2016 IL App (1st) 143044WC

Opinion filed: April 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| STANFORD DORSEY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (City of Chicago,<br><br>Defendant-Appellee). | ) | Appeal from the Circuit Court of Cook County, Illinois.<br><br>Appeal No. 1-14-3044WC<br>Circuit No. 14-L-50114<br><br>Honorable Robert Lopez Cepero, Judge, Presiding. |

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

**OPINION**

¶ 1 The claimant, Stanford Dorsey, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to his left arm allegedly sustained while employed as a street light maintenance electrician for the City of Chicago (employer). Following a hearing, the arbitrator found that the claimant's injuries resulted in a 17% loss of the person-as-a-whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008). The employer sought review of the arbitrator's award before the Illinois Workers' Compensation Commission (Commission), which modified the

award, finding that the claimant's injury to his left arm was compensable as a scheduled injury under section 8(e) of the Act. 820 ILCS 305/8(e) (West 2008). The Commission awarded the claimant a sum equal to the loss of 37.5% of the use of the left arm. The Commission further held that the employer was entitled to a credit for a payment made in 1998, pursuant to a settlement, to compensate for a 30% loss of use of that same arm. The claimant sought judicial review of the Commission's decision before the circuit court of Cook County, which confirmed the Commission's decision. The claimant then filed this timely appeal.

¶ 2 The claimant raises the following issues on appeal: (1) whether the Commission's award of compensation for the loss of the use of the arm under section 8(e) of the Act rather the loss of the use of the person-as-a-whole under section 8(d)(2) was against the manifest weight of the evidence; and (2) whether the Commission erred in granting a credit to the employer for payments made pursuant to a prior settlement agreement.

¶ 3 FACTS

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 23, 2013.

¶ 5 The claimant testified that he had been employed as an electrician by the employer for approximately 24 years. On February 8, 2010, he was working with his crew on street lights that were not functioning. It was determined that they would need to lift a manhole cover to access the electrical circuits. The claimant estimated that the manhole cover weighed approximately 350 to 400 pounds. The claimant and a coworker attempted to lift the manhole cover together, but they lost their balance while doing so. In his struggle not to fall while holding up his end of the manhole cover, the claimant felt an immediate pain in his left arm. The pain caused him to drop the manhole cover.

¶ 6 The claimant sought immediate medical attention at Mercy Works Hospital. The claimant reported that he could not flex his left elbow and had tenderness in left forearm. An MRI revealed a complete disruption (rupture) of the distal biceps tendon, which is located just beneath the elbow. The treatment records noted "left elbow strain." There was no documented complaint of shoulder pain. The attending physician referred the claimant to Dr. William Hellar at the Woodland Orthopedic Center.

¶ 7 On February 12, 2010, the claimant was examined by Dr. Heller, a board certified orthopedic surgeon. Dr. Heller diagnosed ruptured distal bicep tendon and informed the claimant of the need for surgery to repair the rupture.

¶ 8 On February 15, 2010, Dr. Heller performed surgery to repair the tendon rupture and corresponding radial nerve neurolysis. The tendon repair required a debridement of the bicep tendon preparatory to reattachment of the tendon to the bone. The procedure further required surgical drilling into the bone near the elbow joint to anchor the tendon back to the bone with a 7 millimeter screw and anchor system. Following surgery, the claimant underwent a course of physical therapy and work hardening at Mercy Works and at Chatham Hand Rehabilitation Services in Chicago. The claimant's postoperative treatment and physical therapy records reflect the primary pain location as the left elbow, with no mention shoulder pain.

¶ 9 On September 17, 2010, the claimant was released to full duty with no work restrictions. He returned to his former job with the employer with the same duties and responsibilities and the same rate of pay. The claimant testified that at the time he returned to work his left arm was not as strong as his right, nor was it as strong as prior to the accident. He testified that after he returned to work, he was able to perform all tasks assigned to him; however, he was still experiencing pain in his left arm. He routinely took Ibuprofen for the pain. He further testified

that he worked for about one year until he requested, and was granted, a transfer to less strenuous work. After transferring, the claimant took Ibuprofen less frequently.

¶ 10 The claimant further testified that, at the time of the hearing, he still experienced left arm pain. Although he never missed work because of the injury or pain, he still experienced pain and discomfort that affected his activities. He testified that he has continuing problems lifting any heavy objects. Prior to the accident, he lifted weights recreationally, but he has not been able to do so since the accident. He also testified that he cannot help family or friends move or lift furniture as he had on several occasions prior to the accident. The claimant also testified that he is right hand dominant, so he does not have any trouble with routine daily activities, such as dressing himself, writing, eating or cooking. He also testified that he has no appointments for additional medical treatment, nor does he expect to have further medical treatment. Other than an occasional Ibuprofen, he does not take any medication to treat his left arm pain.

¶ 11 The claimant acknowledged that he had a previous injury to his left shoulder in November 1995, which resulted in a settled claim with the employer for 30% loss of use of the left arm pursuant to section 8(e) of the Act. 820 ILCS 305/8(e) (West 1994). The settled amount was $28,590.80. The claimant testified that the injury in 1995 was to his left rotator cuff, and did not involve the biceps tendon. He also testified that, after treatment, he had returned to his regular job in August 1996, and did not require any time off after he completed treatment for that injury.

¶ 12 Following the hearing, at which the only contested issue was the nature and extent of the claimant's permanent injury, the arbitrator awarded the claimant $664.72 per week for 85 weeks ($56,501.20) representing a 17% loss of the person-as-a-whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008). In doing so, the arbitrator relied upon *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC for

the proposition that "shoulder, biceps, and elbow injury classifications" were no longer to be considered injuries to the "arm" compensable under section 8(e) of the Act. 820 ILCS 305/8(e) (West 2008). The arbitrator then rejected the employer's argument that it was entitled to a credit for the prior settlement, finding that credits are not available to offset awards issued pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008).

¶ 13 The employer sought review of the arbitrator's award from the Commission. The Commission modified the award, agreeing with the employer's argument that the claimant's injury to his bicep tendon at the distal insertion (*i.e.*, above the elbow) was an injury to the "arm" compensable under section 8(e)(10) of the Act. 820 ILCS 305/8(e)(10) (West 2008). The Commission found that the arbitrator had misconstrued the holding in *Will County*, since nowhere in that decision had the court held that the "elbow" was not part of the "arm" for purposes of compensation. The Commission noted that, unlike shoulder injuries, "bicep injuries which occurred at the elbow [fall] within the scheduled injuries listed in [section] 8(e) of the Act." The Commission further determined that the employer was entitled to a credit for the payment made in settlement of the 1998 injury to the left arm. The Commission noted that, although the previous injury was to the left shoulder, the settlement was paid under section 8(e) of the Act, which at the time included shoulder injuries in the same injury classification as arm injuries. Thus, the employer was entitled to credit for a previous section 8(e) payment for the same arm.

¶ 14 The Commission awarded the claimant $664.72 per week for 15.375 weeks ($10,220.07) representing 37.5% loss of the use of the left arm minus a credit for the 30% loss of use of the same arm as a result of the prior settlement.

¶ 15 The claimant sought review in the circuit court of Cook County, which confirmed the decision of the Commission. The claimant then filed this timely appeal.

¶ 16 ANALYSIS

¶ 17 1. Permanency

¶ 18 The nature and extent of a claimant's permanent injury is a question of fact for the Commission to determine, and its decision will not be overturned on appeal unless it is against the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175 (2000). At issue in the instant matter is whether the Commission's award of benefits under section 8(e) of the Act (820 ILCS 305/8(e) (West 2008)) rather than section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2008)) was against the manifest weight of the evidence.

¶ 19 Section 8(e) of the Act provides a schedule of compensation of injuries to any of 15 different specified body parts, including the "arm." 820 ILCS 305/8(e)(10) (West 2008). For purposes of compensation under section 8(e)(10) of the Act, the "arm" has been defined as "the segment of the upper limb between the shoulder and the elbow" or "between the shoulder and the wrist." (Emphasis and internal quotation marks omitted.) *Will County Forest Preserve*, 2012 IL App (3d) 110077WC, ¶ 19. Here, the medical evidence established that the claimant's injury was to the bicep tendon at the distal point, *i.e.*, the point where the bicep attached to the bone near the elbow. The claimant acknowledges that he suffered injury to the bicep tendon near the elbow. He maintains, however, that the record established that his left bicep tendon was also damaged near the insertion point of the left shoulder and that the surgical procedure also repaired damage to the tendon at the shoulder. Thus, he maintains, the injury was primarily to his left shoulder and should have been compensated as a shoulder injury.

¶ 20 The record does not support his contention. The medical records describing the claimant's treatment and surgical procedures contain multiple references to the treatment in the elbow area without any reference to treatment or surgery to the shoulder. The surgical records

contain a single reference to the "proximal" area of the arm, which can refer to the shoulder specifically, or can merely refer to the "nearest" to the point of attachment of a specific body part. Taber's Cyclopedic Medical Dictionary (19th ed. 2001). Here, all the medical evidence established that the claimant's surgery was limited to the area near the elbow.[1] Simply put, the claimant maintains that he injured his shoulder, but the overwhelming evidence supports the Commission's finding that he injured his arm and its finding on that issue was not against the manifest weight of the evidence.

¶ 21 2. Credit

¶ 22 The claimant next maintains that the Commission erred in awarding the employer a credit pursuant to section 8(e)(17) of the Act. 820 ILCS 305/8(e)(17) (West 2008). Section 8(e)(17) of the Act provides that, for the "permanent loss of use, or the permanent partial loss of use of" a *** "hand, arm, thumb or fingers, leg, foot or any toes" for which compensation has been paid, *** that loss shall be taken into consideration and "deducted from any award made for the subsequent injury." *Id.* The credit under this section of the Act is mandatory. *General Motors Corp, Fisher Body Division v. Industrial Comm'n*, 62 Ill. 2d 106, 112-13 (1975). The credit is due whether the prior compensation was paid pursuant to an award by the Commission, or pursuant to a settlement contract. *Id.*

¶ 23 Here, the claimant received compensation in 1998, pursuant to a settlement contract, for 30% loss of the use of his left arm as the result of the 1995 accident. Since the compensation was for the partial loss of the use of the left arm, the Commission credited this amount against the subsequent award for the partial loss of use of the same member. The claimant maintains, in light of the holding in *Will County Forest Preserve*, the 1998 settlement contract, which was paid

[1] The arbitrator examined the surgical scar and noted for the record that scar was located at the "crease of the elbow" and extended "around toward the back of the elbow."

under section 8(e) of the Act, should now be viewed as having been paid under section 8(d)(2) of the Act. He points out that the record clearly established that the 1995 injury was to the rotator cuff area of the shoulder and submits that, if the same injury were to be compensated today, it would be a shoulder injury compensable under section 8(d)(2) of the Act, not an arm injury compensable under section 8(e) of the Act.

¶ 24 The claimant cites no authority to support the proposition that the terms of a settlement contract, once approved by the Commission, can be altered or changed. It is well settled that a settlement contract approved by the Commission is a final award of the Commission for all legal effects, including credits due in later awards and the ability to collaterally attack the agreement. See *Harrison Sheet Steel Co. v. Industrial Comm'n*, 404 Ill. 557, 565 (1950); *Michelson v. Industrial Comm'n*, 375 Ill. 462, 468 (1941). Moreover, the public policy of Illinois favors settlements in civil cases, and settlements, once made, are considered to be final. *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 274 (1999).

¶ 25 Here, the claimant settled a claim for injury to his left arm in 1995. The Act provides that any future employer shall be given credit for prior compensation for an injury to that same body part. *General Motors Corp.*, 62 Ill. 2d at 112-13. The fact that the claimant might be compensated differently today for an injury that occurred in 1995 does not change the fact that he was compensated under section 8(e) of the Act in 1998. The record established that the claimant was compensated for a prior injury to his left arm and the Commission properly concluded that the employer was entitled to credit for that prior compensation.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court confirming the decision of Commission is affirmed.

¶ 28 Affirmed.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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| ☐ Affirm and adopt (no changes) | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse Choose reason | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify down | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stanford Dorsey,
Petitioner,

vs. No. 13 WC 03624

City of Chicago,
Respondent.

14IWCC0004

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the sole issue of nature and extent of the permanent partial disability, and being advised of the facts and law, modifies the July 1, 2013 decision of Arbitrator Deborah Simpson as stated below and otherwise affirms and adopts the decision of the Arbitrator, which is attached hereto and made a part hereof. After considering the record as a whole, and for the reasons set forth below, the Commission modifies the permanent partial disability award of the Arbitrator. Arbitrator Simpson awarded Petitioner 17% loss of use of the person as a whole, pursuant to §8(d)2, for his biceps tear at the elbow. The Commission finds that the Arbitrator's permanency award should not have been based upon §8(d)2, but should have been awarded pursuant to §8(e), and hereby modifies the award to 37.5% loss of use of the left arm. The Commission further finds that Respondent is entitled to a credit for a 1998 settlement with Petitioner for 30% of the left arm, leaving Respondent responsible for 7.5% of the left arm for this injury.

On February 8, 2010, Petitioner, an electrician working to maintain street lights, sustained an injury to his left arm when he assisted a co-worker in moving a 350-400 pound manhole cover. He was diagnosed with a biceps tear at the left elbow and underwent surgical repair of the tear on February 15, 2010. Following extensive occupational therapy, Petitioner was released to return to work full duty as of September 17, 2010. He returned to his former position and testified that he was able to perform all of his duties. However, a year after his return, he requested a transfer to the traffic light division, which has less demanding lifting requirements.

14IWCC0004

**§8(e) vs. §8(d)2**

Arbitrator Simpson relied upon *Will County Forest Preserve v. IWCC*, 2012 Ill. App. (3d) 110077WC, *Dobczyk v. Lockport Twp. Fire Protection Dist.*, 12 IWCC 1367, and *Veath v. State of Illinois, Menard C.C.*, 10 WC 12821, for the proposition that shoulder, biceps and elbow injuries are now classified as person as a whole injuries under §8(d)2 of the Act, instead of scheduled arm injuries under §8(e) of the Act.

The Commission acknowledges that the Appellate Court in *Will County* determined that shoulder injuries are no longer to be considered scheduled injuries under §8(e), but are now to receive person as a whole awards under §8(d)2. In this case, however, Petitioner's injury did not involve his shoulder, but his biceps, and the tear occurred at the left elbow, not at the upper arm.

Arbitrator Simpson cited *Veath* for the holding that elbows are non-scheduled body parts and fall under §8(d)2, like shoulders, pursuant to *Will County*. In *Veath*, Petitioner suffered two injuries, one to the right shoulder and one to the left elbow. The Arbitrator in *Veath* awarded Petitioner 22.5% of the right arm for his shoulder injury and 17.5% of the left arm for his elbow injury. On appeal, the Commission modified the Arbitrator's award for the right arm to comply with *Will County*. However, the Commission affirmed the award of 17.5% of the left arm for the Petitioner's elbow injury. Therefore, Arbitrator Simpson's reliance on *Veath* for the proposition that elbow injuries are now considered non-scheduled injuries is misplaced. Petitioner's biceps injury which occurred at the elbow fell within the scheduled injuries listed in §8(e) of the Act.

Therefore, the Commission modifies the Arbitrator's award to change the permanent partial disability award of 17% loss of use of the person as a whole under §8(d)2 to 37.5% loss of use of the left arm pursuant to §8(e).

**§8(e)17 Credit**

Arbitrator Simpson denied Respondent credit for a prior settlement with Petitioner for a left arm injury. In 1998, Respondent settled Petitioner's claim for a torn rotator cuff injury for 30% loss of use of the left arm. Section 8(e)17 of the Act provides as follows:

> In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the **permanent partial loss of use of any such member** or the partial sight of an eye, for which compensation has been paid, **then such loss shall be taken into consideration and deducted from any award for the subsequent injury.**

820 ILCS 305, §8(e)17 (emphasis added). Arbitrator Simpson found that although the 1998 settlement was based upon §8(e) loss of use of the arm, the Appellate Court in *Will County* had subsequently ruled that shoulder injuries properly belonged under §8(d)2. The Arbitrator found that the §8(e)17 credit provision does not apply to §8(d)2 awards and reasoned that, since Petitioner's 1998 settlement should have fallen under §8(d)2, the credit provision was not available to reduce Respondent's liability for this 2010 injury.

After reviewing all of the evidence and the relevant case law, the Commission finds that Petitioner's 1998 settlement occurred prior to the Appellate Court's decision in *Will County* and that the permanent partial disability settlement for Petitioner's shoulder injury fell properly under §8(e) at the time of the settlement. Based on the Commission's determination above, Petitioner's biceps injury in this case also fell properly under §8(e) of the Act. Therefore, credit was available for Respondent's prior settlement for 30% of the left arm, leaving Respondent liable for 7.5% loss of use of the left arm for this injury.

Arbitrator Simpson's reliance on *Dobczyk v. Lockport Twp. Fire Protection Dist.*, 12 IWCC 1367, in support of her denial of credit for the prior shoulder settlement is misplaced. In *Dobczyk,* Petitioner suffered two shoulder injuries, one in 2003 and another in 2010. The Arbitrator awarded Petitioner a nature and extent award under §8(e) for the 2003 injury. Following a hearing for the 2010 injury, the Arbitrator awarded Petitioner permanency under §8(d)2, pursuant to *Will County.* The Arbitrator in *Dobczyk* refused to give Respondent credit for the prior award under §8(e)17, because that credit is available only when the permanency awards or settlements are under §8(e).

