*392 Ill. App. 3d 408, *; 911 N.E.2d 1042, **;*
*2009 Ill. App. LEXIS 352, ***; 331 Ill. Dec. 812*

GLOBAL PRODUCTS, Plaintiff-Appellant, v. THE WORKERS' COMPENSATION COMMISSION and **JOHN HALL,** JR., Defendants-Appellees.

No. 01-08-1914WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, WORKERS' COMPENSATION COMMISSION DIVISION

392 Ill. App. 3d 408; 911 N.E.2d 1042; 2009 Ill. App. LEXIS 352; 331 Ill. Dec. 812

June 9, 2009, Filed

SUBSEQUENT HISTORY: Released for Publication July 27, 2009.

PRIOR HISTORY: [*1]**
Appeal from the Circuit Court of Cook County. No. 07-L-50557. Honorable Elmer Tolmaire, Judge, Presiding.

DISPOSITION: Reversed in part and affirmed in part; cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee workers' compensation claimant's application for adjustment of claim was granted by an arbitrator. Appellee Illinois Workers' Compensation Commission adopted the decision of the arbitrator and remanded for possible further proceedings pursuant to Thomas v. Industrial Comm'n. The Circuit Court of Cook County (Illinois) confirmed the Commission's decision. Appellant employer appealed.

OVERVIEW: The appellate court held that the claimant's smoking was not an intervening cause of his disability. The Commission could find that there was a but-for relationship between the claimant's at-work injury and his condition. The claimant was a smoker and was one prior to his first surgery. The claimant had had problems healing from surgery because he was a smoker. However, the employer did not show that the claimant smoked cigarettes for the purpose of retarding his recovery. Here, the claimant smoked in spite of its potential impact on his recovery, not because of it. The claimant also made an unsuccessful attempt to quit smoking. A reasonable person could conclude that the claimant should not be penalized when he made a good-faith attempt to prevail over his addiction. The Commission's decision that the claimant did not engage in an 820 ILCS 305/19(d) (1998) practice was not an abuse of discretion. However, the Commission's decision to award 820 ILCS 305/19(k), 19(l), and 16 (1998) penalties against the employer was an abuse of discretion as the employer could rely upon its expert, whose testimony that smoking was impeding the claimant's recovery was relatively compelling.

OUTCOME: The trial court's decision was reversed as to the imposition of fees and penalties upon the employer. In all other respects, the decision was affirmed. The case was remanded for further proceedings, if any, pursuant to Thomas.

CORE TERMS: claimant's, smoking, surgery, injurious, intervening cause, arbitrator, cigarette, fusion, causation, manifest, doctor, wheel, buffs, medical expenses, medical opinion, reasonable person, distinguishable, retard, abused, smoker, quit, case law, attorney fees, decision to impose, reasonable basis, standard of review, current condition, sole cause, abuse of discretion, work-related

LEXISNEXIS® HEADNOTES ⊟ Hide

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues
Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Awards > Terminations
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN1 Causation, including the existence of an intervening cause, is a question of fact subject to the manifest-weight standard of review. Conversely, § 19(d) (820 ILCS 305/19(d) (1998)) of the Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq. (1998), by its plain terms, vests the Illinois Workers' Compensation Commission with discretion to reduce an award where a workers' compensation claimant engages in an injurious or unsanitary practice. § 19(d). If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Terminations

Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN2 For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. Employment need only remain a cause, not the sole cause or even the principal cause, of a workers' compensation claimant's condition. So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Terminations

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Abuse of Discretion

Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN3 Unlike an intervening cause, there is no requirement that an injurious practice be the sole cause of a workers' compensation claimant's condition of ill being for the Illinois Workers' Compensation Commission to reduce or deny compensation. 820 ILCS 305/19(d) (1998). Rather, the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. Section 19(d) vests the Commission's discretion on this subject, so the appellate court will only overturn its decision if that discretion is abused. An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission. More Like This Headnote

