2016 IL App (4th) 150543WC

NO. 4-15-0543WC

Opinion filed: April 29, 2016

FILED
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Carla Bender
4th District Appellate
Court, IL

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

STEVEN DUNTEMAN,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Macon County.
	)	
v.	)	No. 14 MR 1125
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	Robert C. Bollinger,
(Caterpillar, Inc., Appellee).	)	Judge, presiding.

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

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

OPINION

¶ 1 The claimant, Steven Dunteman, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for injuries he allegedly sustained on June 21, 2011, while working for the employer, Caterpillar, Inc. The parties stipulated that on June 21, 2011, the claimant sustained an accidental injury arising out of and in the course of his employment. After a

hearing, an arbitrator found that the claimant's current condition of ill-being was causally related to the accident and awarded him reasonable and necessary medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits.

¶ 2 A majority of the Illinois Workers' Compensation Commission (Commission) reversed the arbitrator's decision and vacated the awards of compensation, finding that the claimant suffered a work-related injury on July 21, 2011, but that his self-treatment of the work-related injury constituted an intervening accident that broke the chain of causation between his work-related blister and subsequent infection. The dissenting Commissioner believed the claimant's infection was a foreseeable and natural consequence of the work-related blister and that his self-treatment was not an intervening accident that broke the chain of causation.

¶ 3 On judicial review, the circuit court of Macon County confirmed the Commission's decision. The claimant filed a timely appeal. For the reasons that follow, we reverse and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 On October 19, 2011, the claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for injuries he allegedly sustained on June 21, 2011, while working for the employer. The following factual recitation is taken from the evidence presented at the June 13, 2013, arbitration hearing.

¶ 6 During a 1999 Department of Transportation (DOT) physical examination, the claimant was found to have above normal blood sugar levels. The DOT doctor encouraged him to improve his dietary habits but did not recommend any other treatment

or modifications. The claimant testified that he followed the doctor's advice and improved his eating habits. He stated that, between 1999 and 2008, he felt good, continued monitoring his diet, and had no issue with his blood sugar levels.

¶ 7 The claimant testified that he was first diagnosed with type II diabetes in October 2009 when he sought treatment for an unrelated work accident. When he saw his primary care doctor, Dr. Daniel Smith, on November 9, 2009, Dr. Smith noted that his blood sugar levels were elevated, that he was "trying to work on his diet," and that he continued "to be under a lot of stress." He began taking Metformin to reduce his blood sugar levels.

¶ 8 When the claimant saw Dr. Smith again on January 26, 2010, he had fluctuating blood sugar levels. Dr. Smith noted that the claimant continued monitoring his diet and that his diabetes was "under fair control."

¶ 9 The claimant testified that he continued taking Metformin and that he also began testing his blood sugar levels at home twice a day. He stated that he continued following-up with Dr. Smith and noticed that his blood sugar levels were dropping below normal. He testified that, after consulting with Dr. Smith, he stopped taking Metformin and regulated his blood sugar levels with a controlled diet between July 2010 and June 2011.

¶ 10 The parties stipulated that on June 21, 2011, the claimant sustained an accidental injury arising out of and in the course of his employment. At that time, he was working for the employer as an "outside driver." The automatic truck he usually drove was being repaired and in May 2011 was replaced with an older 10-speed truck, which required him to strike a manual clutch with his left foot about 200 times per shift. He struck the clutch forcefully with the bottom of his left foot because the clutch did not engage properly. He

wore steel-toed boots, but the bottom was rubber with no additional protection. He spent approximately 70% of the workday driving the truck and 30% of the day exiting the truck to perform tasks outside the truck. When exiting the truck, which he did about 30 times per day, he stepped onto a steel, ridged corrugated step and spun on the left upper portion of his foot, in the same area where his foot struck the clutch. On or about June 21, 2011, he noticed that the bottom pad of his left foot was sore. He continued performing his normal work duties, working 12-hour shifts for the next 9 or 10 days. He wore cotton socks with his work boots but continued having pain and problems with his left foot. Striking the clutch worsened the pain, and he began walking with a limp.

¶ 11 The claimant testified that on or about June 25, 2011, while bathing, he noticed a water blister under the callus on the bottom of his left foot between his third and fourth toes. He went to the kitchen, sterilized a needle by boiling it in hot water on the stove, propped up his foot, and inserted the needle to relieve the pressure of the water blister. He testified that pure "water" drained from the blister. He then used peroxide on a cotton swab to wipe the area. He indicated that he had performed this procedure, which his mother had taught him at a young age, many times in the past without complications. He stated that no physician had ever told him not to pop blisters on his foot in this manner.

¶ 12 On Dr. Smith's recommendation, the claimant resumed taking Metformin on June 28, 2011, to regulate his elevated blood sugar levels. According to the claimant, this was the first time he had been on medication in about one year because he had been able to regulate his diabetes with a controlled diet.

¶ 13 On July 1, 2011, the claimant called Dr. Smith to schedule an appointment. Dr. Smith's records indicate that the claimant had a sore on his foot, which he was worried about getting infected, and that his foot was bruised under his callus.

¶ 14 The claimant testified that on July 4, 2011, his left foot was red and swollen around the blister. Because he could not immediately get in to see Dr. Smith, he went to St. Mary's Hospital, where he saw Dr. Brooke Ballard. He reported a 2-day history of fever with chills and a 4-day history of increasing left foot pain with swelling and redness. He noted that 7 to 10 days earlier, he had driven a clutch transmission semi-truck at work and developed a callus on the bottom of his left foot over the fourth metatarsal region. He found a blister and opened it himself. Several days later, the top of his foot was turning red, with swelling and warmth. He had been unable to work that day because of increased pain. Dr. Ballard noted a past medical history of type II diabetes and a November 2009 hospitalization for cellulitis of his right lower extremity. On examination, she found that he was swollen just below his left knee down to his toes. He had a callus on the bottom of his left foot, redness and warmth on the top of his left foot affecting the second and third toes, and tenderness to palpation throughout.

¶ 15 That same day, the claimant saw Dr. Jason Anderson, a podiatrist at St. Mary's Hospital. He reported that about a week and a half prior, he had noticed a blister on the bottom of his foot and had used a sterilized needle to drain the blister. He indicated that he had not had a left leg infection like this in the past but that he did have a prior history of infection to his right leg after a blow to the leg by a large metal object. His blood sugar level was 361, which indicated uncontrolled diabetes. On examination, Dr.

Anderson found significant deep redness on the top of his left foot with lymphangitis and lymphadenopathy in both the inguinal and popliteal glands. There was a thick callus sub third metatarsal head extending distal lateral to the fourth digit on the bottom of his left foot. Dr. Anderson debrided in the area of the third metatarsal head and found a full thickness ulceration that was malodorous and measured two centimeters in diameter with a necrotic fibrotic base. The claimant was diagnosed with severe cellulitis left extremity with low grade temperature, lymphadenopathy, and diabetes with loss of protective sensation. He was admitted to the hospital and put on broad spectrum antibiotics.

¶ 16 On July 5, 2011, the claimant underwent his first surgery performed by Dr. Anderson, an incision and drainage of the deep abscess of his left foot third interspace with debridement of the tendon and fascia and delayed closure. According to the operative report, attention was focused on the bottom of his foot where the ulceration was noted. Dr. Anderson performed incisions "encompassing" the ulceration, which was directly beneath the third metatarsal head.

¶ 17 On July 6, 2011, the claimant underwent a second surgery performed by Dr. Anderson, a secondary irrigation and debridement with delayed closure. His diagnosis was "deep abscess left foot," and his third toe had venous congestion. His cellulitis improved, and he was discharged from the hospital on July 8, 2011, with instructions to take oral antibiotics, follow a diabetic diet, and regularly test his blood sugar levels.

