*7 IWCC 1530; 2008 Ill. Wrk. Comp. LEXIS 50, **

LOUELLEN HARRINGTON, PETITIONER, v. PARK PROPERTIES INC, RESPONDENT.

NOS. 04WC 38000, 05WC 11660

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF LAWRENCE

7 IWCC 1530; 2008 Ill. Wrk. Comp. LEXIS 50

January 9, 2008

CORE TERMS: arbitrator, doctor, temporary total disability, medication, thumb, pain, physical therapy, injections, surgeon, arthritis, maximum, steroid, wrist, x-ray, undergo, shoulder, surgery, trailer, ankle, mobile home park, corrected, prescribed, deposition, traumatic, permanent, petitioner testified, typographical error, right shoulder, medical care, subjective

JUDGES: Yolaine Dauphin; Barbara A. Sherman; Kevin Lamborn

OPINION: [*1]

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanency and benefit rates 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.

Dr. Phillipe, a general practitioner, treated Petitioner from April 1, 2004, through June 12, 2005. Dr. Phillipe's treatment consisted of prescribing pain medication to Petitioner and taking her off work. In his evidence deposition on February 21, 2005, Dr. Phillipe testified that he would consider sending Petitioner to a hand surgeon or ordering physical therapy for Petitioner. Dr. Phillipe opined that hand surgery might help Petitioner's condition. Finally, Dr. Phillipe testified that Petitioner would be at maximum medical improvement if she chose not to pursue any further treatment.

Respondent's section 12 examiner, Dr. Bloss, likewise testified in his evidence deposition on

June 21, 2005, that Petitioner would benefit from additional **[*2]** aggressive treatment to her hands such as physical therapy and steroid injections.

Petitioner testified at hearing on September 15, 2005, that she is not interested in undergoing hand surgery or treating with anyone other than Dr. Phillipe. Petitioner admitted that she has not undergone physical therapy or steroid injections and has not been to a hand surgeon. Furthermore, Dr. Phillipe has not prescribed physical therapy or steroid injections and failed to refer Petitioner to a hand surgeon.

On April 27, 2005, Petitioner's counsel sent Respondent's counsel a letter advising Respondent that Petitioner "prefers not to undergo any type of surgery or other modalities of treatment with another doctor." Petitioner's counsel sent a second letter on April 28, 2005, advising Respondent that Petitioner did not want to see a hand surgeon.

The Arbitrator found that Petitioner has not yet reached maximum medical improvement. The Arbitrator relied on the testimonies of Drs. Phillipe and Bloss, who testified that additional care could improve Petitioner's condition. Inexplicably, the Arbitrator awarded disability benefits for loss of the use of both hands. The Commission finds that Petitioner's **[*3]** decision not to undergo additional treatment places her at maximum medical improvement as of June 12, 2005, the date of her last visit with Dr. Phillipe. As noted, Dr. Phillipe testified that if Petitioner chose not to pursue any further treatment, she would be at maximum medical improvement. The Commission agrees with the Arbitrator's disability award.

Finally, the Commission notes that the Arbitrator awarded temporary total disability benefits from June 3, 2004, through January 12, 2005. However, in paragraph two, under "The Arbitrator Concludes," the Arbitrator stated the starting date of temporary total disability as June 3, 2005. The Commission corrects the Arbitrator's decision to reflect the starting date of Petitioner's temporary total disability as June 3, 2004.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator entered on November 17, 2005, is modified and corrected as stated herein, and otherwise affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf **[*4]** 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.

ATTACHMENT

ORDER

Motion to Recall pursuant to Section 19(f) of the Act was filed by the Petitioner on December 26, 2007. The Commission finds that a clerical error exists in its Decision and Opinion on Review dated November 21, 2007, in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated November 21, 2007 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JAN 9 2008

Yolaine **[*5]** Dauphin

December 21, 2007

Commissioner Yolaine Dauphin
Illinois Workers Compensation Commission
State of Illinois Center
100 W. Randolph Street, Suite 8-200
Chicago, IL 60601

RE: Lou Harrington v. Park Properties, Inc.
Case No.: 07-IWCC-1530 (04-WC-38000 and 05-WC-11660)
D/A: 10/6/03 and 5/30/04

Dear Commissioner Dauphin:

The respondent received the commision's decision in this case on December 12, 2007. Upon reviewing the decision, we found what we believe is a clerical error. Arbitrator Tobin awarded temporary total disability benefits from June 3, 2004 through January 12, 2005. The second paragraph on page two of the commission's decision states that the TTD was awarded by the arbitrator from June 3, 2004 through June 12, 2005. The commission went to correct a typographical error with regard to the commencement date of the TTD benefits. There was no discussion regarding extending those benefits from January to June 2005. We believe that the date of June 12, 2005 is a typographical error and should read January 12, 2005.

In support of this supposition, we are filing a Section 19F Motion to have the decision recalled by the commission and corrected to reflect what we believe **[*6]** is the appropriate ending date of the TTD benefits in the award, namely January 12, 2005.

Enclosed please find the respondent's Notice of Motion Order and Motion under Section 19F. Please take the action you feel is appropriate.

Thank you for your attention to this matter. Please do not hesitate to contact the undersigned should you have any questions regarding this request.

Very truly yours,

Bruce J. Magnuson
cc. Fred Johnson, Attorney for the petitioner
Ron Siebert (028 CB AFU1518 E)

ILLINOIS WORKERS' COMPENSATION COMMISSION NOTICE OF MOTION AND ORDER

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed.

TO: **Commissioner Yolaine Dauphin**
Illinois Workers' Compensation Commission
100 W. Randolph Street, Suite 8-200, Chicago, IL 60601

On , at **PM** or as soon thereafter as possible, I shall appear before the Honorable , or any arbitrator or commissioner appearing in his or her place at , Illinois, and present the attached motion for:

Change of venue (# 3072)

Consolidation of cases (# 3071)
(list case #)

Dismissal of attorney (# 3052)

[*7] Dismissal of review (# 3085)

Fees under Section 16 (# 1600)

Fees under Section 16a (# 1645)

Hearing under Sect. 19(b) (# 1902)

Penalties under Sect. 19(k) (# 1911)

Penalties under Sect. 19(l) (# 1912)

Reinstatement of case (# 3074)

Request for hearing (# R33)

Withdrawal of attorney (# 3073)

[checkmark] Other (explain)

Recall under Section 19F
Signature Petitioner Respondent X

Bruce J. Magnuson (2250)
Attorney's name and IC code # (please print)

Law Offices of Robert J. Hayes
Name of law firm, if applicable

940 West Port Plaza, Suite 208

Street address

St. Louis, Missouri 63146

City, State, Zip code

314-579-8394

Telephone number

E-mail address

ORDER

The motion is set for hearing on

Signature of arbitrator or commissioner

Date

ORDER

The motion is

Granted

Denied

Withdrawn

Dismissed

Continued to

Set for trial (date certain) on

Signature of arbitrator or commissioner

Date

BEFORE THE WORKERS COMPENSATION COMMISSION STATE OF ILLINOIS

PETITION [*8] TO RECALL COMMISSION'S DECISION FOR A CLERICAL ERROR UNDER SECTION 19(F)

Comes now the Respondent, Park Properties, Incorporated, by and through its attorneys, The Law Offices of Robert J. Hayes, and requests that the commission recall its November 21, 2007 decision in this case to correct a clerical error and in support of this motion states the following:

1. The commission's decision, the second paragraph on page two, notes that the arbitrator awarded temporary total disability benefits "from June 3, 2004 through June 12, 2005." A review of the arbitrator's decision will show that the TTD benefits were awarded from June 3, 2004 through January 12, 2005.

2. In its decision, the commission corrected an error in the starting date of temporary total disability benefits which was listed, in the body of the arbitrator's decision, as June 3, 2005. The commission changed that to June 3, 2004. There is no discussion regarding extending the TTD award from January 12, 2005 through June 12, 2005. No explanation is given for this which suggests that it was a typographical error.

3. The commission affirmed and adopted the aribtrator's decision except for a modification and correction **[*9]** with regard to the commencement date of TTD benefits. Two different dates were given, with the order reflecting the commencement date of June 3, 2004 and the conclusion section in the attachment reflecting a commencement date of June 3, 2005. That date was corrected by the

commission and there is no explanation or discussion to document extending the TTD period from January 12, 2005 through June 12, 2005. The respondent therefore contends that the date of June 12, 2005 and the commission's decision was a typographical error.

Wherefore, as it appears that the commission's decision of November 21, 2007 contains a typographical error, the Respondent requests that the decision be recalled for correction of that error and a reissuance of a corrected decision and opinion on review.

Respectfully submitted,

By: Bruce J. Magnuson

Law Office of Robert J. Hayes

940 West Port Plaza, Suite 208

St. Louis, MO 63146

(314) 579-8915

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanency and benefit rates and being advised of the facts **[*10]** 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.

Dr. Phillipe, a general practitioner, treated Petitioner from April 1, 2004, through June 12, 2005. Dr. Phillipe's treatment consisted of prescribing pain medication to Petitioner and taking her off work. In his evidence deposition on February 21, 2005, Dr. Phillipe testified that he would consider sending Petitioner to a hand surgeon or ordering physical therapy for Petitioner. Dr. Phillipe opined that hand surgery might help Petitioner's condition. Finally, Dr. Phillipe testified that Petitioner would be at maximum medical improvement if she chose not to pursue any further treatment.

Respondent's section 12 examiner, Dr. Bloss, likewise testified in his evidence deposition on June 21, 2005, that Petitioner would benefit from additional aggressive treatment to her hands such as physical therapy and steroid injections.

Petitioner testified at hearing on September 15, 2005, that she is not interested in undergoing hand surgery or treating with anyone other than Dr. Phillipe. Petitioner admitted that she has **[*11]** not undergone physical therapy or steroid injections and has not been to a hand surgeon. Furthermore, Dr. Phillipe has not prescribed physical therapy or steroid injections and failed to refer Petitioner to a hand surgeon.

On April 27, 2005, Petitioner's counsel sent Respondent's counsel a letter advising Respondent that Petitioner "prefers not to undergo any type of surgery or other modalities of treatment with another doctor." Petitioner's counsel sent a second letter on April 28, 2005, advising Respondent that Petitioner did not want to see a hand surgeon.

The Arbitrator found that Petitioner has not yet reached maximum medical improvement. The Arbitrator relied on the testimonies of Drs. Phillipe and Bloss, who testified that additional care could improve Petitioner's condition. Inexplicably, the Arbitrator awarded disability benefits for

loss of the use of both hands. The Commission finds that Petitioner's decision not to undergo additional treatment places her at maximum medical improvement as of June 12, 2005, the date of her last visit with Dr. Phillipe. As noted, Dr. Phillipe testified that if Petitioner chose not to pursue any further treatment, she would be at maximum medical **[*12]** improvement. The Commission agrees with the Arbitrator's disability award.

Finally, the Commission notes that the Arbitrator awarded temporary total disability benefits from June 3, 2004, through June 12, 2005. However, in paragraph two, under "The Arbitrator Concludes," the Arbitrator stated the starting date of temporary total disability as June 3, 2005. The Commission corrects the Arbitrator's decision to reflect the starting date of Petitioner's temporary total disability as June 3, 2004.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator entered on November 17, 2005, is modified and corrected as stated herein, and otherwise affirmed and adopted.

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

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

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 **[*13]** of the Secretary of the Commission.

DATED: NOV 21 2007

Yolaine Dauphin

Barbara A. Sherman

Kevin Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION 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 **Jeffery Tobin,** arbitrator of the Commission, in the city of **Lawrenceville,** on **9-15-05.** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [] Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [] Was there an employee-employer relationship?

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

D. [] What was the date of the accident?

E. [] Was timely notice of the accident given to the respondent?

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

G. [] What were the petitioner's earnings?

H. [] What was the petitioner's age **[*14]** at the time of the accident?

I. [] What was the petitioner's marital status at the time of the accident?

J. [X] Were the medical services that were provided to petitioner reasonable and necessary?

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

L. [X] What is the nature and extent of the injury?

M. [] Should penalties or fees be imposed upon the respondent?

N. [] Is the respondent due any credit?

O. [] Other

FINDINGS

. On **5-30-04 and 10-6-03,** the respondent **Park Properties, 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 $ **10,200.00;** the average weekly wage was $ **196.15.**

. At the time of injury, the petitioner was **59** years of age, ***married*** with **0** children under 18.