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employees

HN4 An employer takes his employees as he finds them. More Like This Headnote

Administrative Law > Agency Adjudication > Decisions > Stare Decisis

HN5 Decisions of the Illinois Workers' Compensation Commission are not precedential and thus should not be cited. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN6 Whether to award penalties and fees presents a factual question. The appellate court will not disturb the decision of the Illinois Workers' Compensation Commission on these matters unless it is contrary to the manifest weight of the evidence. Penalties and fees under 820 ILCS 305/19(k), 19(l), and 16 (1998) are appropriate where an employer's decision to delay payment of benefits is unreasonable or vexatious. Generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed. The relevant question is whether the employer's reliance was objectively reasonable under the circumstances. More Like This Headnote

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

HN7 820 ILCS 305/19(l) (1998), which is more in the nature of a late fee, allows an award upon a lesser showing, applying when an employer neglects, or refuses to make payment or unreasonably delays payment without good and just cause. An employer bears the burden of showing that it had a reasonable belief that the delay was justified. More Like This Headnote

COUNSEL: For Appellant: Robert M. Harris, Adrian T. Cherikos/Knell & Poulos, PC, Chicago, IL.

For Appellee: Neal K. Wishnick, Sostrin & Sostrin, PC, Chicago, IL.

JUDGES: JUSTICE HUDSON delivered the opinion of the court. McCullough, P.J., and Hoffman, and Holdridge, JJ., concur. Justice Donovan, concurring in part and dissenting in part.

OPINION BY: HUDSON

OPINION

[1044]** **[*409]** JUSTICE HUDSON delivered the opinion of the court:

Claimant, **John Hall,** Jr., filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 1998)). He alleged that he sustained an employment-related injury to his lower back when he slipped and fell at work. The arbitrator awarded claimant 327 3/7 weeks temporary total disability (TTD) at $ 213.34 per week, $ 53,177.91 for medical expenses, as well as certain penalties and attorney fees. The Workers' Compensation Commission (Commission) adopted the decision of the arbitrator and remanded for possible further proceedings pursuant to *Thomas v. Industrial Comm'n,* 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). The circuit court **[***2]** of Cook County confirmed the Commission's decision. Respondent, **Global Products,** now appeals, arguing that the Commission's decision was contrary to the manifest weight of the evidence in that it did not find that claimant had engaged in an injurious practice such that compensation should be denied (see 820 ILCS 305/19(d) (West 1998)). Respondent also contends that the imposition of fees and penalties was inappropriate under the circumstances of this case. For the reasons that follow, we affirm in part and reverse in part.

I. BACKGROUND

Claimant testified that he had been employed as a laborer by respondent. His job required him to lift 100-pound bags of wax and animal fat and pour them into a mixer. At other times, claimant worked making "wheel buffs." In the course of performing this task, claimant would have to carry 15 of wheel buffs at a time. On August 31, 1999, claimant was carrying a group of wheel buffs, and he slipped and fell. The wheel buffs landed on him. Claimant initially thought **[*410]** that he was not hurt. The next day when he awoke, he could not get out of bed, so he sought medical treatment. After a period during which claimant received conservative treatment, **[**1045]** an operation **[***3]** was performed on claimant's back on December 2, 1999.

Following the surgery, claimant continued to experience pain in his leg. Records show claimant experienced some improvement over the next few months. On two occasions, he tripped and nearly fell. Claimant underwent a lumbar myelogram and began treating with Dr. Stanley of the Chicago Institute of Neurosurgery. In June 2000, claimant experienced another fall. Claimant then came under the care of Dr. Mark Levin. Levin initially prescribed physical therapy. Subsequently, Levin ordered an MRI and then performed a fusion. Eventually, on October 11, 2002, a second lumbar surgery--a fusion--was performed on claimant for a recurrent herniation of the L5 disk.

Claimant testified that no doctor had advised him to stop smoking cigarettes. During cross-examination, he acknowledged the Dr. Mather (respondent's independent medical examiner) did raise the subject of smoking during their final visit. Levin's records indicate that he did tell defendant to cease smoking. Both Levin and Mather testified that they instructed claimant to quit smoking prior to surgery. Indeed, Mather opined that claimant's smoking resulted in the failure of his first spinal **[***4]** fusion.

