2019 IL App (1st) 180644WC
No. 1-18-0644WC
Opinion filed March 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ILLINOIS STATE TREASURER, as *ex-officio* custodian of the Injured Workers' Benefit Fund, Plaintiff-Appellant, v. ESTATE OF GYULA KORMANY, A-TECH STUCCO EIFS COMPANY, and the ILLINOIS WORKERS' COMPENSATION COMMISSION, Defendants, (Estate of Gyula Kormany and A-Tech Stucco EIFS Company, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 17-L-50583 Honorable James M. McGing, Judge, Presiding.

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

Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment and opinion.

OPINION

¶ 1 In April 2008, Gyula Kormany (Kormany) filed an application for adjustment of claim seeking benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)) for injuries he allegedly sustained while working for A-Tech Stucco EIFS

Company (A-Tech). In June 2009, the circuit court of Cook County found that A-Tech's workers' compensation insurance carrier had no duty to defend or indemnify A-Tech against Kormany's workers' compensation claim because A-Tech had breached the insurance contract. Kormany subsequently amended his application for adjustment of claim to name as a party the Illinois State Treasurer (Treasurer), as *ex officio* custodian of the Injured Workers' Benefit Fund (Fund). After finding that Kormany's accident arose out of and in the course of his employment with A-Tech, the arbitrator awarded medical expenses and permanent partial disability benefits. The arbitrator also concluded that the Fund was liable for payment of the award because, although A-Tech had workers' compensation insurance at the time of the accident, it "failed to provide coverage" within the meaning of section 4(d) of the Act (820 ILCS 305/4(d) (West 2008)) by breaching the insurance contract. A majority of the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. The circuit court of Cook County confirmed the decision of the Commission. The Treasurer timely appealed.

¶ 2 We observe that in October 2014, prior to the arbitration hearing, Kormany died of causes unrelated to his workers' compensation claim. There is no evidence of record that a personal representative was appointed and substituted as the petitioner following Kormany's death. Instead, the application for adjustment of claim was amended to substitute the Estate of Kormany as petitioner. When confronted with similar circumstances, Illinois courts have found that the plaintiff's death suspended the court's jurisdiction until the appointment of a proper party plaintiff. See *Voga v. Voga*, 376 Ill. App. 3d 1075, 1079 (2007) (finding that party's death suspended the trial court's jurisdiction until the court appointed a proper successor plaintiff); *Washington v. Caseyville Health Care Ass'n*, 284 Ill. App. 3d 97, 100-01 (1996) (holding that client's death terminated attorney's authority and, since there was no plaintiff, the court's

jurisdiction was suspended until a party plaintiff was appointed). Accordingly, we hold that Kormany's death suspended the Commission's jurisdiction over his claim until such time as a personal representative of Kormany's estate was properly appointed and substituted as the petitioner. In the absence of such an appointment and substitution, the Commission's decision was premature and therefore improper. As a result, both the decision of the Commission and the judgment of the circuit court must be vacated.

¶ 3 During oral arguments, the attorney representing the party denominated as the Estate of Gyula Kormany suggested that if the gross value of Kormany's estate is less than $100,000, the claim could proceed under section 25-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/25-1 (West 2008)), which provides for the payment or delivery of a small estate upon affidavit. While section 25-1 of the Probate Act undoubtedly permits the *distribution* of an estate's assets by means of a small-estate affidavit, we find this to be separate and distinct from the requirement that a personal representative of the decedent's estate be appointed to *prosecute* a workers' compensation claim that is pending and unresolved at the time of the employee's death. Indeed, this circumstance is no different from when a plaintiff in a pending common law action dies. In such circumstances, a personal representative of the deceased plaintiff's estate is appointed and substituted as the party plaintiff. See 735 ILCS 5/2-1008(b) (West 2008); *In re Marriage of Fredricksen*, 159 Ill. App. 3d 743, 744-45 (1987). Thus, while the proceeds of a judgment may be distributed pursuant to the small-estate procedure outlined in the Probate Act, no authority has any been cited to us that would permit the prosecution of an action absent the appointment of a personal representative.

¶ 4 For the reasons set forth above, we are compelled to vacate the judgment of the circuit court and the decision of the Commission and remand the case to allow a properly appointed

representative of Kormany's estate to be substituted as the petitioner and for further proceedings thereafter.

¶ 5 Circuit court judgment vacated.

¶ 6 Commission decision vacated, and cause remanded.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Estate of Gyula Kormany,
Petitioner,

vs.

A-Tech Stucco Eifs Company and
The Injured Workers' Benefit Fund,
Respondent.

17IWCC0342

NO: 08 WC 15587

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent Injured Workers' Benefit Fund herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, employment relationship, average weekly wage, temporary total disability benefits, permanent partial disability benefits, medical expenses, statute of limitation, liability of the Fund, and the propriety of entering an award against a bankrupt employer 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 March 14, 2016, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $40,000.00. 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: JUN 1 - 2017
o5/18/17
DLS/rm
046

David L. Gore

Stephen J. Mathis

DISSENT

I respectfully dissent from the opinion of the Majority. I would have reversed the Decision of the Arbitrator, found that the Injured Workers' Benefit Fund (hereinafter "Fund" or "IWBF") is not liable for the instant award, and granted its motion to be dismissed from the claim.

By way of background, I believe that it is important to outline certain facts that were adduced at arbitration. Petitioner, Kristina Kormany, testified her father was born on September 16, 1961 in Hungary and died October 25, 2014, in an accident unrelated to the work injury that is the subject of this claim. On March 19, 2007, the date of her father's work-related accident, she was 16 years old and lived with him and her disabled grandfather. She did not notice her father had any problems with his left leg or ankle prior to the date of the accident.

Submitted into evidence was a copy of the workers' compensation insurance policy the Respondent employer had in effect on March 19, 2007. On June 9, 2009, Respondent employers' workers compensation insurance carrier was granted summary judgment determining that it had no duty to defend or reimburse the Respondent employer because of the employer's failure to timely notify the insurer of the accident and because it paid out some benefits on the claim. The Circuit Court found that these actions were both in violation of the contract of insurance. The summary judgement order specified that "Defendant Kormany [was] bound by this decision."

Petitioner also submitted various other documents into evidence. The documents establish that Respondent employer was incorporated on August 18, 2004 and was dissolved involuntarily on January 11, 2008. On October 15, 2008, Respondent employer filed for Chapter 7 bankruptcy. On December 16, 2008, the case was closed and the trustee in bankruptcy was dismissed. On February 3, 2009, Respondent employer's owners, John Bagjas and Kama Bagjas were personally discharged from creditors through bankruptcy.

Also submitted into evidence were two amended applications, both of which bear the signature of Mr. Kormany and dated April 8, 2008, the date of the original filing. The first amended application appears to be a copy of the original application with IWBF typed in as a second party Respondent. That application was filed on April 16, 2010. The second amended

application was filed on October 19, 2015, and appears to be a copy of the first amended application with the Petitioner then listed as the Estate of Gyula Kormany. The attorney of record in all the applications is listed as Stewart Orzoff, who clearly did not represent any Petitioner at any time after March 22, 2010, the date he sent correspondence to Petitioner's current lawyer noting he no longer represented Petitioner and would not seek any fees or expenses.

At Arbitration and in its brief, the Fund presented two alternative theories on why it should not be held liable for the instant award. First, the claim against the Fund is barred by the statute of limitations, and second the Fund is not liable because the statutory basis for its liability has not been met. At oral argument, IWBF "withdrew" the issue of the statute of limitations. Nevertheless, that issue has been successfully preserved and not specifically waived. In addition, the Commission is obliged to address any issue which becomes manifest upon considering the entire record, even if an issue has been specifically waived. *See, Klein Construction/Illinois Insurance Guaranty Fund v. I.W.C.C.*, 384 Ill. App. 3d 233 (1st Dist. WC Div. 2008).

Statute of Limitations

The Act provides in pertinent part (820 ILCS §305/6(d)): "In any case, other than one where the injury was caused by exposure to radiological materials or equipment or asbestos unless the application for compensation is filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred."

The Arbitrator found that Petitioner timely filed the amended application naming the IWBF. He noted that the amended application naming the IWBF was filed "exactly three years and four weeks after the date of accident." He also noted the legislative intent that the IWBF pay injured workers who are not covered by workers' compensation insurance and the Act does not specify a statute of limitations for adding the IWBF as a party because it is not an employer under the Act. IWBF argues the claim against it is barred by the statute of limitations because it was only added as a respondent more than three years after the accident.

The Fund acknowledges that there does not appear to be any legal ruling specifically supporting its argument, but it cites what it deems an analogous case, *IPF Recovery Co. v. Illinois Insurance Guaranty Fund*, 356 Ill. App. 3d 658 (1st Dist. 2005). There, the court dismissed a claim against the Guaranty Fund based on the general 5-year statute of limitations in the Code of Civil Procedure. The *IPF* court found "the 5-year statute of limitations, applicable to plaintiff's cause of action was not tolled from the time plaintiff's cause of action accrued until the time that defendant first denied plaintiff's claim for unearned premiums." Therefore, the claim against that guaranty fund was dismissed.

While the Workers' Compensation Act does not specify a separate statute of limitations for including the Fund in a claim, it does place IWBF in the position to advance all defenses the employer can assert. The Appellate Court in *IPF* held that a general statute of limitations applies

with equal force regarding a complaint against a state fund similar to the IWBF. Therefore, it is my interpretation that the intent of the Act is that IWBF shall be afforded the same protections as employers, including protections of the statute of limitations. The same factors intended to protect employers and allow them to offer a legitimate defense against a workers' compensation claim would appear to apply equally to IWBF. If the statute of limitations does not apply to IWBF, it could be in a position to have to defend against stale claims for which it cannot mount a reasonable defense.

The Arbitrator seemed to have applied an analysis similar to determining whether notice of accident to an employer is timely. Under such analysis, a technical violation of the notice requirement can be overlooked if the delay did not result in prejudice against the employer. However, the statutory language of the notice and statute of limitations sections are substantially different. The 90-day notice requirement includes the provision (820 ILCS §305/6(c)(2)): "no defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." On the other hand the statute of limitations provision specifies that if the application is not timely filed "the right to file such application shall be barred." Therefore, the legislature clearly intended that the statute of limitations requirement be more absolute than the notice requirement.

It could be interpreted that the Arbitrator effectively applied an equitable tolling of the statute of limitations. The Arbitrator stressed the efforts of Petitioner to collect benefits prior to filing the amended complaint. The *IPF* court did not address this specific issue because the plaintiff did not advance the argument in the Circuit Court and therefore it was deemed waived. A problem I have with such an analysis is that the Summary Judgment granted to the workers' compensation insurer was entered on June 9, 2009. Mr. Kormany would have been aware of the order because he was a defendant and the order provided specifically that he was subject to, and bound by, the judgement. Nevertheless, the amended complaint naming IWBF was not filed until 10 months later. Petitioner had about nine months to join IWBF to be within the three-year statute of limitations and there is no indication that IBWF had any pre-knowledge of the claim prior to the amended complaint.

In this regard, I am aware of a prior decision of the Commission in *Wold v. Sun Towing & IWBF*, 16 I.W.C.C. 535 (filed Sept. 30, 2016). There, the Commission affirmed and adopted the Decision of the Arbitrator who held simply "Petitioner's claim against the IWBF is not time barred because the Application naming Sun [employer respondent] was timely filed." However, in *Wold* there is no indication Petitioner had prior notice that insurance coverage was not available prior to running of the statute of limitations. In that regard *Wold* is distinguishable from the instant claim because as noted above the injured employee had notice that he was not protected by workers' compensation insurance coverage nine months before he had to join the Fund within the normal three-year statute of limitations. Therefore, I would find that because Petitioner failed to name and failed to join the Fund within the three-year statute of limitations despite sufficient notice to do so, her action against IWBF is barred.

17IWCC0342

Liability of IWBF

The Act provides in pertinent part (820 ILCS §305/4(d)): "Moneys in the Injured Workers' Benefit Fund shall be used only for payment of workers' compensation benefits for injured employees when the employer has failed to provide coverage as determined under this paragraph (d) and has failed to pay the benefits due to the injured employee." The Arbitrator denied IWBF's motion to dismiss it from the claim and found it to be liable for the award under the Act.

The Arbitrator found IWBF liable because of his determination that the employer effectively did not "provide" workers' compensation coverage because it apparently did not comply with the contractual requirements of the policy. The Arbitrator stressed the legislative intent for establishment of the IWBF to pay awards to claimant by employers which "fail to provide coverage" and Respondent employer had workers' compensation insurance in effect at the time of the accident.

Clearly, the IWBF was established to provide protection to injured workers whose employers do not maintain workers' compensation insurance coverage. Here, the record is also clear that Respondent employer indeed did maintain a workers' compensation insurance policy at the time of the accident. Nevertheless, for reasons unknown to the Commission, Respondent employer did not comply with the provisions of the policy contract and therefore neither the employer nor the employee received any benefits from the insurance policy coverage. While the Appellate Court appears not to have addressed this issue, it did interpret the above cited language to mean that the sole purpose of the Fund was to pay awards against employers which failed to carry workers' compensation insurance. *See, Illinois State Treasurer v. I.W.C.C.*, 12054WC (1st Dist. 2013).

It is important to understand that the establishment of the Fund is part of a larger legislative scheme. IWBF is funded exclusively from fines imposed on businesses that unlawfully fail to carry workers' compensation insurance collected either through citation issued by the Insurance Compliance Division of the Commission or by order of the Commission itself upon petition from the Insurance Compliance Division. In this matter, Respondent employer could not have been fined under §4(d) because it did in fact have workers' compensation insurance at the time of the accident. Therefore, the Respondent employer could not have been forced to contribute to the fund through fines. The decision of the majority would effectively sever the link between funding the IWBF through fines imposed against uninsured employers and payments to injured employees of such uninsured employers established in the Act.

In addition, according to the plain words of the statute, simply not "providing workers' compensation insurance" is not in itself sufficient to establish liability of IWBF. The statute also requires that the uninsured employer failed to pay benefits due the injured worker. Therefore, if the employer decides to pay benefits instead of submitting a claim to its insurer, the Fund would not be liable for payment of the award. The record before us indicates that at least initially, the Respondent employer began to pay some benefits on behalf of the injured employee. The insurance carrier argued that such payments were a violation of the insurance policy and such

alleged violation became a basis for the insurer's successful argument that it was not bound to defend the claim.

I understand that the result I advocate here may appear harsh because the descendent of the deceased employee may not have any way to recover for decedent's injury. However, it also must be recognized that the IWBF has often not had sufficient funds to pay 100% of the awards against it. Therefore, the money has to be distributed on a *pro rata* basis to all recipients for the preceding year, as specified in the Act. Accordingly, any result that improperly imposes liability on the Fund could be considered unfair to the other recipients whose awards thereby may be reduced.