In this case, both Petitioner's prior settlement and the current award fall within the scope of §8(e). Therefore, credit for the prior settlement is available to Respondent under §8(e)17. The Commission finds that Petitioner is entitled to 37.5% loss of use of the left arm for his 2010 biceps tear and that Respondent is entitled to credit under §8(e)17 of 30% loss of use of the left arm for the 1998 settlement.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 15.375 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 37.5% loss of use of Petitioner's left arm, and Respondent is entitled under §8(e)17 to a credit for a 1998 settlement for 30% loss of use of Petitioner's left arm.

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.

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

14IWCC0004

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

JAN 0 3 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

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drd/dak
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STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
### NATURE AND EXTENT ONLY

**Stanford Dorsey**
Employee/Petitioner

v.

**City of Chicago**
Employer/Respondent

Case # 13 WC 003624

Consolidated cases: _____

**14IWCC0004**

The only disputed issue is the nature and extent of the injury. 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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **April 26, 2013**. By stipulation, the parties agree:

On the date of accident, **February 8, 2013**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**63,632.40**, and the average weekly wage was $**1,223.70**.

At the time of injury, Petitioner was **55** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

14IWCC0004

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**664.72**/week for a further period of **85** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **a 17% loss of the man as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **02/08/2010** through **05/26/2013**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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.

Deborah L. Simpson
Signature of Arbitrator

June 29, 2013
Date



JUL -1 2013

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| **Stanford Dorsey,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **vs.** | ) | **No. 13 WC 03642** |
| | ) | |
| **City of Chicago,** | ) | |
| | ) | **14IWCC0004** |
| **Respondent.** | ) | |
| | ) | |

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

The parties agree that on February 8, 2013, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner sustained an accidental injury or was last exposed to an occupational disease that arose out of and in the course of the employment. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act and that the Petitioner's current condition of ill-being is causally connected to the accidental injury sustained.

At issue in this hearing is as follows: (1) the nature and extent of the injury.

**STATEMENT OF FACTS**

The Petitioner has been employed by the Respondent for twenty-four years as an electrician. He worked in the bureau of electricity maintaining street lights. His job included painting, lifting poles that were down, fixing poles that were out, stringing temporary wire the wiring was bad, which included pulling wire from one light to another and any other required maintenance.

On February 8, 2010, he was working with his crew at 79th & St. Louis on lights that were out. They determined that they were going to need to go underground to work on this particular problem. They had to lift the manhole cover, which weighed between 350 and 400 pounds. He and his partner had a grip on each side, lost their balance and in the struggle not to fall he felt immediate pain in his left arm and dropped the manhole cover.

He sought medical attention immediately at Mercy Works where he had x-rays and was sent for an MRI. The MRI revealed a complete disruption of the biceps tendon retraction at least 4.5 cm. Petitioner had a hollow deformity in the distal biceps tendon area, could not flex his elbow and had tenderness in the left forearm as well. The Petitioner was referred to Dr. William Hellar at Woodland Ortho. (P. Ex. 1)

Petitioner saw Dr. Hellar on February 12, 2010, who after examining the Petitioner and reviewing the MRI results informed the Petitioner he needed surgery to repair the ruptured tendon. (P. Ex. 1,3) As a result of the work-related accident on February 8, 2010, Petitioner sustained (1) a complete rupture of the left distal biceps tendon, which retracted from the radial tuberosity at least 4.5 cm, (2) a retraction of the stump into proximal arm, and (3) a sprain of the radial collateral ligament. (P. Ex. 3).

On February 15, 2010, the Petitioner had surgery, at Mercy Hospital, performed by Dr. Hellar. Specifically the injury required surgical intervention in the form of a left elbow distal biceps tendon rupture repair and radial nerve neurolysis. (P. Ex. 3). The tendon repair first required a debridement of the biceps tendon before the tendon could be reattached to the bone. (P. Ex. 3). Further, the surgical operation performed included drilling a hole into Petitioner's bone and anchoring the biceps tendon back to the bone with a 7mm screw and anchor system. (P. Ex. 3).

The Petitioner went through a course of physical therapy and then work hardening, through Mercy at the Chatham Hand Rehab. (P. Ex. 2) The Petitioner was released to return to work full duty with no restrictions on September 17, 2010. (P. Ex. 1)

The Petitioner testified that after the surgery he still had pain in his left arm. He took the prescription pain medications three times per day while he was doing physical therapy and off work. He stated that at the time he returned to work his left arm was not as strong as it had been prior to the injury. Prior to the injury, he never had trouble performing his job duties.

The Petitioner returned to work for the Respondent in September of 2010 at his same position with his same duties and responsibilities at the same rate of pay. The Petitioner testified that he was able to perform all of the tasks required by the job but he was still experiencing pain in his left arm. He testified that he took over the counter ibuprofen for the pain. The Petitioner testified that he continued to work in that position for about a year. He then switched to working on traffic lights which was a less strenuous job than the street lights were. He testified that the traffic lights that need to be lifted weigh only ten to fifteen pounds. He stated that the job was less strenuous and he only had to take ibuprofen occasionally for the pain in that assignment.

The Petitioner testified that he had no trouble or problems doing the job when he switched from street lights to traffic lights. The Petitioner testified that he did not miss any work because of the injury to his arm once he was released to return to work full duty on September 17, 2010. The Petitioner testified that he has not worked for the Respondent since January 7, 2013.

The Petitioner testified that the injury he sustained on February 8, 2010, still causes him problems to date. He stated that although once he returned to full duty work he did not miss any work days because of the injury or the pain, he still has pain and residual effects.

The Petitioner testified that currently he has problems lifting heavy objects. Prior to the accident he lifted weights, recreationally, not competitively; he could easily lift eighty pounds. He testified that they have a facility at his apartment complex and he lifted steel weights, bench pressed, did curls, bicep curl and that he lifted about 80 pounds. He no longer does that. He has tried to lift the 80 pounds he used to lift but cannot because his arm is not as strong as it used to be and it causes pain. He stated that he is unable to help people move or lift furniture and he cannot carry heavy objects.

The Petitioner testified that he is right hand dominant so he does not have any trouble dressing himself, writing, eating or cooking and is otherwise able to perform the activities of daily living without incident.

The Petitioner testified that he does not currently have any appointments for further medical treatment or medications and does not expect to make any. He states that he uses over the counter ibuprofen for the occasional pain he experiences.

The Petitioner admitted that he had a previous work injury in November of 1995, while working for the Respondent. He received treatment and filed a worker's compensation claim for that injury. That injury was to his left shoulder and he settled the claim for 30% loss of the use of the left arm which was $28,590.80. (R. Ex. 1) Petitioner testified that the injury at that time was to his rotator cuff, and did not involve the biceps tendon. He testified that after treatment he returned to his regular job and did not require any time off for that injury after he was treated. He was able to do his job without problems until the injury of February 8, 2010.

## CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). This includes the nature and extent of the petitioner's injury.

*Will County Forest Preserve v. Workers' Compensation Commission*, 2012 Ill. App. (3d) 110077WC, *Dobczyk v. Lockport Township Fire Protection District*, 12 IWCC 1367, and *Veath v. Illinois, State of Menard Correctional Center*, 10 WC 12821, changed shoulder, biceps, and elbow injury classifications under the Act. Instead of being awarded under Section 8(e), the aforementioned body parts are now classified under man as a whole awards pursuant to Section 8(d)2 of the Act.

In this case, the credible evidence showed that the Petitioner suffered a torn left bicep tendon at the elbow, which was surgically repaired in an outpatient procedure by Dr. Heller. Following physical therapy, the Petitioner was able to return to work full duty approximately

seven months after the injury. At the time of his return, the Petitioner worked in the same position for the same pay and with the same hours as he had prior to his injury. The Petitioner also testified that he was able to perform all the duties attendant to that position. Petitioner testified that he requested the reassignment from street lights to traffic lights on his own, not because of any restrictions placed upon him by his treating physicians. Because the Petitioner is right-handed, his injury to his left arm has not affected his daily activities other than preventing him from lifting weights up to 80 pounds and doing other heavy lifting activities.

Due to Petitioner's injuries, treatment, and current residual symptoms and limitations, pursuant to Section 8(d)2 of the Act, he is entitled to an award of 17% loss of the man as a whole.

**Is the Respondent Entitled to a Credit for the Previous Work Injury Settlement from 1995?**

In *Dobczyk*, the Commission affirmed the Arbitrator's decision to deny respondent a credit for a previous award paid to Petitioner. The Petitioner in *Dobczyk* suffered a shoulder injury in 2003. He was diagnosed with a mild grade two AC separation, prescribed medication and removed Petitioner from work. Shortly after petitioner returned to work he sustained an aggravation of his AC separation. Petitioner underwent a distal clavicle resection, then went through a course of physical therapy and was returned to work full-duty by May 2004. Petitioner was awarded a nature and extent award for permanent partial disability pursuant to Section 8(e) of the Act subsequent to this initial injury.

Petitioner worked unimpeded until March 2010, when Petitioner sustained a work-related injury. Petitioner was diagnosed with a SLAP tear, supraspinatus tear, and partial rotator cuff tear in his left shoulder. Petitioner underwent surgery to repair all of the conditions followed by another course of physical therapy. The Arbitrator in *Dobczyk* awarded Petitioner a nature and extent award for permanent partial disability pursuant to Section 8(d)2 of the Act subsequent to this second injury. The Arbitrator found Respondent was not entitled to a credit for the previous shoulder award based on the court's ruling in the *Will County Forest Preserve v. Workers' Compensation Commission* Decision. The changed classification of the body parts under the Act from Section 8(e) to Section 8(d)2 was sufficient to deny Respondent a credit.

The *Dobczyk* court held that Respondent was not entitled to a credit for an award paid to Petitioner for a previous shoulder award based on the *Will County* decision. Specifically, because the *Will County* court ruled that a shoulder is not considered a "member" of Section 8(e) of the Act, and any PPD awards for shoulder conditions should be awarded pursuant to 8(d)2. Moreover, the court said that Section 8(e)17 credits under the act only apply to permanency losses contained within the bounds of Section 8(e) of the Act. The original award granted to Petitioner in the present case was for a left shoulder condition, where Petitioner sustained a rotator cuff tear. While at the time the injury was classified under Section 8(e) of the Act, pursuant to the *Will County* and *Dobczyk* decisions, shoulders injuries, for the purpose of credits, are no longer covered by Section 8(e); rather under Section 8(d)2.

The recent case of *Veath v. Illinois, State of Menard Correctional Center*, 10 WC 12821, changed the classification of elbow awards from Section 8(e) to Section 8(d)2. In *Veath*, the Arbitrator awarded the petitioner 17.5% loss of the use of his left elbow after sustaining injuries

which required a left elbow ulnar nerve debridement. However, the Commission changed the award from a Section 8(e) award to a Section 8(d)2 award citing the *Will County* decision as its basis for the augmentation.

In the present case Petitioner suffered an elbow injury as well, in the form of a torn biceps tendon, in light of these decisions, he is entitled to an award under Section 8(d)2 of the Act. Given that his award should be under Section 8(d)2 and that the award for which Respondent claims a credit was pursuant to Section 8(e), Respondent is due no credit for the award paid out for Respondent's previous permanent partial disability payment to Petitioner. Petitioner is entitled to his full Section 8(d)2 award.

## ORDER OF THE ARBITRATOR

Petitioner is found to have suffered a permanent injury pursuant to Section 8(d)2 of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$664.72**/week for **85** weeks, because the injuries sustained caused the **17%** loss of the man as a whole as provided in Section 8(d)2 of the Act.

Deborah L. Simpson
Signature of Arbitrator

June 29, 2013
Date

2016 IL App (1st) 143044WC

Opinion filed: April 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

| | | |
|---|---|---|
| STANFORD DORSEY, | ) | Appeal from the Circuit Court |
| | ) | of Cook County, Illinois. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| | ) | |
| v. | ) | Appeal No. 1-14-3044WC |
| | ) | Circuit No. 14-L-50114 |
| THE ILLINOIS WORKERS' | ) | |
| COMPENSATION COMMISSION *et al.* | ) | |
| (City of Chicago, | ) | Honorable |
| | ) | Robert Lopez Cepero, |
| Defendant-Appellee). | ) | Judge, Presiding. |

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

**OPINION**

¶ 1 The claimant, Stanford Dorsey, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to his left arm allegedly sustained while employed as a street light maintenance electrician for the City of Chicago (employer). Following a hearing, the arbitrator found that the claimant's injuries resulted in a 17% loss of the person-as-a-whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008). The employer sought review of the arbitrator's award before the Illinois Workers' Compensation Commission (Commission), which modified the



award, finding that the claimant's injury to his left arm was compensable as a scheduled injury under section 8(e) of the Act. 820 ILCS 305/8(e) (West 2008). The Commission awarded the claimant a sum equal to the loss of 37.5% of the use of the left arm. The Commission further held that the employer was entitled to a credit for a payment made in 1998, pursuant to a settlement, to compensate for a 30% loss of use of that same arm. The claimant sought judicial review of the Commission's decision before the circuit court of Cook County, which confirmed the Commission's decision. The claimant then filed this timely appeal.

¶ 2 The claimant raises the following issues on appeal: (1) whether the Commission's award of compensation for the loss of the use of the arm under section 8(e) of the Act rather the loss of the use of the person-as-a-whole under section 8(d)(2) was against the manifest weight of the evidence; and (2) whether the Commission erred in granting a credit to the employer for payments made pursuant to a prior settlement agreement.

¶ 3 FACTS

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 23, 2013.

¶ 5 The claimant testified that he had been employed as an electrician by the employer for approximately 24 years. On February 8, 2010, he was working with his crew on street lights that were not functioning. It was determined that they would need to lift a manhole cover to access the electrical circuits. The claimant estimated that the manhole cover weighed approximately 350 to 400 pounds. The claimant and a coworker attempted to lift the manhole cover together, but they lost their balance while doing so. In his struggle not to fall while holding up his end of the manhole cover, the claimant felt an immediate pain in his left arm. The pain caused him to drop the manhole cover.

¶ 6 The claimant sought immediate medical attention at Mercy Works Hospital. The claimant reported that he could not flex his left elbow and had tenderness in left forearm. An MRI revealed a complete disruption (rupture) of the distal biceps tendon, which is located just beneath the elbow. The treatment records noted "left elbow strain." There was no documented complaint of shoulder pain. The attending physician referred the claimant to Dr. William Hellar at the Woodland Orthopedic Center.

¶ 7 On February 12, 2010, the claimant was examined by Dr. Heller, a board certified orthopedic surgeon. Dr. Heller diagnosed ruptured distal bicep tendon and informed the claimant of the need for surgery to repair the rupture.

¶ 8 On February 15, 2010, Dr. Heller performed surgery to repair the tendon rupture and corresponding radial nerve neurolysis. The tendon repair required a debridement of the bicep tendon preparatory to reattachment of the tendon to the bone. The procedure further required surgical drilling into the bone near the elbow joint to anchor the tendon back to the bone with a 7 millimeter screw and anchor system. Following surgery, the claimant underwent a course of physical therapy and work hardening at Mercy Works and at Chatham Hand Rehabilitation Services in Chicago. The claimant's postoperative treatment and physical therapy records reflect the primary pain location as the left elbow, with no mention shoulder pain.

¶ 9 On September 17, 2010, the claimant was released to full duty with no work restrictions. He returned to his former job with the employer with the same duties and responsibilities and the same rate of pay. The claimant testified that at the time he returned to work his left arm was not as strong as his right, nor was it as strong as prior to the accident. He testified that after he returned to work, he was able to perform all tasks assigned to him; however, he was still experiencing pain in his left arm. He routinely took Ibuprofen for the pain. He further testified





that he worked for about one year until he requested, and was granted, a transfer to less strenuous work. After transferring, the claimant took Ibuprofen less frequently.

¶ 10 The claimant further testified that, at the time of the hearing, he still experienced left arm pain. Although he never missed work because of the injury or pain, he still experienced pain and discomfort that affected his activities. He testified that he has continuing problems lifting any heavy objects. Prior to the accident, he lifted weights recreationally, but he has not been able to do so since the accident. He also testified that he cannot help family or friends move or lift furniture as he had on several occasions prior to the accident. The claimant also testified that he is right hand dominant, so he does not have any trouble with routine daily activities, such as dressing himself, writing, eating or cooking. He also testified that he has no appointments for additional medical treatment, nor does he expect to have further medical treatment. Other than an occasional Ibuprofen, he does not take any medication to treat his left arm pain.

¶ 11 The claimant acknowledged that he had a previous injury to his left shoulder in November 1995, which resulted in a settled claim with the employer for 30% loss of use of the left arm pursuant to section 8(e) of the Act. 820 ILCS 305/8(e) (West 1994). The settled amount was $28,590.80. The claimant testified that the injury in 1995 was to his left rotator cuff, and did not involve the biceps tendon. He also testified that, after treatment, he had returned to his regular job in August 1996, and did not require any time off after he completed treatment for that injury.

¶ 12 Following the hearing, at which the only contested issue was the nature and extent of the claimant's permanent injury, the arbitrator awarded the claimant $664.72 per week for 85 weeks ($56,501.20) representing a 17% loss of the person-as-a-whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008). In doing so, the arbitrator relied upon *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC for

the proposition that "shoulder, biceps, and elbow injury classifications" were no longer to be considered injuries to the "arm" compensable under section 8(e) of the Act. 820 ILCS 305/8(e) (West 2008). The arbitrator then rejected the employer's argument that it was entitled to a credit for the prior settlement, finding that credits are not available to offset awards issued pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2008).