The arbitrator found that claimant's condition ofill being was causally related to his on-the-job accident. According to the arbitrator, both claimant and Dr. Levin were credible. The arbitrator also noted that all doctors testifying in this case agreed that the surgeries performed upon claimant were necessary and that a third surgery is indicated. However, respondent refused to authorize a third surgery due to fact that claimant continued to smoke cigarettes. Regarding this issue, the arbitrator found that "Dr. Levin has taken [claimant's] smoking history into account in developing a treatment plan" and that "[t]he fact that [claimant] smokes cigarettes is not a reasonable basis to deny [claimant] his need for revision surgery." Moreover, the arbitrator expressly found that "the need for a third surgery to [claimant's] back is related to [claimant's work-related] accident."

The Commission adopted the opinion of the arbitrator in full. The circuit court of Cook County determined that the Commission's decision was not contrary to the manifest weight of the evidence. This appeal followed.

II. ANALYSIS

Respondent raises two main issues in this case. First, it argues that claimant's **[***5]** use of cigarettes constitutes an injurious practice such **[*411]** that the Commission should have denied claimant recovery for medical expenses and time off work following his second surgery. Actually, respondent's argument meanders between smoking being an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d) (West 1998)) and it being an intervening cause that severed the causalrelationship between claimant's injury and employment (see *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005)). Respondent makes two additional arguments regarding TTD and medical expenses that are wholly dependent on this first claim. As we reject respondent's first argument, these two derivative claims must fail as well. Second, respondent argues that it should not be subject to penalties and fees (see 820 ILCS 305/16, 19(k), 19(l) (West 1998)) because claimant's continued smoking was a reasonable basis for it to deny benefits to claimant.

A. Injurious Practice and Causation

We first turn to respondent's claim that the Commission should have **[**1046]** denied compensation due to claimant's smoking. Respondent cites section 19(d) of the Act (820 ILCS 305/19(d) (West 1998)), which suggests it is raising **[***6]** an injurious practice defense. At other times, respondent makes assertions like "[claimant's] self-inflicted behavior broke any chain of causation back to the original work injury." Such claims sound like respondent is asserting that claimant's smoking is an intervening cause. See *Vogel*, 354 Ill. App. 3d at 786. These are principles of law governed by different standards. One difference is the standard of review. HN1 Causation, including the existence of an intervening cause, is a question of fact subject to the manifest-weight standard of review. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 293, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992). Conversely, section 19(d), by its plain terms, vests the Commission with discretion to reduce an award where a claimant engages in an injurious or unsanitary practice. 820 ILCS 305/19(d) (West 1998) ("If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the *Commission may, in its discretion*, reduce or suspend the compensation of any such injured employee" (emphasis added)); *Bailey v. Industrial Comm'n*, 286 Ill. 623, 626, 122 N.E. 107 (1919).

Another **[***7]** difference involves the relationship between a claimant's current condition of ill being and the accident. HN2 For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. *Boatman v.* **[*412]** *Industrial Comm'n*, 256 Ill. App. 3d 1070, 1074, 628 N.E.2d 829, 195 Ill. Dec. 365 (1993). Employment need only remain a cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v. Industrial Comm'n*, 361 Ill. App. 3d 673, 682, 838 N.E.2d 55, 297 Ill. Dec. 568 (2005). So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 87, 656 N.E.2d 1084, 212 Ill. Dec. 250 (1995); *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970). In this case, the Commission could have quite reasonably determined that there is clearly a but-for relationship between claimant's at-work injury and his current condition. Quite simply, if claimant had not had the surgery necessitated by his on-the-job fall, there would have been no fusion to fail as a result of claimant's smoking. See *Vogel*, 354 Ill. App. 3d at 788 ("Even if the **[***8]** accident was responsible for the failed fusion, such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of claimant's work injury"). Employment remains a cause of claimant's condition. Thus, smoking is not an intervening cause that would relieve respondent from liability.

HN3 Unlike an intervening cause, there is no requirement that an injurious practice be the sole cause of a claimant's condition of ill being for the Commission to reduce or deny compensation. See 820 ILCS 305/19(d) (West 1998). Rather, the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. *Keystone Steel & Wire Co. v. Industrial Comm'n*, 72 Ill. 2d 474, 481, 381 N.E.2d 672, 21 Ill. Dec. 345 (1978). Section 19(d) vests the Commission's discretion **[**1047]** on this subject, so we will only overturn its decision if that discretion is abused. See *Yocum v. Industrial Comm'n*, 297 Ill. App. 3d 813, 817-18, 697 N.E.2d 766, 232 Ill. Dec. 24 (1998). An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).

