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*2011 Ill. App. LEXIS 1086, *; 960 N.E.2d 583, **;*
*355 Ill. Dec. 701, ****

OTTO BAUM COMPANY, INC., Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Tim Hilton, Appellees).

No. 4-10-0959WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, WORKERS COMPENSATION COMMISSION DIVISION

2011 IL App (4th) 100959WC; 2011 Ill. App. LEXIS 1086; 960 N.E.2d 583; 355 Ill. Dec. 701

September 29, 2011, Filed

PRIOR HISTORY: [*1]
APPEAL FROM THE CIRCUIT COURT OF McLEAN COUNTY. No. 10 MR 247. HONORABLE MICHAEL J. PRALL, JUDGE PRESIDING.

DISPOSITION: Affirmed and remanded to the Commission.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant corporation challenged an order of the Circuit Court of McLean County (Illinois) which confirmed a decision of the Illinois Workers' Compensation Commission awarding appellee claimant, who worked as a laborer for the corporation for several months, 13 6/7 weeks of temporary total disability (TTD) benefits pursuant to the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006), for injuries he received while working on August 6, 2008.

OVERVIEW: The corporation argued that the Commission erred in awarding TTD benefits from December 2008 to February 2009 because the claimant had refused prior offers of employment within his medical restrictions. The appeals court found the Commission awarded him TTD benefits for only the period preceding and following his refusal to work in September 2008. The appeals court inferred from the Commission's decision that the Commission considered, and rejected, the possibility that the claimant's refusal was so unjustified as to warrant termination of his TTD benefits, yet determined that his refusal justified a suspension of his benefits for the time that he refused work. That approach had sufficient support in the record. The Commission was presented with evidence that the claimant eventually submitted himself for work in December 2008 and that the corporation

refused to accommodate him at that time. It was not clearly apparent that he was not entitled to TTD benefits for the period from December 10, 2008, through February 18, 2009, nor did the Commission abuse its discretion in suspending his benefits rather than terminating them due to his failure to accept work in September 2008.

OUTCOME: The judgment was affirmed and remanded to the Commission for further proceedings.

CORE TERMS: claimant, manifest, workers' compensation, light-duty, questions of law, standard of review, arbitrator, returning, awarding, sedentary, hardening, cleared, hearing conducted, arbitrator's decision, totally disabled, entitlement, temporarily, prescribed, terminated, confirmed, suspended, modified, mixed, temporary, return to work, exacerbated, recommended, termination, accommodate, contacted

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Procedural Considerations > Weight & Sufficiency

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 The Appellate Court of Illinois applies a manifest weight standard when reviewing factual findings of the Illinois Workers' Compensation Commission. Commission rulings on questions of law are reviewed de novo. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Procedural Considerations > Weight & Sufficiency

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

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

HN2 The period during which a claimant is temporarily totally disabled is a question of fact to be resolved by the Illinois Workers' Compensation Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Procedural Considerations > Weight & Sufficiency

HN3 For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN4 When determining whether an employee is entitled to temporary total disability benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. More Like This Headnote

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

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

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

HN5 The Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006), provides incentive for the injured employee to strive toward recovery and the goal of returning to gainful employment by providing that temporary total disability benefits may be suspended or terminated if the employee refuses medical services or fails to cooperate in good faith with rehabilitation efforts. 820 ILCS 305/19(d) (2004). Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor. More Like This Headnote

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

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

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

HN6 A claimant's improper refusal of modified work may justify the termination of his temporary total disability benefits. However, the Illinois Workers' Compensation Commission has discretion to terminate or suspend benefits in response to a claimant's refusal to accept work within his restrictions. More Like This Headnote

HEADNOTES / SYLLABUS Hide

SYLLABUS

Trial court's confirmation of Workers' Compensation Commission's award of 13 6/7 weeks of temporary total disability benefits was affirmed.

JUDGES: JUSTICE HOFFMAN delivered the judgment of the court, with opinion. Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment and opinion.

OPINION BY: HOFFMAN

OPINION

[584] [***702]** Otto Baum Company, Inc. (Otto), appeals from an order of the circuit court of McLean County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant 13 6/7 weeks of temporary total disability (TTD) benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) for injuries he received while working on August 6, 2008. For the reasons that follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the record on appeal and the evidence presented at the arbitration hearing conducted on May 12, 2009.

The claimant, who worked as a laborer for Otto for several months but as a union laborer for

seven years, was injured at work on August 6, 2008. He testified that he sought medical treatment soon after the injury and was taken off of work. On **[*2]** August 19, 2008, Dr. Grant Zehr examined the claimant before noting some improvement but concluding that the claimant could not yet return to work. On August 28, 2008, a magnetic resonance imaging (MRI) of the claimant's spine revealed disc bulges and degenerative changes. On that date, the claimant was cleared to return to work, with restrictions that he limit himself to sedentary duty. Also in late August, Otto's associate risk manager, Marc Collins, sent the claimant a letter offering him a temporary position within his work restrictions. The claimant testified that he reported for the offered work, but, on the second day, he exacerbated **[**585]** **[***703]** his condition while trying to use a weed trimmer.

In his testimony, the claimant stated that he did not recall having any subsequent conversations with Collins regarding returning to work for Otto in a restricted capacity. Collins, however, testified that he contacted the claimant on September 2, 2008, to offer him light-duty work, but that the claimant told him that "he was blacking out because *** his anti-depressants were mixing with whatever painkillers he was prescribed and he didn't want to drive over." Collins further recalled that, on September **[*3]** 9, the claimant declined another offer for light-duty work because it "hurt [him] to drive [his car]" the distance required for the commute.

By September 10, 2008, the claimant was still cleared to work but limited to sedentary duty; these restrictions were repeated on September 18.

On October 21, 2008, the claimant saw Dr. Paul Nord, his family physician, who took him off of work completely for one week. An October 27, 2008, treatment note from Dr. William Jhee states that the claimant's pain had exacerbated just prior to his visit.

The claimant testified that, on November 11, 2008, Dr. Nord cleared him for sedentary work and that he thereafter requested appropriate work from Otto, but that Otto did not offer him work then or at any time after. In his testimony, Collins stated that the claimant contacted him in late November or early December 2008, after he had obtained representation for his workers' compensation claim, to request work and that Collins responded by telling the claimant to make the request through his attorney. Collins testified that Otto was no longer offering the claimant work because the claimant had declined previous work offers.

The results of a December 8, 2008, **[*4]** functional capacity evaluation (FCE) revealed that the claimant was capable of light-medium to medium work, and that work hardening was recommended. The claimant testified that he did not complete work hardening due to difficulty paying for the service. Collins testified that he made sure that work hardening services were authorized for the claimant after they were recommended in December 2008.

On July 9, 2009, following a hearing conducted pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)), the arbitrator awarded the claimant TTD benefits for 3 3/7 weeks (from August 7 through August 25, 2008, and from October 23 through October 29, 2008) as well as medical expenses.

The claimant sought review of the arbitrator's decision before the Commission, which affirmed the arbitrator's decision but modified it to include a total of 13 6/7 weeks of TTD benefits, covering the dates cited by the arbitrator as well as the period from December 10, 2008, through February 18, 2009. In adding the December 10 through February 18 TTD benefits, the Commission found that the claimant had refused offers for light-duty work on September 2 and September 9, 2008, but that Otto denied the **[*5]** claimant's request for light-duty work in December 2008 because the claimant had refused work in the past. Additionally, the Commission remanded the case to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Otto filed a petition for judicial review of the Commission's decision in the circuit court of

McLean County. The circuit court confirmed the Commission's decision, and this appeal followed.

[586]** **[***704]** Otto's only argument on appeal is that the Commission erred in awarding the claimant TTD benefits from December 2008 to February 2009 because the claimant had refused prior offers of employment within his medical restrictions. Otto urges us to apply a "clearly erroneous" standard of review, contending that the issues involved present mixed questions of law and fact. The claimant argues that the appropriate standard of review is manifest weight.

HN1 We apply a manifest weight standard when reviewing factual findings of the Commission. *Parro v. Industrial Comm'n*, 260 Ill. App. 3d 551, 554, 630 N.E.2d 860, 863, 196 Ill. Dec. 695 (1993). Commission rulings on questions of law are reviewed *de novo*. *Lenny Szarek, Inc. v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 597, 603, 919 N.E.2d 43, 49, 335 Ill. Dec. 522 (2009). **[*6]** In *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204-05, 692 N.E.2d 295, 302, 229 Ill. Dec. 522 (1998), our supreme court first recognized a clearly erroneous standard applicable to the review of an administrative agency's decision involving a mixed question of law and fact. However, the supreme court has never applied this standard to an appeal involving a decision of the Workers' Compensation Commission. The last time the supreme court considered a claimant's entitlement to TTD benefits, in the case of ***Interstate Scaffolding,*** *Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 272, 337 Ill. Dec. 707 (2010), decided several years after *City of Belvidere*, the court explained that HN2 "the period during which a claimant is temporarily totally disabled is a question of fact to be resolved by the Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence." But see *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543-45, 950 N.E.2d 256, 260-62, 351 Ill. Dec. 100 (2010) (applying clearly erroneous standard of review). Given the supreme court's approach to this issue, we will continue to apply the manifest weight **[*7]** standard to review of the Commission's determination of a claimant's entitlement to TTD benefits, unless and until the supreme court directs otherwise. Accordingly, we apply the manifest weight of the evidence standard to Otto's claim that the Commission erred in finding the claimant eligible for TTD for the period from December 10, 2008, through February 18, 2009. HN3 For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896, 169 Ill. Dec. 390 (1992).

"The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force." ***Interstate Scaffolding,*** *Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274. "Therefore, HN4 when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." ***Interstate Scaffolding,*** *Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274. HN5 "The Act provides incentive for the injured employee to strive toward recovery and the **[*8]** goal of returning to gainful employment by providing that TTD benefits may be suspended or terminated if the employee refuses" medical services or fails to cooperate in good faith with rehabilitation efforts. ***Interstate Scaffolding,*** *Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274 (citing 820 ILCS 305/19(d) (West 2004)). "Benefits may also be suspended or terminated **[**587]** **[***705]** if the employee refuses work falling within the physical restrictions prescribed by his doctor." (Emphasis added.) ***Interstate Scaffolding,*** *Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274 (citing *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 166, 601 N.E.2d 720, 731, 176 Ill. Dec. 22 (1992), and *Hayden v. Industrial Comm'n*, 214 Ill. App. 3d 749, 574 N.E.2d 99, 158 Ill. Dec. 305 (1991)).

We agree with Otto that HN6 a claimant's improper refusal of modified work may justify the termination of his TTD benefits. However, as indicated, the Commission has discretion to terminate or suspend benefits in response to a claimant's refusal to accept work within his

restrictions. Here, the Commission considered the evidence of the claimant's refusal to work in September 2008 and awarded him TTD benefits for only the period preceding and following his refusal. We must infer from the **[*9]** Commission's decision that the Commission considered, and rejected, the possibility that the claimant's refusal was so unjustified as to warrant termination of his TTD benefits, yet determined that the claimant's refusal justified a suspension of his benefits for the time that he refused work. That approach has sufficient support in the record. Although Otto presented evidence that it stood ready to accommodate the claimant and that he nonetheless refused work in September, the Commission was also presented with evidence that the claimant eventually submitted himself for work in December 2008 and that Otto refused to accommodate the claimant at that time. Given that evidence, we cannot say that it was clearly apparent that the claimant was not entitled to the TTD benefits for the period from December 10, 2008, through February 18, 2009, nor can we say that the Commission abused its discretion in suspending his benefits rather than terminating his benefits due to his failure to accept work in September 2008.

Based upon the foregoing analysis, we affirm the circuit court's decision to confirm the Commission's decision awarding the claimant 13 6/7 weeks of TTD benefits, and remand the **[*10]** matter to the Commission for further proceedings.

Affirmed and remanded to the Commission.

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*2010 Ill. Wrk. Comp. LEXIS 752, **

TIM **HILTON,** PETITIONER, v. **OTTO BAUM** COMPANY, INC., RESPONDENT.

No. 08WC46205

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCLEAN

2010 Ill. Wrk. Comp. LEXIS 752

July 20, 2010

CORE TERMS: pain, light duty, hardening, arbitrator, return to work, temporary total disability, recommended, spasm, pound, returning to work, lumbar, physical examination, sedentary, weedeater, strain, medication, diagnosed, lifting, neck, prescribed, contacted, modified, undergo, muscle, hurt, temporary, physical therapy, appointment, lumbosacral, tenderness

JUDGES: Yolaine Dauphin; Nancy Lindsay; Molly C. Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

PETITIONER'S TESTIMONY

Petitioner, a 44 year old union laborer at the time of the accident, testified that on August 6, 2008, he slipped and fell on a concrete surface while performing his job duties. He elaborated, "As I fell, my hand went up, I grabbed the crane cable coming down. I grabbed it, [it] twisted

me and then I released and fell to the ground." Petitioner stated **[*2]** that he felt tightness in his chest and "massive back pains." Respondent's job superintendent took Petitioner to HealthPoint Clinic (HealthPoint). After undergoing conservative treatment, Petitioner was released to return to work on restricted duty on August 19, 2008. Respondent offered him light duty work beginning August 26, 2008.

Petitioner further testified that on August 26, 2008, he reported for light duty work and ended up sitting in the basement conference room reading magazines. On August 27, 2008, Respondent's safety officer, Marc Collins, told Petitioner that his restrictions had been modified and asked him to try to use a weedeater. After using a weedeater for a couple of minutes, Petitioner felt "shooting pains through [the] back, over [the] shoulders and down into [the] left testicle and down [the] right leg." He stopped using the weedeater, returned to the shop and sat down. Mr. Collins instructed him to see Dr. Dru Hauter in Peoria.

After seeing Dr. Hauter on August 27, 2008, Petitioner continued to treat at HealthPoint. He attempted to undergo an MRI on September 18, 2008, but the study had to be stopped because he had severe shooting pains through his back and body. **[*3]** He was prescribed Valium for a repeat MRI, which he underwent on September 26, 2008. Subsequently, Dr. Grant Zehr at HealthPoint referred him to Dr. Emilio Nardone, a neurosurgeon. Dr. Nardone recommended conservative treatment and referred Petitioner to Dr. Won Heum Jhee, a physiatrist. On October 21, 2008, Petitioner saw his family physician, Dr. Paul Nord, who took him off work. On October 27, 2008, Petitioner saw Dr. Jhee, and on October 28, 2008, he followed up with Dr. Nord. On November 11, 2008, Dr. Nord released Petitioner to return to work on sedentary duty. Petitioner stated that Respondent did not offer him another light duty assignment. Also, Respondent discontinued temporary total disability benefits in October of 2008. However, Respondent continued to pay his medical bills.

Petitioner further testified that on December 8, 2008, he was examined by Dr. David Fletcher at Respondent's request. Dr. Fletcher recommended work hardening. Although Petitioner wished to undergo the recommended work hardening, Respondent did not contact him to set it up.

Petitioner next followed up with Dr. Nord on January 22, 2009. Dr. Nord recommended home exercises. Petitioner followed up with **[*4]** Dr. Nord on February 24, 2009; March 26, 2009; and April 28, 2009. Each time, Dr. Nord kept him on restricted duty. Petitioner stated that Respondent did not offer him any work, and, under the union rules, he could not look for work through the union until he was released to return to work full duty.

Petitioner described his condition at the time of the arbitration hearing:

> "Now I have lower back pain most of the time. It's stiff, it hurts to bend [and] it hurts to twist.
>
> I have a pain that has never gone away under my right shoulder blade and the spasms will *** come and go. I experienced some on the right side of my body today."

Petitioner stated that he was not taking any medication for his back condition. He would like to undergo work hardening and "maybe get another prescription." He had scheduled an appointment to see Dr. Nord three weeks after the arbitration hearing.

On cross-examination, Petitioner testified that Dr. Nardone did not recommend any follow-up treatment after the initial visit. Petitioner did not recall speaking with Mr. Collins in September of 2008 about returning to work. He stated that at the time, he did not feel comfortable

returning to work because **[*5]** of the side effects from the medications he was taking. Petitioner maintained that Respondent never contacted him about work hardening. He qualified that he did not communicate with Respondent directly because Mr. Collins instructed him to communicate through his attorney.

TESTIMONY OF RESPONDENT'S WITNESS

Mr. Collins, associate risk manager with Respondent, testified that his job duties included managing workers' compensation claims and light duty program. He stated that it was Respondent's policy to offer light duty work to injured employees. Mr. Collins confirmed that Respondent offered Petitioner a light duty job beginning August 26, 2008. He also confirmed that after Petitioner's restrictions were modified, he asked Petitioner to cut some weeds with a weedeater. Mr. Collins stated that after Petitioner was shown the weedeater, he felt it was something he could do. A short time later, Petitioner stated that he was going home because he thought he had reinjured his back. Mr. Collins made an appointment for Petitioner with Dr. Hauter. Mr. Collins thought that Dr. Hauter kept Petitioner on restricted duty.

Mr. Collins further testified that on September 2, 2008, he contacted Petitioner **[*6]** about returning to work. Petitioner responded that he was having blackouts because his anti-depressants were mixing with painkillers. On September 9, 2008, Mr. Collins followed up with Petitioner about returning to work. Petitioner stated he was not returning to work because it was painful for him to drive from Bloomington to Morton, where Respondent's facility was located.

In late November or early December of 2008, Petitioner called Mr. Collins about returning to work on light duty. Because Petitioner had already filed an application for adjustment of claim, Mr. Collins advised him to communicate with Respondent through his attorney. Mr. Collins stated that Respondent was no longer offering Petitioner light duty work, explaining:

> "At some point if an employee walks off the job and that's our understanding of it. [Petitioner] is not coming to work for various reasons, we can't continue to bring an employee back whenever he feels like he is gonna come in. It's contrary to personnel policy now.
>
> This three months later after it was made clear to him he could come in, work out something and he decided not to. That's a bad precedence [*sic*] for all our other employees."

Mr. Collins **[*7]** stated that Respondent authorized work hardening shortly after it was recommended. Respondent had not withdrawn the authorization for work hardening.

On cross-examination, Mr. Collins confirmed that Respondent discontinued paying temporary total disability benefits, explaining that the decision was made "[b]ecause of the employment issue." Mr. Collins stated that he would authorize temporary total disability benefits for the period of work hardening.

CORRESPONDENCE BETWEEN THE PARTIES

Correspondence between the parties includes a letter from Mr. Collins dated August 21, 2008, offering Petitioner light duty work in the Morton office, beginning August 26, 2008; a letter from Petitioner's attorney dated December 18, 2008, stating that on December 3, 2008, Petitioner contacted Mr. Collins and requested light duty work; a letter from Respondent's attorney dated January 7, 2009, offering Petitioner work hardening; and letters from Petitioner's attorney

dated January 20, 2009, and February 25, 2009, requesting light duty work within the restrictions imposed by Dr. Nord. In addition, there are multiple letters from Petitioner's attorney requesting temporary total disability benefits.

MEDICAL **[*8]** RECORDS

The medical records in evidence show that on August 6, 2008, Petitioner presented at HealthPoint with complaints of back pain, which he rated an 8/10. He reported having back pain in the past, but not as severe. On physical examination, straight leg raise test caused some pain at 45 degrees, but Petitioner was able to continue to almost 90 degrees. He was able to lean forward to only 60 degrees and had difficulty straightening up. His gait was stiff and guarded. Dr. Zehr diagnosed lumbosacral strain, prescribed medication and took Petitioner off work until the next visit. On August 19, 2008, Petitioner reported that the pain was better, a 7/10, but stated that he felt "that pain is deeper in lower back and is radiating to left shoulder." Straight leg raise test was positive on the left while seated and positive bilaterally at 45 degrees when supine. Petitioner moved from supine to upright position with some difficulty. He could bend forward only 30 degrees. Extension and lateral flexion were limited. The gait was guarded. Dr. Zehr refilled Petitioner's medications, instructed him to continue physical therapy and kept him off work. An addendum dated August 20, 2008, states **[*9]** that "Marc at co." contacted Dr. Zehr to ask if Petitioner could work on light duty. Dr. Zehr released Petitioner to return to work with restrictions of no lifting over five pounds frequently and 10 pounds occasionally; alternating sitting, standing and walking every 20 minutes; and no stooping, squatting or overhead work. On August 28, 2008, Petitioner reported returning to work and being asked to use a weedeater. He stated that within five minutes of using the weedeater, he felt severe pain in his low back. "The pain then went into his groin and down to his testicles and [through] the back of his RT leg." Dr. Zehr ordered an MRI and released Petitioner to return to work on sedentary duty.

Also on August 28, 2008, Petitioner saw Dr. Hauter. He complained of back pain radiating to the left testicle and right arm, and gave a history consistent with his testimony. Physical examination findings were as follows:

> "There is a deformity of stiff posture. There is pain at the SI joints bilaterally with palpation. The main pain is at the lumbar paraspinous muscles at the L4-5 level. There is no spinous process tenderness. Gait is hesitant on initiation. Reflexes are normal at the patella **[*10]** and ankle bilaterally. Sensation is normal. There is no weakness of the lower extremities. Lumbar lateral rotation is 10 degrees to the right and 10 degrees to the left before pain. Lumbar flexion is 10 degrees and is painful. The testes are softer than normal and without tenderness or mass. There are no hernias."

Dr. Hauter diagnosed lumbar muscle strain without radiculopathy, and testicular pain. He prescribed a Medrol DosePak and released Petitioner to return to work on sedentary duty.

On August 29, 2008, and September 2, 2008, Petitioner did not show up or call to cancel his appointments at HealthPoint. An office note dated September 5, 2008, states that a claims adjuster reported trying to contact Petitioner for a week about scheduling an MRI, and Petitioner not returning her calls. On September 10, 2008, Petitioner's physical examination findings were unchanged. Dr. Zehr made arrangements to schedule an MRI and kept Petitioner on sedentary duty. On September 18, 2008, Petitioner reported having had an unsuccessful MRI study because of his "having back spasms." He also complained of anxiety. He was prescribed valium to be taken one hour before a repeat MRI, and his restrictions **[*11]** were continued. On September 23, 2008, Petitioner came to the office requesting a refill of Tylenol # 3. Dr. Zehr dispensed the medication. An MRI performed September 26, 2008, showed a posterior disc protrusion and tear of the annulus fibrosus accompanying a disc bulge and

degenerative changes at L2-L3 with "relative" thecal sac stenosis.

On October 8, 2008, Petitioner saw Dr. Nardone. He complained of muscle spasms in the back and denied radicular pain. On physical examination, he had tenderness to palpation throughout the spine. Dr. Nardone interpreted the MRI as showing a small disc herniation at L2-L3, and opined that Petitioner was not symptomatic from lumbar stenosis. He thought that Petitioner's condition was mainly musculoskeletal and recommended conservative treatment in the form of physical therapy, ultrasound, massage, a TENS unit and possibly acupuncture, and referred Petitioner to a physiatrist.

On October 21, 2008, Petitioner saw Dr. Nord. He complained of pain in the thoracic spine area. On physical examination, Dr. Nord noticed a spasm in the lower lumbar area and a minimal spasm in the thoracic area. He diagnosed thoracic and lumbar strain and prescribed physical **[*12]** therapy. On October 23, 2008, Dr. Nord took Petitioner off work for one week.

On October 27, 2008, Petitioner saw Dr. Jhee. He reported improving low back pain and complained of worsening neck and mid back pain. He stated that the pain in the neck and shoulder blades radiated to the arms, stopping at the elbows, and the arms were "somewhat weaker." He also reported difficulties with any type of neck motion. On physical examination, the range of motion in the neck was slightly limited in lateral bending. On sensory examination, Petitioner reported a lightly diminished pinprick sensation in bilateral index fingertips. Physical examination was otherwise grossly normal.

On October 28, 2008, Petitioner reported to Dr. Nord that he was feeling a little better. On physical examination, he had a full range of motion in the thoracic and lumbosacral spine. He had a minimal spasm on the left side. On November 11, 2008, Petitioner reported that he still had some low back pain. Physical examination findings were unchanged. Dr. Nord stated, "[I] talked to him about doing sedentary duties. He says there is nothing available." Dr. Nord advised Petitioner that he intended to release him to return **[*13]** to work on sedentary duty.

On December 8, 2008, Petitioner underwent a functional capacity evaluation at the request of Dr. Fletcher. The physical therapist concluded that Petitioner was capable of working at the light to medium physical demand level, and recommended work hardening.

On December 30, 2008, Petitioner reported to Dr. Nord that he continued to have some intermittent pain in the low back area. Physical examination was normal. Dr. Nord instructed Petitioner to perform home exercises and released him to return to work with restrictions of no lifting, pushing or pulling over 20 pounds, no climbing, and no repetitive bending, lifting or twisting. On January 22, 2009, Petitioner reported doing a little better. He complained of pain when he did home exercises. Physical examination was unremarkable, with the exception of some minimal pain to palpation over the intrascapular area. Dr. Nord advised Petitioner to continue with home exercises. On February 24, 2009, Petitioner reported some pain in the upper cervical spine and low back, but stated that he was doing much better. Physical examination was normal. Dr. Nord continued to recommend home exercises and imposed a 10 pound lifting **[*14]** restriction. On March 26, 2009, Petitioner reported continued improvement. He complained of developing a spasm in the neck after soldering for a couple of hours. Physical examination was unremarkable, with the exception of spasm in the lumbosacral area. Dr. Nord continued to recommend home exercises. On April 28, 2009, Petitioner did not keep his appointment. On May 5, 2009, Petitioner complained of some stiffness in the low back, but no pain at rest. He stated that he had not been taking muscle relaxants for a month. Dr. Nord released him to return to work with a 20 pound lifting restriction.

SECTION 12 REPORT

In a report dated December 10, 2008, Dr. Fletcher, an occupational medicine specialist and Respondent's section 12 examiner, stated that he examined Petitioner on December 8, 2008, and reviewed medical records from HealthPoint, Dr. Hauter and Dr. Nardone, the functional

capacity evaluation report, and the MRI report. Petitioner complained of pain in the back and neck with radiation to the arms. On physical examination, the range of motion in the back was mildly restricted. Dr. Fletcher noted tenderness and muscle spasms in the back. Physical examination was otherwise unremarkable. **[*15]** Dr. Fletcher diagnosed myofascial pain syndrome related to the work accident on August 6, 2008. He opined that Petitioner had not yet reached maximum medical improvement and recommended work hardening for four to six weeks. He stated that Petitioner could work on modified duty while undergoing treatment.

DISCUSSION

Amongst other things, the Arbitrator awarded temporary total disability benefits for the periods from August 7, 2008, through August 25, 2008, and from October 23, 2008, through October 29, 2008. We find that Petitioner is entitled to additional temporary total disability benefits from December 10, 2008, through February 18, 2009.

The record shows that after attempting to return to work on a light duty basis on August 27, 2008, Petitioner refused the offers of light duty work extended to him on September 2, 2008, and September 9, 2008. However, in early December of 2008, Petitioner approached Respondent about light duty work. In a report dated December 10, 2008, Dr. Fletcher recommended work hardening and stated that Petitioner could work modified duty while undergoing treatment. At that point, Respondent was aware of both Petitioner's request for light duty work, and his **[*16]** ability to perform light duty work. Mr. Collins testified that Respondent decided not to offer Petitioner light duty work because Petitioner had refused light duty work in the past. While Respondent may be within its right to decide not to extend another offer of light duty work after the employee turned down previous offers of light duty work, that does not negate its liability to pay temporary total disability benefits. See Interstate Scaffolding. Inc. v. Workers' Compensation Comm'n, 236 Ill. 2d 132 (2010). We note that on January 7, 2009, Respondent offered Petitioner work hardening. However, Petitioner failed to take advantage of the work hardening offer. Dr. Fletcher indicated in his report that he expected Petitioner to return to work full duty after six weeks of work hardening. We therefore find that Petitioner is entitled to additional temporary total disability benefits from December 10, 2008, through February 18, 2009, six weeks after the date Respondent offered work hardening.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2009, is hereby modified as stated herein and otherwise affirmed and adopted. **[*17]**

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 682.93 per week for a period of 13 6/7 weeks, from August 7, 2008, through August 25, 2008, from October 23, 2008, through October 29, 2008, and from December 10, 2008, through February 18, 2009, those being the periods of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the 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 **[*18]** 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 $ 16,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATE: JUL 20 2010

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 **Ruth White**, arbitrator of the Commission, in the city of **Bloomington**, on **May 12, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. 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 **[*19]** necessary?
K. What amount of compensation is due for temporary total disability?
N. Other **prospective work hardening**

FINDINGS

. On **August 6, 2008**, the respondent **Otto Baum Company, Inc.** ***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 $ **8,059.73**; the average weekly wage was $ **1,024.40**.

