NO. 5-94-0445WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

INDUSTRIAL COMMISSION DIVISION

BUTLER SUPPLY COMPANY, INC., Appellant, v. THE INDUSTRIAL COMMISSION et al. (Daniel Hamilton, Appellee).	Appeal from the Circuit Court of St. Clair County. No. 93-MR-194 Honorable Ellen A. Dauber, Judge, presiding.

RULE 23 ORDER

Daniel Hamilton (claimant) and Butler Supply Co., Inc. (employer), entered into a lump sum settlement agreement for the resolution of a claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 1992)) arising from injuries sustained by the employee on November 11, 1989. The contract was approved by the Illinois Industrial Commission (Commission), and the claimant subsequently filed an "Application for Entry of Judgment in Accordance With Final Decision of the Industrial Commission Pursuant to Section 19(g) of the Act." The claimant alleged that the lump sum settlement agreement obligated the employer to pay any outstanding medical bills reasonably related to the employee's work injury that were incurred prior to the date of the contract's approval. The employer alleged that its only obligation under the agreement was to pay the lump sum settlement amount of $40,000. The circuit court found in favor of the

claimant, and the employer appeals from this order. The issue on appeal is whether the settlement agreement obligates the employer to pay outstanding medical expenses in addition to the lump sum settlement amount.

According to contract law, courts must initially determine, as a question of law, whether the language of a contract is ambiguous as to the parties' intent. If the language is clear and explicit, the parties' intent must be derived from the writing itself (*Quake Construction, Inc. v. American Airlines, Inc.* (1990), 141 Ill. 2d 281, 288, 565 N.E.2d 990), and courts will not resort to rules of construction or other extrinsic evidence. (*In re Marriage of Belk* (1992), 239 Ill. App. 3d 806, 809, 605 N.E.2d 86.) A contract is ambiguous only if the language used is reasonably susceptible to having more than one meaning but is not considered ambiguous simply because the parties do not agree on the meaning of its terms. (*Flora Bank & Trust v. Czyzewski* (1991), 222 Ill. App. 3d 382, 388, 583 N.E.2d 720.) The determination of whether an ambiguity exists is made by looking at the entire contract rather than a specific provision. *Flora Bank & Trust*, 222 Ill. App. 3d at 388.

The front page of the document at issue in the instant case contains a section entitled "Medical" which provides:

"Employer has paid all medical bills: Yes x No
If no Employer has not paid:
(a) Doctor bills of $ _____
(b) Hospital bill of $ _____
(c) Other medical bills of $ _____
(d) Total medical bills not paid by the Employer $ _____"

The next page of the agreement contains a section entitled "Terms of Settlement" which provides:

> "Respondent to pay petitioner the lump sum of $40,000 in full and final settlement of all claims resulting from the alleged incident of on or about 11/14/89. Petitioner has already received compensation for 65% of the left leg, 10% of the right leg, and 7.5% of the body as a whole. Payment of $4),000 to petitioner represents an additional 20% permanent partial disability to the body as a whole ($12,000) and includes $28,000 towards future medical expense. Disputes exist to: (1) nature and extent of disability, (2) amount of temporary total disability benefits, if any, to which petitioner may be entitled; (3) responsibility for any medical expense that has been incurred or may be incurred in the future; (4) causal relationship between petitioner's present complaints and the incident of 11/14/89; (5) responsibility for maintenance/retraining expense. It is the purpose of this Contract to effect a full and final settlement of this claim without the right of either party to reopen the case under any provision of the

workers' compensation laws of Illinois, Missouri, or any other jurisdiction."

The circuit court's order stated in relevant part:

> "The agreement, prepared by Respondent, indicates that the Employer/Respondent has paid all medical bills, and also indicates that $12,000 of the $40,000 lump sum payment is to be allocated toward future medical expenses. The contract nowhere on its face indicates that the $40,000 lump sum is to be allocated to past medical expenses, or that the Employer was not paying certain medical bills. Applying well-settled principles of contract interpretation law, the Court finds that Employer agreed to pay all medical bills reasonably related to the Plaintiff's work-related injury." (Emphasis in original.)

The employer first argues that the settlement contract is unambiguous and does not obligate the employer to pay any medical expenses outstanding at the time the settlement agreement was executed and that the circuit court's ruling to the contrary went beyond the literal meaning of the instrument. According to the employer, the circuit court modified the contract statement that "employer has paid all medical bills" to read "employer will pay any and all unpaid medical bills whenever submitted." The employer also states

that the court's interpretation of the agreement is contrary to the "Terms of Settlement" section of the contract.

The employer further argues that the claimant's interpretation of the significance of checking the yes box in the "Medical" section of the contract form causes the preprinted section of the contract to contradict and negate the language of two specific clauses of the "Terms of Settlement" section which state: (1) that a dispute exists as to responsibility for any medical expense that has been incurred; and (2) that the contract was in full and final settlement of all claims. Thus, the employee's proposed construction, by eliminating two separate and specific subsequent terms, violates the general rule of contract law requiring reconciliation of provisions to give each its intended effect. (See *Mayfair Construction Co. v. Waveland Associates Phase I Limited Partnership* (1993), 249 Ill. App. 3d 188, 619 N.E.2d 144.) Where a conflict exists between a typed portion of a contract and a printed form provision of a contract, the typed portion is given effect over the printed portion. (*Brzozowski v. Northern Trust Co.* (1993), 248 Ill. App. 3d 95, 99, 618 N.E.2d 405.) The employer claims that a better interpretation of the printed portion and the typed section is that the employer has disputed responsibility for medical expenses and now pays $40,000 as a final amount to compromise and eliminate further obligation. We disagree.

Considering the four corners of the written instrument, the employer has represented in the "Medical" section of the agreement that all medical bills have been paid. Because no other date is

specified, the plain language indicates that all medical bills are paid as of the execution of the contract. In addition, there is no indication in the "Medical" section that there were any exceptions to the bills paid. We also conclude that, based on the language of the agreement, there is no conflict between the "Medical" section on the printed form and the "Terms of the Settlement" on the typed portion of the agreement. The printed section represents that the employer has paid all medical bills as of the execution of the contract, and the typed section indicates that the parties have agreed to a lump sum settlement of $40,000 to be allocated for the payment of an additional 20% permanent partial disability ($12,000) and future medical expenses ($28,000). Although the employer claims that it indicated its objection to certain medical expenses as evidenced by the statement on the second page of the document that disputes exist to: "(3) responsibility for any medical expense that has been incurred or will be incurred in the future," and that $40,000 was paid in full and final settlement of the disputed amounts, $28,000 has been allocated toward the payment of future medical expense and there was no allocation of the settlement amount for past medical expenses.

Accordingly, the order of the circuit court is affirmed. Because the record is unclear as to which medical bills have not been paid by the employer, the cause is remanded to the circuit court for that determination.

Affirmed and remanded.