Therefore, for the reasons stated above I respectfully dissent from the Decision of the Majority. I would have found that the claim against the Fund was barred both because the Fund was not joined before the expiration of the statute of limitations and because the statutory basis for liability of the Fund has not been met.

DLS/dw
O-5/18/17
46

Deborah L. Simpson
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0342

ESTATE OFKORMANY, GYULA
Employee/Petitioner

Case# **08WC015587**

A-TECH STUCCO EIFS COMPANY AND THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 3/14/2016, 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 0.47% 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:

0412 RIDGE & DOWNES
MEGAN O'BRIEN
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

0000 A TECH STUCCO EIFS CO
1001 AURORA AVE
AURORA, IL 60505

5472 ASSISTANT ATTORNEY GENERAL
BETSY FERGUSON
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

17IWCC0342

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☒ 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

Estate of Gyula Kormany
Employee/Petitioner

v.

A- Tech Stucco Eifs Company and the Injured Workers' Benefit Fund
Employer/Respondent

Case # 08WC 15587

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **January 25, 2016**. 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 **1. Respondent's Motion to Dismiss the Injured Workers' Benefit Fund; 2. Is Respondent IWBF Liable; 3. Was Notice Proper; 4. Can an award be entered against Respondent employer when it has been discharged in bankruptcy; 5. Was Amended Application against Fund Timely Filed**

FINDINGS

On **March 19, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$38,414.35**; the average weekly wage was **$800.30**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **1** child under 18.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$19,970.80**, as provided in Section 8(a) of the Act. Said payment shall be made consistent with the medical fee schedule. Respondent shall further reimburse Petitioner's union health and welfare fund, Administrative District Council 1 Welfare Fund, in the amount of **$2,038.28.**

Respondent shall pay Petitioner permanent partial disability benefits of **$480.18**/week for **41.75** weeks, because the injuries sustained caused the **25 %** loss of the **foot**, as provided in Section 8(e) of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Respondent Injured Workers' Benefit Fund Motion to Dismiss is denied.

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

3/11/16
Date

MAR 14 2016

FINDINGS OF FACT:

Gyula "George" Kormany ("Petitioner") was born on September 16, 1961 and passed away on October 25, 2014. (PX 17 and 18) On March 19, 2007, he was single, and had one dependent daughter, Kristina Kormany ("Petitioner's daughter"), whose date of birth was May 29, 1990. On this date, Petitioner worked for Respondent A-Tech Stucco Eifs Company ("A-Tech"), owned by John Bajas ("Bajas"). On this date, A-Tech had a workers' compensation policy with West Bend Mutual Insurance Company ("West Bend"). (PX 9)

Petitioner filed an Application for Adjustment of Claim ("Application") on April 9, 2008, case number 08 WC 15587. (PX 20) On July 15, 2008, West Bend filed a Complaint for Declaratory Judgement against A-Tech alleging that A-Tech violated the terms of its workers' compensation policy with West Bend because it did not report Petitioner's accident to West Bend for over twelve months after the accident. (PX 11)

On October 15, 2008, A-Tech filed a Petition for Chapter 7 Bankruptcy. (PX 12) A-Tech listed Petitioner Kormany as a debtor in connection with its bankruptcy hearing. (PX 13) On December 16, 2008, A-Tech's Bankruptcy Petition was closed. (PX 12) On February 3, 2009, A-Tech's owner, Bajas, and his wife, Kama Bajas, were personally discharged from bankruptcy by the United States Bankruptcy Court of the Northern District of Illinois. (PX 13)

On June 9, 2009, Judge Mary K. Rochford granted West Bend's Motion and found that West Bend had no duty to defend or indemnify A-Tech in workers' compensation case 08 WC 15587 and that Petitioner Kormany was bound by such order. (PX 15)

On April 16, 2010, Petitioner amended his Application to include the Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund as a party Respondent to case 08 WC 15587. (PX 20) After Petitioner's death, Petitioner's daughter completed a Small Estate Affidavit. (PX 19) Thereafter, Petitioner's Application was amended to change the name on the Application from Gyula Kormany to the "Estate of Gyula Kormany". (PX 20)

Prior to the hearing on January 25, 2016, Petitioner sent notice of the hearing to A-Tech to two different locations, both of which were listed on different check stubs of Petitioner. (PX 2) Petitioner's attorney called out the name of Bajas prior to commencement of the hearing and he was not present.

As Petitioner was not alive at the time of the hearing on January 25, 2016, Petitioner's case in chief came from the direct testimony of Petitioner's daughter and Petitioner's former boss, John "Jack" Lorezal ("Lorezal").

In 2005, Petitioner's daughter, at the age of 14, moved in with her father and her disabled grandfather at 428 West Touhy, Des Plaines, Illinois 60018. Prior to this time she lived with her mother in the Chicago-area. On March 19, 2007, Petitioner's daughter continued to live with her father and she was 16 years old at the time of his accident.

Lorezal worked as a superintendent for A-Tech from 2006 until 2009. He reported directly to owner Bajas and served as a liaison between other employees of A-Tech and Bajas. As superintendent he looked at blue prints, ordered materials for projects, delivered material and supervised employees. In March of 2007

Lorezal served as Petitioner's supervisor. Lorezal testified Petitioner worked as a plasterer and plastered walls. To perform this job, Petitioner had to climb up and down scaffolds and ladders as well as mix and apply plaster.

Petitioner's daughter testified that she regularly noticed her father deposit his paystubs from A-Tech into the bank. Lorezal testified A-Tech paid Petitioner on an hourly basis. On Fridays, Lorezal would drop off paychecks to Kormany at his job sites. He also dropped off a check to Petitioner at his house on Touhy Avenue the week after his accident.

Upon his death, Petitioner's daughter found old paystubs from the years 2006-2007 in the top drawer of his dresser at their house Touhy Avenue. Petitioner's daughter brought copies of the paystubs she located from A-Tech to trial on January 25, 2016 from pay periods of March 24, 2006 through March 17, 2007. There were a total of 48 weekly pay stubs. (PX 8) Each pay check listed the name of the employer in the top left-hand corner as "A-Tech Stucco EIFS Co." and the employee name as "Gyula Kormany". Each check listed "regular pay" and deduction for applicable taxes and union dues. (PX 8)

Prior to March 19, 2007, Petitioner did not have any known problems with his left leg or ankle. On March 19, 2007, while working for A-Tech, Petitioner fell off a six foot, four inch, scaffold and was taken to the emergency room at Advocate Condell Medical Center via ambulance. (PX 3) He complained of pain in his left ankle. Lorezal testified that he saw Petitioner in the emergency room at Advocate Condell Medical Center and Petitioner's foot was wrapped. Lorezal provided that he informed Bajas that he saw Petitioner in the emergency room.

Petitioner came under the care of Dr. Zoellick in the emergency room. The doctor diagnosed Petitioner with "left posterior talus fracture with left calcaneal anterior process fracture with mild displacement. Lateral calcaneal fracture at the calcaneocuboid joint, not displaced. Left knee strain/contusion." (PX 3) Dr. Zoellick opined that Petitioner could have problems with arthritis and need an ankle fusion in the future. Dr. Zoellick placed his left ankle in a cast and he was discharged the next day. (PX 3)

Petitioner followed up with Dr. Zoellick on March 23, 2007. Dr. Zoellick mailed all treatment notes to Bajas. (PX 4). X-rays from March 23 showed a fracture of the anterior process of the calcaneus with slight displacement and an avulsion fracture of the talus by the fibula. Dr. Zoellick recommended Petitioner be seen by a foot and ankle specialist. Petitioner strongly advised he did not want any surgical intervention. Petitioner received a cam-boot and was advised to remain non-weight bearing. (PX 4) At his follow up with Dr. Zoellick on April 2, Petitioner again indicated he did not want surgical intervention; and, as such, Dr. Zoellick indicated he would continue with conservative care, keep Petitioner off work, keep him in the cam boot and be non-weight bearing for six weeks. At this appointment the doctor once again warned about the possibility of development of arthritis, decreased range of motion and the need for surgical intervention in the future. (PX 4)

Petitioner continued to treat with Dr. Zoellick and he prescribed physical therapy. On June 18, 2007, Dr. Zoellick indicated that Petitioner could try to return to work light duty, with a restriction of no lifting more than 20 pounds and no climbing ladders. On August 13, 2007, Petitioner still felt like he had broken glass in his ankle when walking. Dr. Zoellick indicated Petitioner could return to work full duty; however, he recommended an evaluation with Dr. Kodros or Dr. Kelikian, orthopedic foot and ankle specialists. (PX 4)

Petitioner presented to Dr. Kodros for a second opinion on August 16, 2007, complaining of pain over the lateral aspect of the ankle, hindfoot and heel. He indicated the pain was aggravated by weight-bearing. Dr. Kodros opined that Petitioner may have some posttraumatic arthritis of the hindfoot and prescribed a custom molded brace for his weightbearing activity. The doctor recommended activity modification, prn use of ice and anti-inflammatory medications and periodic corticosteroid injections (which Petitioner declined at the visit). Petitioner started using the custom molded brace. (PX 6)

The custom molded brace only provided relief for a short time. Petitioner returned to Dr. Kodros' office on April 9, 2008 and came under the care of Dr. League at the same office. Examination on that date revealed that Petitioner had only approximately 25 percent of the inversion-eversion hindfoot motion on the left side when compared to the non-injured right foot. At this appointment, Petitioner agreed to a steroid injection. (PX 6) The relief from the steroid injection only lasted for 24 hours; as such, Dr. League recommended an MRI on April 30, 2008. The MRI revealed patchy edema throughout the lateral process of the talus that likely indicated post-traumatic degenerative healing pattern and a slight tear of the Achilles tendon. Dr. League prescribed an additional course of physical therapy and consideration of excision of the lateral process of his talus. Petitioner continued to wear his custom molded brace. (PX 6)

At his initial physical therapy evaluation on May 7, 2008, Petitioner indicated that "if he works one day, the next he cannot walk, because it is so painful" and that "his heel feels like a broken glass when he walks". He further stated that he could not move his ankle sideways and that he had a constant sharp/burning pain in the bottom of the heel and lateral foot. (PX 6)

Petitioner stopped attending physical therapy on his own on June 30, 2008 and cancelled his follow up appointment with Dr. League on July 7, 2008.

During the course of his treatment with the orthopedic physicians, Petitioner also treated his ankle through chiropractic treatment at Community Health and Rehabilitation Center from May 3, 2007 through June 29, 2012. (PX 5)

Petitioner did not sustain any new accidents after March 19, 2007. Petitioner used one crutch and a cane after his accident. He used the cane until the date of his death. After he completed his medical treatment, Petitioner's daughter noticed that cold weather caused him pain and she sometimes saw him in tears. She also noticed that during rainy weather, her father had a hard time getting out of bed. Petitioner's daughter noticed that he would take pain medication at the dinner table (sometimes prescribed pain medication and sometimes samples given to him from his physician). She specifically remembers that he took Hydrocodone.

Similarly, Petitioner's daughter indicated that after he finished his medical treatment related to his accident, Petitioner no longer played soccer or gymnastics with her. She stated that prior to his accident, he would play soccer with her in their front or back yard. They also used to take long walks around their neighborhood together before the accident. After the accident, they did not take these walks as frequently. If they did, they did not walk for more than a half hour, they walked at a slower pace and Petitioner needed to take frequent stops and use his daughter's arm for stability.

At the time of trial, several medical bills remained unpaid and were entered into evidence as Petitioner's group exhibit 7A-7G. The bills are as follows: Adult and Pediatric Orthopedics ($3660.00); Lake County Radiology Assoc. ($433.00); Illinois Bone and Joint ($4851.00); Community Health and Rehabilitation Center ($2538.00); Condell Medical Center ($8234.80); Dr. Spiros Stamelos ($254.00); and, Administrative District Council 1 Welfare Fund, seeking reimbursement to union for group health payments made on behalf of Petitioner ($2038.28).

With respect to (A.) Was Respondent operating under and subject to the Illinois Workers' Compensation Commission or Occupational Disease Act, the Arbitrator finds as follows:

The Arbitrator finds that Respondent A-Tech was operating under and subject to the Illinois Workers' Compensation Act on March 19, 2007. Respondent was in the business of plastering and stucco work. The Arbitrator finds there to be automatic coverage under Section 3 of the Act.

With respect to (B.) Was there an Employee-Employer relationship, the Arbitrator finds as follows:

The Arbitrator finds that there was an employee-employer relationship between A-Tech and Petitioner. In coming to this conclusion, the Arbitrator relies on the testimony of Superintendent Lorezal, who served as a supervisor to Petitioner and confirmed he was employed by A-Tech at the time of the accident. The Arbitrator also relies on Petitioner's pay stubs that state the name of the employer as "A-Tech" and name of employee "Gyula Kormany".

With respect to (C.), (D.) & (E.) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent; What is the date of the accident; Was timely notice of the accident given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds that an accident occurred on March 19, 2007 that arose out of and in the course of Petitioner's employment. Petitioner arrived at Advocate Condell Medical Center via ambulance after falling off a scaffold while working for A-Tech on March 19, 2007. Petitioner injured his left foot and ankle. Petitioner gave a history of his accident occurring at work to every physician he saw, including, the emergency room physicians, Dr. Zoellick, Dr. Kodros, Dr. League and the treaters at Community Health and Rehabilitation Center.

Regarding notice, the Arbitrator finds that timely notice of the accident was given to Respondent. Petitioner advised Supervisor Lorezal of the accident on March 19, 2007. Furthermore, on March 19, 2007, Lorezal saw Petitioner in the Emergency Room at Advocate Condell Medical Center with his foot wrapped. Lorezal informed the A-Tech owner Bajas of the accident. Finally, all of Dr. Zoellick's treatment records indicating that Petitioner injured his left foot when he fell from a scaffold while working for A-Tech were sent directly to Bajas.

With respect to (F.) Is Petitioner's current condition of ill being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's left foot condition of ill-being at the time of his death on October 25, 2014 was related to his work accident of March 19, 2007.

Petitioner's daughter testified that Petitioner had no known problems with his left foot or ankle prior to March 19, 2007. Lorezal testified Petitioner was always able to perform his job prior to the date of the accident. All of the medical records indicate Petitioner's left foot/ankle was in fine condition until his injury of March 19, 2007.

Beginning with the date of the accident, Dr. Zoellick warned Petitioner that his injury was serious enough that it would lead to future arthritis and the need for a potential fusion. All of Petitioner's treatment from the date of the accident through the date of his death dealt with the initial treatment of his left foot/ankle or therapy and by April 2008 (one year after the accident) an MRI revealed post-traumatic arthritis.

Finally, Petitioner did not suffer any additional accidents to his left foot/ankle after March 19, 2007. In light of the above, the Arbitrator finds all of Petitioner's medical treatment to be causally related to his March 19, 2007 work accident.