. Necessary medical services ***have*** been provided **[*15]** by the respondent.

. 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 $ **130.77**/week for **31 and 6/7ths** weeks, from **6/03/04** through **1/12/05,** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **117.69**/week for a further period of **266.5** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **65% PPD to each hand; 5% PPD to right arm; 5% PPD to left foot.**

. The respondent shall pay the petitioner compensation that has accrued from **10/06/03** through **9/15/05,** and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **2,543.50** for necessary 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(1) of the Act.

. The respondent **[*16]** shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.19% 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

11/14/05

Date

HARRINGTON 04 WC 38000 & 05 WC 11660

THE ARBITRATOR FINDS THE FOLLOWING FACTS REGARDING ALL DISPUTED ISSUES:

These two claims were consolidated for hearing without objection. The petitioner was hired to work at Southwind Village Mobile Home, a trailer park operated by the respondent, on April 24, 2003. She was hired to be the property manager. The property consisted of 68 units, one half of which were occupied.

The petitioner's duties included making rounds to see that all was in order, operating the office, collecting **[*17]** rents, dealing with the contractors who would come to work on the property, buying and selling mobile homes and helping with mowing of the lawns and painting of the repossessed trailers. She would often paint, clean and have things fixed. The property covered approximately 33 acres. If there were tree limbs that had blown down in wind storms she would move them and pile them up for the City of Robinson to pick up. The job involved filling out many forms, which she then faxed into the corporate offices on a daily basis.

Petitioner completed the 10th grade in school and had no other formal training. She enrolled as a student at Lincoln Trail Community College but claims she could not handle the studies. She did not obtain a general equivalency diploma.

On October 6, 2003, the petitioner was returning to the office after serving some papers. While walking back to the office, she looked up to see what her maintenance man was doing. She stubbed her toe on a piece of raised sidewalk, pitched forward and landed on her hands. Her hand struck the ground as she reached out to break her fall. She could not get up for a while and the maintenance man came over and helped her up. The petitioner **[*18]** went back to the office, sat at her desk and continued to work. She did not seek any medical care on that date.

The petitioner did not seek medical care until October 7, 2003. At that time she went to the Crawford Memorial Hospital in Robinson. She complained of pain to the left foot and ankle, the right hand and the right shoulder. She was able to bear weight but was noted to be limping. She was unable to raise her arm above the shoulder. X-rays were taken and were found to be negative for fracture. Arthritic changes were noted as being present. She was diagnosed as suffering from an acute left ankle sprain, contusion to the right wrist and sprain, traumatic

biciptal tendonitis in the right shoulder. She was given medications and a sling and told to follow up with her family doctor. (Pet.Ex.8)

The petitioner resumed her job and continued to work as the manager. The petitioner did not seek medical care again until April 1, 2004. At that time she consulted her family physician, Dr. Michael Phillippe. Dr. Phillippe, a general practice physician, recorded that the petitioner had fallen in October 2003 and landed on her left and right wrists. It was noted that the petitioner had undergone **[*19]** x-rays on October 7, 2003 and all of those tests were negative. The petitioner was complaining of pain in the MP joint of both thumbs, with the left being worse than the right. Dr. Phillippe found the petitioner had good range of motion. When he examined her, he found swelling and thickening of the synovium of the MP joints of both thumbs. There was no erythema or increased warmth. Dr. Phillippe diagnosed the presence of traumatic arthritis and prescribed medications. (Pet.Ex.7) Dr. Phillippe did not restrict the petitioner's activities at that time. The doctor testified that he understood that the petitioner's job involved taking care of the trailer court and doing paperwork. (Pet.Ex.3 at 10) Dr. Phillippe did not have any discussion with the petitioner at that time about working at the trailer court and felt that she was capable of continuing to work. (Pet.Ex.3 at 10-11)

Dr. Phillippe re-evaluated the petitioner on April 23, 2004. At that time he recorded she complained that her hands hurt every day and both hands ached. She reported having discomfort before her fall in October 2003. She also complained that her hands were worse in cold weather. The doctor's physical examination **[*20]** revealed no change at that time. He changed her medications and suggested she undergo tests for rheumatoid arthritis. He told her to follow up in one month. (Pet.Ex.7) Dr. Phillippe did not place any restrictions on the petitioner's activities at that time. (Pet.Ex.3 at 12)

The petitioner next consulted with Dr. Phillippe on May 15, 2004. She continued to complain of pain in her thumbs and also noted that the medication prescribed at the last visit had made her sleepy. She noted worsening pain and stiffness in cold weather. When Dr. Phillippe examined the petitioner's hands, he found some thickening of the synovium around the MP joint of the thumb. X-rays of the hand and wrist taken on April 23, 2004 were reviewed and found to show no change from the prior right hand and right wrist studies. The doctor again diagnosed traumatic arthritis in the arm. He also switched her medication and suggested switching to a Cox-2 inhibitor. (Pet.Ex.7) Dr. Phillippe did not restrict the petitioner's activities in any way following this visit. (Pet.Ex.7)

The petitioner sustained a new injury on May 30, 2004. There had been a storm during the night and one of the residents of the mobile home park could **[*21]** not get her door open due to a downed limb blocking the exit. The petitioner and her fiance went to take the limbs away from the trailer. The limb was 12 to 15 feet long and was still connected to the tree. She and her fiance had to pull it away so that the door could be opened. The petitioner's hands felt worse after doing this activity.

The petitioner returned to Dr. Phillippe on June 3, 2004. At this visit she reported that her hands felt better. She also mentioned the incident involving the limbs. She noted she had been on Indocin for a week and it had already helped quite a bit. She complained of difficulty holding paper between her thumb and index finger. She complained of difficulty doing her housework. Dr. Phillippe re-examined the petitioner and his note contains no new objective findings. His diagnosis remained traumatic arthritis of the thumb and index finger. He recommended she obtain a comprehensive metabolic profile, continue to take Indocin. The petitioner was given a note to "be off work indefinitely." (Pet.Ex.7)

The petitioner did not return to Dr. Phillippe until September 8, 2004. The doctor's report does not include any new findings made. He diagnosed several items, **[*22]** including seronegative rheumatoid arthritis and traumatic arthritis to the wrist. He prescribed various medications and recommended that the petitioner lose weight. (Pet.Ex.7)

The petitioner was examined at the respondent's request by Dr. Bryant Bloss, an orthopedic surgeon, on December 27, 2004. At this visit, the petitioner complained of pain primarily in the right wrist at the base of the thumb which was accompanied by a sharp stabbing constant pain. She also complained of left wrist pain along the back of the hand with some numbness. She complained of some pain in her left shoulder, but noted that it was not as painful now as originally. The doctor also noted the petitioner mentioned that she had originally hurt her left ankle but had no pain or swelling at the time of the examination. (Res.Ex.1 at 7)

Dr. Bloss performed an orthopedic examination. He found that the petitioner was tender over the first carpometacarpal joint of the thumb. He found that she had a positive Rine test on both sides. This caused pain to be referred to the CMC joint. He also found both of those joints to be tender, the right worse than the left. (Res.Ex. 1 at 7-8) Dr. Bloss found that the petitioner did **[*23]** not have evidence of carpal tunnel syndrome. The petitioner's shoulders were examined and she was noted to have full range of motion. There was no weakness. She had negative shoulder impingement signs, but there was some subjective complaint in extreme motion of shoulder impingement. Dr. Bloss noted the petitioner complained more of her wrist than her shoulder. He examined her left ankle and found it to be stable. There was some minor heel cord tightness but no swelling was present. There was normal range of motion except for the right heel cords. The petitioner was able to squat and duck walk fairly well and could walk bilaterally on heels and toes. (Res.Ex. 1 at 8)

Dr. Bloss then proceeded to perform some diagnostic testing on the petitioner. He performed a Jamar grip strength test and found that the right hand was slightly stronger than the left but overall the petitioner had about 50% strength. The doctor felt this was what he would expect for someone of the petitioner's age and build. There were some minor inconsistencies but overall the testing was fairly objective. The petitioner was also tested for pinch strength and that again was consistent. The right hand was 20% stronger **[*24]** than the left. (Res.Ex. 1 at 9)

X-rays were taken at the doctor's office. He found grade 1 narrowing and subluxation in the first carpal joint on the left and a little greater than grade 1 to 2 on the right. There was some irregularity in the carposcaphoid joint on the left. The joint spacing was normal. The left ankle showed a one centimeter spur on the heel plantar surface, but otherwise the joint space was good. Stress films of the ankle showed it to be stable. X-rays of the right shoulder showed minor degenerative changes of the AC joint and the glenohumeral joint was normal. Dr. Bloss testified that it was his opinion that these x-ray finding were all consistent with the presence of degenerative arthritis. (Res.Ex.1 at 10-11) Dr. Bloss was also of the opinion that these degenerative changes would have been present prior to October 6, 2003. (Res.Ex. 1 at 11)

Dr. Bloss testified that the arthritis of the shoulder was pre-existing. He felt that the petitioner had some post traumatic arthritis of the first carpometacarpal joints on both sides, with the right being worse than the left. There was a strain of the right shoulder which had healed. There was a strain on the left ankle **[*25]** which had healed. (Res.Ex. 1 at 12) Dr. Bloss testified that it was his opinion that these problems were aggravated by the fall but not caused by the fall. (Res.Ex. 1 at 13)

Dr. Bloss testified that he had discussed with the petitioner the type of work she performed at the time of her fall. He noted that she did primarily paperwork, but was involved with some mild maintenance. It was his opinion that the petitioner would be able to work as the manager of a mobile home park. He felt she might have some discomfort, but her duties would be less painful if she were treated more vigorously, especially with local steroid injections. He also suggested that she could wear braces and take anti-inflammatory medications. (Res.Ex. 1 at 13-14) Dr. Bloss also felt that the petitioner had no contraindications to using her right hand to fill out forms or write out other documents. He noted she would have to do it intermittently, but if she took steroid injections and non-steroidal anti-inflammatories and wore a brace, she would be able to handle the paperwork. (Res.Ex. 1 at 14)

Dr. Bloss felt that the petitioner had not reached maximum medical improvement with regard to her hand injuries and that **[*26]** the condition in her hands and her functional ability could be improved with treatment. (Res.Ex.1 at 15) When asked whether it was his opinion that the petitioner's hand conditions had room for improvement if she underwent more aggressive hand therapy, the doctor's response was "yes I do, very much so." (Res.Ex. 1 at 15)

The petitioner followed up with Dr. Phillippe on November 5, 2004 and January 12, 2005. These two medical visits are documented in the record. The petitioner testified to having seen Dr. Phillippe on August 15, 2005, but no records were placed into evidence. The two visits of November 15, 2004 and January 12, 2005 do not contain any new or additional findings with regard to the petitioner's hands. The doctor continued to recommend medications. On January 12, 2005, Dr. Phillippe noted that the petitioner should be re-checked in one to two months. That was Petitioner's last visit with Dr. Phillippe. (Res.Ex.7)

Dr. Phillippe testified that it was his opinion that the petitioner had arthritis in both of her wrists and that it was causally related to the accident of October 2003. He felt that the arthritis in the right shoulder was not causally related to the falling. (Pet.Ex.3 **[*27]** at 19) Dr. Phillippe testified that as of the last date of examination he gave petitioner a permanent restriction. (Pet.Ex.3 at 20) Dr. Phillippe also testified the petitioner would have trouble doing anything repetitive with her hands or anything that requires twisting or using her thumb, index finger, lifting, pulling or pushing. He felt that she could lift up to 5 pounds. (Pet.Ex.3at 21)