RAKOWSKI, J., with McCULLOUGH, P.J., and COLWELL, ELDRIDGE, and RARICK, JJ., concurring.

NO. 5-07-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THOMAS HAGENE,	) Appeal from the
	) Circuit Court of
Petitioner-Appellant,	) Perry County.
	)
v.	) No. 07-MR-2
	)
DEREK POLLING CONSTRUCTION,	) Honorable
	) James W. Campanella,
Respondent-Appellee.	) Judge, presiding

JUSTICE CHAPMAN delivered the opinion of the court:

The petitioner appeals an order of the trial court dismissing his petition to enter a judgment in accordance with a final decision of the Industrial Commission pursuant to section 19(g) of the Illinois Workers' Compensation Act (820 ILCS 305/19(g) (West 2006)). He filed this petition after agreeing to a lump-sum settlement with the respondent. The settlement indicated that the respondent had paid all the petitioner's medical bills; however, three past medical bills remained unpaid. The petitioner argues on appeal that the court erroneously found that the lump-sum settlement relieved the respondent of its obligation to pay his outstanding past medical bills. We reverse.

On June 16, 2003, the petitioner, Thomas Hagene, was injured in a work-related accident when he fell from the scaffolding at a construction site. As a result of the accident, he suffered injuries affecting his left arm and shoulder (requiring surgery), right leg, and lumbar spine. He received temporary total disability benefits for a period of 39 weeks, and then he returned to work.

On July 5, 2005, arbitrator John Dibble approved a workers' compensation lump-sum

settlement between the petitioner and his employer, respondent Derek Polling Construction. The settlement is on a form agreement prepared by the respondent. The first page contains a section called "Medical Expenses." In that section, there is a space to place a check on a line indicating whether the employer has or has not paid all the medical bills. Here, the employer checked that it had paid all the medical bills. Following that, there is an instruction to "[l]ist unpaid bills in the space below." That space is empty. The first page also contains a section entitled "Temporary Total Disability Benefits." That section provides spaces on which the parties can indicate the beginning and ending dates of the period that an employee was totally temporarily disabled. Both spaces are filled in with "Disputed–See terms of settlement."

On the second page, a section entitled "Terms of Settlement" provides, in relevant part, as follows:

> "The Respondent offers and the Petitioner accepts the lump sum of $20,036.10 in full, final, and complete settlement of any and all claims whatsoever under the Illinois Workers' Compensation Act ('Act') [(820 ILCS 305/1 *et seq.* (West 2002))] *** resulting from *** the alleged accidental occurrence on or about June 16, 2003. *** This lump sum is in full and final settlement of any and all claims, including, but not limited to, temporary total disability compensation, past, present, and/or future medical and hospital bills, death, vocational rehabilitation, permanent partial disability to Petitioner's left arm and right leg under Section 8(e) of the Act [(820 ILCS 305/8(e) (West 2002))], and permanent partial disability to petitioner's person as a whole under Section 8(d)(2) of the Act [820 ILCS 305/8(d)(2) (West 2002))]. *** The Petitioner expressly represents and agrees that prior to the approval date of this contract, the Petitioner submitted to the Respondent all reasonable, necessary, and causally related medical and hospital bills[] and that the Respondent has fully satisfied the same prior

to the approval date of this contract. At the applicable permanency rate of $284.20, this settlement includes 30% (70.5 weeks) loss of use of petitioner's left arm, under Section 8(e) of the Act."

On January 11, 2007, the petitioner filed an application for the entry of a judgment in accordance with a final decision of the Industrial Commission pursuant to section 19(g) of the Workers' Compensation Act (820 ILCS 305/19(g) (West 2006)). The petitioner alleged that the settlement required the respondent to pay all the petitioner's medical bills to the date of the settlement and that the following bills remained unpaid: $2,326.25 to Dr. Mark Miller, $17,311 to Timberlake Surgery Center, and $340 to I-Flow, totaling $19,977.25.

On February 16, 2007, the respondent filed a motion to dismiss the petitioner's petition. The respondent argued that the "Terms of Settlement" paragraph prohibited the petitioner from requesting the payment of these bills.

On February 27, 2007, the court held a hearing in the matter and entered an order granting the respondent's motion to dismiss on March 6. The court found that the respondent's obligation had been "satisfied of record." This appeal followed the denial of the petitioner's motion to vacate and reconsider.

The petitioner argues that the trial court erred in its interpretation of the lump-sum settlement agreement. He contends that (1) the contract did not prohibit him from seeking reimbursement for the medical bills at issue, (2) the "Terms of Settlement" section did not relieve the respondent of its obligation to pay all causally related medical expenses, and (3) assuming that the contract is ambiguous, it was drafted by the respondent and must therefore be construed against the respondent. The respondent argues that (1) the settlement unambiguously provides that it had fulfilled its obligation to pay all the petitioner's medical bills and (2) because the parties agree, and the court found, that the settlement is unambiguous, there is no need to resort to a rule of construction such as that found in the

petitioner's final argument.

"A release is a contract wherein a party relinquishes a claim to a person against whom the claim exists, and a release is subject to the rules governing the construction of contracts." *Carona v. Illinois Central Gulf R.R. Co.*, 203 Ill. App. 3d 947, 951, 561 N.E.2d 239, 242 (1990). However, when interpreting settlement contracts, Illinois courts routinely look to the intent of the parties in order to ascertain the scope and extent of the claims released. *Ainsworth Corp. v. Cenco, Inc.*, 107 Ill. App. 3d 435, 440-41, 437 N.E.2d 817, 822 (1982). "Particularly with a release, this intent ' "is discerned from the language used *and the circumstances of the transaction*." ' " (Emphasis in original.) *Farmers Automobile Insurance Ass'n v. Kraemer*, 367 Ill. App. 3d 1071, 1074, 857 N.E.2d 691, 694 (2006) (quoting *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 838, 648 N.E.2d 317, 321 (1995) (quoting *Carona*, 203 Ill. App. 3d at 951, 561 N.E.2d at 242)). We are able to examine the circumstances surrounding the transaction without changing the terms or creating an ambiguity. *First Bank & Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 46, 787 N.E.2d 300, 310 (2003).