With respect to (G.) What were Petitioner's earnings, the Arbitrator finds as follows:

The Arbitrator calculates Petitioner's average weekly wage to be $800.30. In coming to this conclusion, the Arbitrator used the paystubs entered into evidence as Petitioner's Exhibit 8.

Petitioner's daughter regularly noticed her father deposit his paystubs from A-Tech into the bank and she brought copies of his pay stubs to trial. Lorezal testified A-Tech paid Petitioner on an hourly basis. On Fridays, Lorezal would drop off paychecks to Kormany at his job sites. He also dropped off a check to Petitioner at his house on Touhy Avenue the week after his accident.

Upon his death, Petitioner's daughter found several old paystubs from the years 2006-2007 in the top drawer of his dresser at the house where they lived together on Touhy Avenue. Petitioner gave a detailed description of the dresser where she found the pay stubs and indicated that her father kept his television on the dresser. Each pay check listed the name of the employer in the top left-hand corner as "A-Tech Stucco EIFS Co." and the employee name as "Gyula Kormany". Each check listed "regular pay" and deduction for applicable taxes and union dues.

Petitioner's daughter brought copies of the paystubs she located from A-Tech to trial on January 25, 2016 from pay periods of March 24, 2006 through March 17, 2007. There were a total of 48 weekly pay stubs. The Arbitrator totaled the 48 pay stubs and found Petitioner's salary for the dates of March 24, 2006 through March 17, 2007 to be $38,414.35. That total divided by 48 weeks, equates to an average weekly wage of $800.30.

With respect to (H.) & (I.) What was Petitioner's Age at the time of accident and What was Petitioner's Marital Status at the time of the accident, the Arbitrator finds as follows:

Petitioner was 47 years old at the time of the accident, single and never married. (PX 17 and18)

With respect to (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, the Arbitrator finds as follows:

Having found the requisite causal relationship, the Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary.

Petitioner arrived at Advocate Condell Medical Center emergency room via ambulance where he came under the care of Dr. Zoellick. After Dr. Zoellick felt he could no longer help Petitioner, he referred him to foot/ankle specialist, Dr, Kodros. Dr. Kodros treated Petitioner for some time, until he changed offices, at which time Petitioner came under the care of Dr. League at Dr. Kodros' former office. Petitioner attended physical therapy throughout the pendency of his treatment at Community Health and Rehabilitation Center.

All of the medical treatment received by Petitioner was reasonable and necessary and were within the allowed chain of medical providers. The Arbitrator finds that A-Tech did not pay all appropriate charges for this reasonable and necessary medical treatment. At the time of trial, the following bills remained outstanding (P. Ex. 7A-7G):

Adult and Pediatric Orthopedics	$3,660.00
Lake County Radiology Associates	$433.00
Illinois Bone and Joint	$4851.00
Community Health and Rehabilitation Center	$2538.00
Condell Medical Center	$8234.80
Dr. Spiros Stamelos	$254.00

The Arbitrator finds Respondent liable for the above stated medical bills, which total $19,970.80. Additionally, Petitioner's union paid $2038.28 in work- related medical bills. The Arbitrator finds Respondent shall reimburse Administrative District Council 1 Welfare Fund in the amount of $2,038.28.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator finds Petitioner reached maximum medical prior to his death on October 25, 2014 and that the Estate of Gyula Kormany is entitled to a permanency award in the amount of 25% loss of use of the left foot.

Petitioner sustained fractures of the left posterior talus with a left calcaneal anterior process fracture as well as a lateral calcaneal fracture at the calcaneocuboid joint. From his very first trip to the emergency room, doctors advised Petitioner that he would have arthritis in the future as well as the potential need for an ankle fusion.

Although Petitioner was not able to testify at trial, it is very clear from the medical records that he was very resistant to anything more than conservative treatment, even though he was in a tremendous amount of discomfort. Throughout his treatment records, Petitioner described tremendous pain with weight-bearing. Doctors Zoellick, Kodros and League all recommended eventual surgical intervention which Petitioner was strongly opposed to. Petitioner's objection to surgery was evident when he fact did not even agree to a cortisone injection until a year after the accident.

By April 2008, Dr. League confirmed (via an MRI) that Petitioner had post traumatic arthritis. At a physical therapy appointment on May 7, 2008, Petitioner indicated that, "if he works one day, the next he cannot walk, because it is so painful" and that "his heel feels like a broken glass when he walks." He further stated that he could not move his ankle sideways and that he had a constant sharp/burning pain in the bottom of his heel and lateral foot. This description of pain was corroborated by Dr. League's April 9, 2008 examination, which showed that Petitioner had only approximately 25 percent of the inversion-eversion hindfoot motion on the left side when compared to the non-injured right foot. In April 2008, Dr. League recommended one more course of physical therapy and indicated the only other option for Petitioner would be surgical intervention if it did not work.

Petitioner stopped treating for his ankle on his own accord in July 2008. At that point, he had a current physical therapy prescription as well as a follow up appointment scheduled with Dr. League. Petitioner was not able to testify at trial on January 25, 2016, as such, the Arbitrator cannot speculate why Petitioner stopped treatment. Whatever the reason Petitioner stopped treatment, it is clear that he had continuing complaints at the time he stopped treatment. He continued to use a cane, one crutch, and the custom boot after his treatment stopped. Petitioner's daughter testified that he used the cane until the date of his death. Petitioner's daughter also testified that his ankle caused him pain during cold weather and/or rainy weather and that he had difficulty getting out of bed. He continued to take pain medication after his treatment ceased. On a personal level, he used to play soccer with his daughter and take long walks before the accident. After the accident, he no longer was able to play soccer with his teenage daughter and, if they took walks, they were less frequent, slower, and he needed to use his daughter for stability during the walk.

In light of the above, the Arbitrator finds Petitioner's Estate entitled to an award of 25% loss of use of the left foot.

With respect to (O.) (1 and 2) Respondent's Motion to Dismiss the Injured Workers' Benefit Fund and Is Respondent IWBF liable, the Arbitrator finds as follows:

The Arbitrator denies party Respondent Injured Workers' Benefit Fund's Motion to Dismiss the Fund (R. Ex. 1) and finds that the Fund is liable for payment of this award under the Act. The circumstances behind Petitioner filing against the Fund are laid out in the Findings of Fact as well as in Petitioner's Response to Respondent Illinois State Treasurer, as Ex Officio of the Injured Workers' Benefit Fund's Motion to Dismiss. (PX 16)

The party Respondent Injured Workers' Benefit Fund (IWBF) argues that because A-Tech had an insurance policy at the time of the accident, the IWBF is not liable to make any payments related to case 08 WC 15587. The Arbitrator disagrees and finds that the legislative intent of the IWBF is to protect injured workers that find themselves in situations similar to Petitioner. For the purposes of this case, A-Tech's insurance policy is essentially null and void due to the order of Judge Mary K. Rochford that the insurance carrier had no duty to defend or indemnity A-Tech in case 08 WC 15587 and Petitioner was bound by that order. To make matters worse for Petitioner, both A-Tech and Bajas filed for bankruptcy and listed Petitioner as a creditor. As such, Petitioner's only recourse to secure any type of benefits whatsoever would be through the IWBF. The Arbitrator finds that the IWBF's legislative intent was to help injured workers that found themselves in situations similar to Petitioner.

The Arbitrator acknowledges that there is no case law on point on this specific issue, and that it is a matter of first impression before this Commission. Respondent argues that since there are no cases saying that Petitioner should be entitled to benefits in this instance, that benefits should be denied. The Arbitrator disagrees. The IWBF was formed in July 2005, less than two years before Petitioner's accident and certainly was still very new in the eyes of the Commission at the time of trial 10 years later. It is not unusual that a case with this specific fact pattern has not yet come before the IWBF.

Section 4(d) of the Act clearly states:

> "Moneys in the Injured Workers' Benefit Fund shall be used only for payment of workers' compensation benefits for injured employees when the employer has failed to provide coverage as determined under this paragraph (d) and has failed to pay the benefits due to the injured employee." 820 Ill. Comp. Stat. Ann. 305/4(d).

Under the circumstances of this case, A-Tech failed to provide coverage to Petitioner as well as failed to pay him the benefits that were due. There is no case law in Illinois that distinguishes the different ways an employer can "fail to provide coverage" under 4(d) and the Illinois Workers' Compensation Commission Rules do not present any information on this issue. However, it is clear from Section 4(d), under, "Penalties For Employer Lacking Insurance", that the legislature believed that there were different ways an employer could "fail to provide coverage". This section specifically distinguishes penalties for employers that "knowingly" fail to provide coverage as well as those that "negligently" fail to provide coverage.

Section 4(d) states:

> "Whenever a panel of 3 Commissioners comprised of one member of the employing class, one member of the employee class, and one member not identified with either the employing or employee class, with due process and after a hearing, determines an employer has knowingly failed to provide coverage as required by paragraph (a) of this Section, the failure shall be deemed an immediate serious danger to public health, safety, and welfare sufficient to justify

service by the Commission of a work-stop order on such employer, requiring the cessation of all business operations of such employer at the place of employment or job site..."

Section 4(d) also states:

"Any individual employer...who knowingly fails to provide coverage as required by paragraph (a) of this Section is guilty of a Class 4 felony... "

Furthermore, Section 4(d) states

"Any individual employer...who negligently fails to provide coverage as required by paragraph (a) of this Section is guilty of a Class 4 misdemeanor... "

The Arbitrator finds that A-Tech negligently failed to provide coverage. There are several ways that a Respondent can fail to provide coverage. Certainly breaching its agreement with its workers' compensation carrier in a way that the carrier is able to secure a judgment that it does not need to defend its insured falls within the meaning of "failing to provide coverage" to this Arbitrator. Although A-Tech may not have "knowingly" failed to provide coverage, it was certainly "negligent" in not following the terms and conditions of the policy and notifying the carrier within the time frame determined by the policy. In fact, A-Tech, did not notify the carrier for over one year after the accident, when it clearly had notice of the accident and was being sent all of Petitioner's medical records from Dr. Zoellick. The IWBF clearly states that it is funded by the penalties and fines collected from employers that both "negligently" and "knowingly" fail to provide coverage.

In light of the above, the Arbitrator finds that since A-Tech failed to provide adequate coverage pursuant to 4(d) of the Act and failed to pay benefits due to Petitioner, the IWBF is an appropriate party to this case, and as such, denies the IWBF's Motion to Dismiss itself from the case.

With respect to (O.) (3.) Was notice proper, the Arbitrator finds as follows:

The Arbitrator finds that notice of the January 25, 2016 hearing in Waukegan, Illinois, was properly served on both Respondent A-Tech and party Respondent the Injured Workers' Benefit Fund. Specifically, with respect to A-Tech, the Arbitrator notes that notice was sent certified mail to both addresses listed on Petitioner's pay stubs, 29 W. 160 Calumet Avenue, Warrenville, Illinois 60555 and 1001 Aurora Avenue, Unit C, Aurora, Illinois 60505, respectively, on December 16, 2015. (PX 2C and 2D) The letter sent to the Calumet Avenue address was tracked and the status of the letter on January 4, 2016 was "Moved, left no address" and it was eventually sent back to the United States Post Office on January 16, 2016. (PX 2C) The letter sent to the Aurora Avenue address was tracked and the status of the letter on December 18, 2015 was, "Notice left (no authorized recipient available). On January 7, 2016, the maximum hold time expired and the United States Post Office found the letter to be "unclaimed". (PX 2D)

The Injured Workers' Benefit Fund was copied on all notices sent to A-Tech.

With respect to issue (O.) (4.) Can an award be entered against respondent employer when it has been discharged in bankruptcy, the Arbitrator finds as follows:

For the purposes of proceeding against the Injured Workers' Benefit Fund, the Arbitrator notes that Section 4(d) of the Act does not prevent Petitioner's from proceeding against the Fund if the Respondent-Employer has been discharged in Bankruptcy.

The Arbitrator will not determine whether federal bankruptcy law prevents the Illinois Attorney General's office from prosecuting Respondent A-Tech for failing to provide coverage to Petitioner at the time of the injury.

With respect to (O.) (5.) Was amended Application against Fund timely filed, the Arbitrator finds as follows:

Petitioner's Application for Adjustment of Claim was timely filed. Due to the complicated nature of this case and the fact that Petitioner tried many avenues to collect workers' compensation benefits, all of which were unsuccessful, on April 16, 2010, Petitioner amended his Application to include the Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund as a party Respondent to case 08 WC 15587. (PX 20) The Fund was added exactly three years and four weeks after the date of accident. The Arbitrator again notes that the legislative intent of the Fund is to protect workers' whose employers fail to provide adequate workers' compensation coverage and that the Fund is Petitioner's only recourse for benefits under the Illinois Workers' Compensation Act ("Act"). Section 4(d) of the Act does not indicate any time limit under which the Fund may be added to an Application.

Furthermore, the Act specifically itemizes who is considered an Employer under Section 1(a). The Fund is not considered an employer under 1(a) and thus there is no statute of limitations under which the Fund may be added to a timely filed Application for Adjustment of Claim against an employer-respondent. Based upon the above reasons, the Arbitrator finds that the Application against the Fund was timely filed.

2019 IL App (1st) 181449WC

Workers' Compensation
Commission Division
Opinion Filed: June 28, 2019

No. 1-18-1449WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RAVENSWOOD DISPOSAL SERVICES, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Sergio Lagunas, n/k/a Sergio Delgado, by His Parent/Guardian Maria Diaz, Next of Kin of Raul Lagunas, Deceased, Appellee).	)	Appeal from the Circuit Court of Cook County No. 17 L 051033 Honorable James McGing, Judge, Presiding.

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

OPINION

¶ 1 Ravenswood Disposal Services (RDS) appeals from an order of the circuit court of Cook County, confirming a decision of the Illinois 'Workers' Compensation Commission (Commission) that (1) found that an employment relationship existed between it and the

decedent, Raul Laguna, on September 14, 2013, when, while working, Raul was pinned between two vehicles resulting in his death, and that Raul's minor son, Sergio Lagunas, now known as Sergio Delgado, qualifies as a dependent under section 7(a) of the Workers' Compensation Act (Act) (820 ILCS 305/7(a) (West 2012)), notwithstanding the fact that he was adopted by Isidro Delgado subsequent to the date of the accident, which resulted in the death of his father; (2) awarded Sergio death benefits and weekly benefits until age 18 or, if he is enrolled in an accredited educational institution, until age 25, penalties under sections 19(k) and (*l*) of the Act (*id.* § 19(k), (*l*)and attorney fees under section 16a of the Act (*id.* § 16a); and (3) ordered it to pay Raul's medical bills of $17,570.61, subject to the statutory fee schedule. For the reasons which follow, we affirm.

¶ 2 The following factual recitation is taken from the evidence adduced at the arbitration hearing held on October 26, 2015.