We cannot say that the **[***9]** Commission abused its discretion here. We begin with the well-established principle that HN4 "an employer takes his employees as he finds them." *Bocian v. Industrial Comm'n*, 282 Ill. App. 3d 519, 528, 668 N.E.2d 1, 217 Ill. Dec. 816 (1996). Claimant is a smoker and, apparently, was one prior to his first surgery, as his doctor advised him to quit. Given the testimony of Dr. Mather (respondent's expert), it is clear that problems healing after a surgery are part of being a smoker. Respondent asserts that claimant has "engage[d] in deliberate actions to retard recovery from a work related accident" and that it

should not be held liable for expenses "associated with such injurious practices." We see no evidence (and respondent provides no record citation to such evidence) that claimant smoked cigarettes for the **[*413]** purpose of retarding his recovery. In fact, *Gallego v. Industrial Comm'n*, 168 Ill. App. 3d 259, 268-69, 522 N.E.2d 692, 119 Ill. Dec. 30 (1988), which respondent cites, is distinguishable on this basis, for in that case there was evidence that the claimant was binding his hand in a deliberate attempt to impair circulation and prolong recovery. In this case, it appears the claimant smoked in spite of its potential impact on his recovery, not because **[***10]** of it.

Respondent cites *Beebe v. Transport Leasing Contract*, No. 99WC66951 (September 20, 2005), a decision of the Commission, in support of its position. HN5 Decisions of the Commission are not precedential and thus should not be cited. See *S & H Floor Coverings, Inc. v. Industrial Comm'n*, 373 Ill. App. 3d 259, 266, 870 N.E.2d 821, 312 Ill. Dec. 377 (2007). Morever, that case, in any event, is distinguishable. In *Beebe*, two doctors instructed the claimant "repeatedly to stop smoking, to exercise, to lose weight, and to stop wearing the CAM boot." *Beebe*, No. 99WC66951 at . The claimant disregarded all of this advice. The Commission determined that the claimant's "persistence in so many injurious practices *** compels the Commission to invoke the sanctions of section 19(d)." *Beebe*, No. 99WC66951 at . However, in so holding, the Commission expressly stated, "We recognize that an employer takes an employee as it finds him, in this case, an overweight smoker, and that these factors alone generally would not justify suspension or reduction of compensation." *Beebe*, No. 99WC66951 at . Respondent fails to acknowledge this limitation on *Beebe's* reasoning.

Furthermore, claimant did make an unsuccessful attempt to quit smoking. **[***11]** Nothing indicates that this was not a *bona fide* attempt, and, as respondent states, "it is commonly accepted by the medical community that smoking is an addiction." Areasonable person could certainly conclude that claimant should not be penalized when he made a good-faith attempt to prevail over his addiction.

In short, neither the law nor the facts support respondent's position. Claimant's smoking does not rise to the level of an intervening cause, and the Commission did not abuse its discretion in determining that claimant should not be denied recovery because of it. Accordingly, we affirm the Commission's decision on this issue as well **[**1048]** as on the two derivative issues that respondent has raised.

B. Penalties and Fees

Respondent also argues that the Commission erred when it imposed penalties (820 ILCS 305/19(k), 19(l) (West 1998)) and awarded attorney fees (820 ILCS 305/16 (West 1998)). HN6 Whether to award penalties and fees presents a factual question. *Greaney v. Industrial* **[*414]** *Comm'n*, 358 Ill. App. 3d 1002, 1024, 832 N.E.2d 331, 295 Ill. Dec. 180 (2005). We will not disturb the decision of the Commission on these matters unless it is contrary to the manifest weight of the evidence. *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209, 437 N.E.2d 617, 62 Ill. Dec. 929 (1982). **[***12]** Penalties and fees under sections 16 and 19(k) are appropriate where an employer's decision to delay payment of benefits is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 234 Ill. Dec. 205 (1998). Generally, "[w]hen the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed." *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810, 293 Ill. Dec. 885 (2005). The relevant question is "whether the employer's reliance was objectively reasonable under the circumstances." *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145, 190 Ill. Dec. 276 (1993). HN7 Section 19(l), which is more in the nature of a late fee, allows an award upon a lesser showing, applying when an employer "neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.'" *McMahan*, 183 Ill. 2d at 515, quoting 820 ILCS 305/19(l) (West 1992). The employer bears the "burden of showing that it had a reasonable belief that the delay was justified." *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579, 658 N.E.2d 838, 213 Ill. Dec. 89 (1995).