. At the time of injury, the petitioner was **44** years of age, ***single*** with **0** children under 18.

. Necessary medical services **have partially** been provided by the respondent.

. To date, $ **2,536.61** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **682.93** /week for **3 3/7** weeks, from **August 7, 2008** through **August 25, 2008**, from **October 23, 2008** through **October [*20] 29, 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 the reasonable costs associated with the work hardening recommended by Dr. Fletcher including temporary total disability benefits during the work

hardening program.

. 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, 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 at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or **[*21]** a decrease in this award, interest shall not accrue.

Signature of arbitrator

July 1, 2009

Date

JUL 9 2009

In support of the Arbitrator's award, the Arbitrator makes the following findings of fact and conclusions of law on all disputed issues.

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

This case was tried on a 19(b) and permanency is not addressed. It is undisputed that the petitioner injured his back on August 6, 2008, when he slipped while working with a cable. It is further undisputed that he was involved in the use of a weed cutting machine on August 27, 2008, while attempting restricted duty work. The evidence established the petitioner immediately began treating with HealthPoint, following his injury on August 6th of 2008. A HealthPoint physician diagnosed a lumbosacral strain, prescribed physical therapy and medication, and took the petitioner off work. Treatment continued through HealthPoint and the Respondent paid TTD during this period.

On August 20th of 2008, the petitioner received a release to return to restricted duty work of no lifting over five pounds, and on August 25th, he did return to work in a light duty sedentary **[*22]** capacity. The petitioner testified he initially was sitting in a room reading different material. Marc Collins testified that while Petitioner was in this restricted duty phase, the petitioner had a conversation with Marc Collins in which he indicated that he really didn't have to be doing the restricted duty work, because it was outside his union and his union didn't require him to do so. Ultimately, on August 27th of 2008, the petitioner's restrictions were increased to 10 pounds, and the respondent made an effort to increase the petitioner's light duty work. On that date, the petitioner met with Marc Collins from the respondent, and there was a discussion about whether or not the petitioner could use a weed-eater which weighed under 10 pounds. The petitioner agreed he could do this work and attempted the work.

After he had been doing this for about 15 minutes, Marc Collins received a call from the petitioner indicated that he had injured himself, had hurt his testicle, and was heading home. Mr. Collins directed the petitioner to go immediately to the IWIRC facility, which was in Peoria where the petitioner was performing his light duty work.

At the IWIRC facility, the petitioner **[*23]** was again diagnosed with a lumbar strain, and received a release to continue working with a 10 pound restriction.

Following this exacerbation and treatment through IWIRC, the respondent made several attempts to again bring the petitioner back to work light duty. On August 29th, the petitioner called Marc Collins and said his pain medications were mixing with his anti-depressants and he was blacking out. As a result, he indicated he would not be coming into work. No medical documentation as to these black outs was presented, and Marc Collins made it clear to the petitioner that he was allowed to return to work.

Marc Collins testified that on September 2nd of 2008, he again called the petitioner and indicated that his restricted duty job was available. The petitioner indicated that his back hurt and that he would not be returning. Again on September 9th of 2008, Marc Collins called the petitioner and discussed with him the desire to have him come back to work. The petitioner at that time claimed that it hurt for him to drive and indicated that he would not be returning to work.

At all times during these attempts to bring the petitioner back to work, the medical documentation indicates **[*24]** the petitioner was released to return to restricted duty. Marc Collins, in his testimony, indicated that restricted duty work is important to **Otto Baum,** and a formal light duty plan has been developed. It was always the intention of **Otto Baum, and Otto Baum** always conveyed to the petitioner that they would work with whatever restrictions were in place. Despite these numerous attempts to return the petitioner to work, he did not comply with the offer of work and the medical restrictions in place.

Marc Collins provided additional detail about the restricted duty work and follow up contact received from the petitioner. Collins testified that he is aware of no union restrictions on the petitioner performing this light duty work. The work was not union work and **Otto Baum** has never received an objection from the union in offering this type of work. The petitioner could also present no evidence on this point. Collins also testified that since the light duty plan was implemented, 12 injured workers have been returned in restricted capacity and **Hilton** is the only one that didn't work out. Collins also confirmed that some time after Thanksgiving the petitioner called and indicated he wanted **[*25]** to go back to work. At that time, the petitioner was represented and Mr. Collins referred him to his attorney. The petitioner made a further contact in January, indicating he wanted to go back to work, and again Marc Collins referred him to his attorney. Collins testified at trial that as of that date, the restricted duty work was no longer available. **Otto Baum's** employment policies would not allow them to keep a job open for an employee who had refused an offer to return to work on three separate occasions.

Following this initial treatment through HealthPoint and IWIRC, the petitioner ultimately came under the care of OSF Medical Group. Dr. Paul Nord treated the petitioner for a low back strain, and with the exception of the period from October 23rd to October 29th, continued the petitioner's allowance to work with restriction. Dr. Nord did have the petitioner completely restricted from work for the week of October 23rd, and the respondent paid TTD for that period.

Following the exacerbation at work on August 27th, the petitioner again visited with HealthPoint on August 28th. HealthPoint ordered an MRI. The respondent paid for that MRI. The MRI ultimately revealed degenerative **[*26]** changes.

On December 10th of 2008, the respondent had the petitioner examined by Dr. David Fletcher. Dr. Fletcher conducted an objective evaluation and ultimately came to the conclusion the petitioner suffered from myofascial pain. Dr. Fletcher agreed with the restrictions that had previously been placed on the petitioner, and indicated that work hardening of four to six weeks should take place. Marc Collins testified at trial that he thought the work hardening was offered to the petitioner, and an offer to pay TTD during the work hardening was made. The petitioner testified at trial that he had always been willing to undergo the work hardening, but had not done so because no one had contacted him. The testimony is not clear.

Based upon the above, the Arbitrator finds that the petitioner proved a causal relationship

between the injury of August 6th of 2008 and a low back strain. The petitioner further proved entitlement to the TTD which was paid by the respondent from August 7th of 2008 through August 25th of 2008, and again from October 23rd of 2008 and October 29th of 2008, when the petitioner was completely restricted from work by Dr. Nord. The TTD has been paid. The petitioner **[*27]** failed to prove entitlement to any other period of TTD.

The evidence documents that during all other claimed periods of TTD, the petitioner was released to return to work with restriction and the respondent had offered to accommodate the restrictions. Respondent made extensive efforts to return the petitioner to work within a restricted capacity. At no time during the petitioner's failure to return to work did there exist or did the petitioner offer a medical excuse as to why he could not undergo the restricted duty work. This is especially relevant since the respondent had made it clear they would work with the petitioner under any restriction in place and attempt to find him work which would accommodate his restrictions.

The Arbitrator further finds that the petitioner proved a causal relationship between the medical treatment rendered by HealthPoint, and by IWIRC. The petitioner also proved a causal relationship between some of the treatment provided by Dr. Nord. Payment has been made with regard to that treatment. The Arbitrator therefore specifically finds that with regard to all medical incurred up to the date of hearing, the respondent has fulfilled its obligation to make **[*28]** payment on said medical.

The Arbitrator further finds that the petitioner is entitled to four to six weeks of work hardening on a prospective basis, pursuant to the recommendations of Dr. Fletcher.

J. Were the medical services that were provided to petitioner reasonable and necessary? and O. Propsective work hardening

Based upon the evidence outlined above, the Arbitrator finds the respondent has paid all medical bills causally related to the injury in question. The Arbitrator further finds that on a prospective basis, the petitioner is entitled to four to six weeks of work hardening, as recommended by Dr. Fletcher.

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

Based upon the evidence outlined above, the Arbitrator finds the compensable period of TTD is from August 7th of 2008 through August 25th of 2008 and from October 23rd of 2008 through October 29th of 2008, representing 3 5/7ths weeks. The Arbitrator finds that the respondent has paid this amount and is not obligated to pay additional TTD, unless or until the petitioner undergoes the four to six weeks of work hardening recommended by Dr. Fletcher.

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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*2010 Ill. Wrk. Comp. LEXIS 753, **

TIM **HILTON,** PETITIONER, v. **OTTO BAUM** COMPANY, INC., RESPONDENT.

No. 08WC44202

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCLEAN

2010 Ill. Wrk. Comp. LEXIS 753

July 20, 2010

CORE TERMS: arbitrator, ill-being, causally, present condition, disputed issues, connected, notice, accrue

JUDGES: Yolaine Dauphin; Nancy Lindsay; Molly C. Mason

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2009, is hereby affirmed and adopted.

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

The 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: JUL 20 2008

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of* **[*2]** *Hearing* was mailed to each party. The matter was heard by the Honorable **Ruth White**, arbitrator of the Commission, in the city of **Bloomington**, on **May 12, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?

FINDINGS

. On **August 27, 2008**, the respondent **Otto Baum Company, Inc *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 **$ 8,059.73**; the average weekly wage was **$ 1,024.40**.

. At the time of injury, the petitioner was 44 years of age, ***single*** with **0** children under 18.

. Necessary medical services ***have*** been provided by the respondent.

. To **[*3]** date, **no compensation** has been paid by the respondent for TTD and/or maintenance benefits.

. Petitioner failed to prove that his present condition of ill-being is causally connected to the accident of August 27, 2008.

ORDER

. Claim for compensation is denied.

COMPENSATION IS DENIED based on Petitioner's failure to prove a liability issue. Subject to changes imposed on review before the Commission, this decision is final on all issues and the case does not remain open for any further determination of benefits.

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

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

Signature of arbitrator

July 1, 2009

Date

JUL 9 2009

In support of [*4] the arbitrator's decision relating to "F. Is the petitioner's present condition of ill-being causally related to the injury?" the arbitrator finds the following facts:

Petitioner suffered an injury to his low back on August 6, 2008. That case is adjudicated in companion case 08 WC 46205. The accident of August 27, 2009, did not result in any change in Petitioner's condition or the light duty work restrictions that were in effect on this date. Petitioner's condition of ill-being is causally connected to the August 6, 2008, accident, not the August 27, 2008 accident.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

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*2012 Ill. App. Unpub. LEXIS 1476, **

JOSEF HEDL, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (TITAN ELECTRIC, Appellee).

No. 1-11-3248WC

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

2012 Ill. App. Unpub. LEXIS 1476; 2012 IL App (1st) 113248WU

June 25, 2012, Filed

NOTICE: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. No. 10 L 51130. Honorable Margaret A. Brennan, Judge Presiding.

DISPOSITION: Affirmed and remanded.

CORE TERMS: claimant's, layoff, light-duty, doctor, arbitrator, restricted-duty, stabilized, manifest, credible, attorney fees, question of fact, stood, accommodate, anyway, total disability, arbitration hearing, arbitrator's decision, totally disabled, temporarily, terminated, confirmed, suspended, temporary, accommodating, accommodated, conditional, contacted, connected, recalled, foremen

JUDGES: JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment.

OPINION BY: HOFFMAN

OPINION

ORDER

Held: The decision of the Commission, which limited the claimant's entitlement to 1 2/7 weeks of temporary total disability (TTD) benefits, is neither contrary to law or against the manifest weight of the evidence. Further, the Commission properly denied the claimant's request to penalties and attorney fees.

The claimant, Josef Hedl, appeals from a judgment of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) awarding him 1 2/7 weeks of temporary total disability (TTD) benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2008)), for injuries received on February 12, 2009, while in the employ of Titan Electric (Titan). For the reasons which follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the evidence presented at the arbitration hearing.

The claimant testified **[*2]** that he began working as a journeyman electrician (associated with the Local 134 Union) for Titan on January 27, 2009. He said that the job required "a lot of lifting" of around 50 pounds, and also "[a] lot of running up and down ladders." On February 12, 2009, the claimant fell at work and injured his left ankle, knee, hip, and shoulder. On February 14, he received treatment for his injuries and was released to restricted duty, but he testified that his restrictions were not accommodated. On February 18, his doctors released him for full-duty work, but, on February 25, his doctors imposed the restrictions that he avoid using ladders or kneeling.

The claimant testified that his union had a rule that, if a worker was laid off after working 45 days on a job, that worker would be placed at the end of the union's list for workers to fill other jobs. The claimant said that, after receiving his new restrictions, he recalled the union's 45-day rule and asked his foremen, William Roth and William Berge, to lay him off before his 45th day if the plan was indeed to lay him off. The claimant stated that he emphasized that he did not want to be laid off immediately, but only sometime before the **[*3]** 45th day, and only if his superiors planned to lay him off anyway. The next day, the claimant recalled, he was told that he was being laid off immediately. According to the claimant, he reacted angrily when he was shown his termination slip, which indicated that he had requested to be laid off. The claimant explained his reaction as follows:

> "I made it clear to everyone who was standing around when they brought it to me I didn't ask to be laid off today. I said before the 45 days was up, okay, and I was very angry, and I grabbed the slip, and I left."

After his layoff, the claimant testified, Titan never contacted him to offer light-duty work.

The claimant continued to receive treatment for his injuries. That treatment included a July 15, 2009, surgery. After the surgery, on July 21, his doctors authorized him to return to restricted-duty work. On October 3, 2009, the claimant's doctors again ordered him off of work, but he was released for restricted work again on October 5.

In his testimony, Berge, the general foreman at the time of the claimant's accident, said that, the day before the claimant was laid off, Roth called him and told him that the claimant had requested a layoff. Berge **[*4]** testified that, upon hearing this news, he approached the claimant for confirmation, and the claimant told him "yes, he want[ed] a layoff because he was coming close on his 45 days." Berge stated that the claimant did not condition his layoff request on the premise that Titan would lay him off anyway, but instead asked directly for a layoff. Berge also said that the claimant did not cite injury as the reason for his layoff request. Berge further testified that, during the claimant's return to Titan after the accident but before the

layoff, he left to Roth the task of accommodating the claimant's work restrictions, and he said that Roth accommodated those restrictions.

Roth, the claimant's direct foreman with Titan, testified that he checked with the claimant every morning after his injury to ensure that he was able to do the work assigned to him. He said that the claimant reported no problems. Like Berge, Roth testified that the claimant asked for a layoff but did not mention that his request was conditioned on the premise that Titan intended to lay him off anyway. According to Roth, the claimant said that he wanted a layoff "because [his] time [was] running out." Roth said that the **[*5]** claimant never connected his layoff request to his injury.

Roth testified that he was in charge of accommodating the claimant's restrictions but that he did not learn of the specific restrictions until February 25, the day the claimant requested a layoff. He said that, before that date, he had given the claimant easier work due to his injury.

Thomas Brummel, Titan's field superintendent, testified that Titan had light-duty work available for its employees both in February 2009 and at the time of his testimony. He added that Titan had throughout that period allowed workers to work in light-duty capacities. Brummel agreed that nobody from Titan contacted the claimant after his layoff to offer light-duty work.

After the conclusion of the hearing which was held pursuant to section 19(b) of the Act, the arbitrator found that the claimant was entitled to TTD benefits for 1 2/7 weeks, from July 15, 2009, through July 20, 2009, and from October 3, 2009, and October 5, 2009, both periods in which the claimant's doctors ordered him not to work. The arbitrator declined to award additional TTD benefits, based on the finding that the claimant asked to be laid off on February 25, 2009, and thereby **[*6]** declined available light-duty work. The arbitrator based this ruling on a finding that the testimony of Roth and Berge was more credible than that of the claimant. The arbitrator further found that Titan had light-duty work available "consistently from the day of [the claimant's] injury to the day of" the arbitration hearing. The arbitrator further found that the claimant was entitled to prospective medical treatment.

The claimant sought review of the arbitrator's decision before the Commission. In a decision with one commissioner dissenting, the Commission adopted and affirmed the arbitrator's decision, and it remanded the cause pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. The claimant now appeals.

The claimant's first contention on appeal is that the Commission erred in finding that he was not entitled to additional TTD benefits. The claimant raises two challenges to the Commission's TTD finding.

The claimant's first, and primary, challenge to the Commission's TTD finding is his assertion that the Commission's **[*7]** reasoning contravenes our supreme court's recent decision in ***Interstate Scaffolding,*** *Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010). According to the claimant, ***Interstate Scaffolding*** stands for the proposition that a claimant is entitled to TTD benefits so long as his condition has not stabilized, regardless of whether the claimant was discharged from work in the meantime. The claimant then observes that the Commission awarded him prospective medical treatment. Thus, the claimant argues, his condition had not stabilized, and the Commission was required to award him TTD up to the date of the hearing. In the claimant's view, the Commission erred as a matter of law when it based its finding on the claimant's request not to work, because "[t]he only issue is whether [his] condition had stabilized." We disagree.

Although the claimant does not directly quote any passages from ***Interstate Scaffolding*** in his briefs, we presume that the claimant means to rely on ***Interstate Scaffolding***'s statement

that "[i]t is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, **[*8]** whether the claimant has reached maximum medical improvement." ***Interstate Scaffolding***, 236 Ill. 2d at 142. However, later in its decision, the supreme court expounded on that statement:

> "Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force.
>
> The Act provides incentive for the injured employee to strive toward recovery *** by providing that TTD benefits may be suspended or terminated if the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts. [Citations.] *Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor.* [Citations.]" (Emphasis added.) ***Interstate Scaffolding***, 236 Ill. 2d at 146.

Here, the Commission found that Titan stood ready to provide restricted-duty work but that the claimant requested a layoff for reasons unrelated to his injury. Accordingly, the Commission's decision was based **[*9]** on a finding that the claimant had forgone available work within his physical restrictions, a finding that comports with the supreme court's decision in ***Interstate Scaffolding***. We therefore reject the claimant's first challenge to the Commission's TTD finding.

The claimant's second challenge to the Commission's TTD finding is his assertion that the Commission erred in concluding that his layoff was voluntary and that Titan stood ready to provide him restricted-duty work. The time during which a claimant is temporarily totally disabled is a question of fact. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118-19, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992).

To assert that the Commission erred in fixing his period of TTD, the claimant advances the narrative that his **[*10]** foremen knew he was injured, wanted him off the job, and used his conditional layoff request as a pretext for terminating his employment. The version of events that the claimant advances matches his testimony. However, it conflicts with the testimony of Roth and Berge, who both testified that the claimant's layoff request was not conditional and was not connected to his injury.

It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). The Commission did so in this case, by finding that Roth and Berge were more credible witnesses than the claimant. We will not intrude on the Comission's fact- finding prerogative by revisiting that question here. The Commission's TTD determination was supported by what it deemed to be credible testimony from Roth and Berge, and we therefore cannot say that the Commission's finding was against the manifest weight of the evidence.

Next, the he claimant argues that the Commission erred in refusing to award him attorney's fees and penalties. According to the claimant, attorney's fees and penalties are appropriate **[*11]** in this case because Titan acted unreasonably in failing to accommodate his restrictions

and in firing him as a reaction to his "inquiring about his future work status." However, for the reasons stated above, we uphold the Commission's finding that the claimant did not accompany his layoff request with an inquiry about his future work with Titan. We also uphold the Commission's finding that Titan stood ready to provide restricted-duty work to the plaintiff. Further, Roth testified that Titan made every effort to accommodate the claimant's restrictions, and the Commission found Roth's testimony to be credible. As a result, we disagree with the claimant's factual premise that Titan failed to accommodate his restrictions and fired him as retaliation. By rejecting that premise, we necessarily reject the attorney's fees and penalty request that relies on it.

For these reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision, and remand for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Affirmed and remanded.

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*2010 Ill. Wrk. Comp. LEXIS 677, **

JOSEF **HEDL,** PETITIONER, v. **TITAN** ELECTRIC, RESPONDENT.

NO: 09WC 09872

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2010 Ill. Wrk. Comp. LEXIS 677

June 29, 2010

CORE TERMS: ankle, layoff, arbitrator, shoulder, pain, knee, left knee, door, temporary total disability, skip, light duty, tendon, tear, stair, hip, rotator, cuff, underwent, doctor, posterior, strain, opined, biceps, floor, physical therapy, returned to work, overhead, foreman, walking, patellofemoral

JUDGES: Nancy Lindsay; Daniel Donohoo

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, prospective medical, penalties 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 December 11, 2009, 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 **[*2]** 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.

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: JUN 29 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) 8(a) 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 **Maureen H. Pulia**, arbitrator of the Commission, in the city of **Chicago**, on **11/20/09**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, **[*3]** and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
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?
L. Should penalties or fees be imposed upon the respondent?
N. Other **Prospective Medical**

FINDINGS

. On **2/12/09**, the respondent **Titan Electric *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 $ **2,758.00**; the average weekly wage was $ **1,576.00**.

. At the time of injury, the petitioner was **61** years of age, ***married*** with **no** children under 18.

. Necessary medical services **[*4]** ***have not*** been provided by the respondent.

. To date, $ **21,034.72** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **1050.67**/week

for **1-2/7** weeks, from **7/15/09** through **7/20/09**, and **10/3/09** through **10/5/09** 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 is entitled to credit for its overpayment over temporary total disability benefits.

. The respondent shall pay $ **1,167.97** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **00.00** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **00.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **00.00** 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 **[*5]** temporary total disability, medical benefits, or compensation for a permanent 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 award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

12/10/09

Date

DEC 11 2009

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 61 year old journeyman electrician, alleges he sustained an accidental injury that arose out of and in the course of his employment by respondent on 2/12/09 when he fell down some stairs while leaving work. Petitioner is right-hand dominant, is 5'10" tall and weighs 235 pounds.

On 2/12/09 petitioner was working at 155 N. Wacker, Chicago, IL. His duties included putting conduit **[*6]** into the ceiling, and running subfeeds for power lines. They also included tearing out and replacing subfeeds, going up and down ladders, and lifting a maximum of 50 pounds. Petitioner testified that he was on his feet 75-80% a day. He testified that his duties required him to squat, kneel and sit. About 75% of his time was spent doing work at or above chest level.

After petitioner completed his work on 2/12/09 about 3:15 p.m. he and the other guys in his crew were waiting for the elevator inside the building. Petitioner stated that the elevator broke down a lot and at times they would have to wait an hour for it to be fixed. Petitioner stated that since everyone wanted to leave, Carl Thomas, the foreman told everyone to go to the 30th floor and catch the skip (the elevator on the outside of the building). Petitioner testified that normally he would not use the skip when working. He stated that pursuant to company rules the skip should only be used for a delivery.

Petitioner testified that when he got in the skip on the 30th floor there were 3 or 4 people in it: Bill Dolan, Carl Thomas, and another foreman whose name he did not know. The skip lowered to the loading dock where all **[*7]** the men exited. Petitioner testified that he was the last to exit. They all walked down the loading dock to the door that led outside. Petitioner was last in line and was pushing his cooler with ice and pop in it. Petitioner testified that outside the door there were some steep steps that lead to the basement, which led to the alley. From there the men went to their cars in the parking lot.

Petitioner testified that by the time he got to the door the others had already gone through it and the door was shut. Petitioner picked up his cooler and opened the door. He placed his foot as a stop by the door. Petitioner stated that when he opened the door there was the effect of a wind tunnel. As he removed his foot from the door and went to walk out and down the stairs the wind blew the door closed from behind him. The force of the door struck him from behind and pushed him down the stairs, four feet to the basement floor. He testified that he landed on his left ankle and his body crumbled to the floor on his left side. He testified that his cooler flew out of his hand.

Petitioner testified that Dolan was ahead of him and when he heard the noise he came back and asked him if he was okay and **[*8]** needed any help. He testified that Dolan offered to take him to the hospital. Petitioner declined. After the fall petitioner stated that he was hurting and his left ankle started to swell. He also testified that his left knee, hip and shoulder hurt.

Adam Smith, a fellow journeyman electrician, testified that he was with Dolan when he approached petitioner on 2/12/09. He stated that he saw petitioner in the skip, on the dock exiting the job site and then on the ground after he fell. Smith testified that in order to exit the dock from the skip, the men formed a single file line to go down the stairs through the door. Smith said he was the second to last guy through the door. After he exited he heard the door slam behind him. As he began walking he heard the door slam again and he turned around and saw petitioner on the ground. Smith testified that when he went to offer petitioner some help petitioner got up on his own and said he was okay. Smith exited with petitioner. He did not recall seeing petitioner limping.

Smith stated that he had seen other employees leave via the skip on other days. Smith stated that he was on the skip when it stopped at the 30th floor to pick up petitioner. **[*9]** He stated that no one else was picked up on that floor. Smith stated that at the beginning of the job he would take the skip down daily. However, later he was instructed by respondent to use the regular elevator and not the skip. Smith stated that he would take the skip when the elevator line was too long and the skip was open. Smith testified that on 2/12/09 his foreman, Pete Dolan, and Dave Grau, Kevin Cooper and Rich Rivery (all journeymen) got in the skip together. Smith testified that Dolan gave them permission to use the skip that day instead of waiting for the elevator. Smith testified that there was nothing wrong with petitioner being on the skip that day.

Petitioner admitted to prior injuries and problems with his left ankle, but not with his left shoulder. Petitioner testified that in 2004 he treated with Dr. Haddad for his left ankle and eventually underwent a fusion in April of 2006. He was released from the care of Dr. Haddad on 8/30/06. His diagnosis at that time was healed left ankle arthrodesis. Dr. Haddad noted swelling at that time. Petitioner stated that it was due to his job. He stated that he had been ambulating with full weight bearing on his left ankle. He stated **[*10]** that he had been working aggressively in construction and felt that he had been putting a lot more stress across his ankle joint overall. He stated that following his fusion surgery his left ankle was chronically swollen, but was even more swollen after the incident on 2/12/09. On September 19, 2006, Dr. Coe examined petitioner and was of the opinion petitioner was restricted from using his right arm at or above shoulder height.

Petitioner also reported a prior injury to his left knee on 2/22/07 when he slipped on some ice

while walking his dog. He was diagnosed with neck, left knee and left ankle strain. On 2/26/07 he was seen by Dr. Biegler for his knee and Dr. Haddad for his left ankle. He was prescribed anti-inflammatories. He also presented to Sherman Hospital where he reported pain in his left ankle. He reported that he felt something tear as he fell. He also complained of left knee pain. On 2/28/07 he saw Dr. Shapiro who ordered an MRI of his neck. Petitioner denied any further treatment for his left ankle until the incident on 2/12/09.

In March of 2008, petitioner injured his left knee when he fell 5 feet from a ladder at Loyola. He testified that he landed partially on his **[*11]** left leg, twisted his left knee and hit his left elbow. On 3/18/08 he presented to Dr. Biegler. An MRI of the left knee was taken. The results revealed low grade injuries of the ACL and collateral ligaments, probable synovial cyst between he cruciate ligaments, moderate chondromalacia of the patellofemoral joint with patella alta, small patellofemoral joint effusion, and degenerative change of the posterior horn of the medial meniscus. A definite meniscal tear was not identified. Petitioner also underwent a course of physical therapy before returning to full duty work without restrictions on 6/10/08. Petitioner denied any further problems with his left knee until the incident on 2/12/09.

Petitioner testified that after he got up he followed Dolan out of the building and limped to his car. Petitioner testified that the next morning, he was achy, bruised and his left ankle, knee and side were swollen. Petitioner got up and went to work. Once there he reported the accident and completed an accident report. About an hour after arriving at work the shop steward took petitioner to Northwestern Memorial Physicians Group. Petitioner gave a history of falling off the top of the 4th stair and **[*12]** landing on the ground injuring his left shoulder, left hip, left knee and left ankle. He stated that he landed on his left shoulder and left hip and twisted his left knee. He also complained of left foot pain. He reported some numbness in his right fingertips and thumb tip only. He complained of left hip pain and pain in the left knee. Petitioner stated that he had minimal symptoms after the fall that increased in the morning. At trial, petitioner testified that this history was wrong. Following an examination and x-rays, petitioner was diagnosed with a left shoulder strain, left hip contusion, left knee strain, and left ankle and foot contusion. Petitioner had restrictions of no prolonged walking or standing, no overhead work with left arm, and no pushing or pulling or lifting with his left arm. Petitioner testified that his restrictions were not accommodated by respondent and he continued working his full duty job. Respondent disputes petitioner's claim that his restrictions were not honored.