¶ 3 Maria Diaz and Raul married on June 4, 1996. Their son, Sergio, was born on November 9, 2001. Maria and Raul divorced on August 18, 2010, and on October 17, 2010, Maria married Isidro Delgado. It is uncontested that Raul died on September 15, 2013, after he was crushed between a dump truck and front loader on the premises of RDS on September 14, 2013. The parties stipulated that RDS paid funeral and burial costs totaling $14,062.50 and made one payment of $1497.60 for death benefits.

¶ 4 Maria testified that, after she and Raul divorced, Raul complied with the court's order to pay her child support, which, according to their marital settlement agreement (MSA), amounted to $313.04 every other week. Later, when Raul began receiving cash payments from RDS, he gave Maria payments totaling $200 to $300 per week. Until he died, Raul made those payments on a weekly or monthly basis, depending on when Maria needed the money, and also gave

Sergio a weekly allowance of $10 to $30. Maria explained that she and Raul "provided for" Sergio even though he lived with her and Isidro and, although she did not have "frequent" contact with Raul, he responded "any time [she] needed help from him." After Raul died, Isidro adopted Sergio, and Maria changed the last name on his birth certificate from Lagunas to Delgado. Until his adoption, Sergio used the last name Lagunas.

¶ 5 Branko Vardijan, RDS's president, testified that Raul began working for RDS and its related companies "a few years before his death." A spreadsheet entered into evidence showed that RDS paid Raul a total of $37,674.70 between September 8, 2012, and September 11, 2013. Raul received $750 per week between September 8, 2012, and November 10, 2012, but entries between November 17, 2012, and September 11, 2013, varied between $0 and $1264 per week. Vardijan stated that RDS initially paid Raul by sending checks to a staffing company but later, at Raul's request, paid him directly in cash. RDS did not issue him "W-2" or "1099" forms for the cash payments. Vardijan explained that the cash payments began following a conversation in March 2013 between him, his brother, and Raul, during which Raul requested to "do work differently." Specifically, Raul asked to work at just one of RDS's premises and to set his own hours. Notwithstanding, Vardijan stated that he told Raul "what to do" and agreed that he "control[led] *** the way that [Raul] did his job." Vardijan added that he considered Raul to be an employee and acknowledged that, when the accident occurred, he was "doing the work that employees do."

¶ 6 Sergio testified that, at the time of the hearing, he considered his parents to be Maria and Isidro. He agreed that Isidro "bought [him] things" after marrying Maria and that he spent most of his free time with Isidro and Maria and went on vacations with them. Sergio agreed that he did not see Raul often after Raul and Maria divorced but also stated that Raul picked him up from

school two or three days per week and would give him $5 or $10. Sergio's school records and a martial arts award from 2015 listed his last name as Delgado, but he explained that he did not use the name Delgado until "after" Maria and Isidro "changed [his] last name."

¶ 7 Maria testified that, at the time of the hearing, she paid "a hundred percent" of the expenses for Sergio's "[h]ealth and welfare." When Isidro contributed, he typically paid "a little less" than 30% of Sergio's expenses.

¶ 8 Prior to the close of proofs, Maria's counsel entered into evidence a notice issued by the Department of Healthcare and Family Services (DHFS) to RDS, stating that DHFS "has become subrogated to [Raul]'s right of action to recover medical expenses paid on [his] behalf." Maria's counsel also tendered bills from the medical providers who treated Raul before he died. Although counsel represented that the bills "were sent directly to [Maria]," each was addressed to Raul at his address in Chicago.

¶ 9 RDS's counsel objected to the admission of the bills into evidence on the basis that "many of [the bills] have been reduced," but he did not specify which bills were inaccurate and did not provide his own calculations for the unpaid expenses. The arbitrator asked RDS's counsel whether he had "any other grounds" for objecting to the bills' admission into evidence, and he said, "no." Next, the arbitrator asked Maria's counsel whether the bills were obtained pursuant to subpoena and certified for purposes of the Act. Maria's counsel stated that the bills were certified but that the certifications were not attached to them and that he could "make [a] representation to the court" that they had been obtained pursuant to subpoena. The arbitrator stated that the bills would be entered into evidence subject to "the grounds that are stated in [RDS's] objection."

¶ 10 Following the arbitration hearing on October 26, 2015, the arbitrator held that (1) RDS employed Raul on the date of the accident, (2) the accident arose out of and in the course of his employment, and (3) Sergio was Raul's survivor for purposes of section 7(a) of the Act. The arbitrator found that RDS unreasonably argued that no employment relationship existed, as the evidence established that it controlled Raul's work, paid him regularly during the year preceding his death, and its president considered him to be an employee. The arbitrator also noted that, although RDS "raised reasonable questions" as to whether Sergio was entitled to benefits after Maria's second husband, Isidro Delgado, adopted him following Raul's death, Sergio's right to benefits under the Act was unaffected by his adoption, the fact that Isidro financially supported him, or evidence that he regarded Isidro as a father and lacked "emotional ties" with Raul. The arbitrator concluded that, because Sergio was Raul's dependent when Raul died, Raul was legally required to support him, and because Maria testified "credibly" that Raul paid child support until his death, Sergio was entitled to section 7(a) benefits. The arbitrator (1) ordered RDS to pay Raul's medical bills totaling $17,570.61, subject to the fee schedule; (2) awarded Sergio death benefits of $48,089.90 and weekly benefits of $473.39 until age 18 or, if he is enrolled in an accredited educational institution, until age 25; and (3) granted RDS a $15,560.10 credit for already-paid death benefits and funeral expenses. Additionally, the arbitrator imposed penalties of $32,081.46 and $10,000 pursuant to sections 19(k) and 19(*l*) of the Act, respectively, and attorney fees and costs totalling $12,832.58 under section 16 of the Act.

¶ 11 RDS filed a petition for review of the arbitrator's decision before the Commission. On November 17, 2017, with one commissioner dissenting, the Commission affirmed and adopted the arbitrator's decision. The dissenting commissioner noted that, although section 7(a) of the Act does not expressly terminate benefits for dependent minors upon adoption in the same

manner as for surviving spouses who remarry, that provision should be construed in light of the Adoption Act (750 ILCS 50/1 *et seq.* (West 2012)). As the Adoption Act's intent "is to terminate all parental rights and responsibilities of [a] biological parent in *lieu* of the adoptive parent," and the Act's purpose "is to protect dependent children in case of [the] work-related death of a parent upon whom the child is legally dependent," the dissenting commissioner reasoned that Sergio's adoption "terminated his dependency on his late father and therefore his entitlement to survivor benefits." (Emphasis in original.) According to the dissenting commissioner, the majority's decision would allow Sergio to collect double benefits should Isidro also die in a work-related accident, which would be "fundamentally unfair and might have due process implications."

¶ 12 RDS sought a judicial review of the Commission's decision in the circuit court of Cook County. On June 7, 2018, the court entered a written order confirming the Commission's decision, and this appeal followed.

¶ 13 As an initial matter, we observe that RDS directs each of its four assignments of error against the order of the circuit court affirming the Commission's decision. When, as here, an appeal is taken following entry of judgment by the circuit court on review from a decision of the Commission, this court reviews the ruling of the Commission, not the judgment of the circuit court. *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543 (2010).

¶ 14 For its first assignment of error, RDS claims that the Commission's finding that Raul was its employee, and not an independent contractor, when the accident occurred was against the manifest weight of the evidence. RDS notes that Raul did not have an employment contract, Vardijan did not control his schedule, and Raul requested to work at a particular location. Additionally, RDS posits that variations in Raul's cash payments during the months preceding

the work accident suggest that he was not paid in the manner of either an employee for RDS or the staffing company.

¶ 15 Whether an employment relationship existed at the time of an accident is a question of fact. *Esquinca v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150706WC, ¶ 48. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Id.* We will disturb the Commission's determination of a factual issue only if it is against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). For a factual finding to be against the manifest weight of the evidence, the "opposite conclusion" must be "clearly apparent," such that "no rational trier of fact could have agreed" with the Commission. *Id.* Whether a reviewing court might reach the opposite conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence; rather, the appropriate test is "whether there is sufficient factual evidence in the record to support the Commission's decision." *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 16 It is well established that, "[f]or purposes of the Act, the term 'employee' should be broadly construed." *Esquinca*, 2016 IL App (1st) 150706WC, ¶ 46. Although "[n]o rigid rule exists regarding whether a worker is an employee or an independent contractor," several criteria are relevant to consider in making this determination. *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 30. "The single most important factor is whether the purported employer has a right to control the actions of the employee." *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000) (citing *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 172 (1972)). Another criterion "of great significance" is the nature of the alleged employee's

work in relation to the employer's general business. *Id.* (citing *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982)). Other relevant criteria include "the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, *** whether income tax has been withheld," and to a lesser extent, "the label the parties place upon their relationship." *Id.*

¶ 17 The nature of RDS's business and the scope of Raul's duties are not specified in the record, but it is undisputed that he died after he was crushed between a dump truck and front loader on RDS's premises, and no evidence suggested that he had provided those vehicles. Vardijan agreed that Raul was "doing the work that employees do," and that he told Raul "what to do" and "control[ed] *** the way that [Raul] did his job," albeit at a worksite and on a schedule that Raul preferred. Further, Vardijan acknowledged that RDS did not issue Raul either a W-2 form or 1099 form for the cash payments he received between March 2013 and September 2013. Thus, although RDS posits that the cash payments recorded in the spreadsheet do not, in themselves, prove that he received wages as an employee, neither do they support the inference that he was compensated as an independent contractor where RDS admitted that it never created the tax forms that could have been relevant to that determination. See *Reo Movers, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 216, 224 (1992) (inferring that evidence which an employer did not produce at a hearing would be adverse to the employer where such evidence was in its control and not equally available to the employee). These circumstances, taken as a whole and considered alongside Vardijan's admission that he considered Raul to be an employee, support the Commission's finding that an employment relationship existed between Raul and RDS when the accident occurred. Based on this record, the Commission's determination is not against the manifest weight of the evidence, and RDS's claim of error is, therefore, without merit.

¶ 18 Next, RDS contends that the Commission erred as a matter of law in awarding $17,570.61 for medical bills that were entered into evidence without proof that they were certified or obtained pursuant to subpoena under section 16 of the Act (820 ILCS 305/16 (West 2012)). RDS further posits that, due to write-offs, reductions, and payments from other sources, Raul's unpaid medical expenses "only amount to $9,131.61."

¶ 19 Section 16 of the Act relaxes the foundational requirement for the admission of hospital records by providing that "records, reports, and bills kept by a treating hospital, *** certified to as true and correct by the hospital, *** shall be admissible without any further proof as evidence of the medical and surgical matters stated therein." *Id.*; *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561, 567 (2004). The statute creates "a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct." 820 ILCS 305/16 (West 2012). "[H]ospital records are highly reliable," but "a proper foundation" is still required "before they will be admitted into evidence." *National Wrecking Co.*, 352 Ill. App. 3d at 568. Therefore, "[w]hen a proper objection is raised, *** the certification requirement of section 16 must be observed." *Id.*

¶ 20 At the hearing, RDS's counsel objected to the admission of Raul's medical bills on a single ground—namely, that "many" of the bills had been reduced and were, therefore, inaccurate—and expressly denied raising any other challenge to their admissibility. The arbitrator admitted the bills into evidence subject to the objection "stated in [RDS's] objection." Thus, although the arbitrator also questioned Maria's counsel about whether the bills had been certified or obtained pursuant to subpoena, RDS never objected to their admission on that basis. Its claim of error based upon lack of certification is, therefore, forfeited. See *People v. Sawyer*, 42 Ill. 2d 294, 298 (1969) (declining to consider a claim of evidentiary error where the objection

urged on review involved "an entirely different basis from the objection in the trial court"). As for RDS's claim that Raul's unpaid medical bills totaled $9131.61, RDS never raised that figure before the arbitrator, nor did RDS apprise the arbitrator, the Commission, the circuit court, or this court of the particular bills that it challenged. The appellate court "is not merely a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate or seek error in the record." (Internal quotation marks omitted.) *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). The vagueness of RDS's argument precludes this court from conducting any meaningful review of its challenge to the arbitrator's award of medical expenses. As such, this argument is rejected.[1]

¶ 21 For its next assignment of error, RDS contends that the Commission erred in finding that Sergio qualified as Raul's dependent under section 7(a) of the Act because, as a matter of law, death benefits are not due to a decedent's child who has been adopted. In support of this position, RDS observes that section 17 of the Adoption Act (750 ILCS 50/17 (West 2012)) provides that "[a]fter *** the entry of a judgment of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child." As the legal obligation for Sergio's support no longer rested with Raul (or more accurately, Raul's estate) following his adoption by Isidro, RDS posits that his adoption "sever[ed] any liability [for death benefits] that would otherwise have existed under the Act."

[1]We note that, although DHFS purported to have subrogated Raul's "right of action to recover medical expenses paid on [his] behalf," RDS never raised DHFS's claim as a defense to Maria's attempt to secure payment of Raul's medical expenses through the workers' compensation proceeding. See 820 ILCS 305/7(f) (West 2012) (providing that an employer who fails to provide necessary "medical, surgical or hospital service" to a decedent employee "shall pay the cost thereof to the person or persons *** *providing the same*" (emphasis added)).

¶ 22 This issue presents a question of statutory interpretation, and our review is, therefore, *de novo*. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. Our primary objective in construing a statute is to give effect to the legislature's intent, which is best indicated by the plain and ordinary language of the statute. *Id.* In giving meaning to the words and clauses of a statute, no part should be rendered superfluous. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 26. When statutory language is unambiguous and clear, it will be given effect without reliance on other devices of construction. *In re Marriage of Goesel*, 2017 IL 122046, ¶ 13. However, when a statute's meaning is unclear, the court may consider the purpose of the statute, the evils it was designed to remedy, and the consequences that would result from construing it in a particular manner. *Id.* In determining legislative intent, "we presume that the legislature did not intend absurd, inconvenient, or unjust consequences." *Id.* A court will not "rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009).