Respondent asserts that its denial of benefits was reasonable because it had set **[***13]** forth a meritorious defense "based on the medical opinion of Dr. Mather and existing case law." As we explain above, the "existing case law" upon which respondent relies--namely, *Gallego*, 168 Ill. App. 3d 259, 522 N.E.2d 692, 119 Ill. Dec. 30, and *Beebe*, No. 99WC66951--is clearly distinguishable. However, Mather's testimony was relatively compelling, even if it did not ultimately persuade the Commission. Accordingly, we hold that respondent could rely upon Mather, and that no reasonable person could conclude that respondent was not entitled to do so. Since an abuse of discretion occurs when no reasonable person could agree with the position taken by the Commission (*Certified Testing*, 367 Ill. App. 3d at 947), we are compelled to conclude that the Commission abused its discretion in imposing fees and costs. We reverse its decision in this respect.

III. CONCLUSION

In light of the foregoing, we reverse the circuit court of Cook County's decision confirming the decision of the Commission insofar as it imposed fees and penalties upon respondent and we affirm in all **[*415]** other aspects. We remand this cause for further proceedings, **if any**, pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794.

Reversed in part and affirmed in part; cause remanded.

McCullough, **[***14]** P.J., and Hoffman, and Holdridge, JJ., concur.

CONCUR BY: Donovan (In Part)

DISSENT BY: Donovan (In Part)

DISSENT

Justice Donovan, concurring in part and dissenting in part:

I concur in the majority's analysis of the issues of injurious practice and causation, **[**1049]** but I cannot concur in the majority's decision to reverse the Commission's decision to impose penalties and fees. The majority quite rightly determined that claimant's cigarette smoking constitutes neither an intervening cause that would relieve respondent from liability, nor an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d)(West 2004)). Given that, Dr. Mather's opinions, which were offered in support of a position or theory that has no basis in existing law, are inconsequential. The respondent has failed to establish reasonable legal support for its decision to terminate TTD benefits and to deny medical expenses. Denying benefits without a legal basis is certainly unreasonable. The Commission's decision to impose penalties and fees is not against the manifest weight of the evidence. Accordingly, I would affirm the circuit court's decision to confirm the decision of the Commission in its entirety.

*2007 Ill. Wrk. Comp. LEXIS 646, *; 7 IWCC 0583*

JOHN HALL JR., PETITIONER, v. **GLOBAL PRODUCTS,** RESPONDENT.

No. 00 WC 1391

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANKAKEE

2007 Ill. Wrk. Comp. LEXIS 646; 7 IWCC 0583

May 14, 2007

CORE TERMS: surgery, fusion, smoking, doctor, treating, bone, temporary total disability, deposition, ill-being, smoker, screw, permanent disability, credible, causally, nicotine, revision, smoke, pain, temporary, temporary disability, present condition, written request, recommended, interbody, cigarettes, nonunion, unpaid, graft, wheel, buffs

JUDGES: Paul W. Rink; Mario Basurto; David L. Gore

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 3, 2006 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the **[*2]** Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

DATED: MAY 14 2007

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(B) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Gregory Dollison, Arbitrator of the Commission, in the city of Kankakee, on December 8, 2005. After reviewing **[*3]** all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues highlighted below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is Petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to Petitioner reasonable and necessary?
K. What amount of compensation is due for Temporary Total Disability?
L. Should penalties or fees be imposed upon Respondent?

FINDINGS

. On August 31, 1999, Respondent **Global Products** *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 injuries that arose out of and in the course of employment.

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

. In the year preceding the injury, Petitioner earned $ 16,640.00; the average weekly wage was $ 320.00.

. At the time of injury, Petitioner was 35 years of age, *married'* with 2 children under 18.

. Necessary medical services *have not* been provided by Respondent in part.

. To date, $ 51,909.04 has been paid by Respondent for **[*4]** TTD and/or maintenance and advances benefits.