Dr. Phillippe testified that he had not made any referrals to other physicians for work up for her condition. He noted that he had not done this as "she hasn't been back in." (Pet.Ex.3 at 24) Dr. Phillippe testified that the petitioner could possibly undergo surgery to the MP joints of the thumb by a hand surgeon. She could also maybe undergo injections. The doctor noted, when he testified on February 21, 2005, that he could send her to a hand surgeon and they might be able to inject for temporary relief. (Pet.Ex.3 at 25) The doctor did not give the petitioner any steroid injections himself and he could not recall having braced her. When asked whether there was anything else he could do for her, he said that she could maybe undergo physical therapy and occupational therapy or see a hand surgeon. **[*28]** (Pet.Ex.3 at 26)

During his deposition, Dr. Phillippe confirmed that his specialty is family practice and he only does very minor general surgery. (Pet.Ex.3 at 29) He agreed that none of the x-rays taken of this petitioner's hand reveal that there was any fracture or dislocation in any of the bones. He agreed that there was no new boney pathology noted right after the accident, such as fractures or dislocations. (Pet.Ex.3 at 32) The doctor also agreed that if osteoarthritis was present on October 7, 2003 that would indicate that the changes would have been developing prior to the fall at work. He also agreed that considering the petitioner's age of 58 years, that osteoarthritic changes in the joints would not be unusual. (Pet.Ex.3 at 32)

Dr. Phillippe testified that he did not recall discussing with the petitioner what the full extent of her duties were at the mobile home park. The doctor did not remember that the petitioner did any heavy lifting and it was his impression that she was doing office work. (Pet.Ex.3 at 33) Dr. Phillippe also testified he did not know whether the petitioner was right or left handed. He thought she was right handed but stated that he honestly did not know. **[*29]** (Pet.Ex.3 at 33)

Dr. Phillippe noted that when he examined the petitioner on April 1, 2004, her system was overall within normal limits other than her complaints in the thumb. The findings of swelling and thickening of the synovium were indications of arthritis. (Pet.Ex.3 at 34) The doctor agreed he allowed her to continue to work as the trailer court manager after that first visit. He also testified that he did not have the petitioner undergo any type of physical therapy. (Pet.Ex.3 at 35) Dr. Phillippe also admitted that there was no obvious progression of the arthritis that he could objectively document through x-rays. (Pet.Ex.3 at 36)

Dr. Phillippe testified that when the petitioner returned on April 15, 2004, he found no changes

in the objective examination findings relating to the hands. With regard to whether the petitioner had rheumatoid arthritis, he stated that he did not think he could prove she had it but he can't disprove it either. He noted that he would have to ask the opinion of a rheumatologist. (Pet.Ex.3 at 38) When Dr. Phillippe saw the petitioner on June 3, 2004, he had noted the petitioner's hands were feeling better at that time. The doctor testified that when **[*30]** he gave the petitioner her note to be off work on June 3, 2004 that was based upon subjective complaints presented to him at that visit. (Pet.Ex.3 at 39) He agreed that the main basis for disabling the petitioner at that time was based upon her complaints of pain in the thumbs. (Pet.Ex.3 at 39-40)

Dr. Phillippe testified that throughout the time he provided treatment to this petitioner he primarily treated her with medications. (Pet.Ex.3 at 40) The doctor testified that other possible treatments could be done through an occupational medicine specialist or a physical therapy specialist. He also agreed that the petitioner could see a hand surgeon. He felt that there was some potential for other sources of treatment that might provide the petitioner with improvement. He agreed that depending upon what results the petitioner got from additional care or what was found out through a functional capacity evaluation, the petitioner's restrictions could be changed. The doctor also agreed that he would not discourage the petitioner from returning to work if she wanted to do so. (Pet.Ex.3 at 42-43)

The petitioner's attorney sent her to J. Stephen Dolan for a vocational and rehabilitation assessment **[*31]** on March 21, 2005. Mr. Dolan met with the petitioner on the one occasion only. (Pet.Ex.4 at 19)

Mr. Dolan noted that the petitioner's work history was rather sketchy and she had not worked much in the last 25 years. The job at Southwind Village was the first job she had done since sometime in the 1970s. (Pet.Ex.4 at 10) Mr. Dolan gave the petitioner various tests, and noted that she read at the 47th percentile, which is the high school level. She is able to spell in the 66th percentile, which is the post high school level. He noted that the petitioner was a pretty good speller. The petitioner was able to do math at the 45th percentile, which was also noted to be high school level. (Pet.Ex.4 at 13) Mr. Dolan testified he did a very limited labor market survey, which consisted of contacting an official of the Illinois Department of Employment Security. (Pet.Ex.3 at 13) Mr. Dolan testified that it was his opinion that the petitioner was not employable. (Pet.Ex.4 at 16) He did note that if someone else could find the petitioner a job "more power to them." (Pet.Ex.4 at 18)

Upon cross-examination, Mr. Dolan testified that his practice was heavily geared towards plaintiffs, approximately **[*32]** 90%. (Pet.Ex.4 at 20) Mr. Dolan agreed that the petitioner's job at the mobile home park included a significant amount of responsibility and required independent action on her part. He also agreed that her job had included fiduciary responsibilities which included collecting rent, making receipts, approving payout for services, depositing funds and keeping track of those funds. (Pet.Ex.4 at 24-25) He agreed that she had carried out her responsibilities in a way that resulted in her cash pay being increased. He agreed that she had shown the ability to perform managerial tasks. (Pet.Ex.4 at 25) Mr. Dolan also testified the petitioner had computer skills and had reported to him that she used a computer every day. He also agreed that there was nothing disagreeable about her and that she had no personality flaws or problems that would have made her unattractive to potential employers. Mr. Dolan agreed that computer skills are marketable and that experience with handling money in a trustworthy manner is a skill that can also be attractive to potential employers. (Pet.Ex.4 at 26) He agreed that the petitioner was literate. With regard to the labor market survey, Mr. Dolan testified that **[*33]** he had only contacted the Illinois Department of Employment Security. He did not survey any of the want ads in the newspapers where the petitioner resided and did not contact any employers on the petitioner's behalf. (Pet.Ex.4 at 27-28)

Brenda Latham testified at arbitration. She was a vocational rehabilitation counselor hired by the respondent who evaluated the petitioner and worked on locating her a job.

Ms. Latham testified that it was her opinion, within a reasonable degree of professional certainty, that the petitioner was placeable in the job of a customer service associate/survey worker with a company called **Catalyst** RTW. She testified that it was her understanding that the petitioner had been interviewed for a job with **Catalyst** and that they felt she would be appropriate. Ms. Latham testified that the job at **Catalyst** RTW would be within the restrictions outlined by Dr. Phillippe. (Res.Ex.2)

The petitioner admitted at arbitration that she had interviewed with individuals at **Catalyst** RTW over the telephone. She admitted that a job was offered to her but that she had decided to decline acceptance. She admitted she had not attempted to perform the job but claimed that she felt **[*34]** she was unable to do so.

The petitioner testified at arbitration that she refused to treat with any physician other than Dr. Phillippe, her general practice family physician. She admitted she had not undergone physical therapy, steroid injections nor had she seen a hand expert. Respondent's Exhibit 3 shows that the petitioner refused to consult with any other physician, including a hand surgeon. She decided she did not wish to treat with anybody other than her present doctor, this being her general practice physician, Dr. Phillippe. The petitioner did not have much in the way of treatment, as Dr. Phillippe's record show infrequent visits and the only treatment recommended consisted of medications. The doctor did not provide any other vigorous or aggressive approaches in an attempt to increase the petitioner's functional ability.

THE ARBITRATOR CONCLUDES

1. The petitioner sustained injuries arising out of and in the course of employment on October 6, 2003 and May 30, 2004. The petitioner sustained injuries to both hands, her right arm and her left foot. The medical treatment rendered was reasonable and necessary and the bills for same reasonable. Respondent shall pay total medical **[*35]** expenses of $ 2,543.50 which break down as follows: CMH $ 346; $ 2,019.50 Crawford Memorial; $ 178.00 Lakeland Radiology if same remain unpaid.

2. Concerning the amount of compensation due for temporary total disability, the arbitrator finds that the petitioner was able to perform her job from the date of the alleged accident through June 3, 2005. She was taken off work based upon subjective complaints by Dr. Phillippe, her family physician. Her last visit with him was on 1/12/05. When the petitioner was examined by Dr. Bryant Bloss, on 12/27/04, an orthopedic surgeon, he found that she was capable of performing her regular job. Both Dr. Phillippe and Dr. Bloss have testified that the petitioner's job primarily involved office work with some maintenance involved. Dr. Phillippe did not have any information, contained in his records or his deposition, that document that the petitioner reported to him that her job was as extensive as she claimed during her testimony. The petitioner's primary job involved office work, with some maintenance and mowing involved. However, the petitioner testified that there were other individuals who performed mowing, including Robert Goff. Mr. Goff testified **[*36]** that he did mow the properties. Mr. Goff testified that the areas mowed were those around the trailers and the trailer pads. He testified that the maintenance staff did not mow the entire acreage.

When considering which opinion is most credible, the arbitrator weighs the qualifications of the providers. Dr. Phillippe testified that he is a general practice physician and has no specialization in hand treatment. Dr. Bloss is an orthopedic surgeon. Dr. Phillipe also did not do much in the way of treatment other than prescribe medications. He admitted that he did not send the petitioner for physical therapy, did not provide a brace, did not perform any injections and he did not refer the petitioner to a hand specialist. He testified that these activities might provide the petitioner with some benefit. He did see Petitioner more frequently than Bloss but as stated that ended on 1/12/05. Any TTD beyond that date would be speculative and is not awarded.

3. Concerning the nature and extent of disability, the arbitrator notes that the petitioner has a

diagnosis of osteoarthritis that was aggravated by the two incidents at work. The petitioner clearly had findings of osteoarthritis present **[*37]** on October 7, 2003, the date when she went to the emergency room. The petitioner's accident therefore did not cause osteoarthritis in the hands and thumbs. Both doctors agree that the petitioner's incidents aggravated the arthritis and caused an increase in symptomotology. The x-rays show the presence of degenerative changes. They do not reveal any fractures, dislocations or new boney pathology. The petitioner therefore has aggravated degenerative changes in the thumbs bilaterally.

The arbitrator notes that the petitioner received very little in the way of medical care from Dr. Phillippe. During the period from April 1, 2004 through January 12, 2005, Dr. Phillippe saw the petitioner on 7 occasions. He prescribed medications but did little else in the way of care. He did not recommend any physical therapy, did not provide injections, did not provide a brace until much later and did not send the petitioner to a hand specialist for therapy. Dr. Phillippe agreed that additional therapy, including possibly occupational therapy, could provide the petitioner with benefit and reduce her subjective symptomotology. Dr. Bloss indicated that there were conservative measures the petitioner could **[*38]** follow that would provide relief. The petitioner did not seek out any of this care. In fact, she refused to see any other doctors or seek any other modalities. This is documented in Respondent's Exhibit 3. The petitioner took very little action to pursue care to provide her with resolution or improvement in her symptoms. She appears to have been content to visit Dr. Phillippe occasionally and not seek any true resolution of her condition.

The arbitrator finds that the petitioner has not truly reached a state of maximum medical improvement such as to entitle her to permanent total disability benefits. Dr. Phillippe and Dr. Bloss both testified that additional medical care could provide the petitioner with a better result. She has elected to not seek this care and instead claims that she is unable to perform any work.

In assessing this situation, the arbitrator again weighs the credentials and credibility of the two medical experts. The arbitrator places more weight upon the opinions of Dr. Bloss, as he is an orthopedic expert. Dr. Phillippe is a general practitioner with no specialization in the treatment of arthritis or hand injuries. The doctor appears to have found the petitioner **[*39]** unable to work based upon very minimal findings and mostly upon subjective complaints. He did not take many steps to push the petitioner to a higher result.

The arbitrator therefore finds that the petitioner has not supported her claim that she is permanently and totally disabled based upon medical evidence. The arbitrator adopts the opinions of Dr. Bloss over those of Dr. Phillippe regarding that issue.