¶ 23 The purpose of section 7(a) of the Act (820 ILCS 305/7(a) (West 2012)) "is to provide some compensation to persons who were dependent upon the deceased employee for support or as to whom a legal obligation to support existed." *Yellow Cab Co. v. Industrial Comm'n*, 42 Ill. 2d 226, 230 (1969). Thus, "section 7(a) sets up a subcategory of persons, specifically the surviving widow and child or children, who are conclusively presumed to be dependent upon the deceased because he was under a legal obligation to support them at the time of the accident." *Id.* When a deceased employee's only survivor who is entitled to benefits under the Act is a spouse, and that spouse remarries, he or she has a right to a lump-sum payment equal to two years' compensation, "and all further rights of such widow or widower shall be extinguished." 820 ILCS 305/7(a) (West 2012). In contrast, death benefits must be paid to "any surviving child ***

until *** the age of 18," or if the child is "enrolled as a full time student in any accredited educational institution, the payments shall continue until such child has attained the age of 25." *Id.* The term "child" refers to "a child whom the deceased employee left surviving, including a posthumous child, a child legally adopted, a child whom the deceased employee was legally obligated to support or a child to whom the deceased employee stood *in loco parentis*." *Id.* The phrase "legally obligated to support" does not create "a statutory requirement for benefits" under section 7(a) of the Act. *Drives, Inc. v. Industrial Comm'n*, 124 Ill. App. 3d 1014, 1017 (1984). Rather, it "serves merely as a catch-all for those [children] not covered" by the other categories enumerated in the statute. *Id.*

¶ 24 Based on this construction of section 7(a) of the Act, the court in *Drives* determined that a surviving child who qualified for death benefits on the basis that she was enrolled full-time in graduate school could not be denied benefits on account of her marriage, which occurred after her father's death. *Id.* at 1015, 1017. While the child's marriage may have obviated the decedent's legal obligation to support her, and therefore eliminated that circumstance as a ground for awarding benefits, it had no bearing on her right to benefits based on a different statutory criterion—*i.e.*, her status as a full-time student. *Id.* at 1017. Thus, section 7(a) of the Act contemplates that a child may qualify for benefits based on one statutory ground but not another, and the fact that a child does not qualify under a particular ground will not prevent him or her from obtaining benefits under a different ground, if one exists.

¶ 25 Applying these principles in the present case, we find that Sergio's adoption by Isidro following Raul's death may have precluded Sergio from claiming ongoing benefits on the basis that Raul was "legally obligated" to support him but did not restrict him from claiming benefits on different grounds, namely, that he was under age 18 when Raul died. See 820 ILCS 305/7(a)

(West 2012). And, unlike for a surviving spouse who remarries, the Act contains no express language terminating Sergio's right to benefits by reason of his adoption where he otherwise qualified for benefits based on his age when the accident occurred. We will not read into the Act such a limitation when it does not appear in its plain language. *LOMTO Federal Credit Union v. 6500 Western-LLC*, 2018 IL App (1st) 173106, ¶ 18.

¶ 26 In so holding, we reject RDS's position that this outcome is irreconcilable with section 17 of the Adoption Act (750 ILCS 50/17 (West 2012)), which addresses the duties owed by a natural parent to a child, not the child's rights *vis-á-vis* the natural parent. Moreover, our supreme court has explained that it is not necessary "to actually establish that the child was completely dependent upon the decedent" in order to merit an award of benefits under section 7(a) of the Act; to the contrary, the Act requires that "a legally enforceable basis for the dependency existed at the time of the employee's accident." *Inventory Service Corp. v. Industrial Comm'n*, 62 Ill. 2d 34, 37 (1975). Thus, the fact that Sergio may have received some support from Isidro both before and after his adoption does not defeat his right to benefits where he also depended on Raul when the accident occurred. As such, section 17 of the Adoption Act and section 7(a) of the Act are not incompatible and do not preclude an award of benefits in this case.

¶ 27 RDS argues, however, that the evidence did not establish that Sergio was dependent on Raul at the time of his death, as Maria's testimony that Raul provided child support was "unsubstantiated" and Sergio's testimony suggested that he had already severed emotional ties with Raul. We disagree. As noted, it is the Commission's duty to assess witnesses' credibility, resolve conflicting evidence, assign weight to the evidence, and draw reasonable inferences therefrom. *Esquinca*, 2016 IL App (1st) 150706WC, ¶ 48. At the hearing, Maria testified that Raul provided child supported until his death and Sergio stated that Raul picked him up at school

approximately twice per week. Further, while Maria and Sergio agreed that Isidro was a part of their family and that he sometimes gave Sergio financial and material support, Raul's legal relationship to Sergio was not terminated prior to his death, and no evidence suggested that he failed to discharge his responsibilities under the MSA.

¶ 28 These facts differentiate the instant case from *Inventory Services Corp.* and *Hoffman-Spears v. Eastern Woolen Co., Inc.* Ill. Indus. Comm'n, No. 04 I.I.C. 0809 (Dec. 9, 2004), both relied on by RDS, where section 7(a) benefits were denied to children who were fully supported by individuals who adopted them, or functioned as an adopting parent, prior to the work-related death of a natural parent who provided the child with negligible support. See *Inventory Services Corp.*, 62 Ill. 2d at 35 (denying benefits where the decedent's parental rights were terminated before his death, and, before the child's adoption, the decedent had not paid child support or visited her for more than one year); *Hoffman-Spears*, Ill. Indus. Comm'n, No. 04 I.I.C. 0809 (denying benefits where the decedent's parental rights were terminated five years' prior to his death, he saw the child twice in nearly six years, provided no monetary support, and the second husband of the child's mother stood *in loco parentis*). Here, unlike in *Inventory Services Corp.* or *Hoffman-Spears*, ample evidence supported the Commission's determination that Sergio was dependent on Raul at the time of the work accident. Consequently, there is no basis in the record to disturb the Commission's factual findings as to this issue, and RDS's argument is without merit.

¶ 29 Finally, RDS argues that the Commission's award of penalties under sections 19(k) and (*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2012)) and attorney fees under section 16a of the Act (*id.* § 16a) was against the manifest weight of the evidence or an abuse of discretion.

¶ 30 Penalties under section 19(*l*) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late and the employer cannot show an adequate justification for the delay. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id.* (citing *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998)). The employer has the burden for justifying the delay. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 19. "The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence." *Id.*

¶ 31 In contrast to section 19(*l*) of the Act, section 19(k) allows penalties for "any unreasonable or vexatious delay of payment or intentional underpayment of compensation." 820 ILCS 305/19(k) (West 2012). Penalties under section 19(k) are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515. Section 16a of the Act, in turn, provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16a (West 2012). The imposition of penalties and attorney fees under sections 16a and 19(k) is discretionary and will not be disturbed on appeal unless the Commission has abused that discretion. *McMahan*, 183 Ill. 2d at 515-16.

¶ 32 Before the Commission, RDS raised two theories in defense of its nonpayment of benefits following Raul's death: (1) Sergio was not Raul's dependent and (2) Raul was not RDS's employee. The Commission found the former contention to be reasonable and the latter contention to be unreasonable. In its brief on appeal, RDS objects to the Commission's imposition of fines and fees based solely on the reasonableness of RDS's dependency argument,

without raising any challenge to the merits of the Commission's actual basis for penalties, *i.e.*, the unreasonableness of RDS's theory that no employment relationship existed. RDS posits, however, that because Sergio was Raul's sole alleged dependent, and the Commission found that RDS had a reasonable basis for challenging dependency, it was justified in not paying benefits irrespective of its decision to challenge Raul's status as its employee. We disagree.

¶ 33 RDS's argument overlooks the fact that, in addition to not paying death benefits to Sergio, it also failed to pay certain of Raul's medical expenses. RDS's liability for those expenses turned on whether Raul was its employee—an issue independent of Sergio's status as a dependent. As the Commission determined that RDS lacked a reasonable basis for challenging the existence of an employment relationship, and Raul's status as an employee gave rise to RDS's obligation to pay his medical expenses, it was not irrational for the Commission to impose penalties on RDS notwithstanding that RDS's unrelated challenge to Sergio's status as a dependent may have been reasonable.

¶ 34 As noted, on appeal, RDS has not challenged the merits of the Commission's imposition of attorney fees and penalties for its failure to pay benefits predicated on its theory that Raul was not an employee. The issue is, therefore, forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in the initial brief on appeal] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Forfeiture aside, we observe that, for reasons explained *supra*, the manifest weight of the evidence established that Raul was RDS's employee when the accident occurred; moreover, RDS's president, Vardijan, believed that Raul was an employee and was performing the work of employees when the accident occurred. Under these circumstances, the Commission could reasonably determine that RDS's failure to pay Raul's medical expenses was deliberate and in bad faith, such that it did not abuse its discretion

in imposing penalties and attorney fees under sections 19(k) and 16a of the Act. As the standard for awarding penalties and attorney fees under sections 16a and 19(k) of the Act is higher than the unreasonable delay standard under section 19(*l*), it follows that we also cannot find that the Commission erred in imposing a late fee pursuant to section 19(*l*) of the Act.

¶ 35 Based upon the foregoing analysis, we affirm the judgment of the circuit court that confirmed the decision of the Commission.

¶ 36 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ 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

Sergio Lagunas n/k/a Sergio Delgado
by his Parent/Guardian Maria Diaz next of kin
of Raul Lagunas, deceased,
Petitioner,

vs.

Ravenswood Disposal Services,
Respondent.

17IWCC0729

NO: 13 WC 31481

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, wages, rate, penalties, survivor's dependency 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 November 3, 2016, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay §7(a) death benefits on behalf of Petitioner Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, totaling $48,089.90, and weekly benefits of $473.39 until Sergio's 18th birthday, or until his 25th birthday if he is enrolled in an accredited educational institution.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

17IWCC0729

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. 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: NOV 17 2017
o9/28/17
DLS/rm
046

David L. Gore

Stephen J. Mathis

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner, Sergio Lagunas n/k/a/ Sergio Delgado (Sergio) was no longer entitled to survivor benefits under the Workers' Compensation Act after his adoption.

Sergio was born on November 9, 2001 to Maria and Raul Lagunas. Sergio's biological parents were divorced on August 18, 2010. Under the Judgement for Dissolution of Marriage, Raul was required to pay child support and was able to declare Sergio as a dependent for income tax purposes. Maria married Isidro Delgado on October 17, 2010. Raul died in a work-related accident on September 15, 2013. On July 1, 2014, Isidro Delgado formally adopted Sergio. On October 19, 2015, Sergio's birth certificate was amended to name Isidro Delgado as his father.

In finding Sergio was entitled to survivor benefits, the Arbitrator relied on the fact that at the time of Raul's death he had a legal obligation to support Sergio, and therefore, Sergio was his legal dependent. I agree with the Arbitrator that at the time of Raul's death, Sergio was a dependent minor under the Workers' Compensation Act and entitled to death benefits. However, I would have found that Sergio's entitlement to these benefits terminated upon his legal adoption by Isidro Delgado.

I acknowledge that the Workers' Compensation Act provides that a spouse's entitlement to survivor benefits terminates after remarriage and after a lump sum payment of two years of compensation benefits. 820 ILCS 305/7(a). In addition, the Act does not have any similar provision terminating the survivor benefits of dependent minors upon adoption. Nevertheless, the administration of the Workers' Compensation Act must be interpreted in light of the rest of the Illinois Compiled Statutes, including the Adoption Act. The Adoption Act provides in pertinent part (750 ILCS 50/17):

> "Effect of order terminating parental rights or Judgment of Adoption. After either the entry of an order terminating parental rights or the entry of a judgment of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents."

In my opinion, the adoption of Sergio terminated his dependency on his late father and therefore his entitlement to survivor benefits. Also in my opinion, my interpretation furthers the public policy interests of both the Workers' Compensation Act and the Adoption Act. The public policy objective of the Adoption Act is to terminate all parental rights and responsibilities of biological parent in *lieu* of the adoptive parent. The public policy interest of the Workers' Compensation Act is to protect dependent children in case of work-related death of a parent upon whom the child is legally dependent. Hypothetically, if Isidro Delgado died in a work-related accident after his legal adoption of Sergio, Sergio would be entitled to survivor benefits under the Workers' Compensation Act. In effect, the Decision of the Arbitrator provides Sergio with "enhanced" survivor benefits because he would be entitled to survivor benefits upon the work-related death of his biological father, Raul and his adoptive father, Isidro. That result would appear to be fundamentally unfair and might have due process implications.

Based on the reasoning stated above, I would have found that Petitioner, Sergio Lagunas n/k/a/ Sergio Delgado (Sergio), was no longer entitled to survivor benefits under the Workers' Compensation Act after his adoption, reversed the Decision of the Arbitrator, and terminated survivor benefits as of the date of adoption. For these reasons, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

RWW/dw
O-9/28/17
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

17IWCC0729

LAGUNAS, SERGIO N/K/A SERGIO DELGADO BY HIS PARENT/GUARDIAN DIAZ, MARIA NEXT KIN OF LAGUNAS, RAUL DECEASED
Employee/Petitioner

Case# 13WC031481

RAVENSWOOD DISPOSAL SERVICES
Employer/Respondent

On 11/3/2016, 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 0.50% 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.

0159 LAW OFFICE OF FRANCIS DISCIPIO
1200 HARGER RD
SUITE 500
OAK BROOK, IL 60523

4866 KNELL & O'CONNOR
ANDREW FERNANDEZ
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

17IWCC0729

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

☐ 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
FATAL

Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, next of kin of Raul Lagunas, deceased.
Employee/Petitioner

v.

Ravenswood Disposal Services
Employer/Respondent

Case # **13** WC **31481**

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 26, 2015**. 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 Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☒ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☒ Who was dependent on Decedent at the time of death?

K. ☒ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **September 14, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned $**37,674.70**; the average weekly wage was $**724.51**.

On the date of accident, Decedent was **47** years of age, ***single*** with **1** dependent child.

Respondent ***has not*** paid all reasonable and necessary 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 $**1,497.60** for death benefits and $**14,062.50** for funeral expenses, for a total credit of $**15,560.10**.

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

The Arbitrator finds that Decedent died on **September 15, 2013**, leaving **1** survivor, **Sergio Lagunas, n/k/a Sergio Delgado** as provided in §7(a) of the Act.

ORDER

Respondent shall pay §7(a) death benefits on behalf of Petitioner Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, totaling **$48,089.90,** and weekly benefits of **$473.39** up the Sergio's 18th birthday, or until his 25th birthday if he is enrolled in an accredited educational institution.

Respondent shall pay unpaid medical bills for medical services provided to the deceased Raul Lagunas totaling **$17,570.61**, to be adjusted in accord with the fee schedule provide by §8.2 of the Act

Respondent shall be given credit for **$1,497.60** paid in disputed death benefits. Respondent shall also be given credit for **$14,062.50** for paid funeral and burial expenses.

Respondent shall pay **§19(k)** penalties in the amount of **$32,081.46**.

Respondent shall pay **§19(l)** penalties in the amount of **$10,000.00**.

Respondent shall pay **§16** penalty fees in the amount of **$12,832.58.**

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

November 3, 2016
Date

NOV 3 - 2016

Sergio Lagunas, n/k/a Sergio Delgado, by his parent/ guardian Maria Diaz, next of kin of Raul Lagunas, deceased
v.
Ravenswood Disposal Services
13 WC 31481

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***B:*** Was there an employee-employer relationship?; ***C:*** Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?; ***G:*** What were Decedent's earnings?: ***J:*** Who was dependent on Decedent at the time of death?; ***K:*** 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?; ***M:*** Should penalties be imposed upon Respondent?; ***N:*** Is Respondent due any credit?

Prior to the presentation of evidence Petitioner's motion to amend the Application for Adjustment, dismissing Lissette Lagunas and Raul Lagunas as Petitioners and joining Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, next of kin of Raul Lagunas, deceased, as Petitioner was granted without objection.