Findings of Fact:

Petitioner was employed by the Respondent, **Global Products,** as a laborer. He was 35 years old at the time of his accident. On August 31, 1999, Petitioner was assigned a job requiring him to carry wheel buffs. While carrying the wheel buffs Petitioner slipped and fell and injured his low back. Petitioner testified that prior to the date of August 31, 1999 his condition of health was good and he had no prior problems with his low back.

Petitioner testified that he did not work after August 31, 1999. Petitioner was treated at the Riverside medical center. He was kept off work and has not worked since the date of accident.

Petitioner testified he has had two back surgeries. The first surgery, a L5 - S1 micro discectomy was performed by Dr, Chavez on December 22, 1999. The second surgery, a fusion was performed October 11, 2002, by Dr. Marc Levin. Subsequent to the second surgery, Petitioner continued to treat with Dr. Levin. Throughout his treatment, Petitioner complained of low back pain and burning in the legs. Dr. Levin prescribed medication, physical therapy, multiple diagnostic studies and kept Petitioner off work. **[*5]** (PX 1)

On December 5, 2003, Respondent's IME physician, Dr. Steven Mathor issued a report noting a CT scan taken, on October 29, 2003 revealed Petitioner had a nonunion at L5-S1. Dr. Mathor noted Petitioner also had severe, facet degeneration at the level above, L4-5, with a crack in the lamina of L5 "and more importantly, his left S1 screw is drilled through his left S1 nerve." Dr. Mathor believed additional surgery was required to remove the old instrumentation, re-bone grafting up to the L4 area to address the crack in the lamina and to address the nonunion as well as the degenerative changes at L4-L5. Dr. Mathor also stated the left S1 screw needed a new position, Petitioner was not at maximum medical improvement and that given the above, Petitioner was not able to work. In a subsequent report dated January 6, 2004, Dr. Mathor indicated that "[he] can state categorically that Mr. **Hall's** nonunion has occurred from his smoking." Dr. Mathor indicated that it's clear from extensive medical research that nicotine in any form prevents fusion bone from forming and remodeling. (PX 1)

On February 23, 2004, Petitioner's treating physician, Dr. Levin issued a report indicating it was questionable **[*6]** whether Petitioner's fusion was complete and that "certainly" the left S1 screw needed moving "somewhat" more laterally. Dr. Levin recommended a re-exploration of the L5-S1 fusion, "probably re-fusion" and repositioning of the S1 screw. Dr. Levin also indicated that it would be best if Petitioner stopped smoking at least one month prior to the procedure. (PX 1)

Both Dr. Marc Levin, Petitioner's treating doctor and Respondent's examining physician, Dr. Steven Mather testified via deposition. Dr. Levin testified that Petitioner needed further surgery in the form of an expiration and a repeat fusion. Dr. Levin testified that smoking reduces the rate of fusion "maybe 25 percent of the time" and that the majority of smokers "do fuse." Dr. Levin stated that smoking "can make a difference on the outcome, but certainly it doesn't do so a hundred percent of the time, by far." He felt Petitioner's surgery would be reasonable and necessary. Dr. Levin also testified Petitioner could not return to work and that his current condition of ill-being is causally related to the accident sustained in August 1999. (PX 3)

Dr. Levin testified that the failure rate of fusions in non-smokers is about five **[*7]** percent. He stated smoking was probably one of the factors why Petitioner had a failed fusion. He indicated another factor may be the fact he used alagraft (bone from a cadaver) and not autograft (bone taken from the patient) bone. He indicated the fact that one of the screws was put in the wrong angle was a factor and stated, "sometimes you just don't get a fusion." (PX 3)

Dr. Steven Mather testified that he first saw Petitioner on July 9, 2002. Based on his examination and after reviewing medical records provided, he felt Petitioner had a symptomatic degenerative disc disease at L5-S1 which required a fusion. Dr. Mather stated he advised Petitioner that nicotine and smoking prevents fusions from healing and recommended he stop smoking post surgery so that he could properly heal.

Dr.Mather testified Petitioner's posterior interbody fusion at L5-S1 failed due to his smoking. Dr. Mather explained that nicotine in any form doesn't allow new capillaries to grow in. "They're just stunted." Dr. Mather stated, "the nicotine he ingested essentially caused the failure of capillaries feeding that bone craft - that interbody bone graft..." Dr. Mather indicated the bone graft is there in failed **[*8]** fusion of non smokers while the bone graft dissolves in smokers. He also stated that the failure rate in an interbody fusion "... where somebody with screw fixations and two cages and smoke let's say one pack per day, it's probably going to be around 10, 20 percent." Dr. Mather testified to other causes for non-union.