¶ 13 The employer sought review of the arbitrator's award from the Commission. The Commission modified the award, agreeing with the employer's argument that the claimant's injury to his bicep tendon at the distal insertion (*i.e.*, above the elbow) was an injury to the "arm" compensable under section 8(e)(10) of the Act. 820 ILCS 305/8(e)(10) (West 2008). The Commission found that the arbitrator had misconstrued the holding in *Will County*, since nowhere in that decision had the court held that the "elbow" was not part of the "arm" for purposes of compensation. The Commission noted that, unlike shoulder injuries, "bicep injuries which occurred at the elbow [fall] within the scheduled injuries listed in [section] 8(e) of the Act." The Commission further determined that the employer was entitled to a credit for the payment made in settlement of the 1998 injury to the left arm. The Commission noted that, although the previous injury was to the left shoulder, the settlement was paid under section 8(e) of the Act, which at the time included shoulder injuries in the same injury classification as arm injuries. Thus, the employer was entitled to credit for a previous section 8(e) payment for the same arm.

¶ 14 The Commission awarded the claimant $664.72 per week for 15.375 weeks ($10,220.07) representing 37.5% loss of the use of the left arm minus a credit for the 30% loss of use of the same arm as a result of the prior settlement.

¶ 15 The claimant sought review in the circuit court of Cook County, which confirmed the decision of the Commission. The claimant then filed this timely appeal.





¶ 16 ANALYSIS

¶ 17 1. Permanency

¶ 18 The nature and extent of a claimant's permanent injury is a question of fact for the Commission to determine, and its decision will not be overturned on appeal unless it is against the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175 (2000). At issue in the instant matter is whether the Commission's award of benefits under section 8(e) of the Act (820 ILCS 305/8(e) (West 2008)) rather than section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2008)) was against the manifest weight of the evidence.

¶ 19 Section 8(e) of the Act provides a schedule of compensation of injuries to any of 15 different specified body parts, including the "arm." 820 ILCS 305/8(e)(10) (West 2008). For purposes of compensation under section 8(e)(10) of the Act, the "arm" has been defined as "the segment of the upper limb between the shoulder and the elbow" or "between the shoulder and the wrist." (Emphasis and internal quotation marks omitted.) *Will County Forest Preserve*, 2012 IL App (3d) 110077WC, ¶ 19. Here, the medical evidence established that the claimant's injury was to the bicep tendon at the distal point, *i.e.*, the point where the bicep attached to the bone near the elbow. The claimant acknowledges that he suffered injury to the bicep tendon near the elbow. He maintains, however, that the record established that his left bicep tendon was also damaged near the insertion point of the left shoulder and that the surgical procedure also repaired damage to the tendon at the shoulder. Thus, he maintains, the injury was primarily to his left shoulder and should have been compensated as a shoulder injury.

¶ 20 The record does not support his contention. The medical records describing the claimant's treatment and surgical procedures contain multiple references to the treatment in the elbow area without any reference to treatment or surgery to the shoulder. The surgical records

contain a single reference to the "proximal" area of the arm, which can refer to the shoulder specifically, or can merely refer to the "nearest" to the point of attachment of a specific body part. Taber's Cyclopedic Medical Dictionary (19th ed. 2001). Here, all the medical evidence established that the claimant's surgery was limited to the area near the elbow.[1] Simply put, the claimant maintains that he injured his shoulder, but the overwhelming evidence supports the Commission's finding that he injured his arm and its finding on that issue was not against the manifest weight of the evidence.

¶ 21 2. Credit

¶ 22 The claimant next maintains that the Commission erred in awarding the employer a credit pursuant to section 8(e)(17) of the Act. 820 ILCS 305/8(e)(17) (West 2008). Section 8(e)(17) of the Act provides that, for the "permanent loss of use, or the permanent partial loss of use of" a *** "hand, arm, thumb or fingers, leg, foot or any toes" for which compensation has been paid, *** that loss shall be taken into consideration and "deducted from any award made for the subsequent injury." *Id.* The credit under this section of the Act is mandatory. *General Motors Corp, Fisher Body Division v. Industrial Comm'n*, 62 Ill. 2d 106, 112-13 (1975). The credit is due whether the prior compensation was paid pursuant to an award by the Commission, or pursuant to a settlement contract. *Id.*

¶ 23 Here, the claimant received compensation in 1998, pursuant to a settlement contract, for 30% loss of the use of his left arm as the result of the 1995 accident. Since the compensation was for the partial loss of the use of the left arm, the Commission credited this amount against the subsequent award for the partial loss of use of the same member. The claimant maintains, in light of the holding in *Will County Forest Preserve*, the 1998 settlement contract, which was paid

[1] The arbitrator examined the surgical scar and noted for the record that scar was located at the "crease of the elbow" and extended "around toward the back of the elbow."





under section 8(e) of the Act, should now be viewed as having been paid under section 8(d)(2) of the Act. He points out that the record clearly established that the 1995 injury was to the rotator cuff area of the shoulder and submits that, if the same injury were to be compensated today, it would be a shoulder injury compensable under section 8(d)(2) of the Act, not an arm injury compensable under section 8(e) of the Act.

¶ 24 The claimant cites no authority to support the proposition that the terms of a settlement contract, once approved by the Commission, can be altered or changed. It is well settled that a settlement contract approved by the Commission is a final award of the Commission for all legal effects, including credits due in later awards and the ability to collaterally attack the agreement. See *Harrison Sheet Steel Co. v. Industrial Comm'n*, 404 Ill. 557, 565 (1950); *Michelson v. Industrial Comm'n*, 375 Ill. 462, 468 (1941). Moreover, the public policy of Illinois favors settlements in civil cases, and settlements, once made, are considered to be final. *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 274 (1999).

¶ 25 Here, the claimant settled a claim for injury to his left arm in 1995. The Act provides that any future employer shall be given credit for prior compensation for an injury to that same body part. *General Motors Corp.*, 62 Ill. 2d at 112-13. The fact that the claimant might be compensated differently today for an injury that occurred in 1995 does not change the fact that he was compensated under section 8(e) of the Act in 1998. The record established that the claimant was compensated for a prior injury to his left arm and the Commission properly concluded that the employer was entitled to credit for that prior compensation.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court confirming the decision of Commission is affirmed.

¶ 28 Affirmed.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] PTD/Fatal denied
- [x] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dyian McBride,

Petitioner,

vs.

09IWCC0914

NO: 06 WC 28019

State of Illinois-Ludeman Development Center,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Hagan, filed September 24, 2008, finding that Petitioner sustained accidental injuries arising out of and in the course of her employment on June 13, 2006, awarding temporary partial disability benefits of $3,781.88 for the period from June 19, 2006 through October 19, 2006 and further finding that Petitioner suffered permanent partial disability to the extent of 45% loss of use of her right hand under §8(e) of the Act, less a credit of 32.3 weeks, for a net award of 59.5 weeks. The Commission, after considering the issues of causal connection, temporary total disability, calculation of credit and permanency, 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.

When considering the issue of calculating the amount of credit Respondent is entitled to for prior settlements received by Petitioner, the Commission reviewed §8(e)17 of the Act which states that:

> "[i]n computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg foot or any toes, such loss or partial loss of any

> such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." 820 ILCS 305/8(e) 17 (2007).

On review, Respondent argued that credit shall be calculated by subtracting the percentage of the present value of the injury minus the percentage of the credit Respondent has from prior injuries to the same body part. In support of its argument, Respondent cited General Motors Corp v. Industrial Commission, 62 Ill.2d 106, 113 (1975), in which the Illinois Supreme Court agreed with the Circuit Court that the employer was entitled to a credit for a previous settlement, but reversed the Circuit Court's decision finding that the credit was limited to the amount of money paid in the prior settlement. However, neither §8(e)17 of the Act or General Motors state that credit **shall** be calculated by subtracting the percentage of the present value of the injury minus the percentage of the credit Respondent has from prior injuries to the same body part. *(Emphasis added.)*

In 2002, the Appellate Court in Keil v. Industrial Commission, 331 Ill.App.3d 478, 481 (2002), explained that §8(e)17 of the Act:

> "does not restrict the Commission as to how it should determine the proper amount of credit. Instead, it requires only that the Commission take the prior loss into consideration and deduct it from any subsequent award. This gives the Commission the necessary flexibility to address each situation on a case-by-case basis in order to achieve the remedial purpose of the statute while achieving a result that is just and equitable."

In Isaacs v. Industrial Commission, 138 Ill.App.3d 392, 396 (1985), the Appellate Court explained that "[c]redits which operate as partial exceptions to the liabilities created by the Act should, therefore, be narrowly construed where granted and not be extended by implication unless necessary to accomplish the purpose of the Act."

As noted by Petitioner in her brief, since General Motors was decided, the Illinois Workers' Compensation Act was amended and the maximum number of weeks payable for loss of use of the hand has been increased from 190 weeks to 205 weeks. Under Petitioner's prior settlement, Petitioner received 17% loss of use of the hand totaling 32.3 weeks. If the Commission were to award credit of 17% loss of use of the hand under the current Act, Respondent would receive a credit for 34.85 weeks even though Petitioner was never paid that amount. It would be inequitable to provide Respondent with a credit for 2.55 weeks of compensation that Petitioner never received. Therefore, the Commission finds that the appropriate means of determining the prior amount of credit, consistent with the humane and remedial purposes of the Act, is to award Respondent credit for the amount of weeks actually paid Petitioner and not the percentage of loss provided for in the prior settlement.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator entered on September 24, 2008, is affirmed and adopted.

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

DATED: SEP 15 2009

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Kevin W. Lamborn

Barbara A. Sherman

Paul W. Rink

# Illinois Official Reports

## Appellate Court

***S&C Electric Co. v. Illinois Workers' Compensation Comm'n*,**
**2015 IL App (1st) 141057WC**

| | |
|---|---|
| Appellate Court Caption | S AND C ELECTRIC COMPANY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Edmundo Cortez, Appellee). |
| District & No. | First District, Workers' Compensation Commission Division<br>Docket No. 1-14-1057WC |
| Filed | October 2, 2015 |
| Decision Under Review | Appeal from the Circuit Court of Cook County, No. 13-L-50711; the Hon. Robert Lopez-Cepero, Judge, presiding. |
| Judgment | Affirmed and remanded. |
| Counsel on Appeal | Robert E. Maciorowski and Julie A. Garrison, both of Maciorowski, Sackmann & Ulrich, of Chicago, for appellant.<br><br>James F. Coyne, of Coyne Law Offices, LLC, of Chicago, for appellee. |
| Panel | JUSTICE HARRIS delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment and opinion. |

## OPINION

¶ 1 On March 16, 2011, claimant, Edmundo Cortez, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer S&C Electric Company in case No. 11WC10211. He alleged he suffered injuries to his lumbar spine while lifting and pulling equipment at work on February 4, 2011. On April 5, 2012, claimant filed a second application for adjustment of claim alleging injury to his "back man as a whole" resulting from lifting, bending, and pulling in the performance of his employment on February 15, 2011, in case No. 12WC12147. Following a September 11, 2012, consolidated hearing, the arbitrator concluded in case No. 11WC1021 claimant had established an accident that occurred on February 4, 2011, that arose out of and in the course of his employment, and his current condition of ill-being in his low back was causally related to the work accident. The arbitrator calculated claimant's average weekly wage as $572.43 and awarded claimant total disability benefits of $381.62 per week for the period of February 15, 2011, through September 11, 2012.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. The Commission also remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980). On judicial review, the circuit court of Cook County affirmed the Commission's decision. On appeal, the employer argues the Commission's (1) finding claimant sustained a compensable work-related injury was against the manifest weight of the evidence and (2) decision improperly included overtime hours in the calculation of claimant's average weekly wage. We affirm and remand the matter for further proceedings.

¶ 3 ### I. BACKGROUND

¶ 4 The following evidence relevant to this appeal was elicited at the September 11, 2012, arbitration hearing.

¶ 5 Claimant began working for the employer in August 2010 as a "mechanical assembler basic." Claimant testified that he worked 10 hours per shift, 5 days per week, which included mandatory overtime. His job duties included assembling an average of three to four stainless steel tanks each shift. Claimant testified his job required him to lift cables weighing 10 to 50 pounds and tools weighing 25 to 30 pounds. He installed one to two wire cables per tank, tightening the bolts with a wrench-like tool that was at least one meter long and made of thick metal. To tighten the bolts, claimant explained, "we have to insert [the wrench] to the nut almost to the eye level. Then we pull it down, all the way down to the floor, pull it taut and put it back on the top again. Again, pull it down, bend it over all the way down to the floor until the nut is securely tightened." According to claimant, this step is repeated 30 to 40 times before the bolt is tight. He then had to lean over the tank and connect the wires. Claimant testified that, as a new employee, he was not allowed to sit down while assembling the tanks.

¶ 6 Claimant testified that at approximately 10 p.m. on the night of the accident, he was using a manual hand jack with a steel extension to pick up a pallet. Claimant explained "[t]he steel

extension [located on] the top of the hand jack is one-inch thick with almost like one meter square on the top of the forklift." Claimant testified he had to pull the steel extension on the hand jack up in order to slide the jack under the pallet. In order to do this, claimant stated, "I stood in front of the hand jack. I bent at my waist. I pulled up the extension bars on the top of it." According to claimant, "[t]hat is the time I felt the click on my back." Claimant continued to pull up on the extension bar to lock it in place and then grabbed his back which was "painful already." He described the location of the pain as "the left side of the lower back." Claimant testified that one of his coworkers asked if he was okay. He replied, "I just have a click in my back." Claimant explained although his back was already painful, he could still do his job and so he continued to work. The accident occurred on a Friday, and over the weekend, claimant took Advil, used a hot pack on his back, and lay on his couch. On cross-examination, claimant acknowledged he worked the Saturday following the accident–as evidenced by his time card–but testified the pain he experienced directly following the accident was "just like an ordinary pain."

¶ 7 Claimant testified that his back was still painful when he returned to work the following Monday, and noticed the pain increased when he bent over, pulled something, or tightened bolts. He continued to work the rest of the week despite the increasing pain. By Wednesday, claimant stated he had started to notice pain running through his left leg. The following weekend, he took Aleve and used hot packs on his back.

¶ 8 According to claimant, when he returned to work on Monday, February 14, 2011, he spoke to his team leader, Robert Navarro, to inform him that he might see claimant sitting down at his work station due to back pain. Claimant did not want Navarro to think he was lazy. Claimant noted as of that Monday, his pain was "worse already, because it [was] running, really going to my left leg. It [was] almost really difficult for me to walk."

¶ 9 Claimant testified that the following morning, February 15, 2011, Navarro approached him and asked how his back was. Claimant stated he told Navarro it was "worse, very painful." According to claimant, Navarro then told him to inform their supervisor, Jim Wilson, and then go see the nurse. Claimant testified when he told Wilson he was going to see the nurse, Wilson responded, in what claimant perceived to be a threatening manner, "that is not work-related." Claimant stated that Wilson's comment scared him as he was still in his probationary period at work.

¶ 10 James Wilson testified that he was a supervisor for the employer on the date of the accident. Wilson testified claimant, as well as other employees, were allowed to leave early from their shifts on February 1, 2011, due to a snow storm. Claimant did not work the following day. According to Wilson, when claimant returned to work February 3, claimant showed him a picture of the snow in the alley by his apartment and told him "he had to shovel the snow to get out to the street." Claimant admitted to having shown Wilson a photograph of the snow, but he denied telling Wilson he had to shovel the snow and testified he did not own a shovel at that time.

¶ 11 Wilson testified that employees are required to report all work injuries immediately to someone in leadership. According to Wilson, when an employee reports an accident to him, he immediately sends them to see the nurse. Wilson stated claimant did not report an accident to him until February 15, 2011, at which time he sent claimant to see the nurse. Wilson further testified claimant denied injuring himself at work when he and Navarro asked, but he stated that claimant later attributed his injury to work because another employee had experienced the

same symptoms. According to Wilson, however, the other employee's symptoms resulted from a tripping incident. Wilson denied telling claimant the injury "[was] not work-related" and testified he had never threatened an employee for filing a workers' compensation claim.

¶ 12 On cross-examination, Wilson testified that prior to February 2011, claimant performed "at a very good level" and was able to perform all his job duties.

¶ 13 Robert Navarro testified that he worked for the employer in a leadership position. He stated that all injuries, no matter how minor, were required to be reported immediately to someone in leadership. Navarro testified the employees were aware of this rule. During his testimony, claimant denied having any knowledge of this rule.

¶ 14 According to Navarro, on February 15, 2011, he noticed claimant "making gestures on his face like he was hurting, like injured or something." He asked claimant if something was wrong and claimant responded that his back and legs were hurting and that he could not stand up for long. Navarro testified claimant told him "he used to get that pain when he used to work at a liquor store. The pain used to go off and on." During his testimony, claimant denied injuring his back while working at a liquor store. Navarro stated that as soon as he became aware of claimant's back pain, he "persuaded" claimant to go see the nurse. Navarro denied having a conversation with claimant the day before regarding his back pain. According to Navarro, claimant told him that he was not sure whether he had injured himself at work but noted another employee had a similar injury.

¶ 15 Koffi Kongo, claimant's co-worker, signed an affidavit on May 16, 2011, indicating that on or about February 4, 2011, he was working near claimant when he "saw him injure his back in the course of his employment." Kongo further noted, "[a]fter witnessing [claimant] grab for his lower back in obvious pain[,] I asked if he was alright and he told me[, ']I felt a pop in my lower back.' " Kongo testified at his deposition that claimant did not appear to have any back problems prior to the work accident. He was unable to recall the particular date of the accident but stated it was in February.