Maria Diaz, Sergio Delgado, and Branko Vardijan testified at trial.

FINDINGS OF FACT

Maria Diaz testified on behalf of Petitioner. She married Raul Lagunas on June 4, 1996. Sergio Lagunas was born November 9, 2001. Petitioner's Exhibit #7, Sergio's birth certificate, listed Maria Diaz and Raul Lagunas as his parents. Following Sergio's birth Maria and Raul lived together until they divorced on August 18, 2010. The divorce decree, Petitioner's Exhibit #5, entered by Judge Thomas J. Kelley August 18, 2011, included a marital settlement agreement which provided that Raul pay $313.04 in child support every other week and that Maria retain sole right to claim the minor children, including Sergio, as dependents for income tax service purposes. Ms. Diaz testified that Raul paid $200 to $300 per week in child support.

Ms. Diaz married Isidro Delgado on October 17, 2010. Isidro Delgado adopted Sergio in June 2014 (PX #5). The Judgment Order for Adoption provided that Sergio's name shall remain Sergio Xavier Delgado. A revised Certification of Birth (RX #1) notes

Isidro Delgado as the father of Sergio. Ms. Diaz testified that Sergio stopped using the Lagunas surname after the adoption and has since gone by Sergio Delgado.

Raul Lagunas was injured in an accident September 14, 2013 on Respondent's premises at 221 N. Washtenaw Ave., Chicago (PX #3). Raul was crushed between a dump truck and a front loader September 14, 2013 (PX #6). He died from those injuries at Mt. Sinai Hospital on September 15 (PX #6).

Sergio Delgado was called to testify by Respondent. He testified that his parents are Maria Diaz and Isidro Delgado. Sergio acknowledged that his birth father was Raul Lagunas. Sergio remembered living with Raul Lagunas but considers Isidro his father. Following his mother's marriage to Isidro, Sergio lived with them. Sergio testified that he did not see Raul Lagunas very frequently.

Throughout his testimony, Sergio repeatedly referred to Isidro Delgado as his dad. Sergio also uses the name Delgado at school. Indeed, Sergio's school records from Canton Middle School state his name as "Sergio Delgado (RX #5).

Respondent called Branko Vardijan as a witness on the behalf of Respondent. Mr. Vardijan is president of Respondent Ravenswood Disposal Services. Decedent Raul Lagunas was hired several years before his death. Mr. Vardijan testified that Raul did not work exclusively for Ravenswood Disposal. He testified that "we" have a landfill company and employees worked under other companies' names. Mr. Vardijan did not recall how many weeks Raul worked in the 52 weeks before his death. After reviewing Petitioner's Exhibit #2, a duplicate of Respondent's Exhibit #6, Mr. Vardijan testified that Raul was working for Respondent.

Respondent attempted to elicit testimony from Mr. Vardijan regarding conversations with Raul and Raul's requests for changes in his work status and work schedule and to be paid in cash. Petitioner's objections based on the Illinois Deadman's Act, *735 ILCS 5/8-201*, were sustained. Mr. Vardijan was barred from testifying about any conversation or event which took place in the presence of the deceased.

On cross-examination Mr. Vardijan acknowledged that Raul was doing work that employees do. He also acknowledged that he did not bring Raul's records to trial in response to a subpoena. He chose not to obtain the records from Respondent's accountants. He had no IRS W-2s or 1099s. Raul was paid by check through a staffing company but was paid directly when paid in cash. Mr. Vardijan admitted that he did not issue W-2s or 1099s to Raul. Mr. Vardijan considered Raul as his employee.

Following the death of Raul Lagunas, Raul's eldest son came to Mr. Vardijan to ask that Respondent pay for Raul's funeral expenses. Respondent paid these funeral expenses: $8,997.50 to Wolniak Funeral Home and $5,065.00 to St. Albert's Cemetery. Payment of funeral and burial expenses was stipulated. The parties further stipulated to the payment of $1,497.40 in death benefits.

On re-direct examination Mr. Vardijan admitted that he controlled Raul's work and production but that he did not control when Raul showed up for work.

While Maria testified that Raul's medical bills were sent to her, the bills themselves reflect that they were sent only to the decedent and that the decedent's employer/guarantor is listed as "Unknown" (PX #1). Petitioner's Exhibit #1 demonstrated unpaid medical bills for Raul totaled $17,570.61.

Petitioner's Exhibit #2 was a duplicate of Respondent's Exhibit #6. This document is a ledger of payments made to Decedent Raul Lagunas from September 8, 2012 through September 11, 2013. The total amount of payments was $37,674.70.

CONCLUSIONS OF LAW

B: Was there an employee-employer relationship?

In determining whether an employee-employer relationship existed several factors will assist in that determination. The Arbitrator must weigh whether the purported employer had the right to control or exercised control the manner in which work was performed, what was the method of payment, did the purported employer have the right to discharge the employee, whether special skills were involved in the work, who owned the tools or equipment used in the work, the relationship of the work to employer's purpose, the method of payment and whether payroll withholding or other deductions were made. However, the employer's right to control the manner of the work is the single most important factor, even if other factors conflict with the factor of control.

Branko Vardijan, Respondent's president, considered the decedent Raul Lagunas to be one of his employees. Mr. Vardijan's opinion is not necessarily dispositive to the employee-employer relationship. However, Mr. Vardijan freely testified on re-direct examination that he controlled Raul's work and production. Aside from this being the most important factor to consider, there was circumstantial evidence that Respondent provided the tools and equipment for the work. Petitioner's Exhibit #3, the Chicago Police Case Report and Case Supplementary Case Report, documents that Raul was killed during the operation of heavy equipment of frontend loader and truck. The

attached investigatory photographs confirm the use of heavy equipment of the sort that an employee would not ordinarily own.

Mr. Vardijan testified that Raul was initially paid for his work through a now defunct staffing company. Raul was paid cash beginning in March 2013. No payroll taxes were withheld. There was no other evidence, other than the circumstantial evidence that Raul provided services to Respondent for which he was paid, relating to the issue of employee-employer relationship.

In addition, Petitioner's Exhibit #3, the Chicago Police Incident Report, recorded the statement of Dulce Jaimes, Raul's girlfriend, that Raul worked for Respondent.

The Arbitrator finds that in consideration of all the evidence Petitioner proved that an employee-employer relationship existed between the decedent Raul Lagunas and Respondent Ravenswood Disposal Services at the time of Raul's accident on September 14, 2013 which led to his death.

G: What were Decedent's earnings?

Petitioner, Exhibit #2, and Respondent, Exhibit #6, submitted a ledge of payments to Decedent Raul Lagunas from September 8, 2012 through September 11, 2013, 53 weeks. It was stipulated the ledger reflected payments by Respondent to Raul. Respondent argues that only certain of these payments should be considered for computing average weekly wage. Respondent argues that the cash payments noted were made to Raul in his capacity of independent contractor. The Arbitrator, in light of the previous finding that an employee-employer relationship was proved, rejects this argument.

Petitioner and Respondent submitted exhibits showing payments to Raul Lagunas over a 53 week period before his death. It is clear from all the evidence that Raul was paid for performed for Respondent over that period. The Arbitrator knows of no distinction between wages paid by check or cash for work performed. While the cash payments for Raul's work are suggestive of efforts by both Respondent and Raul to evade or avoid certain legal obligations, there is a reasonable inference from the facts that the cash payments were wages as much as the payments by check.

Petitioner's Exhibit #2 and Respondent's Exhibit #6 demonstrate that Raul's total wages for the 52 weeks prior to his death was $36,924.70. Therefore, his average weekly wage at the time of his death was $710.09, equal to a benefits rate of $473.39/week.

J: Who was dependent on Decedent at the time of death?

The issue of Sergio's dependency rests on the peculiar facts presented by the evidence. At the time of his death Raul Lagunas was under a court-ordered obligation to provide support payments for Sergio. There is no dispute that Sergio was entitled to §7(a) benefits at the time of Raul's death. What is in dispute is whether the posthumous adoption of Sergio by Isidro Delgado altered his dependency status under §7(a) of the Act.

Respondent suggests that *Inventory Service Corporation v. The Industrial Commission*, 62 Ill.2d 34 (1975) and *Rebecca Hoffman-Spears, et al. v. Eastern Woolen Company, Inc.*, 4 IIC 809; 2004 control here. The Arbitrator finds that *Inventory Service* and *Hoffman-Spears* are distinguishable on the facts and do not provide guidance in determining Sergio's dependency at the time of Raul's death.

In *Inventory Service* Ana Guetersioh, on behalf of her minor daughter Glenda Guetersioh, filed for §7(a) benefits due to the work related death of Glenda's natural father, Wynn Coppenbarger, in October 1968. Glenda was the child of Ana and Wynn's marriage. Ana and Wynn divorced in 1966 and Ana then married James Guetersioh in 1967. The divorce decree provided that Wynn pay child support for Glenda. James adopted Glenda in 1968. The adoption order terminated Wynn's parental rights as to Glenda and that Glenda "be freed of all obligations" to Wynn.

The Supreme Court held that Glenda was not entitled to §7(a) benefits because Wynn owed no legal obligation to support Glenda at the time of his death. Here, the divorce decree established a legal obligation to pay child support for Sergio. That obligation was still in place at the time of Raul's death. In fact, the evidence showed that Raul had complied with the support provisions of the divorce decree before his death.

Hoffman-Spears is equally distinguishable. In that case an application for §7(a) benefits was made for the various minor children were dependents of the deceased worker William Maldonado. The Commission addressed the claim of dependency made on behalf of the minor Lauren Hoffman after William was killed at work on November 19, 1999. Decedent William Maldonado was married to Rebecca Hoffman-Spears in 1992. Lauren Maldonado was born of this marriage in 1993. Rebecca initiated divorce proceedings against William in Louisiana and William agreed to the termination of his parental rights in 1994, which included terminating his support obligations otherwise owed to Lauren. The evidence further showed that William provided no financial support for Lauren after the divorce.

The Commission, citing *Inventory Service*, affirmed the Arbitrator's finding that Lauren was not entitled to §7(a) benefits because William had no legal obligation at the time of his death to support Lauren.

The distinguishing fact here is that at the time of his death Raul Lagunas was under a legal obligation to support Sergio. Maria (Lagunas) Diaz testified credibly that Raul in fact paid child support for Sergio up to the time of his death.

The Arbitrator finds the case of *Drives, Inc. v. The Industrial Commission*, 124 Ill.App.3d 1014 (1984) more on point. Petitioner Janice Den Besten-Reitsma was the 21 year child of Alfred Den Besten when he was killed September 23, 1977. Janice was enrolled in undergraduate school at the time of Alfred's death. After graduation Janice taught school and married. She enrolled in graduate school before she turned 25. The disputed issue was whether she was entitled to §7(a) benefits after she married and enrolled in graduate school.

The Court held that she was entitled to benefits when she enrolled in graduate school. The Court found that the new dependency status from her marriage was irrelevant in determining whether benefits are owed under the Act. The Court looked to her dependency status on the date of the employee's death and found it was the controlling factor in determining entitlement for benefits. The Court found no exceptions to the 25-age rule in the Act and affirmed benefits for Janice up to her 25th birthday. The Court held that Janice was entitled to §7(a) benefits so long as she was enrolled in an accredited educational institution for whatever time she was enrolled up to age 25. The fact of her marriage did not alter her dependency status at the time of Alfred's death.

In this case, Sergio was a minor dependent as defined by the Act on the date of Raul's death. He was the natural child of Raul and therefore entitled to §7(a) benefits as of the date of Raul's death. As in *Drives, Inc.*, the change in Sergio's dependency status from the adoption was irrelevant to his dependency status as of the date of Raul's death. Whether Sergio thought of or acted as though Isidro were his natural father or that Isidro supported Sergio is equally irrelevant. The subsequent alteration in dependency did not alter dependency at the time of death as defined in the Act.

Respondent elicited substantial evidence from Sergio which established that he had severed emotional ties with Raul and came to regard Isidro as his father even before the adoption. Sergio was using the name Delgado before the adoption. The Arbitrator finds this to be irrelevant. As in *Drives, Inc.*, the status of dependency on the date of death is controlling.

Therefore, the Arbitrator finds that Sergio (Lagunas) Delgado is entitled to §7(a) benefits up to the age of 18, or up to the age of 25 if he is enrolled in an accredited educational institution. Petitioner accrued §7(a) benefits up to the date of trial totaling $48,089.90, and is entitled weekly benefits of $473.39 thereafter.

K: 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?

Petitioner's Exhibit #1 was admitted in evidence. Exhibit #1 was a group exhibit comprising billing statements for medical services provided to Raul after his accident up to his death. Petitioner's Exhibit #1 shows a total of $17,570.61 in unpaid medical bills. In light of previous findings that Arbitrator finds that the billing charges comprising Petitioner's Exhibit #1 are reasonable and necessary.

Respondent shall pay Petitioner, or pay directly to the healthcare providers, $17,570.61, as provided in §8(a) of the Act and adjusted in accord with the fee schedule provided by §8.2 of the Act.

M: Should penalties be imposed upon Respondent?

Penalties pursuant to §19(k) and §19(l), as well as attorney's fees under §16(a) may only be awarded in circumstances where there has been an unreasonable or vexatious delay of payment of compensation. Here, the Arbitrator finds that Respondent was unreasonable in its withholding of payment of compensation.

The Arbitrator previously found that an employee-employer relationship existed between the Raul Lagunas and Respondent. The Arbitrator particularly took note of the testimony of Respondent's president Branko Vardijan. Mr. Vardijan admitted that Respondent controlled Raul's work and production. But, more to the point here, Mr. Vardijan looked on Raul as his employee. As stated earlier, Mr. Vardijan's opinion that Raul was his employee was not dispositive of the employee-employer relationship, it is evidence of a state of mind dispositive of the issue of liability for penalties and fees.

Mr. Vardijan's belief that Raul was his employee infers that he was aware of his obligation under the Act to pay medical bills. The Arbitrator notes that Respondent paid $1,497.40, for which a credit is due. That payment is not a waiver of Respondent's obligation to pay compensation, particularly if there had been a reasonable liability

dispute. Respondent argues that the employee-employer relationship and dependency were reasonably disputed.

The Arbitrator, after considering all the evidence, finds that Respondent's defense on the issue of dependency was reasonable. Sergio's adoption, which created a new status of dependency, raised reasonable questions of whether he was entitled to §7(a) benefits after the adoption. However, in light of all the evidence, the defense based on disputed employee status was unreasonable. Respondent's president thought of Raul Lagunas as his employee. Respondent paid Raul wages almost every week in the year before Raul's death. Branko Vardijan testified that Respondent controlled Raul's work and production. The claim that Raul was not an employee but, instead, was an independent contractor rings hollow in light of the evidence. Respondent cannot reasonably deny that Raul Lagunas was its employee in the face of all the evidence.