Dr. Mather testified that he currently recommends "[t]o salvage this with a posterior lateral fusion of L5-S1. He stated that his recommendation is solely due the post surgical smoking of Petitioner. He also stated the treatment Petitioner received up to this point was reasonable and necessary. Dr. Mather testified that he has performed surgery on smokers only after they "... promise to quit smoking..." He also testified that the success rate in smokers is somewhere around 80 to 90 percent. Dr. Mather further testified that the recommended surgery would be reasonable if Petitioner were advised that "[i]f you quit smoking, your chances of healing are 100 percent or near 100 percent. If you continue to smoke, you probably a 10 to 20 percent chance of failure."

Petitioner testified that he wants to stop smoking. He indicated that he worries he can't stop. He stated that **[*9]** every few days he "can do less and less." He also complained of pain in the lower back and legs.

(F); Whether Petitioner's present condition of ill-being is related to the injury, the Arbitrator finds the following:

Petitioner suffered an undisputed accident which arose out of and in the course of his employment on August 31, 1999. On that date Petitioner fell while carrying wheel buffs. Petitioner suffered an injury to his low back. Petitioner had two back surgeries. The second

surgery was a fusion, the fusion failed and Petitioner is in need of a third surgery due to the failed fusion.

Respondent refused to authorize the surgery due to the fact that Petitioner smokes cigarettes. Respondent's doctor agrees the surgery is necessary. Petitioner's treating doctor and Respondent's examining doctor agree the surgery is the result of Petitioner's injury at work.

Both Dr. Marc Levin (Petitioner's treating doctor) and Dr. Steven Mather (Respondent's examining doctor) agree on the need for the third back surgery. Dr. Levin, Petitioner's treating doctor testified that Petitioner's condition of ill-being is related to his accident of August 31, 1999 and the need for the third surgery was **[*10]** the result of that accident (p. 18 -- 20, Dr. Levin's deposition). Dr. Levin, in his deposition refers to the effect smoking has on back surgery and concludes that "I don't necessarily hold operative fusion treatment from them because of that reason." Both Dr. Levin and Dr. Mather testified that surgery is reasonable if a smoker is told to stop smoking, and is advised of the risk of surgery but is really in pain (Dr. Levin p. 18 and Dr. Maters deposition).

It is also noted that the success rate for surgery is approximately 80%.

The evidence clearly indicates Petitioner's condition is related* to his injury at work. All doctors agree Petitioner needs further surgery. Petitioner was pain free prior to his work accident. Petitioner still experiences back pain. The Arbitrator finds the treating doctor (Dr. Marc Levin) testimony is credible. The treating doctors testimony can be given greater weight that Respondent's examining doctor, International Vermiculits vs. Industrial Commission 76 Ill 2d 394 N.E. 2d 1169 (1979).

The Arbitrator finds upon observing the testimony and demeanor of the witness that Petitioner's testimony is highly credible and supported **[*11]** by all treating records. The Arbitrator finds credible the report and deposition of Dr. Marc Levin, the treating orthopedic surgeon which supports Petitioner testimony. The Arbitrator further notes that Dr. Levin's testimony does not differ significantly from Dr. Mathers testimony. Both doctors agree Petitioner needs further back surgery and both doctors agree that the surgery is reasonable (Dr. Mather feels the surgery would be reasonable if Petitioner is advised of the effects smoking would have on his recovery.

The Arbitrator finds based upon review of the medical records, the testimony of the treating and examining doctors that Petitioner has proven his condition of ill-being is causally related to the work injury of August 31, 1999. The Arbitrator further notes that the need for a third surgery to Petitioner's low back is related to said accident.

(J); "Were the medical services provided reasonable and necessary, the Arbitrator finds the following:

Having found that Petitioner's present condition of ill-being causally related to the accident on August 31, 1999, the Arbitrator finds that the medical provided was reasonable and necessary.

Respondent is to reimburse and is liable **[*12]** to Petitioner $ 53,177.91 for medical expenses submitted as Petitioner exhibit # 5. Said expenses remain unpaid.