¶ 18 The claimant saw Dr. Anderson again on August 2, 2011. The doctor noted that the distal aspect of his third toe was completely "gangrenous" and "necrotic." On August 5, 2011, the claimant underwent a third surgery performed by Dr. Anderson, a left third

toe amputation with medial based toe flap closure and deep interspace debridement in the left third interspace. His diagnoses were left third toe necrosis and cellulitis.

¶ 19 Dr. Anderson took the claimant off work on July 4, 2011, and released him to return to work effective September 5, 2011. At that time, he returned to full duty work with no restrictions.

¶ 20 When the claimant saw Dr. Anderson again on September 20, 2011, the redness and swelling had resolved, and no new lesions or open ulcerations were present. Dr. Anderson noted that the claimant's job put him at risk for these ulcerations because he had to use his left foot not only to clutch but also to get in and out of the truck. The doctor opined that "[t]his is most likely the cause of his original ulceration" and that "there would have been no reason for him to suffer a large callus without the direct mechanism and repetitive mechanism."

¶ 21 On February 7, 2012, at his attorney's request, the claimant underwent an independent medical examination by Dr. Jeffrey Coe, a board certified occupational medicine specialist. Dr. Coe testified by evidence deposition that he considered the history the claimant gave him, the treatment records from St. Mary's Hospital and Dr. Anderson, and his own clinical examination of the claimant. Dr. Coe testified, to a reasonable degree of medical certainty, that there was a causal relationship between the nature of the claimant's work with the employer involving the repetitive clutch depression and exiting of the truck and his current condition of ill-being of his left foot. Dr. Coe described the claimant's diabetes as mild because he was not insulin-dependent, controlled his blood sugar levels with diet only, and had no known complications

associated with diabetes. Dr. Coe testified that the claimant had a higher risk of infection as a result of his diabetes but opined that he would not have developed the infection if he had not developed a blister from his work activities. Dr. Coe opined that "the infection arose from the penetration of the blister in his left foot with a needle."

¶ 22 Dr. Coe stated that the claimant's prognosis was excellent. The wound was healed, and he had returned to full activities, but he did have changes in sensation and balance as well as a flexion contracture, or hammer toe deformity, in his left second toe.

¶ 23 On May 25, 2012, at the employer's request, the claimant underwent an independent medical examination by Dr. Ernest Chiodo, who is board certified in internal medicine, occupational and environmental medicine, and public health and epidemiologic medicine. Dr. Chiodo, who testified by evidence deposition, found no causal relationship between the surgeries and the claimant's work duties and asserted that the claimant's infection "happened on the top of his foot, not on the bottom." Although Dr. Chiodo acknowledged that the claimant's repetitive use of the clutch caused the blister and that once a blister has formed, complications can arise from it, he believed that neither the blister nor the lancing of the blister contributed to the claimant's foot infection.

¶ 24 Dr. Chiodo testified that the claimant had uncontrolled diabetes and was not exercising diabetic foot care. He testified that the claimant had roughened and chapped feet with slight cracking of the top of his left foot. On examination, Dr. Chiodo found brownish discoloration consistent with atrophic changes involving the left foot consistent with poor blood supply in addition to the lack of any diabetic foot care. Based on the medical records and history of poor foot care, Dr. Chiodo opined that the infection

occurred on the top of the foot originally due to uncontrolled diabetes and lack of proper diabetic foot care and that there was no causal connection between the infection and the blister on the bottom of his foot. Dr. Chiodo stated that "there is the very plausible alternative explanation of bacterial intrusion through cracked, roughened skin in an area on the top of his foot remote from the blister." Although Dr. Chiodo believed the cellulitis was causally connected with the amputation of the toe, he did not believe the cellulitis was work related.

¶ 25 The claimant testified that he listened to and followed Dr. Smith's orders when it came to the treatment of his diabetes. He stated that he had not taken Metformin since September 2012 because he had lost weight and was able to control his diet. He testified that he would resume taking Metformin if Dr. Smith recommended it but that no doctor had recommended that he resume taking medication to control his blood sugar.

¶ 26 The claimant returned to work with the employer on September 5, 2011, keeping the same job title. He testified that he was currently working a 40-hour work week, with no restrictions or assistance. His current job duties were similar to his duties before the work accident, but he was now driving an automatic "jockey truck." He was in a different department, which required transporting frames, which was lighter duty work than his prior position. He did not have to move as much in his current position.

¶ 27 The claimant testified that, after his foot surgeries, it was harder to get up after being on his knees because he could not put as much pressure on the amputation site due to the immense pain it caused. He had to adjust the manner in which he got up from this position. He testified regarding issues concerning his balance, in that he wobbled if he

did not put pressure on his left foot, but the pressure caused pain. He stated that cold temperatures caused discomfort in his foot and that the scarred area became numb.

¶ 28 The claimant offered into evidence invoices for medical expenses he had incurred as a result of the foot treatment, noting an outstanding balance of $2,117.13. The remaining medical bills had been paid through the employer's group insurance carrier.

¶ 29 On August 8, 2013, the arbitrator filed a decision, finding that on June 21, 2011, the claimant sustained an accidental injury arising out of and in the course of his employment and that his current condition of ill-being was causally related to the accident. More specifically, the arbitrator found that the claimant suffered from a work-related blister, which he self-treated in a sterile manner, and subsequently developed an infection resulting in multiple surgeries and the amputation of his third, middle toe.

¶ 30 The arbitrator found that the claimant did not commit an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d) (West 2010)). The arbitrator noted that the claimant was informed of an elevated blood sugar level in 1999 and took reasonable measures to treat the condition, which included dietary changes, lifestyle modifications, and a reduction of his daily stresses. In 2009, he was diagnosed with type II diabetes; it was recommended that he begin treatment for that condition; and he immediately did so with Dr. Smith. The arbitrator found that there was nothing in Dr. Smith's medical records to indicate a failure to comply, treat, or otherwise follow the appropriate protocol. To the contrary, the claimant began taking medication, had regular follow-up visits, monitored his blood sugar levels daily, and continued monitoring his diet. It was only after his blood sugar levels dropped that he stopped taking the medication. His blood

sugar levels spiked again after the left foot injury, and he again followed-up with Dr. Smith. The arbitrator found that, contrary to Dr. Chiodo's opinion, the record shows that the claimant followed-up with medical supervision and medications and monitored his diet, weight, and blood sugar levels once he was diagnosed with diabetes. The arbitrator found that there was no indication of non-compliance or any failure to appropriately treat his diabetes. The arbitrator, thus, found that the claimant's conduct in this regard did not rise to the level of an injurious practice under section 19(d).

¶ 31 The arbitrator also found that the claimant's lancing of his blister did not rise to the level of an injurious practice. The arbitrator noted that the un-rebutted testimony shows that the claimant popped his blister using a home remedy technique in a sanitary fashion. The arbitrator found that it was not unreasonable for a person to "pop" what appears to be a "water blister" with a sanitary needle. The arbitrator noted that, although the claimant did suffer from diabetes, the un-rebutted testimony shows that neither his treating physician, nor any other doctor, ever told him not to "pop" his blisters in this way.

¶ 32 The arbitrator awarded the claimant TTD benefits of $475.87 per week for 9 weeks from July 4 through September 4, 2011; PPD benefits of $428.29 per week for 46.4 weeks because the injuries sustained caused the 100% loss of use of the third toe and the 20% loss of use of the left foot; and $2,117.13 in medical expenses.