¶ 16 Janice McLeran, the employer's health services administrator, testified regarding a February 15, 2011, nurse's note that indicated claimant reported "having a bad pain that is hard to tolerate in certain positions" that "originates in low back" and "goes all the way down left leg to calf along the back of the leg" which began approximately three weeks prior to the visit. The note further stated, "RN attempted to discuss causation and he states day shift [employee] had same symptoms so he feels this must be [related to] the job. He does not have a special moment in time. He denies prior medical history of this." According to McLeran, she was present in the room with claimant and the nurse when claimant "told us he was sure [the injury] was work-related because somebody else in his department had the same symptoms." McLeran testified she did not seek further information from claimant regarding a specific time or date of his injury. She stated she had worked closely with claimant on short-term disability and had no recollection of claimant telling her he was injured at work while using a hand jack. During his testimony, claimant stated he told the nurse he did not know what caused his back pain because he was "scared of [Wilson] and my job. I might lose my job."

¶ 17 After seeing the company nurse on February 15, 2011, claimant was referred to Peterson Urgent Care Center where he reported having pain in his left hip down into his left leg for the last two weeks. He was diagnosed with acute lumbar pain and a possible herniated disc. He returned to Peterson Urgent Care Center the following day and reported his pain was

"worsening day by day." The medical report from the latter visit indicated claimant had experienced "mild pain when pulling something at work."

¶ 18 On February 17, 2011, claimant first saw Dr. Sara Brown, a family and sports medicine physician. At that time, claimant reported experiencing severe low back pain shooting down his left leg stopping at the mid-calf for approximately three weeks. When Dr. Brown asked claimant whether he had suffered a trauma or injury, he initially responded, "no"; however, she stated claimant immediately followed up by saying, "I think this happened at work." He told her he did a lot of walking, bending, and pushing at work. She diagnosed claimant with "lubago," or low back pain, which she believed was likely due to a disk herniation. Dr. Brown ordered a magnetic resonance image (MRI) of claimant's back, prescribed steroids, ordered physical therapy, and restricted him from lifting, pushing, or pulling at work.

¶ 19 Dr. Brown next saw claimant on March 1, 2011. At that time, claimant continued to complain of low back pain that was worsening, a sharp shooting pain down his left leg, and numbness in his left leg. She reviewed the results of his MRI, which indicated "a very severe disk herniation at the L5-S1 level with impingement on the S1 nerve root." Dr. Brown testified the MRI results were consistent with claimant's pain complaints. She explained that the MRI also indicated some degenerative changes, but noted the severe extrusion of the disk was more indicative of a traumatic change. Dr. Brown referred claimant to Dr. David Walega, an interventional spine specialist, for further treatment. She opined that claimant's disk herniation was caused by a work injury based on the information he had provided.

¶ 20 On cross-examination, Dr. Brown denied that claimant related his injury to work based on a co-worker's report of similar symptoms. She agreed that she had no knowledge of the bending, pushing, and lifting requirements of claimant's job, and acknowledged claimant did not specifically attribute his injury to any of these activities. She agreed a person could suffer a herniated disk from shoveling snow.

¶ 21 Claimant saw Dr. Walega on March 8, 2011, and received an epidural steroid injection that provided relief for two days. Thereafter, Dr. Walega referred claimant to Dr. Joshua Rosenow, a neurosurgeon.

¶ 22 On March 18, 2011, claimant saw Dr. Rosenow. According to an April 6, 2011, letter from Dr. Rosenow to Dr. Walega, claimant "[l]ifted something very heavy (hand jack extension of at least 50 lbs) at work in February and felt a 'click' in his back with new onset of LLE radicular pain increasing over several days." Due to claimant's failure to obtain relief through conservative treatment, Dr. Rosenow recommended a surgical decompression. On March 21, 2011, Dr. Rosenow performed a left L5-S1 laminectomy and microdiskectomy for what he described as a "very large herniated disk." Following this surgery, claimant continued to complain of lumbar and buttock pain as well as severe headaches. A May 4, 2011, MRI demonstrated a cerebrospinal fluid leak and on May 6, 2011, claimant underwent a second surgical procedure to repair the cerebrospinal fluid leak and dural tear, insert a spinal fluid drain, and remove a recurrent herniated lumbar disk. Thereafter, claimant began physical therapy.

¶ 23 On August 4, 2011, claimant saw Dr. Michel Malek, a neurosurgeon. According to Dr. Malek's evidence deposition, claimant was referred to him by Diversey Medical Center, but the record contains no indication of the reason claimant was seen at Diversey Medical Center. According to Dr. Malek's records, claimant was still experiencing pain in his back that radiated down his lower left leg. Dr. Malek ordered a repeat MRI scan of claimant's lumbar

spine. The results of the MRI indicated "post-operative changes at L5-S1, retrolistheses of L5 on S1 with no evidence of recurrent disc herniation, primarily scarring *** [and] a small annular tear at L4-5 and no significant foraminal narrowing." Dr. Malek recommended a lumbar fusion at L5-S1. In Dr. Malek's opinion, short of proceeding with the lumbar fusion, claimant suffered from a permanent disability and had reached MMI.

¶ 24 Dr. Malek further opined that claimant's current condition of ill-being in his low back and his need for a lumbar fusion were the direct result of the February 4, 2011, work injury. He noted that although claimant suffered from an underlying degenerative condition, the degenerative condition was asymptomatic and unlikely to become symptomatic during claimant's lifetime absent the February 4, 2011, injury. (We note that a portion of Dr. Malek's deposition, specifically the portion in which he identified medical records he reviewed during his treatment of claimant, is missing from the record.)

¶ 25 On August 8, 2011, claimant saw Dr. Morris Marc Soriano, a neurosurgeon, for an independent medical evaluation. In addition to conducting a physical examination, Dr. Soriano reviewed the initial investigation report, the Peterson Urgent Care records, the MRIs, the operative reports, and the records of claimant's treating physicians. Dr. Soriano testified that claimant still complained of pain with prolonged sitting or standing and intermittent left leg pain. Following his physical examination of claimant, Dr. Soriano was of the opinion that claimant was in the process of recovering from his disk herniation. However, Dr. Soriano opined that the herniated disk and the corresponding surgery were not related to the February 4, 2011, accident. When asked what he based his causation opinion on, the following colloquy occurred:

> "A. Well, what was in [the incident investigation report] was that [claimant] was actually directly asked by the team leader if he had been injured at work, and he replied that he had not been injured at work. So, that was part of the reason I formulated my opinion that this was not a work injury, since [claimant] himself was not of the opinion, at least [as] of [February, 15, 2011], that he was injured at work.
>
> Q. Did you see anything in the initial records that related any of his complaints to lifting, pushing or pulling at work?
>
> A. No.
>
> Q. What, if any, significance did you attach to that?
>
> A. Well, when he tells–when he gives the direct report to the nurse that he had not lifted, pushed or pulled anything that would account for his pain, then I mean again that's information that you utilize to try and formulate an opinion, determine whether it's a work[-]related injury or not."

Dr. Soriano concluded that claimant would likely be able to return to work without restrictions following another two to four weeks of work hardening.

¶ 26 On October 26, 2012, the arbitrator issued her decision in the matter, finding claimant had established a February 4, 2011, accident that arose out of and in the course of his employment and his current condition of ill-being in his low back was causally related to the work accident. The arbitrator specifically noted, "[i]n finding accident on [February 4, 2011], the [a]rbitrator places greater weight on the credible testimony of [c]laimant and his co-worker and on the work accident reference recorded by Peterson Clinic and Dr. Brown than on the testimony of Mr. Wilson, Mr. Navarro and the nurse." She further noted, "the record is devoid of any

credible evidence to suggest that [claimant] suffered any back problems prior to this accident." The arbitrator calculated claimant's average weekly wage as $572.43 and awarded claimant total disability benefits of $381.62 per week for the period of February 15, 2011, through September 11, 2012. On review, the Commission affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Cook County affirmed the Commission's decision.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, the employer argues the Commission's (1) finding claimant sustained a compensable work-related injury was against the manifest weight of the evidence and (2) decision improperly included overtime hours in the calculation of claimant's average weekly wage.

¶ 30 As a preliminary matter, we note that when it reviews the Commission's decision pursuant to the manifest-weight-of-the evidence standard, the circuit court must examine the evidentiary record. In this case, the circuit court found the Commission's decision was not against the manifest weight of the evidence and entered its order confirming the decision on March 13, 2014. However, two months later, on July 15, 2014, the court ordered the Commission to prepare and file the administrative-review record, which included the evidentiary record, with the circuit clerk. Thus, it does not appear the circuit court examined the record before it made its decision. However, since on appeal we review the Commission's decision and not the circuit court's judgment, we will consider the merits of this appeal. See *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543, 950 N.E.2d 256, 260 (2010).

¶ 31 A. Compensable Injury

¶ 32 On appeal, the employer first argues the Commission's finding claimant sustained a compensable work-related injury on February 4, 2011, is against the manifest weight of the evidence. The employer's assertion is based on its contentions that (1) claimant and Kongo were not credible, and (2) claimant's theory of the injury was not supported by the contemporaneous medical histories he provided to his treating physicians.

¶ 33 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). An injury generally arises "in the course of employment" when it occurs "within the time and space boundaries of the employment." *Id.* Further, an injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* at 203, 797 N.E.2d at 672.

¶ 34 "The determination of whether an injury arose out of and in the course of a claimant's employment is a question of fact for the Commission to resolve, and its finding in that regard will not be set aside on review unless it is against the manifest weight of the evidence." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 24, 990 N.E.2d 284. "In resolving questions of fact, it is the function of the Commission to judge the credibility of witnesses and resolve conflicting medical evidence."

*City of Springfield, Illinois v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 24, 990 N.E.2d 284.

¶ 35 The employer asserts that Kongo's testimony was not credible in that he (1) contradicted claimant regarding whether claimant solicited his testimony and (2) could not recall the specific date or time of the incident or the specific activity claimant was performing at the time of his injury. Although, as the employer notes, Kongo could not recall the specific date or time of the incident, he testified that he observed claimant "using the hand[ ]jack, like pulling the skid" and then reaching back with his left hand and grabbing his lower back in February of 2011. We decline to find that Kongo's inability to recall the specific date or time of the accident renders his testimony incredible. The employer also points to a discrepancy between Kongo's testimony that he thought claimant called him on the telephone to ask him to testify, and claimant's testimony that the two of them saw each other in a department store and Kongo offered to testify on claimant's behalf. To the extent an inconsistency exists in the witnesses' testimony in this regard, we find it is immaterial and does not undermine the arbitrator's credibility determination.

¶ 36 The employer next provides a bulleted list of "facts" in its brief which it claims demonstrates claimant's allegations of a work injury are not supported by the record. Many of these "facts" are simply portions of claimant's testimony which were contradicted by his supervisor or team leader. For example, the employer notes claimant's testimony (1) denying having told Navarro that he suffered intermittent back pain while working at the liquor store when Navarro testified claimant told him this; (2) that he told Navarro of his back pain the day before seeing the nurse, and Navarro's denial of any such conversation; and (3) that he felt threatened by Wilson's statement regarding the injury not being work related, and Wilson's denial of having made such a statement. In addition, the employer argues claimant's credibility was further undermined by his denial that he shoveled snow on February 2, 2011, when Wilson testified claimant told him he had shoveled snow. This argument by the employer amounts to nothing more than an invitation to reweigh the evidence and find the employer's witnesses more credible than claimant's. However, as noted above, it was for the Commission to weigh the evidence and resolve any conflicts in the testimony. Here, the Commission, having heard the testimony of each witness, specifically found claimant's and Kongo's testimony more credible. Based on this evidence, we find that the Commission's credibility determination was not against the manifest weight of the evidence.

¶ 37 The employer next takes issue with claimant's failure to initially provide details of the accident to his treating physicians, instead attributing his injury to work only because a co-worker had suffered similar symptoms. According to the employer, claimant provided the specific details of his alleged injury only after he was confronted with the lack of documentation supporting a work injury.

¶ 38 Our review of the record reveals that on February 15, 2011, claimant reported to the company nurse that the pain in his low back and left leg began three weeks prior to his visit. While claimant did not identify a specific event as having caused the injury at that time, he denied any prior medical history of low back pain and attributed his injury to work. Although claimant told the nurse he thought his injury must be work-related because a coworker was experiencing similar symptoms, he testified that directly prior to seeing the nurse, he spoke

with Wilson who told claimant the injury was "not work related." We further note that [illegible]eran, who was in the room with claimant and the nurse, testified she did not ask claimant for specific information regarding his injury. Immediately after seeing the company nurse, claimant was seen at Peterson Urgent Care, where claimant complained of pain in his left hip and left leg for the last two weeks. The next day, February 16, 2011, claimant again reported to Peterson Urgent Care, and the medical report from the later visit indicates claimant experienced "mild pain when pulling something at work." Further, on March 18, 2011, claimant reported to Dr. Rosenow that he was lifting an extension on a hand jack when he felt a click in his back followed by low back pain that increased over several days. Thus, contrary to the employer's contention, the medical records do provide details of a work injury suffered by claimant on February 4, 2011.

¶ 39 In addition, we note that Dr. Malek concluded claimant's injury was the direct result of the February 4, 2011, work injury. The sole medical opinion disputing causation in this case was Dr. Soriano's. He testified his finding of no causation was based on (1) the incident investigation report that noted claimant denied having injured himself at work when asked by Navarro and (2) his interpretation of the nurse's report as claimant having told the nurse he had not lifted, pushed or pulled anything that would account for his pain. We note, however, that the Commission specifically found the testimony of claimant and his co-worker more credible than the testimony of Navarro. In addition, the nurse's report referred to by Dr. Soriano did not contradict claimant's description of the mechanism of the injury, but stated only, "[h]e does not have a specific moment in time."

¶ 40 Based on the above evidence, we find the Commission's determination that claimant sustained a compensable work-related injury on February 4, 2011, was not against the manifest weight of the evidence.

¶ 41 B. Propriety of Including Overtime Hours in the Calculation of Claimant's Wage

¶ 42 Last, the employer argues the Commission improperly included overtime hours in its calculation of claimant's average weekly wage. Claimant asserts his overtime hours were properly included in the calculation of his wage.

¶ 43 "In a workers' compensation case, the claimant has the burden of establishing his or her average weekly wage." *Kawa v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120469WC, ¶ 134, 991 N.E.2d 430. "The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it is against the manifest weight of the evidence." *Id.* Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. 820 ILCS 305/10 (West 2010); *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 983 (2007).

¶ 44 Despite the contentions of both the employer and claimant, neither the arbitrator nor the Commission included overtime hours in the calculation of claimant's average weekly wage. In fact, the arbitrator's decision, which was adopted and affirmed by the Commission, states, "[i]n calculating the average weekly wage, the [a]rbitrator finds that [claimant] *failed to prove that overtime should be included in the calculation.*" (Emphasis added.) The arbitrator noted, "the record is devoid of ample evidence to conclude that any time worked over 8 hours is mandatory." Accordingly, the arbitrator subtracted claimant's overtime earnings of $1,127.23

from his gross wage of $15,438.25 and divided that amount ($14,310.93) by the number of weeks he worked (25) to obtain his average weekly wage of $572.43. As such, we find this claim lacks merit.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision and remand for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 47 Affirmed and remanded.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

| | |
|---|---|
| ☐ Affirm and adopt (no changes) | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify ☐ up | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDMUNDO CORTEZ,

Petitioner,

vs.

NO: 11 WC 10211
12 WC 12147

S&C ELECTRIC,

13IWCC0650

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission clarifies the Arbitrator's award of temporary total disability benefits. The Arbitrator awarded Petitioner temporary total disability benefits for 29-6/7 weeks commencing February 15, 2011, through September 11, 2012.

We agree with the Arbitrator's award of temporary total disability benefits but find that the time period between February 15, 2011, and September 11, 2012, is 82-1/7 weeks. Petitioner is entitled to temporary total disability benefits for that time period.

**13IWCC0650**

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $381.62 per week for a period of 82-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $87,544.25 for medical expenses under §8(a) of the Act.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 0 8 2013
TJT: kg
O: 5/7/13
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

13IWCC0650

STATE OF ILLINOIS )
)SS.
COUNTY OF COOK )

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
## 19(b)

**EDMUNDO CORTEZ**
Employee/Petitioner

v.

**S & C ELECTRIC**
Employer/Respondent

Case # 11 WC 010211

Consolidated cases: 12 WC 12147

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **September 11, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

# 13IWCC0650

**FINDINGS**

On the date of accident, **2/4/11**, Respondent ***was*** operating under and subject to the provisions of the Act. The Arbitrator found no accident on 2/15/11 in case 12 WC 12147. See Decision

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

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

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

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

In the 25 weeks worked prior to the accident, Petitioner earned **$14,310.93**; the average weekly wage was **$572.43.** See Decision

On the date of accident, Petitioner was **45** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $0 for TTD, $**0.00** for TPD, $**0.00** for maintenance, and **$23,291.81** for other benefits, for a total credit of **$23,291.81.**

Respondent is entitled to a credit of $**87,544.25** under Section 8(j) of the Act in addition to the credit above for other benefits paid.

**ORDER**

Respondent shall pay for any outstanding medical bills for Petitioner's lumbar spine treatment pursuant to Section 8 and 8.2 of the Act.

Respondent shall be given a credit of $87,544.25 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $381.62 /week for 29-6/7 weeks, commencing 2/15/11 through 9/11/12.

Respondent shall be given a credit of $23,291.71 for paid short term disability and long term disability payments.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or 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

10/26/12
Date

OCT 26 2012

## FINDINGS OF FACT

Petitioner is a 46 year old native of the Philippines. He testified that he worked 6 months for Respondent S & C Electric before his accident of 2/4/11. Petitioner worked as a mechanical assembler. He testified that he worked 10 hours per day five days per week Monday through Friday. His shift began at 3:30 pm and ended at 2:00 am. T. 9-10. Petitioner testified that he worked 50 hours per week which included mandatory overtime of two hours per day. T. 11. The S & C Job Snapshot describes Petitioner's job duties and indicates that daily and weekend overtime is "required". PX P.

Petitioner assembled large stainless steel tanks and on average built three to four tanks per day. At the start of the shift Petitioner uses a crane to move the tank from the ground up onto a work table. The tank is secured to the table and then Petitioner begins the assembly process. T. 17. Petitioner testified that on Friday, 2/4/11, he finished assembling a tank and was using a hand jack to pick up a pallet holding return material. Petitioner testified that he used a hand jack with a steel extension handle and a forklift tongue. T. 19. In order to slide the hand jack under the pallet Petitioner testified that he had to bend and lift the steel extension bar. He testified that when he pulled up the extension bar he felt a "click" in his back. T. 20. Petitioner immediately felt pain in his left lower back. T. 21. Petitioner testified that a co-worker asked if he was okay and he said the he had a click in his back and that he kept working through the pain. T. 21.

Petitioner's co-worker, Mr. Koffi Kongo, signed an affidavit and gave a deposition. At the deposition, Mr. Kongo testified that on 2/4/11, he saw Petitioner grab his low back in pain after pulling a skid using a hand jack. PX A, p. 20,44,49. Petitioner told him he felt a pop in his back. PX A, p. 25-26.

Petitioner returned to work the following Monday 2/7/11. He spent the weekend lying on the couch at home with a heating pad on his back and taking Advil for pain. T. 23. While at work on Monday, Petitioner noticed the pain in his back would increase while bending, pulling or lifting heavy tools. T. 24. Petitioner testified that he was required to stand while assembling the tanks and that he was told as a new probationary employee that he was not to sit down while assembling. Standing and bending while assembling caused increased pain in Petitioner's back. T. 28. By Wednesday 2/9/11, Petitioner noticed pain going down his left leg. T. 30. Over the next weekend Petitioner's back pain continued to worsen and on Monday 2/14/11, Petitioner returned to work. T. 33.

Petitioner testified that on Monday 2/14/11, he spoke with his supervisor Robert Navarro and advised him that he had back pain and that he might be sitting down to do his work. T. 34. On 2/14/11, Petitioner noticed that his back pain worsened and that the pain was "really going" into the left leg and that it was difficult to walk. T. 34. On 2/15/11, Petitioner told Mr. Navarro that his back was worse and Mr. Navarro sent Petitioner first to the supervisor Jim Wilson and then to the nurse. Petitioner testified that he spoke with Jim on 2/15/11 and told him that he was going

to the nurse for back pain and that Jim told him "this is not work-related in a threatening manner." T. 35. Petitioner testified that he was scared due to the fact that he was still under a probationary period. T. 35. Petitioner testified that he saw the nurse on 2/15/11 and told her that he wasn't sure "if it happened in my work or I don't know. I just said like that." T. 35. He reported the pain running from his back down his left leg. Petitioner testified that he was afraid to report a work injury because he was afraid of "...Jim and my job" and that he "...might lose my job." T. 36. The nurse, Janice McLeran testified that on 2/15/11, Petitioner complained of back pain radiating down his leg and that Petitioner told her he "was sure it was work related because somebody else in his department had the same symptoms." She did not ask him if he had a specific time or date regarding the injury. T. 169. Finally, she testified that Petitioner never reported injuring his back while using a hand jack. T. 170.

Mr. Navarro testified that Petitioner reported to him. T. 144. He further testified that he observed Petitioner in pain on 2/15/11 and asked Petitioner if he could help him with anything. Mr. Navarro testified that Petitioner told him his back and legs hurt and that he was having difficulty standing. T. 153. Mr. Navarro testified that he told Petitioner to see the nurse but that Petitioner was "reluctant" at first and explained that he "used to get that pain when he used to work at a liquor store. The pain used to go off and on." T. 153. Jim Wilson testified that when he first met with Petitioner to complete the accident report written on 2/15/11 (and approved on 2/24/11) Petitioner denied injuring himself at work and that he denied a work injury to Mr. Navarro as well. T. 112, 124. Mr. Wilson denies threatening Petitioner and telling Petitioner that his accident did not happen at work. T. 113. Finally, he agreed that prior to 2/4/11, Petitioner performed at a very good level and that he made no prior complaints of back problems. T. 119.

An incident report was generated by the report of a non-specific work injury to the nurse and Mr. Wilson testified that he and Mr. Navarro met with Petitioner on 2/15/11 to complete the report. RX 1. RX 1 reads "...When asked by his team leader if he had injured himself here at work he said no. He told Health Services that he had not lifted, pushed or pulled anything that would account for the pain but he felt it was work related because the employee on the first shift had similar complaints...Based on Edmundo's responses to all inquiries I do not believe that the injury occurred at S&C." RX 1.

On 2/15/11, Petitioner was given a note at Health Services to go to the Peterson Clinic that night. T. 36. Petitioner reported pain radiating to the left leg and a shooting pain when sneezing or cough at 10/10 pain level. Petitioner reported that the pain was worsening every day. He was prescribed pain medication and told to use a heating pad and to get an MRI if the pain was not relieved. Petitioner reported "unknown injury" and "mild pain when pulling something at work 4 weeks ago." PX F.

On 2/17/11, Petitioner reported to his primary doctor, Dr. Sara Brown. Dr. Brown testified that Petitioner reported severe low back pain shooting down his left leg. Petitioner initially denied a

work injury but then reported that he thought the injury happened at work. PX B, p. 12. Dr. Brown noted "Pain has been about 3 weeks maybe more. No trauma or injury. Believes injury may have occurred at work. Performs a lot of walking, bending, pushing forces on the job." PX C. Dr. Brown placed Petitioner on restricted duty and ordered an MRI which revealed a severe disk herniation at the L5-S1 level with impingement on the S1 nerve root. PX B, p. 16, PX C. Dr. Brown opined that the disk herniation was consistent with a traumatic event due to the severity of the extrusion of the disk. PX B, p. 18. Dr. Brown referred Petitioner to Dr. Walega, a spine specialist, for additional care.

Petitioner saw Dr. Walega who administered an S1 epidural injection on 3/8/11 which provided 2 days of temporary relief. Thereafter, Dr. Walega sent Petitioner to Dr. Rosenow on 3/18/11 for a discectomy. PX C. On 3/18/11, Dr. Rosenow noted "lifted something very heavy (hand jack extension of at least 50 lbs) at work in February and felt a click in his back with new onset of LLE radicular pain increasing over several days." PX H. Based on the large herniated disk at L5-S1 and the failed conservative treatment, Dr. Rosenow performed a left L5-S1 Laminotomy and Microdiskectomy to repair the large herniated disk. PX H.

Petitioner returned to Dr. Rosenow on April 26, 2012 at which time Dr. Rosenow noted that Petitioner was almost 5 weeks post discectomy for a "massive" herniated disc. PX H. Petitioner had continued complaints of lumbar pain and buttock pain with onset of severe headaches. He was diagnosed with a cerebrospinal fluid leak and was sent for an MRI performed on May 4th, 2011 confirming the leak. The MRI also confirmed persistent dorsal displacement of the traversing left S1 nerve root. PX H. On May 6th, 2011, Petitioner underwent a second surgery at Northwestern Memorial Hospital to repair the cerebrospinal fluid leak and dural tear, insertion of lumbar spinal fluid drain and repair of recurrent lumbar herniated disk. PX I, PX E. Petitioner remained admitted in Northwestern Memorial Hospital until he received a blood patch on May 13th, 2011 and was discharged after nine days on May 15th, 2011. PX I.

On July 19th, 2011 Petitioner began a physical therapy program at Rehabilitation and Pain Management. Dr. Rosenow referred Petitioner for physical therapy, work hardening and an FCE. Petitioner had continued complaints of pain in his back at a level of 7/10 and in his leg at a level of 4/10 at rest. PX J. Petitioner did not show improvement in physical therapy and did not meet the medium duty demands of his job after the FCE of October 24, 2011. PX J, PX L.

On August 4th, 2011, Petitioner went to neurosurgeon, Dr. Malek. PX E. Petitioner complained of persistent headaches, back pain and weakness, pain, numbness and tingling radiating down the left lower extremity. Petitioner complained of being incapacitated by the pain with the leg pain bothering him more than the back pain. Dr. Malek referred Petitioner for a lumbar MRI and an EMG. PX E. On August 10th, 2011, Petitioner returned to Dr. Malek with the results of the MRI and EMG. The MRI confirmed post operative changes at L5-S1 and retrolisthesis of L5 on S1 with no evidence of recurrent disc herniation. The EMG indicated bilateral S1 radiculopathy. Dr. Malek offered two options; living with the symptoms or consideration of a lumbar fusion at

L5-S1 to resolve the mechanical instability. PX E, PX D, p. 21. Short of undergoing the lumbar fusion and physical therapy, Dr. Malek confirmed Petitioner had reached MMI as of August 10th, 2011. PX E. Petitioner saw Dr. Malek one more time on September 1, 2011 at which time Dr. Malek's recommendations remained the same. Petitioner has not undergone a lumbar fusion or any surgical procedures after September 1, 2011. T. 45. Petitioner has not been returned to work. PX D, p. 25.

Dr. Malek testified that in his opinion, Petitioner's herniated disk is causally related to the work accident of 2/4/11 and his condition progressed from low back pain to radiating leg pain as a result of his continuous work thereafter. PX D, p. 15-18.

Dr. Soriano performed a Section 12 examination of Petitioner on August 8, 2011. RX 7. Following his exam, he diagnosed Petitioner as status post herniated disk at L5-S1. RX 7, p. 12. Dr. Soriano testified that in his opinion, Petitioner's disk herniation was not the result of any work related accident as described by Petitioner stating that his opinion was "based on his history and based upon the records that I reviewed." PX 7. P. 13. Dr. Soriano's opinion is based on Petitioner's denial of a work accident in the incident report of 2/15/11, and the lack of a specific work accident involving pushing, pulling or lifting to account for his pain as reported to the nurse. RX 7, p. 14. He felt Petitioner's prognosis was good and that after more work hardening he could return to normal work. RX 7, p. 16. At his deposition, Dr. Soriano was shown the August MRI and EMG. He testified that the MRI confirms retrolisthesis at L5-S1 without nerve root compression and that the EMG shows S1 radiculopathies that in his opinion have no "medical or physiological relationship to the retrolisthesis." RX 7, p. 53. Furthermore, Dr. Soriano's exam of Petitioner one day before the MRI and EMG were performed did not reveal evidence of an S1 radiculopathy and did not reveal signs or symptoms to support a finding of retrolisthesis. RX 7, p. 62.

Since August 2011, Petitioner takes over the counter pain medication and uses hot packs. Petitioner continues to have pain in his low back with radiating pain and numbness down the left leg. T. 47. Ordinary movement such as bending, pulling or picking something off the floor aggravates his low back pain. T. 47. Again, Petitioner testified that at his August 2011 visit with Dr. Malek, Dr. Malek told him to "have a lumbar fusion." Petitioner has not had the surgery. When asked why he responded, "He cannot give me assurance that the outcome was really perfect. Besides, I was really scared about my previous surgery already." T. 45. On an average day Petitioner is at home. He testified, "I lay on the couch or sometimes I need to stand. Because as I said, if I get only one position for at least 30 or more minutes, it is really painful. That is why I need to change my position every now and then."

On the issue of overtime, James Wilson testified that overtime is "sometimes" mandatory. Mr. Wilson explained that overtime is necessary when a customer demand must be met. He first asks for volunteers. If he does not get any or enough volunteers then he assigns the overtime. T. 103. Robert Navarro testified that "obviously, if the demand is there, we have mandatory overtime..."

if no one volunteers to work the overtime. T. 145. Both men testified to regular 8 hour work shifts that become 10 hour shifts if overtime is available. T. 164. Finally, Koffi Kongo testified that he is scheduled to work a 10 hour shift and that he can't leave after eight hours. However, he also testified that some workers refuse the overtime and that sometimes he works an 8 hour shift and sometimes he works a 10 hour shift. T. 12-13, 33.

Petitioner's pay stubs were admitted at PX O. There is no question that Petitioner worked 25 weeks for Respondent prior to his injury. PX O and RX 2 present the same spread sheet of numbers representing Petitioner's gross wage and overtime wage earned during the 25 week period.

## CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

**C. D. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? What was the date of the accident?**

Petitioner credibly testified that he did not have any prior back pain or problems prior to 2/4/11. On 2/4/11, Petitioner was at work performing his duties as an assembler. Petitioner credibly testified that he was using a hand jack to move materials when he felt a click in his back and immediate pain in his low back. Petitioner's testimony of an injury to his back was buttressed by the testimony of his co-worker Koffi Kongo who testified that he saw Petitioner using the hand jack and then grab his low back in pain. Mr. Kongo further testified that when he asked Petitioner what happened Petitioner told him that he hurt his back.

Petitioner credibly testified that his pain continued to worsen and by Wednesday 2/9/11, Petitioner noticed pain going down his left leg. T. 30. Over the next weekend Petitioner's back pain continued to worsen and on Monday 2/14/11, Petitioner returned to work where he continued to work through the pain which was made worse by Petitioner's assembly duties. T. 28-33. On 2/15/11, Petitioner reported his pain to Mr. Navarro, Mr. Wilson and to the nurse. Petitioner credibly testified that he was afraid to report that he had a work injury to any of these individuals in that he was still under a probationary work period. Instead, Petitioner reported to the nurse that he suffered a work injury similar to another employee. That reference of a work accident was enough for the nurse to indicate that an incident report be prepared. Mr. Wilson and Mr. Navarro prepared the report on 2/15/11 indicating a belief that no work accident had been suffered as Petitioner failed to provide a specific work incident.

Petitioner began his medical care for his back and leg pain on 2/15/11. At Petersen Clinic Petitioner reported that he had mild pain after pulling something at work 4 weeks earlier. On 2/17/11, Petitioner reported severe low back pain shooting down his left leg. Petitioner initially denied a work injury but then reported that he thought the injury happened at work. PX B, p. 12. In her records, Dr. Brown noted "Pain has been about 3 weeks maybe more. No trauma or

injury. Believes injury may have occurred at work. Performs a lot of walking, bending, pushing forces on the job." PX C. Dr. Brown placed Petitioner on restricted duty and ordered an MRI which revealed a severe disk herniation at the L5-S1 level with impingement on the S1 nerve root. PX B, p. 16, PX C. Petitioner was referred to Dr. Rosenow for surgery and on 3/18/11, Dr. Rosenow noted that Petitioner "lifted something very heavy (hand jack extension of at least 50 lbs) at work in February and felt a click in his back with new onset of LLE radicular pain increasing over several days." PX H.

In finding accident on 2/4/11, the Arbitrator places greater weight on the credible testimony of Petitioner and his co-worker and on the work accident reference recorded by Peterson Clinic and Dr. Brown than on the testimony of Mr. Wilson, Mr. Navarro and the nurse. Petitioner's credibly testimony of accident and injury is further buttressed by the chronology of events which evidence the immediate development of pain and radiating leg pain followed by a surgery to address a large disk herniation almost immediately after the start of Petitioner's care. Finally, the record is devoid of any credible evidence to suggest that Petitioner suffered any back problems prior to this accident.

Based on the foregoing, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on 2/4/11. The Arbitrator notes that Petitioner's last day worked was on 2/15/11 but that the accident in which Petitioner sustained injury occurred on 2/4/11 and that no accident or further aggravation is attributed to the date of 2/15/11.

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

The Arbitrator finds that Petitioner sustained a herniated disk at L5-S1 and that his condition of ill-being is causally related to the accident of 2/4/11. Again, there is no evidence to suggest that Petitioner suffered any prior back injury or problem. He was asymptomatic when he arrived at work on 2/4/11. His supervisors testified that he was a good worker without indication of any physical limitations prior to 2/4/11. Petitioner credibly testified that he noticed immediate low back pain after the accident and that the pain worsened in the subsequent days. Petitioner noticed radiating left leg pain as of 2/9/11. He received initial and consistent care for a diagnosed disk herniation including surgery to repair that condition on 3/21/11. The chronology of events presented by the evidence at trial supports a finding of causal connection between Petitioner's disk herniation and the accident of 2/4/11.

A finding of causal connection is further supported by the opinions of Dr. Brown and Dr. Malek who each opined that Petitioner's disk herniation was the result of a work related trauma based on the reports of Petitioner, the chronology of events, a lack of prior history of back injury and on the size of the herniation. In so finding, the Arbitrator places greater weight on the opinions of these physicians than on the opinion of Dr. Soriano which is based primarily on his conclusion that Petitioner failed to report a work related accident. The Arbitrator also notes that Dr. Soriano takes no issue with the original diagnosis of a disk herniation or with the care received.

Accordingly the Arbitrator finds that Petitioners' continued condition of ill-being through the date of hearing is causally related to the accident.