On 2/18/09 petitioner presented to Dr. Mitton at Northwest Corporate Health. He complained of pain at an 8 on a level of 10 in his shoulder with overhead lifting, a 6 out of 10 in his left **[*13]** ankle, and a 9.5 out of 10 in his left knee. Petitioner was released to full duty work. Petitioner continued working his full duty job. On 2/25/09 petitioner reported increased pain in his left knee and ankle with extended kneeling at work. He also complained of left shoulder and left ankle pain. Petitioner was released to work with restrictions of no use of ladders and no kneeling. Petitioner returned to work after his appointment.

When petitioner returned to work he stated that his foreman Bill Roth asked him when the doctor was going to release him. Petitioner testified that he told Bill that he had a doctor report. He further testified that he told Roth that he did not want what happened to him last year to happen to him again. Petitioner testified that what this meant was that he did not want to be laid off after 45 days because then his name would go on the bottom of the list at the union hall and he might not get additional work for about a year. He testified that he told Roth to let him know if he was going to keep him. If not, he wanted him to lay him off before his 45 days were up. Petitioner testified that this is what happened to him last year with a different employer. **[*14]** He stated that two weeks after his 45 days were up he was laid off and was off work for 10 months. Petitioner testified that if he is laid off before his 45 days are up his name does not go to the end of the list at the union hall. Petitioner denied that he asked Roth for a layoff. He stated that he still had 5 weeks left before his 45 days were up.

Petitioner testified that on 2/26/09 he was notified that he was being laid off. He stated that he was told this by Roth, William Berge, and the assistant steward. He stated that at no time

before he was laid off was he ever asked if he wanted a voluntary layoff. Petitioner denied that he asked to be laid off. However, he did state that if they were going to let him go, to do so before his 45 days were up. He testified that he was still under light duty restrictions by Dr. Mitton when he was laid off. Petitioner testified that from 2/26/09-11/20/09 he has not been contacted by respondent or its insurer about employment.

On 3/3/09 petitioner presented to Dr. Biegler. Dr. Biegler was a doctor of his own choosing. Petitioner gave a history of falling down a flight of stairs on 2/12/09. An examination revealed obvious weakness of the left **[*15]** rotator cuff. Dr. Biegler was of the opinion that it appeared petitioner may have sustained a low-grade recurrent strain of the left knee, and probable rotator cuff tear of the left shoulder. An MRI of the knee and shoulder were recommended.

On 3/12/09 petitioner followed-up with Dr. Mitton. He rated his ankle pain between a 6 and 9 on a scale of 10, his knee pain between 5-8 on a scale of 10, and his shoulder between a 4 and 7 on a scale of 10, all varying with different movements. Dr. Mitton noted that petitioner was still waiting for an appointment with Dr. Haddad. Dr. Mitton ordered a course of physical therapy for the left shoulder and ankle. Petitioner was diagnosed with a left shoulder strain, left hip contusion, left knee strain, and left foot and ankle contusion. Petitioner stated that Dr. Mitton had referred petitioner to Dr. Haddad. He also gave him restrictions of no prolonged walking or standing, no overhead work with left arm, and no kneeling or ladders.

On 3/17/09 petitioner underwent an MRI of the left knee and left shoulder. The results of the left knee MRI revealed small complex ACL ganglion, high grade chondromalacia of the patellofemoral joint, and a prominent signal **[*16]** within the posterior horn of the lateral meniscus. The presence of a tear could not be definitely excluded. The results of the MRI revealed a full thickness tear of the supraspinatus tendon insertion with minimal tendinous retraction, probable disruption of the biceps tendon, arthritic changes of the AC joint, and degenerative changes of the glenoid labrum with degenerative tearing suspected.

On 3/24/09 petitioner followed-up with Dr. Biegler. Dr. Biegler reviewed the results of the MRI and recommended that the rotator cuff should be addressed first. He planned a biceps tenodesis. He prescribed Naprelan and Voltaren gel for the knee.

On 3/26/09 petitioner followed up with Dr. Mitton. Dr. Mitton added a restriction of no lifting over 10 pounds to the restrictions he ordered on 3/12/09. Petitioner was scheduled for surgery on 4/10/09 but never had it because it had not been authorized by the respondent.

On 6/2/09 petitioner underwent a Section 12 examination by Dr. Lawrence Lieber at the request of the respondent. Petitioner gave a history of an injury on 2/12/09 while working for respondent. Petitioner stated that he was hit in the back by a door which projected him down off a dock, **[*17]** landing onto concrete and sustaining injury to his left shoulder, knee, hip and ankle. Petitioner gave a history of his treatment to date. Petitioner complained of continued difficulties with his left shoulder and left knee area and stated at times he has problems with his left ankle. Petitioner reported no left hip discomfort. He stated that his left shoulder bothers him at night, and he had weakness and difficulty with overhead activity. He complained of increasing pain with increasing activity as well as numbness in his shoulder and arm. Petitioner reported problems with his left knee when ambulating on uneven ground. He also complained of occasional giving way of his knee, weakness in his knee, and difficulty with stairs with no locking or popping. Petitioner stated that his left ankle bothers him on uneven ground as well as with ambulation. He complained of weakness in his ankle as well as pain at night and difficulty with swelling.

Following a physical examination and record review, and in answer to the correspondence of respondent's attorney, Mr. Makauskas, Dr. Lieber's diagnosis was left knee status post strain, chronic left rotator cuff tear and status post ankle fusion. **[*18]** Dr. Lieber opined that petitioner's left knee was neither aggravated nor caused by the accident on 2/12/09 and he had

no objective evidence of any abnormality that can be related to the injury. He opined that the petitioner's left shoulder condition was aggravated by the injury on 2/12/09. He was of the opinion that there was a significant preexisting rotator cuff pathology that appeared to have been aggravated by the injury that caused increased symptomatology at the present time with objective results of weakness. Dr. Lieber opined that there is evidence of a minor injury to all areas involved based on petitioner's complaint of increased symptoms the morning after the accident. Dr. Lieber opined that petitioner needs no further treatment for the left knee or left ankle, but may need surgical intervention for the left shoulder in direct relationship to the aggravation of his preexisting chronic rotator cuff tear. He further opined that petitioner needed no restrictions concerning his left knee or ankle, but with respect to his left shoulder he should be restricted from overhead activity and lifting more than 50 pounds to chest level. Dr. Lieber was of the opinion that petitioner had **[*19]** reached maximum medical improvement with respect to his left knee and ankle.

Petitioner testified that on 6/24/09 when this case was scheduled for trial the respondent authorized his surgery and offered him some temporary total disability benefits which petitioner accepted. The parties stipulate that respondent has paid $ 21,034.72 in temporary total disability benefits. He also testified that he was supposed to see Dr. Haddad on 6/24/09 but never received authorization from the respondent for the visit.

On 7/15/09 petitioner underwent surgery at Ravineway Surgery Center. Dr. Biegler performed an arthroscopy of the left shoulder, limited synovectomy, subacromial arthroscopic decompression, arthroscopic rotator cuff repair-double row technique, and mini open biceps tenodesis. Petitioner's post-operative diagnosis was shredded biceps tendon long head, full thickness supraspinatus tear with minimal retraction, subacromial impingement. Petitioner testified that he began receiving temporary total disability benefits as of 7/15/09.

Petitioner followed-up post-operatively with Dr. Biegler. He began physical therapy at Athletico on 7/24/09. On 7/21/09 Dr. Biegler ordered physical therapy **[*20]** for petitioner. He also released petitioner to office work only. Petitioner testified that he was never offered any office work by respondent and continued to receive temporary total disability benefits.

On 8/8/09 petitioner followed-up with Dr. Biegler. On 9/8/09 Dr. Biegler drafted a new prescription for physical therapy to include biceps rehabilitation, strengthening and function. Dr. Biegler released petitioner to office work only until 11/17/09.

On 9/21/09 petitioner saw Dr. Haddad for his left ankle. Petitioner reported that he never had any pain in his left ankle until the incident on 2/12/09. He then stated that he had some pain in his ankle in 2007 following an injury, but that it had gone away. Petitioner reported to Dr. Haddad that he could not walk after the incident on 2/12/09. He reported that he was pushed off the loading dock and came down on his left ankle and sustained a fair amount of soft tissue damage for which Dr. Biegler had been treating him. Petitioner reported that he was unable to walk after the incident and felt that something was not right with his left ankle. Following an examination and x-rays, Dr. Biegler's impression was healed ankle arthrodesis, possible **[*21]** early subtalar arthritis, and possible peroneal tendon or posterior tibial tendon injury. Dr. Haddad was of the opinion that petitioner's fusion was doing fine, but due to petitioner's pain complaints, he ordered a diagnostic ultrasound to look at the peroneal tendon, posterior tibial tendon, anterior tibial tendon and anterior structures.

On 9/29/09 petitioner received a letter from West Bend, respondent's insurer informing him that they could not take him back to work because he had taken a voluntary layoff. Petitioner testified that he was not aware of any light duty work available through the union. He stated that if you have light duty restrictions you cannot get work through the union. However, on cross-examination petitioner admitted that he had undergone an FCE in 2005 and was given permanent restrictions with respect to his right shoulder. He stated that in 2006 he was given permanent restrictions of no overhead work with respect to his right shoulder by Dr. Coe. Despite these restrictions petitioner continued to get work through the union.

On 10/3/09 Dr. Biegler continued petitioner off work. On 10/5/09 Dr. Bielger released petitioner to seated work until 11/17/09. Petitioner **[*22]** testified that his temporary total disability benefits were cut off on 10/5/09.

On 10/8/09 petitioner filed a petition for penalties and fees claiming respondent has failed to pay any weekly compensation benefits provided for under the Act. Respondent filed its response on 10/29/09. Respondent denied petitioner's allegations.

On 11/17/09 petitioner had a scheduled appointment with Dr. Biegler. However, petitioner was turned away and told he could not be seen because he had an outstanding bill.

William Berge, general foreman of the job petitioner was working on 2/12/09, was called as a witness on behalf of respondent. Berge stated that petitioner began working there on 1/27/09 when he came to the job site with a slip from the union hall. Berge testified that he became aware of petitioner's accident of 2/12/09 on 2/13/09 on his way into work. He testified that Thomas Halfman told him about the accident and that he also interviewed Adam Smith. Berge testified that Halfman told him Smith was present when petitioner fell. Berge denied ever talking to Dolan about the incident.

Berge spoke with petitioner on 2/13/09 when he went to the 31st floor and asked him what happened. An accident **[*23]** report was completed. Berge did not notice petitioner walking with a limp. After petitioner returned from the doctor later that morning, Berge stated that petitioner was sent home. When petitioner returned to work on 2/16/09 Berge asked petitioner how he was feeling. Petitioner stated that he was feeling a little sore but ready to work. He testified that petitioner asked for 8 hours of work.

Berge testified that Roth told him that petitioner had requested a layoff. Berge testified that he learned about the layoff request one day before petitioner was laid off. Berge testified that he had a conversation with petitioner about the layoff. He stated that he wanted to talk to petitioner to confirm what Roth told him was true. Berge testified that Roth told him petitioner wanted a layoff because he was coming close to his 45 days. Berge believed the 45 day rule was the reason for petitioner's layoff request.

Berge next spoke with petitioner when he gave petitioner his final check and severance on 2/26/09. Berge testified that he then thanked petitioner for his help and the only thing petitioner stated was that he thought he would be laid off on Friday (the next day). Berge testified that **[*24]** from the time petitioner was injured until the time he was laid off he never saw petitioner limping when he walked through the work site. He testified after the injury when he would walk the floors he saw petitioner roughing the walls. He further testified that petitioner never complained to him of any problems that would keep him from performing his work. Berge stated that petitioner never told him he was requesting the layoff because he was injured.

Berge testified that petitioner was a good worker with a good reputation on the job for being a hard worker. He further testified that he did not have the initial conversation with petitioner regarding the layoff. He stated that petitioner had it with someone else. Berge testified that on occasion workers will ask for a layoff if they know there may not be work for them after 45 days. Berge testified that he does not keep track of the employees days worked or if they have prior work that would count towards the 45 days. Berge testified that he gave petitioner the layoff because he asked for it. He was not aware petitioner was under any restrictions when he requested the layoff.

Berge testified that when someone asks for a layoff it is **[*25]** given immediately. He testified that it is not common practice where someone asks for a layoff on a future day. Berge testified that checks are issued to the employee the day after the layoff is requested. Berge testified that petitioner never told him that he only wanted to be laid off if there was not going to be

work for him after his 45 day period. Berge stated that the job petitioner was working was just getting started and they were still hiring.

Berge testified that after petitioner was injured he was aware he had restrictions. He stated that it was Roth's job to make sure restrictions were accommodated, and he believed Roth accommodated them. Berge believed roughing walls was within petitioner's restrictions, but admitted that it may violate the restriction of prolonged standing.

Roth testified that he currently has light duty restrictions and respondent is accommodating them. Roth testified that petitioner reported the accident to him the day the day after the accident. He testified that he sent petitioner to the hospital with the steward and after he came back sent him home with pay. When petitioner returned to work on Monday he assigned petitioner the job of roughing walls. **[*26]** Roth testified that petitioner can perform this job standing or kneeling. Roth never saw that petitioner was unable to perform this job and petitioner never told him he could not perform the job. Roth testified that each day he would ask petitioner how he was and he would indicate that he was fine. Roth testified that he never noticed petitioner limping from the date of injury to the day he was laid off.

Roth testified that he was told by another foreman (Carl Thomas) that petitioner wanted a layoff because his time from the hall was running out. Roth testified that he then went to petitioner and asked him if he wanted to be laid off and why. He testified that petitioner told him that that he wanted to be laid off because he time was running out. Petitioner never told him he was in any pain or wanted the layoff because he was in pain or due to the injury.

Roth testified that it is possible petitioner had up to 25 days left of his 45 days if he had not worked somewhere else. He further testified that there have been other employees that have asked for layoffs due to the 45 day rule. Roth testified that he comes from a different union than petitioner and was unaware of the 45 day rule **[*27]** until someone explained it to him after petitioner asked for the layoff for this reason. Roth testified that he gave petitioner the layoff because he did not want to screw petitioner and have him loose his spot in the books. Roth testified that petitioner never told him how many days he had left when he requested the layoff. However, he assumed it was soon because he was asking for the layoff.

Thomas Brummel, field superintendent for respondent, was called as a witness for respondent. His duties include managing the manpower between one job and another. He decides who runs the work, calls the union to request help, and completes the slips for layoffs. Brummel testified that he is familiar with the union rules and eligible electricians to hire. Brummel is the one who faxes the requests to the union hall regarding what job is available, how long it will last, and how many men are needed. He also testified that he is familiar with the process at the union hall when a member is laid off. Brummel testified that in 2/2009 he had light duty available for any injured workers, and still has it available today. He described some of these light duty jobs as maintaining tools, repairing wheels **[*28]** on carts, maintaining temporary light fixtures, and office work. He stated that all these jobs can be done while sitting.

Petitioner testified that he wants follow-up visits with Dr. Haddad and Dr. Biegler and wants to undergo the ultrasound to his left ankle recommended by Dr. Haddad. Petitioner testified that he has not yet been released to work by Dr. Biegler.

On 5/17/07 petitioner gave a deposition in a case versus McShane. In that deposition he was asked if he was currently working. He answered that he was currently driving a truck delivering electrical material for Platinum Electric. Petitioner testified that although he was supposed to do this job, it never came to fruition. He testified that he never drove a truck.

After all of the respondent's witnesses testified petitioner was recalled for rebuttal. Petitioner testified that Smith was not in the skip with him, was not present when he fell, and never saw him before he appeared in court. Petitioner testified that the only one who came up to him when he was on the ground was Dolan. Petitioner also testified that Thomas was the first

person he talked to about the layoff. Petitioner did not call Dolan or Thomas as witnesses on **[*29]** his behalf. Petitioner testified that on 2/25/09 he had 23 of his 45 day cycle left. Petitioner testified that he told Roth/Berge that his layoff was conditioned on whether they were going to keep him on after 45 days. Petitioner testified that he talked to Roth and Berge about being laid off because he did not want what happened to him the year before to happen again. He testified that he was off work from 4/08-1/09 after being laid off in 2008 after his 45 days had past. Petitioner also testified that Berge lied when he said petitioner was sent home with pay after returning from the doctor the day after the accident. Petitioner said he returned to work when he got back from being treated and completed the day. Petitioner also testified that Smith lied when he said that petitioner was the only one that got on the skip on the 30st floor on 2/12/09. Petitioner denied ever telling Roth or Berge that his hours were running out.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT?

Petitioner presented unrebutted testimony that on 2/12/09 he took the skid to leave the building. Although the skip is not normally allowed for **[*30]** things other than deliveries, Berge testified that no one was disciplined for taking the skip down after work on 2/12/09.

Petitioner testified that the skip lowered to the loading dock. Once the men exit the skip they walk single file across the dock through a door, down four stairs to the basement and then out of the building. Smith testified that he was ahead of petitioner when he left the building. After he exited the door he heard it slam behind him. Shortly thereafter, as he walking he heard the door slam again behind him, turned around and saw petitioner on the floor. Petitioner testified that as he tried to get through the door with his cooler the opening of the door caused a wind tunnel and when he let go of the door to exit it the wind caught the door and slammed it into his back pushing him down the 4 stairs that were just outside the door. Petitioner testified that he landed on the ground injuring his left shoulder, hip, knee and ankle.

Adams testified that he went over to petitioner with Dolan to see if he was alright. Petitioner stated that he was alright, got up, and walked out with him. Although petitioner denies that Smith was there when he fell, the arbitrator finds **[*31]** the history of what occurred consistent. The petitioner notes that no one actually saw petitioner fall, but that Dolan did approach him after he fell and asked him if he needed any help. Petitioner declined. Petitioner never called Dolan to testify.

Based on the above, as well as the credible record the arbitrator finds the petitioner sustained an accidental injury that arose out of and in the course of his employment by respondent on 2/12/09 when he fell down the stairs after exiting the loading dock on his way to his car at the end of the day. The petitioner was carrying his cooler while exiting the door and presented unrebutted testimony that the door got caught by a blast of wind and struck him in the back as he exited the door causing him to fall down the stairs.

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

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of accident and incorporates them herein by this reference.

Petitioner claims that his current condition of ill-being as it relates to his left shoulder, knee, hip and ankle are casually related to the accident on 2/12/09. **[*32]** Prior to the accident on 2/12/09 petitioner underwent a left ankle arthrodesis in April of 2006. Petitioner actively treated for this injury through 8/30/06. At that time Dr. Haddad noted chronic swelling. Petitioner reported chronic swelling since that date which he associated with being on his feet all day working in the construction trade. Petitioner sustained an injury to his left knee and an aggravation to his left ankle on 2/22/07 when he slipped on some ice while walking his dog. Petitioner had a follow-up visit with Dr. Biegler and Dr. Haddad, and a visit to Sherman

Hospital. He received no treatment after 2/27/07.

In 2008 petitioner injured his left knee when he fell from a ladder. On 3/18/08 he presented to Dr. Biegler. An MRI of the left knee was taken. The results revealed low grade injuries of the ACL and collateral ligaments, probable synovial cyst between the cruciate ligaments, moderate chondromalacia of the patellofemoral joint with patella alta, small patellofemoral joint effusion, and degenerative change of the posterior horn of the medial meniscus. A definite meniscal tear was not identified. Petitioner also underwent a course of physical therapy before returning **[*33]** to full duty work without restrictions on 6/10/08.

Petitioner's first treatment following the accident was at Northwestern Memorial Physicians Group. He gave a history of falling off the top of the 4th stair and landing on his left shoulder, hip, knee and ankle. He reported that he landed on his left shoulder and left hip and twisted his left knee. He also had complaints of left foot pain. Petitioner was diagnosed with a left shoulder strain, left hip contusion, left knee strain and left ankle and foot contusion.

When petitioner followed-up with Dr. Mitton on 2/18/09 his knee pain was the most severe with a rating of 9.5 on a scale of 10. He also rated his shoulder pain as an 8 on a scale of 10 and his ankle pain as a 6 on a scale of 10. He stated that his left knee and ankle pain increased with extended kneeling at work.

Petitioner next sought treatment for his left shoulder with Dr. Biegler, a doctor of his own choosing. On 3/12/09 he followed-up with Dr. Mitton with ongoing complaints of left shoulder, knee and ankle pain. Dr. Mitton ordered physical therapy for petitioner's shoulder and ankle.

An MRI of the left knee on 3/17/09 showed increased chondromalacia of the patellofemoral **[*34]** joint and prominent signal within the posterior horn of the lateral meniscus. The MRI of the left knee taken in March of 2008 showed moderate chondromalacia of the patellofemoral joint and degenerative changes of the posterior horn of the medial meniscus. At that time a definite meniscal tear was not identified. On the MRI taken March of 2009, the presence of a tear of the posterior horn of the medical meniscus could not be definitely excluded.

The results of the MRI of the left shoulder showed a full thickness tear of the supraspinatus tendon insertion with minimal tendinous retraction, probable disruption of the biceps tendon, arthritic changes of the AC joint, and degenerative changes of the glenoid labrum with degenerative tearing suspected. For this condition Petitioner underwent an arthroscopy of the left shoulder, limited synovectomy, subacromial arthroscopic decompression, arthroscopic rotator cuff repair-double row technique, and mini open biceps tenodesis. Petitioner's post-operative diagnosis was shredded biceps tendon long head, full thickness supraspinatus tear with minimal retraction, subacromial impingement. Post-operatively, petitioner underwent physical therapy.

On **[*35]** 9/1/09 petitioner saw Dr. Haddad for his left ankle. Respondent gave petitioner authorization for this visit after the IME of Dr. Lieber. Petitioner testified that he could not walk after the incident on 2/12/09. Petitioner gave a history of landing on his left ankle when he fell down the stairs on 2/12/09. The arbitrator finds this history inconsistent with the history provided at Northwestern Memorial Physicians Group on 2/13/09, one day after the accident and most contemporaneous with the accident. The arbitrator further finds petitioner's claim that he could not walk on his left ankle inconsistent with the testimony of Berge, Smith, and Roth, who all testified that they never saw petitioner limping at work after the accident. Dr. Haddad's diagnosis was healed ankle arthrodesis. He believed petitioner's fusion was doing fine, but due to petitioner's pain complaints he ordered a diagnostic ultrasound to look at the peroneal tendon, posterior tibial tendon, anterior tibial tendon and anterior structures.

Dr. Lieber was of the opinion that petitioner's left knee condition was neither aggravated nor caused by the accident on 2/12/09 and that petitioner had no objective evidence of **[*36]** any

abnormality that could be related to the injury on 2/12/09. He opined that the petitioner's left shoulder condition was aggravated by the injury on 2/12/09. He was of the opinion that there was a significant preexisting rotator cuff pathology that appeared to have been aggravated by the injury that caused increased symptomatology at the present time with objective results of weakness. He further opined that there is evidence of a minor injury to all areas involved based on petitioner's complaint of increased symptoms the morning after the accident. Dr. Lieber opined that petitioner needs no further treatment for the left knee or left ankle, but may need surgical intervention for the left shoulder in direct relationship to the aggravation of his preexisting chronic rotator cuff tear. He further opined that petitioner needed no restrictions concerning his left knee or ankle, but with respect to his left shoulder he should be restricted from overhead activity and lifting more than 50 pounds to chest level. Dr. Lieber was of the opinion that petitioner had reached maximum medical improvement with respect to his left knee and ankle.

Based on the above, as well as the credible record **[*37]** the arbitrator finds the petitioner's current condition of ill-being as it relates to his left shoulder causally related to the accident on 2/12/09. With respect to the left knee the arbitrator finds the petitioner sustained a temporary aggravation and that condition has reached maximum medical improvement. Based on the opinion of Dr. Lieber, the arbitrator finds the petitioner may have aggravated her pre-existing left ankle condition as a result of the accident on 2/12/09. Whether or not petitioner's current condition of ill-being is causally related to the accident or whether petitioner simply sustained a temporary aggravation to his left ankle is unknown pending the results of the diagnostic ultrasound.

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

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of accident and incorporates them herein by this reference.

Based on the arbitrator's finding regarding causal connection, and the parties stipulation as to medical expenses, the arbitrator finds the petitioner is entitled to $ 1,167.97 medical bills pursuant to Section 8(a) and Section **[*38]** 8.2 of the Act as follows:.

Northwestern Medical Faculty Foundation - $ 249.00
Athletico - $ 267.99
Illinois Bone & Joint - $ 441.66
Accelerated Rehab Centers - $ 203.32
TOTAL: $ 1,167.97

K. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issues of accident and causal connection and incorporates them herein by this reference.

Petitioner claims that he was temporarily totally disabled from 2/26/09 through 11/20/09. The respondent claims petitioner is not entitled to any temporary total disability benefits.

The primary issue here is whether or not petitioner was laid off by respondent on 2/26/09 or whether petitioner requested a voluntary layoff on that date.

Prior to being hired by respondent in 1/06 petitioner had been off for 10 months. Petitioner was very upset about this because he believed the cause of it was the fact that his prior employer had let him Work beyond the 45 day period following his assignment from the union hall and he had to go to the end of the list for reassignment.

After his injury, petitioner was released to light duty work **[*39]** on 2/13/09. His restrictions included no prolonged walking or standing, no overhead work with left arm, and no pushing or pulling or lifting with his left arm. Petitioner testified that his restrictions were not accommodated by respondent and he continued working his full duty job. Respondent claims the work they provided petitioner was within his restrictions. On 2/18/09 petitioner was released to full duty work after being examined by Dr. Mitton. Petitioner testified that he continued working his full duty job.

Petitioner testified that he told Roth that he did not want what happened to him in 2008 when he was laid off two weeks after his 45 days to happen to him again. He testified that he told Roth that if was going to be laid off to do it before his 45 days were up. Petitioner testified that that he still had 5 weeks left with respondent before his 45 days would be up when he had this conversation with Roth. However, there is no evidence to support a finding that he made such a statement to respondent. Petitioner denied he ever requested a voluntary layoff.

Roth testified that he never talked directly with petitioner regarding his layoff. He testified that when petitioner returned **[*40]** to work on 2/13/09 he assigned him the job of roughing walls which he believed fell within petitioner's light duty restrictions. He stated that petitioner never told him that this job exceeded his restrictions. Roth stated that each day after petitioner returned to work he asked him how he was doing and he stated that he was fine.

Roth testified that Thomas told him that petitioner had come to him and requested the layoff because his time at the hall was running out. Roth testified that he then went to petitioner to confirm that he wanted to be laid off and why. Roth testified that petitioner told him he wanted to be laid off because he was running out of time. He testified that petitioner never said anything about wanting the layoff because he was in pain or because of his injury. The arbitrator notes the petitioner never testified that he wanted a layoff due to his pain or injury. Roth testified that other employees have asked to be laid off due to the 45 day rule. Roth testified that he gave the petitioner the layoff because he did not want to screw the petitioner and have him loose his spot in the books at the union hall. Roth testified that petitioner never told him how many **[*41]** days he had left when he asked for the layoff.

Berge testified that he learned that petitioner had requested a voluntary layoff from Roth one day before petitioner was laid off. Roth told him that petitioner wanted a voluntary layoff because he was coming close to his 45 days. Berge spoke with petitioner when he presented him with his final check and severance on 2/26/09. Berge stated that petitioner never told him he was taking a layoff due to his injury. He stated that on occasion workers coming up against the day that they would have to be placed at the bottom of the list at union hall will ask for a voluntary layoff before that day. Berge testified that he gave petitioner the layoff because he asked for it.

Berg testified that when someone asks for a layoff it is effective the next day when they are presented with their check. Berge denied petitioner ever told him that he only wanted to be laid off if there was not going to be any work for him after his 45 days were complete.

Brummel testified that in 2/09 respondent had light duty work available for employees with work restrictions. Brummel even provided a list of some potential jobs. Roth even noted that he is currently working **[*42]** under light duty restrictions and respondent is accommodating them. Brummel stated that light duty has been available ever since petitioner was injured.

On rebuttal petitioner admitted that Roth was not the first person he talked to about the lay off. He stated that the first person he talked to about the layoff was Thomas. However, petitioner did not call Thomas as a witness, or ask that the hearing be continued so that he could bring Thomas in after hearing the testimony of Roth, Berge and Brummel. Petitioner was very combative while testifying and at times disruptive to the court when respondent's witnesses were testifying.

After being released to full duty work on 2/18/09, petitioner was put back on light duty work effective 2/25/09. Petitioner remained on light duty restrictions until 7/15/09 when he underwent surgery. Petitioner was released to light duty work by Dr. Biegler on 7/21/09. On 10/3/09, Dr. Biegler authorized petitioner off work. On 10/5/09 Dr. Biegler released petitioner to light duty work through 11/17/09. Petitioner was unable to follow-up on 11/17/09 due to his unpaid bill.