The Arbitrator finds that Petitioner was entitled to total death benefits of $64,162.91, after applying credits. Therefore, Petitioner is entitled to penalties under §19(k) of the Act equal to 50% of compensable death benefits in the amount of $32,081.46.

The Arbitrator further finds that Petitioner is entitled to penalties under §19(l) of the Act in the amount of $10,000.00, the maximum allowable under §19(l).

The Arbitrator also finds that Petitioner is entitled to §16 attorneys' fees in the amount of $12,832.58 for Respondent's unreasonable and vexatious delay in paying compensable death benefits, due to a lack of a reasonable basis or defense to withhold payment of benefits.

Steven J. Fruth, Arbitrator

November 3, 2016
Date

Illinois Official Reports

Appellate Court

***Conway v. Illinois Workers' Compensation Comm'n*,**
2019 IL App (4th) 180285WC

Appellate Court Caption	BRIANA CONWAY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Bloomington Public School District No. 87, Appellee).
District & No.	Fourth District, Workers' Compensation Commission Division Docket No. 4-18-0285WC
Filed Rehearing denied	May 2, 2019 June 27, 2019
Decision Under Review	Appeal from the Circuit Court of McLean County, No. 17-MR-692; the Hon. Rebecca S. Foley, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	William L. Gregory, of Koth, Gregory & Nieminski, P.C., of Bloomington, for appellant. Heyl, Royster, Voelker & Allen, of Peoria (Brad A. Elward and Craig S. Young, of counsel), for appellee.

Panel

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

OPINION

¶ 1 The claimant, Briana Conway, appeals an order of the circuit court of McLean County dismissing her petition for review of a decision of the Illinois Workers' Compensation Commission (Commission) for lack of jurisdiction.

¶ 2 FACTS

¶ 3 The claimant filed an application for adjustment of claim against her employer, Bloomington Public School District No. 87, for an injury she sustained on November 23, 2011. The arbitrator awarded the claimant 5% loss of use of a person as a whole and denied certain benefits and payment of outstanding medical expenses. The claimant sought review of the arbitrator's decision before the Commission. On October 27, 2017, the claimant received the Commission's decision, which affirmed and adopted the decision of the arbitrator.

¶ 4 On November 13, 2017, the claimant filed a petition for administrative review and a request to issue summonses in the circuit court. The summonses were issued the next day.

¶ 5 On December 6, 2017, the employer filed a motion to dismiss the claimant's petition for failure to file with the circuit court proof that a notice of intent was filed with the Commission or an affidavit within 20 days of receiving the Commission's decision. The employer argued that such proof was required to be filed with the court within 20 days of receiving the Commission's decision by section 19(f)(1) of the Workers' Compensation Act (Act) (820 ILCS 305/19(f)(1) (West 2016)) to vest the circuit court with jurisdiction. Attached to the employer's motion to dismiss was a copy of a November 13, 2017, letter sent by the claimant's counsel to the Commission and the employer's counsel. The letter stated that a check was enclosed for $35 for the cost of the record to be filed along with three copies of a notice of intent to file for review in the circuit court. The claimant's counsel asked the Commission to file stamp the extra copy and return it. The circuit court was not included as a recipient of the letter.

¶ 6 On March 9, 2018, the circuit court held a hearing on the employer's motion to dismiss. The claimant's counsel tendered an affidavit dated March 9, 2018, wherein he stated, "[o]n November 13, 2017, [the claimant's] attorneys sent their Notice of Intent to File for Review in the Circuit Court to the Illinois Workers' Compensation Commission" and provided a file-stamped copy of the notice of intent filed with the Commission dated December 15, 2017.

¶ 7 On March 23, 2018, the circuit court granted the employer's motion to dismiss, finding that it lacked jurisdiction over the petition because the claimant was required to file proof exhibiting that she filed a notice of intent with the Commission or an affidavit with the circuit court within 20 days of receipt of the Commission's decision and failed to do so.

¶ 8 The claimant appeals.

¶ 9 ANALYSIS

¶ 10 On appeal, the parties do not dispute that the claimant did not file a notice of intent or an affidavit in the circuit court within 20 days of receipt of the Commission's decision. Instead, the parties argue whether this is a requirement to vest the circuit court with subject-matter jurisdiction under section 19(f)(1) of the Act (*id.*).

¶ 11 Whether a circuit court has jurisdiction to review an administrative decision presents a question of law, which we review *de novo*. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 13. *De novo* review is also appropriate where, as in this case, the resolution of the jurisdictional question turns solely on the statutory construction of section 19(f) of the Act, which also presents a question of law. *Id.*

¶ 12 While Illinois courts are courts of general jurisdiction and enjoy a presumption of subject-matter jurisdiction, that presumption does not extend to workers' compensation proceedings. *Kavonius v. Industrial Comm'n*, 314 Ill. App. 3d 166, 169 (2000). Courts exercise "special statutory jurisdiction" in workers' compensation proceedings where strict compliance with the statute is required to vest the court with subject-matter jurisdiction. *Id.*

¶ 13 The issue before us requires us to first determine what the Act requires to invoke the circuit court's jurisdiction and then evaluate whether the claimant satisfied those requirements.

¶ 14 Judicial review of decisions by the Commission is governed by section 19(f)(1) of the Act. The relevant version of section 19(f)(1) provides, as follows:

> "A proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission. The summons shall be issued by the clerk of such court upon written request returnable on a designated return day, not less than 10 or more than 60 days from the date of issuance thereof, and the written request shall contain the last known address of other parties in interest and their attorneys of record who are to be served by summons. ***
>
> ***
>
> No request for a summons may be filed and no summons shall issue unless the party seeking to review the decision of the Commission shall exhibit to the clerk of the Circuit Court proof of filing with the Commission of the notice of the intent to file for review in the Circuit Court or an affidavit of the attorney setting forth that notice of intent to file for review in the Circuit Court has been given in writing to the Secretary or Assistant Secretary of the Commission." 820 ILCS 305/19(f)(1) (West 2016).

¶ 15 The claimant argues that section 19(f)(1) only requires petitioners to file their petition for review within 20 days of receipt of notice of the Commission's decision. She contends that section 19(f)(1) does not specifically state that a notice of intent or affidavit must be filed within the circuit court within 20 days, but only that the circuit court cannot file and issue a summons unless the court has been provided proof of filing.

¶ 16 The employer, relying on interpretations of section 19(f)(1) prior to its 2013 amendment, contends that a petitioner's failure to file a notice of intent or an affidavit with the circuit court within the 20-day period deprives a circuit court of jurisdiction over the judicial review. Before the 2013 amendment, section 19(f)(1) provided the following paragraph instead of the current paragraph regarding the proof of filing of a notice of intent or affidavit:

> "In its decision on review the Commission shall determine in each particular case the amount of the probable cost of the record to be filed as a part of the summons in that

> case and no request for a summons may be filed and no summons shall issue unless the party seeking to review the decision of the Commission shall exhibit to the clerk of the Circuit Court proof of payment by filing a receipt showing payment or an affidavit of the attorney setting forth that payment has been made of the sums so determined to the Secretary or Assistant Secretary of the Commission, except as otherwise provided by Section 20 of this Act." 820 ILCS 305/19(f)(1) (West 2012).

In summation, the previous version of section 19(f)(1) required the petitioner to show proof of payment to the Commission for the probable cost of the record before a summons could be issued. In contrast to the current version, which requires the petitioner to show proof that he or she filed a notice of intent with the Commission before a summons can be issued. We next turn to cases interpreting section 19(f)(1) prior to the 2013 amendment because we find that they are instructive.

¶ 17 First, in *Esquivel v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 156, 158 (2010), the claimant filed a petition for review, a request for summons to the Commission and all parties of record, and a certificate of mailing of the summons to the Commission in the circuit court within 20 days of receipt of the Commission's decision. However, the claimant did not file proof of payment of the probable cost of the record until more than six months after the 20-day filing period had expired. *Id.* The claimant's late proof of payment was in the form of an affidavit from the claimant's attorney, stating that he had paid the probable cost of the record within 20 days as required under section 19(f)(1) of the Act. *Id.* Therefore, there was proof of record that the payment was made within 20 days of the Commission's decision, but such proof was not tendered to the court within 20 days of the Commission's decision.

¶ 18 The *Esquivel* court held, "in order to perfect jurisdiction in the circuit court, the appellant must not only file a written request for summons within 20 days after receiving the Commission's decision, but *he or she must also exhibit to the clerk of the circuit court within the same time frame* either a receipt showing payment of the probable cost of the record on appeal or an affidavit of an attorney setting forth that such payment has been made to the Commission." (Emphasis added.) *Id.* at 159-60. Thus, the circuit court did not have subject-matter jurisdiction.

¶ 19 Second, in *Rojas v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 965, 972 (2010), the court found that the petitioner's failure to follow the requirements set forth in section 19(f)(1) was more serious than in *Esquivel*. In *Rojas*, the claimant's receipt for payment of the probable cost of the record was dated on the twenty-second day and no affidavit by the petitioner's attorney alleging payment within the required 20-day period was of record. *Id.* The court concluded that the petitioner's clear failure to submit proof of payment of the probable cost of the record deprived the circuit court of jurisdiction. *Id.* at 973.

¶ 20 Last, in *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 13, our supreme court stated that it "consistently held that the timely filing of a request for issuance of summons and the timely exhibition of proof of payment for the probable cost of the record (both of which are necessary for commencement of a judicial review action under section 19(f)(1)) are jurisdictional requirements that must be strictly adhered to in order to vest the circuit court with jurisdiction."

¶ 21 Following these previous interpretations of section 19(f)(1), we conclude that the newest amendment requires the petitioner to exhibit proof of filing with the Commission of the notice of the intent to file for review in the circuit court or an affidavit of the attorney setting forth that

notice of intent to file for review in the circuit court within 20 days of receiving the Commission's decision.

¶ 22 In the case before us, the record shows that the claimant received notice of the Commission's decision on October 27. The claimant was required to comply with the requirements set forth in section 19(f)(1) by November 16, which was 20 days after she received notice of the Commission's decision. On November 13, the claimant's counsel mailed, *inter alia*, a notice of intent to the Commission and sent copies to the employer's counsel. However, proof of this notice of intent was not filed with the circuit court by November 16. On December 6, the employer filed its motion to dismiss for failure to file a notice of intent or affidavit within 20 days of receiving the Commission's decision. On March 9, the circuit court held a hearing on the employer's motion to dismiss where the claimant's counsel tendered an affidavit dated March 9, wherein he stated that "[o]n November 13, 2017, [the claimant's] attorneys sent their Notice of Intent to File for Review in the Circuit Court to the Illinois Workers' Compensation Commission" and provided a file-stamped copy of the notice of intent filed with the Commission dated December 15. The documents demonstrating that the claimant mailed the Commission a notice of intent within 20 days was not filed with the court within the required 20-day period. Therefore, the court lacked subject-matter jurisdiction over the claimant's petition for review.

¶ 23 As a final matter, we note the cases the claimant relies on in support of her position are inapposite. See *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d 197, 203 (2010) (there is no requirement that a summons *must issue* within the 20-day period under section 19(f)(1)); see also *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 316 (1999) (although the claimant exhibited proof of payment for the probable cost of the record *after* filing his request for summons, all of the required documents under section 19(f)(1) were filed within the required 20-day period and invoked the circuit court's jurisdiction).

¶ 24 Therefore the trial court did not err as a matter of law when it dismissed the claimant's petition for review for lack of subject-matter jurisdiction.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of McLean County dismissing the claimant's petition for lack of jurisdiction.

¶ 27 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☒ 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

Briana Conway,
Petitioner,

vs.

Bloomington Public School Dist. #87,
Respondent.

17IWCC0679

NO: 12 WC 10568

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, medical, causal connection 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 August 16m 2016, 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.

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: OCT 26 2017
o10/12/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0679

CONWAY, BRIANA
Employee/Petitioner

Case# **12WC010568**

BLOOMINGTON PUBLIC SCHOOL DIST #87
Employer/Respondent

On 8/16/2016, 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 0.44% 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:

2460 KOTH & GREGORY PC
WILLIAM L GREGORY
420 N MAIN ST
BLOOMINGTON, IL 61701

0264 HEYL ROYSTER VOELKER & ALLEN
VINCENT M BOYLE
PO BOX 6199
PEORIA, IL 61602

17IWCC0679

STATE OF ILLINOIS)
)SS.
COUNTY OF MC LEAN)

- ☐ 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

Briana Conway
Employee/Petitioner

v.

Bloomington Public School Dist. 87
Employer/Respondent

Case # 12 WC 10568

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 William R. Gallagher, Arbitrator of the Commission, in the city of Bloomington, on June 29, 2016. 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 _____

FINDINGS

On November 23, 2011, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $12,526.08; the average weekly wage was $240.89.

On the date of accident, Petitioner was 21 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $2,200.01 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,200.01.

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

ORDER

Respondent shall pay Petitioner the sum of $220.00 per week for a period of 25 weeks because the injuries sustained caused the five percent (5%) loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

Based upon the Arbitrator's Conclusions of Law attached hereto, no further medical or compensation benefits are awarded to Petitioner.

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.

William R. Gallagher, Arbitrator

August 7, 2016
Date

AUG 16 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on November 23, 2011. According to the Application, Petitioner was injured while "Restraining student" and the injury was to the "Back and torn ligaments" (Respondent's Exhibit 1). There was no dispute that Petitioner sustained a work-related injury; however, Respondent disputed liability on the basis of causal relationship. Respondent disputed liability for various medical bills as well as the duration of and Petitioner's entitlement to temporary total and temporary partial disability benefits (Arbitrator's Exhibit 1).

Petitioner began working for Respondent in August, 2011, as a Paraprofessional Teaching Assistant for elementary grade school students with special needs. Petitioner's job required her to monitor students, push wheelchairs and, on a regular basis, physically restrain students.

Petitioner testified that on November 23, 2011, she had to deal with an uncooperative student on the playground. The student did not want to come inside and Petitioner had to climb up a slide to get her. At that time, the student had what Petitioner described as a tantrum/meltdown. To prevent the student from running away, Petitioner restrained her by holding her from behind by locking her arms around the student. At that time, the student started rocking forward and backward which caused the Petitioner to be bent forward and backward. Petitioner described the student as being female and weighing 130 to 140 pounds and the student was taller than Petitioner. Petitioner is 5'5" tall and, at the time of the accident, weighed 100 pounds. When the case was tried, Petitioner testified that she weighed 112 pounds.

Petitioner testified that she felt an immediate onset of back pain at the time of the accident. However, Petitioner did not seek medical treatment because the accident occurred shortly before the Thanksgiving weekend.

Petitioner initially sought medical treatment at OSF Medical Group on November 30, 2011, and was seen by Dr. Regina Powers. Petitioner complained of mid-back pain but without radiation into either the arms or legs. Dr. Powers ordered x-rays of the thoracic spine and prescribed some medications. The x-rays were normal (Petitioner's Exhibit 15).