Finally, in finding causal connection for Petitioner's condition of ill-being through the date of the 19(b) hearing, the Arbitrator further notes Dr. Malek's August 2011 conclusion that short of undergoing the recommended lumbar fusion and physical therapy, Petitioner had reached MMI. PX E. This matter was tried under Section 19(b) and this decision is rendered in accordance with that Section in that the Arbitrator is not finding Petitioner to be at MMI at present. However, based on the conclusion of Dr. Malek rendered in August 2011, Petitioner must decide whether to pursue the surgery and proceed accordingly.

**G. What were the Petitioner's earnings?**

There is no question that Petitioner worked 25 weeks for Respondent prior to his injury. PX O and RX 2 present the same spread sheet of numbers representing Petitioner's gross wage and overtime wage earned during the 25 week period. PX O and RX 2 present the best evidence on the issue of Petitioner's wages –both regular and overtime- earned during the 25 week period worked.

In calculating the average weekly wage, the Arbitrator finds that Petitioner failed to prove that overtime should be included in the calculation. In short, all witnesses testified to a scheduled 8 hour work day for a 40 hour work week. In addition, the records submitted by both parties indicate that Petitioner worked more than 40 hours per week almost all of the 25 weeks worked. However, the record is devoid of ample evidence to conclude that any time worked over 8 hours is mandatory. Rather, based on the testimony of Respondent's witnesses as well as Mr. Kongo, overtime is only mandatory if no one volunteers and that workers always volunteer to work the overtime.

Using the gross wage of $15,438.25 minus the overtime earnings of $1,127.32 leaves a total earnings of $14,310.93/25 weeks equals an average weekly wage of $572.43. PX O, RX 2, ARB EX 1. This is also the average weekly wage listed by Petitioner on ARB EX 1. The Arbitrator notes that Respondent also relies on RX 2 to offer an average weekly wage without overtime. However, the Arbitrator finds that the "gross less O/T total" of $12,055.99 listed on RX 2 and used by Respondent in offering an average weekly wage does not comport with the figures listed above which were also taken from RX 2. No explanation of the contradictions in PX O/RX 2 was offered by either party although it was relied on by both parties in offering an average weekly wage figure.

**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?**

Respondent's objection to the medical care received was based on liability. Accordingly, based on the findings of accident and causal connection, the Arbitrator further finds that Respondent is to pay the reasonable and necessary medical expenses of Petitioner incurred in connection with the care and treatment of Petitioner's condition. Respondent shall receive a credit for all amounts paid under Section 8(j) of the Act.

**L. What temporary benefits are in dispute? TTD**

Based on the findings of accident and causal connection for Petitioner's condition of ill-being, the Arbitrator finds that Petitioner is entitled to temporary total disability for a period of 29-6/7 weeks commencing 2/15/11 through 9/11/12, pursuant to Section 8(b) of the Act. Respondent shall receive credit for all amounts paid.

**Illinois Official Reports**

**Appellate Court**



***City of Bridgeport v. Illinois Workers' Compensation Comm'n*,**
**2015 IL App (5th) 140532WC**

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| Appellate Court Caption | THE CITY OF BRIDGEPORT, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Stephen Harvey, Appellee). |
| District & No. | Fifth District<br>Docket No. 5-14-0532WC |
| Filed | December 10, 2015 |
| Decision Under Review | Appeal from the Circuit Court of Crawford County, No. 13-MR-28; the Hon. Mark L. Shaner, Judge, presiding. |
| Judgment | Affirmed. |
| Counsel on Appeal | R. Mark Cosimini, of Rusin & Maciorowski, Ltd., of Champaign, for appellant.<br><br>J. Robert Edmonds, of Edmonds Law Office, P.C., of Edwardsville, for appellee. |

Panel

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

Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.

Presiding Justice Holdridge specially concurred, with opinion.

## OPINION

¶ 1 The claimant, Stephen Harvey, filed an application for adjustment of claim against the City of Bridgeport (City), seeking workers' compensation benefits for the death of his wife, Jacqueline Harvey (decedent), in an alleged work accident on May 19, 2011. The claim proceeded to an arbitration hearing under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). The arbitrator found that an employee-employer relationship did not exist between the decedent and the City and that the decedent did not sustain an accident that arose out of and in the course of her employment. The claimant appealed to the Illinois Workers' Compensation Commission (Commission). The Commission reversed the arbitrator's decision, finding that an employee-employer relationship did exist between the decedent and the City and that the decedent's accident arose out of and in the course of her employment. It ordered the employer to pay $2,069.25 for medical expenses, $8,000 for burial expenses, and $466.13 per week for 25 years or $500,000. The City filed a timely petition for review in the circuit court of Crawford County, which confirmed the Commission's decision. The City appeals.

¶ 2 BACKGROUND

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing on July 13, 2012.

¶ 4 The decedent starting working for the City as a water meter reader in March 2011. On the morning of May 19, 2011, she reported to city hall to retrieve her water meter reading equipment. This was the first month she was going to read the meters without a City employee accompanying her for training. While in the process of reading a water meter near the residence of Jeffrey and Vivian Perry, the decedent suffered a seizure, fell facedown in standing water about eight inches deep, and drowned. The claimant testified that the decedent had a seizure disorder and suffered from grand mal seizures.

¶ 5 Jeffrey and Vivian Perry testified by evidence deposition. Mr. Perry testified that, at about 9:45 a.m., he saw a car stopped in the road. He called Mrs. Perry to see if she knew whose car it was. The car was running, and the decedent's purse and a metal booklet that he believed was "the meter reader's book" were inside. Mrs. Perry, a registered nurse, testified they called out a few times and no one answered, so she telephoned the water department to see if a meter reader was near their house. She spoke to Jeannie Darnell, who confirmed that the decedent was in their area reading meters. While they were on the phone, Mr. Perry discovered the decedent. Mr. Perry testified that he saw the decedent facedown in the water about 1 to 1½ feet from the water meter. Mrs. Perry stated she told Ms. Darnell to send an ambulance. Mr. Perry picked the decedent up out of the water and started cardiopulmonary resuscitation (CPR). Mrs. Perry

testified that Mr. Perry started compressions and that she called the police. Mr. Perry stated that they did not detect any signs of life. They continued CPR until the ambulance arrived. The decedent was taken to the hospital, where she was declared dead.

¶ 6 Sheriff Russell Adams testified by evidence deposition. He investigated the decedent's death. He stated that he was called at 10:03 a.m. on May 19, 2011, and informed that there was a "body down at Low Water Bridge." He responded to the call and led the ambulance to the scene. He stated that a meter reader wand was found on the west side of the meter in the water.

¶ 7 Coroner Shannon Steffey testified by evidence deposition. She stated that Sheriff Adams contacted her to report that a woman had been found unresponsive in water in a rural area. She testified that, based on her investigation, the decedent was trying to read a water meter when she died. The coroner's report was admitted into evidence. Coroner Steffey wrote that the meter is in a rural setting and is located at an elevation approximately two feet lower than the road. Six to eight inches of water surrounded the meter. The cause of death was drowning due to clinical seizure.

¶ 8 Forensic pathologist Dr. John Allen Heidingsfelder testified by evidence deposition that he performed the autopsy on the decedent. He opined that the decedent had a clinical seizure while performing her work activities at a location near standing water, fell into the water, and drowned.

¶ 9 Stephen Boatman, the City's water department superintendent, testified about the job duties of a water meter reader. He testified that a water meter reader approaches each water meter with the electronic reader wand and touches the meter, which generates electronic information to the wand that is used to record the volume of water used. The City has approximately 1,200 customers with water meters, and the water meter reader must physically go to each water meter and read the usage on a monthly basis.

¶ 10 Mr. Boatman testified that part of the City's business involves providing water service to its customers who pay to use the water. The City determines how much to charge each customer based on the volume of water used. The volume of water used is calculated based on a water meter reading.

¶ 11 Mr. Boatman testified that the decedent and the other applicants for the water meter reader job filled out the same application as all City employees. Sara Sechrest, the City clerk, and Max Schauf, the City mayor, testified by evidence deposition and stated the same thing. Mr. Boatman stated that he was not on the hiring committee but that he participated in interviewing the decedent and the five other candidates for the water meter reader job. He testified that the hiring committee intended to hire an independent contractor to read the water meters. He admitted that some contractors hired by the City do not fill out the job application completed by the decedent. Ms. Sechrest testified that at one time City water department employees read the meters but that the City started a water mainline project, and the water department employees no longer had time to read the meters. The City decided to hire a contract meter reader and prepared a contract meter reader job description. Victoria Ralston, a City water clerk, testified that the City prepared the contract water meter reader document after it started the $3 million water fill project laying waterline and realized City workers did not have time to read the meters. Mayor Schauf testified that the City intended to hire the decedent as an independent contractor as opposed to an employee to save time and money. Ms. Sechrest testified that neither the City employees nor the decedent had a contract with the City.

¶ 12 Mr. Boatman testified that a member of the city council prepared a job description for a contract water meter reader for the City. A copy of the contract water meter reader job description was admitted into evidence. It states that the City will provide the water reading equipment and a vest for the meter reader but will not provide transportation. Pursuant to the description, the meter reader is expected to dress presentably; be personable and able to work with angry or difficult customers; read meters on route, record readings, and make the necessary calculations; read the meters between the twentieth and twenty-sixth of each month; be trained by qualified City water department personnel; identify water meter equipment problems and report defects to city hall; report violations of rules and regulations governing water consumption; maintain assigned tools and equipment; and if driving the route must provide the City with driver's license and insurance information. The description stated that the City was not liable for any property damage, personal injury, or accidents.

¶ 13 Mr. Boatman testified that the decedent was paid monthly and that City full-time and part-time employees are paid every two weeks. Full- and part-time employees have taxes withheld from their paychecks. Full-time City employees receive benefits, while part-time employees do not receive benefits. Ms. Sechrest testified that full-time City employees have state and federal taxes, social security, retirement pay, and any elected insurance deducted from their paychecks. She stated that the decedent was paid monthly with no taxes or benefits subtracted from her paycheck. The decedent was not entitled to any of the benefits the full-time City employees received.

¶ 14 Mr. Boatman testified that the City provided the decedent with a meter reading wand, a vest, and route books. The books were a set of metal-backed notebooks that described the locations of the water meters and provided a suggested route of meters located in close proximity to each other. He stated that, generally, the meter reader followed the suggested route but could read meters in any order she chose. The meters must be read between the twentieth and twenty-sixth of each month to maintain consistency in the billing. The decedent was authorized to start reading meters on the nineteenth to accommodate her other job. The decedent could set her own schedule so long as she read all the meters during daytime hours and within the allotted time frame. The decedent was not permitted to estimate usage. Mr. Boatman testified that a meter reader could travel the route by car, bike, on foot, or in whatever manner she chose.

¶ 15 Mr. Boatman testified that the City owned the water meter wand and attached computer. The equipment required special rechargeable batteries. The decedent went to city hall to get the batteries and to recharge them. He stated that the decedent would need permission to take the equipment home.

¶ 16 Ms. Sechrest testified that the decedent typically picked up her equipment in the morning and returned it in the evening. The wand was only to be used to read the City's water meters. If the decedent damaged the wand she was to take it to the City for repairs.

¶ 17 Mr. Boatman testified that Tom Perrin trained the decedent. Ms. Ralston testified that she and Ms. Sechrest also helped train the decedent. Mr. Boatman stated that in March and April 2011, a City employee accompanied the decedent on her route and that May 19, 2011, was the first time she had covered the route alone. Her training involved showing her the location of the water meters and teaching her how to use the wand. Mr. Boatman testified that reading a water meter does not require a high skill level. He stated that a person could be trained to read

a water meter in "thirty seconds." There is no license or certificate required to read a meter. The hardest part of the job is finding the meter.

¶ 18 Mr. Boatman testified that, to the best of his knowledge, there was no written contract between the decedent and the City. The city council voted to hire the decedent, and her termination required a vote by the city council. The decedent could quit or be terminated without reason at any time. Mr. Boatman testified that the City gives full-time employees an employee manual, which describes the disciplinary process. The employee manual was admitted into evidence. Employee discipline consists of a verbal warning issued by the city council personnel committee and the department head, a written warning given by the city council personnel committee and the department head, and termination by the written ballot majority vote of the city council. Mr. Boatman and Mayor Schauf admitted that City employees are at-will employees and can be terminated at will without following the policy set forth in the manual. Ms. Sechrest admitted that the job application specifies that, if hired, the employee will be an at-will employee, and there is no contractual document that guarantees the employee the right to go through the disciplinary process.

¶ 19 Mr. Boatman testified that the decedent was expected to contact him or city hall if she had a problem reading meters, if she was involved in an accident while working, if she damaged a customer's property, if she had a confrontation with a customer, or if she saw a customer illegally tapping into the water supply. She was expected to read all the meters and could not opt to be paid for only the meters she chose to read. Mr. Boatman stated that, if asked, the decedent was expected to recheck a meter.

¶ 20 The minutes from the special city council meeting on February 16, 2011, were admitted into evidence. The following discussion about the hiring of a water meter reader took place:

> "Pam asked that we start with the water meter reader. Darlene spoke on behalf of the personnel committee; the committee had interviewed 6 people for the water meter reader position. The committee recommends that we hire [the decedent]; she was the most qualified and the one most familiar with the equipment. Pam wanted to know if she was familiar with all of the meters that did not work and would not get fixed. Ed made a motion to hire [the decedent] for 450.00 a month, seconded by Kay, all approve."

¶ 21 Ms. Sechrest testified that the City provides water to its citizens who are its customers and charges them for the water based on the volume of water used during a period of time. The decedent was required to read all the meters during daylight hours during the allotted time frame dictated by the City, and she could not read them at another time of the month or just choose to read the easy meters and skip the others. If the decedent was unable to read all the meters in the allotted time frame or if she wanted to read the meters before the nineteenth of the month, she had to contact the City.

¶ 22 Mayor Schauf concurred that the meters must be read during the allotted time frame and that the decedent could not change the time frame. Changes to the time frame would have been at the City's discretion. The decedent was expected to read all the meters and could not pick and choose which ones to read.

¶ 23 Ms. Ralston testified that if a customer had a problem with a bill, the decedent could not take care of it, and that the customer would have to contact the City. If a customer complained that the meter reading was incorrect, Ms. Ralston would compile a list of meters to be

rechecked. If it was the week the decedent was working, Ms. Ralston would give the list to her to recheck the meters.

¶ 24 Mr. Boatman testified that the City excavated the area where the accident occurred in order to install the water meter. It is located off the lease road in a low-lying area of the woods, which floods when it rains. He stated that the decedent was required to step off the road into the woods and walk over to the water meter to get close enough to read it with the wand. He testified that there would be no reason for a person to be in that area except to read the water meter. Mayor Schauf stated that on the day of the accident, he went to the accident site. He said that the water meter was located in a low-lying area along the lease road and that it "had a hole around it." He testified that the area fills with water whenever it rains. Ms. Ralston testified that the area where the accident occurred is low lying and that it floods with rainfall.

¶ 25 The arbitrator held that an employee-employer relationship did not exist between the decedent and the City. He further held that the decedent did not sustain an accident that arose out of and in the course of her employment.

¶ 26 The claimant sought review of this decision before the Commission, which reversed the arbitrator's decision. It found that the decedent was an employee of the City. It found that the factors most illustrative of this relationship were the City's directing the decedent to read the water meters only during a one-week period each month during daylight hours, the intersection between her job duties and the City's business interests, and the similar manner in which the decedent and recognized City employees could have their employment terminated. It held that there was not one single factor that definitively favored the City's position that the decedent was an independent contractor. The Commission found that the decedent's accident arose out of and in the course of her having to work in conditions that included an eight-inch pool of rainwater, a hazard it found was not confronted by the general public. The Commission ordered the City to pay the claimant $2,069.25 for medical expenses and $8,000 for burial expenses. It further ordered the City to pay the claimant the greater of the sum of $466.13 per week commencing May 19, 2011, for 25 years or $500,000. One commissioner dissented.

¶ 27 The City sought judicial review of the Commission's decision in the circuit court of Crawford County, which confirmed the Commission's decision. The City now appeals. We affirm.

¶ 28 ANALYSIS

¶ 29 The City argues that the Commission's determination that an employee-employer relationship existed between the decedent and the City was against the manifest weight of the evidence. It is a "well-settled legal principle that proof of an employer-employee relationship at the time of an accident is an essential element of any action for an award under the Act." *Skzubel v. Illinois Workers' Compensation Comm'n*, 401 Ill. App. 3d 263, 266, 927 N.E.2d 1247, 1250 (2010). The question of whether an employment relationship existed at the time of the accident is one of fact. *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 29, 981 N.E.2d 14. Accordingly, this court will disturb the Commission's resolution of that issue only if it is against the manifest weight of the evidence. *Id.* A finding of fact is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Id.*

¶ 30 No rigid rule of law exists to determine whether a worker is an employee or an independent contractor. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122, 743 N.E.2d 579, 583 (2000). Whether a person is an employee is a vexatious question. *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174, 866 N.E.2d 191, 200 (2007). "The difficulty arises not from the complexity of the applicable legal rules, but from the fact-specific nature of the inquiry." *Id.* "When elements of both the relationship of employee and of independent contractor are present and the facts permit an inference either way, the Commission alone is empowered to draw the inferences, and its decision as to the weight of the evidence will not be disturbed on review." *Young America Realty v. Industrial Comm'n*, 199 Ill. App. 3d 185, 188, 556 N.E.2d 796, 798 (1990).

¶ 31 No rule has been, or could be, adopted to govern all the cases where the court must determine whether an individual is an employee or an independent contractor. *Roberson*, 225 Ill. 2d at 174-75, 866 N.E.2d at 200. Instead, the court considers whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; whether the employer supplies the person with material and equipment; and whether the employer's general business encompasses the person's work. *Id.* at 175, 866 N.E.2d at 200. The court also considers the skill the work requires. *Labuz*, 2012 IL App (1st) 113007WC, ¶ 30, 981 N.E.2d 14. No single factor is determinative, and the determination rests on the totality of the circumstances. *Roberson*, 225 Ill. 2d at 175, 866 N.E.2d at 200.

¶ 32 The single most important factor to consider in determining whether a person is an employee is whether the purported employer has a right to control the person's actions. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. The City argues that it did not control the decedent's work activities. It contends that it did not control the hours, days, or method in which she performed her tasks. She was free to work any days between the twentieth and twenty-sixth of each month, she could read the meters in whatever order she chose, and she was free to report to work and leave when she wanted.

¶ 33 The Commission found that the decedent had some flexibility with respect to how and when she performed her duties. However, she had to read all 1,200 water meters during an allotted time frame and during daylight hours. Ms. Sechrest testified that if the decedent wanted to change the time frame to read the meters or if she was unable to read all the meters, she had to contact the City. Mayor Schauf testified that the meters had to be read during the allotted time frame and that the decedent could not alter the time frame without the City's permission. Mr. Boatman testified that the decedent was to contact him or city hall if she had a problem reading the meters, if she was involved in an accident while working, if she damaged a customer's property, if she had a confrontation with a customer, or if she saw a customer illegally tapping into the water supply. He and Ms. Ralston testified that, at the City's request, the decedent may have to recheck a water meter. The Commission found that the City controlled the decedent's actions. There is evidence in the record to support such a determination.

¶ 34 The City argues that the decedent "was mostly responsible for providing equipment." It asserted that "the main equipment [the decedent] needed was transportation, which she provided on her own." She was responsible for her own transportation, but this was not the

only piece of equipment she needed. To read the electronic water meters, a special wand was needed. The City supplied the decedent with the needed meter reader wand, electrical cord, computer attachment, batteries, and special chargers. The batteries are unique to the devices and not commonly available. The battery charger was kept at city hall. The decedent returned the batteries to city hall each day to switch with a charged set. Ms. Sechrest testified that if the decedent damaged the wand, she was to return it to the City for repairs. Mr. Boatman testified that the decedent would need permission to take the equipment home. Additionally, the City provided the decedent with route books that listed suggested routes and the specific location of water meters. The Commission found that "both parties supplied needed instrumentalities as [the City] supplied the equipment necessary to read and record the meter readings and [d]ecedent suppl[ied] the mode of transportation."

¶ 35 The City argues that the fact that it could discharge the decedent at will, the fact that she did not have taxes withheld from her paycheck, and the fact that she did not receive the same benefits as its other employees indicate she was an independent contractor. The Commission found that the fact that the decedent was paid once per month rather than twice per month was most likely the result of her seven-days-per-month work schedule. It concluded that the decedent simply was on a different pay schedule than the City's other employees. The Commission noted that neither the decedent nor part-time City employees were entitled to benefits. It found that "given this shared denial of benefits, the only divergence with respect to compensation found between [d]ecedent and at least [the City's] part-time employees, and presumptively its full-time employees, is that [d]ecedent was paid without having income taxes or FICA withheld from her paycheck." Whether income tax is withheld has not been found to be a significant factor in determining whether a party is an employee or an independent contractor. *Id.* at 1127, 743 N.E.2d at 586.

¶ 36 The City considered the decedent's employment to be at will. The procedure for terminating her, like other City employees, required a vote by the city council. The City argues that its employees had greater protection because the employee policy manual contained a three-step disciplinary process to be followed prior to termination. However, Mr. Boatman and Mayor Schauf testified that City employees are at-will employees and can be terminated without following the policy set forth in the manual. In addition, Ms. Sechrest testified that the job application completed by City employees specifies that, if hired, the employee will be an at-will employee and that there is no contractual document that guaranteed the employee the right to go through the disciplinary process. Based on the evidence, the decedent's at-will status was consistent with that of other City employees. This factor points to an employee-employer relationship.

¶ 37 The lack of specialized skill required to perform a job is indicative of an employee-employer relationship. *Skzubel*, 401 Ill. App. 3d at 268, 927 N.E.2d at 1251. The job of water meter reader required no license, certificate, or specialized skill. Mr. Boatman testified that a person could be trained to read a water meter in "thirty seconds" and that the hardest part of the job was locating the meters. The fact that the water meter reader position was an unskilled position supports the Commission's finding that the decedent was a City employee.

¶ 38 Another factor of great significance is the nature of the work performed by the alleged employee in relation to the general business of the employer. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. "[B]ecause the theory of workmen's compensation legislation is that the

cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71, 442 N.E.2d 903, 905 (1982). One of the City's functions involves providing water service to its customers who pay to use the water. The decedent's job was to record the water usage rates of the City's customers to ensure that the City had an accurate record of its customers' water consumption for billing purposes. Her job duties also entailed reporting malfunctioning water department equipment and violations of rules and regulations governing water consumption. The decedent's services in reading meters formed a regular part of the cost of the City's business of supplying water to its residents, and her work did not constitute a separate business distinct from that of the City. The Commission found that, in performing her job duties, the decedent helped the City meet its duty of providing services to its residents. There is sufficient evidence in the record to support such a finding.

¶ 39 The Commission also considered how the parties viewed their relationship. Mr. Boatman, Ms. Sechrest, Ms. Ralston, and Mayor Schauf testified that the decedent was an independent contractor. It is uncertain how the decedent viewed her relationship with the City. She completed the same job application form as all City employees. The form includes no information that would alert her that she was applying for a contract position. There is no information in the record that she was ever given the contract water meter reader job description. The minutes from the city council meeting where the council voted to hire her do not indicate that she was being hired for a contract position. The Commission found that because only the City was available to comment on the topic, it was unable to properly ascertain how the parties viewed their relationship.

¶ 40 The Commission held that the decedent was an employee despite the City's intention of making her an independent contractor. It found the most persuasive factors were that the City controlled the decedent in that she had to perform her job duties each month during a one-week period during daylight hours, that her job duties and the City's business interests intersected, and that she and City employees could be terminated in a similar manner. The Commission further found that not one single factor definitively favored the City's position that the decedent was an independent contractor. It is within the province of the Commission to weigh the evidence and to decide among competing inferences. *Roberson*, 225 Ill. 2d at 187, 866 N.E.2d at 207. This court will not reject permissible inferences drawn by the Commission simply because different inferences might be drawn from the same facts, nor will this court substitute its judgment for that of the Commission on such matters unless its findings are contrary to the manifest weight of the evidence. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26, 993 N.E.2d 473. We cannot say that the Commission's decision that the decedent was a City employee was against the manifest weight of the evidence.

¶ 41 The City argues that the Commission's decision that the decedent sustained an accidental injury that arose out of and in the course of her employment was contrary to law and against the manifest weight of the evidence. For accidental injuries to be compensable under the Act, the claimant must show that the injuries arose out of and in the course of her employment. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 349, 732

N.E.2d 49, 51 (2000). "A question of law arises only where no factual matters are disputed or where no conflicting inferences can be drawn from the facts." *Oldham v. Industrial Comm'n*, 139 Ill. App. 3d 594, 596, 487 N.E.2d 693, 694 (1985). The Commission may draw inferences from the undisputed facts to determine whether an injury arose out of employment or whether the employment increased the risk of injury, and such inferences will not be disturbed unless they are against the manifest weight of the evidence. *Id.* at 596, 487 N.E.2d at 694-95. A decision is against the manifest weight of the evidence when the opposite conclusion is clearly apparent. *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15, 19 (1996). A Commission's decision is not against the manifest weight of the evidence if there is sufficient factual evidence to support it. *Id.*

¶ 42 The City argues that the decedent had an idiopathic fall in a location that did not pose a heightened risk of injury. An idiopathic fall originates from an internal and personal condition of the employee. *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d 1006, 1010, 791 N.E.2d 1308, 1311 (2003). It is undisputed that the decedent sustained an idiopathic fall. However, injuries resulting from an idiopathic fall are compensable if the employment significantly contributed to the injury by placing the employee in a position increasing the dangerous effects of the fall. *Elliot v. Industrial Comm'n*, 153 Ill. App. 3d 238, 244, 505 N.E.2d 1062, 1066-67 (1987).

¶ 43 The City argues that the decedent's employment did not place her in a position increasing the dangerous effects of her fall because she fell into a rain puddle, which is common everywhere. It asserts that the general public is routinely exposed to rain puddles. The City contends that the ground where the decedent fell posed no greater danger than that to which the public was exposed. It further argues that the decedent was not obligated to read the meter at the location of the injury on that specific day.

¶ 44 "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). Coroner Steffey testified that, based on her investigation, the decedent was trying to read a water meter when she died. In her report, she noted that the meter was located in a rural setting at an elevation approximately two feet lower than the road and that six to eight inches of water surrounded the meter. Mr. Boatman testified that the City excavated the area where the accident occurred to install the water meter. He stated that the water meter is located off the road in a low-lying area of the woods that floods when it rains. He testified that the decedent had to step off the road into the woods and walk over to the water meter in order to get close enough to read it with the wand. He further testified that the only reason the decedent would be in that area was to read the water meter. Mayor Schauf and Ms. Ralston testified that the water meter was located in a low-lying area that floods when it rains. The general public is not routinely exposed to eight-inch-deep floodwater in secluded, low-lying woods.

¶ 45 The decedent was required to read all 1,200 water meters between the twentieth and twenty-sixth of each month. While the decedent had some flexibility as to when she could read the water meters, she did not have the same flexibility as the general public to avoid standing water and other rural conditions. Her job required her to read the meter in this low-lying secluded area where water pooled whenever it rained. The water was deep enough to cause drowning, and the remoteness of the location meant that someone injured there would not likely receive prompt assistance. The Commission found that the decedent's accident "arose

out of and in the course of her having to work in conditions that included an eight-inch pool of rainwater, a hazard it finds is not confronted by the general public." This finding is not against the manifest weight of the evidence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court of Crawford County.

¶ 48 Affirmed.

¶ 49 PRESIDING JUSTICE HOLDRIDGE, specially concurring.

¶ 50 I agree that there was sufficient evidence in this case to support the Commission's findings of an employment relationship and an accidental injury arising out of the decedent's employment. I therefore join in the majority's judgment. I write separately because I disagree with one aspect of the majority's analysis regarding the employment relationship issue. In support of its holding, the majority stresses the connection between the nature of the work performed by the decedent and the nature of the City's "business" of supplying water to its residents. *Supra* ¶ 38. Relying upon *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982), and *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000), the majority states that " '[b]ecause the theory of workmen's compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product,' " " 'a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act.' " *Supra* ¶ 38 (quoting *Ragler Motor Sales*, 93 Ill. 2d at 71); see also *Ware*, 318 Ill. App. 3d at 1124. The majority notes that "[t]he decedent's services in reading meters formed a regular part of the cost of the City's business of supplying water to its residents," "her work did not constitute a separate business distinct from that of the City," and "in performing her job duties, the decedent helped the City meet its duty of providing services to its residents." *Supra* ¶ 38. Following *Ragler Motor Sales* and *Ware*, the majority concludes that these facts weigh in favor of finding an employment relationship.

¶ 51 The analysis employed by the majority finds support in our prior decisions. Applying the rule announced in *Ragler Motor Sales*, we have repeatedly found an employment relationship where, *inter alia*, the claimant performs work that is "an integral part of" or is "intimately related to" the respondent's business. *Ware*, 318 Ill. App. 3d at 1125.

¶ 52 I question the logic of this approach. The purpose of finding an employment relationship under such circumstances is, purportedly, to ensure that "the cost of industrial accidents [is] borne by the consumer as a part of the cost of the product." *Ragler Motor Sales*, 93 Ill. 2d at 71. However, that result could be achieved just as effectively without finding an employment relationship. An independent contractor may obtain her own workers' compensation insurance. Presumably, the cost of such insurance would be reflected in the price that she charges a municipality or a private company for her services and then passed on to the municipality's or company's customers. Thus, the cost of the accident will be "borne by the consumer[s] as part of the cost of the product" regardless of whether the claimant is deemed an employee or an independent contractor.

¶ 53 Moreover, under the rule currently applied by our courts, this factor will *always* cut in favor of finding an employment relationship in cases involving contractors whose work forms "an integral part of" the municipality's or company's business, which is very often the case when a municipality or company hires an independent contractor. Because of the importance that our courts currently attach to this factor, this stacks the deck heavily in favor of an employment relationship in a great number of cases. In my view, courts should stop considering this factor in determining whether an employment relationship exists. At the very least, courts should stop placing such heavy reliance on this factor. I hope our supreme court will reexamine this issue in the near future.

STATE OF ILLINOIS )
) SS.
COUNTY OF WILLIAMSON )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☒ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEPHEN HARVEY (Widower),

Petitioner,

**13IWCC0575**

vs.

NO: 11 WC 44657

CITY OF BRIDGEPORT,

Respondent.

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 employer-employee relationship, accident, permanent partial disability, medical expenses, death benefits and penalties and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

No controversy exists concerning the actual death of Jacqueline Harvey ("Decedent"). On May 19, 2011, Decedent was engaged in reading of municipal water meters for Respondent when she experienced a seizure that caused her to fall into a standing pool of rainwater and resulted in her drowning in said pool.

Though both parties agree Decedent read water meters for Respondent, there is a divergence of opinion as to whether she was an independent contractor, as is alleged by Respondent, or was a municipal employee, as is alleged by Petitioner. The Commission finds Respondent provided Petitioner great freedom with respect to how she performed her job duties but, nevertheless, retained such control over Decedent as make her an employee, not an independent contractor.

No rigid rule of law exists regarding whether a worker is an employee or an independent contractor, there exists a number of factors courts have articulated when forced to decide between the two with the single most important factor being whether the purported employer has

the right to control the actions of an employee. Ware v. Industrial Commission, 318 Ill.App.3d 1117, 1122, 743 N.E.2d 579,583 (1st Dist. 2000). Also held with great significance by the Ware court is the nature of the work performed by the alleged employee in relation to the general business of the purported employer. Ware, 318 Ill.App.3d at 1122. Other factors considered in deciding between an independent contractor and an employee include method of payment, right to discharge, the skill the work entails, which party provides the needed instrumentalities, whether income taxes are withheld and what label the parties place on the relationship. Ware, 318 Ill.App.3d at 1122.

The Commission agrees with the finding contained in the Arbitration Decision that the Decedent had some flexibility with respect to how and when she performed her duties. For instance, Petitioner was free to read water meters any day of the week and in any route of her choosing. She was, however, required to read the water meters between the 20th and 26th of each month, though, to accommodate Decedent's other job, she was permitted to read the water meters as early as the 19th of each month. In the event she was unable to read a particular meter due to time constraints, physical impediments or malfunctioning equipment, Decedent was required to report such incidents to her supervisor. In addition to having to read the water meters within the designated seven day window, Decedent was also required to perform her water meter reading only during daylight hours as so not to disturb Respondent's customers after sunset. The Commission finds particularly noteworthy the testimony of Sara Schrest, Respondent's City Clerk, as she testified that Decedent was not allowed to read the water meters outside the timeframe set by Respondent.

Unaddressed in the Arbitration Decision was any consideration of the intersection of Decedent's job duties and the business of Respondent. The Commission finds the primary business of Respondent is to provide services to its residents, included among these services is water delivery. Petitioner's primary job duty was to record the water usage rates of Respondent's customers to ensure Respondent had an accurate record of their customer's water consumption for billing purposes. Petitioner's other job duties, such as reporting malfunctioning water department equipment or circumvention of proper water meter usage, also advanced Respondent's business of delivering water. In performing her job duties, Decedent helped Respondent to meet its duty of providing services to its residents.

The Commission, when reviewing how compensation was paid, cannot readily adopt the Arbitration Decision finding that Decedent's condition was more akin to a fee-for-service rather than wages. That Decedent was paid once a month rather than twice a month as areRespondent's other employees is deemed to be more likely to be the result of her work schedule being only seven days a month than for any other reason. The Commission recognizes Respondent could have elected to Decedent's wages bimonthly but, for reasons unexplained, chose to pay her on a monthly basis. The Commission, therefore concludes simply Decedent was on a different compensation schedule than were Respondent's other employees. The Commission also notes the Arbitration Decision addressing this particular issue found Petitioner was not eligible for retirement benefits, pension benefits, health care benefits, vacation and sick days or any other benefit but failed to note, per the testimony of Stephen Roy Boatman, that none of Respondent's part-time employees are offered such benefits. Given this shared denial of benefits, the only divergence with respect to compensation found between Decedent and at least Respondent's

part-time employees, and presumptively its full-time employees, is that Decedent was paid without having income taxes or FICA withheld from her paycheck.

Decedent could have had her employment terminated by vote of the city council. The same procedure was used to terminated the employment of Respondent's recognized employees, though Respondent argued said employees are given layers of protection against immediate termination not afforded Decedent, namely a verbal warning followed by a written warning followed by a suspension. The Arbitration Decision, however, correctly noted the testimony that these layers of protection were more of a guideline than an enforceable contract between Respondent and its workers. As a practical matter, Respondent could have foregone the warnings and suspension and proceeded directly to a city council vote to terminate the employment of a recognized employee, the same as could have been done with Decedent.