Based on the above, as well as the credible record, the arbitrator finds the petitioner's **[*43]** main concern after his injury was the possibility of being laid off just after his 45 days lapsed. Petitioner was very concerned about this happening since it had happened in 2008 and he was off for 10 months prior to respondent hiring him. The arbitrator finds the testimony of Roth and Berg more credible than petitioner and adopts their testimony that petitioner told him he wanted to be laid off because his 45 days were running out. Even petitioner testified that he wanted to be laid off if he was not going to be retained after his 45 days ran out. Petitioner never testified that he told Roth or Berge that his request for a layoff had anything to do with his injury.

Based on the credible testimony the arbitrator finds the petitioner asked respondent to be laid off prior to his 45 days being up, but was not expecting them to do it the so soon. The arbitrator finds the petitioner's reason for asking for the layoff was so that he would be allowed to return to the union hall and be reassigned without having to go to the end of the list. The arbitrator finds the respondent had no way to know when petitioner's 45 days were up and only honored his request that he be laid off because he **[*44]** asked for it. The arbitrator finds that based on what happened the year before, the petitioner's primary concern at that time was that he not be laid off shortly after his 45 days ran out. The arbitrator finds that this is the reason why petitioner asked Thomas for a layoff. The respondent has provided unrebutted evidence that it has had light duty work available consistently from the day of petitioner's injury to the day of trial.

The arbitrator finds the petitioner asked for a voluntary layoff on 2/25/09 and received it on 2/26/09. Given the fact that respondent has light duty work available for its employees the arbitrator finds the petitioner is not entitled to temporary total disability benefits for the period 2/27/09 through 7/4/09. Given that the petitioner was authorized off work from 7/15/09 through 7/20/09, and from 10/3/09-10/5/09, the arbitrator finds the petitioner is entitled to 1-1/7 weeks of temporary total disability benefits. The arbitrator finds the petitioner is not entitled to temporary total disability benefits from 10/6/09 through 11/20/09 due to the respondent's availability of light duty work.

L. SHOULD PENALTIES OR FEES BE IMPOSED UPON THE RESPONDENT? [*45]

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issues of accident, casual connection and temporary total disability benefits and incorporates them herein by this reference.

On 10/8/09 petitioner filed a petition for penalties and fees claiming respondent has failed to pay any weekly compensation benefits provided for under the Act. Petitioner did not request penalties and fees for any unpaid medical expenses. Respondent filed its response on 10/29/09. Respondent denied petitioner's allegations.

Based on the arbitrator's findings that petitioner is only entitled to temporary total disability benefits for the period 7/15/09 through 7/20/09 and 10/3/05 through 10/5/09, pursuant to Dr. Biegler's off work authorizations, the arbitrator finds the respondent has not only paid the weekly compensation benefits due and owing, but has also overpaid the amount of temporary total disability benefits to which petitioner is entitled. As such, the arbitrator finds the petitioner is entitled to 1-1/7 weeks of temporary total disability benefits for the periods 7/15/09-7/20/09 and 10/3/09-10/5/09. The arbitrator further finds the respondent is **[*46]** entitled to a credit

for its overpayment of temporary total disability benefits.

N. IS THE PETITIONER ENTITLED TO PROSPECTIVE MEDICAL TREATMENT?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issues of accident and casual connection and incorporates them herein by this reference.

Petitioner testified that he wants follow-up visits with Dr. Haddad and Dr. Biegler and wants to undergo the ultrasound recommended by Dr. Haddad. Based on the casual connection finding the arbitrator orders petitioner to pay for the diagnostic ultrasound ordered by Dr. Haddad and one follow-up visit to review those results. The arbitrator further orders respondent to pay for follow-up visits with Dr. Biegler for all reasonable and necessary treatment related to petitioner's left shoulder. These bills are to be paid pursuant to the fee schedule.

CONCURBY: MOLLY C. MASON

DISSENTBY: MOLLY C. MASON

DISSENT: PARTIAL CONCURRENCE AND DISSENT

I respectfully disagree with the Arbitrator's and majority's temporary total disability analysis and award.

The Arbitrator concluded that Petitioner "asked for a voluntary layoff on 2/25/09 and received it on 2/26/09." I view the evidence differently. **[*47]** Petitioner did not ask to be laid off. In fact, he testified that "only an idiot" would have requested a layoff. T. 59. The Arbitrator and majority overlook the sequence of events preceding February 25, 2009. On February 18, 2009, Dr. Mitton of Northwestern Corporate Health (a physician of Respondent's selection) released Petitioner to full duty despite the fact that Petitioner was complaining of significant pain in his left shoulder, left ankle and left knee and despite the doctor's notation that Petitioner might require a shoulder MRI. PX 1. Petitioner returned to work as directed but was assigned a job that required "extended kneeling." On February 25, 2009, Petitioner went back to Dr. Mitton and complained of increased left knee and ankle pain secondary to this job assignment. The doctor prescribed Norco for pain and imposed restrictions of no kneeling and no ladder usage. PX 1. Petitioner testified that he went back to the jobsite after seeing Dr. Mitton and gave the new restrictions to Bill, his foreman. According to Petitioner, Bill responded by asking when the doctor was going to release him. T. 27. It was only after this exchange occurred that Petitioner raised the **[*48]** issue of a layoff. I find it very reasonable to infer that Petitioner sensed his foreman's irritation at the new restrictions and initiated a discussion concerning the timing of a possible layoff because he sensed a layoff coming his way. Petitioner's request that Respondent not wait to lay him off until he had been on the job for more than 45 days (in which case he would have gone to the end of the call list per his union's rules, T. 27-28) was simply a peremptory strike. Respondent served Petitioner with a severance slip the next day and elected to characterize the layoff as "voluntary." That election was to Respondent's benefit since, per union rules, a "voluntary" layoff has the effect of terminating the employment relationship and ensuring that the laid off worker has to comply with "new employee" protocol if rehired. T. 176.

I also disagree with the Arbitrator's and majority's decision to award temporary total disability benefits after the so-called "voluntary" layoff only during those brief intervals (July 15, 2009 through July 20, 2009 and October 3, 2009 through October 5, 2009) when Petitioner was completely off work at his doctor's direction. It is undisputed that Petitioner **[*49]** was subject to work restrictions and under active medical treatment as of the February 26, 2009 layoff. Petitioner's condition remained unstable as of the Section 19(b) hearing of November 20, 2009. In Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132, 142 (2010), the Illinois Supreme Court reaffirmed that "when a claimant seeks TTD benefits, the **dispositive inquiry** is whether the claimant's injury has stabilized, i.e., whether the claimant has reached maximum medical improvement." (emphasis added) There is no evidence in the record to suggest that Petitioner

reached maximum medical improvement at any point between the layoff and the hearing. There is evidence that Petitioner's shoulder surgeon, Dr. Biegler, released him to light, office or seated work, while also prescribing continued therapy, on various dates after the rotator cuff repair and biceps tenodesis of July 15, 2009 but there is no evidence that Respondent offered such work to Petitioner during this time. T. 36-38. In fact, despite the arguments now before the Commission, Respondent paid temporary total disability benefits until September 29, 2007, when it switched tactics and **[*50]** informed Petitioner that no additional benefits would be forthcoming because Respondent had light duty but could not take Petitioner back due to union rules governing "voluntary" layoffs. T. 41. PX 8.

I find it ironic that employers are arguing that the logic of Interstate Scaffolding should not be applied so as to permit employees to "drive" their own claims. Is an injured worker who presents significant restrictions following a good faith effort to resume full duty really in the driver's seat?

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law > Collective Bargaining & Labor Relations > Discipline, Layoff & Termination

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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

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*2012 Ill. App. Unpub. LEXIS 458, **

CHICAGO BRIDGE AND IRON COMPANY, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (JERRY EVANS, Appellees).

No. 3-11-0207WC

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

2012 IL App (3d) 110207WU; 2012 Ill. App. Unpub. LEXIS 458

March 2, 2012, Filed

NOTICE: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

PRIOR HISTORY: [*1]
APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY. No. 10 MR 167. HONORABLE MICHAEL E. BRANDT, JUDGE PRESIDING.

DISPOSITION: Affirmed and remanded.

CORE TERMS: claimant, retirement, supervisor, retire, manifest, conversation, vocational, recalled, arbitrator, cross-examination, recollection, responded, retiring, planning, pension, retired, questions of fact, disability, confirmed, doctor, card, record to support, arbitrator's decision, conflicting evidence, contacted, awarding, ordering, temporary, evidence to support, years of service

JUDGES: JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment.

OPINION BY: HOFFMAN

OPINION

ORDER

Held: The decision of the Commission awarding the claimant temporary total disability benefits, maintenance benefits and ordering vocational services is not against the manifest weight of the evidence.

Chicago Bridge and Iron Company (Chicago) appeals from a judgment of the Circuit Court of Peoria County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Jerry Evans, temporary total disability (TTD) and maintenance benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2006)), for back injuries he sustained on January 8, 2007, and ordering a vocational assessment. For the reasons which follow, we affirm.

The following factual recitation is taken from the record of the arbitration hearings as well as the remainder of the record on appeal.

The claimant, a boilermaker who was 64 years old at the time of his **[*2]** testimony and had worked for Chicago for 27 years, testified that he slipped and fell on the job on January 8, 2007, and injured his back. The injury was later revealed to be a disc herniation. He reported his injury, and, on January 12 and afterwards, doctors restricted him to light-duty work. The claimant stopped working for Chicago on February 22, 2007, the end date of the job he had been working on. He thereafter sought treatment (including physical therapy and medication) for his back pain. A functional capacity evaluation conducted approximately one year later revealed that he was functioning in the "light to medium physical demand range" despite his reports of improvement.

The claimant testified that, at the time of his injury, he worked as a superintendent, a position that required him to supervise other employees but also to perform various physical tasks, such as climbing water towers or scaffolds, lifting heavy weights, and standing for long periods. He said that, after his injury, he informed his supervisor, David Lieske, of his new limitations and asked for accommodations.

The claimant stated that his plan had been to continue to work with Chicago for another three years **[*3]** in order to maximize his pension benefits. However, on cross-examination, he agreed that around the time of his January 2007 accident, he had told Lieske and another supervisor, David Beck, that he was considering retirement. He also agreed that he made his statements about retirement to his supervisors when they proposed that he begin work on a new job in the next month and that he told them that, if his back did not improve, he would likely have to retire. After that conversation, the claimant submitted a pension request form to Chicago's human resources department and, on the form, he indicated that he would retire in March 2007. In his testimony, the claimant explained that he completed the form in that way because he was considering retiring in March.

Near the time of the claimant's accident, Chicago had planned for the claimant to supervise a job in Darien, Illinois. When this plan was presented to him after his accident, the claimant recalled that he told Lieske he would be physically unable to do the job as planned but would accept the job if his duties were limited to his advising and training other workers. In the claimant's recollection, Lieske then offered to hire the claimant's **[*4]** son on the Darien job in order to entice the claimant to accept the work, but the claimant maintained that he could not accept the job without work restrictions. At that time, the claimant said, Lieske asked him to start the job while Lieske searched for another supervisor. The claimant testified that he agreed to this proposal, with the caveat that he had to contact his union to stop any steps that had been taken towards his official retirement. During cross-examination, the claimant agreed that he spoke with Lieske closer to the start of the Darien job and again told him he still had to tell the union to call off his retirement before he could commit to the Darien work, but he said that

he intended to call the union to clarify the situation. According to the claimant, Lieske never gave him that chance. Instead, shortly thereafter, Lieske called him back to tell him that he "[did not] have to be there Monday, [']send me your telephone *** and your credit card. Have a good life.['] And that was it." The claimant said that he remembered that Lieske called him one week later to try to smooth over any personal offense that had been caused by their earlier communications. The claimant **[*5]** reiterated that, in January and February 2007, he was willing to work if Chicago had offered him duties within his physical restrictions.

When asked during cross-examination whether he recalled a follow-up conversation with Lieske regarding the Darien job, the claimant stated that he had no recollection of such a conversation, nor any recollection of his telling Lieske that he intended to stop working for personal reasons.

The claimant recalled that, in the summer of 2008, Lieske called him again to offer him work on a job in Michigan. The claimant testified that he told Lieske he would be interested in the work but that he "never heard back" from Lieske, who "evidently found someone else to do it." The claimant said that, other than that summer 2008 contact, Chicago made no efforts to provide him with light-duty work.

The claimant further testified that he had conducted his own job searches after he stopped working for Chicago. He documented eight contacts with potential employers in the years after he left Chicago, and he said that he had made several more contacts prior to the time he began documenting them.

Lieske, the claimant's supervisor at Chicago, testified that he, the claimant, **[*6]** and Beck spoke about the claimant's retirement in mid- to early-January. According to Lieske, the claimant told them at that meeting that he had been traveling "a long time" and was considering retiring at the end of the job he was completing. At that point, Lieske testified, the supervisors asked the claimant if he would continue working to oversee the Darien job. Lieske said that he told the claimant to do the Darien work within his medical limitations, something the claimant would have been able to accomplish since he would have overseen all work activities at the site. In Lieske's recollection, the claimant responded by saying he was still considering retirement and would get back to them.

In early February 2007, two weeks before the end of what became the claimant's last job with Chicago, Lieske had a follow-up conversation with the claimant regarding the Darien job. During that conversation, Lieske said, the claimant "said he'd been traveling a long time and that his wife wanted him to come home and that he didn't want to work anymore." Lieske testified that he responded by offering to let the claimant's son work on the Darien job despite the company's anti-nepotism policy, but **[*7]** the claimant still wished to retire. At that point, Lieske asked the claimant to start the Darien job while Chicago looked for another foreperson, and the claimant, who had begun paperwork to receive a pension from his union, responded that he would have to get permission from his union to work. Lieske recalled that he later telephoned the claimant to inquire about the Darien job, and the claimant had not yet contacted his union and could not commit to the job. Although the claimant promised to contact the union and then call Lieske back, Lieske testified that he became nervous and instead found another foreperson. After doing so, Lieske informed the claimant and asked the claimant to return his company phone and credit card. Lieske said that he later called the claimant again to reconcile, because he had heard that the claimant was upset following their last conversation. He said that, in March 2007, he completed a "B card" to finalize the claimant's job file due to the claimant's retirement.

Lieske testified that he called the claimant again in 2008, to gauge the claimant's interest in acting as a safety supervisor at a new job for Chicago. He said, however, that he elected to use **[*8]** another Chicago employee for the job.

Jerry Evans, another of the claimant's supervisors at Chicago, testified that the claimant told

him near the end of 2006 that "he was planning on retiring" because "he had been on the road a long time ***, [and] wanted to spend more time with his grandchildren and his wife and work in his wood shop." Evans also remembered a January 2007 conversation, after the claimant's work injury, between the claimant, Lieske, and him in which the claimant again stated an intent to retire at the end of the pending job. When the claimant indicated his intent to retire, Evans recalled, Lieske responded by asking the claimant to stay on to do the Darien job, and the claimant replied that he would consider doing so. Evans testified that Chicago actually had the claimant scheduled to work on the Darien job and another job after that. Evans verified that the claimant would have been able to limit himself to his medical restrictions if he had continued to work for Chicago.

Recalled as a rebuttal witness, the claimant reiterated that he had intended to continue to work for Chicago until he had 30 years of service, and he said that his December 2006 comments were general **[*9]** ruminations about retirement. Although Evans and Lieske had testified that the claimant could do the Darien job within his job restrictions by delegating certain physical tasks, the claimant testified that his delegating those tasks would have been inappropriate. He further said that the job would have required him to lift beyond his restrictions, and to operate machinery despite medical problems doing so. On cross-examination, the claimant agreed that, despite his restrictions, he was able to finish his last job for Chicago, but he said he did so without taking his medications and by sometimes exceeding his medical restrictions.

The claimant's medical records include a January 8, 2010, note from Drs. Keith Barnhill and Demaceo Howard stating that the claimant was "not returning to work as he will retire as of February." However, the records also include a February 6, 2008, note from the same doctors reporting that, "[o]n discharging [the claimant] he stated he would like to return to duty, however he wanted work-related restrictions because he cannot lift."

On September 4, 2009, the arbitrator issued a decision finding that the claimant had retired from the workforce and had turned **[*10]** down work during the period for which he sought TTD benefits. The arbitrator awarded the claimant some medical expenses but denied him TTD and vocational rehabilitation benefits. In so ruling, he found that the claimant was not credible and that the claimant's testimony was undercut by documentary evidence, including a written pension request. The arbitrator also noted that the fact that the claimant continued to work for Chicago after suffering his injury indicated that he could perform supervisory tasks after his disability. Based on this evidence, the arbitrator found that the claimant retired on January 15, 2007, and that he declined work Chicago had offered him within his restrictions.

The claimant filed a petition for review of the arbitrator's decision before the Commission. In a decision with one commissioner dissenting, the Commission extensively modified the arbitrator's decision. In the Commission's view, the evidence showed that the claimant "began to plan his retirement in December of 2006 and started putting that plan into action in mid-January 2007" but did not decline later work offers. The Commission found that the claimant was willing to work the first two weeks on **[*11]** the Darien job, and it awarded him TTD benefits for those two weeks (from February 23, 2007, through March 8, 2007). The Commission also found that the claimant demonstrated a willingness to work when Lieske contacted him in 2008, and it thus awarded him maintenance benefits for 37 weeks from October 1, 2008, through June 16, 2009. It also ordered a vocational assessment, and it remanded the case to the arbitrator for further proceedings pursuant to Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Chicago filed a petition for judicial review of the Commission's decision in the Circuit Court of Peoria County. The circuit court confirmed the Commission's decision, and this appeal followed.

On appeal, Chicago asserts that the Commission erred in finding that the claimant had not retired by February 22, 2007, and that he had not removed himself from the workforce thereafter. It argues, therefore, that the Commission's award of TTD and maintenance benefits and its order for a vocational assessment of the claimant are against the manifest weight of he

evidence. We disagree.

Normally, benefits under the Act may be suspended or terminated if an employee refuses work falling **[*12]** within the physical restrictions prescribed by his doctor. **Interstate Scaffolding,** Inc. v. Illinois Workers' Compensation Comm'n, 236 Ill. 2d 132, 146, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010). Here, the Commission found as a matter of fact that the claimant was willing to work both for the first two weeks of the Darien job, from February 23, 2007, through March 8, 2007, and at a job Lieske offered him in 2008. This represents a finding of fact by the Commission, whose function it is to decide questions of fact, judge the credibility of witnesses and resolve conflicting evidence. O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Caterpillar, Inc. v. Industrial Comm'n, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question **[*13]** of fact is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. Benson v. Industrial Comm'n, 91 Ill. 2d 445, 450, 440 N.E.2d 90, 64 Ill. Dec. 538 (1982).

To assert that the Commission's finding regarding the claimant's willingness to work is against the manifest weight of the evidence, Chicago emphasizes testimony from Lieske and Beck that the company stood ready to accommodate any of the claimant's restrictions, yet he hesitated to accept work on the Darien job. It also emphasizes evidence, both from Lieske's and Beck's testimony and from exhibits introduced at the hearing, that the claimant was planning to retire in early 2007. The Commission, however, considered this evidence and determined that the claimant's discussion of retirement amounted only to planning. There was ample evidence in the record to support this determination. The claimant testified that his retirement talk was only planning, and he further testified that he had no intention of retiring until he obtained 30 years of service. Although Liekse and Beck testified that their job offers would have allowed the claimant **[*14]** to work within his restrictions, the claimant testified that such promises were not realistic. Further, although there was evidence that the claimant told treating physicians that he was retired, there was matching evidence that he told the same physicians within the same time period that he wanted to return to work. In addition, the claimant testified that he was willing to take a job described to him by Lieske in October 2008. In sum, although there may be sufficient evidence to support a finding that the claimant in fact did intend to retire in early 2007, there is also sufficient evidence to support a contrary finding. Given this conflicting evidence, we will not disturb the Commission's factual findings on the issue. That being the case, the Commission's award of TTD and maintenance benefits and its order for a vocational assessment of the claimant are not against the manifest weight of he evidence.

For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision, and we remand the matter back to the Commission for further proceedings.

Affirmed and remanded.

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*2010 Ill. Wrk. Comp. LEXIS 534, **

JERRY **EVANS,** PETITIONER, v. **CHICAGO BRIDGE** & IRON, RESPONDENT.

NO: 08WC15856

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF PEORIA

2010 Ill. Wrk. Comp. LEXIS 534

May 7, 2010

CORE TERMS: arbitrator, supervisor, pain, doctor, lumbar, temporary total disability, vocational rehabilitation, superintendent, underwent, foreman, injection, pension, retire, conversation, supervisory, follow-up, retired, temporary, modifies, physical therapy, functional, cross-examination, recommended, light-duty, diagnosed, tolerance, credibly, climbing, starting, vocational

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1] EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT. THE LEXIS SERVICE WILL PLACE THE CORRECTED VERSION ON-LINE UPON RECEIPT.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical care, vocational rehabilitation, § 19(k) and § 19(l) penalties and § 16 attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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).

After considering the entire record, the Commission modifies the Decision of the Arbitrator in **[*2]** several respects.

The Arbitrator declined to award temporary total disability benefits because he viewed

Petitioner as having voluntarily retired in February of 2007. The Commission views the evidence somewhat differently and disagrees with the Arbitrator's assessment of Petitioner's credibility. While it appears that Petitioner (who had worked for Respondent for 27 years) began to plan his retirement in December of 2006 and started putting that plan into action in mid-January 2007, as evidenced by the pension request form in evidence (RX 1), he did not decline Respondent's operations manager's subsequent offer of two weeks of field foreman "start up" work. Although the operations manager ultimately decided not to use Petitioner in this capacity, there is no evidence that Petitioner ever refused the offer. T. 38-40, 69-70, 103. Petitioner last worked for Respondent on February 22, 2007 but, in the Commission's view, was willing to work an additional two weeks. The Commission also notes that Petitioner was still subject to Dr. Cisneros' restrictions as of February 22, 2007 and that the doctor did not release him to full duty until April 12, 2007. PX 3. Based on this evidence and the **[*3]** stipulated average weekly wage of $ 830.67 (Arb Exh 1), the Commission modifies the Decision of the Arbitrator by awarding temporary total disability benefits at the rate of $ 553.78 per week from February 23, 2007 through March 8, 2007, a period of two weeks.

The Commission also modifies the Decision of the Arbitrator by awarding maintenance benefits at the rate of $ 553.78 per week from October 1, 2008 through June 16, 2009, a period of 37 weeks. Petitioner testified that Respondent's operations manager, Dave Lieske, called him in the summer of 2008 and offered him a job as a "resident safety man" at a jobsite in Michigan beginning October 1, 2008. Petitioner further testified that he responded affirmatively to the offer but did not hear from Lieske thereafter. T. 23-24. Lieske acknowledged making this offer but testified that he later decided to give the job to another individual. T. 72-73. The Commission views Petitioner's acceptance of Lieske's offer as evidence of his willingness to re-enter the workforce.

The Commission further modifies the Decision of the Arbitrator by directing Respondent, in consultation with Petitioner and his attorney, to prepare a vocational assessment **[*4]** in accordance with Section 8(a) of the Act and Rule 7110.10.

Petitioner acknowledged receiving permanency advances totaling $ 8,700.00 prior to arbitration. T. 27. The Arbitrator ordered Petitioner to repay this money to Respondent. The Commission vacates the order of repayment but finds that Respondent is entitled to credit for the monies it advanced.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $ 553.78 per week for a period of 2 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 947.98 for medical expenses under § 8(a) of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 553.78 per week for a period of 37 weeks, that being the period of maintenance benefits under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION **[*5]** that Respondent, in consultation with Petitioner and his attorney, prepare a vocational assessment in accordance with § 8(a) of the Act and Rule 7110.10.

IT IS FURTHER ORDERED BY THE COMMISSION that the order directing Petitioner to repay permanency advances in the amount of $ 8,700.00 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $ 8,700.00 for the permanency monies it advanced.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the 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 **[*6]** Circuit Court by Respondent is hereby fixed at the sum of $ 13,900.00. 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: MAY 7 2010

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 **Arb. Mathis**, arbitrator of the Commission, in the city of **Peoria**, on **5-28-09 & 6-16-09**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
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 the respondent?
N. Other **Vocational Rehabilitation**

FINDINGS

. On **1-8-07**, the respondent **[*7]** ***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 $ **64,792.00**; the average weekly wage was $ **1246.00**

. At the time of injury, the petitioner was **61** years of age, ***married*** with **0** children under 18.

. Necessary medical services ***have*** been provided by the respondent.

. To date, $ **8,700.00** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **n/a**/week for weeks, from **n/a** through **n/a**, 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 $ **0** for **[*8]** medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **0** 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 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 award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

8-24-04

Date

SEP 4 2009

DECISION [*9] OF THE ARBITRATOR

In support of The Arbitrator's decision relating to (K), **What amount of compensation is due for temporary total disability?, (J) Were the medical services that were provided to the Petitioner reasonable and necessary?** and (N), **Vocational Rehabilitation**, The Arbitrator finds the following facts:

The Petitioner testified on direct-examination that he sustained a work-related accident on January 8, 2007 while working as a supervisor boiler maker. He had worked for the Respondent for 27 years building water towers and storage tanks. He slipped and fell on a job site injuring his back while supervising in Ludington, Michigan on January 8, 2007.

Petitioner was employed as a superintendent for which he was responsible for oversight of the construction and refurbishing of water towers. As part of his job, he did physical duties including climbing ladders, scaffolds, lifting over 100 pounds and he sometimes had to stand over 8 hours per day. As a superintendent, he said he would have to step in for employees who had called in. If job inspectors presented at any of the work sites, it would be Petitioner's duty to climb the tower and to perform other physical activities **[*10]** to show the inspector the site

to comply with regulations. Also as a superintendent, he said he was responsible for insuring the safety of the employees by climbing water towers and making sure that the work area was safe.

Next on direct-examination, Petitioner testified that on January 8, 2007 he provided notice of the injury to the employer. He was sent by the employer to OSF Occupational Health in Peoria initially on January 12, 2007 and was given light-duty restrictions which he gave to his supervisor. He was diagnosed with L4 nerve root irritation, underwent physical therapy and was given anti-inflammatory drugs and pain relievers. He began physical therapy at IWRRC at the Respondent's request and underwent a Functional Capacity Evaluation (FCE) on February 1, 2008 which released him to light-medium-duty work.

Petitioner testified that he was referred to Dr. Kuby, an orthopedic surgeon who advised him that he could be a candidate for spinal fusion but recommended he undergo injections first. Petitioner said he underwent three injections by Dr. Howard and an MRI which he said revealed an L3-L4 herniation and L4-L5 bulging disc. He testified that he saw Respondent's IME Dr. Norman **[*11]** Hagman on October 8, 2008.

Petitioner testified that following the January 8, 2007 work accident, he informed his supervisor, Dave Lieske, of the spinal pain and problems he was having. He testified that this conversation occurred "later in January." He stated he told Dave Lieske that he didn't think he could physically do his job. He said that in January or February 2007, he told Mr. Lieske that he could perform light-duty work primarily as an adviser but not as a superintendent. He said he was worried that a superintendent had to be concerned for all safety on site and that he would not be able to perform that aspect of his supervisor's job. Next, Petitioner testified that the Respondent had previously fired superintendents that couldn't perform the "safety" aspect of their job.

Petitioner acknowledged that even with his restrictions in place, continued to work as a superintendent at Respondent's job in Ludington, Michigan finishing at the end of February 2007. He knew there was a new job starting immediately after that which he described as the Darien "Jack Job" but that he informed Dave Lieske he couldn't complete such a job in the capacity of "superintendent." Petitioner testified **[*12]** that he told Lieske could to overseeing but he did not want the responsibility of actually managing that "Jack Job" due to his work restrictions. He testified that Dave Lieske scheduled him for the "Jack Job" job with those conditions.

Next, Petitioner stated that on the Thursday or Friday of the week before the beginning of the Darien "Jack Job," Dave Lieske called him and said he didn't need the petitioner to show up in Darien, asked him to "send your cell phone and credit cards and have a good life."