Petitioner was subsequently seen by Dr. Jyotir Jani, another physician at OSF Medical Group, on December 7, 2011. Dr. Jani examined Petitioner and noted that there was tenderness of the medial and inferior muscles of the bilateral scapula. He ordered physical therapy (Petitioner's Exhibit 15).

Petitioner was seen by Dr. Jani on December 16, 2011, and advised that she had been to two physical therapy sessions, but that her symptoms had not improved. Dr. Jani authorized Petitioner to be off work. When he saw Petitioner on January 4, 2012, he ordered an MRI of the thoracic spine (Petitioner's Exhibit 15).

The MRI was performed on January 12, 2012. According the radiologist, the MRI did not reveal any disc herniation or neural impingement and was "Essentially unremarkable" (Petitioner's Exhibit 15).

Petitioner was seen by Dr. Jeffrey Wingate, an orthopedic surgeon, on January 31, 2012. Petitioner continued to complain of thoracic back pain. On examination, Dr. Wingate noted tenderness between T8 and T9 and opined that Petitioner had probably sustained an injury to the interspinous ligaments at that level. He prescribed a back brace and medications (Petitioner's Exhibit 6). Petitioner was seen by Dr. Jani on February 3, 2012. At that time, Petitioner stated that she was unable to tolerate working because of the pain. He authorized Petitioner to be off work for one month (Petitioner's Exhibit 15).

Petitioner saw Dr. Wingate on February 24, 2012. He noted that Petitioner's back brace was well fitted; however, Petitioner still had upper/mid thoracic back pain. He opined that Petitioner had clinical signs of a tear of the interspinous and supraspinous ligaments in thoracic spine. He ordered a high-resolution MRI scan (Petitioner's Exhibit 6).

Petitioner was seen by Dr. Jani on March 2, 2012. He authorized her to remain off work for another two months. (Petitioner's Exhibit 15).

On March 2, 2012, the MRI scan ordered by Dr. Wingate was performed; however, the radiologist's report regarding it was not tendered into evidence at trial. Dr. Wingate reviewed the MRI on March 7, 2012, and opined that it had a high intensity signal change within the supraspinous and interspinous tendons bilaterally. He gave a diagnostic injection in the back of Petitioner's and stated that Petitioner could continue with normal activities that day (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Michael Stover, an orthopedic surgeon, on March 21, 2012. In connection with his examination of Petitioner, Dr. Stover reviewed medical records provided to him by Respondent. At that time, Petitioner complained of pain with flexion, extension and rotation of the spine. On examination, Petitioner had tenderness at T6 to T9. Dr. Stover opined that Petitioner sustained a thoracic sprain/strain and that the ligaments of the thoracic spine should heal without difficulty. He reviewed the MRI of March 2, 2012, and opined that it did not reveal any abnormalities of ligamentous complex or posterior spinal structures of the thoracic spine. He recommended Petitioner have physical therapy for six to eight weeks and that she could return to work to light duty and then subsequently progress to full duty over the next six to eight weeks at which time Petitioner would then be at MMI (Respondent's Exhibit 12; Deposition Exhibit 2).

Petitioner was subsequently seen by Dr. Wingate on March 27, 2012. At that time, Dr. Wingate recommended Petitioner have an epidural steroid injection to the thoracic spine. Petitioner had an epidural steroid injection on April 12, 2012, at T9-T10. She saw Dr. Wingate on April 20, 2012, and advised that the epidural steroid injection did not help her. Dr. Wingate then referred Petitioner to Millenium Pain Center for further treatment (Petitioner's Exhibit 6). Petitioner was evaluated by Dr. Ricard Vallejo at Millennium Pain Center on May 21, 2012. From May through August, 2012, Dr. Vallejo who treated Petitioner and performed several facet injections and

nerve blocks. These only gave Petitioner some temporary relief from her symptoms. (Petitioner's Exhibit 8).

Petitioner saw Dr. Wingate on June 27, 2012. At that time, Dr. Wingate indicated that Petitioner might need an instrumental posteriolateral thoracic fusion. He also suggested the possibility of a spinal cord stimulator. (Petitioner's Exhibit 6).

Petitioner south chiropractic treatment from Dr. Jeffrey Stout who initially saw her on August 22, 2012. Dr. Stout initially diagnosed Petitioner with thoracic radiculitis, costochondritis and thoracic myofacitis and myalgia. He prescribed chiropractic treatment to Petitioner through December, 2012 (Petitioner's Exhibit 5).

Petitioner was seen by Dr. Wingate on September 19, 2012. Petitioner advised that nothing had helped her and she continued to have severe thoracic back pain. Dr. Wingate again suggested a fusion, but he also wanted to obtain another MRI scan (Petitioner's Exhibit 6).

When Dr. Wingate saw Petitioner on November 13, 2012, he recommended Petitioner have an upright thoracic MRI. That MRI was performed on November 27, 2012. According the radiologist who performed the study, there was no evidence of acute fracture or subluxations, mild kyphosis and the spinal cord/canal and neural foraminal where unremarkable (Petitioner's Exhibit 6).

Dr. Wingate saw Petitioner on December 5, 2012, and he reviewed the MRI scan. Dr. Wingate opined that the MRI revealed torn supraspinous and interspinous ligaments. Petitioner subsequently saw Dr. Wingate on January 14, February 26, and March 19, 2013. Dr. Wingate again recommended that they proceed with the thoracic spinal fusion (Petitioner's Exhibit 6).

Dr. Wingate ordered a CT scan of Petitioner's thoracic spine which was performed on April 12, 2013. Other than some early degenerative changes in the upper and middle thoracic spine, it was normal (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was again examined by Dr. Stover on May 1, 2013. In connection with his examination of Petitioner, Dr. Stover reviewed medical records for treatment provided to Petitioner since his prior examination of her. He also reviewed the MRIs and x-rays of Petitioner. In that regard, Dr. Stover stated that he agreed with the radiologists that the MRIs did not reveal any abnormalities of the thoracic spine and there was no evidence of interspinous or supraspinous ligamentous injuries. He opined that a spinal fusion was not indicated. His diagnosis was that Petitioner had "Back pain", and that while it was reasonable for her to attempt chiropractic care, no further chiropractic treatment was recommended. He recommended that Petitioner undergo a functional capacity evaluation (FCE) (Respondent's Exhibit 12; Deposition Exhibit 3).

Dr. Wingate saw Petitioner on May 7, 2013, and he opined that Petitioner had discogenic instability in the mid and lower thoracic spine. He renewed his recommendation that Petitioner undergo a spinal fusion (Petitioner's Exhibit 6).

Dr. Wingate subsequently referred Petitioner to Dr. Richard Kube, an orthopedic surgeon, who saw Petitioner on August 23, 2013. Dr. Kube opined that Petitioner had significant thoracic based pain. He opined that Petitioner might require a dorsal column stimulator, but was reluctant to proceed with it at that time because of Petitioner's age. He opined that Petitioner was at MMI and ordered an FCE to determine her restrictions (Petitioner's Exhibit 3; Deposition Exhibit 2).

An FCE was performed on September 30, 2013. The examiner opined that Petitioner could work at the medium work demand level. There were some lifting and pushing/pulling weight restrictions indicated; however, the examiner opined that Petitioner could frequently stand, walk, bend, squat, climb and kneel/crawl (Petitioner's Exhibit 3; Deposition Exhibit 3).

Dr. Kube saw Petitioner on October 17, 2013, and reviewed the FCE. He again opined that Petitioner was at MMI and subject to the work restrictions noted in the FCE (Petitioner's Exhibit 3; Deposition Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Ryon Hennessy, an orthopedic surgeon, on June 11, 2014. In connection with his examination of Petitioner, Dr. Hennessy reviewed medical records provided to him by Respondent as well as the MRIs and x-rays. Dr. Hennessy opined that Petitioner sustained a thoracic strain on November 23, 2011. He opined that Petitioner was at MMI and capable of returning to work without restrictions as of March 2, 2012, the date of the second MRI. Dr. Hennessy noted that all three MRIs failed to reveal any ligamentous or disc injuries (Respondent's Exhibit 13; Deposition Exhibit 2).

Petitioner obtained further chiropractic care from Dr. Jeffrey Hoekstra in May and June, 2014. He treated Petitioner for neck, upper back and mid-back pain (Petitioner's Exhibit 7).

Dr. Wingate and Dr. Stout were both deposed on April 9, 2013. Their deposition testimony was received into evidence at trial.

Dr. Wingate's deposition testimony was consistent with his medical records regarding his treatment of Petitioner and his surgical recommendation. He reaffirmed his opinion that Petitioner tore the ligaments between T8 and T9 which created instability between those two bones. He opined that this condition was causally related to the accident of November 23, 2011. In regard to the MRIs performed on March 2, 2012, and November 27, 2012, Dr. Wingate opined that both scans revealed tears of the ligaments between T8 and T9 (Petitioner's Exhibit 2; pp 19-20, 25-26, 51-52).

On cross-examination, Dr. Wingate agreed that he disagreed with the opinions of the radiologists who performed the MRIs of March 2, 2012, and November 27, 2012. Both radiologists opined that the MRIs were essentially normal (Petitioner's Exhibit 2; pp 90-93).

Dr. Stout's testimony was consistent with his records regarding his treatment of Petitioner which he opined was reasonable and necessary. Dr. Stout initially diagnosed Petitioner with various mid-back conditions; however, his final diagnosis was thoracic disc syndrome. He did review the MRI November 27, 2012, and agreed that it was essentially normal (Petitioner's Exhibit 4; pp 29, 37-38, 47-48).

Dr. Stover was deposed on May 8, 2013, and his deposition testimony was received into evidence at trial. Dr. Stover's testimony was consistent with his two medical reports regarding his examinations of Petitioner and he reaffirmed the opinions contained therein. In regard to his reading of the MRIs of March 2, 2012, and November 27, 2012, he testified that both diagnostic studies did not reveal any tearing or signal changes or interruption of the ligaments in the thoracic spine (Respondent's Exhibit 12; pp 17-20, 33-37).

Dr. Kube was deposed on November 12, 2015, and his deposition testimony was received into evidence at trial. Dr. Kube's diagnosis was chronic thoracic pain. He suggested a dorsal column stimulator, but opined that it was not indicated at that time due to Petitioner's age. He stated that Petitioner was at MMI as of the October, 2013, visit subject to the work restrictions noted in the FCE (Petitioner's Exhibit 3; pp 11, 13-15, 19-24).

Dr. Kube reviewed the MRI of November 27, 2012, and opined that it was normal. He did not diagnose any ligamentous tears in the thoracic spine (Petitioner's Exhibit 3; pp 30 – 33).

Dr. Hennessy was deposed on May 6, 2015, and his deposition testimony was received into evidence at trial. Dr. Hennessy's testimony was consistent with his medical report and he affirmed the opinions contained therein, in particular, that Petitioner sustained a thoracic strain as a result of the accident of November 23, 2011. He further stated that there was no medical evidence to support Dr. Wingate's diagnosis of interspinous ligamentous injuries or surgical recommendations. He reviewed the MRIs of March 2, 2012, and November 27, 2012, and opined that they were both normal. He further stated that Petitioner would have been at MMI as of the time of the March 2, 2012 MRI and that she could have returned to work without restrictions (Respondent's Exhibit 13; pp 19-22, 28-29).

Petitioner claimed that she was entitled to temporary total disability and temporary partial disability benefits of 17 2/7 weeks and 76 weeks, respectively. The period of temporary total disability claimed was December 9, 2011, through January 5, 2012, and February 3, 2012, through May 2, 2012. The temporary partial disability claimed was from May 3, 2012, through October 18, 2013 (Petitioner's Exhibit 14).

Subsequent to Petitioner's leaving the employment of Respondent, she worked at a number of part-time jobs. This included working at a bar, LA Fitness at the front desk, a sales job for a remodeling company and a job for an apartment complex. Eventually, Petitioner obtained a full-time job as a nanny. When this case was tried, Petitioner testified that she was going to start earning $42,000.00 per year with an effective date of July 1, 2016.

Respondent obtained surveillance video of Petitioner in March/April, 2012, and March, 2014. The Arbitrator watched the video and it revealed Petitioner getting in/out of her car, walking, standing behind a desk and carrying what appeared to be a bag. Petitioner moved about in a normal manner and did not exhibit any outward signs that she was uncomfortable or in pain (Respondent's Exhibit 14).

At trial, Petitioner testified that she still has back spasms once or twice per day. She continues to work out; however, not to the extent that she did prior to the accident.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is, in part, causally related to the accident of November 23, 2011.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a thoracic strain as result of the accident of November 23, 2011.

Petitioner has had three MRIs of the thoracic spine performed, two of which have been reviewed by Respondent's Section 12 examiners, Dr. Stover and Dr. Hennessy, who opined that they were normal/unremarkable. Two of Petitioner's treating physicians, Dr. Stout and Dr. Kube, likewise opined that the MRIs were unremarkable. Further, the radiologists had likewise opined that the MRIs were normal/unremarkable.

The only physician who has opined that the MRIs revealed some ligamentous injuries between T8 and T9 was Dr. Wingate. Based on the preceding, the Arbitrator does not find Dr. Wingate's opinion to be credible.

Petitioner has been seen and treated by various doctors and chiropractors primarily because of her ongoing subjective complaints. The Arbitrator does note that Petitioner was placed under surveillance in March/April 2012, and again in March, 2014, and moved about without any observable difficulties.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner was at MMI as of March 2, 2012, the date of the second MRI, and that no further medical expenses are owed by Respondent thereafter.

In support of this conclusion the Arbitrator notes the following:

As is noted herein, Petitioner sustained a thoracic strain as a result of the accident of November 23, 2011.

Considering all of the medical evidence and the surveillance video of Petitioner, the Arbitrator finds the opinion of Dr. Hennessey that Petitioner was at MMI as of March 2, 2012, to be persuasive.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is not entitled to any further payment of temporary total disability or temporary partial disability benefits.

In support of this conclusion the Arbitrator notes the following:

As aforestated, the Arbitrator has found that Petitioner was at MMI as of March 2, 2012.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of five percent (5%) loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a Paraprofessional Teacher Assistant at the time of the accident. She no longer works in that job and, at the time of trial, was employed full-time as a nanny. The Arbitrator gives this factor minimal weight.

Petitioner was 21 years old at the time of the accident. There was no evidence that Petitioner's age had any effect on her disability. The Arbitrator gives this factor no weight.

Petitioner is now making substantially more income than she was at the time of the accident in a full-time job as a nanny. The Arbitrator gives this factor no weight.

As noted herein, the medical opinions as to the nature and extent of Petitioner's disability varied considerably; however, the Arbitrator has determined that Petitioner sustained a thoracic strain as a result of the accident and not a ligamentous injury. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator