STATE OF ILLINOIS)	[X] Affirm and adopt (no changes)	[ ] Injured Workers' Benefit Fund (§4(d))
) SS.	[ ] Affirm with changes	[ ] Rate Adjustment Fund (§8(g))
COUNTY OF WILL)	[ ] Reverse Choose reason	[ ] Second Injury Fund (§8(e)18)
		[ ] PTD/Fatal denied
	[ ] Modify Choose direction	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL TOLES,

Petitioner,

vs. NO: 09 WC 11199

BOLINGBROOK POLICE DEPARTMENT,

12IWCC1429

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent partial disability, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 2011, is hereby affirmed and adopted.

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

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

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

12IWCC1429

order therefor and deposited with the Office of the Secretary of the Commission.

DATED: DEC 19 2012
o-12/12/12
RWW/lj
46

Ruth W. White

Yolaine Dauphin

Charles J. DeVriendt

STATE OF ILLINOIS	)	
	)SS.	
COUNTY OF WILL	)	

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL TOLES,
Employee/Petitioner

Case # **09** WC **11199**

v.

Consolidated cases: 09WC11200

BOLINGBROOK POLICE DEPARTMENT,
Employer/Respondent

12IWCC1429

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Joliet**, on **May 10, 2011**. 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. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] 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 ____________

12IWCC1429

FINDINGS

On **February 17, 2009**, 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 **$80,472.08**; the average weekly wage was **$1,547.54**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **no** dependent children.

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

Respondent ***has in part*** paid all appropriate charges for all reasonable and necessary medical services.

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

Respondent is entitled to a credit of **$30,539.62** under Section 8(j) of the Act for medical expenses.

ORDER

Respondent shall pay petitioner temporary total disability benefits in the amount of $**1,031.69**/week for a period of **5-2/7** weeks commencing **February 19, 2009** through **March 9, 2009**, and again commencing **March 13, 2009** through **March 29, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay petitioner permanent partial disability benefits of **$664.72**/week for **100** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to his **person as a whole** to the extent of **20%** thereof.

Respondent shall pay petitioner compensation that has accrued from **December 23, 2008** through **November 1, 2010**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay petitioner reasonable and necessary medical services pursuant to the medical fee schedule, of Dr, Mataragas in the amount of $**20,865.00**, of Good Samaritan Hospital in the amount of $**22,516.00**, and ATI Physical Therapy in the amount of $**9,674.62**, as provided in Sections 8(a) and 8.2 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 JOANN M. FRATIANNI

July 7, 2011
Date

JUL 13 2011

12IWCC1429

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

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

Petitioner testified he began working for Respondent as a police office in September of 1995. On February 17, 2009 he was preparing to report to work. Part of this preparation involved placing his duty bag in the trunk of his car. The duty bag weighs 40 pounds and contains the officer's helmet, reports, gas masks, legal codes, ammunition, handcuffs and a flashlight. Petitioner testified that officers keep the duty bags with them for safekeeping. Petitioner would keep his bag in his garage. Once he would arrive at the police station, he would transfer the duty bag from the trunk of his personal car to the trunk of his patrol car.

Petitioner testified that on February 17, 2009 he lifted the duty bag to place it into his car. As he lifted it, he experienced immediate and sudden pain that incapacitated him. Petitioner testified that he had never experienced such pain before this incident. Petitioner testified that he experienced this pain throughout his body and heard a popping noise. Following this incident, Petitioner testified that he could barely stand and he hobbled and crawled into his home to lie down. He immediately called his supervisor, Sgt. Brian Hafner, to report the incident.

Petitioner then called Dr. Mataragas to schedule an appointment. He saw Dr. Mataregas the next day, who documented the incident and increased pain. Dr. Mataragas immediately scheduled surgery and took Petitioner off of work. (Px2)

Petitioner underwent surgery with Dr. Mataragas on February 19, 2009 in the form of a L5-S1 diskectomy and laminectomy. Post surgery, Petitioner remained under the care of Dr. Mataragas and saw him on March 6, 2009. At that time he reported feeling better with decreased pain. Dr. Mataragas prescribed physical therapy.

Petitioner then attempted to return to work with Respondent on March 9, 2009 on a light duty basis and experienced symptoms and problems while sitting in a chair. He returned to see Dr. Mataragas on March 13, 2009 who again took him off of work and prescribed continuing physical therapy.

Petitioner then saw Dr. Mataragas on March 27, 2009, who released him to return to work with certain medical restrictions for two weeks, followed by a full duty return to work. Petitioner did return to work but later resigned to pursue a vocation as a minister.

Petitioner did receive chiropractic care to his spine since 2002 with Dr. Geipel and had seen Dr. Mataragas as recently as four days prior to his February 17, 2009 injury. The medical evidence before this Arbitrator reflects that Petitioner's back condition was improving until his February 17, 2009 injury. There is an indication that his symptoms certainly dramatically changed after that incident on that date. Petitioner further testified that no physician had removed him from work due to back pain prior to February 17, 2009, which is corroborated by the medical evidence before this Arbitrator.