We thus begin our analysis by examining the fact that the settlement arose in the context of a workers' compensation claim. The purpose and policy embedded in the Workers' Compensation Act is to promote the general welfare of the citizens of the state. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181, 384 N.E.2d 353, 357 (1978). The Workers' Compensation Act affords protection to workers by providing prompt and equitable compensation for workplace injuries. *Kelsay*, 74 Ill. 2d at 180-81, 384 N.E.2d at 356. It is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 596, 119 N.E.2d 224, 228 (1954). The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Martin v. Kralis Poultry Co.*, 12 Ill. App. 3d 453, 460,

297 N.E.2d 610, 615 (1973).

It is important here to emphasize that the employer's obligation to pay all the medical bills related to the petitioner's work injury flows not from the settlement contract, but from the Workers' Compensation Act. See 820 ILCS 305/8(a) (West 2002) (requiring an employer to pay for all the necessary medical care and first aid causally related to an on-the-job injury). The employer is, of course, only required to pay for care that is reasonably required to treat injuries that are actually caused by the work-related accident. *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 717, 609 N.E.2d 775, 781 (1993) (citing *Quality Wood Products Corp. v. Industrial Comm'n*, 97 Ill. 2d 417, 423, 454 N.E.2d 668, 671 (1983)). If there is a dispute over whether any of the petitioner's injuries are, in fact, causally connected to his or her on-the-job accident, the parties may choose to resolve this dispute as a part of a settlement. If the parties agree that only some of the medical bills are causally related, there may well be disputed unpaid medical bills for which the employer is, by agreement, not obligated to pay. However, unlike the indicated dispute over the length of total temporary disability here, the settlement agreement does not indicate a dispute regarding whether any of the bills were causally related. Instead, in the medical-expenses section it indicates that the employer has paid all the medical bills. Paradoxically, the respondent conceded at oral argument that the bills at issue were in fact causally connected to the petitioner's accident. Nevertheless, the respondent argues that, because the settlement contract is unambiguous, the actual facts surrounding the execution of the settlement are immaterial because we are foreclosed from any extraneous consideration under contract law. Essentially, the respondent wants us to decide this case in a vacuum, looking only to the four corners of the document.

Fortunately, we do not find ourselves to be so constrained under Illinois law. "No form of words, no matter how all-encompassing, will foreclose a court's scrutiny of a release

or prevent a reviewing court from inquiring into the surrounding circumstances to ascertain whether it accurately reflected the parties' intention." *Kraemer*, 367 Ill. App. 3d at 1074, 857 N.E.2d at 694.

Here, the amount of the settlement–$20,036.10–does not include *any* amount for the payment of medical bills. The settlement amount was calculated following the statutory guidelines for permanent partial disability. Section 8(e) of the Workers' Compensation Act (820 ILCS 305/8(e) (West 2002)) provides that an injured employee who permanently loses the use of any body part is to be compensated for that loss. The amount of that compensation is determined, in part, by the amount of weekly compensation the employee receives for total temporary disability under section 8(b)(1) of the Workers' Compensation Act (820 ILCS 305/8(b)(1) (West 2002) (providing that an employee is to receive 66⅔% of his or her normal weekly salary while totally temporarily disabled)). 820 ILCS 305/8(e) (West 2002). The petitioner was entitled to $284.20 per week while totally temporarily disabled using this formula. For a total permanent loss of the use of an arm, an employee is entitled to the equivalent of 235 weeks of total temporary disability. 820 ILCS 305/8(e)(10) (West 2002). The parties here agreed that the petitioner's loss of the use of his arm was 30%, and he was therefore entitled to 30% of 235 weeks, or 70.5 weeks. Multiplying 70.5 weeks by his weekly total temporary disability amount ($284.20) yields a total of $20,036.10. That was the full extent of the settlement, thus making it clear that no part of the settlement amount was compensation for past unpaid medical bills related to the accident.

Nonetheless, the respondent argues that by entering into the settlement contract, the petitioner waived his right under the Workers' Compensation Act to obligate the respondent to pay for unpaid related medical bills. Unquestionably, employees can and do contract away their right to have past and future related medical expenses paid for by their employers. However, a waiver of important statutory rights must be explicit. See *Gallagher v. Lenart*,

226 Ill. 2d 208, 237-38, 874 N.E.2d 43, 61 (2007) (finding that general release language was insufficient to waive an employer's statutory right to a workers' compensation lien in a related suit against a third party on the basis that statutory rights must be explicitly waived). The supreme court in *Gallagher* went on to cite a number of other cases requiring an explicit waiver, stating: "We note it is not uncommon to require the explicit waiver of certain rights. In various other contexts, where an important statutory right is at issue, an explicit manifestation of intent is required before the right in question can be deemed waived." *Gallagher*, 226 Ill. 2d at 239, 874 N.E.2d at 62.

The respondent points to the "Terms of Settlement" section in support of its argument that the payment of the petitioner's past medical bills was specifically waived. Were we to read these terms in isolation, we would be inclined to agree with this interpretation. However, we are instructed to give effect to *all* the relevant contractual language to resolve the question of the parties' intent. *Gallagher*, 226 Ill. 2d at 241, 874 N.E.2d at 63. This includes the contract recitals in which the respondent indicated that it had paid all the medical bills, when in truth and in fact it had not. "[W]hile recitals are not [an] operational part of [a] contract between the parties, they reflect the intent of the parties and influence the way the parties constructed the contract." *First Bank & Trust Co. of Illinois*, 338 Ill. App. 3d at 48, 787 N.E.2d at 311 (citing *Yoemans v. Brown*, 239 Ill. App. 117, 124 (1925), and 5 M. Kniffin, Corbin on Contracts §24.7, at 37 (rev. ed. 1998)). The contract recitals create a context through which the operational portion of the contract can be better understood, because they indicate the relevant circumstances to its execution. *First Bank & Trust Co. of Illinois*, 338 Ill. App. 3d at 48, 787 N.E.2d at 311.

When we consider the entire contract in the context of all the surrounding circumstances, we conclude that the parties did not intend to discharge the respondent's statutory obligation to pay the petitioner's past related medical bills. What is clear from the

surrounding circumstances is that the settlement was premised on the understanding that the respondent had in fact paid all the outstanding medical bills to the date of the settlement as indicated in the contract recital. To find otherwise would result in a windfall to the respondent, because it would be absolved from paying bills as required by statute without paying the petitioner any real consideration (the settlement amount almost equals the unpaid medical bills) as well as a loss to the petitioner (after the payment of the medical bills in question and attorney fees). This is a result the parties never could have intended. We will not interpret the settlement contract in such a way to defeat a claim not then in the minds of the parties. *Gladinus v. Laughlin*, 51 Ill. App. 3d 694, 696, 366 N.E.2d 430, 432 (1977). To do so would not only lead to an absurd and unjust result but also seriously undermine the remedial purpose of the Workers' Compensation Act.

For the reasons stated, we reverse the order of the trial court dismissing the petitioner's application for a judgment in accordance with section 19(g) of the Workers' Compensation Act. We remand.

Reversed; cause remanded.

STEWART and WELCH, JJ., concur.

NO. 5-07-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THOMAS HAGENE, Petitioner-Appellant, v. DEREK POLLING CONSTRUCTION, Respondent-Appellee.	) Appeal from the) Circuit Court of) Perry County.)) No. 07-MR-2)) Honorable) James W. Campanella,) Judge, presiding

Opinion Filed: February 24, 2009

Justices: Honorable Melissa A. Chapman, J.

Honorable Bruce D. Stewart, J., and
Honorable Thomas M. Welch, J.,
Concur

Attorneys for Appellant: Thomas C. Rich, Jennifer L. Barbieri, Thomas C. Rich, P.C., 6 Executive Drive, Suite 3, Fairview Heights, IL 62208

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*2009 Ill. Wrk. Comp. LEXIS 56, **

LEONEL **CHAMORRO,** PETITIONER, v. **WORKFORCE** STAFFING, RESPONDENT.

NO: 07 WC 38033; 09 IWCC 0055

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 56

January 16, 2009

CORE TERMS: arbitrator, utilization, pain, temporary total disability, review report, light duty, neurologist, physical therapy, pre-existing, return to work, right leg, causation, lumbar, exam, film, permanent disability, supplemental report, scientific evidence, legislative intent, medical community, medical treatment, present condition, written request, plain language, chiropractor, recommended, prescribed, orthopedic, worsening, underwent

JUDGES: David L. Gore; James F. DeMunno; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for. Review under §19b having been filed by the Respondent herein and notice given-to all parties, the Commission, after considering the issue(s) of temporary total disability, causal connection, medical expenses, prospective medical 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 April 14, 2008 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 Circuit Court has expired without **[*2]** 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 $ 12,300.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JAN 16 2009

ATTACHMENT:

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 **Mitton Black**, arbitrator of the Commission, in the city of **Chicago**, on **February 27, 2008**. After reviewing all of the **[*3]** evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the 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?
N. Other **Prospective medical treatment; Should the respondent authorize an examination by a neurologist?**

FINDINGS

On **July 31, 2007**, the respondent **Workforce Staffing *was*** operating under and subject to the provisions of the Act.

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

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **21,320.00**; the average weekly wage was $ **410.00**.

. At the time of injury, the petitioner was **32** years of age, ***single*** with **0** children under age 18.

. Necessary medical **[*4]** services ***have*** been provided by the respondent.

. To date, $ **0.00** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER.

. The respondent shall pay the petitioner temporary total disability benefits of $ **273.33**/week for **22** weeks, from **September 27, 2007** through **February 27, 2008**, 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.

. The respondent shall pay $ **6,159.09** for medical services, in accordance with the medical fee senequte as provided in Section 8.2 of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **0.00** in attorneys' 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 **[*5]** disability, if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this aware, interest or 1.60% 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

April 11, 2008

Date

STATEMENT OF FACTS

The Petitioner testified that he has been employed by the Respondent since 1997 as a machine operator. He testified that on July 31, 2007 at about 8 AM he was in the process of cleaning a machine. He testified that in order to clean the machine he and a coworker had to lift a platform weighing approximately one hundred fifty to two hundred pounds. He testified that he and his coworker lifted the platform from the same side, but his coworker dropped it, and the weight fell on the Petitioner. He testified that he felt a pop in his right lower back, and that his **[*6]** right leg began to swell. He testified that he told his supervisor and then continued working until 11 AM.

The Petitioner testified that he was sent to a Concentra Medical Center by the Respondent on that day. The treatment records from the initial visit recite that the Petitioner was examined by Dr. Richard Fairbrother and that the Petitioner complained of pain in his right lower back as well as right lower knee, calf, heel, and ankle. He was released to return to work that day with restrictions of no repetitive lifting, pushing and/or pulling over fifteen pounds, no prolonged standing and /or walking longer than tolerated, and no squatting and/or kneeling. The Petitioner followed up with Dr. Charles Carlton at Concentra on August 2, 2007 with continued complaints of right sided lower back. He was released to return to work that day with the same restrictions. Dr. Carlton recommended that the Petitioner continue to undergo physical therapy, which the Petitioner did. He had a follow up exam with Dr. Carlton on August 7, 2007. The records recite that the Petitioner felt his pattern of symptoms was worsening, including right leg pain; that the Petitioner was working within his restrictions; **[*7]** and that he was referred for an MRI (PX1).

The Concentra physical therapy records of August 8, 2007 recite that that the Petitioner was experiencing increased pain radiating from his lower back and into his right leg into the toes. Physical therapy was discontinued until MRI results became available. The Petitioner saw Dr. Carlton on August 14, 2007 and August 21, 2007 with the same complaints with no improvement. At the Respondent's request the Petitioner underwent a Section 12 examination and record review by Dr. Julie Weimer on September 6, 2007. Her first report stated that the Petitioner was not yet at maximum medical improvement, that an MRI should be performed, that physical therapy should be stopped until the results were available, that she did not see any preexisting condition, and that he could continue to work at light duty (RX1).

The Petitioner underwent a lumbar spine MRI on September 14, 2007 at Westchester Diagnostic Imaging Center, as ordered by Dr. Weimer. Then he was examined by Dr. Carlton on September 18, 2007. The Petitioner testified that he told Dr. Carlton that the pain was very strong and that he did not sustain a new injury to the low back or right leg. **[*8]** The Concentra records state that the Petitioner felt the pattern of symptoms was worsening, that the physical therapy did not make him feel better, and that after taking prescribed medications he did not feel better. After reviewing MRI, which Dr. Carlton stated showed no evidence of structural derangement, he released the Petitioner to regular activity and from medical treatment. In his chart note Dr. Carlton opined that he

did not believe the Petitioner's current back pain was a direct result of the July 31, 2007 injury at work. Dr. Carlton noted that the Petitioner expressed disagreement with the assessment. Dr. Carlton advised the Petitioner to see his private doctor for the persistent and worsening lower back pain (PX1).

The Petitioner testified that he then did so and followed up with Dr. Vargas, a chiropractor, at Los Quiropracticos on September 22, 2007. He was advised to begin a course of therapy at Los Quiropracticos and was referred to Dr. Ernesto Padron, an orthopedic physician, at Diversey Medical Center. Dr. Vargas advised the Petitioner to remain off of work beginning on September 27, 2007 (PX2).

The Petitioner testified that on October 8, 2007 he had his first visit **[*9]** with Dr. Padron. Dr. Padron noted the Petitioner's history and complaints. Dr. Padron requested the Petitioner bring in his MRI films so that he could personally review them. He also prescribed a lower extremity EMG/NCV, medication, and to continue therapy three times per week (PX3).

The Petitioner testified that the EMG/NCV testing was done on October 17, 2007 at Oakbrook Medical and Diagnostic Group. The EMG revealed a right L4 radiculopathy.

Dr. Padron examined the Petitioner on October 22, 2007 and November 5, 2007; he had the same complaints of pain. At the November 5, 2007 exam Dr. Padron had reviewed the electrographic testing results and the MRI films. He noted that the electrographic testing showed right L4 radiculopathy. He noted that the MRI film showed what appeared as a possible L4-L5 small amount of bulging, that the film quality was not great, and that he would like a repeat MRI. Dr. Padron referred the Petitioner for a repeat MRI (PX3). At the Petitioner's request, Dr. Padron released the Petitioner to light duty work at the November 5, 2007 exam. The Petitioner testified that he gave the light duty note to and spoke to Melissa Garcia at the Respondent's work location, **[*10]** but he did not return to work, because she would not accept him with restrictions.

The Petitioner underwent a repeat MRI at Advanced Diagnostics, as ordered by Dr. Padron, on December 6, 2007. This MRI showed only minimal degenerative changes (PX3). The Petitioner testified that he followed up with Dr. Padron on December 10, 2007, that he was advised to continue his chiropractic treatment, and that he was referred to a neurologist. Dr. Padron ordered the treatment (PX4). The Petitioner testified that he wants to see a neurologist, as recommended by Dr. Padron.

The Petitioner testified that his pain is worse in the mornings and at night. He testified that he has difficulty sleeping due to his pain. He testified that approximately four to five days per week he has to sleep on the floor with his leg elevated by a pillow to help alleviate some of his pain. He testified that he has the same type of pain as when he had first treated at Concentra, but the pain has actually become worse over time. He testified that he has pain after standing for one or two hour. He testified that his job for the Respondent requires him to stand eight hours per day with one thirty minute lunch break and one **[*11]** ten minute break during the work day.

The Respondent submitted Dr. Wehner's supplemental reports dated September 6, 2007 (sic) and February 5, 2008. The first supplemental report recommended physical therapy and light duty (RX2). The February 5, 2008 supplemental report was prepared after a re-examination. That supplemental report recited that the Petitioner had mild Waddell signs, which Dr. Wehner did not elaborate; that the Petitioner was at MMI; that he had no permanent disability, and that the prognosis was for a full recovery (RX3).

The Respondent submitted into evidence a February 18, 2008 utilization review report authored Dr. Robert Porter, an occupational medicine physician, with Elite Physicians Ltd. That report recited that the Petitioner sustained a prior back injury, on September 4, 2002, as documented by Concentra medical records, that he then had a soft tissue lumbar sprain/strain as a result of the July 31, 2007 lifting incident, that his subjective complaints were out of proportion to any objective clinical findings, and that treatment should have ended after 8 weeks (RX4).

The Respondent submitted into evidence a surveillance video, four minutes and forty one seconds **[*12]** in duration, showing the Petitioner on several occasions on August 29, 2007, September 5, 2007, and September 7, 2007. The video depicted the Petitioner moving, walking and driving (RX6).

CONCLUSIONS OF LAW

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

The Petitioner's testimony about his physical complaints is corroborated by the medical records. Dr. Wehner's first two reports did not dispute causation. In her third I report she appears to be advocating, such as when she states there are some mild Waddell signs, which she does not explain. Furthermore the Petitioner's testimony about his physical complaints is consistent with the sequence of events.

The Respondent's proposed findings assert that the Arbitrator's finding regarding causation should be based, in part, on the utilization review report. However, pursuant to Section 8.7(a) and Section 8.7(i) of the Act, a utilization review will be considered in the determination of the reasonableness and necessity of the medical bills and treatment. The plain language does not include words like causation or causal connection. Therefore a finding regarding causation based upon utilization **[*13]** review would be contrary to legislative intent. Accordingly the Arbitrator shall not consider the utilization review report on the issue of causal relationship.

Based upon the foregoing analysis, the Arbitrator finds that the Petitioner's present condition of ill-being is causally related to his work injuries of July 31, 2007.

(J) Were the medical services that were provided to petitioner reasonable and necessary?

The Petitioner's proposed findings make no reference to the utilization review.

The Respondent's proposed findings rely heavily on utilization review on the issues of medical bills and treatment. The Respondent's proposed findings characterize utilization review as scientific evidence. However the plain language Section 8.7(a) through Section 8.7 (j) of the Act does not include words like scientific evidence, extraordinary evidence, or super evidence. Therefore relying upon utilization review as scientific evidence would be contrary to legislative intent. Accordingly utilization review will be considered by the Arbitrator, along with all other evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical **[*14]** bills or treatment.

The Petitioner did not object to the Respondent's utilization review report. However admissibility does not equate to weight or sufficiency. In this case the utilization review is not entirely impartial or non partisan. The report includes answers to questions framed by the Respondent's attorney in a light favorable to the Respondent. For example the first question includes reminders to "**please keep in mind Petitioner's two negative MRIs performed September 14, 2007 and December 6, 2007 as well as the minimal findings upon multiple physical examinations**" (emphasis in the original). The second question refers to the EMG finding and then asks "**Does this finding alter the medical community's recommendation on the on the type and degree of treatment to address the Petitioner's lumbar strain?**" (emphasis in the original). This answer would speak for the Respondent and for the entire medical community. The third question asks "**Does the medical community agree that the Petitioner has reached MMI for his lumbar strain of July 31, 2007?**" (emphasis in the original). This answer, too, would speak for the Respondent and for the entire medical community. The second **[*15]** and third questions and answers purport to be treated as extraordinary evidence.

The Arbitrator finds that the utilization review is not persuasive.

The Respondent's proposed findings refer to Dr. Padron as a chiropractor; however he is an orthopedic physician.

The Petitioner was still symptomatic when he was treated by his chiropractor, Dr. Vargas. The Petitioner was still symptomatic when he was told by Dr. Padron, his orthopedic physician, to continue the chiropractic treatment. The medical fee schedule mathematical analysis (PX7) of Dr. Vargas and Los Quiropracticos was agreed to by the Respondent. Therefore, the Arbitrator finds that the Respondent shall pay the outstanding balance of Dr. Vargas and Los Quiropracticos in the amount of $ 5,439.03. The medical fee schedule mathematical analysis (PX6) of Dr. Padron was agreed to by the Respondent. Therefore, the Arbitrator finds that the Respondent shall pay the outstanding balance of Dr. Padron in the amount of $ 720.06.

(K) What amount of compensation is due for temporary total disability?

The Respondent's proposed findings assert that the Arbitrator's finding regarding temporary total disability should be based, in part, **[*16]** on the utilization review report. However the plain language of Section 8.7(a) and Section 8.7(i) of the Act does not include the words temporary total disability. Therefore a finding regarding temporary total disability based upon utilization review would be contrary to legislative intent. Accordingly the Arbitrator shall not consider the utilization review report on the issue of temporary total disability.

The Arbitrator finds that the Petitioner is due compensation for temporary total disability from September 27, 2007 through the date of hearing, February 27, 2008. The Petitioner was unable to work, and he was under his treating doctors' orders during this time. The Petitioner attempted to return to work after his November 5, 2007 exam with Dr. Padron, when he asked the doctor for a light duty release, because he needed the money. Dr. Padron agreed to allow an attempt at light duty work. However, the Petitioner was advised that the Respondent no available light duty work.

Therefore, the Arbitrator finds that the Respondent shall pay the Petitioner temporary total disability benefits from September 27, 2007 through the hearing date, February 27, 2008.

(N) Should the Respondent [*17] authorize prospective medical treatment, namely an examination by a neurologist, as prescribed by Dr. Padron?