Petitioner testified that if the Respondent had offered him a job within his restrictions, he would have done it. He said that in the first part of January 2007, he had spoken with Dave Lieske and with another supervisor, Dave Beck, and told them he couldn't "physically do it anymore" referencing climbing and other duties associated with a superintendent job. Petitioner testified that he is currently wiling to return to work within his restrictions and said that the Respondent called him in the summer of 2008 to ask him if he would be interested in doing a job in Michigan as a safety man starting in October 2008. He said that Dave Lieske never called him back regarding that position. **[*13]**

Petitioner testified that he has filed a demand for vocational rehabilitation. He admitted that all the medical bills had been paid except for one with IWRRC. He further indicated that he has made a job search effort as indicated in his Trial Exhibit # 10. He said he originally intended to work for 30 years to receive his maximum benefits in the Boilermakers Union and was three years short of that when he stopped working in 2007.

As to his current complaints, Petitioner he stated he had back pain "24/7." He said he gave his

golf clubs to his grandson because he has difficulty performing that activity. Instead of using a push mower, he now uses a riding mower. Further on direct examination, he admitted he received advances totaling $ 8,700.00 but that lie received no additional TTD benefits. He reiterated that he did not voluntarily retire in 2007 and did so only because he needed the money and was not going to be given light-duty work.

After cross-examination by Respondent's counsel and on re-direct examination, Petitioner stated that he was originally a union boiler maker and that in the early 1980s the Respondent went "non-union." As to the job search records, Trial Exhibit # 10, **[*14]** Petitioner stated he applied for more jobs than listed but that he had not written those job searches down. He reiterated that he would like a vocational counselor to assist him to find suitable work. He concluded his testimony on re-direct examination by stating that on January 12, 2007, Dr. Pena had given him a light-duty restriction for work.

On cross-examination by Respondent's counsel, petitioner denied having a conference with Dave Lieske and Dave Beck in January 2007, approximately 4-6 weeks before the end of the Ludington job which was on February 22, 2007. He then denied that Dave Lieske appealed at the Ludington, MI job in the first week of 2007 to offer him the Darien job. Next, Petitioner denied that Dave Lieske offered him an enticement to take the Darien job by offering to have Petitioner's son be his "assistant foreman" on the Darien job. Next, Petitioner denied that Dave Lieske contacted him to advise that he had found another employee to be supervisor on the Darien job or that he was told this was because the Petitioner had not yet confirmed whether he would or would not accept that Darien position.

Petitioner was shown his hand-written "CBNI Pension Request" which **[*15]** we Respondent had marked as their Exhibit # 1. The Arbitrator notes that this "CBNI Pension Request" was completed by the Petitioner and detailed his "Retirement Date" as March 1, 2007. Petitioner denied writing that he had applied for his union pension on "January 15, 2007" despite the fact that the Exhibit indicated that the Petitioner had expressed his desire to retire as early as January 2007.

The Respondent's first witness was Dave Lieske, Petitioner's supervisor. Mr. Lieske testified credibly that he was aware of the Petitioner's work-related accident in January 2007.

On direct-examination, Lieske stated that approximately 4-6 weeks prior to the end of the Ludington, Michigan job, he and another supervisor, Dave Beck, had a conversation with the petitioner in the Respondent's Plainfield office. He said the Petitioner had asked to come in for a conference and told Lieske and Beck that he was considering. retirement. He informed Lieske and Beck that he thought he could "make it on my pension" with the Boilermakers. Lieske requested that the petitioner "reconsider" because Respondent wanted him to be a foreman/supervisor with the current Ludington crew at a new "Jack Job" building **[*16]** stand pipes on the ground level in Darien where he would not have to exceed his work restrictions. He stated that the Respondent did not expect Petitioner to do any more then the doctor's light-duty restrictions. Lieske said that the Petitioner responded that he would have to "think about it", to discuss it with his wife but that he was "pretty sure" that he was going to retire anyway.

Further on direct-examination, Lieske testified that in February 2007, approximately 3 weeks before the end of the Ludington, Michigan job, in the first week of February 2007, he went to the Ludington, Michigan location specifically to speak with the Petitioner to see if he would accept the job. He had a conversation with the Petitioner in the "crew shack" in which he asked the following "are you going to do the Darien job?" Petitioner responded that he had been working a long time, that his wife wanted him to "come home" and not travel anymore. Petitioner stated that he could not fill the job so to entice the Petitioner to accept the position, Lieske offered to have his son be 'assistant foreman' in the Darien job. He acknowledged that this was against company policy but that he had spoken with his **[*17]** superiors and they had agreed to waive that restriction (of "nepotism") to entice the Petitioner to accept the Darien job because he was valued employee. When the petitioner rejected this offer, Lieske asked whether

the Petitioner would agree to only 'begin' the Darien job until Lieske could find a permanent supervisory replacement. Petitioner respondent that he would need to check with the Boilermakers Union to determine whether they would allow him to work for a brief time since he had already submitted a requested his Union Pension.

Lieske testified that when an individual receives his Union Pension, he is not allowed to work in the trade. Otherwise, such a person would risk having to re-pay the pension to the Union or not receiving a Pension at all. The Petitioner could not commit to beginning the Darien job for a few weeks. Lieske advised Petitioner that he would wait to hear from him regarding the Darien job. Meanwhile, Lieske did write-in the Petitioner's name as the supervisor for the Darien job in the company calendar though he was still waiting to hear back from Petitioner.

While waiting for Petitioner's response, Lieske found Jerry McLaurin to perform the foreman job at **[*18]** the Darien location on a full-time/permanent basis but McLaurin would be unavailable for the first two weeks of that job. As a result, Lieske assumed the Petitioner could perform those duties for the first two weeks of the Darien job.

Lieske testified that immediately prior to the end of the Ludington job on February 22, 2007, he called the Petitioner to request whether he could perform the supervisor duties for the first two weeks of the Darien job. The Petitioner responded that he had not yet called the Boilermakers Union to discuss his Pension situation. Petitioner informed Lieske that he would call the Union but that he did not know if they would let him work the Darien job. He could not commit to the Darien job but he would call Lieske back after speaking with the Union.

Lieske testified that after this, he could no longer wait because the Darien job was starting so he "came up with a new plan" and asked a construction supervisor, Steve Swanson, who at the time worked for Respondent in Clive, Iowa to be the supervisor/foreman for the first two weeks of the Darien job. Steve Swanson agreed ed to this temporary position in Darien with the understanding that he was going to return **[*19]** as a construction supervisor in Clive, Iowa after two weeks.

Lieske testified that on that same day, or the next day, he called the Petitioner, told him he had found a replacement for the Darien job and would not need him. Lieske testified that the Petitioner said he had called the union and that they would allow him to do the Darien job for the first two weeks.

In fact, Petitioner had already testified that at that point in time, he had not yet contacted the Union and he still was unaware of their position regarding that Darien job. Lieske testified he was going to use Steve Swanson as a replacement for the first two weeks so he asked the petitioner to send in his phone and credit cards. He denied telling the petitioner to have a "good life" and stated he had no animosity towards the Petitioner.

Within a week after this telephone call, Lieske contacted the Petitioner again because he found out that the Petitioner had become "upset." He testified that he cared about the Petitioner because he had been a capable foreman who he had worked with Respondent for many years. He asked the Petitioner why he was upset and the Petitioner indicated that Lieske had hung up on him. Lieske denied **[*20]** doing this, apologized if he had done anything to the Petitione and said that Petitioner had been a long-time employee who built a lot of "good jobs" for the Respondent so he felt bad if the Petitioner was upset.

Finally, Lieske testified that in February 2008, he had a job in Midland, Michigan where he needed a safety supervisor starting in Fall 2008 which would last approximately four to six months. He contacted the Petitioner to convey the availability of this job and to ask him if was interested. Petitioner said he would be, Meanwhile, another supervisor, Bill Cox, returned from overseas and Respondent elected to use him for that Fall 2008 job instead. Lieske did not call back the Petitioner to discuss the new job in Midland, Michigan.

On cross-examination by petitioner's counsel, Lieske testified that the Petitioner was excellent and above-average in every facet of his job. He stated that as a field foreman for a "Jack Job" in Darien, the Petitioner would not have had to perform any duties that would have exceeded his light-medium-duty job restrictions. When pressed by Petitioner's counsel as to the specific nature of those duties, Lieske testified credibly that he was unaware **[*21]** of the specific restrictions as of the trial date but that he would not have allowed the Petitioner to return to the Ludington, Michigan job without knowing those restrictions or without having a doctor's note.

Lieske testified that the Respondent's nepotism policy was waived with the permission of Lieske's supervisor but could not recall the name of the supervisor that allowed him to waive that policy. He concluded that he had no documents indicating that the Petitioner had voluntarily retired from the Respondent. He testified as to the "B" Card termination and Rating Form he completed on March 14, 2007 indicating Petitioner had retired

On June 16, 2009, Respondent presented the testimony of David Beck, another of Respondent's foremen and Petitioner's supervisors.

On direct and cross-examination, Beck testified credibly regarding the various conversations he had with Petitioner, including one conversation immediately prior to Christmas 2006 in which the petitioner informed Beck that he intended to retire without going into specifics. Further, Mr. Beck testified credibly in confirming the subsequent conversation that took place between himself, Dave Lieske and the Petitioner where **[*22]** Lieske requested the Petitioner accept the supervisory position at the upcoming Darien job. He also confirmed Lieske's testimony that the Petitioner refused to immediately accept that job offer.

Following Beck's testimony, Petitioner testified again in rebuttal. During Respondent's cross-examination, Petitioner for the first time confirmed that he was able to perform his duties at the Ludington, Michigan job within his restrictions and that he did not violate those restrictions throughout the course of that job which ended at the end of February 2006.

As to medical treatment and bills, Petitioner introduced several medical records exhibits and acknowledged that all medical bills had been paid except for a balance bill from IWIRC in the amount of $ 947.98.

According to the records, on January 12, 2007, the petitioner was seen by Homer Penya, M.D. at OSF Occupational Health wherein he gave the following history "The petitioner was going up the stairs of a company office trailer when his foot slipped out from under him and he had to contort his body to avoid falling backwards." The petitioner noted pain in his lower central back and a burning sensation down his right lateral leg. The **[*23]** petitioner noted an increase in pain throughout the day, but he decided not to seek care in Michigan despite a company offer. The petitioner gave a history of a herniated disc at the L4-5 level to the right approximately 10 years prior. (Pet. Ex.2)

The petitioner underwent X-rays that revealed a loss of disc space at multiple levels, most significantly between L4-5 where there was "no disc space, whatsoever;" diffuse degenerative changes, and dextroscoliosis at the lumbar level with the chipping of the dorsal spine visible. The doctor diagnosed petitioner with a possible L4 nerve root irritation and wrote that he would "lean more to the diagnosis of a lumbosacral strain versus an aggravation of the degenerative disc disease." The doctor noted that "the stiffness, posturing and the need to push off his thighs to get up was indicative of a lumbosacral strain versus an aggravation of degenerative disc disease." He wrote that it was "difficult to understand why he has not yet started any kind of medication, whatsoever, but I feel that he is fearful of starting medications on his own with having three onboard now." The doctor opined that conservative care would be appropriate and that **[*24]** he was "uncertain that light duty is available, but I am open to that if the company would contact us." The petitioner was taken off work from January 12, 2007 to January 26, 2007. (Pet.Ex.2)

Further, on January 16, 2007, petitioner was seen by Dr. Christine Cisneros at IWIRC (Illinois Work injury Resource Center) for evaluation. Dr. Cisneros noted that in 1997 or 1998, petitioner underwent extensive physical therapy. She diagnosed petitioner with a lumbar sacrum sprain. The doctor did not note any evidence of radicular findings and placed the petitioner on light duty work restrictions of a 10 pound lifting limit and "self-guided work restrictions" through January 23, 2007. (Pet.Ex.3)

On January 26, 2007, the petitioner was seen by Dr. Ryan D. Shmidgal wherein he stated he drove 400 miles the previous day which exacerbated his pain. The petitioner was diagnosed with a lumbar sprain and the doctor noted that "despite his complaints, I cannot appreciate any neurologic deficits on his exam." (Pet.Ex.3)

On February 2, 2007, the petitioner was again seen by Dr. Cisneros as a follow-up. The petitioner reported that his medications were not helping his pain and the doctor continued the petitioner's **[*25]** work restrictions.

The petitioner was seen on February 9, 2007, February 16, 2007 and February 23, 2007 for follow-up of his back pain with Dr. Cisneros.

On April 12, 2007, the petitioner was seen by Dr. Cisneros for a re-evaluation of low back pain and SI joint pain. He reported he was significantly improved from the date of injury but continued to experience pain in his back radiating into his hip with prolonged sitting. Petitioner expressed concerns of possible problems in the future and the doctor wrote that the petitioner was at maximum improvement with his low back and sacroiliac status. However, "due to his concerns, the doctor was requesting authorization to refer him to Dr. Kube for evaluation regarding whether further diagnostic or treatment was required." (Pet.Ex.3)

The petitioner received physical therapy at the Illinois Work Injury Resource Center from February 23 through April 12, 2007 and their balance bill totals $ 947.98. (Pet.Ex.9)

On June 26, 2007, the petitioner was seen by Dr. Richard Kube for the first time evaluation wherein he gave the following history: "the petitioner had pain for several months and had been off work for 3 months prior. The petitioner had **[*26]** an issue at work where he sustained a lumbar strain and also had a previous injury approximately 10 years prior that he described as either a herniated disc at L3-4 or at L4-5. The petitioner stated that resolved to some degree, but not completely with injections and with physical therapy." The doctor diagnosed petitioner with radicular symptoms at L3 and L4 with spinal asymmetry and degeneration. He ordered an MRI to be obtained of the petitioner's spine to obtain a "definitive diagnosis." (Pet.Ex.4)

On July 13, 2007, the petitioner underwent an MRI of his lumbar spine that revealed multi-level degenerative bulging; facet arthropathy with mild central and foraminal stenosis at L4-5 and small left foraminal disc herniation at L3-4. (Pet.Ex.4)

On July 26, 2007, the petitioner was seen in follow-up with Dr. Kube wherein he complained of severe leg pain. The doctor noted that the pain seemed to be more at the L4 than the L3 level based on his examination and evaluation. After reviewing the MRI, Dr. Kube noted petitioner had some foraminal stenosis at the L3-4 on the left and "pretty significant" L4-5 stenosis on the right that he believed would be consistent with causing L4 nerve root **[*27]** impingement and the pain the petitioner described. The doctor recommended petitioner undergo injections in an attempt to alleviate any of the inflammation of the L4 nerve root. The doctor wrote that if the petitioner received inadequate relief from the pain intervention, then he would consider surgery. (Pet.Ex.4)

Next on September 24, 2007, the petitioner was seen by Dr. Howard for a medial branch block of the L3, L4 and L5 levels on the left side. The pre-operative and post-operative diagnoses

were of low back pain and lumbar facet arthropathy. (Pet.Ex.5)

On October 24, 2007, Dr. Howard noted petitioner's lumbar disc disorder, right hip and groin pain. He wrote that the petitioner did not improve as hoped with the lumbar medial branch block. He noted that there was a question as to whether the petitioner's symptoms were of facet or disc etiology. Her recommended transforaminal epidural steroid injections. (Pet.Ex.5) On November 1, 2007, petitioner underwent a lumbar epidural steroid injection at the L4-5 level. The petitioner had a pre and post procedure diagnosis of lumbar disc disorder. Then, on November 21, 2007, petitioner was seen in follow-up and noted improvement following **[*28]** the lumbar epidural steroid injection. He complained of some residual discomfort in his low back and right hip, however, it "had lessened." (Pet.Ex.5)

On January 9, 2008, the petitioner was seen in follow-up by Dr. Howard wherein he stated his back pain continued to improve. **The doctor noted that the petitioner had not returned to work as he was retired as of February**. (emphasis added) (Pet.Ex.5)

On February 6, 2008, the petitioner was again by Dr. Howard. He stated he was progressing well and estimated 60% to 70% overall improvement. The doctor noted that petitioner may not improve any further and recommended diet control to determine whether he could lose a more weight to take pressure off his back. On discharge, the petitioner stated he would like to return to full duty, however, he wanted work-related restrictions because he could not lift. The doctor recommended a functional capacity evaluation prior to discharge. (Pet.Ex.5)

On February 21, 2008, petitioner underwent the FCE (functional capacity evaluation) at the Illinois Work Injury Resource Center at Dr. Howard's request. (Pet.Ex.5) The behavioral assessment indicated that the petitioner gave [ILLEGIBLE TEXT] with **[*29]** medical records. The petitioner gave a medical history of two prior back injuries in the past 12 years with progressive peripheralization with each injury, including the current injury. (Pet.Ex.5)

Petitioner's functional assessment demonstrated the following significant abilities: material handling abilities in the light to medium physical demand range, normal ambulation and climbing abilities, normal tolerance to neutral sitting and deep knee postures and normal tolerance to repetitive climbing abilities. Petitioner demonstrated deficits in the following areas: material handling abilities to a heavy physical demand level, tolerance to sustained neutral and stoop to standing, tolerance to stoop to sitting, mild dynamic balance deficit, and tolerance to sustained elevated work due to shoulder de-conditioning. Petitioner was assessed at a light to medium physical demand range functional level. Petitioner's functional ability limitations were directly correlated with a provocation of his lumbar symptoms and were consistent with the findings or an unresolved mechanical origin. Petitioner did not demonstrate the ability to return to unrestricted work activities and was unlikely to benefit **[*30]** from further rehabilitation efforts. (Pet.Ex.5)

On March 5, 2008, petitioner saw Dr. Howard as a follow-up to the FCE. Dr. Howard opined the petitioner had reached maximum medical improvement with the Pain Clinic. (Pet.Ex.5)

The Arbitrator finds that the Petitioner voluntarily retired from the workforce in February 2007 and, therefore, is not entitled to TTD benefits beyond his retirement date. The credible evidence demonstrates Petitioner was asked to continue working in a supervisory capacity within his restrictions. Respondent's Dave Lieske testified credibly as to this offer of employment which Petitioner failed to accept in a timely manner. Lieske's testimony was supported by that of Respondent's other witness Dave Beck and the documentary evidence.

The Arbitrator finds that this Petitioner lacked credibility and his testimony was not corroborated by the testimony of the credible witnesses or the Trial Exhibits, including Respondent's Exhibits 1, 2 and 3. Those Exhibits supported Respondent's contention that the Petitioner was going to retire when he put in his Pension request on January 15, 2007 and listed his retirement date as March 1, 2007 (Res.Ex. 1) The Respondent's Exhibit **[*31]** # 2

indicated that Petitioner last worked for Respondent on February 22, 2007 and that the "Reason" was "retirement". (Res.Ex.2) This was signed by Respondent's witness David Lieske on March 14, 2007 further supporting his testimony and discrediting Petitioner's testimony. Finally, Respondent's Exhibit # 3, their work schedule/calendar for late 2006 and early 2007 supports Respondent's witness Dave Lieske's testimony that as of January 6, 2007, the Respondent had planned on having the Petitioner to start the Darien 'standpipe' job as supervisor on February 11, 2007. (Res.Ex.3). It also confirms that despite his assertions of disability and being unable to perform supervisory work, that the Petitioner continued to work as Supervisor in the Ludington. MI job until it was completed on February 24, 2007. (Res. Ex.3).

On rebuttal, Petitioner contradicted his earlier testimony by admitting that he could and did perform Supervisory duties for the Respondent in a light duty capacity while working after the accident in Ludington, MI until February 24, 2007.

The Arbitrator finds that the Petitioner did intend to retire as of January 15, 2007, that the Respondent offered the Supervisory work **[*32]** within his restrictions in Darien, IL which the Petitioner did not accept and that the Petitioner is not entitled to TTD benefits or vocational rehabilitation assistance as a result. The Arbitrator relies on the credible testimony of the Respondent's witnesses, the Respondent's Exhibits and the Petitioner's lack of credibility as evidenced by his contradictory testimony.

As to medical bills, the Arbitrator awards a sum of $ 947.98 representing a remaining balance from the provider, IWIRC, and with credit to Respondent for any portion of that bill it has paid. Respondent shall pay that bill after appropriate reductions to account for the Balance billing Provisions of the Workers' Compensation Act and Illinois Medical Fee Schedule. The Arbitrator finds that the Petitioner is entitled to no TTD benefits and no vocational rehabilitation. The Arbitrator finds that the Respondent's paid the Petitioner $ 8700.00 in PPD advances in good-faith during this litigation and that the Petitioner must re-pay/reimburse the Respondent in the amount of $ 87000.00 since there was a finding specifically against an award of TTD benefits or vocational rehabilitation assistance. Petitioner failed to establish **[*33]** that he was entitled to TTD benefits or vocational rehabilitation as related to the work accident of January 8, 2007.

In support of The Arbitrator's Decision relating to (L), **Should penalties or fees be imposed upon the Respondent?**, the Arbitrator finds the following facts:

As per the discussion above. Petitioner did not establish he was entitled to TTD benefits or to vocational rehabilitation in that he voluntarily retired and declined a job within his restrictions offered by Respondent. Therefore, the Arbitrator finds that no penalties or fees will imposed upon the Respondent. The Arbitrator further finds that the Respondent is entitled to reimbursement from Petitioner in the amount of $ 8700.00 for good-faith advances it made during litigation. The Arbitrator specifically found that the Petitioner was not entitled to TTD or vocational rehabilitation and Respondent is entitled to return of it's good-faith payments to Petitioner to prevent a possible wind-fall to the Petitioner.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision modifying the Arbitrator's Decision and awarding Petitioner additional temporary total disability benefits, maintenance benefits, and **[*34]** a vocational assessment. In this instance the Arbitrator made a credibility determination concerning the various witnesses and bolstered that determination with references to corroborating evidence in the record. The Majority has simply set aside that well-reasoned and thought out determination and found Petitioner credible without any explanation, discussion, or reasoning. Then, in reliance upon Petitioner's testimony alone, the Majority has awarded Petitioner an additional two weeks of temporary total disability benefits, 37 weeks of maintenance, and a vocational assessment -- all to a claimant who had planned to voluntarily retire (and did so) prior to his work accident. The Arbitrator heard the witnesses, observed the

witnesses, and reviewed the exhibits. He correctly found that Petitioner not only voluntarily removed himself from the workforce but was ineligible for temporary total disability benefits, maintenance, and vocational rehabilitation thereafter. He further correctly emphasized that Petitioner's subsequent job opportunities were not accepted in a timely manner. The Majority's indication of a "willingness to work" is not enough to support an award of temporary total **[*35]** disability benefits or maintenance nor must an offer remain open until such time as the employee refuses it. That might never occur. I would have affirmed and adopted the Arbitrator's Decision. Accordingly, I must dissent.

Nancy Lindsay

Legal Topics:

For related research and practice materials, see the following legal topics:
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Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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*2012 Ill. App. Unpub. LEXIS 306, **

BERGENSONS/ADMINISTAFF, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Kevin Kreger, Appellee).

Appeal No. 3-10-0876WC

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

2012 IL App (3d) 100876WU; 2012 Ill. App. Unpub. LEXIS 306

February 14, 2012, Order Filed

NOTICE: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois. Circuit No. 09-MR-435. Honorable Kendall O. Wenzelman, Judge, Presiding.

DISPOSITION: Affirmed in part and reversed in part and vacated in part; cause remanded.

CORE TERMS: claimant, arbitrator's, parking lot, pain, general public, attorney fees, traveling, exposed, street, manifest, leg, cleaning, knee, orthopedic, swelling, light-duty, injuries arose, causal connection, performing, authorize, awarding, automatic sprinklers, regional, pavement, wet, medical opinions, per week, risk of injury, distinctly, connected

JUDGES: JUSTICE HOLDRIDGE delivered the judgment of the court. Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

OPINION BY: HOLDRIDGE

OPINION

ORDER

Held: The Commission's determination that the claimant's injuries arose out of and in the course of his employment, the award of TTD benefits and the award of prospective medical benefits were not against the manifest weight of the evidence. The award of penalties and attorney fees for the employer's termination of TTD benefits was against the manifest weight of the evidence. The employer's request to supplement the record on appeal with evidence not presented to the Commission was denied.

The claimant, Kevin Kreger, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for an injury to his knee alleged to have occurred on October 1, 2004, arising out of and in the course of his employment with Bergensons/Administaff **[*2]** (employer). Following a 19(b) hearing, held on February 20, 2008, and April 4, 2008, an arbitrator found that the claimant established that his accident injuries arose out of and in the course of his employment and awarded 170 1/7 weeks of temporary total disability (TTD) benefits for the period November 16, 2004, through February 20, 2008. The employer was given credit for TTD benefits previously paid. The arbitrator additionally awarded penalties as provided under sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2002)), as well as attorney fees as provided under section 16 of the Act (820 ILCS 305/16 (West 2002)).

The matter again proceeded to a section 19(b) hearing on November 7, 2008, following which the arbitrator awarded additional TTD benefits of 37 weeks, from February 21, 2008, through November 6, 2008, and additional penalties and attorney fees. In an addendum to the order, the arbitrator also ordered the employer to authorize and pay for a pain rehabilitation program offered at the Cleveland Clinic. The arbitrator also found that a request from the claimant for an orthopedic evaluation of his left leg was reasonable and ordered the employer to authorize **[*3]** it as well.

The employer sought review of the arbitrator's decisions by the Illinois Workers' Compensation Commission (the Commission). The Commission declined to adopt some of the arbitrator's evidentiary rulings but, in all other ways, unanimously affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision in the circuit court of Kankakee County, which confirmed the Commission's decision. This appeal followed.

FACTS

The claimant worked for the employer as a regional manager. His job required him to travel throughout several states from North Dakota to Kentucky. The claimant's home was in South Bend, Indiana. As regional manager, he was required to oversee the employer's janitorial service operations in approximately 300 retail establishments. His primary job was to ensure that cleaning crews were performing satisfactorily. In connection with his employment, the claimant traveled between 1,500 and 2,000 miles per week. The claimant testified that, on those occasions when a cleaning crew failed to report for work, he would do the work himself.

The claimant arrived at a Marshall's department store in Bradley, Illinois, at approximately **[*4]** 7 a.m. on October 1, 2004, after spending the previous night at a motel in Champaign, Illinois. The store was not open to the general public until 9 a.m. The claimant testified that he parked his car in the store parking lot, walked into the store, and toured the store with the store manager. He then returned to his car to retrieve a cleaning checklist. As he was walking back to the store with the list, he slipped on a newly-taped parking stripe in the recently-paved parking lot. He testified that he did not hit the ground or his car. However, as he fell forward, he felt a pop in his left knee. At the time, he was carrying the paperwork and a small appointment book. The claimant testified that, although it had not been raining, the pavement in the parking lot near his car was wet. He observed that area was wet due to the automatic sprinklers for the shrubbery near where he was parked.

The claimant then testified that he completed his calls the rest of the day, with tolerable pain in

his left leg. However, that night, his left leg became very swollen, which prompted him to seek medical attention at the emergency department of Memorial Hospital in South Bend, Indiana. He gave a history **[*5]** of twisting his left knee suddenly that morning, with pain in his left leg thereafter and with gradual swelling in the left leg that day. Dr. Mark Walsh, attending physician, noted swelling of the left calf and ankle, with limited range of motion due to left knee pain. Dr. Walsh diagnosed left knee strain.

On October 2, 2004, the claimant returned to the emergency department, reporting pain and swelling in his left knee. The claimant was given a knee immobilizer and instructed to follow up with an orthopedic specialist.

On October 19, 2004, the claimant reported to the emergency department with left knee pain, swelling and numbness. Upon examination, his entire left leg was swollen with decreased sensation. The claimant was again treated for left leg swelling on October 20, 26, 28, and 29, 2004.

On November 3, 2004, the claimant reported to Dr. Thomas with extreme pain and swelling in the entire left leg. Dr. Thomas noted extreme edema to the point that he could not detect a pulse in the left toes due to the extreme edema. Dr. Thomas diagnosed acute left lower extremity edema secondary to trauma with venous/lymphatic injury.

After several treatments, with no significant improvement, the **[*6]** claimant was diagnosed with reflex sympathetic dystrophy (RSD). RSD is a variant of complex regional pain syndrome (CRPS), an uncommon nerve disorder which causes intense pain, usually in the arms, hands, legs or feet. The claimant subsequently underwent two surgical procedures in June of 2005, neither of which alleviated his symptoms. The claimant has been off work due to the symptoms of RSD since the date of the accident.

On September 12, 2005, Dr. Scott Eshowsky, noting that the claimant had been through a course of 18 months of treatment with little or no relief, referred the claimant to Dr. Stanton-Hicks at the Cleveland Clinic for pain management, who recommended an orthopedic evaluation.

On March 2, 2006, the claimant underwent an independent medical examination performed by Dr. Timothy Lubenow, who authored a report finding a causal connection between the claimant's current condition of RSD and his accident on October 1, 2004. Dr. Lubenow also concurred in the treatment plan to date.

On December 26, 2006, the claimant completed a standard two-day functional capacity evaluation (FCE). The FCE showed little functional capacity and near constant pain.

On January 24, 2007, Dr. Lubenow **[*7]** authored a second report, indicating some improvement since his last examination but also indicating his overall agreement with his treatment for pain.

On September 19, 2007, Dr. Lubenow again examined the claimant for an independent medical examination. Dr. Lubenow reiterated a diagnosis of complex regional pain syndrome of the legs which, by this time, had spread to his arms, face and back. Dr. Lubenow's report indicated that he viewed some surveillance tapes of the claimant engaged in some light carpentry work and similar activities. Dr. Lubenow indicated that, while the tapes did not change his diagnosis or his opinion of the claimant's current plan of treatment, it would indicate that the claimant had reached maximum medical improvement (MMI) and could handle some degree of light duty.

On the basis of Dr. Lubenow's report, the employer terminated the claimant's TTD benefits. The employer indicated that an offer of light duty employment would be forthcoming, however, the record does not contain any indication that an offer of light duty was ever made.

ANALYSIS

1. Whether the Commission erred in finding that the claimant's injuries arose out of and in the course of his employment.

To **[*8]** be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment." 820 ILCS 305/2 (West 2006). An injury "arises out of" one's employment if "its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 627, 727 N.E.2d 247, 244 Ill. Dec. 948 (2000); see also *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995). A risk is "incidental to the employment" when it "belongs to or is connected with what the employee has to do in fulfilling his duties." *Stembridge Builders, Inc. v. Industrial Comm'n*, 263 Ill. App. 3d 878, 880, 636 N.E.2d 1088, 201 Ill. Dec. 656 (1994).

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been performing his duties, and while the claimant is actually performing those duties, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989). Here, it is undisputed that the claimant's injuries were sustained in the course of his employment. At the time he fell, the claimant was retrieving a cleaning list **[*9]** from his car that was to be used in the process of cleaning the Marshall's department store, a task required by the claimant's position.

The employer disputes the Commission's finding that the claimant's injuries arose out of his employment. The "arising out of" component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Courts have recognized three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 317 Ill. Dec. 355 (2007).

In this case, the claimant was injured when he fell in a newly-painted and recently-paved parking lot. There was also evidence that the pavement was wet due to a nearby automatic sprinkler system which had apparently watered the nearby shrubbery. The record indicated that the claimant was injured **[*10]** at approximately 7 a.m., but the parking lot was not opened to the general public until 9 a.m. There is no evidence indicating that the claimant suffered from a physical condition that caused his fall, nor is there any indication that the risk of falling in the parking lot was distinctly associated with his employment. Thus, we find, as the Commission determined, that the risk of injury was neutral in nature.

Before proceeding to the arguments raised by the employer, we note that the risk to which the claimant was exposed was greater than that to which the general public was exposed by virtue of the fact that the claimant was present in the parking lot at 7 a.m., while the general public would not be expected to be present in that parking lot until 9 a.m. Here, the record established that the pavement where the claimant slipped was wet due to the fact that an automatic sprinkler system had recently operated to water decorative shrubbery near where the claimant's car was parked. Assuming that the automatic sprinklers were timed to water when the public was not expected to be present in the parking lot, the fact that the claimant was present at 7 a.m. so as to complete the cleaning of **[*11]** the store prior to its opening would necessarily expose him to the risk of water on the pavement to a degree greater than that of the general public. If this were the case, the risk would not be a neutral risk but would instead be a risk distinctly associated with the claimant's employment.

However, even if the risk to which the claimant was exposed was a neutral risk we find that the

claimant had established a connection between the risk and his current condition of ill-being. Injuries resulting from neutral risks are not generally compensable unless the claimant can establish that he was exposed to the risk to a degree greater than that to which the general public would be exposed. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000). Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Potenzo*, 378 Ill. App. 3d at 117.

Here, the Commission adopted the arbitrator's reference to the so-called "street risk doctrine" to determine that the claimant's exposure **[*12]** to the risk of falling in the parking lot was quantitatively greater than that to which the general public would be exposed. The arbitrator concluded that the claimant was "a traveling employee and thereby [was] at greater risk of injury than the general public."

Although neither party nor the Commission properly addressed the special status of a "traveling employee," we find it useful to do so. Traveling employees are employees "whose work is largely outside the plant because of the nature of their business, [and who] are compelled to expose themselves to the hazards of the streets and the hazards of automobiles * * * much more than the general public." *Illinois Publishing & Printing Co. v. Industrial Comm'n*, 299 Ill. 189, 191, 132 N.E. 511 (1921). In short, a traveling employee is one for whom travel is an essential element of his or her employment. *Urban v. Industrial Comm'n*, 34 Ill. 2d 159, 163, 214 N.E.2d 737 (1966). For a traveling employee, an injury arises out of his employment if his conduct at the time of the injury was reasonable and foreseeable by the employer. *Robinson v. Industrial Comm'n*, 96 Ill. 2d 87, 92, 449 N.E.2d 106, 70 Ill. Dec. 232 (1983).

Analyzing the instant matter under the traveling employee doctrine, we conclude that **[*13]** the claimant herein was a traveling employee. The record clearly established that the claimant's employment required him to travel extensively to perform his duties. Although there is nothing in the record to indicate the number of days per week the employee traveled, the record does establish that he traveled 1,500 to 2,000 miles per week to supervising cleaning operations at various retail stores throughout a large geographical area. Additionally, the record supports a clear inference that the claimant's work duties were conducted entirely away from the employer's location. Since the claimant is clearly a "traveling employee," his exposure to the hazards of the street is, by definition, greater quantitatively than that of the general public, as long as his conduct at the time of the injury was reasonable and foreseeable to the employer. *Illinois Publishing & Printing*, 299 Ill. at 191; *Robinson*, 96 Ill. 2d at 92. Given that the claimant was a "traveling employee," we find that his risk of injury by slipping or tripping in a parking lot of one of the stores he was sent to by the employer to oversee the cleaning operation was a risk to which he was exposed to a degree greater than the **[*14]** general public.

While the Commission correctly noted that the claimant was a "traveling employee," it limited its analysis to the so-called "street risk doctrine" which holds, generally, that "where the evidence establishes that the claimant's job requires that [he] be on the street to perform the duties of his employment, the risks of the street become one of the risks of the employment, and an injury sustained while performing that duty has a causal connection to [his] employment." *Potenzo*, 378 Ill. App. 3d at 118. In such a circumstance, it is presumed that the claimant is exposed to risks of accidents in the street to a greater degree than if he had not been employed in such a capacity, and the claimant is thereby entitled to benefits. *City of Chicago v. Industrial Comm'n*, 389 Ill. 592, 601, 60 N.E.2d 212 (1945).

Here, the Commission's finding that the claimant's employment exposed him to the risks of the street (and presumably the parking lot) was not against the manifest weight of the evidence. The record is clear that the claimant's job duties required him to be on the street, and in parking lots, to such a degree that risks of the street became the risks of his employment. While we find that **[*15]** the claimant's status as a "traveling employee" is the more

appropriate analysis, we nonetheless find that the Commission's "street risk" analysis is supported by the record. We, therefore, affirm the Commission's finding that the claimant's injuries arose out of and in the course of his employment.

2. Whether the Commission erred in awarding TTD benefits from October 29, 2007, through November 7, 2008.

The employer next disputes the claimant's entitlement to TTD benefits from October 29, 2007, through November 7, 2008. Whether a claimant is entitled to TTD benefits is a question of fact for the Commission which will not be overturned on appeal unless it is against the manifest weight of the evidence. ***Interstate Scaffolding,*** *Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010). Here, the Commission determined that the claimant had not yet reached MMI during the period in question, that the claimant's work restrictions during that period of time were of a completely sedentary nature, and that the employer had failed to offer a light-duty job within the claimant's restrictions. The employer points out that the report of Dr. Lubenow supported a finding that the **[*16]** claimant had reached MMI. However, other medical evidence supported a conclusion that the claimant had not yet reached MMI during the time in question.

As to whether the employer offered the claimant a job within his physical restrictions, the record is subject to disputed interpretations. Although a meeting took place on November 12, 2007, at which the claimant's job restrictions and a possible return to work within those restrictions was discussed, nothing in the record indicates that the employer followed up the meeting with an actual job offer within the claimant's restrictions. Given the record, we cannot say that the Commission's determinations as to TTD benefits was against the manifest weight of the evidence.

3. Whether the Commission erred in awarding penalties and attorney fees.

The employer next maintains that the Commission erred in awarding penalties and attorney fees. Whether to award penalties and attorney fees under the Act is a factual question, and a reviewing court will not overturn the Commission's decision unless it is against 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). Penalties are appropriate where an **[*17]** employer's decision to delay payment of benefits is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514, 702 N.E.2d 545, 234 Ill. Dec. 205 (1998). When, however, an employer acts in reliance upon reasonable medical opinions 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).

Here, the employer relied primarily upon the medical opinion of Dr. Lubenow that the claimant had reached MMI when it ceased paying TTD benefits. However, as the arbitrator noted when awarding penalties, Dr. Lubenow did not opine that the claimant could return to unrestricted duty. Rather, he opined that the claimant could perform certain light-duty functions. The arbitrator then noted that no light-duty employment was offered by the employer. Reviewing Dr. Lubenow's records, the arbitrator found no good faith basis upon which the employer could reasonably terminate TTD benefits. The Commission adopted the arbitrator's findings.

We find that the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. Once an injured claimant has reached MMI, the disabling condition has become **[*18]** permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 289 Ill. Dec. 794 (2004). In the instant matter, a controversy existed as to whether the claimant could perform light-duty work and whether the employer in fact offered such light-duty work. However, that controversy was not relevant to the question of whether the employer had a good faith basis for terminating TTD benefits. Dr. Lubenow had opined that the claimant had reached MMI, and the employer relied upon his opinion in terminating TTD benefits. The employer's termination of TTD benefits,

based upon Dr. Lubenow's opinion that the claimant had reached MMI, was not unreasonable or vexatious and the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. We reverse the Commission's award of penalties and attorney fees and vacate the decision granting penalties and attorney fees to the claimant.

4. Whether the Commission erred in instructing the employer to authorize and pay for orthopedic treatment.

The employer next maintains that the Commission erred in instructing it to authorize and pay for prospective orthopedic treatment. The employer **[*19]** offers no citation to case authority to support its argument. It is well-settled that arguments made without citation to supporting authority are deemed waived. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 830, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002). Moreover, it is well-settled that the Commission has the authority to order prospective medical benefits, and its decision to do so will not be overturned on appeal unless it is against the manifest weight of the evidence. *Plantation Manufacturing Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 710-11, 691 N.E.2d 13, 229 Ill. Dec. 77 (1997). Here, prospective orthopedic treatment was deemed warranted by Dr. Stanton-Hicks, and we cannot say that the Commission's reliance upon Dr. Stanton-Hick's opinion was against the manifest weight of the evidence.

5. Whether the appellate court should consider evidence in the instant matter that was not proffered to the Commission.

The employer lastly maintains that it should be allowed to supplement the record upon review before this court with certain medical records which it received pursuant to a subpoena served on March 30, 2010, and received by it on May 17, 2010. This subpoena was issued 23 months after proofs were closed in the first 19(b) hearing and **[*20]** 18 months after the proofs were closed in the second 19(b) hearing.

There is no authority for this court to allow the record to be supplemented with material not of record before the Commission. This court has jurisdiction to review only the final determinations of the Commission. *International Paper Co. v. Industrial Comm'n*, 99 Ill. 2d 458, 459 N.E.2d 1353, 77 Ill. Dec. 104 (1984). The employer cites *A-Tech Computer Services, Inc. v. Soo Hoo*, 254 Ill. App. 3d 392, 627 N.E.2d 21, 193 Ill. Dec. 862 (1993), for the general proposition that the appellate court can accept non-record evidence. However, *A-Tech Computer Services, Inc.* has no relevance to matters involving appeals from a decision of the Commission. We find that there is no authority under the Act for permitting the employer to supplement the record on appeal to add evidence which was not presented to the Commission.

CONCLUSION

The judgment of the Kankakee County circuit court, which confirmed the Commission's decision is affirmed in part. The Commission's award of penalties and attorney fees is reversed and vacated. The matter is remanded to the Commission for further proceedings.

Affirmed in part and reversed in part and vacated in part; cause remanded.

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*2009 Ill. Wrk. Comp. LEXIS 1300, **

KEVIN KREGER, PETITIONER, v. BERGENSON'S PROPERTY SERVICE/ADMINISTAFF, RESPONDENT,

NO: 06WC 49437; 09 IWC C 1171

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANKAKEE

2009 Ill. Wrk. Comp. LEXIS 1300

November 6, 2009

CORE TERMS: arbitrator, pain, medication, pump, temporary total disability, addendum, video, recommendations, recommended, orthopedic, sedentary, narcotic, patient, doctor, opined, course of treatment, medical treatment, written request, intrathecal, capabilities, prescribed, watched, treater, owing, permanent disability, temporary, permanent, notice, amount of compensation, disputed issues

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review of Petitioner's second § 19(b) Petition having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, entitlement to prospective medical expenses, temporary total disability benefits and additional compensation/attorneys' 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 January 29, 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 **[*2]** filing a written request for Summons to the 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 $ 56,900.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT

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 **[*3] Kankakee, Illinois,** on **November 7, 2008.** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

L. Should penalties or fees be imposed upon the respondent?

N. Other **Prospective Medical**

FINDINGS

. On **October 1, 2004,** the respondent **Bergenson's Property Services *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 $ **57,460.00;** the average weekly wage was $ **1,105.00.**

. At the time of injury, the petitioner was **33** years of age, ***married*** with **2** children under 18.

. Necessary medical services ***have in part*** been provided by the respondent.

[*4] . To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **736.67**/week for **37** weeks, from **February 21, 2008** through **November 6, 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 $ **n/a** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **13,628.40** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **7,770.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **8,177.04** 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 disability, if any.

RULES REGARDING APPEALS Unless a party **[*5]** 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 0.34% 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

1/29/08

Date

STATEMENT OF FACTS

The Arbitrator previously heard the first 19(b) hearing on February 20, 2008 and April 4, 2008. The Arbitrator filed a decision on August 29, 2008. In that decision, the Arbitrator found the case compensable and ordered the payment of TTD benefits as well as Section 19(k), 19(1) penalties and Section 16 attorney fees.

On April 17, 2008, Petitioner presented to the Cleveland Clinic for refill of the medication Prialt for his implanted intrathecal pump. (Px. 1)

On May 23, 2008, Dr. Stanton-Hicks recommended and prescribed that Petitioner should attain the Cleveland Clinic's Pain Rehabilitation Program. (Px. 2)

Petitioner would undergo **[*6]** refills of his pain pump on May 30, 2008, July 2, 2008, August 14, 2008 and August 26, 2008. (Px. 2)

Petitioner next treated at the Cleveland Clinic on September 17, 2008. His pump was again refilled with Prialt. At that time, Dr. Stanton-Hicks and his fellow, Dr. Currie Lee examined Petitioner. Dr. Stanton-Hicks opined, "The course of treatment that the patient is currently on is the correct course of treatment based on prior nonresponse or fail to therapies. In Dr. Stanton Hicks' opinion this is the appropriate course of treatment." (Px. 2) Dr. Stanton-Hicks still

restricted Petitioner to sedentary work. He also recommended Petitioner see an orthopaedic Dr. Barsoum for evaluation. Dr. Stanton-Hicks noted Petitioner had been unable to attend the Cleveland Pain Rehabilitation Program (CPRP) because they were awaiting ruling with worker's compensation. Petitioner's diagnosis remained RSD and pain disorder with medical and psychologic features. (Px. 2)

The parties stipulated that medical bills are in line for payment or have been paid through the date of trial. The parties further stipulated that amounts paid by other insurance providers would result in a Section 8(j) credit for Respondent **[*7]** with a corresponding statutorily created hold harmless of Petitioner.

In support of the Arbitrator's Decision relating to (K), what amount of compensation is due for Temporary Total Disability, the Arbitrator finds the following facts:

Since the last hearing where the Arbitrator found TTD benefits owing, Petitioner's restrictions have remained unchanged, i.e., sedentary. Dr. Stanton-Hicks office note of September 17, 2008 clearly indicated that the restrictions were sedentary. (Px. 2) Those restrictions were based in part on an FCE conducted on November 27, 2007. Petitioner testified at trial that since the time of the prior 19(b) hearing's start on February 20, 2008, no one from Bergenson's Property Services nor Administaff have contacted Petitioner to offer him a job within his restrictions.

The IME report of Dr. Konowitz and his addendums are not found to be persuasive nor a basis for the denial of TTD benefits. Dr. Konowitz' addendums dated November 4, 2008 and November 5, 2008 are silent with regard to restrictions. The Arbitrator next considers Dr. Konowitz' May 2, 2008 IME report. Dr. Konowitz' first eight pages do not address any of Petitioner's work capabilities. However, **[*8]** on page nine of his report under the category of recommendations, Dr. Konowitz states, "The patient's videos demonstrate significant function, contradistinction to all his medical visits and symptom amplification with regards to his dysfunction appears to be amplified. The patient can work as demonstrated in the videos and should." The Arbitrator is not persuaded that this statement justifies the denial of TTD benefits for three reasons.

The first reason relates to the videos that Dr. Konowitz viewed. In reviewing, Dr. Konowitz' report, he lists a number of items that he reviewed in preparing his report. On page seven of the report, bullet number five, Dr. Konowitz lists "Investigative Solutions & Consulting Services -- confidential reports and DVD." The Arbitrator is aware from the prior 19(b) hearing that a total of 17 days of surveillance was introduced at trial consisting of seven DVD's. However, Dr. Konowitz' May 2, 2008 report does not in any way identify what DVD he watched. Dr. Konowitz does not specifically reference a date of the DVD or give any other information for the source of the DVD that he watched. Further, there is conflict within Dr. Konowitz' own report as to **[*9]** whether he reviewed a single DVD (Rx 1, Page 7, # 5) or multiple DVD's (Rx 1, Page 9). The Arbitrator cannot speculate or assume what was viewed. As such the Arbitrator is not persuaded by the opinion of Dr. Konowitz.

Even if the Arbitrator were to impermissibly presume or speculate that the video Dr. Konowitz watched was the same as the surveillance elicited at the first trial, the Arbitrator previously considered said evidence and found it unpersuasive on the issues of causal connection and TTD benefits. (See Arb. Dec. 6, "Nothing in the videotapes obviated Respondent's obligation to pay TTD benefits.") Thus, Dr. Konowitz' opinion regarding work capabilities would be disregarded because it ignores the law of the case resulting from the first 19(b) hearing.

The Arbitrator further notes that Dr. Konowitz' comment on work capabilities does not delineate what level of restriction is appropriate. Dr. Konowitz' statement, "The patient can work as demonstrated in the videos and should," is open to multiple interpretations. Further, when contrasted against the opinion of the treater, Dr. Stanton-Hicks, whose opinion is based, in part, upon an FCE, it is clear that Petitioner's restrictions **[*10]** remain at a sedentary level.

The Arbitrator finds and orders Respondent to pay TTD benefits from February 21, 2008 through November 6, 2008 representing 37 weeks at a TTD rate of $ 736.67. Respondent stipulated that it has paid no TTD benefits during this time period.

In support of the Arbitrator's Decision relating to (N), should medical authorization be provided, the Arbitrator finds the following facts:

Petitioner's treater, Dr. Stanton-Hicks has prescribed since May 23, 2008 his desire that Petitioner enroll in the Cleveland Clinic's Pain Rehabilitation Program. (Px. 2) This treatment consists of group therapy, physical therapy, a period of inpatient care to address Petitioner's medication levels and aqua therapy. The program runs from Monday through Friday from 8:00 am to 5:00 pm with dorm rooms provided on site. Dr. Stanton-Hicks opined on September 17, 2008, that Petitioner's course of medical treatment was "the correct course." He continued to prescribe the pain rehabilitation program and recommended that Petitioner see Dr. Barsoum, an orthopedic doctor for "evaluation." (Px. 2)

In seeking to deny Dr. Stanton-Hicks recommendations for further medical treatment, Respondent **[*11]** offers the opinions of Dr. Konowitz via IME records of May 2, 2008; November 4, 2008 and November 5, 2008. In his May 2, 2008 report, Dr. Konowitz confirmed a diagnosis of complex regional pain syndrome. (Page 7) Among Dr. Konowitz' recommendations are that Petitioner's "pump should be weaned and discontinued." (Page 9) Dr. Konowitz felt that Petitioner's narcotics resulted in minimal relief and should be discontinued. In its place, Dr. Konowitz recommended that Petitioner substitute among other drugs - Topamax. After reviewing the most up to date medical records, Dr. Konowitz on November 4, 2008 in his first addendum suggests Petitioner undergo "MMPI testing" but does not indicate what that is. He further suggests narcotic withdrawal due to poor response from all objective criteria after judging Petitioner's function level, supplementing medication and pain scores. Finally, Dr. Konowitz produced a second addendum on November 5, 2008 stating, "[N]o additional pain management or orthopedic opinion and/or treatment is appropriate or indicated in this case."

After considering all of the evidence, the Arbitrator is more persuaded and relies on the opinions of Dr. Stanton-Hicks rather **[*12]** than those of Dr. Konowitz. While Dr. Konowitz belongs to the Comprehensive Pain Management Group, Respondent's first IME Dr. Timothy Lubenow noted that Petitioner's treater, Dr. Stanton-Hicks was considered one of the leading doctors in the country when it comes to CRPS. (Rx. 1, Dep. 43, 1st 19(b) hearing) Dr. Lubenow further stated about Dr. Stanton-Hicks, "And he probably has one of the widest experiences in treating CRPS in the country." (Rx. 1, Dep. 43, 1st 19(b) hearing) Dr. Lubenow also agreed that the Cleveland Clinic is renowned for its treatment of CRPS. (Rx. 1, Dep. 43-44, 1st 19(b) hearing)

The issue of narcotic withdrawal has previously been considered. Respondent's own IME Dr. Timothy Lubenow agreed that Dr. Stanton-Hicks, being both the treating doctor and given his reputation would be in the best position to guide the medical process of weaning from narcotics if needed. (Rx. 1, Dep. 63, 1st 19(b) hearing)

The issue of removal of the intrathecal pump has previously been considered. Respondent's own IME Dr. Lubenow opined that the intrathecal pump was permanent and the medications needed long term. (Rx. 1, Dep. 77-78, 1st 19(b) hearing) Dr. Lubenow further opined that **[*13]** the treatment rendered to Petitioner as of the date of deposition were reasonable (Rx. 1, Dep. 78, 1st 19(b) hearing) Dr. Lubenow's opinions were expressed on January 31, 2008, less than four months before Dr. Konowitz' first report (May 2, 2008) that suggested a radical departure from the treatment protocol. Respondent can't circumvent the opinions of its own IME physician, Dr. Lubenow, with the opinions of Dr. Konowitz.

Furthermore, the Arbitrator notes the tenuousness of Dr. Konowitz recommendations because it suggests a return to a medication, Topamax that had previously been tried in August of 2007

and ended in approximately a month due to its hallucinatory effect amongst other complications. Petitioner testified that when taking Topamax he had to contact Anne, the nurse practitioner who administers his medications at the Cleveland Clinic, for advice on how to wean himself from Topamax.

Dr. Konowitz noted Petitioner's pain level as between 8-10 at the time of his first report in May of 2008 but does not address the medical records which indicate a drop in self reported pain levels from 6-8 on May 30, 2008 to a 6 beginning on July 2, 2008 and staying at that level. Part of Dr. **[*14]** Konowitz' opinion for a radical change in medical treatment was a failure to illicit a change in pain levels. (November 4, 2008 addendum)

In reviewing all of the medical evidence, the Arbitrator is persuaded by the opinions of Dr. Stanton-Hicks and that of Dr. Lubenow. As such, the Arbitrator orders Respondent to authorize and pay for the Pain Rehabilitation Program offered at the Cleveland Clinic. This includes the cost of inpatient care and the use of dormitory rooms when staying overnight for the daily treatment. The Arbitrator notes the program includes all day treatment making daily travel from Petitioner's house in Granger, IN to Cleveland, Ohio, a drive of 4 1/2 to 5 hours unreasonable and impractical. The Arbitrator further finds reasonable the request for an orthopedic evaluation for Petitioner's left leg.

In support of the Arbitrator's Decision relating to (L), should penalties or fees be imposed upon the Respondent, the Arbitrator finds the following facts:

The Arbitrator does not consider the awarding of penalties and/or fees lightly. The Arbitrator found at the time of the first 19(b) hearing that Respondent's conduct was unreasonable and vexatious in not paying **[*15]** TTD benefits. The Arbitrator has not viewed any evidence to change his opinion as of the second hearing. Respondent has solicited the opinions of two separate IME doctors (Drs. Lubenow and Konowitz) who are in contrast to each other. Petitioner's restrictions remain in place, he remains under active medical care, has been prescribed further medical care in the nature of a pain management program and orthopedic evaluation, has still not been offered a job within his restrictions and is still not being paid TTD benefits.

Pursuant to the Act, a delay of greater than 14 days creates a rebuttable presumption of unreasonable delay. Respondent has not rebutted that presumption.

The Arbitrator awarded TTD benefits from February 21, 2008 through November 6, 2008 representing 37 weeks at a TTD rate of $ 736.67 and totaling $ 27,256.79. Respondent stipulated that they have made no payment of TTD benefits during this time period.

The Arbitrator orders Respondent to pay Section 19(K) penalties of 50% of the TTD owing or $ 13,628.40.

There has been a 259 day delay in TTD benefits owed from February 21, 2008 (the day after the start of the first 19(b) hearing) through the date of trial November **[*16]** 7, 2008. Section 19(L) allows for $ 30 per day penalties for the delay in payment. Thus, the Arbitrator orders Respondent to pay Section 19(L) penalties in the amount of $ 7,770.00.

The Arbitrator orders Respondent to pay Section 16 attorneys' fees of 20% of the TTD due and owing and the total 19(K) penalties awarded ($ 40,885.19), equaling $ 8,177.04.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > Rehabilitation

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*2009 Ill. Wrk. Comp. LEXIS 1301, **

KEVIN KREGER, PETITIONER, v. BERGENSON'S PROPERTY SERVICE/ADMINISTAFF, RESPONDENT,

NO: 06WC 49437; 09 IWC C 1172

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANKAKEE

2009 Ill. Wrk. Comp. LEXIS 1301

November 6, 2009

CORE TERMS: pain, extremity, arbitrator, swelling, leg, diagnosed, knee, doctor, symptoms, bilateral, experienced, medication, edema, crutch, left knee, prescribed, numbness, upper, ankle, causal connection, lumbar, calf, surveillance, right side, intrathecal, sedentary, street, sympathectomy, recommended, follow-up

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review of Petitioner's first § 19(b) Petition having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident-arising out of, causation, temporary total disability and additional compensation/attorneys' fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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).

The Commission has reviewed several of the Arbitrator's evidentiary rulings and finds the Arbitrator did not err in denying Respondent's Motion to Compel Petitioner's Appearance at a Functional Capacity Evaluation. The Arbitrator erred in barring the testimony of Barbara Ostrowska, Respondent's **[*2]** witness, under Ghere v. Industrial Commission, 278 Ill. App.3d

840 (1996), and the same should have been made part of the testimonial evidence at the Arbitration hearing. Additionally, any opinions expressed by Barbara Ostrowska should go to the weight to be assigned to said testimony rather than to the admissibility of said testimony. The Arbitrator erred in allowing the testimony/documentary records regarding Petitioner's past bankruptcy filing into the record as the same was not relevant to the current proceedings. The Commission further finds that proper foundation was laid for Respondent's surveillance tapes/dvds and as such the Commission affirms the Arbitrator's decision to allow the same into the record. Additionally, the Commission finds that the Arbitrator properly allowed Respondent's surveillance investigation reports into the record as part of the business records exception to the hearsay rule. Lastly the Commission finds that the Genex surveillance report generated by Karen Sugden was properly allowed into the record as part of the business record exception to the hearsay rule.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall **[*3]** pay to the Petitioner the sum of $ 736.67 per week for a period of 170-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 3,450.00 as provided in § 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 6.065.98 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $ 3,639.59 as provided in § 16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing **[*4]** 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 $ 25,300.00. 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.

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 **Gregory Dollison,** Arbitrator of the Commission, in the city of **Joliet and Kankakee, Illinois,** on **2/20/08 and 4/4/08.** After reviewing all **[*5]** of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

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

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

L. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On **10/1/2004,** the respondent **Bergenson's Property Services *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 $ **57,460.00;** the average weekly wage was $ **1,105.00**

. At the time of injury, the petitioner was **33** years of age, ***married*** with **2** children under 18.

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

. To date, $ **113,207.19** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **736.67**/week for **170-1/7** weeks, from **11/16/04** through **2/20/08,** 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 $ **n/a** for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **6,065.98** in penalties, as provided in Section 19(k) of the Act

. The respondent shall pay $ **3,450.00** in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay $ **3,639.59** 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 **[*7]** 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 award, interest of 1.92% 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

8/27/08

Date

Attachment to Arbitrator Decision

(06 WC 49437)

STATEMENT OF FACTS

Petitioner worked as a regional manager for Respondent. His job required him to travel through multiple states. Petitioner testified that on October 1, 2004 he was visiting a store in Bradley, Illinois. He said that he had stayed the previous night in Champaign and had arrived at the store at 7 am. He said that he got out of his car, stretched and toured the store with the manager. He then said that he returned to his car to obtain some paperwork when he slipped on a taped stripe in the newly paved parking lot. At the time of the **[*8]** incident he said he was carrying a small appointment book. Petitioner indicated that it had not been raining, but the ground was wet due to the automatic sprinklers for the surrounding shrubs. He said that he completed his sales calls for that day. However, that night he said that his left leg became very swollen, which prompted him to seek medical attention.

Petitioner went to the emergency room at Memorial Hospital Emergency Room in Indiana. Petitioner's history indicated he twisted his left knee suddenly that morning. For the rest of the day he experienced pain in his left leg. His left foot and calf gradually swelled with a corresponding increase in left knee pain. Petitioner reported a prior arthroscopic MCL surgery on his left knee fifteen years ago. Examination of the left knee showed tenderness over the popliteal fossa but also laterally and in the suprapatellar area. Petitioner's range of motion was limited by pain. Dr. Walsh noted swelling in the left calf and left ankle. Petitioner was diagnosed with a left knee strain with significant pain and swelling of left leg. Petitioner was to follow-up with Dr. Matt Christ and return the following day to follow-up with the emergency **[*9]** room physician. Dr. Walsh discussed the possibility of a knee strain, a ruptured baker's cyst, or a tear of ligament or cartilage. (Px.7)

On 10/2/2004, Petitioner went to the Memorial Hospital Emergency Room. Petitioner complained of ankle and left knee pain after twisting his left knee yesterday. Examination revealed some mild left knee swelling without obvious effusion. The doctor noted mostly lateral tenderness and an inability to flex the knee past 20 degrees. Examination showed mild to moderate left ankle swelling. The doctor diagnosed an acute soft tissue injury to the left knee. The doctor recommended that Petitioner wear a knee immobilizer. Petitioner was again instructed to follow-up with Dr. Christ or other orthopedic doctors. Differential diagnosis included concomitant soft tissue injury of left knee with ruptured baker's cyst and obliteration of cyst upon rupture. (Px.7)

On 10/5/2004, Petitioner presented to Dr. Halstead who noted that Petitioner had been asymptomatic prior to this episode. Examination revealed tenderness about the entire interior knee; minimal, if any effusion, but mild swelling about the ankle. The doctor noted no instability to Varus or Valgus stress **[*10]** testing but with discomfort over the tibial collateral ligament. A Lachman test was negative. Dr. Halstead diagnosed a knee strain. Dr. Halstead prescribed Bextra, recommended a short exercise program and continued use of a knee immobilizer.

(Px.1)

On 10/8/2004, Dr. Halstead noted significant pain in the knee with significant swelling, which prevented a complete exam. Dr. Halstead noted no gross instability but felt Petitioner might have a positive Lachman test. Dr. Halstead recommended a Doppler ultrasound looking for possible Thrombophlebitis; as well as an MRI of the knee. Dr. Halstead prescribed Vicodin. (Px.1)

On 10/8/2004, a duplex venous sonography of the left lower extremity revealed no evidence of a deep venous thrombosis of left lower extremity. (Px.7) A 10/9/2004, left knee MRI showed no evidence of internal derangement (Px.8)

On 10/12/2004, Dr. Halstead reviewed the left knee MRI and prescribed therapy and a weaning from the crutches and knee immobilizer as best as he could. (Px.1)

On 10/19/2004, Petitioner was admitted to the emergency room at Memorial Hospital for left knee pain, swelling and numbness. Petitioner had been up and about for the past two days and now **[*11]** had complaints of increased swelling and discomfort in his ankle. Upon examination his entire left leg was swollen with decreased sensation over the dorsum of the upper foot and ankle. The doctor diagnosed a probable left gastrocnemius tear and recommended follow-up with Dr. Halstead. Petitioner was advised to elevate his leg and use crutches along with Vicodin. (Px. 7)

On 10/19/2004, a CT scan of the left lower extremity showed diffuse edema in the subcutaneous tissues with no obvious bony or intramuscular pathology. X-Rays of the left knee were unremarkable and there was no Doppler evidence of acute DVT. (Px.7)

On 10/20/2004, an MRI of the left calf showed extensive subcutaneous edema throughout the left calf non associated bony or musculotendinous abnormalities. (Px.8)

On 10/26/2004, Dr. Halstead noted Petitioner's continued difficulty with his leg although he did not have much trouble with the knee and the knee exam was benign. Dr. Halstead noted significant swelling of the calf with moderately severe swelling of the calf and ankle. Dr. Halstead prescribed compression stockings and an EMG of the left lower extremity. (Px. 1)

On 10/28/2004, Dr. Klauer interpreted an EMG as **[*12]** showing abnormal peroneal motor response with low amplitude. The amplitude was abnormally low, most likely because of the 2+ pedal adema which was present in the inability of the surface electrode to actually get a proper reading. Sural sensory response was absent and that too was likely due to the amount of swelling about the ankle. Needle examination of left lower extremity showed decreased recruitment in the anterior tibialis peroneus longus and vastus lateral. No frugalation potential were seen in any of the muscles, however if denervation was present, it often required at least one month to appear. Decreased recruitment accompanied by genuine fatigue of muscles in patient's left lower extremity. Dr. Klauer diagnosed an abnormal electro diagnostic study. There was not a specific pattern of loss of recruitment that could be attributed to one nerve root level or one peripheral nerve. Petitioner was referred back to Dr. Halstead. A repeat needle examination in approximately two months might reveal denervation not visible to date. (Px. 4)

On 10/29/2004, Petitioner presented to the emergency room at Memorial Hospital. On this day, Petitioner had been on his leg a little bit more with **[*13]** resultant increase in swelling. Examination of the left lower extremity below the knee revealed it to be edematous with mild tenderness and palpable pulse. Range of motion was worse on dorsiflexion. It was noted that because Petitioner was inactive he was still at risk for possible deep venous thrombosis. Petitioner was to remain non weight bearing with elevation. The doctor diagnosed left lower extremity swelling with suspected gastrocnemius tear. (Px.7, 8)

On 11/3/2004, Petitioner presented to Dr. Thomas. Etiology of left leg swelling remained

obscured with no evidence of DVT. A question of a possible gastrocnemius tear existed. Edema was decreased with elevation but returned quickly upon standing. Dr. Thomas' exam proved difficult because of pain in the calf. Left lower extremity was markedly edematous below the knee. Petitioner's foot in its entirety was also edematous as were the toes. Dr. Thomas could not palpate pulses in foot due to edema. Edema was 2+ and pitting. The right lower extremity was unremarkable and normal. Dr. Thomas diagnosed acute left lower extremity edema secondary to trauma with venous/lymphatic injury. Dr. Thomas planned a venogram, lymphedema clinic, Aspirin **[*14]** and referred Petitioner for a second opinion and recommendations. (Px8)

On 11/9/2004, Dr. Fischback reviewed a venogram of the left lower extremity, which showed no evidence of thrombus within the veins of the calf within the deep venous system left lower extremity. (Px. 7, 8)

On 11/12/2004, Petitioner underwent a lymphedema assessment. A history taken indicated Petitioner slipped on a strip in parking lot and hurt his left knee. Examination showed 3+ calf edema. The diagnosis was left lower extremity edema of unclear etiology. (Px.11)

On 11/17/2004, Dr. Chitwood felt that peroneal nerve abnormalities might be related to his ademia. (Px.3)

On 11/22/2004, Petitioner presented to Dr. Eshowsky with severe pain. Petitioner was also seeing Dr. Scott Thomas at the Lymphedema Clinic for gastrocnemius tear resulting in severe lymphedema of the left lower extremity below the knee. His condition was improving but with mild increase in redness. (Px10)

On 11/23/2004, a physical therapist noted Dr. Klauer saw Petitioner that day and was pleased with changes in the lower extremity. Petitioner had significant decrease in edema in the calf and foot. The ankle remained symptomatic. (Px.11) On **[*15]** 11/29/2004, a physical therapist noted Petitioner had tried not wearing bandages one day and the left lower extremity swelled up. On 11/30/2004, a physical therapist noted Petitioner's leg was all red and Petitioner was ambulating with crutches. (Px.11)

On 12/1/2004, Dr. Brokaw provided a second opinion. Examination revealed a brawny type edema to leg with tenderness to palpation. Petitioner was positive for joint pain and swelling left knee, ankle and lower leg. Petitioner experienced stiffness in his ankle and knee joint. Dr. Brokaw noted bluish discoloration and hyperemic changes. Dr. Brokaw was concerned Petitioner might have complex RSD. Dr. Brokaw referred Petitioner to Dr. Steinberg to diagnosis RSD. Dr. Brokaw opined that Petitioner was off work because of significant pain unless there was an ability to control his pain where he could perform sit-down work. (Px.9) Dr. Steinberg prescribed sit down work only. (Px.9)

On 12/8/2004, Dr. Steinberg performed a left lumbar sympathetic block. (Px.9)

On 12/10/2004, Dr. Klauer performed a nerve block in Indianapolis. The doctor noted the first surgery was miserable and had not helped at all. Dr. Klauer diagnosed RSD. (Px.11)

On **[*16]** 12/15/2004, Dr. Steinberg performed a consultation on the left leg. Dr. Steinberg diagnosed RSD. Dr. Steinberg planned a series of block injections. Dr. Steinberg limited Petitioner to sit down work only. (Px.9)

Dr. Steinberg performed a left lumbar sympathetic block on 12/22/2004, 1/5/2005 and 1/12/2005. (Px. 9)

On 1/19/2005, Petitioner presented to Dr. Steinberg with pain equal to 10/10. It was noted Petitioner awoke the previous evening with severe pain and numbness in his entire left leg from the knee down. Petitioner had 1+ edema. Dr. Steinberg diagnosed RSD. Physical therapy was

prescribed and Petitioner was limited to sit down work only. (Px. 9)

On 2/8/2005, the physical therapist noted a significant increase in swelling from left knee to foot with increased discoloration and reddening. The therapist felt Petitioner had made little to no progress in physical therapy and instead, had experienced significant exacerbation of his symptoms. Petitioner appeared very motivated in physical therapy though he had limited tolerance for activities secondary to symptoms. (Px. 9)

On 2/9/2005, Dr. Steinberg documented pain equal to ten. The medicinal change at the last visit was not helpful. **[*17]** Petitioner was using bilateral axillary crutches. On examination, Petitioner had significant pain and swelling for the past week to ten days, which caused difficulty wrapping his leg. Neurontin and Vicodin were not providing relief. Gait was markedly antalgic even with crutches. Dr. Steinberg noted 3+ edema left lower extremity to knee. The left lower extremity was markedly warm relative to right. Petitioner was diffusely tender about the entire left lower extremity. Distal pulses were only faintly palpable at dorsal, pedis and posterior tibia. Dr. Steinberg diagnosed RSD and ordered a Doppler test of the left lower extremity to rule out DVT; a second series of sympathetic blocks; and a change in medication from Neurontin to Cymbalta while adding trazodone. The Doppler test returned negative for DVT. (Px. 9)

On 2/15/2005, a physical therapist noted Petitioner had experienced significant exacerbation of his symptoms and made little progress in physical therapy. Physical therapy was discontinued. (Px. 13)

Dr Steinberg performed a left lumbar sympathetic block on 2/16/2005, 3/3/2005 and 3/10/2005. (Px. 9)

On 2/24/2005, Dr. Stanton-Hicks prescribed physical therapy. (Px. 10)

On 3/16/2005, **[*18]** Petitioner presented to Dr. Steinberg for follow up on his left leg RSD. The pain equaled ten and was worse since his last visit. Petitioner experienced significant relief for five days after the last block. Dr. Steinberg diagnosed RSD of the left leg. Petitioner was to continue his medications and obtain a series of radiofrequency sympathectomies with Dr. Gupta. Petitioner was released to sit down work only. (Px. 9, 10)

On 3/22/2005, Dr. Gupta performed a right lumbar paravertebral sympathetic block. The doctor noted this did not provide pain relief "despite the fact that he had excellent lower extremity sympathetic blockade at lower extremity." (Px. 9)

On 4/27/2005, Petitioner returned to the Pain Management Group for repeat evaluation of left leg pain. The series of lumbar sympathetic blocks provided little relief. Petitioner now stated his pain and swelling had started to recur particularly in the left leg. Petitioner was able to ambulate well on his own but used a walker for walking long distances. The medical plan was to try a couple of lumbar epidural blocks with steroid injections; long-term Petitioner might require placement of a dorsal column stimulator. (Px. 8)

On 5/4/2005, **[*19]** Petitioner presented to Dr. Deshpende. After undergoing treatment in Indianapolis his treatment was moved closer to his home in South Bend, Indiana. Upon questioning, Petitioner stated at times his nails were growing much faster on his left foot than on the right. Hair growth pattern showed a loss of hair and regrowth of hair. At times his skin was very blotchy, purplish-red, sometimes turning very white. His skin felt very cold on the left compared to the right at times. None of these abnormalities were noticed on exam. Petitioner was taking Cymbalta, Dibenzyline, Trazodone, Vicodin and a medication for anxiety. Petitioner reported tremors of the upper extremity and body. The doctor concurred with a diagnosis of complex regional pain syndrome-reflex sympathetic dystrophy. Petitioner showed some improvement on Neuropathic pain mediations including Cymbalta and the doctor wanted to add lamotrigine or lanictal to his medications. (Px. 8)

On 5/4/2005 Dr. Deshpende noted in March of 2005 Petitioner had a hospitalization secondary to an apparent reaction to Duragesic 50 mg patches. Petitioner was very functional and active at the time with a majority of his current treatments mainly centered **[*20]** around activity and range of motion. (Px. 8)

On 5/12/2005, an MRI from S2 to T11 showed no change in mild degenerative changes. No disc herniation or recompression of stenosis was seen. (Px. 8)

On 5/17/2005, Petitioner went to the St. Joseph emergency room with worsening pain in bilateral hips and back to his right leg. Dr. Devereaux diagnosed exacerbation of RSD. Petitioner stated he had a seizure back in May of 2005 possibly related to a fentanyl patch he was on. Petitioner was taking Vicodin, Trazodone, Klonopin, Cymbalta, Lamictal, Vicodin and BenSalen. (Px. 8)

On 5/27/2005, Dr. Poulin noted Petitioner was incapacitated from RSD that started with his left leg and was now beginning to affect his right leg. Petitioner had mixed results with steroid injections and was referred for left lumbar sympathectomy. Dr. Poulin diagnosed RSD and planned a left lumbar sympathectomy. (Px. 8)

On 6/6/2005, Dr. Poulin performed a left lumbar sympathectomy. (Px. 8) This produced questionable results as noted by Dr. Poulin on 6/9/2005. (Px. 8) By 6/14/2005, Dr. Poulin noted Petitioner had an excellent lower extremity response to his left lumbar sympathectomy and Petitioner wanted to proceed with **[*21]** the right side in a couple of weeks. (Px. 8)

On 6/30/2005, Dr. Poulin performed a right lumbar sympathectomy. (Px. 8)

On 7/5/2005, Dr. Gable examined an EMG with NCV that was abnormal and revealed an apparent peripheral neuropathy demyelinating. (Px. 8)

On 7/20/2005, Petitioner presented to the hospital with history of bleeding status post lumbar sympathectomy. He had no further GI bleeding at the hospital but developed numbness in his mid torso and an inability to walk. He was seen by multiple consultations including neurology, neurology, surgery, psychiatry and pain. Nobody could identify the exact problem. (Px. 8)

On 9/12/2005, Dr. Eshowsky noted Petitioner had been through quite an ordeal over the last year to eighteen months. Petitioner's recent sympathectomy surgery by Dr. Poulin had improved symptoms significantly although initially it paralyzed both legs. During the course of hospitalization, the pain became so frustrating that Petitioner became suicidal and was subsequently admitted to Madison Center for four days. Prior to admission, Petitioner had been on Kadian, Cymbalta, Neurontin and Trazodone. At Madison, the doctors discontinued the prescriptions and started Zoloft. **[*22]** Petitioner continued to see Dr. Brown. Petitioner was no longer suicidal and was dealing with the pain quite a bit more. Dr. Deshpande recommended long-acting opiates but Petitioner did not want them. The pain was significantly improved from prior to sympathectomies, but he still had difficulty sleeping at night It was noted that Petitioner wanted to try short acting opiates because he was taking care of his kids during the day and although not driving or working, he did not want mental cloudiness. Dr. Eshowsky noted that range of motion exercises resulted in purplish discoloration, edema and burning left greater than right in the lower extremity. Petitioner had pain with weight bearing and currently used crutches. Petitioner indicated he would like to see Dr. Stanton-Hicks at the Cleveland Clinic. Dr. Eshowsky diagnosed RSD and felt Petitioner was not looking to abuse meds but was simply trying to find a happy medium between pain and an ability to sleep. Dr. Eshowsky referred Petitioner to Dr. Stanton-Hicks. (Px. 10)

On 9/26/2005, Petitioner presented to Dr. Eshowsky for follow-up of RSD and insomnia. Dr. Eshowsky diagnosed RSD/chronic pain syndrome. Dr. Eshowsky prescribed OxyContin **[*23]** and a restart of Nortriptyline while continuing Ambien for insomnia. (Px. 10)

On 0/17/2005, Dr. Eshowsky noted significant pain and intermittent swelling. Dr. Eshowsky diagnosed RSD/chronic pain and recommended discontinuation of the morphine, increase in OxyContin, continued use of Vicodin and a change from Ambien to Lunaesta for insomnia. (Px. 10)

On 10/26/2005, Petitioner presented to Dr. Stanton-Hicks who noted Petitioner's poor sleep habits. His pain was constant although it waxed and waned. Petitioner described some skin color changes, increased swelling and increased sweating "all over." No changes in hearing or vision were noted. Petitioner used crutches for ambulation. Petitioner had underwent bilateral surgical sympathectomies on 9/6/05, which provided transient relief for a few months but he experienced a gradual return of symptoms. The Neurontin caused some tunnel vision. Dr. Stanton-Hicks diagnosed complex RSD to both lower extremities with the right worse than the left. The doctor discussed neurostimulation given severity of symptoms and suggested a trial period might be useful. Should it fail, he suggested an intrathecal trial of medications with possible use of Prialt. **[*24]** Petitioner was negative for leg swelling but with mild allodynia over both feet. Edema was 2+ left greater than right up to his calf. Dr. Stanton-Hicks diagnosed RSD and prescribed Hytrin; Lyrica SCS, TEC and eventually an intrathecal trial with Prialt (Px. 9, 10, 14)

On 11/4/2005, a venogram of the left leg revealed swelling. (Px. 7)

On 11/7/2005, Petitioner presented to Dr. Eshowsky for follow-up for RSD and insomnia. Petitioner was entertaining using a spinal cord stimulator but would need psychiatric evaluation prior to it. Eshowsky diagnosed RSD and insomnia and recommended continued use of Ambien for insomnia. (Px. 10)

On 12/23/2005, Dr. Stanton- Hicks started an SCS trial. (Px. 14) On 12/24/2005, Dr. Steinberg prescribed physical therapy. (Px. 9)

On 12/28/2005, Dr. Eshowsky noted worsening pain secondary to RSD as well as several episodes of confusion and "incoherent talking." Petitioner was sleeping a little bit more than usual. The doctor noted Petitioner's wife said he said things that did not make sense. Trial spinal cord stimulator was implanted at Cleveland Clinic about one week ago. Since then the pain was approximately ten times worse with no relief from the pain **[*25]** medication. Dr. Eshowsky felt Petitioner had increased pain and sedation secondary to RSD. Dr. Eshowsky stated management of opiates was his primary role because treatment of RSD was beyond his scope. Dr. Eshowsky opined that the combination of increased OxyContin in addition to Dalmane and Ambien maybe what was causing increased sedation and episodes of confusion. Petitioner was to discontinue Dalmane and continue with Ambien. (Px. 10)

On 1/6/2006 Dr. Stanton-Hicks removed the leads after the SCS trial for RSD pain and noted the pain was getting worse with stimulation. (Px. 14)

On 1/10/2006, Dr. Stanton-Hicks diagnosed bilateral upper and lower RSD. Precipitating factors were noted to be activity and sustained positions. Symptoms began following slip/fall at work in 2004 with hyperextension of left knee. Symptoms interfered with physical activity and led to poor sleep. Petitioner had some skin color changes and increased swelling all over with some hair loss to both lower extremities. Edema was 2+ left greater than right up to mid calf. Dr. Stanton-Hicks diagnosed RSD bilateral upper and lower extremities. Petitioner had failed all conservative treatment and thus needed placement **[*26]** of intrathecal pump trial. (Px. 14)

On 1/24/2006, Dr. Chapman diagnosed all four extremities as having RSD. Dr. Chapman initiated placement of an intrathecal pump trial. (Px. 14)

On 1/30/2006, Petitioner presented to physician's assistant Novak, for follow up on the ITP. Petitioner's symptoms had worsened since stopping the trial. (Px. 14)

On 2/1/2006, Petitioner presented to Dr. Eshowsky for follow-up regarding RSD. Since the last visit, Petitioner had started a trial of Prialt via an intrathecal infusion. Petitioner responded very well to this and all sharp, burning, stinging pain in both legs and arms resolved with these medications (Prialt-intrathecal infusion). There were significant side effects which were transient and included nausea, hallucinations and urinary retentions. He was to receive a permanent placement of an intrathecal port for chronic infusion of meds on 3/22/06. Since the trial period ended, pain returned with subsequent difficulty sleeping. Ambien put him to sleep for a few hours only. The doctor prescribed Rozerem for sleep but Ambien if Rozerem does not work. (Px. 10)

On 3/2/2006, Petitioner underwent an IME with Dr. Lubenow who authored a report finding **[*27]** a causal connection existed. Dr. Lubenow briefly reviewed the course of Petitioner's medical treatment to that date. The Petitioner related that during the Prialt infusion he had an approximately 50% reduction on the pain scale and also a significant reduction in muscle spasms. Dr. Lubenow found that the Petitioner continued to have symptoms congruent with bilateral upper and lower extremity Complex Regional Pain Syndrome. Due to the positive response of the percutaneous infusion of Prialt he recommended the placement of an intrathecal pump to deliver this medication consistently. He believed that the procedure would allow for the addition of Dilaudid to the intrathecal infusion to decrease and ideally discontinue the oral opioid requirement.

On 3/29/2006, Dr. Stanton-Hicks performed surgery to install a permanent implant of the intrathecal pump. Petitioner's symptoms were improving with no apparent side effects. Petitioner would periodically report to have his Prialt medication increased. (Px. 14)

On 5/2/2006, Dr. Eshowsky diagnosed RSD and increased the OxyContin. Petitioner was to continue treating with the Cleveland Clinic every two weeks for titration of Prialt. With respect **[*28]** to medication, Petitioner was to take Ambien for insomnia; Zoloft for depression; Omnicef for bilateral otalgia/itching, Singulair for eustachian tube function; and VoSol Otic to each ear for itching. (Px. 10)

On 5/12/2006, Petitioner presented to physician's assistant Novak with CRPS symptoms in his hand. Petitioner had no side effects from Prialta. (Px. 14)

Petitioner saw Dr. Sapienza-Crawford on 5/26/2006 and 6/28/2006 with pain equal to nine and weakness to both arms. He experienced no side effects from Prialta. (Px. 14)

On 7/28/2006, Petitioner saw Dr. Sapienza-Crawford and noted that after the medicine was increased he felt like his legs were in water, a sort of gelatinous feeling but without pain. Petitioner felt increased pain in his bilateral upper extremities and right knee. Petitioner experienced no symptoms or side effects from the Prialt although he did have an erection problem. He also heard music in his head. Pain was less but he still had bad pain days during the month. (Px. 14)

On 8/25/2006, Dr. Sapienza-Crawford noted weakness in Petitioner's bilateral upper extremities. Petitioner complained of a burning pain over the top/occipital head. Petitioner felt sharp **[*29]** pain on the incision sites (describes as "bad sunburn"). Petitioner experienced hallucinations like someone was talking. In one episode, he thought someone was in garage stealing his car. He hears music and continued to experience an erection problem. (Px. 14)

On 9/8/2006, Petitioner presented to physician's assistant Novak for a pump refill. Petitioner complained of burning and weakness in his bilateral upper extremities but this occurred before Prialt too. Petitioner was not tolerating physical therapy more than one day per week and was not doing any pool therapy. Petitioner experienced side effects including hallucinations like someone talking, suffered short term memory loss, talked too fast and could not sleep. (Px. 14)

On 9/12/2006, a physical therapist noted Petitioner ambulated with a standard cane, although he stated he did not typically use the cane when at home. (Px. 13)

On 9/28/2006, Petitioner presented to Dr. Sapienza-Crawford with complaints that for the past two weeks he had numbness in his upper extremity and lower extremity along with a burning pain over the top of his head. Petitioner reported hearing chain saws and people that weren't there. He felt bugs crawling **[*30]** on his neck and scratched until bleeding. The doctor felt the symptoms could be side effects from Prialt. Petitioner experienced waves of nausea, vomiting, weakness or urinary changes. The doctor suggested a decrease in Prialta. (Px. 14)

On 10/3/2006, Dr. Eshowsky received emails from John Hancock Ins. Co. wanting to verify Petitioner could work light duty. Dr. Eshowsky says Petitioner was still off work. (Px. 10)

On 10/19/2006, Dr. Stanton-Hicks noted Petitioner was undergoing a medicinal adjustment through the implanted system. He felt Petitioner was rapidly approaching a point where he could add land exercises to existing aqua therapy. Anticipate FCE in approximately eight weeks. Petitioner remained temporarily and totally disabled until completion of FCE. (Px. 18)

On 10/31/2006, Dr. Sapienza-Crawford at the Cleveland Clinic noted weakness in Petitioner's bilateral upper extremities. Swelling of hands and lower extremity appeared slightly less. (Px. 14) Dr. Sapienza-Crawford prescribed an FCE. (Px. 18)

On 11/13/2006, Dr. Kapura of the Cleveland Clinic prescribed an FCE. (Px. 13)

On 11/16/2006, Dr. Stanton-Hicks saw Petitioner in follow-up appointment for bilateral lower and **[*31]** upper extremity pain, hip pain and lower back pain secondary to RSD. Petitioner complained of increased pain and burning in the bilateral lower extremities. Dr. Stanton-Hicks noted increased swelling and discoloration in bilateral upper and lower extremities. Petitioner had experienced episodes of confusion. Petitioner hears chain saws and people who aren't there. The plan was to continue medications, aqua therapy and obtain an FCE in December. (Px. 14)

