, we also consider the subject it addresses and the legislature's apparent objective in enacting it, while presuming that the legislature did not intend to create absurd, inconvenient, or unjust results. *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006). The construction of a statute presents a question of law, which we review *de novo*. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 510-11 (2007).

¶ 15 Section 19(g) confers authority upon a circuit court to render a judgment in accordance with an award or other decision of the Commission when a certified copy thereof is presented to the court. Section 19(g) provides in relevant part as follows:

> "Except in the case of a claim against the State of Illinois, either party may present a certified copy of the award of the Arbitrator, or a certified copy of the decision of the Commission when the same has become final, *when no proceedings for review are pending*, providing for the payment of compensation according to this Act, to the Circuit Court of the county in which such accident occurred or either of the parties are residents, whereupon the court shall enter a judgment in accordance therewith." (Emphasis added.) 820 ILCS 305/19(g) (West 2012).

¶ 16 Sunrise concludes that the proceedings on the section 19(h) petition qualify as "proceedings for review" that would bar an application for judgment under section 19(g), because section 19(h) repeatedly uses the term "review." Section 19(h) prescribes a procedure for modifying compensation paid in installments and provides in relevant part as follows:

> "An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award *be reviewed by the Commission* at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
>
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award *be reviewed by the Commission* at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
>
> On such *review*, compensation payments may be re-established, increased, diminished or ended. The Commission shall give 15 days' notice to the parties of the hearing for *review*. Any employee, upon any petition for such *review* being filed by the

> employer, shall be entitled to one day's notice for each 100 miles necessary to be traveled by him in attending the hearing of the Commission upon the petition, and 3 days in addition thereto. ***
>
> When compensation which is payable in accordance with an award or settlement contract approved by the Commission, is ordered paid in a lump sum by the Commission, no *review* shall be had as in this paragraph mentioned." (Emphases added.) 820 ILCS 305/19(h) (West 2012).

¶ 17 Sunrise's position carries obvious superficial appeal in that section 19(g) authorizes an application for judgment only "when no proceedings for review are pending" and that section 19(h) repeatedly refers to its proceedings as a "review" of the award. However, Sunrise takes the term "review" out of the broader context of the contrasting purposes of sections 19(g) and 19(h). Read in that context, the statutory language compels us to conclude that proceedings initiated under section 19(h) are not "proceedings for review" that would bar an application for judgment under section 19(g).

¶ 18 When "the disability of the employee has subsequently recurred, increased, diminished or ended," section 19(h) prescribes a procedure by which either the employee or the employer may petition the Commission to modify an award to be paid in installments. 820 ILCS 305/19(h) (West 2012). Accordingly, section 19(h) authorizes the Commission to reestablish, increase, diminish, or end future installments; but when compensation is ordered by the Commission to be paid in a lump sum, section 19(h) does not authorize modification. Thus, section 19(h) does not authorize review of lump-sum payments or installments that have already accrued. An order entered by the Commission under section 19(h) is one for future modification based on a material change in the employee's disability, rather than a review of the original finding of disability.

¶ 19 Harmoniously interpreted, sections 19(g) and 19(h) provide that the trial court may not enter judgment on the original award while the Commission is reviewing whether that award is proper, but judgment on the original award may be entered when the Commission is deciding under section 19(h) whether a material change in circumstances warrants a prospective modification.

¶ 20 A literal interpretation of sections 19(g) and 19(h) would lead to inconvenient results that run contrary to the remedial purpose of the Act. To hold that section 19(h) proceedings for prospective modification qualify as "proceedings for review" that preclude a judgment under section 19(g) would deny a claimant the benefits upon which he depends while a collateral matter remains pending. Under Sunrise's interpretation of the Act, an employer could block the claimant's application for judgment under section 19(g) by initiating section 19(h) proceedings to modify future installments. Although there are no allegations of such gamesmanship in this case, the legislature certainly did not intend proceedings to modify future benefits to thwart a claimant's attempt to enforce the award of accrued benefits. We hold that section 19(h) proceedings are not "proceedings for review" under section 19(g), to effectuate the Act's policy and prevent litigants from causing needless delay in section 19(g) proceedings.