¶ 33 The employer sought review of the arbitrator's decision before the Commission. On December 10, 2014, a majority of the Commission reversed the arbitrator's decision and vacated the awards of compensation, reasoning as follows:

"[T]he parties stipulated that [the claimant's] work activities caused the development of the blister. However, *** the infection did not come from the existence of the blister, but from [the claimant's] lancing of the blister, which constitutes an intervening accident that breaks the causal chain between the development of the blister and [his] current condition of ill-being. The blister, in and of itself, did not lead to the infection. [The claimant's] actions lead [*sic*] to the infection, and the infection is what led to the amputation of [his] left third toe.

There is nothing in the record to indicate that the infection was a result of [the claimant's] work with [the employer]. Instead, as explained above, the record points to [the claimant's] lancing of the blister, and not the blister itself, as the cause of [his] left foot infection. Therefore, *** the Commission finds that the infection, and not the blister, caused [his] left foot condition and, ultimately, the amputation of [his] left third toe. As a result, [he] failed to prove that the development of the blister at work is causally related to [his] need for treatment of an infection, the amputation of his toe, and his current condition of ill-being. Therefore, the Commission reverses the Arbitrator's finding regarding causal connection and finds that [the claimant's] current condition of ill-being is not causally related to the June 21, 2011 accident."

¶ 34 In response to the employer's argument that the claimant engaged in injurious practices under section 19(d) of the Act by lancing the blister, the Commission stated:

"[Section 19(d)] deals with a claimant negatively affecting his/her recovery. It does not deal with a claimant's actions as the cause of his/her injuries or a

claimant's behavior severing the causal connection between a work accident and the claimant's condition of ill-being. Therefore, Section 19(d) *** does not apply to the case at bar."

¶ 35 The dissenting Commissioner would have upheld the arbitrator's decision. In his view, the claimant's "lancing the blister in a sterile manner does not constitute an intervening accident" but was, instead, "a natural consequence of the work-related injury." According to the dissent, if the claimant had not incurred the work-related blister, his foot would not have become infected, and no amputation would have been required. The dissent noted that applicable case authority requires that the intervening accident must completely break the causal chain between the injury and ensuing condition and that the accidental injury need only be a causative factor in the resulting condition of ill-being. The dissent concluded that the stipulated work-related accident led to a blister, which was a causative factor in the claimant's resulting infection, and that it is foreseeable that a blister will become infected.

¶ 36 The claimant filed a timely petition for judicial review in the circuit court, which confirmed the Commission's decision on June 15, 2015. This appeal followed.

¶ 37 ANALYSIS

¶ 38 Prior to reaching the merits of this appeal, we must first determine the appropriate standard of review. The employer argues that causation is a question of fact and that the appropriate standard of review is, therefore, whether the Commission's finding was against the manifest weight of the evidence. The claimant asserts, however, that he does not dispute any of the Commission's factual findings, including its finding that his

lancing of his work-related blister with a sterilized needle caused his infection. He argues that, because the facts determined and relied upon by the Commission are undisputed on appeal, the Commission's finding with regard to causation presents a question of law subject to *de novo* review. We agree with the employer.

¶ 39 Causation, including the existence of an independent intervening cause, is a question of fact for the Commission, and its finding in that regard will not be reversed on appeal unless it is against the manifest weight of the evidence. *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411, 911 N.E.2d 1042, 1046 (2009).

¶ 40 To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that 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). The "in the course of" component refers to the time, place, and circumstances under which the injury occurred. *Id.* The "arising out of" component addresses the causal connection between a work-related injury and the claimant's current condition of ill-being. *Id.* at 203, 797 N.E.2d at 672. An injury "arises out of" one's employment if it "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.*

¶ 41 Here, the parties stipulated that on June 21, 2011, the claimant sustained an accidental injury that arose out of and in the course of his employment. However, the employer argues that the work-related blister was not causally related to the subsequent

infection. The Commission agreed, finding that the claimant's lancing of the blister, and not the blister itself, caused his infection and that this was an independent intervening accident that broke the chain of causation between the blister and subsequent infection.

¶ 42 "Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury." *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26, 993 N.E.2d 473. "Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred 'but for' the original injury." *Id.*

¶ 43 "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411, 911 N.E.2d at 1046. A work-related injury "need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original). *Sisbro*, 207 Ill. 2d at 205, 797 N.E.2d at 673.

¶ 44 As long as there is a "but-for" relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. *Global Products*, 392 Ill. App. 3d at 412, 911 N.E.2d at 1046. See also *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 239-41, 247, 263 N.E.2d 49, 50-51, 55 (1970) (claimant's continuing traumatic neurosis resulting from a work-related head injury was a causative

factor in the total and permanent disability that occurred four years later when his wife struck him in the head); *Harper v. Industrial Comm'n*, 24 Ill. 2d 103, 109, 180 N.E.2d 480, 483 (1962) (" 'While (the act of suicide) may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an act intervening between the injury and the death, and part of an unbroken chain of events from the injury to the death, and not a cause intervening between the injury and the death.' "); *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 788-89, 821 N.E.2d 807, 814 (2005) (three automobile accidents did not break the causal connection between claimant's work-related back injury and current condition of ill-being because even if the initial automobile accident was responsible for the failed fusion, "such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of claimant's work injury"); *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 835-38, 612 N.E.2d 77, 77-79 (1993) (claimant's racquetball injury and sneezing episode were only contributing causes of disc rupture, and not intervening causes, where "[h]ad it not been for the original [work-related] injury, in all probability claimant's back problems would not have reached the stage they did in such a short period of time"); *Fermi National Accelerator Lab v. Industrial Comm'n*, 224 Ill. App. 3d 899, 908, 586 N.E.2d 750, 756 (1992) (claimant's second fall involving use of crutches was not an intervening accident that broke the causal connection between his work-related fall and current condition of ill-being where he would not have been using crutches but for the work-related injury).

¶ 45 A review of the record in this case demonstrates that there is clearly a "but-for" relationship between the claimant's work-related blister and subsequent infection. Quite simply, even if the claimant's lancing of the work-related blister with a sterilized needle was the immediate cause of his infection, as the Commission found, the infection would not have occurred "but for" the existence of the work-related blister. That is because "but for" the existence of the work-related blister, there would have been no blister to lance. His employment, therefore, remains *a* cause of his current condition of ill-being. The Commission's finding that the claimant's self-treatment was an independent intervening accident that broke the chain of causation between his work-related blister and subsequent infection was, therefore, against the manifest weight of the evidence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we reverse the judgment of the circuit court of Macon County, reverse the decision of the Commission, and remand to the Commission for further proceedings consistent with this decision.

¶ 48 Circuit court's judgment reversed; Commission's decision reversed; cause remanded.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Dunteman,

Petitioner,

14IWCC1019

vs.

NO: 11 WC 40320

Caterpillar, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits, permanent disability, and Section 19(d) of the Illinois Workers' Compensation Act (hereinafter "Act"), reverses the Decision of the Arbitrator regarding causal connection, finds that Petitioner's current condition of ill-being is not casually related to the June 21, 2011 work accident, and vacates all awards of compensation.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent.

One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

With the above in mind, the Commission notes that while it was stipulated to by the parties that Petitioner's blister was a result of Petitioner's work for Respondent, there is nothing in the record to indicate that the blister itself was in any way the cause of Petitioner's infection and/or ultimate amputation of Petitioner's left third toe in the left foot. The medical records indicate that Petitioner did not develop an infection in his left foot until after Petitioner had

lanced the blister at the bottom of his left foot. The Commission notes that Petitioner testified that following the lancing of the blister, his foot condition worsened and he developed redness and swelling, symptoms he did not have prior to the lancing. (T.36-37) The Commission further notes that Petitioner attributed the heat and humidity to his worsening condition. (T.34-35) Petitioner testified that his left foot condition became worse over time and as the temperature became hotter and more humid. (T.37)

On July 4, 2011, Petitioner went to the hospital, where he was diagnosed with lower extremity cellulitis and diabetes mellitus 2. The Commission notes that these are the same conditions Petitioner was diagnosed with back in 2009, except at that time the cellulitis was in the right lower extremity. (PX5,RX6) At the hospital on July 4, 2011, Dr. Smith noted that Petitioner noticed a blister formation on the plantar aspect of his left foot "approximately a week and a half" before this visit. (PX4) Dr. Smith further noted that Petitioner "used a hot needle that he seared on the stove along with peroxide to drain this abscess and/or blister at that time. He thought that this would be adequate. However, his foot got progressively red and painful." (PX4)

The Commission notes that on August 10, 2012, Petitioner's Section 12 examiner, Dr. Coe, testified that Petitioner's infection "arose from the penetration of the blister in his left foot with a needle that unfortunately became infected." (PX6-pg.34) Dr. Coe further admitted that he thought it was "correct to say that the infection arose after he drained the blister using the hot needle as he described it." (PX6-pg.48)

In *Vogel v. Illinois Workers' Compensation Commission*, 354 Ill. App. 3d 780, 786 (2005), the court explained that:

> "[e]very natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable **unless caused by an independent intervening accident that breaks the chain of causation between work-related injury and an ensuing disability or injury.**" (emphasis added)

As previously mentioned, the parties stipulated that Petitioner's work activities caused the development of the blister. However, the Commission notes that the infection did not come from the existence of the blister, but from Petitioner's lancing of the blister, which constitutes an intervening accident that breaks the causal chain between the development of the blister and Petitioner's current condition of ill-being. The blister, in and of itself, did not lead to the infection. Petitioner's actions lead to the infection, and the infection is what led to the amputation of Petitioner's left third toe.

There is nothing in the record to indicate that the infection was a result of Petitioner's work with Respondent. Instead, as explained above, the record points to Petitioner's lancing of the blister, and not the blister itself, as the cause of Petitioner's left foot infection. Therefore, based on the totality of the evidence, the Commission finds that the infection, and not the blister,

caused Petitioner's left foot condition and, ultimately, the amputation of Petitioner's left third toe. As a result, Petitioner failed to prove that the development of the blister at work is causally related to Petitioner's need for treatment of an infection, the amputation of his toe, and his current condition of ill-being. Therefore, the Commission reverses the Arbitrator's finding regarding causal connection and finds that Petitioner's current condition of ill-being is not causally related to the June 21, 2011 accident.

The Commission notes that in its Statement of Exceptions to Arbitrator's Decision and Supporting Brief, Respondent also argued, that Petitioner engaged in injurious practices under Section 19(d) of the Act when he lanced the blister on his left foot. The Commission finds that a complete reading of Section 19(d) establishes that it does not apply in this case.

Section 19(d) of the Act reads, in pertinent part:

> "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee." 820 ILCS 305/19(d) (2013).

The Commission notes that this section deals with a claimant negatively affecting his/her recovery. It does not deal with a claimant's actions as the cause of his/her injuries or a claimant's behavior severing the causal connection between a work accident and the claimant's condition of ill-being. Therefore, Section 19(d) of the Act does not apply to the case at bar.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 8, 2013, is hereby reversed as stated above and all awards of compensation vacated.

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.

No bond is required for removal of this cause to the Circuit Court. 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:
MJB/ell
o-09/30/14
52

NOV 2 5 2014

Michael J. Brennan

Kevin W. Lamborn

DISSENT

Respectfully, I dissent from the majority's decision in finding that the condition of ill-being in Petitioner's left foot was not causally related to his June 21, 2011 work accident.

This finding was made despite the fact that it was undisputed that Petitioner sustained a work-related accident which caused a blister to form on the bottom of his left foot. The majority notes that the lancing of the blister by Petitioner led to an infection. The majority finds "that the infection, and not the blister, caused Petitioner's left foot condition and, ultimately, the amputation of Petitioner's left third toe."

The majority relies on *Vogel v. Illinois Workers' Compensation Commission*, 354 Ill. App 3d 780, 786 (2005), in determining that the lancing of the blister by Petitioner constituted an intervening accident that broke the causal chain between the work-related blister and Petitioner's current condition of ill-being.

Respectfully, I disagree with the reasoning of the majority. It is clear that the blister was work-related—that fact has been stipulated by both parties. I would find that Petitioner's action of lancing the blister in a sterile manner does not constitute an intervening accident or injurious practice. Petitioner's actions were not an intervening accident, but a natural consequence of the work-related injury. Petitioner was required to drive an old ten-gear truck with a clutch that required forceful application with the left foot. Combined with repetitive exiting of the truck while spinning on the same point of impact on the bottom of his left foot, Petitioner incurred the work-related blister. If Petitioner had not incurred the work-related blister, his foot would not have become infected. If Petitioner's foot had not become infected, no amputation would have been required. Hence, this work related injury is clearly causally connected to his current condition of ill-being.

In order for an intervening non-work related cause to relieve an employer of liability, the intervening incident must completely break the causal chain between the injury and the ensuing condition. Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was "a" causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d 123, 127, 227 N.E.2d 65 (1967). It is clear to this Commissioner in this case that the stipulated work-related accident which led to a blister forming on the bottom of the Petitioner's left foot was a causative factor in Petitioner's

resulting condition of ill-being. Also, it is a foreseeable consequence that a blister has a natural potential to become infected. To me this is a fact regardless of whether the blister popped naturally or was lanced by Petitioner.

The majority never fully addresses Respondent's argument that Petitioner engaged in injurious practices under Section 19(d) of the Act when Petitioner lanced the blister on his left foot because of their finding that the infection was not a work-related accident. The majority therefore correctly categorizes Section 19(d) as dealing with a claimant negatively affecting their recovery. Once the injury is found to be work-related, the argument needs to be addressed.

I would uphold the decision reached by Arbitrator Zanotti in finding that Petitioner did not commit an injurious practice pursuant to Section 19(d) of the Act. Section 19(d) infers a degree of intent to imperil or retard one's recovery. See *Global Products v. Workers' Comp. Comm'n*, 392 Ill. App. 3d 408 (2009). (Claimant's smoking did not constitute an injurious practice, even though it may have negatively impacted his recovery, because there was no evidence that the claimant smoked for the purpose of retarding his recovery). In the current case, there is no evidence that Petitioner was attempting to retard his recovery, on the contrary the record supports a finding that Petitioner lanced the blister in order to get some relief from the blister on the bottom of his foot that was a work related accident. As such, Petitioner's action was not an injurious practice and did not break the chain of causation.

As in most cases, there are different medical opinions, one offered by Petitioner's treating physician, Dr. Anderson and shared by Petitioner's Section 12 examiner, Dr. Coe. The differing opinion comes from Respondent's Section 12 examiner, Dr. Chiodo. Dr. Anderson, the treating surgeon, noted that Petitioner's activities at work most likely caused the original ulceration which developed into the infection. Dr. Anderson opined that Petitioner's job put him at risk for ulcerations to his feet and that such an ulceration ultimately led to Petitioner's infection. Dr. Coe agreed and opined that there was a causal relationship between the left foot repetitive strain injury suffered by Petitioner and his current left foot symptoms and state of impairment. Dr. Chiodo denied causation, asserting that the infection developed on the top of, as opposed to the bottom of, Petitioner's foot.

The Supreme Court of Illinois has ruled that the Commission may properly attach greater weight to the opinion of the treating physician, as the Arbitrator did in this case. See, *Holiday Inns of America v. Indus. Comm'n*, 43 Ill.2d 88, 89-90, 250 N.E.2d 643 (1969). The Arbitrator's decision to not rely on Dr. Chiodo's opinion regarding causal connection is justified and rationally reasoned. Dr. Chiodo's opinion has little basis for his conclusion. The medical records clearly indicate that the infection was focused in the plantar aspect of Petitioner's foot, and not on the top. Also, Dr. Chiodo based his causation opinion on Petitioner having improper foot care, as evidenced by his examination of Petitioner on May 25, 2012. This examination occurred nearly one year after the onset of the infection and subsequent to his three left foot surgeries. Dr. Chiodo's contention is uncorroborated by any medical record. Further, no treating

physician indicated that Petitioner had improper foot care or needed to improve his foot care regimen prior to his infection.