Dr. Mataragas authored a report that the incident of February 17, 2009 aggravated the lower back condition and most likely increased his symptoms to the point where he required surgery. Dr. Mataragas also testified by evidence deposition that it was his opinion that lifting of the duty bag exacerbated and increased Petitioner's pain to the point that he required surgery. Dr. Mataragas testified that it was irrelevant that he may have discussed surgery with Petitioner prior to February 17, 2009, and explained that he was not a surgical candidate until he accepted the option for surgery. Petitioner accepted this option after February 17, 2009 and Dr. Mataragas felt that the lifting of the duty bag caused a dramatic increase in Petitioner's pain leading to the need for surgery.

12IWCC1429

Respondent arranged for Petitioner to be examined by Dr. Miller. Dr. Miller testified by evidence deposition that the injury of February 17, 2009 could have caused additional injury and a worsening of the disc condition. When specifically asked if Petitioner's work activities caused his condition, Dr. Miller responded that it was possible that it did.

Respondent introduced into evidence a memorandum from Sgt. Brian Hafner who documented the incident of February 17, 2009 as reported to him. (Rx5)

Based upon the above, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment by respondent on February 17, 2009. The fact that Petitioner was home at the time does not change this finding as he was specifically engaged in an activity performed for the benefit of Respondent, an activity the Respondent could reasonably expect him to perform. Petitioner's testimony that the duty bags were to be kept with officers for safekeeping even while off duty was not contradicted. The Arbitrator is also aware that Petitioner would be considered to be on-call 24 hours a day as a police office.

Based further upon the above, the Arbitrator further finds that the condition of ill-being to the lower back as described above is causally related to the accidental injury of February 17, 2009.

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?

Petitioner introduced into evidence the following charges incurred after this accidental injury

Dr. Nicholas Mataragas	$20,865.00
Good Samartian Hospital	$22,516.00
ATI Physical Therapy	$ 9,674.62

These charges total $53,055.62.

See findings of this Arbitrator in "C" and "F" above.

The Arbitrator finds that all treatment rendered and all medical expenses in this case as noted above represents reasonable and necessary medical care and treatment in this matter.

Based upon said findings, the Arbitrator finds Respondent to be liable for all of the above charges in the amount of $53,055.62, subject to the provisions of the medical fee schedule as created by Section 8.2 of the Act.

To the extent that the above charges have been paid by Respondent's group health insurance carrier, Respondent is entitled to receive a credit for such payments pursuant Section 8(j) of the Act, and shall hold Petitioner safe and harmless from all attempts at reimbursement made by such health insurance provider.

12IWCC1429

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator finds that as a result of this accidental injury, Petitioner was temporarily and totally disabled from gainful employment commencing February 19, 2009 through March 9, 2009, and from March 13, 2009 through March 29, 2009, and is entitled to receive compensation from Respondent for these periods of time.

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

See findings of this Arbitrator in "C" and "F" above.

Petitioner testified that he is now more careful lifting, twisting and turning and changed the way that he exercises. Petitioner testified that he is unable to perform certain squats and limits the weight that he carries on his shoulder.

The Arbitrator finds that the above condition of ill-being is now permanent in nature.

2015 IL App (3d) 130869WC

NO. 3-13-0869WC

Opinion filed December 7, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BOLINGBROOK POLICE DEPARTMENT,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Will County.
	)	
v.	)	No. 13-MR-111
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION *et al.*	)	Barbara Petrungaro,
(Michael Toles, Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justice Hoffman concurred in the judgment and opinion.
Justice Hudson dissented, with opinion, joined by Justice Harris.

OPINION

¶ 1 The claimant, Michael Toles, worked as a police officer for the employer, Bolingbrook Police Department. He injured his back while loading his duty bag into his personal vehicle in preparation for reporting to the police station for work. He filed a claim for benefits pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2012)). The Commission found that the claimant sustained an

accidental injury arising out of and in the course of his employment. The Commission further found that the claimant established a causal relationship between the accident and the condition of ill-being in his low back requiring surgery. In light of these findings, the Commission awarded the claimant reasonable and necessary medical expenses, 5-2/7 weeks of temporary total disability (TTD) benefits, and 100 weeks of permanent partial disability (PPD) benefits. The employer appeals the Commission's finding that the claimant's injury arose out of and in the course of his employment. The employer also takes issue with the Commission's finding that the claimant's conditions of ill-being in his low back are causally related to the accident. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The claimant began working for the employer as a police officer in September 1995. The claimant testified that his job duties required him to wear an armored vest, a Kevlar helmet, and a duty belt that consisted of two pairs of handcuffs, a firearm, two firearm cartridges, a metal baton, and a taser. He injured his back on February 17, 2009, as he lifted his duty bag to place it in his personal vehicle prior to leaving his home for work. He testified that the duty bag weighed approximately 40 pounds and contained the equipment he uses as a police officer on patrol, including the Kevlar helmet, gas mask, vehicle and criminal codes, incident reports, extra ammunition, his handcuffs, and "a few other items." He described the incident as follows:

"That day I was getting ready to go to work. I put on my uniform, put on my coat, I was in my garage. I went to go pick up my duty bag, and I lifted it up and I turned to go put it in the trunk of the car and my back gave out on me."

He testified that he felt a sharp pain in his lower back. He had problems with his back prior to this incident, but he testified that this pain was different because it was incapacitating. He had to "hobble" back into his house bent over.

¶ 4 The claimant stated that he was required to keep the duty bag "with [his] person." The employer did not require him to take the duty bag home and did not require him to take it to the station at the end of his shift. However, the employer did not prohibit him from keeping the duty bag at his home. When asked why he was putting the duty bag in the trunk of his car, he responded:

"I kept it in the trunk because that way I didn't have to carry it all the way into the station. Tried to be as smart as possible. Drive the squad car to my car, take it out of the trunk of my personal car, take it up, set it down in the garage. It's typical. Most police officers would do that instead of having to carry their duty bags back and forth to their lockers because of the weight of it."

¶ 5 The claimant explained that he kept his duty bag in his garage at home "[t]o keep it safe." On cross-examination, he acknowledged that there was no requirement that he take his duty bag home after each shift but added that the employer did not have a policy prohibiting it either.

¶ 6 (1)

¶ 7 The Claimant's Medical Treatments for Low Back Conditions Prior to the Accident

¶ 8 The evidence in the record establishes that the claimant received medical treatments for low back pain before the February 17, 2009, incident. The claimant testified that he experienced a sharp pain in his lower back at the end of his shift on November 21, 2008. Before that incident, he had sciatica problems "from time to time" and had received chiropractic adjustments for a low back condition.

¶ 9 Medical records show that he periodically received chiropractic treatment from Dr. Carl Geipel between 2002 and 2009. Dr. Geipel's records reflect that the claimant had a "severe low back condition" as early as July 2002. Thereafter, he reported a variety of symptoms while treating with Dr. Geipel, including right-sided low back pain, right sciatic nerve complaints, sharp pain and tightness in his low back, and low back pain radiating to the right hip and lower extremity. He testified that he never discussed back surgery with Dr. Geipel.

¶ 10 On November 26, 2008, he consulted with a spine surgeon, Dr. Nicholas Mataragas. According to Dr. Mataragas, at that time, the claimant reported a history of low back and right leg pain for about a week without any contributing factor. The claimant testified that he told Dr. Mataragas that he had been seeing a chiropractor for years and that he was experiencing increased pain. Upon physical examination, straight-leg raising was positive on the right, which, according to Dr. Mataragas, was indicative of nerve compression in the claimant's spine. Dr. Mataragas' impression was degenerative disc disease with radiculopathy. Dr. Mataragas prescribed over-the-counter pain

medication, advised the claimant to modify his activities, and ordered an MRI. The MRI showed a disc herniation at L5-S1.

¶ 11 The claimant returned to Dr. Mataragas' office on December 5, 2008. At that time, he continued to complain of pain in his low back and right leg. He reported that he believed that his tool belt seemed to give him some back pain. Dr. Mataragas noted that, despite these symptoms, the claimant was "functionally quite well." Dr. Mataragas prescribed physical therapy and advised him that if, at the completion of therapy, he still had symptoms, epidural steroid injections would be considered. The claimant testified that the physical therapy provided some improvement, but he still experienced discomfort.

¶ 12 The claimant saw Dr. Mataragas on February 13, 2009. At that time, he was still symptomatic, so he and Dr. Mataragas discussed "[a]ll of [his] treatment options." The claimant testified that he believed that they talked about another round of physical therapy and possibly steroid treatments. He denied that he and Dr. Mataragas discussed surgery as an option on February 13, 2009. He testified that he was not a candidate for surgery at that time. Dr. Mataragas testified that they "probably discussed everything from *** epidural steroid injections to surgery." Dr. Mataragas' office note reflects that the claimant wanted to take some time to consider his options and would contact the doctor's office when he made "a decision regarding any further treatment." Dr. Mataragas testified that there was no specific recommendation for surgery at that time; they only discussed options.

¶ 13 A telephone log from the claimant's physical therapist states that he contacted her on February 13[1] and stated that he wanted to discontinue physical therapy due to surgery. The telephone log provides:

> "[The claimant] called to inform us today was his last 'training' session. [The claimant] stated having seen [*sic*] MD today [and] *** has considered surgery. [The claimant] stated [physical therapy] has worked but continues to have [pain] and 'tightness' the next day. [The claimant] also said Doctor said he has signif [*sic*] nerve impingement [and] the 'next step is to remove cartilage to relieve pressure.' [The claimant] reports the MD stated now that he has been in therapy for [about three months] the success rate of the surgery will ↓ *** due to the nerve impingement. [The claimant] states the surgery will probably be within next 2 weeks [and] to [discontinue] therapy."

¶ 14 A February 18, 2009, discharge summary prepared by claimant's physical therapist states that claimant "saw his MD on 2/13/09" and "came into the clinic after MD appt. stating that he wanted to be D/C'd from PT due to possibly having surgery." At the

---

[1] The date on the physical therapist's telephone log is February 13, 2008. However, this appears to be a typographical error as there is no indication that the claimant was receiving physical therapy in February 2008. Moreover, a prior message on the telephone log is dated January 24, 2009, and a February 13, 2009, date is consistent with a discharge summary prepared by the physical therapist.

arbitration hearing, the claimant denied telling the physical therapist before February 17 that he was discontinuing physical therapy in anticipation of surgery.

¶ 15 (2)

¶ 16 The Claimant's Medical Treatments After the Accident

¶ 17 After the accident, the claimant immediately called his supervisor to tell him that he injured his back and would not be coming into work. He then called Dr. Mataragas' office and told him that he hurt his back "pretty severe" and that he needed to see the doctor. The following day, he saw Dr. Mataragas and reported that his pain had become significantly worse after picking up a bag. The claimant testified that it was at that point that he discussed surgery with Dr. Mataragas and decided to have back surgery. Dr. Mataragas removed him from work. Prior to that time, no physician had ever removed him from work due to back problems.

¶ 18 The next day, February 19, 2009, the claimant underwent a bilateral laminectomy at L5-S1 with excision of herniated disc material under the direction of Dr. Mataragas. Dr. Mataragas noted that the operative findings showed a disc protrusion and some nerve compression, which was consistent with the claimant's symptoms. Following surgery, the claimant underwent physical therapy. He periodically worked light duty in March and April before Dr. Mataragas returned him to full duty on April 14, 2009.

¶ 19 (3)

¶ 20 Conflicting Medical Opinions on the issue of Causation

¶ 21 On March 22, 2010, Dr. G. Klaud Miller, an orthopaedic surgeon, examined the claimant at the employer's request and reviewed the claimant's medical records. In his report dated March 28, 2010, Dr. Miller wrote that Dr. Mataragas clearly discussed surgery with the claimant on February 13, 2008, and that Dr. Mataragas stated that delay could compromise the results of the surgery. He believed that the claimant was preparing for surgery before the February 17, 2009, accident involving the duty bag. He opined that the claimant's low back surgery was inevitable based on his condition on February 13, 2008, and that the February 17, 2009, accident did not cause or accelerate the need for surgery.

¶ 22 Dr. Miller testified by evidence deposition that, in conjunction with the examination, he reviewed the records of Dr. Geipel and Dr. Mataragas, the report of the claimant's surgery, and the physical-therapy records. Dr. Miller diagnosed the claimant with a herniated disc at L5-S1. When asked about the cause of the herniated disc, Dr. Miller responded:

> "I can't say because it—it probably was the same thing that caused it in 2002, probable—probably just happened. There's no way for me to tell what caused it, but the symptoms were identical in 2008. Probably just natural deterioration of whatever started in 2002. Call it bad genes or bad luck or unknown or unidentified injury, I can't say."

¶ 23 Dr. Miller was also asked whether the claimant's act of lifting his duty bag on February 17, 2009, would have caused the need for back surgery. In response, Dr. Miller

observed that surgery had been "discussed and recommended" before February 17, 2009. Moreover, in his opinion, there was no objective evidence of any change in the claimant's condition before or after the alleged accident and no evidence to suggest that there was any effect by the event of February 17.

¶ 24 On cross-examination, Dr. Miller explained that he reached his conclusion that the February 17, 2009, accident did not cause or accelerate the need for surgery based on not only the February 13, 2009, physical therapy note, but also the records of Dr. Mataragas, which discuss "treatment" on February 13, 2009. He admitted that the notes do not specifically indicate that Dr. Mataragas discussed surgery as an option. In addition, he admitted that the claimant reported "subjective improvement" in his low-back condition between December 2008 and February 13, 2009. He also acknowledged that it is "possible" that an act of lifting as described by the claimant could cause an increase in pain in an individual with a preexisting back condition. He also admitted that the increased pressure on the claimant's disc from lifting the duty bag could cause additional injuries or worsening of the disc condition. Nevertheless, he indicated that, in his opinion, "this was an inevitable degeneration that had been going on for five years." He further noted that the claimant had a diagnosis of a herniated disc prior to the February 17, 2009, event. As such, he concluded that "the lifting incident had nothing to do with [the claimant's] need for surgery." He agreed that because he cannot opine what caused the condition in the claimant's back, it was possible that the claimant's work caused it.

¶ 25 On re-direct examination, Dr. Miller noted that although Dr. Mataragas' office note of February 13, 2009, does not use the term "surgery," it states that he discussed "all of his treatment options." Dr. Miller testified that the treatment options for a herniated disc are nonoperative versus operative. Since the claimant had already undergone nonoperative care, Dr. Miller presumed that Dr. Mataragas discussed surgery with the claimant on February 13, 2009. Dr. Miller added that his presumption is supported by the physical therapy record of the same date, which references a surgical recommendation.

¶ 26 In response to a request from the claimant's attorney regarding causation, Dr. Mataragas authored a letter dated September 3, 2009. In the letter, Dr. Mataragas opined as follows:

> "The incident of February 17, 2009 *** certainly could have aggravated [the claimant's] condition and most likely did as it increased his symptoms to the point where he required surgery. Therefore, I would say within a reasonable degree of medical certainty that the incident of February 17, 2009, did in fact lead to his surgery as he was not symptomatic enough prior to that incident to require surgery."

¶ 27 In his evidence deposition, Dr. Mataragas reiterated that the claimant's act of lifting the duty bag on February 17, 2009, aggravated the preexisting condition of his spine leading to the need for surgery. Dr. Mataragas explained:

> "Well, just based on his complaints. If he wasn't having pain before and he had it immediately after, you know, you could surmise that the two events were

related. The mechanism of bending forward or down is a flexor—flexion moment [*sic*] which does increase pressure on the disc. That's the position in which disc injuries do occur, so it does make sense."

¶ 28 Dr. Mataragas further testified at his deposition that he probably discussed surgery with the claimant on February 13, 2009. However, he denied making any specific recommendation for surgery on that date. He stated that he never tells a patient whether he or she needs spine surgery. With respect to Dr. Miller's opinions, Dr. Mataragas testified that he thought Dr. Miller was "a bit confused in that whether or not I discuss surgery with a patient does not necessarily mean that patient will accept surgery are [sic] be a candidate for surgery." He added that Dr. Miller is not a spine surgeon and, therefore, was not familiar with what spine surgeons do on a daily basis.

¶ 29 He explained that most spine surgery is an elective surgery that is ultimately decided upon by the patient based on his or her complaints. Thus, Dr. Mataragas related, that he discussed surgery with the claimant on February 13, 2009, has nothing to do with whether he felt that the patient needed surgery at that time. The doctor believed that his discussion of surgery with the claimant on February 13, 2009, was "irrelevant," because the claimant did not deem himself to require surgery until after he had the lifting accident. In other words, according to Dr. Mataragas, although he and the claimant discussed surgery prior to February 17, 2009, "as an option," he did not believe that the claimant would be a candidate for surgery until the claimant accepted that option. The claimant did not accept surgery as an option until after the February 17, 2009, accident.

On cross-examination, Dr. Mataragas agreed that if the claimant had decided upon surgery prior to February 17, 2009, he would have been ready to perform the surgery.

¶ 30 (4)

¶ 31 Proceedings Below

¶ 32 Based on the foregoing evidence, the arbitrator determined that the claimant sustained accidental injuries that arose out of and in the course of his employment with the employer on February 17, 2009. In support of this finding, the arbitrator acknowledged that the accident occurred while the claimant was at home but reasoned that the claimant was "specifically engaged in an activity performed for the benefit of [the employer], an activity [the employer] could reasonably expect [the claimant] to perform. [The claimant's] testimony that the duty bags were to be kept with officers for safekeeping even while off duty was not contradicted." The arbitrator also pointed out that, as a police officer, the claimant would be considered to be on-call 24 hours a day. Additionally, the arbitrator concluded that the claimant established that the condition of ill-being of his low back requiring surgery is causally related to the February 17 accident. The arbitrator awarded the claimant reasonable and necessary medical expenses (820 ILCS 305/8(a), 8.2 (West 2008)) and 5-2/7 weeks of TTD benefits (820 ILCS 305/8(b) (West 2008)). Further, the arbitrator, concluding that the claimant's condition had stabilized, awarded him 100 weeks of PPD benefits (representing 20% loss of a person as a whole) (820 ILCS 305/8(d)(2) (West 2008)). The Commission summarily affirmed and

adopted the arbitrator's decision. On judicial review, the circuit court of Will County confirmed the Commission's decision. This timely appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, the employer challenges the Commission's award of benefits on two grounds. First, the employer contends that the Commission's finding that the claimant sustained an accidental injury arising out of and in the course of his employment on February 17, 2009, is contrary to law and against the manifest weight of the evidence. Second, the employer argues that the Commission's finding that there is a causal relationship between the alleged accident of February 17, 2009, and the claimant's condition of ill-being in his low back is against the manifest weight of the evidence. We disagree with both of the employer's arguments.

¶ 35 (1)

¶ 36 Arising out of and in the course of employment

¶ 37 An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. 820 ILCS 305/2 (West 2008). The employee bears the burden of proving by a preponderance of the evidence both of these elements. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477, 949 N.E.2d 1151, 1156 (2011). The "in the course of" element refers to the time, place and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 667 (1989). The "arising out of" element requires that an injury's origin "must be 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 58, 541 N.E.2d at 667. "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.*

¶ 38 As a general rule, the question of whether an employee's injury arose out of and in the course of his employment is one of fact for the Commission. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19, 10 N.E.3d 403. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). We will not overturn the Commission's determination on a factual matter unless it is against the manifest weight of the evidence. *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶ 15, 999 N.E.2d 711. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n,* 2012 IL App (3d) 110077WC, ¶ 15, 970 N.E.2d 16. In the present case, the Commission's finding that the claimant's injury arose out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 39 Testimony in the record establishes that the claimant's duty bag contained gear and equipment that were necessary for the performance of his duties as a police officer. The

40-pound bag included a Kevlar helmet, gas mask, vehicle code, criminal code, incident reports, extra ammunition, handcuffs, flashlight, and other items necessary for his duties as a police officer. He was injured while lifting this equipment in preparation for work.

¶ 40 On appeal, the employer emphasizes that the claimant was not required to take his duty bag home and because the accident occurred at his home, it did not arise out of and in the course of his employment. We disagree.

¶ 41 The evidence in the record supports a finding that, as part of his job duties, the claimant was responsible for the safekeeping of his duty bag. He testified that the employer required him to keep the duty bag with his person, presumably while on patrol. The evidence in the record also supports a finding that, at the end of his shift, the employer allowed him at least two options with respect to the job-related task of safekeeping the duty bag: securing the bag in lockers at the police station or securing the bag at his personal residence. Both options were apparently acceptable to the employer as many officers took their duty bags home at the end of their shifts, and the employer had no rule prohibiting the safekeeping of duty bags at officers' personal residences. Therefore, regardless of which of the two options the claimant chose at the end of any given shift, the Commission could find that the responsibility for the safekeeping of the duty bag remained a job-related undertaking.

¶ 42 Because safekeeping the duty bag at home was acceptable to the employer, it does not matter whether the claimant injured his back while loading his duty bag into a personal vehicle or loading the bag into or retrieving the bag out of a locker at the station.

The evidence supports a finding that both scenarios entail identical tasks that are incidental to the claimant's job-related responsibility of keeping his duty bag secure. Because the employer allowed its officers to secure their duty bags at their personal residences, the employer could reasonably expect its officers to perform the tasks necessary for securing duty bags at their personal residences; the employer would know that the claimant needed to move the duty bag in his garage for loading and unloading the bag from its secure storage. Accordingly, in the present case, the claimant's election to secure his duty bag in his garage, instead of a locker at the station, does not remove his injury from the realm of compensable injuries. "Injuries sustained at a place where a claimant might reasonably have been while performing his work duties are deemed to have been received in the course of his employment." *Nee v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 132609WC, ¶ 20, 28 N.E.23d 961.

¶ 43 As noted above, to be compensable, an injury must also occur while the officer is engaged in an activity that is incidental to his position. *Siens v. Industrial Comm'n*, 84 Ill. 2d 361, 364, 418 N.E.2d 749, 750 (1981). An activity is incidental to the employment if it carries out the employer's purposes or advances its interests, either directly or indirectly. *Sears, Roebuck & Co. v. Industrial Comm'n*, 79 Ill. 2d 59, 71-72, 402 N.E.2d 231, 237 (1980). The employer argues that the only conclusion that the record supports is that the claimant's "actions of lifting his duty bag were personal in nature and not an activity performed for the benefit of the [e]mployer." We disagree.

¶ 44 In the present case, the evidence supports a finding by the Commission that the claimant's duties related to the safekeeping of his duty bag directly furthered the employer's interests. We believe that the direct benefit to the employer when an officer performs tasks that are necessary for the safekeeping of his duty bag is substantial and self-evident. Law enforcement duty bags containing live ammunition, and other law enforcement equipment, left unattended in the community or otherwise lost or unaccounted for in the community, have the potential of posing a hazard to public safety as well as presenting an unprofessional image, undermining the public's confidence in law enforcement. The employer has a direct interest in seeing that its officers maintain the safekeeping of the equipment that is necessary for their duties on patrol. The claimant was injured while performing actions that were directly related to this job-related task.

¶ 45 The claimant testified that the employer required him to keep his duty bag "with [his] person." Arguably, this directive might apply only while the officers are on patrol because they were not required to carry their duty bags while off duty. However, it does not take much of an inference for the Commission to conclude that the employer's direct interest in its police officers' duty bags does not terminate at the end of their shifts but also encompasses the safekeeping of their bags in between their shifts. The claimant testified that he kept his duty bag in his garage "[t]o keep it safe."

¶ 46 Therefore, the evidence in the record supports a finding that the employer's interests are furthered when its officers perform tasks before and after their shifts that are

directly related to the safekeeping of their duty bags. These safekeeping tasks include lifting the 40-pound bags from their secure locations in preparation for assigned duties. The claimant in the present case sustained his injury performing this lifting task. The Commission was well within its prerogative in finding that the claimant was "specifically engaged in an activity for the benefit of [the employer], an activity the [employer] could reasonably expect [the claimant] to perform." Under the manifest weight of the evidence standard, we cannot reverse this finding.

¶ 47 (2)

¶ 48 Causal Connection Between the Accident and Conditions of Ill-Being

¶ 49 The employer also challenges the Commission's finding that the claimant established a causal connection between the accident and the conditions of ill-being in his low back. The record contains conflicting medical evidence on this issue. It is well settled that the Commission has the responsibility of resolving conflicts within the evidence, particularly medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24 (1980). Under the facts of this case, we cannot second-guess the Commission's resolution of the conflicting medical evidence on the issue of causation.

¶ 50 In a proceeding under the Act, the employee has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim. *Id.* at 253, 403 N.E.2d at 223. Among other things, the employee must establish that his or her condition of ill-being is causally connected to a work-related injury. *Elgin Board of Education*

School District U-46 v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 943, 948-49, 949 N.E.2d 198, 203 (2011). In cases involving a preexisting condition, recovery will depend on the employee's ability to establish that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to be causally connected to the work-related injury. *Id.* at 949, 949 N.E.2d at 204.

¶ 51 Under the Act, the accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). "Thus, even though an employee has a preexisting condition that may make him or her more vulnerable to injury, recovery will not be denied where the employee can show that a work-related condition aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to be causally related to conditions in the workplace and not merely the result of a normal degenerative process of the preexisting condition." *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 596-97, 840 N.E.2d 300, 312 (2005).

¶ 52 Whether a causal connection exists between an employee's condition of ill-being and his or her employment is a question of fact for the Commission. *Id.* at 597, 840 N.E.2d at 312. It is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny*, 397 Ill. App. 3d at 674, 928

N.E.2d at 482. The Commission's factual findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 257, 899 N.E.2d 365, 378 (2008). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District,* 2012 IL App (3d) 110077WC, ¶ 15, 970 N.E.2d 16.

¶ 53 In finding a causal relationship between the claimant's employment and the condition of ill-being in his low back, the Commission affirmed and adopted the arbitrator's decision. The arbitrator, in turn, was persuaded by the medical opinions and testimony of the claimant's treating physician, Dr. Mataragas. Dr. Mataragas opined that the claimant's act of lifting his duty bag aggravated or accelerated the preexisting condition in his low back, leading to his back surgery. The evidence supports Dr. Mataragas's opinion that the claimant's preexisting condition worsened after the work-related accident.

¶ 54 Before the accident, Dr. Mataragas diagnosed the claimant with degenerative disc disease with radiculopathy and ordered an MRI. The MRI showed a disc herniation at L5-S1. Thereafter, Dr. Mataragas treated the claimant conservatively with medication and physical therapy. When the claimant saw Dr. Mataragas on December 5, 2008, the doctor noted that he was "functionally quite well." The claimant testified that the physical therapy prescribed by Dr. Mataragas provided him with some improvement. When the claimant saw Dr. Mataragas on February 13, 2009, they discussed further

treatment options. There is a conflict in the record concerning whether they specifically discussed back surgery as an option. Regardless, it is undisputed that back surgery was not prescribed at that time. The employer's own expert, Dr. Miller, admitted during his testimony that the claimant reported subjective improvement before the accident.

¶ 55 The claimant described the work-related accident and testified that the back pain he experienced from the accident was different from any previous back pain he had experienced because the new pain was incapacitating. Dr. Miller admitted that it was possible that the act of lifting the 40-pound duty bag could cause an increase in pain in an individual with a preexisting back condition. He admitted that the increased pressure on the claimant's disc from lifting the duty bag could cause additional injuries or worsening of the claimant's disc condition. Likewise, Dr. Mataragas opined that the mechanism of bending forward is a flexion movement "which does increase pressure on the disc." He concluded that, within a reasonable degree of medical certainty, "the incident of February 17, 2009, did in fact lead to [the claimant's] surgery as he was not symptomatic enough prior to that incident to require a surgery."

¶ 56 Based on this evidence, the Commission was well within its prerogative to find that the claimant's work-related accident aggravated or accelerated his preexisting back condition and was a causative factor resulting in his back surgery. The evidence relevant to the issue of causation was conflicting, and it is not clearly apparent in the record that the Commission's finding was incorrect. Therefore, we cannot reverse the Commission's causation finding under the manifest weight of the evidence standard.