Respondent is further liable for and is to provide Petitioner the medical expenses for the prospective medical cost for the third surgery (revision of Petitioner's fusion) as testified by Dr. Marc Levin and Dr. Steven Mather. The Arbitrator has found that Dr. Levin's testimony as convincing and is in agreement with Respondent's examining Dr. Steven Mather. Both doctors agree Petitioners need the revision surgery. The Arbitrator finds Petitioner smoking does not constitute a reasonable basis to deny this surgery. Dr. Levin in his testimony at his depositions discusses this issue at pages 19 and 20. The fact Petitioner smokes cigarettes is not a reasonable basis to deny Petitioner his need for revision surgery. The Arbitrator finds Dr. Levin has taken Petitioner's smoking history into account in developing a treatment plan. The Arbitrator concludes that Respondent is liable for that surgery and orders Respondent to authorize it.

(K); Amount of compensation due for temporary total disability, the Arbitrator finds the following:

The Arbitrator finds that Petitioner is entitled **[*13]** to 327-3/7 weeks of temporary total disability. In order to recover temporary total disability benefits, the claimant must prove the injuries arose out of and in the course of employment and that the claimant as a result an has been unable to work.

Dr. Marc Levin at his deposition testified Petitioner on his last visit remained unable to work. Petitioner has testified before the Arbitrator regarding his disability.

The Arbitrator finds Dr. Levin's testimony credible and finds no testimony that rebuts his conclusions. The Arbitrator further notes that the doctors agree Petitioner needs further revision surgery. Based on these findings and the finding as to (F) that Petitioner's condition of ill-being is related to his accident of August 31, 1999. The Arbitrator finds Petitioner was disabled from work from September 1, 1999 through December 8, 2005 the date of Arbitration. This award shall in no instance be a bar to further hearing and determination of a further amount of temporary or permanent disability if any.

(M); Should penalties or fees be imposed upon Respondent, the Arbitrator finds the following:

Petitioner is entitled to penalties pursuant to Section 19(1), 19(k) and 16 **[*14]** of the Act because Respondent's failure to pay temporary disability and medical benefits was unreasonable and vexatious. Petitioner is entitled to $ 69,850.34 in temporary disability 327 3/7 times $ 213.33. Respondent has failed to pay and has unreasonably withheld 95 weeks of compensation or 665 days of unpaid TTD. Petitioner is entitled to $ 2,500.00 pursuant to section 19(1).

Petitioner further is entitled to $ 36,676.90 pursuant to Section 19(k) ($ 20,175.88 unpaid TTD x .5 = $ 10,087.94) + ($ 53,177.91 unpaid medical x .5 = $ 26,588.96) = $ 36,676.90. Petitioner is entitled to $ 14,670.76 pursuant to Section 16 ($ 20,175.88 x .2 = $ 4,035.18) + $ 53,177.91 x .2 = $ 10,635.58) = $ 14,670.76. Respondent has refused to pay Petitioner due to an erroneous belief that Petitioner need for surgery is based on an unreasonable demand. All doctors agree that the surgery is reasonable and necessary. Dr. Levin has testified that' he would not withhold fusion surgery just because someone smoked cigarettes. Dr. Mather feels that the surgery is not unreasonable if Petitioner is advised the effects smoking could have on his recovery.

The Arbitrator finds that Respondent was vexatious in its refusal **[*15]** to pay compensation and the medical bills incurred by the Petitioner.

ORDER

. Respondent shall pay Petitioner temporary total disability benefits of $ 213.34 /week for 327 3/7 weeks, from September 1, 1999 through December 8, 2005 as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act. This award shall in no instance be a bar to further hearing and determination of a further amount of temporary disability or permanent disability if any.

. Respondent shall pay $ 53,177.91 for medical services, as provided in Section 8 (a) of the Act

. Respondent shall pay $ 36,679.90 in penalties, as provided in Section 19(k) of the Act.

. Respondent shall pay $ 2,500.00 in penalties, as provided in Section 19(L) of the Act.

. Respondent shall pay $ 14,670.76 in attorney's fees, as provided in Section 16 of the Act.

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, **[*16]** if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.78 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/1/06

Date

MAY 3 2006

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort

Workers' Compensation & SSDI > Compensability > Injuries > General Overview