As all of Petitioner's testimony, medical records and Dr. Anderson's and Dr. Coe's opinions support the conclusion that Petitioner's condition of ill-being and surgeries are causally related to the accident, the Commission should affirm the Arbitrator's decision.

Therefore, I urge the Commission to reconsider. I would uphold the well-reasoned decision reached by Arbitrator Zanotti. I would insist on the employer paying all remaining and outstanding medical bills, and temporary total disability benefits from July 4, 2011 through September 4, 2011. Lastly, based upon all the medical records and testimony in this matter, a finding that Petitioner has sustained a 100% loss of his left third toe and 20% loss of his left foot is fair and just.

Thomas J. Tyrrell

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- ☐ 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

STEVEN DUNTEMAN
Employee/Petitioner
v.
CATERPILLAR, INC.
Employer/Respondent

Case # 11 WC 40320

14IWCC1019

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 13, 2013**. 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other: Did Petitioner commit an injurious practice pursuant to Section 19(d) of the Act?

14IWCC1019

FINDINGS

On **June 21, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* sustain 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 **$37,117.88**; the average weekly wage was **$713.81**.

On the date of accident, Petitioner was **46** years of age, *single* with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,464.28** for other benefits, for a total credit of **$3,464.28**.

Respondent is entitled to a credit of **$56,395.90** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $2,117.13, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act. (Note: The $2,117.13 figure is the amount due after Respondent's credit is taken into account).

Respondent shall pay Petitioner temporary total disability benefits of $475.87/week for 9 weeks, commencing July 4, 2011 through September 4, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $428.29/week for a further period of 46.4 weeks, as provided in Sections 8(e)7 and 8(e)11 of the Act, because the injuries sustained caused the 100% loss of use of the third toe and the 20% loss of use of the left foot.

Petitioner did not commit an injurious practice pursuant to Section 19(d) of the Act.

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

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

08/01/2013
Date

AUG 8 – 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STEVEN DUNTEMAN
Employee/Petitioner

v.

CATERPILLAR, INC.
Employer/Respondent

14IWCC1019

Case # 11 WC 40320

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On June 21, 2011, Petitioner, Steven Dunteman, testified he worked for Respondent, Caterpillar, Inc., as an "outside driver." As an outside driver, Petitioner testified that he would drive trucks to various locations inside and outside the plant and that he was required to hook, dismantle and transport materials.

In 1999, Petitioner testified that he underwent a Department of Transportation (DOT) physical examination, and was found to have above-normal blood sugar levels. During that examination, the DOT doctor encouraged Petitioner to improve his dietary/eating habits, but never recommended medications, injections, or any follow-up evaluations with specialists. Petitioner testified that he followed the doctor's advice, improved his eating habits, and monitored his consumption.

Between 1999 and 2008, Petitioner testified that he felt good, continued monitoring his diet, and had no issue with his blood sugar. In October 2009, Petitioner testified that he was involved in a work accident (unrelated to the present claim), and was taken to the hospital, at which time he was first diagnosed with Type 2 Diabetes. At the emergency room doctor's recommendation, Petitioner followed-up with his primary care doctor, Dr. Daniel Smith for the condition. According to Dr. Smith's records, on November 9, 2009, Petitioner had elevated blood sugar levels and Dr. Smith noted that Petitioner was "trying to work on his diet" and "continues to be under a lot of stress." (Petitioner's Exhibit (PX) 5; Respondent's Exhibit (RX) 3). Petitioner testified that he began taking Metformin medication at Dr. Smith's recommendation in order to reduce his blood sugar levels. On January 26, 2010, Petitioner followed-up with Dr. Smith and was found to have fluctuating blood sugar levels. The doctor noted that Petitioner continued monitoring his diet. Dr. Smith noted that the diabetes was "under fair control." (PX 5; RX 3). Petitioner testified that he continued to take Metformin and also began testing his blood at home twice per day to monitor his blood sugar levels. Petitioner testified that he continued to follow-up with Dr. Smith, and noticed his blood sugar levels were dropping below normal. Petitioner testified that he felt it was affecting his personal life, so he contacted his doctor and it was decided to discontinue the Metformin. Petitioner testified that his blood sugar levels remained maintained between July 2010 and June 2011.

On June 21, 2011, the parties stipulated that Petitioner sustained an accidental injury to his left foot which arose out of and in the course of his employment. (See Arbitrator's Exhibit (AX) 1). Petitioner testified that the automatic truck that he was driving was being repaired, and it was replaced in May 2011 with an older ten-speed truck with a clutch. Petitioner testified that the clutch was on the left side of the truck and required him to strike it forcefully with the bottom of his left foot. Petitioner testified that he wore steel-toed shoes but the bottom was rubber with no additional protection. Petitioner testified that he was required to strike the steel clutch approximately 200 times per shift, and he spent approximately 70% of the day operating the truck and 30% of the day leaving the truck to perform tasks outside of the truck. When exiting the truck, he would step onto a steel, ridged corrugated step and spin on the left upper portion of his foot, in the same area where his foot struck the clutch. He exited the truck approximately 30 times per day, spinning on his left foot. After approximately four weeks of driving the ten-speed truck, Petitioner testified that he began noticing bruising on the bottom pad of his left foot under his second, third and fourth toes. Petitioner testified it was the same area in which he repeatedly struck the clutch and steel step.

Toward the end of June 2011, Petitioner testified that he was taking a bath and washing his feet, when he noticed a water blister under the callus formation on the bottom of his left foot between his third and fourth toes. He rubbed and loosened up his foot, stepped on a towel and walked to his kitchen. He sterilized a needle in order to pop the blister and relieve the pressure/pain in his foot. He testified that he boiled the needle in hot water and may have used a lighter flame as well for sterilization. He used peroxide and cotton, propped up his foot, and inserted the needle to relieve the blister. Petitioner testified that liquid immediately began to drain. When asked about popping the blister, Petitioner testified he was taught by his mother at a young age to sterilize a needle and use peroxide to pop blisters, and he had done so in the past without any complications.

Petitioner testified he continued to work wearing light, cotton socks in the work boots but continued to have pain and problems with his left foot. He noticed that striking the clutch with his left foot worsened the pain, and he began walking with a limp and noticed an ulcer on the bottom of his left foot where the blister formed. Petitioner testified he called Dr. Smith at this point. On July 1, 2011, Dr. Smith's records note that Petitioner had a sore on his foot which he was worried about getting infected, that he bruised his foot under his callus and was taking Metformin again because of elevated blood sugar levels. (PX 5; RX 3). Petitioner testified that neither Dr. Smith nor any other physician ever advised him against popping a blister himself.

On July 4, 2011, Petitioner testified that his left foot began to swell and redden around the blister. He marked on a photograph of his foot with the letter "R" where the redness occurred. (PX 8). Because it was the weekend, he was unable to see Dr. Smith and instead presented to St. Mary's Hospital. He was admitted and the triage notes indicate a two week onset of left foot problems, after he pushed on a pedal in a semi-trailer with his left foot and developed a bruise on the bottom of his foot which led to edema and redness. (PX 3, 4; RX 4). On July 5, 2011, Petitioner underwent surgery performed by Dr. Jason Anderson. The pre-operative diagnosis noted was cellulitis and abscess of the left foot. The surgery documents a two week history of a blister on the plantar aspect of the left foot, which Petitioner popped with a needle and subsequently had increased redness and darkening of the spot. The operative procedure consisted of an incision and drainage, deep abscess left foot 3rd interspace, a debridement including tendon and fascia, and delayed closure. According to the July 5, 2011 operative report, attention was focused on the plantar aspect of the foot where an ulceration was noted. The doctor performed incisions "encompassing" the ulceration. The doctor noted that it was directly beneath the third metatarsal head. (PX 3; RX 4). Petitioner made a line marking on a photograph depiction of the bottom of his foot indicating where the surgical incision occurred. (PX 8).