¶ 21 Our conclusion is supported by *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259, 262 (1978), where the employer agreed to make monthly payments of $725 for nursing services for the disabled employee, who could not care for herself. The parties agreed that the payments would be discontinued if the nursing care were no longer needed or different nursing care were

required. After honoring its obligation for three years, the employer petitioned the Commission to reopen the case on the ground that, because nursing services were no longer being provided, the payment obligation had ended. The employer unilaterally terminated payments, but the Commission denied the petition to reopen the case and the employer did not seek review. *Ahlers*, 73 Ill. 2d at 262-63.

¶ 22 More than a year after the employer stopped making payments, the employee filed an application for judgment under section 19(g) for the unpaid amounts that had accrued since that time. *Ahlers*, 73 Ill. 2d at 263. The trial court entered two judgments for the arrearages, the employer appealed, and, while the appeal was pending, the employer again petitioned the Commission to reopen the case. *Ahlers*, 73 Ill. 2d at 263. The appellate court affirmed the judgments for the arrearages, and two days later the Commission reduced the employer's future payment obligation. *Ahlers*, 73 Ill. 2d at 264.

¶ 23 On appeal to the supreme court, the employer argued, *inter alia*, that the trial court could not enter the judgments for the arrearages, because proceedings for review were pending before the Commission. The supreme court disagreed, holding that the record revealed that no proceedings regarding nursing care were pending in the Commission when the judgments were entered. *Ahlers*, 73 Ill. 2d at 266-67. First, although a petition filed by the employee might have been pending before the Commission when the trial court entered the judgments, matters unrelated to nursing care were at issue in that petition. Second, although the employer placed the issue of nursing care before the Commission by petitioning to decrease the payments, that petition was filed after the judgments had been entered and were on review in the appellate court. In short, no proceedings involving the issue of nursing care were pending when the trial court entered the judgments, and the supreme court rejected the employer's argument, accordingly. *Ahlers*, 73 Ill. 2d at 267.

¶ 24 The *Ahlers* court held that the section 19(g) application for judgment on the nursing-care arrearages was not barred by the pending proceedings, because the latter did not involve nursing care. In this case, the section 19(g) application relates to the award of medical expenses, TTD benefits, and PPD benefits. The record before us does not indicate on what grounds Banach was petitioning for an increase in benefits; however, the prospective nature of section 19(h) shows that the petition must have addressed future installments, not the lump sum or installments that already had accrued. Thus, one could argue that the subject matter of the section 19(h) petition (*i.e.*, increasing future installments) was different from the subject matter of the section 19(g) application (*i.e.*, the lump sum and accrued installments).

¶ 25 Regardless, *Ahlers* stands at least for the proposition that not all proceedings for review bar a section 19(g) application. In this case and in *Ahlers*, a petition filed by the employee was pending before the Commission when the employee applied for the judgment. Consistent with *Ahlers*, we agree with the trial court that Banach's section 19(g) application could be heard, despite the pending section 19(h) proceedings. We conclude that the trial court had subject matter jurisdiction to consider the application, and we deny Sunrise's motion to dismiss this appeal.

¶ 26 B. Postaward Interest

¶ 27 Banach argues that she is entitled to a judgment under section 19(g) and interest under section 2-1303 of the Code. Section 2-1303 governs prejudgment and postjudgment interest and provides in relevant part as follows:

> "Judgments recovered in any court shall draw interest at a rate of 9% per annum from the date of the judgment until satisfied ***. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment." 735 ILCS 5/2-1303 (West 2012).

¶ 28 As discussed, section 19(g) provides that "either party may present *** a certified copy of the decision of the Commission when the same has become final, *** whereupon the court shall enter a judgment in accordance therewith." 820 ILCS 305/19(g) (West 2012). The court must enter judgment on the award without questioning the Commission's decision, even if the court disagrees with the Commission's construction of the law. *Ahlers*, 73 Ill. 2d at 268. In this appeal, Sunrise does not challenge the validity of the award approved by the Commission, but rather contends that no judgment is warranted because it made full payment immediately following the previous appeal. Tender of full payment of the final award is a defense to a section 19(g) petition. *Voorhees v. Industrial Comm'n*, 31 Ill. 2d 330, 332 (1964) (a tender of less than the full amount due the employee under the Commission's final award did not constitute a tender, and the trial court properly entered judgment on the full award under section 19(g)).