In light of the prior findings an examination by a neurologist does not appear to be unreasonable. The Arbitrator has already considered and found not persuasive the utilization review. The Respondent's short surveillance video depicting the Petitioner moving, walking and driving is unhelpful. The Arbitrator notes that the Respondent's company clinic physicians at Concentra made no mention of a pre-existing injury and that the Respondent's Section 12 examining physician, Dr. Weimer, wrote that she did not see any preexisting condition. The Petitioner's treating physicians, Dr. Vargas and Dr. Padron made no mention of a pre-existing injury. However the utilization review report mention records of a pre-existing injury. Assuming those records exist, they were not submitted to the Arbitrator by either party. Furthermore the Petitioner was not asked about any pre-existing injury by either party. Why a pre-existing injury is mentioned in the utilization review report only and the record is silent thereafter has not been addressed by either party. It may be useful to do so in **[*18]** future proceedings.

The Arbitrator finds that the Respondent shall authorize and pay for an examination by a neurologist.

Legal Topics:

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

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

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RECORDS PROVIDED FOR REVIEW:

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Prior to DOL

On September 4, 2002 Petitioner presented to Concentra Medical Center due to back pain. He stated he was lifting a metal scrap barrel when he felt a snap in his back. Petitioner complained of lower back pain with prolonged sitting. No bilateral numbness, tingling or weakness was reported. No radicular pain was noted. No tenderness was present in the lumbar region. Full AROM without pain was reported. Bilateral Straight Leg Raise and Waddell's tests were negative bilaterally. X-rays of the lumbar spine were negative. Petitioner was diagnosed with back pain. He was instructed to take ibuprofen and to return to work at his regular duties.

Post DOL

On July 31, 2007 petitioner, 32 years old, presented to Concentra Medical Centers complaining of back pain. He stated he was lifting 150 pound bed frame when his partner slipped and placed all the weight on him. Petitioner reported he felt a pull in his back and right leg and developed pain in those areas. Petitioner stated his pain was 9/10. No numbness, tingling, paresthesias were reported in his lower extremities. The right knee joint was noted to be stable. No swelling, bruising, tenderness, locking or deformities was observed. The drawer sign, McMurray's, Lachman's and Patellar grind tests were negative. The right ankle demonstrated no deformity. Tenderness was noted laterally over the proximal tibia. The remainder examination of the lower leg was reported be unremarkable. The bilateral leg raise was noted to be negative. A decrease in lumbar AROM due to pain was observed. Tenderness was present throughout right side of the spine from T-10 to L-3. Petitioner was diagnosed with a lumbar strain and pain. He was given an ice pack, instructed to begin physical therapy and prescribed

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ibuprofen and Cyclobenzaprine. Petitioner could return to work with the following restrictions: no repetitive lifting, pushing or pulling of 15 pounds. No squatting, kneeling or prolonged standing or walking. MMI was expected two weeks from this date. He was scheduled to return for a follow-up on August 2, 2007.

That same day Petitioner attended physical therapy until August 8, 2007 for his back and right leg pain/lumbar strain for a total of four visits. Sx's are exacerbated by trunk AROM. Trunk ROM WNL except: ERP and Flexion 60 degrees. Seated straight leg raise negative; supine negative; hamstring length positive -45 on R L-20 degrees. PT 3x week until goals met. Petitioner underwent electrical stimulation, manual therapy, therapeutic exercises, ROM, strengthening, conditioning and a home exercise program during all these visits. Throughout these visits, Petitioner's condition would be better or worse on a day to day basis.

On August 2, 2007 Petitioner was seen by Dr. Charles Carlton at Concentra for a follow up on his right lower back and leg pain. He stated his lower back pain had not improved but he had some improvement of the right leg. Petitioner then noted left shoulder pain. The bilateral shoulder ROM and strength was reported normal. The bilateral leg raise was noted as negative. Very limited lumbar ROM was observed on the flexion and extension. Full ROM of the knee and ankle was present. X-rays of the lumbar spine revealed no fractures, subluxation, destruction or spondylolisthesis. Petitioner was diagnosed with a lumbar strain. He was instructed to continue taking ibuprofen and Cyclobenzaprine, physical therapy, remain under the same work restrictions and begin an HEP. Charles Carlton, M.D.

On August 7, 2007 Petitioner presented to Dr. Carlton to follow-up on his lower right back and leg pain. He reported the pains were worse in his back and leg. Petitioner stated the pain in his leg was now affecting his calf. Paresthesia was reported in the right leg. He was diagnosed with lumbar pain. An MRI was ordered to rule out radiculopathy. Petitioner was taken off ibuprofen because of its side effects. He was prescribed Ultram, advised to continue the same work restrictions and await the approval for the MRI. There is a therapy progress note stating pt reports increased pain in R LB region during sitting at work. Pt indicates he is working modified activity with acceptable tolerance. Trunk ROM 50% deficit and ERP with all planes of movement. Tenderness noted to R glut med. Piriformis, TFL, QL and oblique MM. Pt tolerated treatment without adverse reactions. Continue therapy with same frequency and duration. Therapy services provided by Constantine P. Bolos, P.T.

On August 14, 2007 Petitioner was seen by Dr. Carlton for a follow-up on his lumbar strain. He reported he was still in pain and had not undergone his MRI. Petitioner stated his right leg pain was worse. A decrease in the lumbar AROM was noted. Petitioner was diagnosed with lumbar pain and right leg pain. He was prescribed Tramadol, advised to remain under the same restrictions and await approval for the MRI. PT progress note states pt has been experiencing increased RLE pain that radiates laterally into the toes, starting from LB. Per conversation with M.D., pt to D/C therapy until MRI results are available. Chris Gries, DPT.

On August 21, 2007 Petitioner presented to Dr. Carlton for his back pain. He was diagnosed with lumbar pain with radicular right leg pain. Petitioner was instructed to remain under the same restrictions while he awaited the MRI approval.

Independent Medical Examination –Dr. Wehner

On September 6, 2007 Petitioner underwent an IME with Dr. Julie Wehner of Loyola University Medical Center for his lower back and right leg pain. He stated he was injured at work while moving a

large metal with the help of another person when he felt a crack and twist in his back. Thereafter, he developed low back and right leg pain. He denies any prior chiropractic tx, any prior work-related injuries or any other back problems. He has not had any previous x-rays or MRIs of his back. He does not have a PCP. Upon physical examination, Petitioner was noted to have a mild limp to the right. No paraspinal spasms or scoliosis was reported. The straight leg raise was mildly positive at 90 degrees on the right side. His knee and ankle reflexes were normal and motor strength was normal. Petitioner was diagnosed with low back pain. Dr. Wehner recommended a MRI and advised Petitioner not to attend physical therapy until he received one. He was instructed to continue on light duty and MMI was yet to be determined.