The following day, Petitioner underwent a second surgery performed by Dr. Anderson, which included irrigation debridement because of a delayed closure in the left foot. The pre- and post-operative diagnoses noted were "deep abscess left foot." (PX 3; RX 4).

On August 2, 2011, Dr. Anderson's notes indicate that Petitioner's third toe was completely "gangrenous" and "necrotic" and amputation of the third toe was recommended. On August 5, 2011, Dr. Anderson performed a third surgery, which was a left third toe amputation with medial based toe flat closure as well as deep interspace debridement in the left third interspace. The pre- and post-operative diagnoses noted were "left third toe necrosis and cellulitis." (PX 3; RX 4). It was also noted that Petitioner had a flexion contracture of his left second toe. Petitioner was taken off work per Dr. Anderson on July 4, 2011, and was released to return to work effective September 5, 2011. (PX 3).

On September 20, 2011, Dr. Anderson's medical records indicate that the redness and swelling resolved and there were no additional lesions or open ulcerations. Dr. Anderson went on to say that Petitioner's "job puts him at risk for these ulcerations as he has to use his left foot not only to clutch but also get in and out of the truck. This is most likely the cause of his original ulceration. ...there would have been no reason for him to suffer a large callus without the direct mechanism and repetitive mechanism." (PX 3; RX 4).

On February 7, 2012, Petitioner was examined at his attorney's request by Dr. Jeffrey Coe. Dr. Coe testified by evidence deposition. Dr. Coe found that Petitioner's diabetes condition was mild as he was not insulin-dependent with no known complications associated with the diabetes. (PX 6, p. 25). Dr. Coe testified, based upon a reasonable degree of medical certainty, that there was a causal relationship between the nature of Petitioner's work with Respondent involving the repetitive clutch depression and climbing in and out of the truck and his condition of ill-being regarding his left foot. (PX 6, pp. 32-33). Dr. Coe testified that diabetes places Petitioner at a higher risk for infections, but opined that the left foot condition and surgeries would not have developed if it was not for the blister (which occurred from the repetitive activities) penetration. (PX 6, pp. 33-34). Dr. Coe clarified on cross-examination that the infection arose after Petitioner drained the blister using the needle. (PX 6, p. 48). Dr. Coe also testified that Petitioner's post-operative, post-infectious flexion contracture of his left second toe and his ankle swelling was also causally related to the infection. (PX 6, pp. 52-53).

On May 25, 2012, Petitioner was examined at Respondent's request by Dr. Ernest Chiodo pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). Dr. Chiodo testified by evidence deposition. Dr. Chiodo testified that Petitioner had diabetes and was not exercising proper foot care for his condition, which included medical supervision for his diabetic condition, medications to lower his blood sugar, diet, exercise and weight loss as the proper treatment. (RX 2, pp. 11-13, 19). Dr. Chiodo found no causal relationship between the surgeries and Petitioner's work duties, and asserted that Petitioner's infection "happened on the top of his foot, not on the bottom of his foot." (RX 2, pp. 16-18). Dr. Chiodo admitted that Petitioner's foot blister arose from repetitive use of the clutch at work resulting from the friction from the clutch use; he did not believe, however, that the foot infection had anything to do with the blister. (RX 2, pp. 14, 28-31). Dr. Chiodo agreed that once a blister has formed, complications can arise from a blister. (PX 2, p. 31).

Petitioner testified, and the medical records confirm, that he has had no problems with his right foot. Petitioner returned to work with a full duty release. He testified that he currently works a full 40-hour work week, with no restrictions or assistance. He returned to work with Respondent on September 5, 2011, keeping the same job title. His current job duties are similar to his duties before the work accident, but he currently drives a "jockey truck," which is automatic. He is in a different department now as well,

which requires transporting frames. He testified this is lighter duty work than his job before, and that he does not have to move as much.

Petitioner testified as to his hobby of working in his garage, and notices that following his foot surgeries it is harder to get up after being on his knees, as he cannot place much pressure on the amputation site of his foot due to the immense pain it causes. He has had to adjust the manner in which he gets up from this position. He testified to issues concerning his balance, in that he will wobble if he does not place pressure on his left foot, but that the pressure causes pain. He testified that cold temperatures cause discomfort in his foot, and that the scarred area will become numb.

At the time of trial, Petitioner testified that he no longer takes Metformin for his diabetes, and stopped doing so at the end of 2012. He testified that no doctor has recommended he resume taking this medication. He clarified that he was no longer taking Metformin because he had lost weight and had controlled his diet.

Petitioner offered into evidence invoices regarding medical expenses he incurred as a result of his foot treatment. (PX 7). He noted an outstanding balance of $2,117.13, and that the remaining medical bills were paid through Respondent's group insurance carrier.

CONCLUSIONS OF LAW

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

In May 2011, Petitioner's truck was changed to an older ten-speed truck with a clutch. The evidence reveals that Petitioner repetitively and forcefully pressed on the steel clutch approximately 200 times per shift for about four weeks, at which time he developed bruising and a blister on the bottom of his left foot. Petitioner reported this to Respondent, as well as to all of the medical providers. The issue of "accident" is not in dispute. (See AX 1). Dr. Anderson, the treating surgeon, noted that Petitioner's activities most likely caused the original ulceration which developed into the infection. Dr. Coe agreed and found a causal relationship. Dr. Chiodo, Respondent's examining physician, denied causation asserting that the infection developed on the top as opposed to the bottom of Petitioner's foot where the blister occurred. Yet, he agreed the blister was work related. Petitioner lanced the blister himself after noticing it while bathing. He did so in a sterile manner. The lanced blister eventually led to an infection which necessitated three surgeries, one of which involved an amputation of Petitioner's third toe. The Arbitrator concludes that the opinions of Dr. Anderson and Dr. Coe outweigh the opinion of Dr. Chiodo. The evidence reveals that the infection and initial surgery was performed on the bottom of Petitioner's left foot in close proximity to the blister and ulceration which developed. Relying on the opinions of Dr. Anderson and Dr. Coe, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his repetitive work activities from May and June 2011.

Issue (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 denied liability in this case and the parties stipulated that the bills were processed through Respondent's group medical carrier pursuant to Section 8(j) of the Act. According to the medical bills offered into evidence, $2,117.13 remained outstanding. Therefore, after finding causation, the Arbitrator finds that Petitioner is entitled to $2,117.13 in reasonable and necessary medical services and allows Respondent a credit for the remaining bills paid by its group medical carrier pursuant to Section 8(j) of the Act. The individual bills, contained in Petitioner's Exhibit 7, are awarded are as follows:

- Clinical Radiologists - $89.24
- Central Illinois Associates - $204.35
- Infectious Disease Specialist - $246.00
- Lincolnland Home Care of SBL - $100.00
- Samuel Potts, M.D. - $146.00
- St. Mary's Hospital - $1,331.54

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent denied liability for payment of temporary total disability (TTD) benefits in this case. The record indicates that Petitioner was off work per his treating physician from July 4, 2011 through September 4, 2011. Therefore, after finding causation, the Arbitrator awards nine weeks of TTD benefits at the rate of $475.87 per week. The Arbitrator further awards Respondent a credit in the amount of $3,464.28 representing non-occupational indemnity disability benefits paid in this case pursuant to Section 8(j) of the Act.