On 12/26/2006, Petitioner completed a standard two day FCE at Memorial Regional Rehab Center. Petitioner stated after 12/18/06 medication adjustment he felt better. Petitioner found using form crutches helps his walking. The therapist's observations of Petitioner were that he moved very slowly and appeared in a lot of discomfort. Petitioner passed validity criteria. Petitioner cooperated and attempted all things requested of him. Petitioner utilized environmental structures and bilateral form crutches to move about. Petitioner had difficulty in all testing secondary to pain complaints throughout entire body. Petitioner had some withdrawal reactions when palpation attempted by the therapist especially in the back region. Petitioner **[*32]** was cooperative and no cog wheel type contractions noted. Grip strength was 59 pounds on the right and 64 pounds on the left. Petitioner was able to climb two flights of stairs (12 steps per flight) taking one minute 48 seconds. During ascending first flight, Petitioner used two hands on the rail on the right side. During descending first flight Petitioner used right hand on right rail and left hand on left rail. During nine hole peg tests, Petitioner took 47 seconds with right hand and 37 seconds with left which was lower than expected norms of 18 and 20 seconds. Findings light physical demand however, for practical purposes, Petitioner considered to be at sedentary physical demand level secondary to lack of physical ability due to pain and overall physical limitations. Petitioner's strength was within functional limits although grip strength is far below the age match norm (59/64 vs. 119/112). Petitioner can do overhead on an occasional basis but should not be expected to reach below waist on anything other than a very low level occasional basis. He was able to tolerate gross motor not fine motor with either hand. He tolerated repetitive bending occasionally. However, he was unable **[*33]** to perform crouching activities. Tolerate frequent sitting with needs to change positions frequently. Petitioner can tolerate an occasional climbing of stairs. The client should not climb ladders. Petitioner was unable to perform crawling activities but with low end occasional kneeling. (Px. 6)

On 1/11/2007, the therapist noted side effects included difficulty with vision and hearing, tongue swelling, speech and Petitioner suffered falls in past 2 wks due to no feeling in leg. (Px. 13)

On 1/11/2007, Dr. Sapienza-Crawford noted numbness to the right side of Petitioner's face and swollen tongue (afraid lose breath). Petitioner reported several falling incidents due to numbness all over his body. Wife reported periods where Petitioner is looking at her but does not appear to be comprehending what she is saying. Petitioner has times when "the world is rushing past me and I am in slow gear." His pain pump was refilled. (Px. 14)

On 1/24/2007, Respondent's IME Dr. Lubenow authored a report finding causal connection existed. Dr. Lubenow described Petitioner as an unfortunate 36-year old man who had developed complex regional pain syndrome of the lower extremities. When Dr. Lubenow previously **[*34]** saw the Petitioner in March of 2006 he had realized a good response to a temporary intrathecal infusion of Prialt. With the use of Prialt, Petitioner reported improvement of his symptoms by approximately 30% and he had been able to reduce his opiate dose of Oxy Contin from 80 mgs twice a day to 20 mgs twice a day. However, the Petitioner reportedly had developed "cognitive side effects'" as well as swelling in the tongue and numbness in the right side of his face. Dr. Lubenow recommended that Petitioner maintain his Prialt infusion at the same dosage; that he discontinue the Oxy Contin in favor of Methadone; that he wean himself from Zoloft and replace it with Cymbalta; that he undergo a course of Transdermal Ketamine/Gabapentin; and lastly he recommended that the Petitioner continue Nortriptyline and Ambien, but discontinue Lyrica. (RX 1)

On 2/15/2007, Ms. Eder noted Petitioner's weight loss was now more than 10 pounds and he had difficulty chewing/swallowing and was at risk to home fall due to weakness and deep pain. (Px. 14)

On 3/6/2007, Dr. Sapienza-Crawford noted numbness to the right side of Petitioner's face and occasional swelling of tongue (afraid lose breath). Petitioner **[*35]** documented several falling incidents. (Px. 14)

On 4/3/2007 Dr. Stanton-Hicks admitted Petitioner for ITP solution change to optimize pain control. Petitioner had RSD to all four extremities. He noted the RSD had started 1 1/2 years ago, had progressively gotten worse and now involved all four extremities. Petitioner experienced shortness of breath and constant swelling in extremities from RSD. (Px. 14)

On 4/4/2007, Petitioner described a burning sensation throughout entire body. However, Petitioner not had Lyrica since 4/3/2007 and Dr. Stanton-Hicks felt that this might be a drop from the Lyrica. Petitioner advised it may take several days for the full effect of the medication to take effect. Activity as tolerated. (Px. 2, 14)

On 4/10/2007, Petitioner complained to Dr. Eshowsky that something felt like it was stuck in his throat. Petitioner reported he had a lump on the right side of his neck that he noticed today. Seemed to have some trouble swallowing and breathing. Petitioner had trouble with numbness on the right side of his face and tongue. Onset of dysphagia was gradual and occurring in persistent pattern for months. Examination showed his tonsils were enlarged on the left **[*36]** side +3 and on the right side +4. His neck was mildly tender. Dr. Eshowsky diagnosed dysphagia and opined that the RSD was spreading to his head and neck. Dr. Eshowsky felt Petitioner might need to consider other diagnostic evaluations to rule out other concomitant processes along with RSD for current symptomatology; look into counseling or psychiatric care to look into mental aspects/consequences of chronic disease. (Px. 15)

On 4/12/2007, Dr. Eshowsky emailed his staff to contact Petitioner and advise him to contact Dr. Jan Warner who works with patients with chronic pain issues. (Px. 15)

On 5/10/2007 Dr. Sapienza-Crawford noted numbness to Petitioner's right face with occasional swelling of tongue to the point where he is afraid he will not be able to breath. Petitioner reported several falling incidents due to numbness and experienced numbness intermittently all over body. Has burning pain over the top/occipital head. "He no longer hears voices or believes someone is present who is not." Continues pool therapy for strengthening. Petitioner continued to complain of symptoms "which could be side effects from Prialt". The doctor noted the following symptoms 1. Swelling of lower **[*37]** extremities and discoloration of legs. This was discussed as part of the CRPS syndrome. 2. Tremors of arms and legs that started with Prialt. 3. Cough and shortness of breath. 4. Hyperalgeisa of lower extremities. 5. Excessive sweating. 6. Burning right side of face and tightness of top of his skull. 7. Continued swelling in oral mucosa where he is chewing on his cheek. 8. Tongue Burning to the point he cannot tolerate. 9. Light headed when up. 10. Occasionally cannot find his feet. Dr. Sapienza-Crawford obtained pysch evaluation and assisted with pysch medications. (Px. 2, 14)

On 7/3/2007, Dr. Sparks felt Petitioner's continued symptoms could be side effects from Prialt. (Px. 14)

On 7/3/2007, a CMA, Ms. Phillips felt Petitioner was at risk for safety in home due to unsteady gait, imbalance, weakness, use of other ambulatory devise cane and history of fall. (Px. 14)

On 7/6/2007, Petitioner underwent a psych pain management evaluation with Ms. Jersan. His father-in-law reported intermittent problems with auditory and visual hallucinations and that he always hears music in his head. Speech was rapid and slurred 70% of time. Petitioner goes out socially less than once a month. Spends **[*38]** much of morning on computer and lays down in afternoon. Fell twice in the shower in past months. Petitioner uses crutches or cane most of the time. Petitioner reclines 16 hours/day. Pain Disability Index suggested severe functional impairment. Petitioner had lost 15 pounds in the past three weeks. Insomnia. DASS score suggestive of severe depression. Anxiety score suggestive of severe anxiety. Petitioner believed pain was incurable and was frustrated by this. Non medical stresses include workers compensation questioning all his bills. The diagnosis was RSD upper and lower extremities; pain disorder with medical and psychological features; probable major depression. (Px. 14)

On 8/14/2007, Petitioner presented to Dr. Stanton-Hicks for follow-up for ITP refill for RSD that affected most of his body and right face. Petitioner experienced numbness to the right side of his face and occasional swelling of his tongue to the point he feared loss of ability to breath. His diagnosis was RSD lower limb and upper limb. The plan was to decrease the ITP rate; neurology was to evaluate lower extremity weakness; chronic pain rehab was pending and Petitioner should continue OxyContin. Petitioner should **[*39]** return to clinic after seen by neurology. (Px. 14)

On 9/19/07, Respondent's IME Dr. Lubenow diagnosed Petitioner with complex regional pain syndrome of the arms, legs, face and back. The record contains a letter from Dr. Timothy Lubenow dated October 19, 2007. Dr. Lubenow notes therein that Petitioner's presentation at the IME in September 2007 was similar to the previous evaluation where the Petitioner demonstrated an inability to carry on a typical gate in the office. According to Dr. Lubenow, Petitioner utilized a single crutch for all components of his gate. Subsequently Dr. Lubenow said that he reviewed several video tapes surveillance DVD's (RX 13) depicting Petitioner doing a variety of activities. Dr. Lubenow found the DVD showing Petitioner doing light carpentry to be particularly compelling and demonstrative of his physical capabilities. Based upon his observation of the DVD's, Dr. Lubenow stated that Petitioner had reached maximum medical improvement and that he is at least able to carry on light to medium duty activities. (RX 1)

On the basis of Dr. Lubenow's letter of October 19, 2007. Respondent notified Petitioner that it was suspending TTD and that arrangements would **[*40]** be made for his return to work within the light to medium duty activities.

On 11/6/2007, Dr. Van Auken, a psychiatrist noted prior psychiatric treatment from previous

accident. Petitioner complained of feeling depression. Was told he could return to light duty work at work by the consulting physician in Chicago. Petitioner had problems with his parents growing up. Accidentally, killed someone 3/11/00 when he crushed a homeless guy in a dumpster at work. (Px. 12)

On 11/6/2007, Petitioner saw Dr. Nageeb at the Cleveland Clinic. Petitioner felt his symptoms had been improving. The diagnosis remained RSD lower limb and upper limb. Seen by IME (Dr. Lubenow) who advised that Petitioner had "reached the maximal improvement that he can achieve, and we agree. Pt will need FCE to determine what type and level of work he can do before he goes back to work." The plan was to increase the intrathecal Prialt and send Petitioner for an FCE, before he could go back to work. The records indicated Petitioner remained at risk due to dizziness, history of falls and use of other ambulatory device cane. (Px. 19)

On 11/19/2007, Petitioner treated with Dr. Warner, a psychiatrist (Px. 12)

On 11/19/2007, **[*41]** Petitioner experienced double vision; decreased vision field; loss of motor control and had fallen this weekend. The doctor noted that Petitioner falls 2-3x week. (Px. 12)

On 11/26/2007, Petitioner underwent standard 2 day FCE at Memorial Regional Rehab Center. Petitioner complained of constant pain, burning, throbbing in back, abdominal region bilateral lower extremities, head and right side of face and bilateral upper extremities. Petitioner usually used forearm crutches to walk due to frequent falls. Petitioner tolerates 15-20 minutes sitting and 5 minutes of standing before pain increases. Petitioner stated he met with a company representative in November of 2007 who stated if Petitioner needed to use crutches they did not have a place for him. Petitioner passed all validity criteria. The restrictions were placed at light duty but for practical purposes were sedentary. Petitioner could tolerate repetitive bending occasionally. Unable to perform squatting or crouching activities. Petitioner needs to use forearm crutches. Petitioner could tolerate climbing stairs on occasion. Needs to utilize hand rail in lieu of forearm crutches. Petitioner should not climb ladders. (Px. 12)

[*42] On 12/4/2007, Petitioner states symptoms were worsening to Dr. Bell and he was having difficulty with his medications. Pain was 10/10 and located in his leg, hips, neck, arms and shoulders. Examination of the left lower extremity showed noticeable edema. FCE showed light physical demand level category but should be considered sedentary physical demand level. The diagnosis was severe CRPS that is generalized. Petitioner was to stop amitriptyline and Zoloft. Petitioner was not at MMI for now. Leave ITP settings the same for now. Petitioner was to return to clinic in two to three wks for possible change or adjustment of medications. (Px. 17)

Petitioner treated with his psychiatrist on 2/6/2007 and 12/11/07 who noted Petitioner's poor mood. (Px. 12)

In support of the Arbitrator's Decision relating to (C), did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent, the Arbitrator finds the following:

Petitioner's job as a regional manager required him to travel to over 300 stores ranging from Fargo, North Dakota to Indiana from Kentucky to Detroit, Michigan. On October 1, 2004, Petitioner drove to Bradley, Illinois after staying overnight **[*43]** in a hotel due to his job. Petitioner arrived at the Marshall's store in Bradley, Illinois at approximately 7:00 am. before the store was opened to the public. Petitioner went inside the store and did his normal inspections. After leaving the store, Petitioner headed back to his car to retrieve some paperwork to document the daily cleaning visit. While getting into his car, he slipped and hyper-extended his left knee. After this occurred, Petitioner noticed that the parking lot was freshly paved and painted. Additionally, Petitioner noted that the parking lot was wet from the

shrubbery being watered. Petitioner felt his left knee pop when he slipped but was able to continue working. Later that evening, Petitioner noticed that his left leg was swollen from the knee to the ankle.

Petitioner's unrebutted testimony was that he had already reported to the store to review the store's cleanliness and had already conducted his inspection. Clearly, he was at work for the employer at that time and thus he satisfies the in the course of employment prong of accident.

With respect to whether or not Petitioner's accident arose out of his employment with Respondent, the Arbitrator finds Petitioner **[*44]** is a traveling employee and thereby at greater risk of injury than the general public. As the Workers Compensation Commission explained in Sorrell v. City of Chicago, 07 IWCC 1605 (2007),

> Under the "street-risk doctrine," Petitioner's injuries arose out of and in the course of his employment. Larson's treatise explains that the doctrine allows recovery for injuries attributable to "risks of the street" if the employment occasioned the use of the street. 1-6 Larson's Workers' Compensation Law § 6.04. The evolution of this doctrine in Illinois has been discussed by our supreme court in City of Chicago v. Industrial Comm'n, 389 Ill. 592 (1945). In that case, the claimant, a license investigator employed by the City of Chicago, stubbed his toe "in stepping up to the sidewalk." Because the claimant was diabetic, his leg was eventually amputated as a result of the injury. The claimant's job was "to canvass all places of business and individuals in that district requiring a city license, and customarily he went from place to place walking the sidewalks." The Supreme Court held the claimant's injury arose out of his employment, **[*45]** explaining:
> "[T]he risks of the street may, depending upon the circumstances, become risks of the employment. Where *** the proof establishes that the work of the employee requires him to be on the street to perform the duties of his employment, the risks of the street become one of the risks of the employment, and an injury suffered on the street while performing his duty has a causal relation to his employment, authorizing an award under the Workmen's Compensation Act. Applying such rule to the present case it seems that defendant in error, by traveling from place to place upon the streets to investigate those who were required to hold licenses, was exposed to risks of accidents in the street to a greater degree than if he had not been so employed." City of Chicago, 389 Ill. At 601.
> To the same effect is C.A. Dunham Co. v. Industrial Comm'n, 16 Ill. 2d 102, 111 (1959), wherein the Supreme Court explained that "where the street becomes the milieu of the employee's work, he is exposed to all street hazards to a greater degree than the general public."

In the instant case, Petitioner slipped on a freshly paved parking lot that contained excess water **[*46]** from hydrating the nearby landscape. Petitioner slipped after retrieving some work product from his car. Based upon Petitioner's un-rebutted testimony, the Arbitrator finds Petitioner to be a credible witness and that he suffered an accident on October 1, 2004 that both arose out of and in the course of his employment.

In support of the Arbitrator's Decision relating to (F), is the Petitioner's present condition of ill-being causally related to the injury, the Arbitrator finds the following:

Petitioner testified that he slipped and hyper-extended his left knee as he was getting into his car. He felt his knee pop when this occurred. While this occurred at approximately 7:00 am, by later that evening, his left leg was swollen from his knee to his ankle. There is nothing in the record to to suggest any type of intervening accident occurred. Additionally, when Petitioner presented to the hospital, he presented a history consistent with his testimony at trial.

In this case, the Arbitrator need look no further than the medical records of Respondent's Independent Medical Examiner, Dr. Lubenow who provided a causal connection opinion in this matter. On March 2, 2006, Dr. Lubenow authored **[*47]** a report opining, "This is a 35-year-old gentleman who sustained an injury while at work to the left lower extremity. He has subsequently developed CRPS as a consequence of that work injury." On January 24, 2007, Dr. Lubenow wrote, "I do believe that he continues to be permanently disabled. I do believe his current condition of ill being is related to his work injury of October, 2004. I do not believe he is able to return to work at this time." On September 19, 2007, Dr. Lubenow conducted another examination at the request of Respondent. While his report of the same date does not address causal connection, Dr. Lubenow does make recommendations for ongoing treatment thereby implying that a causal connection still exists. Finally, after reviewing four videotapes of surveillance, Dr. Lubenow authored a final report on October 19, 2007 in which he simply opined that Petitioner was at maximum medical improvement and could return to work with restrictions. Dr. Lubenow did not negate his earlier causal connection opinions.

During his deposition, Dr. Lubenow stated, "I never said that he didn't have CRPS. I don't want you to walk away from this deposition with the impression that I had the **[*48]** opinion that he does not have CRPS. That is not an issue here." (Dr. Lubenow Dep. P42) (Rx. 1)

Therefore, based upon the medical records, the testimony at trial and the opinion of Respondent's own IME, the Arbitrator finds a casual connection exists between Petitioner's current condition of ill-being and his work injury and finds the medical treatment to date has been reasonable and necessary including, but not limited to, treatment for CRPS/RSD to the arms, legs, face and back as diagnosed by Dr. Lubenow, depression, sleep dysfunction, loss of libido and vision. The parties have stipulated that all medical bills have been paid or were in line for payment as of the time of trial.

The Arbitrator notes that he denied Respondent's motion to compel an FCE examination. The Arbitrator rejected Respondent's motion to compel by holding that Section 12 of the Workers Compensation Act does not confer upon Respondent the right to order Petitioner to undergo an FCE examination. In addition, a valid FCE had just been conducted on November 27, 2007.

At the time of trial, Respondent also sought to introduce evidence in the form of expert testimony from Barbara Ostraska, who had her doctorate **[*49]** in physical therapy, regarding an FCE that Petitioner underwent on November 27, 2007. Respondent's attorney did not tender this purported expert opinion forty-eight hours in advance of trial as required by Ghere. Thus, the FCE expert testimony was excluded at trial although an offer of proof was allowed to be made by Respondent's attorney.

When considering the issue of causation, the Arbitrator had an opportunity to review nineteen days of videotape surveillance. (Rx. 13 & 14) Nine of the days of videotape surveillance were shown to Respondent's IME Dr. Lubenow. These tapes did not change Respondent's IME Dr. Lubenow's opinion that a causal connection existed. While the Arbitrator has given full consideration to all nineteen of these tapes, the Arbitrator finds that none of the tapes viewed by the Arbitrator would cause the Arbitrator to change his opinion as to causal connection.

In support of the Arbitrator's Decision relating to (K), what amount of compensation is due for Temporary Total Disability, the Arbitrator finds the following:

The treating doctor's records indicate that Petitioner was released to sedentary restrictions consistent with the findings of a functional capacity **[*50]** evaluation performed on November 27, 2007. The FCE's restrictions indicated light-duty but for all practical purposes, sedentary restriction and the treating doctor agreed with those restrictions. (Px. 12) During trial, Respondent's attorney asked Petitioner if his treating physician, Dr. Stanton-Hicks had reviewed the FCE and had an opinion on it. Petitioner replied that Dr. Stanton-Hicks had reviewed the FCE and was in agreement with the findings that Petitioner had sedentary restrictions. Besides this testimony, there were medical records from the Cleveland Clinic after the FCE that

commented upon the FCE restrictions in accordance with this testimony.

Dr. Lubenow authored a report on October 19, 2007 indicating restrictions of light-duty. However, the Arbitrator noted at his deposition, that Dr. Lubenow changed his opinions and felt that appropriate restrictions would be "sedentary work or perhaps light medium work." (Dr. Lubenow Dep. 68 Line 3-9) (Rx. 1) Dr. Lubenow subsequently altered his testimony to reflect sedentary or light duty. (Dr. Lubenow Dep. 68 Line 15-23) (Rx. 1) Additionally, Dr. Lubenow opined that because Petitioner had been off of work for such a lengthy period **[*51]** of time, he would have to be transitioned back into work. (Dr. Lubenow Dep. 72-73) (Rx. 1) Based upon the medical records and the testimony at trial, the Arbitrator determines that Petitioner had sedentary restrictions as per the FCE.

Given the restrictions, the arbitrator must next look to whether or not Respondent offered a job within his restrictions. The arbitrator is aware of no statutory provision or case law that allows an employer to "prospectively" cut off an employee's TTD benefits. The Arbitrator notes from the stipulation sheet that Respondent claims its TTD obligation ended on October 19, 2007 (ostensibly due to Dr. Lubenow's report of 10/17/07) and ceased making any payment as of 10/28/07. (Arb. Ex. 1) Termination of benefits could be proper once a job is offered to Petitioner within his restrictions.

Petitioner testified at trial that he met with an area manager, Bryan Loveless from Respondent and spoke to him about a job. Petitioner testified that while he spoke to Mr. Loveless about a job, no job was offered to him. This testimony was supported by the testimony of Respondent's own witness, Mr. Bryan Loveless that he never offered a job to Petitioner within his restrictions **[*52]** or any job for that matter. Instead, Mr. Loveless clearly testified that he would have to speak with the Human Resource person, Mary Altounin after meeting with Petitioner. Mr. Loveless further testified that when he contacted Ms. Altounin that she indicated Mr. Loveless should take no action until they got the results of a functional capacity evaluation.

After a number of days without hearing anything, Petitioner testified that he contacted Mary Altounin, who indicated that he needed to contact Roger at Administaff. When Petitioner contacted Roger, Roger indicated that Administaff would have no contact with Petitioner because Petitioner had an attorney. Petitioner testified that neither Roger nor Mary Altounin offered him a job of any kind.

During his deposition, Dr. Lubenow made clear that someone who had been off as long as Petitioner was would need to be transitioned back to work. (Dr. Lubenow Dep. 72-73) (Rx. 1) The evidence at trial clearly indicates that Respondent never offered Petitioner a transitional job back with his employer as per Dr. Lubenow's recommendations. Nor was a job ever offered to Petitioner within his restrictions. Given the on-going medical treatment that **[*53]** Petitioner was undergoing with Dr. Stanton-Hicks and the failure to offer Petitioner a job within his restrictions, Respondent was liable to continuing paying Petitioner TTD benefits.

The arbitrator finds and orders Respondent to pay TTD benefits from November 16, 2004 through February 20, 2008 representing 170 1/7 weeks at a TTD rate of $ 736.67. Respondent to receive credit for the $ 113,207.19 already paid.

In support of the Arbitrator's Decision relating to (L), should penalties or fees be imposed upon the Respondent, the Arbitrator finds the following:

In this case the arbitrator finds Respondent's actions in this matter to be unreasonable and vexatious.

In Keenan v. Chief Construction, 06 IWCC 1037 (2006), the Commission stated:

> In denying compensation, Respondent has not reasonably relied in good faith on a medical opinion, and has not met the burden of demonstrating a reasonable belief

> that its denial of liability was justified under the circumstances, as required by Continental Distrib. Co. v. Indus. Comm'n, 98 Ill.2d 407, 456 N.E.2d 847 (1983), Bd. Of Educ. V. Indus. Comm'n, 93 Ill.2d 20, 442 N.E.2d 883 (1982) **[*54]** ("Norwood" case) and Bd. Of Educ. v. Indus. Comm'n, 93 Ill.2d 1, 442 N.E.2d 861 (1982) ("Tully" case). In *Tully,* the Illinois Supreme Court held that where a delay has occurred in payment of workers' compensation benefits, the employer bears the burden of justifying the delay and the standard he is held to is one of objective reasonableness in his belief. Thus it is not good enough to merely assert honest belief that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts that a reasonable person in the employer's position would have would justify it. 42 N.E.2d at 865. The Court added in *Norwood* that the question whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. 442 N.E.2d at 885. It was further held in *Continental Distributing* that a Respondent's reliance on its own physician's opinion does not establish, by itself, that its challenge to liability **[*55]** was made in good faith. The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented. 56 N.E.2d at 851. Moreover, the Appellate Court has noted that the burden of proof of the reasonableness of its conduct is upon the employer. Consol. Freightways, Inc. v. Indus. Comm'n, 136 Ill.App.3d 630, 483 N.E.2d 652, 654 (1985); accord, Ford Motor Co. v. Indus. Comm'n, 140 Ill.App.3d, 488 N.E.2d 1296 (1986).

Even though the Arbitrator has previously found that the sedentary restrictions of the FCE are controlling, for purposes of penalties and fees, the Arbitrator considers Respondent's reliance upon their IME Dr. Lubenow's interpretation of Petitioner's restrictions. After reviewing some video surveillance, Respondent's IME Dr. Lubenow authored a report on October 19, 2007. In this report, Dr. Lubenow did not change his causal connection opinion. Nor did Dr. Lubenow release Petitioner to full-duty work. Instead, Dr. Lubenow released **[*56]** Petitioner to return to work with restrictions of light to medium duty. (Rx. 1) (Although at his deposition, Dr. Lubenow would change the restrictions to sedentary or light). Dr. Lubenow Dep. 68 Line 3-9); (Dr. Lubenow Dep. 68 Line 15-23) (Rx. 1) Ostensibly based upon that report, Respondent ceased making TTD benefits as of 10/28/07. (Arb. Ex. 1) Given the ongoing medical treatment that Petitioner was receiving, it is clear that Respondent's liability for TTD benefits continues unless and until they offer Petitioner a job within his restrictions.

The testimony at trial was clear from Bryan Loveless that no job offer was made upon or after meeting with Petitioner on 11/12/07. While Mr. Loveless asked if Petitioner could start work tomorrow, it was clear from Mr. Loveless' testimony that was not a job offer. Instead, Mr. Loveless was "testing the waters" to see when Petitioner would be able to return to work. It is also clear that Respondent was not in a position to have Petitioner start the following day because Bryan Loveless had not brought along any of the tools necessary for Petitioner to return to work (i.e., his portfolio, cell phone, etc.) Furthermore, Mr. Loveless clearly **[*57]** testified that upon leaving the meeting he contacted Mary Altounin, the human resource person for Bergenson's Property Services. Ms. Altounin told Bryan to take no further action until they had the results of the FCE. The testimony at trial from Respondent's own witness clearly indicates that no job offer was ever made to Petitioner.

While the onus is upon Respondent to offer a job within Petitioner's restrictions, Petitioner's unrebutted testimony was that he personally contacted his employer and no job offer was forth coming. Petitioner testified that he, after not hearing anything from his employer after meeting with Bryan Loveless, made contact with Mary Altounin to inquire about a job. Petitioner's unrebutted testimony was that Ms. Altounin told him that he would have to contact Roger at Administaff. The unrebutted testimony is that he then contacted Roger at Administaff and was

told that they would have no further contact with him because he had an attorney.

In this case, Respondent introduced into evidence 17 days of video taped surveillance. However, only a few days of videotaped surveillance were turned over to Dr. Lubenow, Respondent's IME doctor. Yet, after reviewing the **[*58]** videotaped surveillance, Dr. Lubenow still felt that a causal connection existed and opined that Petitioner could return to work with restrictions. Thus, without a full-duty release, Respondent still had an obligation to continuing paying TTD benefits. Nothing in the videotapes obviated Respondent's obligation to pay TTD benefits.

The Arbitrator concludes that Respondent had no basis upon which to stop paying Petitioner TTD benefits. While Respondent disputed accident and causal connection at the time of trial, there has been no evidence introduced to truly dispute either issue. Most damning is the fact that Respondent's own IME supports a causal connection opinion and detailed a set of work restrictions. Respondent never offered a job within those restrictions. Nor was there evidence that after Dr. Lubenow's deposition that Respondent attempted to transition Petitioner back to work as Dr. Lubenow suggested. As such, the action of stopping benefits as of October 28, 2007 was unreasonable and vexatious. Pursuant to the Act, a delay of greater than 14 days creates a rebuttable presumption of unreasonable delay. Respondent has not rebutted that presumption.

The Arbitrator previously **[*59]** awarded TTD benefits from November 16, 2004 through February 20, 2008 totaling $ 125,339.14. Respondent claimed it paid $ 113,207.19 in TTD benefits, meaning that $ 12,131.95 in TTD benefits is owing. The Arbitrator orders Respondent to pay Section 19(K) penalties of 50% of the TTD owing, or $ 6,065.98.

There was a 115 day delay in TTD benefits owed from October 29, 2007 (the date benefits ceased being paid) through the date of trial of February 20, 2008. Section 19(L) allows for $ 30 per day penalties for the delay in payment. Thus, the Arbitrator orders Respondent to pay Section 19(L) penalties in the amount of $ 3,450.00.

The Arbitrator orders Respondent to pay Section 16 attorneys' fees of 20% of the TTD due and owing and the total 19(K) penalties awarded (18,197.93), equaling $ 3,639.59.

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

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