¶ 29 We find guidance in *Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769 (2006), where the claimant argued that the trial court failed to award proper interest on the workers' compensation award. Neither party sought review of the award, but the claimant applied for a section 19(g) judgment and argued that interest under section 2-1303 of the Code should be awarded from the date of the arbitrator's award through the date the employer paid the award in full. *Radosevich*, 367 Ill. App. 3d at 777.

¶ 30 In *Radosevich*, the arbitrator's award set section 19(n) interest at the rate of 1.64% from the date of the award through the day prior to the date of payment. *Radosevich*, 367 Ill. App. 3d at 777. In this case, the arbitrator's award set section 19(n) interest at the rate of 0.15% from the date of the award through the day prior to the date of payment. Banach does not contend that Sunrise failed to make the payments according to the award or that the calculation of the section 19(n) interest was incorrect; she asserts only that section 2-1303 of the Code entitles her to additional interest from the date of the award until Sunrise tendered payment.

¶ 31 The *Radosevich* court observed that a claimant is entitled to section 19(n) interest on all awards of arbitrators and decisions of the Commission. *Radosevich*, 367 Ill. App. 3d at 777 (citing 820 ILCS 305/19(n) (West 2004)). Interest pursuant to section 19(n) is " 'drawn from the date of the arbitrator's award on all accrued compensation due the employee through the day prior to the date of payments.' " *Radosevich*, 367 Ill. App. 3d at 777 (quoting 820 ILCS 305/19(n) (West 2004)).

¶ 32 In contrast, a claimant is entitled to section 2-1303 interest if and when the arbitrator's award or the Commission's decision becomes an enforceable judgment. *Radosevich*, 367 Ill. App. 3d at 778. When an employer fails or refuses to pay an arbitrator's award that becomes the Commission's decision, and no further appeal is taken, a claimant may file a petition pursuant to section 19(g) of the Act to reduce the award to an enforceable judgment in the

circuit court. *Radosevich*, 367 Ill. App. 3d at 778 (citing 820 ILCS 305/19(g) (West 2004)). "Section 2-1303 provides that judgments shall draw interest at the rate of 9% per annum from the date of judgment, and '[w]hen judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment.' " *Radosevich*, 367 Ill. App. 3d at 778 (quoting 735 ILCS 5/2-1303 (West 2004)).

¶ 33 Once a claimant implements section 19(g) of the Act because the employer has failed to pay, a resulting order of the circuit court is an enforceable judgment, and section 2-1303 interest is properly awarded from the date of the arbitrator's award through the date that judgment was entered on that award. In addition, any prospective payments due pursuant to the section 19(g) judgment that are untimely shall also be subject to section 2-1303 interest. *Radosevich*, 367 Ill. App. 3d at 778.

¶ 34 In *Radosevich*, the claimant was entitled to section 19(n) interest on the arbitrator's award, which became the Commission's decision, through the day prior to the date of payment and as to all amounts not included in the section 19(g) judgment. *Radosevich*, 367 Ill. App. 3d at 778. When the claimant initiated the section 19(g) proceedings and the trial court entered judgment, the award became an enforceable judgment. Section 2-1303 interest should have been awarded on all unpaid amounts from the date of the arbitrator's award through the date the trial court entered judgment on the award. *Radosevich*, 367 Ill. App. 3d at 778. Because there was no intervening appeal of the award, section 19(n) interest was not also awarded to the claimant as to amounts found due in the section 19(g) judgment. *Radosevich*, 367 Ill. App. 3d at 778.

¶ 35 In this case, Sunrise appealed the Commission's decision, and section 19(n) interest accrued while that appeal was pending. When the appellate court rendered its decision, Sunrise promptly paid the lump sum, accrued installments, and section 19(n) interest, before Banach filed her section 19(g) application. Sunrise did not refuse to pay before Banach implemented section 19(g). When Sunrise tendered full payment of what was owed, Banach was no longer entitled to a judgment under section 19(g). Without a judgment, Banach was not entitled to additional interest under section 2-1303 of the Code. Therefore, we conclude that the trial court did not err in denying Banach a judgment under section 19(g) and interest under section 2-1303 of the Code.

¶ 36 ## III. CONCLUSION

¶ 37 For the reasons stated, we affirm the denial of Banach's application for a judgment and additional interest under section 2-1303 of the Code.

¶ 38 Affirmed.