A letter dated 09/06/07 from Dr. Wehner reported she had reviewed Petitioner's current MRI dated 9/14/07 and advised it was normal. She recommended he attend physical therapy twice a week for two weeks. Thereafter, Dr. Wehner reported Petitioner should be able to return to full duty and be at MMI. Until then, Petitioner was instructed to continue light duty.

On September 14, 2007 Petitioner underwent a lumbar MRI due to low back and right leg pain. No spondylolisthesis, impingements, infiltrative processes, destructive processes or paraspinous abnormalities were reported. The MRI revealed a normal lumbar spine.

On a 09/18/07 visit with Dr. Charles L. Carlton, pt was advised that there was no evidence of structural derangement note on his MRI scan. Dr. Carlton explained to pt that LBP secondary to muscle strain improves, but does not worsen over a 6-7 month time frame. I do not believe that his current is a direct result of the injury event that occurred at work on 07/31/07. I recommended he see is private doctor for this problem. The employee expressed disagreement with my assessment. ACTIVITY STATUS: Regular activity, pt released from medical care and to return to regular duty on 09/18/07.

Between September 22 through December 11, 2007 Petitioner presented to Los Quiropraticos for therapy on his lower back and right leg for a total of 23 visits. DX is lumbar radiculitis – add sacroiliac sprain/strain. Petitioner underwent electrical muscle stimulation, therapeutic exercises, myofascial release, mechanical traction, infrared lamp, cold and hot packs, U/S, ROM and a home exercise program during all these visits. Throughout these visits, Petitioner's condition would be better or worse on a day to day basis. Overall, he reported minimal improvement in pain. The only comment available on these visits is "improving." Symptoms remain the same however. There is an 11/06/07 chiropractic visit which notes under comment, "Pt re-injure his back doing some cleaning at his home." The notes are difficult to read and some are in Spanish. There are no actual "progress reports", there are only checkmarks on each page of treatment showing sxs are Improving, Same, or Worse, and under Assessment of Progress, "As Expected, Slower than Expected, Faster than Expected, and No Improvement." On the last visit of 12/11/07 sheet is marked "improving" and "As expected." Plan shows "Continue tx plan as reasonable and necessary per standing order" but this is the last visit noted.

A work status report by Eduardo Vargas, DC dated September 27, 2007 noted Petitioner was unable to work until October 12, 2007. His diagnosis was an acute lumbar sprain/strain.

On October 8, 2007 Petitioner presented to Dr. Ernesto Padron for a consultation on his low back pain with radiculopathy. Upon physical examination, Petitioner was noted to have difficulty rising and sitting. Gait was reported abnormal, shuffled and favoring the right lower extremity. Pain was positive with flexion and extension, and left lateral flexion and right rotation. A decrease in strength was reported on the right leg compared to the left. Flexion to 50 degrees is positive more so than ext. to 40 degrees. Sensation was decreased in the right L4 distribution. The straight leg raise was

negative on the left and positive on the right at 30 degrees. Patrick's test was observed negative bilaterally. Petitioner was advised to obtain an EMG/NCV for his lower extremity. He was given Tramadol, instructed to continue ibuprofen, continue therapy and excused from working until his EMG/NCV was obtained. Ernesto Padron, M.D.

On October 17, 2007 Petitioner underwent an EMG of his lower extremities. The study revealed abnormal results and evidence of a right, L4 radiculopathy. Clinical correlation was required.

On October 22, 2007 Petitioner followed up with Dr. Padron. He continued to complain of pain. The Patrick's test was negative. Tenderness was reported in the right PSIS. No SI joint tenderness was observed. Hanging leg on the right was positive. Petitioner was advised two more weeks of conservative treatment until the results of the EMG were received. He was excused from working until his next appointment.

On November 5, 2007 Petitioner presented to Dr. Padron to review the EMG/NCV and MRI from September 14, 2007. A mild bulging at L4-L5 was revealed on the MRI. The MRI quality was noted to be poor. Mild improvement was reported with therapy. A normal gait was observed. On px exam, pt rises and sits with difficulty. Flexion to 50 degrees reproduces pain more so than extension to 40 degrees. L lateral flex and R rotation is positive. R lateral flex and L rot is negative. No PSIS or SI tenderness was observed. Petitioner was advised to obtain another lumbar MRI and continue physical therapy 3 x week. He was restricted from lifting, carrying, pushing or pulling more than 10 pounds.

On December 8, 2007 Petitioner underwent a lumbar MRI due to back pain. Minimal marginal osteophytes at L2-L3 and a small amount of bilateral facet hypertrophy were observed. IMPRESSION: Only minimal degenerative changes. Jeremy Simon, M.D.

This is the extent of medical documentation in our file.

Please address the following concerns in performing your UR analysis:

1. **What is the appropriate type and degree of treatment to address Petitioner's lumbar strain? In answering this request, please keep in mind Petitioner's two negative MRIs performed September 14, 2007 and December 6, 2007, as well as the minimal findings upon multiple physical examinations.**

The Petitioner had a lumbar soft tissue sprain/strain injury as a result of the incident on 7/31/07. Soft tissue sprain/strain injuries would be expected to heal within 6 to 8 weeks in a person of this age. Examinations did not document any significant neuromuscular deficits. Appropriate treatment for moderate musculoskeletal strains would have been anti-inflammatory agents, muscle relaxants, physical therapy and a home exercise program over an 8 week time frame. Treatment beyond that time is known to be associated with escalation of symptoms and physician dependence. ACOEM guidelines indicate that exercise is beneficial for low back strain: "Recommended: Low stress aerobic activities and stretching exercises can be initiated at home and supported by a physical therapist, to avoid debilitation and further restriction of motion."
ODG Physical Therapy Guidelines for low back sprain/strain recommend:
Allow for fading of treatment frequency (from up to 3 or more visits per week to 1 or less), plus active self-directed home PT.
Lumbar sprains and strains:
10 visits over 8 weeks.

2. **Petitioner's October 17, 2007 EMG showed possible L4 radiculopathy. Does this finding alter the medical community's recommendation on the type and degree of treatment to address Petitioner's lumbar strain?**

No. The MRI in September already established no spinal cord or nerve root compromise as a result of the incident on 7/31/07. Even though there were possible findings on the EMG without symptoms upon examination consistent with radiculopathy the treatment plan would not change. According to AMA and ODG radiculopathy is defined as a "significant alteration in the function of a nerve root or nerve roots and is usually caused by pressure on one or several nerve roots. The most important clinical components required to support the diagnosis of a compressive Radiculopathy include:

- Pain, numbness, and/or paresthesias in a dermatomal distribution
- An imaging study documenting correlating concordant nerve root pathology
- Associated clinical findings such as loss of relevant reflexes, muscle weakness and/or atrophy of appropriate muscle groups, loss of sensation in the corresponding dermatome(s)

Electrodiagnostic studies are helpful in supporting the diagnosis of a compressive radiculopathy but are not required, and do not substitute for imaging studies."