Issue (L): What is the nature and extent of the injury?

Petitioner underwent three surgeries for the ulceration/abscess and infection which developed in his left foot, which ultimately resulted in the amputation of the left third toe and a post-operative, post-infectious flexion contracture of his left second toe. This is noted in Dr. Anderson's records, the operative reports, as well as the reports of Dr. Coe and Dr. Chiodo. Dr. Coe noted swelling in the left ankle, a slight decrease in pulsation in Petitioner's left dorsalis pedis pulse, swelling in his left foot, weakness, and mild instability of the left foot related to the surgeries and injuries. (PX 6, pp. 29-31).

At trial, Petitioner testified that he returned to work in a full duty position, but now drives an automatic truck which does not require as much activity with the left foot or any clutch work. Petitioner testified to balance issues and difficulties kneeling and putting pressure on the left foot. Petitioner stated he notices numbness in the left foot and that weather conditions affect his sensitivity. The Arbitrator notes that Petitioner's third toe was amputated although he does have a small stump at the third digit area.

The Arbitrator finds that Petitioner testified in a credible, believable fashion consistent with the medical records. The Arbitrator concludes that Petitioner sustained the 100% loss to his third middle toe pursuant to Section 8(e)7 of the Act, as well as the 20% loss of use to his left foot pursuant to Section 8(e)11 of the Act as a result of the injuries. Petitioner is awarded permanent partial disability benefits accordingly.

Issue (O): Did Petitioner commit an injurious practice pursuant to Section 19(d) of the Act?

Pursuant to Section 19(d) of the Act, "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee." 820 ILCS 305/19(d). Previously, the Appellate Court of Illinois has found that a claimant's inability to quit smoking which caused healing problems did not rise to a level of Section 19(d) injurious practice because the employer did not show that the claimant smoked cigarettes for the purpose of retarding his recovery. *See Global Products v. Workers' Comp. Comm'n.*, 392 Ill. App. 3d 408, 911 N.E.2d 1042 (1st Dist. 2009). In *Global*

Products, the Appellate Court noted that the claimant smoked in spite of its potential impact on his recovery, not because of it, thereby not justifying the triggering of Section 19(d) of the Act. Similarly, the Illinois Workers' Compensation Commission found that weight gain impacting on recovery did not justify reducing or suspending compensation pursuant to Section 19(d) of the Act when there was no evidence that the claimant refused any specific medical treatment, nor had the employer offer any weight loss program. *See Pignon v. Trumpf, Inc.*, 07 IWCC 184 (Feb. 26, 2007). Based upon the plain language of Section 19(d) of the Act, the employee must persist in an act which imperils or retards his recovery, and the reasonableness of the employee's conduct is the test when determining whether said employee has engaged in injurious practices. *Allied Chemical Corp. v. Industrial Comm'n*, 140 Ill. App. 3d 73, 488 N.E.2d 603 (1st Dist. 1986).

Section 19(d) of the Act, as supported by case law, infers a degree of intent to imperil or retard one's recovery. The Arbitrator does not find that Petitioner's conduct in this case rises to that level. The evidence in the record reveals that Petitioner was informed of a raised blood sugar level in 1999, and took reasonable measures to treat the condition, which included dietary changes, life style modifications and a reduction of his daily stresses. In 2009, after an injury, he was diagnosed with Type 2 Diabetes. He was recommended to begin treatment for his diabetic condition and immediately did so with Dr. Smith. There is nothing in Dr. Smith's medical records which indicates a failure to comply, treat or otherwise follow the appropriate protocol. To the contrary, Petitioner began taking medication, had regular follow-up appointments, daily monitoring of his blood sugar levels, and a continuation of his dietary monitoring. It was only after his levels lowered that he stopped taking the medication. The evidence indicates that his blood sugar levels spiked again after the left foot injury and he again followed-up with Dr. Smith. Dr. Chiodo testified that Petitioner was not exercising proper foot care, which the doctor testified included medical supervision, medications, diet, exercise and weight loss for the diabetes condition. (RX 2, p. 19). Contrary to Dr. Chiodo's opinion, the record indicates that Petitioner followed-up with medical supervision and medications, and monitored his diet, weight and blood sugar levels once he was diagnosed with Type 2 Diabetes. There is no indication that there was non-compliance or any failure to appropriately treat his diabetic condition. The Arbitrator finds that Petitioner's conduct in this regard did not rise to the level of an injurious practice pursuant to Section 19(d) of the Act.

The Arbitrator further finds that Petitioner lancing his blister at home does not rise to the level of an injurious or insanitary practice within the purview of Section 19(d) of the Act. The un-rebutted testimony establishes that Petitioner popped his foot blister utilizing a "home remedy" technique in a sanitary fashion. It is not unreasonable for a person to "pop" what appears to be a "water blister" with a sanitary needle. While Petitioner did suffer from diabetes, the un-rebutted testimony also establishes that he was never instructed from his treating physician, or any other doctor, to not engage in such a medical home remedy.

2016 IL App (4th) 150152WC

NO. 4-15-0152WC

Opinion filed: April 29, 2016

FILED
April 29, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

GERALD WEAVER,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Macon County.
	)	
v.	)	No. 14 MR 446
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	Thomas E. Little,
(Decatur Overhead Door, Appellee).	)	Judge, presiding.

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

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

OPINION

¶ 1 The claimant, Gerald Weaver, appeals the order of the circuit court of Macon County confirming the decision of the Illinois Workers' Compensation Commission (Commission) dismissing his petition for review under section 19(h) of the Workers' Compensation Act (Act) (820 ILCS 305/19(h) (West 2012)) for lack of jurisdiction. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 On January 22, 2009, an arbitrator found that the claimant sustained accidental injuries arising out of and in the course of his employment with the employer, Decatur Overhead Door. The arbitrator awarded the claimant permanent partial disability benefits of $454.07 per week for 250 weeks based on her finding that the injuries sustained caused permanent disability to the extent of 50% loss of use of the person as a whole.

¶ 4 On February 23, 2010, a majority of the Commission affirmed and adopted the arbitrator's decision. The dissenting Commissioner thought that the award of 50% loss of use of the person as a whole was inadequate.

¶ 5 On January 13, 2011, the circuit court, on judicial review, found the Commission's decision against the manifest weight of the evidence. The court remanded the matter to the Commission for further consideration in view of the dissenting Commissioner's opinion, the opinions of the claimant's treating physicians, and the lack of concrete and specific evidence of realistic alternative employment available to the claimant.

¶ 6 On June 30, 2011, the Commission issued its decision on remand, vacating its original decision; finding the claimant permanently and totally disabled; and awarding him permanent total disability benefits of $421.59 per week from November 3, 1999, forward and for the rest of his life. The Commission noted that, although all three members of the panel painstakingly reviewed the extensive record and concluded that the claimant failed to show that he was permanently totally disabled, in light of the circuit court's finding that the record contains no concrete and specific evidence of realistic alternative employment available to him, they were compelled to find that he was entitled

to permanent total disability benefits. On June 11, 2012, the circuit court, on judicial review, confirmed the Commission's decision on remand.

¶ 7 On September 25, 2013, this court found that the Commission's original determination that the claimant failed to prove he was permanently totally disabled and that he was permanently disabled to the extent of 50% loss of use of the person as a whole was not against the manifest weight of the evidence and that the circuit court, therefore, erred in setting aside the Commission's original decision. Accordingly, this court vacated the circuit court's June 11, 2012, decision; vacated the Commission's June 30, 2011, decision on remand; reversed the circuit court's January 13, 2011, decision setting aside the Commission's original decision; and reinstated the Commission's original February 23, 2010, decision. *Decatur Overhead Door v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120639WC-U, ¶ 2.