With respect to the skill necessary to perform Decedent's job duties, the conclusion as stated in the Arbitration Decision that the job duties are easily performed is supported given the testimony of Tommy L. Perrin, one of Respondent's employees who helped train Decedent. He testified that it only took him minutes to train Decedent onto how to use the equipment. From the testimony of those most familiar with Decedent's job duties, the most difficult aspect of her job just might have been locating the water meters on Respondent's customers' property.

The penultimate factor concerns which party provided the needed instrumentalities. In this immediate case, there should be no dispute that it was Respondent as the only needed instruments were the meter reading wand, a computer, a safety vest and books indicating the locations of the water meters. Petitioner, on May 19, 2011, supplied her own transportation, though on two prior occasions Respondent provided Decedent with transportation in the form of a city-owned vehicle with a driver to help her learn the locations of the water meters. Per the testimony of Stephen Roy Boatman, it is apparent that Decedent needn't have used her own car but was free to do so or do as other meter readers have done, walk or use a bicycle. With this factor, both parties supplied needed instrumentalities as Respondent supplied the equipment necessary to read and record the meter readings and Decedent supplying the mode of transportation.

The last factor in this analysis is how the parties themselves viewed their relationship. Petitioner testified that Decedent was considered an employee of Respondent but did not specify who held this belief. Petitioner also testified to being unaware that Decedent's title with Respondent was "Contract Water Meter Reader." The employees of Respondent, particularly Stephen Roy Boatman, Sara Sechrest, Mayor Max Schauf, and Vicki Ralston, a water clerk, consistently testified to Decedent being an independent contractor. Shannon Steffey, the Lawrence County Coroner, testified that, while investigating Decedent's death, she was told Decedent was a contract worker by Respondent's personnel. It is uncertain as to how Decedent viewed her employment relationship with Respondent. All that is known is that, on January 17, 2011, Decedent completed an employment application for a meter reader position with Respondent. There is no indication from the document that Decedent would have been aware that the position applied for was for a contract position. Ralston, in her testimony, indicated that an applicant for the meter reader position would have been given the job description for that position if that person was called in for an interview. By virtue of the testimony of the various

witnesses and the documents tendered, the Commission finds that Decedent interviewed for the water meter reader position and was subsequently hired but is uncertain as to whether Decedent was provided with the water meter reader job description at the time she was interviewed as there was no testimony to that effect. In considering the evidence, the Commission finds it is unable to properly ascertain this as only one party is available to comment on this topic.

After reviewing all of the enumerated factors, the Commission finds Decedent was an employee of Respondent irrespective of Respondent's intention of making Decedent an independent contractor. The factors found most illustrative of this relationship were Respondent's directing Decedent to read the water meters only during a one-week period each month and during daylight hours only, the intersection between Decedent's duties and Respondent's business interests and the similar manner in which Petitioner and recognized employees could have their employment terminated. On the whole, the Commission finds there is not a single factor that definitively favors Respondent's position that Decedent was an independent contractor.

Having addressed a threshold issue, the Commission turns its attention to another such issue, accident. The Arbitration Decision found the accident that befell Decedent on May 19, 2011, was the result of her idiopathic condition, not of any hazard encountered while Decedent performed her job duties.

The Arbitration Decision implies but for the standing rainwater the fall that occurred on May 19, 2011, would have turned out differently, with only bruising and embarrassment being the result of the fall. The facts as they were on that day cannot be changed. There was a pool of standing rainwater found to be eight inches deep that surrounded a water meter Decedent had just read, was in the process of reading or was about to read and was later found face down in. How Decedent's face came to rest in the water is uncertain as she was alone at the time of the incident, but an autopsy concluded she drowned after experiencing a seizure. The conclusion of the Arbitration Decision was that there was nothing demonstrated that was a serious risk to Decedent's well-being without her epileptic condition being present. It is axiomatic that an employer takes an employee as they come and, the Commission, again, cannot diverge from the fact Decedent was afflicted with epilepsy and disagrees with the contention that there was nothing that posed a serious risk to her, noting that the eight-inch deep pool of rainwater proved to be fatal to Decedent's well-being. The Commission, given the presented facts, finds Decedent's accident arose out of and in the course of her having to work in conditions that included an eight-inch pool of rainwater, a hazard it finds is not confronted by the general public.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,069.25 for medical expenses under §8(a) of the Act;

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,000.00 for burial expenses;

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the greater of the sum of $466.13 per week commencing May 19, 2011, for 25 years or $500,000.00 under §8(b)4.2;

13IWCC0575

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 of $17,712.93, if any, to or on behalf of Petitioner on account of said accidental injury as stipulated to by both parties;

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not liable for penalties under §19(k) or §19(l) or attorney's fees under §16 as there is no evidence Petitioner's claims were disputed for frivolous or vexatious reasons.

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

DATED: MAY 31 2013
KWL/mav
O: 04/02/13
42

Daniel R. Donohoo

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. Arbitrator Luskin's findings are thorough, well reasoned and grounded in the law. This decision is correct and should be affirmed

Kevin W. Lamborn

STATE OF ILLINOIS )
)SS.
COUNTY OF **Williamson** )

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
FATAL

**13IWCC0575**

**Stephen Harvey (Widower)**
Employee/Petitioner

v.

**City of Bridgeport Illinois**
Employer/Respondent

Case # **11** WC **044657**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **7/13/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☒ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☒ Other **Burial Expenses and Death Benefits**

**FINDINGS** **13IWCC0575**

The Arbitrator finds that Decedent died on **5/19/11**, leaving **1** survivor(s), as provided in Section 7(a) of the Act, **the Decedent's spouse, Stephen Harvey**.

On May 19, 2011, an employee-employer relationship ***did not*** exist between Decedent and Respondent.

On this date, Decedent ***did not*** sustain an accident that arose out of and in the course of employment.

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

Decedent's death ***is not*** causally related to a workplace accident.

The parties stipulated that the Decedent's average weekly wage was $**450.00**.

On the date of accident, Decedent was **43** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**17,712.93** for death benefits, $**8,000.00** for burial expense, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**25,712.93**.

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

**ORDER**

## For reasons set forth in the attached decision, benefits under the Act are denied.

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

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

Signature of Arbitrator — Date: Sept. 4, 2012

ICArbDecFatalp.2

SEP 10 2012

# 13IWCC0575

## BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

| | | |
|---|---|---|
| STEPHEN HARVEY (WIDOWER), | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 11 WC 44657 |
| | ) | |
| CITY OF BRIDGEPORT, ILLINOIS, | ) | |
| | ) | |
| Respondent. | ) | |

## ADDENDUM TO ARBITRATION DECISION

## STATEMENT OF FACTS

Stephen Harvey is the surviving spouse of the decedent, Jacqueline Harvey. Stephen and Jacqueline Harvey married in 1984 and remained married until her death on May 19, 2011. He has not remarried since that date. The marriage produced three daughters, ages 27 (Ashley), 26 (Megan), and 22 (Stephanie). None of the children were minors as of the date of Ms. Harvey's death, and the youngest was not in college at that time or since that point. Neither Stephen nor Jacqueline Harvey had other children. Mr. Harvey testified that Ms. Harvey was a diagnosed epileptic of long standing and did suffer from both grand mal and petit mal seizures, and she had been prescribed anticonvulsant medications for this condition.

Jacqueline Harvey worked for the City of Lawrenceville, Illinois, as a water meter reader on a part-time basis beginning in March 2010. Lawrenceville is three miles from Bridgeport, Illinois. During the course of her employment with Lawrenceville, she came to the attention of the city of Bridgeport. In March 2011, the city of Bridgeport contracted her to work for them one week per month as a water meter reader. Ms. Harvey did not cease employment with Lawrenceville when she began to work for Bridgeport, as the respective schedules allowed for both. Mr. Harvey testified Lawrenceville paid Ms. Harvey based on her route, and her pay stubs from Lawrenceville were introduced as PX22. These demonstrate income earnings being paid through the end of May 2011 on what appears to be an hourly basis, with deductions for federal and state taxes. Mr. Harvey testified that Ms. Harvey was thought to be a city of Lawrenceville employee. The city of Bridgeport contracted with Ms. Harvey for a flat fee of $450 per month. Taxes were not withheld, and benefits were not paid. Her title was that of a "contract water meter reader." She used a private vehicle and was not paid expenses.

On May 19, 2011, Ms. Harvey was engaged in the process of checking water meters in Bridgeport, which involved touching the meters with a computerized sensor wand. While there were no eyewitnesses to the incident itself, what appears to have

happened was that she underwent a seizure near a meter. At the time, she was in a somewhat rural area, and the area in which she collapsed had some standing water which had accumulated to approximately eight inches in depth, and she drowned. Her body was discovered shortly thereafter, but resuscitation efforts were not successful. Toxicology testing during the autopsy showed that she had not taken her anticonvulsant medication. The autopsy report was submitted as PX9, and the deposition of Dr. Heidingsfelder (the forensic pathologist) as PX16.

## OPINION AND ORDER

### Employee Versus Independent Contractor

There is no rigid rule controlling a determination of whether a worker qualifies as an independent contractor versus an employee. Courts have long noted a number of relevant factors to this decision, and have relied upon a totality of the circumstances assessment. See, e.g., *Roberson v. Industrial Commission*, 225 Ill.2d 159, 866 N.E.2d 191 (2007). While the intent of the parties as to their understanding of the relationship is relevant to the overall determination, a more fundamental consideration is based on the degree of control exercised by the putative employer. Classically, focus has been on five significant factors in determining whether or not an employer-employee relationship exists: (i) the method of payment; (ii) the right to discharge; (iii) the skill the work requires; (iv) which party provides the necessary instrumentalities of the work; and (v) whether income tax is withheld from payment. 820 ILCS 301/1; *Ware v. Industrial Commission*, 318 Ill.App.3d 1117, 743 N.E.2d 579 (1st Dist. 2000); see also *Earley v. Industrial Commission*, 197 Ill.App.3d 309 (4th Dist. 1990).

Based on the evidence presented, Ms. Harvey had a certain degree of flexibility in her hours and overall schedule. Meters were generally read between the 20th and 26th of each month (RX1); some flexibility was allowed, and the Arbitrator notes the incident in question occurred on the 19th. Due to customer complaints regarding a prior meter reader, she would not have been allowed to read meters after nightfall. The 26th was a generally firm deadline for purposes of generating water bills to the residents, and so that week was the period during which Ms. Harvey would have been required to perform the job tasks. During that time frame, she would have been able to select what days and hours she worked or did not work, so long as the job was completed on time. The route books delineated a geographically efficient route, but the decedent could select the order in which the meters were read if she wanted to adjust the route for purposes of convenience, personal preference, inclement weather, or the like. The only requirement was that the meters be read by the end of the time period; however, Mr. Boatman testified if a particular meter could not be read at all, the wand could be coded to indicate inaccessibility; examples of such were of a hazardous area, such as a vicious dog, or a physically blocked area. However, most meters were read, and were expected to be so.

While the petitioner correctly points out that the decedent did not have substantial discretion as to whether or not to actually complete the job, the Arbitrator notes that

regardless of whether someone is hired as an employee, a subcontractor, or an independent contractor, failure to essentially perform the primary functions and outcome of the task for which they are retained is not a normally permitted option. Given the overall flexibility relative to hours worked during the day and route taken, these factors are more indicative of independent contractor status.

The method of payment was a flat fee per month rather than hourly payment, and she was paid in a single payment rather than every two weeks as were the respondent's undisputed employees, whether full or part time. Moreover, a W-2 form was not completed and neither income tax nor FICA was withheld, suggesting the remuneration was not considered wages or salary. The decedent was not eligible for retirement, pension, health, vacation, sick leave, or any other type of benefits, and could not submit reimbursement for expenses. Overall, these factors suggest the money received would be more akin to a fee-for-service arrangement as opposed to wages or salary.

The respondent did impose a limited dress requirement, to wit, "dress presentably." RX1. The respondent did provide a reflective vest to the claimant, though it was apparently not required that she use it, and the autopsy report shows she was not wearing it at the time of her death. No strict uniform was mandated. While logos and appearance requirements are generally indicative of an employment relationship, in this case there was no logo or uniform, and given the very loose definition of "presentable," this factor is generally equivocal in terms of employment status in this matter.

Water meter reading has no specific licensure requirements, though it was noted that if the decedent was driving the route, she had to supply the respondent with a driver's license and proof of vehicular insurance. The respondent did not supply a vehicle, nor recompense her for the insurance, mileage, or other expense. The claimant had the freedom to select a route she preferred and make stops along the way if she wished; while the city did present a suggested route, it did not mandate her adherence to that route. These factors generally suggest an independent relationship.

The decedent's relationship with the respondent was considered to be an at-will relationship on both Ms. Harvey's and the respondent's parts. The respondent's undisputed employees were governed by an employment policy manual (RX2) which provides for a disciplinary process. Ms. Harvey was not governed by the manual, which would indicate an independent relationship, but the manual appears to be a guideline rather than an enforceable contract such as a collective bargaining agreement, and the respondent was not mandated to follow the entire disciplinary process before termination of an employee. Accordingly, the right to discharge is distinguished, but not substantially so, from an undisputed employee. This is therefore equivocal.

The respondent provided Ms. Harvey with the meter reading wand, the batteries for it, a vest, and the books containing the locations of the meters. These items remained the property of the city. Ms. Harvey utilized her own vehicle when reading the water meters and could not submit expenses or use a city vehicle. The water meter reading device requires no special skill, and is fairly easily performed. The respondent instructed

her on its use and initially sent city employees with the decedent to demonstrate the location of the water meters. The documentation submitted notes that the water meter reader must be personable and able to work with angry and difficult customers, and the respondent's representatives testified in support of that as a relatively essential skill, as relations with the taxpayers is an essential part of the city's responsibility. The decedent was to report equipment malfunctions, illegal water consumption or violations of laws or regulations to the city; however, she was not empowered to take enforcement action or repairs herself. If Ms. Harvey were to have damaged a customer's property or have an accident, she was required to notify the City. Overall, these factors are more indicative of an employment relationship than an independent one.

While the *Roberson* Court appropriately cautioned against a rigid assessment as to employment determination in favor of a more holistic approach, the *Roberson* decision was also careful to note that a primary factor in its reasoning was the extensive use of the independent contractor argument in trucking cases and the impact of regulations imposed by the Department of Transportation. See *Roberson v. Industrial Commission*, supra. The Arbitrator must note while the Court did not limit *Roberson* to transportation or shipping related employers, the concerns specified by the *Roberson* decision do not appear to be a serious threat in this circumstance, as there does not appear to be any pattern by this respondent of attempting to avoid liability or exposure through facetious or duplicitous reliance on the independent contractor doctrine. Applying the totality of the circumstances analysis to the relevant factors of this case, the Arbitrator finds the nature of Ms. Harvey's relationship was indeed more closely aligned with an independent relationship than employee status, and concludes no more formal employment relationship existed. Therefore, the incident of May 19, 2011, does not qualify as a workplace accident within the meaning of the Act.

**Was the Decedent's Death Causally Related to Her Work?**

While arguably a moot point given the above determination, it must be noted that the petitioner also failed to prove a causal link between the occupational duties and the injury. While there is certainly no dispute the injury occurred in the course of Ms. Harvey's duties from the perspective of time and place, the origin of the risk is in serious question. There are three categories of risks to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Illinois Institute of Technology v. Industrial Commission*, 314 Ill.App.3d 149, 162 (2000). Risks personal to the employee, such as a fall caused by an individual (idiopathic) medical condition, are not compensable, unless some characteristic or condition of work made the injury more severe or otherwise increased the risk. *Illinois Consol. Tel. Co. v. Industrial Commission*, 314 Ill.App.3d 347, 353 (5th Dist. 2000).

As noted above, the evidence has shown Ms. Harvey to have had a seizure disorder stemming back to her childhood, and had been prescribed medication to control the disorder. She underwent a seizure and collapsed into approximately eight inches of

water and drowned. No substantial injury was demonstrated in the autopsy that would have prevented her arising from the water had she not had the seizure; the autopsy further showed that the anticonvulsant medication was not present in her system at the time of her death.

While that the presence of the water did result in her drowning, and had she collapsed onto dry land she would in all likelihood have been otherwise unharmed, it must be noted that she did not fall from a height, or onto or into any surface or location that would have been at all harmful without her idiopathic condition being present. Had she simply slipped and fallen in that area and landed in the water without having the seizure, the virtually certain result would have been at most minor bruising and embarrassment with no substantial injury, as an otherwise healthy adult would not be threatened by less than a foot of water. There was nothing demonstrated about the location that was in and of itself a serious risk to the decedent's well-being without her personal medical condition being present. The fact that her duties took her to the place of injury and she would otherwise not have been there is not sufficient to support a finding that her injuries arose out of employment. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill.2d 478, 483 (1989); *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52, 58 (1989).

## Benefits Due and Owing

For the above-stated reasons, the requested medical costs, survivor benefits and funeral expenses are denied.

## Penalties and Fees

The respondent demonstrated good faith relative to their defense of this matter. Extensive testimony was presented disputing an employment relationship within the meaning of the Act, and the legal dispute was clearly not frivolous or disingenuous. Likewise, the idiopathic nature of the decedent's medical condition which was the triggering aspect of this claim was a worthwhile point to bring out in defense of the claim. Moreover, the witnesses and representatives of the respondent demonstrated no ill will or vexatious behavior or motivation towards either the decedent or her surviving spouse. Given the above facts, penalties and fees would not be appropriate even were this matter otherwise compensable.