3. **Does the medical community agree Petitioner has reached MMI for his lumbar strain of July 31, 2007? If so, when was MMI most likely reached?**

The Petitioner would have been considered at MMI 8 weeks after the accident. Based on the information submitted, by September 6, 2007, which was around 5 weeks after the lifting injury, the Petitioner had subjective complaints of pain but the examination was essentially normal. The physical examination on 9/6/07 did not document any significant pathology or abnormal findings, ""No paraspinal spasms or scoliosis was reported. The straight leg raise was mildly positive at 90 degrees on the right side. His knee and ankle reflexes were normal and motor strength was normal." He had no clinical findings of muscle spasm and only had mild subjective pain complaints with straight leg raising. This would be considered an essentially normal examination. The Petitioner's continued complaints of pain are out of proportion to the objective clinical findings. There was no documented muscle atrophy, abnormal reflexes, motor weakness, loss of sensation or pain in a dermatomal pattern consistent with radiculopathy. The MRI of 9/14/07 was considered normal with no spinal cord or nerve root compromise identified.

4. **If MMI has not been reached for Petitioner's lumbar strain, when is MMI likely to be reached?**

The Petitioner would have been considered at MMI 8 weeks after the accident.

5. **If MMI has not been reached for Petitioner's lumbar strain, what type and duration of continued treatment is appropriate for the lumbar strain?**

The Petitioner would have been considered at MMI 8 weeks after the accident.

6. **Keeping in mind the minimal nature of Petitioner's lumbar strain evidenced by the minimal diagnostic findings and minimal physical exam findings, what is the appropriate type and period of medical activities restriction for such condition?**

The Petitioner could have returned to unrestricted work 8 weeks after the incident. Based on the submitted information his job required significant lifting activities. This amount of time would have given the soft tissue in the back time to heal. Restricting his work to no lifting, pulling and pushing over twenty pounds starting 8/4/07 would have been appropriate. According to ODG return to work

can occur "except for severe cases in 72 hours". It goes on to say, "There is strong epidemiological evidence that most workers with LBP are able to continue working or to return to work within a few days or weeks, even if they still have some residual or recurrent symptoms, and that they do not need to wait till they are completely pain free."

7. **When should Petitioner have been fit to return to modified duties, and what modifications were appropriate at that time?**

Restricting his work to no lifting, pulling and pushing over twenty pounds starting 8/4/07 would have been appropriate giving him 3 days off before returning to work.

8. **When should Petitioner have been fit to return to all regular, pre-injury activities as a result of the lumbar strain?**

As stated above, the Petitioner could have returned to unrestricted activities 8 weeks after the incident. This would have given the soft tissue in the low back time to heal.

9. **If accurate, please voice in your report the analysis provided comports to all URAC guidelines, and that no URAC protocol was overlooked or violated.**

The process and determinations rendered were done pursuant to appropriate URAC protocol and no URAC protocol was violated or ignored in rendering my determination.

CONCLUSION:

The Petitioner had pre-existing low back pain complaints documented in September of 2002. He then had a soft tissue lumbar sprain/strain injury as a result of the lifting incident on 7/31/07. The physical examination on July 31, 2007 at Concentra Medical Center supports this diagnosis. "No numbness, tingling, paresthesias were reported in his lower extremities. The right knee joint was noted to be stable. No swelling, bruising, tenderness, locking or deformities was observed. The drawer sign, McMurray's, Lachman's and Patellar grind tests were negative. The right ankle demonstrated no deformity. Tenderness was noted laterally over the proximal tibia. The remainder examination of the lower leg was reported be unremarkable. The bilateral leg raise was noted to be negative. A decrease in lumbar AROM due to pain was observed. Tenderness was present throughout right side of the spine from T-10 to L-3." Physical therapy was started that day and by August 2, 2007 at a follow up visit for his right lower back and leg pain he stated that his lower back pain had not improved but he had some improvement of the right leg. The bilateral leg raise was noted as negative. Very limited lumbar ROM was observed on the flexion and extension. Full ROM of the knee and ankle was present. X-rays of the lumbar spine revealed no fractures, subluxation, destruction or spondylolisthesis. This was again an unremarkable examination.

Over the next few weeks the Petitioner was evaluated for continued subjective complaints of pain that were out of proportion to any objective clinical findings. He complained of general paresthesia in the right lower extremity but there continued to be no documentation of abnormal reflexes, motor weakness, muscle atrophy as well as pain or loss of sensation in a specific dermatomal pattern. At the IME on 9/6/07, the examination remained essentially normal and the MRI on 9/14/07 confirmed no significant pathology compromising the spinal cord or any nerve root.

Taking all of the information together does not identify significant pathology that resulted from the lifting accident on 7/31/07. The pain complaints are consistent with muscular strains without evidence of significant joint, bony, spinal or neural injury. The MRI of 9/14/07 did not identify spinal

cord or nerve root compression, or bony injury such as compression fractures from the trauma. Appropriate treatment for moderate musculoskeletal strains would have been anti-inflammatory agents, muscle relaxants, physical therapy and a home exercise program over an 8 week time frame. Treatment beyond that time is known to be associated with escalation of symptoms and physician dependence. Although the injured party complained of subjective pain there were no significant abnormal clinical findings to support these complaints. Per ACOEM, "If a patient fails to functionally improve as expected with treatment, the patient's condition should be reassessed in order to identify incorrect or missed diagnoses. Further treatment should be appropriate for the diagnosed condition(s), and should not be performed simply because of continued reports of pain." After the initial 3 sessions of physical therapy there was no significant objective functional improvement established and additional supervised sessions were stopped because of subjective pain complaints and until an MRI was done. The MRI was not done until 9/22/07 which was almost 8 weeks after the incident. By this time any soft tissue injuries would have been significantly healed and passive modalities and manual therapy would not be considered medically necessary. He could have attended 2 physical therapy sessions at this point to be instructed on a home exercise program. He then could have been released to continue his recovery through compliance with the home exercise program. It should be noted that the medical information did not support the need for imaging with an MRI scan due to the lack of evidence of significant pathology on examination.

CRITERIA:

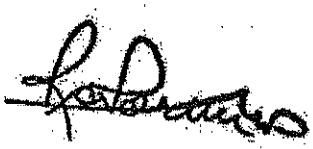
ACOEM Guidelines, Low Back Chapter 12
ACOEM Guidelines Pain Chapter 6
ODG Web based Low Back Chapter

CONFLICT OF INTEREST ATTESTATION:

I attest to the fact that there is no conflict of interest with this review for referring entity, benefit plan, enrollee/consumer, attending provider, facility, drug, device, or procedure.

I attest that my compensation is not dependent on the specific outcome of my review.

PHYSICIAN ADVISOR:



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NMR attests to the fact that there is no conflict of interest with this review for referring entity, benefit plan, enrollee/consumer, attending provider, facility, drug, device or procedure. NMR attests that its compensation is not dependent on the specific outcome of this review or has had any involvement with this case prior to this referral.