With regard to the issue of total disability, the arbitrator finds that the petitioner has, in fact, been offered a job. The petitioner testified that **Catalyst** RTW had offered a job as a customer service associate/survey worker. The petitioner testified she had had two telephone interviews with officials from that company and that such a job had been offered. She declined to accept it. The respondent's vocational expert testified that the petitioner was placeable in this job and that it did fall within her restrictions. It offered flexible hours, no lifting and the ability to work from home. The hourly rate clearly exceeds what the petitioner earned being a mobile home park manager.

The arbitrator finds that Dr. Bloss felt the petitioner could resume her job as a mobile home park **[*40]** manager. However, even without Dr. Bloss' opinion, the arbitrator finds that the respondent has shown that there is work available for the petitioner within her restrictions. She was offered and declined the job with **Catalyst** RTW. She did not even attempt to perform this job. She therefore has not proven that she is unable to do it, merely that she decided she did not wish to. The arbitrator therefore finds that relying upon either Dr. Bloss' opinion or Brenda Latham's, the petitioner is capable of returning to work either at her old job or within the restrictions outlined by Dr. Phillippe. She therefore is not entitled to an award of permanent total disability. Petitioner continues to have pain in her hands all the time and stabbing pain in

her thumb and wrist on the left and right. She continues to take pain medication and sleep is difficult. The Arbitrator awards 65% permanent partial disability for each hand, 5% permanent partial disability for the right arm and 5% permanent partial disability for the left foot.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

Workers' Compensation & SSDI > Compensability > Injuries > Occupational Diseases

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

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*9 IWCC 67; 2009 Ill. Wrk. Comp. LEXIS 99, **

CARL HILL, PETITIONER, v. GENERAL ELECTRIC COMPANY, RESPONDENT.

NO: 05WC 16042

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF McCLEAN

9 IWCC 67; 2009 Ill. Wrk. Comp. LEXIS 99

February 5, 2009

CORE TERMS: pain, rotator, cuff, right arm, permanent, patient, recommended, surgery, tear, vocational, arm, repair, tendon, job offer, phonebook, doctor, vocational rehabilitation, physical therapy, stable, suitable, right shoulder, tape recorder, unsuccessful, performing, recurrent, diagnosed, surgical, shoulder, opined, pounds

JUDGES: Barbara A. Sherman; Yolaine Dauphin

OPINION: [*1]

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability benefits, and nature and extent of permanent partial 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.

The Commission strikes the portion of the Arbitrator's Decision regarding a "sham job offer" made by Respondent in this matter. Instead, the Commission finds, that viewing the evidence in the light most favorable to Respondent, after six months of unsuccessful job search activities, directed by a vocational rehabilitation provider of Respondent's choosing, at best Respondent has showed a sedentary job existed that Petitioner could perform at home and with accommodations, four hours a day. Assuming Petitioner could have done this work, it does not satisfy Respondent's burden of showing a reasonably stable labor market for jobs Petitioner was capable of performing. The Commission concludes Respondent's finding of one sedentary job, on a part-time **[*2]** basis with accommodation, is not sufficient to meet Respondent's burden

of proof, in light of Petitioner's previous cooperation with vocational rehabilitation, Petitioner's age, work experience, education, and physical limitations.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 27, 2007, is hereby affirmed and adopted.

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

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

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

DATE FEB 5 2009

ORDER OF RECALL UNDER SECTION 19(f)

Motion to recall pursuant to Section 19(f) of the Act, having been filed by the Commissioner finds that **[*3]** a clerical error exists in its Decision and Opinion dated January 23, 2009 in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated January 23, 2009 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion shall be issued simultaneously with this Order.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Workers' Compensation Commission of Illinois in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

MEMORANDUM OF DECISION

An Application for Adjustment of Claim was filed in this matter and notice of hearing mailed to each party. The matter was heard by the Honorable Robert Falcioni, an Arbitrator of the Illinois Commission, in the City of Bloomington, on September 11, 2007. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues below, and presents his findings:

(K) **[*4]** Amount of compensation due for temporary total disability; and maintenance benefits.

(L) Nature and extent of the injury;

(F) Whether Petitioner's present condition of ill-being is causally related to the injury.

On March 14, 2002, the Respondent, General Electric Company was operating under and subject to the provisions of the Illinois Workers' Compensation Act.

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

On the above-mentioned date the Petitioner did sustain accidental injuries which arose out of and in the course of the employment by the Respondent.

Timely notice of this accident was given the Respondent.

The earnings of the Petitioner during the year next preceding the injury were $ 37,050.00 and that the average weekly wage was $ 712.50.

Petitioner at the time of injury was 58 years of age, married, and had one dependent grandchild under 18 years of age.

Necessary first aid, medical, surgical and hospital services have been provided by the Respondent herein.

The sum of $ 92,900.62 has been paid on account of this injury for TTD benefits and maintenance benefits.

FINDINGS:

In support of the Arbitrator's **[*5]** Decision relating to (F) whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator finds the following facts:

Petitioner worked for General Electric Company thirteen (13) years prior to his work accident that occurred on March 14, 2002. Petitioner indicated he was working in a position as a Wireman, installing electric wire starters. He forcibly pulled up these heavy wires with his right arm and heard a snap and felt a pain in his upper arm.

Dr. Marra opined that the work accident Petitioner told hint about occurring at work in 2002 more likely than not caused the injury for which he treated the Petitioner (Petitioner's Exhibit # 15, page 21.) The doctor further opined that the patient's complaints were consistent with his findings upon an objective medical exam. (Petitioner's Exhibit No. 15, Page 21-22).

Based on the above opinion, the Arbitrator finds Petitioner's condition of ill being to his right shoulder is causally related to his work accident of March 14, 2002.

In support of the Arbitrator's decision at (K) amount of TTD and maintenance benefits, the Arbitrator finds the following facts:

Petitioner was taken off of work from February **[*6]** 22, 2003 (first surgery) until September, 2004, and received TTD benefits. In September, 2004, petitioner was provided with part time work within his restrictions by the Respondent's for 20 hours a week, moving parts. He was able to perform this job until approximately November 15, 2004, at which time he was told by Respondent that this job was temporary, and there was no full time work available for him with his restrictions. Petitioner indicated he looked for work within his restrictions, once he learned that the employer could not accommodate his permanent restrictions. Petitioner indicated that his permanent work restrictions were: no use of the right arm and working four hours a day. Dr. Marra said that the Petitioner should avoid repetitive use of his arm such as repetitive writing and copying of records. (Petitioner's Exhibit # 15, page 21-22).

Petitioner was not placed in any rehabilitation program for retaining his job skills at any time. However, Petitioner was provided assistance of vocational rehabilitation counsel, Frank Traras from E.P.S. Rehabilitation, Inc. Mr. Traras attempted to find the Petitioner work within his restrictions, from December 2004 through April 2005, **[*7]** but was unable to find him a

position. (Petitioner's Exhibit No.: 11); Petitioner did not receive any additional vocational assistance from the Respondent after April 28, 2005.

Petitioner testified he was contacted by Lisa Berger, the Adjustor that R.T.W. **Catalyst** a second vocational company, who would be contacting him regarding his job search. The Petitioner indicated he was contacted by R.T.W. **Catalyst** in approximately February, 2005. R.T.W. **Catalyst** said they found a job for the Petitioner working for All Facilities, Inc., in which he could work at home earning $ 9.00 per hour approximately 4 hours a day. All Facilities, Inc. did not provide Petitioner with any training, but did install a separate phone line in the Petitioner's home and provided him a Pittsburgh phonebook. The Petitioner testified that he performed this position for 11 days starting March 11, 2005, working approximately 20 hours per week. He indicated that when he performed this job the repetitive writing caused him a great deal of pain in his right arm

Petitioner indicated the job involved calling companies in Pittsburgh, asking them who the owner of the company was, what their advertising budget was, if this **[*8]** person was a decision maker, and asking the square footage of their business. The Petitioner indicated that he was asked to make approximately 20 phone calls an hour, out of the phonebook. He indicated that the callers responded to these questions varied from hang-ups to "none of your business", to "why did this company need to update their information if they were already in the computer". Petitioner found the job duties difficult to complete due to the many "hang ups", increased arm pain from filling out multiple forms, and trouble seeing contact information. Petitioner testified that this position caused him arm pain when writing. Petitioner indicated that he is right hand dominant and had to write with his right hand and hold the phone with his left hand. Petitioner reported to Frank Traras and to Lisa Berger that the troubles he had performing the job included: (1) seeing the phonebook, (2) documenting the information quickly caused him arm pain, and (3) dealing with the reaction to his cold calls.

Petitioner indicated that in order to prepare for the job the night before, he would spend a half an hour to two hours writing out the names out of the phonebook, so that he could **[*9]** see them quickly out of the phonebook. He was provided with a magnifying glass and a tape recorder, but the tape recorder did not pick up the sound of the individuals when he made the recordings and when he informed the recipients of his telephone calls that they were being recorded, he received even more hang-ups than before. Petitioner indicated that he could not perform the job as it caused him to do too much writing resulting in severe pain. Further, the magnifying glass, and tape recorder did not cure this problem with the pain in his right arm.

The Petitioner stopped performing the job after 11 days. Petitioner requested additional vocational assistance and did not receive any. He did perform a job search on his own after this date. He provided Job Search Log Forms dated May 19 through June 10 to the Respondent indicating he was willing to look for additional work within his restrictions. The Respondent did not provide any additional job vocational assistance.

The Respondent paid Petitioner as of April 18, 2005 partial maintenance benefits at the rate of $ 348.80 a week. (See Petitioner's Exhibit No. 18). The Respondent based these weekly benefits on Dr. Marra's report that the **[*10]** Petitioner could work four hours a day.

Petitioner argues the job offer from All Facilities, Inc. was a sham designed to avoid further liability under the Act and to avoid further vocational rehabilitation efforts by the Respondent. Reliance Elevator Co. v. Industrial Commission, 309 Ill.Ap.3d 987, 723 N.E.2d 326, 331, 343, Ill. Dec, 294 (1st Dist. 1999).

Petitioner testified that he received TTD benefits or maintenance benefits up through April 18, 2005 at $ 475.00 a week. After April 18, 2005 he has received partial maintenance benefits of $ 348.80 per week through September 11, 2007 date of Arbitration. The Arbitrator finds that the Petitioner is entitled to full maintenance benefits from April 18, 2005 through September 11, 2007 at the maintenance rate of $ 475.00. Respondent is entitled to a credit for TTD benefits

and maintenance benefits paid of $ 92,962.00 from February 22, 2003 until September 11, 2007.

In support of the Arbitrator's decision as to (L) Nature and Extent of the injury The Arbitrator finds the following facts:

HISTORY OF DIAGNOSIS AND PERMANENT RESTRICTIONS:

The patient treated with Dr. Hon, on April 4, **[*11]** 2002, reporting a right arm injury when he was pulling a wire felt a pop in his right upper arm, noted immediate pain. Dr. Hon diagnosed a deltoid strain and Petitioner returned back to work. The patient returned back to Dr. Hon eight months later for pain. Dr. Hon diagnosed a right arm shoulder strain and recommended an orthopedic consultation to Dr. Lawrence Li. (Petitioner's Exhibit # 1).

Dr. Li after recommending an EMG, NCV, and MRI of the shoulder, indicated that the MRI revealed a complete tear of the supraspinatus tendon with retraction back to the glenohumeral joint line. The doctor recommended a shoulder arthroscopy with open rotator cuff repair. Dr. Li performed the surgery on March 4, 2003, performing a right shoulder arthroscopy with an arthroscopic debridement of the bicep tendon tear, anterior labrial tear, and rotator cuff tear, and open rotator cuff repair. (Petitioner's Exhibit # 2).

The patient followed with physical therapy, but continued to have pain so an MRI was performed on September 2, 2003 which indicated recurrent complex tearing of the infraspintaneous tendon. Dr. Li recommended a subsequent surgery. (Petitioner's Exhibit # 2). E.P.S. Rehabilitation, Inc., **[*12]** recommended that Petitioner first pursue an independent medical examination (IME) with Dr. Michael Gibbons, in Peoria, IL. (Petitioner's Exhibit # 10). Dr. Gibbons, an orthopedic physician recommended a revision of the rotator cuff repair. (Petitioner's Exhibit # 4).

Dr. Lawrence Li recommended a second surgical opinion with Dr. Guido Marra at Loyola University. Dr. Marra first saw the patient on October 2, 2003 and after. reviewing the two MRIs diagnosed a rotator cuff tear, and second surgical repair was recommended. (Petitioner's Exhibit # 6). On October 22, 2003, Dr. Li performed a second surgery, right shoulder arthroscopy with debridement of the bicep tendon and rotator cuff and an open repair. (Petitioner's Exhibit # 2). After the second surgery, the patient followed up with physical therapy with Dr. Won Thee for TENS Unit, injections and physical therapy. (Petitioner's Exhibit # 5).

Petitioner continued to have pain throughout his second course of physical therapy with Dr. Whon Thee. (Petitioner's Exhibit # 5). Dr. Li recommended he follow-up with Dr. Guido Marra. Dr. Marra found that the patient was reporting persistent pain and reviewed a recent arthrogram. The doctor opined **[*13]** the arthrogram indicated a hole in his tendon, the doctor diagnosed this was a recurrent rotator cuff tear. Dr. Guido Marra performed a third surgery, a revision of the arthroscopic rotator cuff repair and revision decompression. Dr. Marra's post operative diagnosis was a repair of recurrent rotator cuff tear and impingement. The patient started a third course of physical therapy. (Petitioner's Exhibit # 6 and Petitioner's Exhibit # 8).

The patient had an MRI on July 23, 2004 after a third surgery. Dr. Marra indicated the MRI showed a recurrent rotator cuff defect. The patient was put on light duty restrictions by Dr. Marra that included: No overhead work, and no lifting over ten pounds on August 3, 2004. Dr. Marra recommended that the patient follow-up with Dr. Romeo at Rush for a second opinion. (Petitioner's Exhibit # 6). Dr. Romeo felt that an additional surgery of a Latissimus Dorsi Transfer would be a reasonable option. (Petitioner's Exhibit # 7).

On October 26, 2004 Dr. Marra reviewed the F.C.E. (Functional Capacity Evaluation) exam with the patient and recommended that he return to work with no use of the right arm and work a four hour day. The restrictions later became permanent. **[*14]** (Petitioner's Exhibit # 9). Dr.

Marra indicated that the Petitioner had reached M.M.I. (maximum medical improvement) on November 23, 2004. He further indicated that there was a possibility that the Petitioner may require future surgical procedures of either a tendon transfer or reverse prosthesis. (Petitioner's Exhibit # 6).

PERMANENT TOTAL DISABILITY "ODD-LOT":

The Petitioner has shown that he has a substantial permanent disability based upon Dr. Marra's deposition. Dr. Marra indicated that Petitioner can only work four hours out of an eight hour day and may not use his right arm at all. Petitioner has further proven that he has been disqualified from work from the Respondent as no permanent job has been provided within his restrictions. Therefore, Petitioner could fall into the "Odd-Lot permanent total" category when those are Petitioner's that may not be totally incapacitated to work, but are so handicapped that they won't be regularly employed in any well known segment of the labor force. Valley Mould & Iron Co. v. Industrial Commission, 84 Ill.2d 538, 419 N.E.2d 1159 (1981). The Courts have found for an "odd lot permanent **[*15]** total" to be awarded the Petitioner must prove that his condition is such that he cannot perform any services for which there is a reasonable stable market. Then the "burden of proof' shifts to the employer to show that some kind of suitable work is readily and continuously available. Sterling Steel Castings v. Industrial Commission, 74 Ill.2d 273, 384 N.E.2d 1326, 24 Ill.Dec.168. (1979). Here, the employer attempted to show that the Petitioner was able to work out of his home doing telemarketing cold call survey work using a tape recorder and calling businesses in the Pittsburgh phonebook.

Petitioner testified that he is in constant pain in his right shoulder, and he has been unable to find employment and looked for work himself after the eleven days he worked at home working in the cold call survey telemarketer. In Skokie Valley Asphalt Co. v. The Industrial Commission, 45 Ill.2d 333, 259 N.E.2d 66 (1970), the Court's found that when a Petitioner is in constant pain and is unable to find employment these were sufficient facts to provide in an award of permanent total disability. The Court **[*16]** indicated that in the Skokie case, the treating doctor did not indicate, in his opinion, that the employee was totally disabled from employment, yet the Commission still found, given the Petitioner's pain and inability to find work, that he was permanently and totally disabled.

The 4th District Appellate case, Illinois Power Co. v. Industrial Commission, 176 Ill.App.3d 317, 530 N.E.2d 617, 125 Ill. Dec. 459 (4th Dist. 1988), indicates that when a Petitioner is not obviously unemployable he must prove an inability to return to gainful employment, either by a diligent but unsuccessful attempt to find work, or, in view of his education, experience, age, training, and his inability to perform any, but the most unproductive tasks.

DILIGENT JOB SEARCH:

Here Petitioner followed every job lead provided to him by the E.P.S., vocational counselors, Thomas & Frank, who assisted the Petitioner in looking for work in a six month time period, but could not provide the Petitioner with any jobs within his permanent restrictions. (Petitioner's Exhibit # 10 & 11). After E.P.S. Rehabilitation Vocational Services had stopped providing **[*17]** him assistance and R.T.W. **Catalyst** had stopped providing him vocational services, Petitioner continued looking for work himself in May and June of 2005. He was unsuccessful in finding work. Petitioner again requested Respondent provide him with some additional vocational assistance, but none was provided.

The Respondent did not rebut the fact that Petitioner complied with all vocational requests from E.P.S. Rehabilitation placing resumes with various employers without success. There is no evidence Petitioner refused job opportunities or disregarded potential employment options.

Petitioner's cooperation with vocational rehabilitation is noted in a letter from Adjustor Lisa Berger of April 15, 2005 where she notes Petitioner has been working satisfactorily with Respondent up to this date. (Respondent's Exhibit # 11).

Petitioner registered at Illinois Employment and Training Center (I.E.T.C.) for Illinois Skills Match Program. Petitioner spent at least 20 hours a week looking for employment opportunities. (Petitioner's Exhibit # 11, dated January 14, 2005). Petitioner followed through with in person applications as requested by Mr. Trares. (Petitioner's Exhibit # 11, letter dated 1/24/05). **[*18]**

Petitioner mailed Mr. Trares weekly job seeker logs documenting his job applications. (Petitioner's Exhibit # 11). Petitioner filled out additional job search forms in May and June, 2005. Petitioner testified he continued to look for work within his restrictions such as positions as motel clerk, but did not receive any job offers. Respondent did not provide vocational assistance after April 28, 2005.

STABLE JOB MARKET FOR PETITIONER:

On the issue whether a reasonably stable job market exists the Arbitrator further looks at the Petitioner's current age, education, job experience. At the time of hearing, Petitioner was 64 years old. He has a high school education and has attended some Junior College classes. Petitioner was a Certified Electrician whose Certification has since expired. Petitioner's employment background is that of a Blacksmith Helper, Machine Repairman and Wireman. (Petitioner's Exhibit No. 11, dated April 28, 2005.) These prior positions require the use of two arms. Petitioner reported arm pain and difficulty in filling out Teller Data Research Forms for each telephone call made, and the extensive amount of writing that caused the petitioner pain. These complaints **[*19]** are documented in the E.P.S. Rehabilitation records between Mr. Hill and Mr. Frank M. Trares on April 28, 2005. (Petitioner's Exhibit # 11).

The Arbitrator finds that the petitions is not able to return back to work to full time employment. The Arbitrator finds the Petitioner made a diligent, yet unsuccessful job search. Further, the Arbitrator finds Petitioner is unable to perform productive tasks due to his advanced age, limited education, and lack of experience in non-physical work positions. As such, this Arbitrator finds that the Petitioner has met his burden, and that his work injury prevents him from performing any services for which there is a reasonably stable job market. The Arbitrator finds Petitioner does fall into the Odd-Lot category.

The burden then shifts to the Respondent to prove that there is available some type of regular and continuous suitable work. The Respondent was unsuccessful in providing Petitioner with a suitable job within his permanent work restrictions, despite over six months of job search efforts from E.P.S. Rehabilitation Services. R.T.W. **Catalyst** Vocational Services did provide the Petitioner with a telemarketing position at home, however this job, **[*20]** according to the unrebutted testimony of the Petitioner, required extensive use of the right arm, in direct contradiction of the permanent restrictions imposed by Petitioner's treating physician, Dr. Marra. Although a representative of Respondent's voc rehab provider contacted Dr. Marra to determine if Petitioner could perform this job, the job duties described to Dr. Marra did not include the extensive amounts of writing that Petitioner would be required to perform with his right arm and hand. The Arbitrator must also determine if this position was a legitimate job offer or designed to avoid liability under the Act. The Respondent did not call as witnesses any of the individuals at R.T.W. **Catalyst** or Vocational Counselors at E.P.S. to testify suitable work was provided to the Petitioner.

The Courts have found that a Petitioner may be found disabled if the Respondent offers the injured employee work, that is obviously a sham, and designed to avoid liability under the Act The Petitioner may be found disabled as if no job offer had been made at all. Reliance Elevator v. The Industrial Commission, 309 Ill.App.987, 723 N.E. 2d, 326, 331, 243, Ill. Dec. 294 (1st Dist. 1999).

This Arbitrator **[*21]** finds the All Facilities job was not a legitimate job offer and and was outside Petitioner's restrictions as well, and will consider this matter as if no job offer has been

provided. Further, Arbitrator finds no regularly and continuous work is available for this Petitioner.

PETITIONER'S CURRENT CONDITION:

Petitioner testified as to having continued pain in Ms right arm and occasional sharp pains with any type of lifting anything activity over two or three pounds. Petitioner testified that he has difficulty dressing himself now and has difficulty mowing his yard and has great pain with sports activities, such as playing golf or baseball. Petitioner indicates that if he carries more than 2 or 3 pounds he notices sharp pains in his arm, such as carrying groceries. He indicates that even carrying a gallon of milk causes hint severe pain in Es right arm if he lifts a gallon of milk he notes spasms in his arm. Esscatially he indicates to keep the pain at a lower degree he keeps his elbow in to the side of his body and does not move his hand above his chest level.

Petitioner indicates that he has not been able to sleep in his bed since the accident and now must sleep in a recliner **[*22]** due to the pain in his right arm. Petitioner indicated that he can no longer swing a club or do any type of activity, that involves force or speed with his right upper extremity. Petitioner indicates that he has been taking Vicodin since the first surgery and Dr. Ji Li still recommends he still take 500 mg. of Vicodin once or twice a day. He testified that he is right hand dominant and has difficulty writing for extended periods of time causing pain. If he lifts a gallon of milk he notes spasms in his arm. Petitioner will testify that he has constant pain in his right upper extremity. The degree of pain will increase if he removes his right elbow away from his side or lifts more than 2 or 3 pounds.

Petitioner's treating physician, Dr. Guido Marra indicated that Petitioner is restricted on a permanent basis to working four hours out of an eight hour day and no use of the right arm. Dr. Mans indicated that any patient who has a rotator cuff tear the size that extends into the posterior rotator cuff can develop pain symptoms. So the doctor opined it was reasonable to restrict Petitioner's activities to four hours per day. (Petitioner's Exhibit No. 15, Page 25).

Dr. Marra indicated rotator **[*23]** cuff tears such as the Petitioner's don't heal and if anything, the rotator cuff could have gotten larger and his condition could have worsened. (Petitioner's Exhibit No. 15, Page 36). Dr. Marra indicated he did discuss with the Petitioner the likelihood of the success of the surgery recommended by Dr. Romeo which was the latissimus dorsi procedure and advised Petitioner that there is about a 50% chance of a successful outcome. Petitioner indicated to Dr. Marra that he did not wish to pursue additional surgical intervention at that time. (Petitioner's Exhibit # 15, Page 15-16). Dr. Marra further indicated he discussed future surgery options either a tendon transfer with the Petitioner or a reverse prosthesis, which is a shoulder replacement designed for people who have rotator cuff tears. (Petitioner's Exhibit # 15, Page 19). The Arbitrator finds Petitioner is entitled to PTD benefits pursuant to Section 8(f) of the Act.

ORDER:

Petitioner is entitled to have and receive from Respondent the sum of $ 475.00 per week as long as the disability lasts as provided in Section 8(f) of said Act, as amended, because the injuries sustained caused an Odd-Lot permanent total injury, commencing **[*24]** on September 12, 2007.

The Arbitrator finds Petitioner is entitled to TTD benefits from February 22, 2003 to November 23, 2004. The Arbitrator finds Petitioner is entitled to maintenance benefits of $ 475.00 a week from November 24, 2004 to September 11, 2007.

RULES REGARDING APPEALS: Unless the Party files a Petition For Review within 30 days after receipt of this Decision, and perfects the Review in accordance with the Act and Rules, then the Decision shall be entered as the Decision of The Illinois Workers' Compensation Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest rates of 4.00% shall accrue from the date listed below to the date 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.

DATED AND ENTERED: September 25, 2007

ARBITRATOR ROBERT FALCIONI

DISSENTBY: KEVIN W. LAMBORN

DISSENT: I respectfully dissent from the Majority's decision to affirm the Arbitrator's award finding Petitioner permanently disabled from all gainful employment pursuant to Section 8(f) of the Act. I would find Petitioner has failed to establish he is entitled to permanent total **[*25]** disability benefits. I would find Petitioner is entitled to a wage differential award under section 8 (d)(1) of the Act. I concur with the Majority's finding striking the Arbitrator's conclusion Petitioner was offered a "sham" job. I dissent from the Majority's reasoning affirming the Arbitrator's award. The record indicates Petitioner accepted and attempted the offered job. The evidence is replete with both actions and attempts to make the job work. It is persuasive Petitioner's treating physician Dr. Marra testified Petitioner could perform this job. A review of the restrictions imposed by Dr. Marra address the number of hours worked and not Petitioner's ability to perform the job. A review of the record discloses nothing to support a finding the Petitioner was unable to perform this job. Petitioner tried then abandoned the job after eleven days. Finally Petitioner testified he did not contact Respondent thereafter to request any further job assistance.

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 > Compensability > Course of Employment > General Overview

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

*11 IWCC 1102; 2011 Ill. Wrk. Comp. LEXIS 1172, **

KEVIN BUNSELMEYER, PETITIONER, v. MENARD CORRECTIONAL CENTER, RESPONDENT.

NO: 08WC 27680

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILLIAMSON

11 IWCC 1102; 2011 Ill. Wrk. Comp. LEXIS 1172

November 7, 2011

CORE TERMS: claimant, vocational, totally disabled, permanently, pain, locksmith, surgery, neck, odd-lot, injection, training, recommended, shoulder, numbness, logs, prima facie case, job offer, improved, lifting, resume, arm, lbs, burden of proof, failed to prove, labor market, regularly, vocational rehabilitation, parties stipulated, disputed issues, specialist

JUDGES: Thomas J. Tyrrell; Daniel R. Donohoo; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of vocational rehabilitation and the nature and extent of the injury and being advised of the facts and law, modifies and expands 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 agrees with the Arbitrator's conclusion that Petitioner failed to prove that he is permanently and totally disabled from working. For a claimant to prove that he is permanently and totally disabled without an expert medical opinion, the claimant must prove that no employment is available to him. Once he does so, the burden shifts to the employer to show the existence of a stable labor market. Illinois courts discussed this burden shifting paradigm in *Courier v. Industrial Commission*, 282 Ill. App. 3d 1 (1996). Quoting *Ceco Corporation v. Industrial Commission*, 95 Ill. 2d 278 (1983), the Courier court explained:

"[I]f the claimant's disability **[*2]** is limited in nature so that he is not obviously

> unemployable, or if there is no medical evidence to support a claim a total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market, then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant." *Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 5-6 (1996).

Regarding the Petitioner's burden of proof, the *Courier* court continued:

> "By using the term prima facie, this rule appears at first glance to require that the claimant must merely make a prima facie case, i.e., produce sufficient evidence so that a finding in that party's favor could be supported if contrary evidence were ignored. However, after careful review of the language of *Valley Mould* ... we find that the claimant must do more **[*3]** than make a prima facie case. In light of *Valley Mould*, the claimant has the burden to initially 'establish' that she falls into the odd-lot category, before the burden of proof shifts to the employer to show availability of work. By using the word 'establish,' *Valley Mould* requires that the claimant make more than a prima facie case. The claimant must prove by a preponderance of the evidence that she falls into the odd-lot category. Whether the claimant has successfully met his burden is a question of fact for the Commission to determine." *Id.* at 6.

The court instructs us that "if the Commission finds that the nature of claimant's injury is such that claimant is not permanently totally disabled in light of claimant's age, experience, training, and capabilities, the Commission is not obligated to find PTD simply because the claimant puts on some evidence that she could not find a job." *Id.* at 7.

Here, we find Petitioner did not establish that he fit into the odd-lot category. Petitioner presented some evidence that he was unable to find a job, but we find this alone insufficient to prove that Petitioner was permanently **[*4]** and totally disabled from work. Petitioner's 156 pages of job search logs consisted of employers that Petitioner claims to have contacted. Some of the entries included follow-up information, but most did not. Petitioner offered very little testimony explaining his job search process. Petitioner offered no testimony regarding his level of education, his training, or his job experience. We also note Petitioner did not present any evidence from a vocational expert.

We further find that Petitioner may have declined a valid job offer. Although Petitioner testified that he never received or declined a job offer, the job search logs show that Petitioner received an offer for a sales job from a company called "Direct Marketing Specialists." Petitioner wrote on the logs, "It was a total commission and a 1099 job with no taxes taken out. It was a non-consistent and non-legitimate job offer." A job is not a **sham** merely because it is classified as an independent contractor position with a commission-based salary. However, we are unable to determine whether this position was appropriate for Petitioner without testimony from Petitioner and supporting evidence from a vocational rehabilitation professional. **[*5]**

In concluding that Petitioner is not permanently and totally disabled, we specifically do not rely on Respondent's Exhibit 2. Petitioner included information on his resume pertaining to his restrictions, his salary requirements, and his preferences regarding scheduling and paid time off. While we recognize that the inclusion of such information is ill-advised, we find that the record contains insufficient evidence for us to determine what impact, if any, the inclusion of

this information had on the ultimate outcome of Petitioner's job search. We do not find the vocational opinions from the vice president of human resources at Denny's as expressed in a letter to Respondent to be reliable evidence regarding the legitimacy of Petitioner's job search.

We further find Respondent's failure to provide Petitioner with a vocational assessment to be in violation of Rule 7010.10. Respondent's argument that it need not provide a vocational assessment because Petitioner failed to conduct a diligent job search is unpersuasive. Nothing in Rule 7010.10 conditions the provision of a vocational assessment on a claimant's good faith job search. The rule contains no requirement that Petitioner request **[*6]** vocational assistance. Under the facts of this case, Respondent was obligated to provide a vocational assessment of Petitioner pursuant to Rule 7010.10.

However, Respondent's failure to comply with Rule 7010.10 does not necessitate a finding that Petitioner is permanently and totally disabled. We note a number of factors that demonstrate Petitioner's lack of motivation to return to the workforce. Petitioner's attorney informed him that his resume presented a potential obstacle to finding employment. This should have promoted Petitioner to request a vocational assessment from Respondent so that he could obtain necessary job search support. Instead, Petitioner unsuccessfully searched for employment for a year before requesting a vocational assessment from Respondent. Petitioner did not file a section 8(a) petition asking the Commission to order a vocational assessment. We also note that at arbitration, Petitioner did not request that the Arbitrator order a vocational assessment, but instead asked for a ruling on permanency. Although Petitioner testified that he would like to return to school for additional training, Petitioner does not request that the Commission order Respondent to **[*7]** proceed with a vocational assessment pursuant to Rule 7010.10, but instead asks us to find him permanently and totally disabled.

Finally, we strike the following sentence from the Arbitrator's decision: "Most locksmiths, other than those for Respondent, do not normally have to lift over 20 lbs." The record contains no evidence regarding a locksmith's general duties and we find such a statement to be improperly speculative.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 636.15 per week for a period of 250 weeks, as provided in § 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 50% of the whole person.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 186,079.88 for medical expenses under § 8(a) of the Act.

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.

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

[*8] 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 **Andrew Nalefski**, Arbitrator of the Commission, in the city of **Herrin**, on **4/12/11**. 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? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

The Arbitrator finds the following facts:

The parties stipulated that Petitioner sustained accidental injuries at work on 1/7/08. Petitioner is a locksmith at and was removing a cover plate weighing 100 pounds when he felt a pull in his neck and shoulder followed by pain. Petitioner testified to no prior problems with his neck or shoulder.

Petitioner saw his family physician, Dr. Platt, who ordered an MRI of his shoulder which was negative. He was then referred to Dr. Guarino, a pain management specialist, for injections. **[*9]** Injections provided Petitioner no relief.

Petitioner saw, Dr. Gornet, an orthopedic spine specialist on 6/16/08. June 16, 2008. Dr. Gornet reviewed an cervical MRI which showed a large disc herniation at C6-7, an annular tear with a smaller protrusion at C5-6, and a protrusion at C4-5.

On 7/14/08 a CT Myelogram showed foraminal stenosis at C5-6 as well as his disc herniation at C6-7. On 7/23/08 Petitioner underwent surgery consisting of a two level disc replacement at C5-6 and C6-7.

While Petitioner's neck pain improved following surgery, he was noted to have burning into his left trapezius after the operation. Dr. Gornet believed that this was either related to some nerve irritation from the original injury or residual far lateral stenosis that would require additional surgery. He recommended anti-inflammatories to see if Petitioner's symptoms would decrease. He also recommended a consultation for his shoulder with his partner, Dr. Mark Miller.

Dr. Miller saw Petitioner on 1/29/09. Although Petitioner was 6 months post surgery, he was still having neck and parascapular pain radiating into his hand. Dr. Miller reviewed an MR/Arthrogram, which except for some subtle inflammatory changes, **[*10]** the was normal. Dr. Miller noticed a subtle impingement side and tried a cortisone injection into the trapezius/rhomboid area. Dr. Miller cautioned that if Petitioner's pain was related to his neck, the injection would not provide meaningful relief.

Because the injection did not help, Dr. Gornet recommended additional surgery. This was done on 4/22/09, consisting of a laminotomy and foraminotomy at C5-6. While this improved Petitioner's left arm symptoms, there was still numbness and tingling into his elbow and hand. Dr. Gornet recommended physical therapy. Because of the continued numbness, Dr. Gornet referred Petitioner to Dr. Brown, another one of his partners. EMG/NCS showed mild ulnar nerve entrapment.

A functional capacity evaluation (FCE) on 1/14/10 showed a consistent performance with good effort. The conclusion of the FCE and that of Dr. Gornet was that Petitioner could work with permanent restrictions of no lifting greater than 20 pounds. Respondent refused to accommodate this restriction.

Respondent elected not to have Petitioner examined by a physician of its choosing.

Petitioner began a self-directed job search in January 2010. He did not ask Respondent for vocational **[*11]** assistance until December 2010. Respondent provided none. Petitioner submitted written job search logs. Petitioner testified that he looked for work within his restrictions for over one year, and did not find any employment. He admitted that he had placed his work restriction of no lifting over 20 lbs. on his resume.

No vocational testimony was offered.

The parties stipulated that all due TTD and maintenance benefits had been paid.

Petitioner testified that while surgery improved his neck pain, he still has burning pain along with numbness and tingling into his arm. He testified to difficulty lifting heavy objects using his arm for both gripping and manipulation. The pain and numbness prevents a good night's sleep, and he has had to curtail many of his hobbies and activities as a result. He no longer splits firewood.

Therefore, the Arbitrator concludes:

1. As a result of his injuries petitioner has sustained the loss of 50% MAW. Petitioner has failed to prove that he is entitled to an odd-lot permanent total award. He is relatively young, 47, at the time of his injury. His training is that of a locksmith. Most locksmiths, other than those for Respondent, do not normally have **[*12]** to lift over 20 lbs. His job search was not in good faith. He did not apply for many locksmith jobs. The majority of the places he contacts were not hiring. He applied for mainly management or supervisor work.

2. Respondent shall pay medical bills of $ 186,079.88, pursuant to the medical fee schedule. Respondent shall receive credit for all amounts previously paid. However, if Petitioner's group health carrier requests reimbursement, Respondent shall indemnify and hold Petitioner harmless.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements

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

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Date/Time: Friday, June 15, 2012 - 4:25 PM EDT

*12 IWCC 157; 2012 Ill. Wrk. Comp. LEXIS 155, **

CHARLES A. ROBINSON, PETITIONER, v. MERIDIAN EXPRESS, RESPONDENT.

NO. 08WC 04944

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 157; 2012 Ill. Wrk. Comp. LEXIS 155

February 14, 2012

CORE TERMS: arbitrator, trailer, surgery, truck, job offer, yard, customer, temporary total disability, doctor, light duty, recommended, dispatcher, place of business, cross examination, physical therapy, slipped, fusion, drove, credible, janitorial, discectomy, functional, vacuuming, cleaning, sweeping, backwards, cervical, mopping, dusting, pain

JUDGES: Michael P. Latz; David L. Gore; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent and 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, evidentiary issues, penalties and attorney 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 April 15, 2011 is hereby affirmed and adopted.

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 **[*2]** 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 $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

19(b) ARBITRATION DECISION

Charles A. Robinson
Employee / Petitioner

v.

Meridian Express
Employer / Respondent

Case # 08 WC 04944

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 **[*3] Charles J. De Vriendt** , arbitrator of the Commission, in the city of **Chicago** , on **March 3, 2011** . After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
C.[X]Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F.[X]Is the petitioner's present condition of ill-being causally related to the injury?
J.[X]Were the medical services that were provided to the petitioner reasonable and necessary?
K.[X]What amount of compensation is due for Temporary Total Disability?
N.[X]Other **Prospective medical and Penalties**

FINDINGS

. On **01/18/2008** , the respondent **Meridian Express** 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 **[*4] $ 38,146.16** ; the average weekly wage was **$ 733.58** .

. At the time of the injury the petitioner was **57** , years of age, married with **1** children under 18.

. Necessary medical services has not been provided by the respondent.

. To date, **$ 33,534.84** has been paid by the respondent on account of this injury.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of **$ 489.05** /week for **162 6/7** weeks, from **January 19, 2008** through **March 3, 2011** , 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 for the surgery recommended by Dr. Hurley and all related benefits including Temporary Total Disability and any appropriate follow up medical treatment.

. The respondent shall pay **$ 36,942,35** for 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 **[*5]** shall pay **$ 0** in penalties, as provided in Section **19(1)** of the Act.

. The respondent shall pay **$ 0** 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

4-14-11

Date

Charles A. Robinson
Employee/ Petitioner

v.

Meridian Express
Employer/ Respondent

Case # 08 WC 04944

Rider to 19(b) Arbitration Decision

Statement of Facts

On January **[*6]** 18, 2008, Charles Robinson, (hereinafter "Petitioner") was employed by Meridian Express (hereinafter "Respondent"). Petitioner was employed as a truck driver and his duties were to locate trailers for loading and reloading and delivering to various locations. On January 18, 2008, Petitioner reported to Respondent's office as he did on a daily basis. On that date, he picked up the truck and was told to pick up a trailer and go to the northwest suburbs. Petitioner was told to go pick up a trailer at the Norfolk and Southern Rail Yard at 51st Street in Chicago. He was then to take the empty trailer to a customer in the suburbs. Petitioner found the trailer and began to hook up to the truck and roll up the dolly legs and that is when he slipped and fell backwards. Petitioner sat on the ground for a while after he fell and he felt some dull pain. Then he got up, pulled himself into the truck and proceeded to check the trailer out. Petitioner then drove to the customer's place of business. When he got to the customer, he informed the customer he was having trouble and he could not lift his leg out of the truck. Petitioner testified that he informed the shipping office at the customer's **[*7]** place of business about the accident. The shipping clerk at the customer's place of business came out with a golf cart and drove the Petitioner into the dock so that Petitioner could count the load. The customer then loaded the truck and thereafter drove the Petitioner back to the front of his truck. Petitioner managed to get into his truck with the help of the clerk at the customer's place of business and then he left the customer's place of business. Petitioner then testified that he advised his dispatcher of what had occurred and he then drove the truck and trailer to the CSX facility at 59th and Damen St. in Chicago. Petitioner thereafter called the dispatcher again and advised him of how he was feeling. He also advised the dispatcher that he had dropped off the truck, he was done and he was ready to head in because he was hurting. Instead of heading into Respondent's facility, Petitioner then, after a conversation with Respondent's dispatcher, drove to Chicago Heights, Illinois. In Chicago Heights, Illinois he picked up a load and brought it back to Chicago to the same facility he was at before, CSX. After that load, Petitioner went back to Respondent's facility. Petitioner testified **[*8]** that he went into Respondent's place of business, a single business trailer, and reported the incident to the dispatcher and told him that he was hurting. He also advised the dispatcher that he could hardly walk. He also advised the dispatcher how the accident happened. After that, Petitioner went home. January 18, 2008 was a Friday and Petitioner stayed home on the weekend and tried to treat himself with hot baths, ointments and rub downs. The following Monday, January 21, 2008, Petitioner testified that he returned to work, advised them how he was physically and was not given work that day. He then went home. For the next few days, Petitioner testified that he laid around the house and tried to get treatment with home remedies such as hot baths and ointments and rub downs from his wife. The home remedies did not help and he finally decided to seek medical care.

On January 26, 2008, Petitioner went to Advocate South Suburban Hospital Emergency Room. (Pet. Ex. # 2) Petitioner advised them of the incident and based on their examination they performed a CT scan of his back and a CT scan of his neck. The emergency room physicians also recommended MRIs of both, but they did not perform **[*9]** them. He was prescribed some medication by the emergency room physicians and advised to follow up with his own doctor. (Pet. Ex. # 2) On February 7, 2008, Petitioner followed up with his own doctor, Dr. Anthony Rivera. (Pet. Ex. # 3 &4) Dr. Rivera ordered MRI exams of Petitioner's neck and back. Dr. Rivera also prescribed physical therapy, Motrin, Baclofen and took Petitioner of work. On February 21, 2008, Petitioner had an MRI of his lower back and on February 22, 2008, Petitioner had an MRI of his neck. Based on the findings in the MRI Petitioner was referred to Dr. Thomas Hurley, a neurosurgeon. Dr. Hurley examined Petitioner, reviewed the diagnostic studies and advised Petitioner that he may be a candidate for surgery.(Pet. Ex. # 5) He was also prescribed a collar for his neck and he was kept off work. Petitioner continued to treat with Dr. Rivera for quite some time and was treated conservatively with Motrin and Baclofen and eventually a cane was ordered for Petitioner. Petitioner was also told to continue wearing the

collar and was kept off work. (Pet. Ex. # 3,4,5) During this time, Petitioner was attending physical therapy. (Pet. Ex. 6 &7)

On March 12, 2009, Petitioner had **[*10]** a functional capacity evaluation. The functional capacity evaluation determined that Petitioner could return to work light duty and despite that finding, both Dr. Rivera and Dr. Hurley kept Petitioner off work. Pet. Ex. # 3,4,5) In August of 2009, Petitioner saw Dr. Hurley again and he was kept off work and was advised to decide whether or not he wished to have surgery. (Pet. Ex. # 5) During this entire time, Petitioner was attending physical therapy and was kept off work by his treating doctors. (Pet. Ex. # 3,4,5,6,7)

Petitioner also had a Section 12 exam on behalf of the Respondent and that exam was performed by Dr. Sean Salehi on May 1, 2008. **Dr. Salehi, in that report, agreed that Petitioner needed surgery and he agreed that he should be off work.** (Res. Ex. # 2) Dr. Salehi issued two other reports, one of May 21, 2009 and March 25, 2010. (Res. Ex. 3,9) In the May 21, 2009 report, Dr. Salehi returns Petitioner to light duty with the restrictions as set out in the FCE and again in the March 25, 2010 report.

Petitioner testified that shortly thereafter, he received a call from his attorney's office regarding returning to work. Petitioner also testified that he called his employer **[*11]** and at no time did they offer him any job.

Petitioner also testified that at this time he would like the surgery that had previously been recommended. (Tr. Page 37)

Respondent called two witnesses to testify on its behalf. The first witness was Laura Cerda. She testified that she performed various duties and functions on behalf of the Respondent. She also testified that all the people that worked for the Respondent worked in a single office trailer and that they were all in the same room. Ms. Cerda testified that she is an office manager and a dispatcher and performs other duties. She also testified that she does not observe the drivers getting in and out of the trucks and would not know if Petitioner had any trouble getting out of the truck on the evening of January 18, 2008. She did not notice anything unusual about the Petitioner that evening.

The next witness for Respondent was Dennis James. Mr. James testified that he was the owner and sole shareholder of Respondent. He further testified that he became aware of Petitioner's accident and testified as to the various procedures of his company when an employee is injured. Mr. James identified certain forms and was then asked **[*12]** to testify about Respondent's Exhibit No. 3. He also testified that Petitioner was suspended from work for one week starting January 21, 2008 for failing to appear at work on a timely basis. Mr. James then testified that eventually Petitioner was returned to work with restrictions and that he was offered a job by the Respondent within those restrictions. **Mr. James testified that he was told that the job offer was declined by Petitioner because, "He could be at risk of further crippling, permanent injury in doing those duties" and that he was told that the Petitioner declined to return to work.** (Tr. p. 111). Mr. James then testified that the job offer that was made was at a pay rate that was the prevailing rate. (Tr. p. 112). **Mr. James then testified that a job offer which included "janitorial, sweeping, mopping, clean and sanitize restrooms, dusting, wiping, vacuuming, yard clean up and other general office duties that are within his restrictions".** (Tr. p. 112).

During cross examination Mr. James confirmed that the trailer they worked in was an office trailer and not a truck trailer and it was about eight to ten feet wide. He also testified that at the time of the accident **[*13]** on January 18, 2008, it might not have had a bathroom. He further testified that it was parked in a yard that did not belong to him. Mr. James testified that there were four or five people that worked in the trailer and there were desks, general business . equipment and that he had a private office which took up approximately 10 to 20% of the space and that these other people working in the trailer were basically on top of each other and could hear each other speak on the radio. During a portion of the cross examination

Mr. James was asked,

> **"Q: That you agreed to pay this man $ 38,146.00 to perform these duties within a trailer eight hours a day, is that what you are saying?"**
>
> **A: I did not say that.**
>
> **Q: You testified the prevailing wage and that is the prevailing wage.**
>
> **A: I did not testify eight hours a day, counselor." (Tr. Page 123)**

On redirect Mr. James testified that he hoped that someone would start doing these duties and eventually grow into a clerical job.

On August 25, 2009, shortly after the aforementioned job offer, Dr. Hurley states in his report regarding the Petitioner:

> **"Plan: I have renewed my recommendations that he needs surgery or he assumes [*14] the risk that eventually he will become paralyzed if nothing is done.**
>
> **I do not believe that with his spinal cord injury and cervical myelopathy that he is safe to be in any work environment. He could be a danger to himself and to his place of employment.**
>
> **Specifically I do not agree the he could do general janitorial work, sweeping, mopping, cleaning and sanitizing washrooms, dusting, vacuuming, yard work/cleanup and other general light duty office work."** (Pet. Ex. # 5)

CONCLUSIONS OF LAW

I. In regards to issue "C", did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent? The Arbitrator finds as follows:

Petitioner testified that he picked up a truck at Respondent's place of business and drove the truck to a rail yard to locate a good trailer. He backed into the trailer and proceeded to hook it up and roll it up. While cranking up the trailer to hook it to the truck he slipped and fell backwards. After he fell he felt some dull pain and he sat there for a few minutes. Petitioner then pulled himself back into the truck and proceeded to drive to his first destination which was a customer of Respondent's.

On January **[*15]** 26, 2008, when Petitioner went to the emergency room at Advocate South Suburban Hospital, he advised them he slipped and fell about one (1) week ago and stayed at home for about one (1) week and to rest and soaked in hot water to reduce the pain. (Pet. Ex. # 2) When Petitioner first saw Dr. Rivera on February 7, 2008, he told Dr. Rivera "... while at work he was cranking a trailer when he slipped and fell backwards landing on his back." (Pet. Ex. # 3 & 4) Petitioner also told Dr. Hurley that he slipped and fell at work. (Pet. Ex. # 5)

Respondent cross examined Petitioner and said cross examination verified the testimony of Petitioner. Respondent did not offer any proof during the cross examination to dispute Petitioner's testimony regarding the accident. Furthermore, Respondent through its witnesses or documents did not offer any proof that disputes Petitioner's testimony regarding the facts of

the accident. Petitioner maintained the same consistent history that he slipped and fell at work.

Based on the foregoing, the Arbitrator finds that on January 18, 2008 an accident occurred that arose out of and in the course of Petitioner's employment by the Respondent.

II. In regards to [*16] issue "F", is the Petitioner's present condition of ill-being causally related to the injury?, the Arbitrator finds the following facts:

Petitioner testified that after he fell backwards and had a dull pain. Furthermore he testified that during the day while getting in and out of the truck he had trouble getting his legs out of the truck. He also testified that the day following the accident and for the following week he attempted home remedies and over the counter medication to treat his pain. Eventually Petitioner went to the emergency room for treatment on January 26, 2008 at Advocate South Suburban Hospital Emergency Room. (Pet. Ex. No. 2). Petitioner shortly thereafter started treating with Drs. Rivera and Hurley and at all times maintained that he was injured on January 18, 2008 while cranking up a trailer and falling backwards. (Pet. Ex. Nos. 3, 4, and 5). Even Respondent's Section 12 examining doctor, Dr. Sean Salehi, in his May 1, 2008 evaluation states as follows, **"Based on what the patient described as having no prior similar episodes and the fact of reporting the injury to the delivery location on the same day (which subsequently notified his place of employment the [*17] same day,), and also notifying his work 4 days later when he returned to work, it appears that his symptoms are as a result of the work related injury."** (Res. Ex. No. 2). Respondent did not proffer any evidence or proof either by expert witness or any other witnesses that Petitioner's present condition of ill-being is not causally related to the injury.

Based on the foregoing, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to the injury of January 18, 2008.

III. In respect to issue "J", were the medical services that were provided to the Petitioner reasonable and necessary?, the Arbitrator finds as follows:

Petitioner, shortly after the accident of January 18, 2008, sought medical treatment at Advocate South Suburban Hospital, Dr. Anthony Rivera and Dr. Thomas Hurley. (Pet. Ex. Nos. 2, 3, 4, and 5). Dr. Hurley recommended surgery and Petitioner decided not to have surgery at that time. Instead, Petitioner was treated conservatively with medication, shots, and physical therapy. (Pet. Ex. Nos. 2, 3, 4, 5, 6, and 7). Even Dr. Salehi, Respondent's Section 12 examining doctor, stated ". . . this condition is a surgically urgent matter **[*18]** and I do recommend that he undergo a multi-level anterior cervical discectomy and fusion at C3-4 down to C5-6." (Res. Ex. No. 2).

Petitioner testified that to the best of his knowledge certain medical bills were not paid by the Respondent. They are as follows: RS Medical, $ 4,009.35; Advocate South Suburban Hospital, $ 5,315.00; Oak Lawn Radiology, $ 454.00; and Physical Therapy and Rehab Network, $ 27,164.00. Respondent did not dispute any of these medical bills but denied being liable for them.

Based on the foregoing, the Arbitrator finds that the medical services that were provided to the Petitioner were reasonable and necessary and orders the Respondent to pay RS Medical $ 4,009.35, Advocate South Suburban Hospital $ 5,315.00, Oak Lawn Radiology $ 454.00 and Physical Therapy and Rehab Network $ 27,164.00 in accordance with the medical fee schedule. Furthermore, Respondent shall be given a credit for any medical previously paid by the Respondent on behalf of the Petitioner.

IV. In regards to issue "K", what amount of compensation is due for temporary total disability? the Arbitrator finds as follows:

Petitioner testified that he was kept off of work by his treating physicians, **[*19]** Drs. Rivera

and Hurley. Petitioner further testified that he was never returned to work by them. Petitioner testified that on March 12, 2009 he had a functional capacity evaluation examination at ATI Physical Therapy. (Res. Ex. No. 7) The functional capacity evaluation indicated that Petitioner was able to do light duty work. Respondent's Section 12 doctor, Dr. Salehi, issued an addendum report of May 21, 2009. In that report, Dr. Salehi states that in his opinion Petitioner can return to work in a light duty capacity as had been outlined in the March 12, 2009 functional capacity evaluation. (Res. Ex. No. 7). Dr. Salehi repeated and stated a similar opinion in an addendum report of March 25, 2010. (Res. Ex. No. 9).

Mr. James, the owner and president of Respondent corporation, testified that a job offer was made which included "janitorial, sweeping, mopping, clean and sanitize restrooms, dusting, wiping, vacuuming, yard cleanup and other general office duties that are within his restrictions". (Tr. p. 112). This job offer was made to the Petitioner in spite of the opinion of his treating physician, Dr. Hurley, in August 25, 2009. Dr. Hurley in his report of August 25, 2009 stated as **[*20]** follows:

> **"Plan: I have renewed my recommendations that he needs surgery or he assumes the risk that eventually he will become paralyzed if nothing is done.**
>
> **I do not believe that with his spinal cord injury and cervical myelopathy that he is safe to be in any work environment. He could be a danger to himself and to his place of employment.**
>
> **Specifically I do not agree the he could do general janitorial work, sweeping, mopping, cleaning and sanitizing washrooms, dusting, vacuuming, yard work/cleanup and other general light duty office work."** (Pet. Ex. # 5)

Mr. James also testified that Petitioner declined the job because, **"He could be at risk for further crippling, permanent injury in doing those duties". (Tr., p. 111).** Mr. James also testified that the job offer that was made was at a pay rate that was the prevailing rate. (Tr., p. 112).

Mr. James also in his testimony described the trailer that he and his company occupied. He stated it was about 10 feet wide and there were four or five other people that worked with him in the trailer and that he had a private office that took up approximately 10 to 20% of the space. Mr. James also testified that at the time of **[*21]** the accident on January 18, 2008 the trailer might not even have had a bathroom. He further testified that the trailer was parked in a yard that did not belong to him and that the people were on top of each other and could each other speak on the radio. During a portion of the cross examination Mr. James was asked,

Q: "That you agreed to pay this man $ 38,146.00 to perform these duties within a trailer eight hours a day, is that what you are saying?

A: I did not say that.

Q: You testified the prevailing wage and that is the prevailing wage.

A: I did not testify eight hours a day counselor." (Tr., p. 123)

Mr. James' own testimony during cross examination indicated that this was not to be an eight hour a day job. (Tr. p. 123). Furthermore, the job offer which included doing general janitorial work, sweeping, mopping, cleaning and sanitizing washrooms, dusting, vacuuming, yard work/cleanup and other general light duty work was not a true job offer. In fact, Mr. James

testified there may not have been any bathrooms to clean and furthermore he did not own the yard in which his trailer was parked. A further indication that this was not a real job offer was the fact that **[*22]** Mr. James testified that Petitioner would be paid at the prevailing rate of $ 38,146.16 per year or a weekly wage of $ 733.58. Our Courts in Reliance Elevator Company vs. The Industrial Commission, et al., 309 Ill.App.3d, 987, 723 N.E.2d, 326, 243 Ill.Dec. 294 (1999), stated, "With respect to the job offer made by Reliance, the record overwhelmingly supports the Commission determination that it was a **sham** and designed to avoid liability under the Act. It was not offered to Todaro until after the initial arbitration hearing, **and was offered at a rate of compensation far higher than was economically justifiable**." The Court went on to state, "Such practice must be strongly discouraged and even condemned, employers must not be allowed to defeat an injured employee's entitlement to disability award by making **sham** job offers. To countenance such practice would severely jeopardize injured workers' abilities to obtain relief and would undermine the spirit and purpose of the Act."

In the case at hand it is very obvious that the job offer made to the Petitioner was a **sham** and was designed to avoid liability under the Act. The **[*23]** offer included duties that may not have even been available, i.e., cleaning bathrooms or cleaning a yard that did not belong to the Respondent. Furthermore, the job offered was at a rate of compensation far higher than was economically justifiable. It is unreasonable to believe that the testimony regarding the job offer was credible. The job offer also conflicts with the medical reports of Petitioner's treating physician, Dr. Hurley.(Pet. Ex. 5) It is the province of the Arbitrator to determine the credibility of witnesses and the medical evidence introduced at trial and his findings should not be set aside unless they are contrary to the manifest way of the evidence. Gano Electrical Contracting vs. Industrial Commission, 260 Ill.App.3d, 92, 197 Ill.Dec. 502, 631 N.E.2d, 724 (1994). The Arbitrator finds that Dr. Hurley's report of August 25, 2009 is more credible than Dr. Salehi's recommendation that Petitioner can return to light duty and the testimony of Mr. James lends no credence to the fact that this was a real job offer. (See Pet. Ex. No. 5).

Based on the following, the Arbitrator finds that the job offer made to the **[*24]** Petitioner by the Respondent was a **sham** offer and that Petitioner is entitled to temporary total disability benefits from January 19, 2008 up and through March 3, 2011. Respondent shall be given credit for temporary total disability that the Respondent may have paid during that time period.

V. In regards to issue "N", prospective medical/surgery as recommended by Dr. Thomas Hurley? the Arbitrator finds as follows:

Petitioner underwent diagnostic tests shortly after the accident of January 18, 2008. In fact, Petitioner had a CT of his lumbar spine on January 26, 2008, an MR of his lumbar spine on February 21, 2008 and an MR of his cervical spine on February 22, 2008. Shortly thereafter, on March 5, 2008 Petitioner went to see Dr. Thomas Hurley at Southwest Suburban Neurological Surgery. On that date, based on the diagnostic tests, Dr. Hurley recommended an anterior cervical discectomy at C3-4, discectomy C4-5, discectomy C5-6, discectomy C6-7, fusion (allographed) C3-4, fusion (allographed) C4-5, fusion (allographed) C5-6, fusion (allographed) C6-7, and plating C3-7. (See Pet. Ex. No. 5). In fact, Respondent's Section 12 examining doctor, Dr. Sean Salehi, in his report of May **[*25]** 1, 2008 agrees that Petitioner should have surgery in the form of a fusion but indicates that he would not fuse or perform surgery to as many levels as Petitioner's doctor, Dr. Hurley. (See Res. Ex. No. 2). The Arbitrator, already having found that Dr. Hurley is more credible than Dr. Salehi, again finds that Dr. Hurley is more credible than Dr. Salehi in regards to the extensiveness of the surgery required. Furthermore the Petitioner testified at trial that at this point in time he would like to have the surgery.

Based on the foregoing, the Arbitrator finds that both the treating physician, Dr. Hurley, and the Respondent's Section 12 doctor, Dr. Salehi, agree that Petitioner is in need of surgery. Having determined that Dr. Hurley is more credible, the Arbitrator finds that the surgery recommended by Dr. Hurley is the one that should be performed. The Arbitrator orders that Respondent pay all reasonable, necessary charges to be incurred by the Petitioner as a result of

having the surgery as recommended by Dr. Hurley and performed by Dr. Hurley. The Arbitrator also finds and orders that during such time that Petitioner is off work for the surgery and recuperating for that surgery and **[*26]** before he can return to work, the Respondent shall pay the Petitioner temporary total disability.

(b) In regards to the issue of penalties, the Arbitrator finds as follows:

Even though the above findings are in favor of Petitioner, the Arbitrator finds that at the time of hearing reasonable issues existed to litigate between the parties. Based on this, all penalties and fees are denied.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

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

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

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