¶ 8 On November 6, 2013, the claimant filed a petition for review under sections 19(h) and 8(a) of the Act (820 ILCS 305/19(h), 8(a) (West 2012)), seeking additional permanency and medical expenses. The employer filed a motion to dismiss the section 19(h) petition, arguing it was filed beyond the 30-month period in which to file such a petition and that the time for filing such a petition was not tolled by judicial review. Noting that the 30-month period following entry of the Commission's original decision expired on August 23, 2012, the employer argued that the claimant's November 6, 2013, section 19(h) petition was untimely. The employer asked the Commission to dismiss the section 19(h) petition and allow the claimant to proceed only on the section 8(a) petition.

¶ 9 The employer's motion to dismiss the claimant's section 19(h) petition came before the Commission for a hearing on January 30, 2014. At that time, the claimant submitted his response to the motion, arguing that his section 19(h) petition was timely because it was filed within 30 months of the Commission's June 30, 2011, decision on remand.

¶ 10 On April 23, 2014, the Commission granted the employer's motion to dismiss the claimant's section 19(h) petition, finding that it was untimely because it was filed more than 30 months after the Commission's original decision affirming the arbitrator's award. The Commission noted that the 30-month period was not tolled by judicial review and that this court had vacated the Commission's June 30, 2011, decision on remand.

¶ 11 On January 30, 2015, the circuit court, on judicial review, confirmed the Commission's decision dismissing the section 19(h) petition. This appeal followed.

¶ 12 ANALYSIS

¶ 13 Section 19(h) of the Act provides, in pertinent part, that an award under the Act providing for compensation in installments "may at any time within 30 months *** after such *** award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended." 820 ILCS 305/19(h) (West 2012).

¶ 14 The purpose of section 19(h) is to set a period of time in which the Commission may consider whether a disability has recurred, increased, diminished, or ended. *Cuneo Press, Inc. v. Industrial Comm'n*, 51 Ill. 2d 548, 549, 283 N.E.2d 880, 881 (1972).

¶ 15 The 30-month period set out in section 19(h) "is a jurisdictional requirement that may be raised at any time." *Eschbaugh v. Industrial Comm'n*, 286 Ill. App. 3d 963, 968,

677 N.E.2d 438, 442 (1996). "It is an absolute and unconditional restriction on the right of review." *Id.* Therefore, the Commission is divested of its review jurisdiction for change of disability 30 months after an award of compensation. *Id.*

¶ 16 The 30-month period for filing a section 19(h) petition runs from the date of filing of the Commission's decision, and judicial review of the Commission's decision does not toll the 30-month period. *Cuneo Press, Inc.*, 51 Ill. 2d at 549, 283 N.E.2d at 881.

¶ 17 Here, the Commission entered its original decision on February 23, 2010, affirming and adopting the arbitrator's decision awarding the claimant permanent partial disability benefits. It is this original decision and its permanency award that the claimant seeks to modify. The employer argues, and the Commission agreed, that the 30-month period for filing a section 19(h) petition began running on February 23, 2010, and expired on August 23, 2012; that the 30-month period was not tolled by judicial review; and that the claimant's November 6, 2013, section 19(h) petition was, therefore, untimely.

¶ 18 The claimant, on the other hand, argues that when the Commission entered a new award for permanent total disability benefits on June 30, 2011, the 30-month period for filing a section 19(h) petition began to run anew, and his November 6, 2013, section 19(h) petition was, therefore, timely. However, the claimant is not seeking to modify the June 30, 2011, award of permanent total disability benefits; instead, he is seeking to modify the February 23, 2010, award of permanent partial disability benefits. Moreover, when he filed his section 19(h) petition on November 6, 2013, this court had already vacated the June 30, 2011, decision and reinstated the February 23, 2010, decision and, therefore, there was no June 30, 2011, award he could have sought to modify.

¶ 19 The issue presented in this appeal is a question of law, which we review *de novo*. See *Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 14 ("On questions of law, review is *de novo*, and a court is not bound by the decision of the Commission.").

¶ 20 Our resolution of this issue is controlled by our supreme court's decision in *Big Muddy Coal & Iron Co. v. Industrial Comm'n*, 289 Ill. 515, 124 N.E. 564 (1919). There, after the circuit court confirmed the Commission's decision in favor of the plaintiff and the supreme court affirmed the circuit court's judgment, the plaintiff filed a section 19(h) petition claiming his disability had increased. *Id.* at 516, 124 N.E. at 564. The Commission agreed and increased his compensation accordingly. *Id.* at 516, 124 N.E. at 565. However, the circuit court set aside the Commission's decision and certified that the cause was proper for the supreme court's review. *Id.* at 516-17, 124 N.E. at 565.

¶ 21 The only issue before the supreme court was when the time period for filing the section 19(h) petition began to run. *Id.* at 517, 124 N.E. at 565. The plaintiff argued that the issues before the supreme court in the prior appeal were such as to make the award undetermined and his rights pending until the court finally determined those issues, and, therefore, his section 19(h) petition, which was filed within 18 months of the court's decision, was timely. *Id.* The supreme court rejected that argument, stating:

> "The right to file application for review of an award accrues as soon as an award is made and is not held in abeyance by appeal or writ of error, nor is that right affected by it. The right of either party in compensation proceedings to file application for review of an award does not in any way depend upon whether or

not the award, if an award has been made, is at the time of the filing of such application enforceable or is being held in abeyance by appeal or writ of error. In other words, the right to file an application for review does not depend upon whether or not the award made is enforceable at the time the application is filed, except in cases where there has been a final determination of this court quashing the award. The purpose of paragraph (h) of section 19 is to give a period of time in which it may be determined whether the injuries received recurred, increased, or diminished. The processes of nature continue without regard to whether there is an appeal pending in the cause, and therefore the ground for an application for review may arise without regard to whether the cause is still pending on appeal. This period of time is eighteen months and extends from the time of *** the award." *Id.* at 518-19, 124 N.E. at 565.

¶ 22 In *Cuneo Press, Inc.*, 51 Ill. 2d at 549, 283 N.E.2d at 881, the supreme court adhered to its decision in *Big Muddy Coal & Iron Co.*, noting that it had considered the same issue in *Big Muddy Coal & Iron Co.* and "held that the statutory limitation is not tolled by reason of judicial review of the award." The court declined to overrule *Big Muddy Coal & Iron Co.* on public policy grounds, stating:

"Section 19(h) provides that when the Industrial Commission orders that compensation payable in accordance with an award *** be paid in a lump sum the right of review under this section is terminated. In view of the fact that the right of review provided is so easily terminated we are not persuaded that public policy

requires judicial enlargement of the period during which the review may be sought." *Id.* at 549-50, 283 N.E.2d at 882.

¶ 23 Applying the supreme court's holding in *Big Muddy Coal & Iron Co.* to the facts of this case leads us to the conclusion that the 30-month period for filing a section 19(h) petition ran from the date of the Commission's original February 23, 2010, decision and was not affected by the subsequent vacatur and reinstatement of that decision. As the court noted in *Big Muddy Coal & Iron Co.*, 289 Ill. at 519, 124 N.E. at 565, "the right to file an application for review does not depend upon whether or not the award made is enforceable at the time the application is filed, except in cases where there has been a final determination of this court quashing the award." Here, there was no final determination of the supreme court (or of this court) quashing the original award. In fact, this court reinstated the original award, and it is that award that the claimant seeks to modify.

¶ 24 Accordingly, the claimant's section 19(h) petition was untimely because it was not filed within 30 months of the original award. The Commission, therefore, properly dismissed the claimant's section 19(h) petition for lack of jurisdiction.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision.

¶ 27 Affirmed.