¶ 57 III. CONCLUSION

¶ 58 For the reasons set forth above, we affirm the judgment of the circuit court of Will County, which confirmed the decision of the Commission awarding claimant benefits under the Act.

¶ 59 Affirmed.

¶ 60 JUSTICE HUDSON, dissenting:

¶ 61 I respectfully dissent from the majority opinion. I would find that claimant failed to sustain his burden of showing that the injury for which he seeks workers' compensation benefits occurred "in the course of" his employment with respondent. Accordingly, I would reverse the judgment of the circuit court, which confirmed the decision of the Commission.

¶ 62 Entitlement to benefits under the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2008)) requires an employee to establish by a preponderance of the evidence not only that his or her injury "arose out of" the employment but also that the injury occurred "in the course of" the employment. 820 ILCS 305/2 (West 2008); *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000). The determination of whether an injury arose out of and in the course of one'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. *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 29. A decision is

against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n,* 2012 IL App (3d) 110077WC, ¶ 15. Although this court is reluctant to conclude that a factual determination of the Commission is against the manifest weight of the evidence, we will not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10. I find this to be such a case.

¶ 63 The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 149, 162 (2000). Injuries sustained on an employer's premises, or at a place where the employee might reasonably have been while performing his duties, and while the employee is at work, are generally deemed to have been received in the course of the employment. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (2011). At the time of the alleged injury in the present case, claimant was employed as a police officer. He alleged that he injured his back as he was placing his duty bag in the trunk of his personal vehicle prior to leaving his home for work. Thus, the alleged injury did not occur on respondent's premises or at a place where claimant was reasonably expected to be in the performance of his duties. See *Mills v. Industrial Comm'n*, 27 Ill. 2d 441, 444 (1963) (holding that injury occurring outside regular work hours does not occur within the time

period of the employment); *Curtis v. Industrial Comm'n*, 158 Ill. App. 3d 344, 350 (1987) (concluding that injuries sustained by truck driver during his lunch period at his employer's "wash rack" did not occur at a place where the employee reasonably would be in the performance of his duties).

¶ 64 The Commission, in affirming and adopting the decision of the arbitrator, acknowledged that the accident occurred while claimant was at home, but reasoned that claimant was "specifically engaged in an activity performed for the benefit of Respondent, an activity the Respondent could reasonably expect [claimant] to perform." The Commission further explained that "[claimant's] testimony that the duty bags were to be kept with officers for safekeeping even while off duty was not contradicted." I disagree with these findings by the Commission. First, there was no evidence regarding how claimant's decision to bring his duty bag home after each shift benefitted respondent. In fact, claimant expressly acknowledged that he was *not* required to bring his duty bag home and that respondent provided a locker at the police station for each officer to store his or her equipment. Nevertheless, claimant elected to take the duty bag home so that he would not have to carry it back and forth from his locker at the beginning and end of each shift. In other words, the evidence of record clearly establishes that it was claimant's own decision to take his duty bag home after each shift and that he did so for his own convenience, not for the benefit of respondent. See *O'Neil v. City of Albany Police Department*, 916 N.Y.S. 2d 313 (N.Y. App. Div. 2011) (denying benefits to police officer injured prior to the start of her shift as she was retrieving from her personal

vehicle a bag containing both personal and work-related items where employer provided a locker to store such items but the officer elected to keep them in her car while off duty).

¶ 65 Second, contrary to the Commission's finding, claimant's testimony that the duty bags were to be kept with officers for safekeeping even while off duty *was* contradicted. Initially, claimant did state that he was required to keep the duty bag "with [his] person." However, he later indicated that he was not required to bring his duty bag home and that respondent provided a locker at the police station for each officer to store his or her equipment. Moreover, claimant did not keep his duty bag with him at all times. In this regard, claimant testified that he kept the duty bag in his garage while not on duty. If respondent provided a locker for its officers to store their equipment and if respondent personally kept his duty bag in his garage, he was clearly not required to keep his duty bag with him at all times. At most, claimant's testimony establishes that officers were required to keep their duty bags with them during their work shifts.

¶ 66 Despite the foregoing evidence, the majority finds that claimant was responsible for the safekeeping of his duty bag and that this task furthered respondent's interests. *Supra* ¶¶ 41, 44. Noting that respondent had no rule prohibiting an officer from keeping a duty bag at his or her personal residence, the majority posits that respondent allowed claimant "two options with respect to the job-related task of safekeeping the duty bag: securing the bag in the lockers at the police station or securing the bag at his personal residence." *Supra* ¶ 41. The majority then notes that each duty bag contains potentially dangerous items which, if lost or left unattended in the community, "have the potential of

posing a hazard to public safety as well as presenting an unprofessional image, undermining the public's confidence in law enforcement." *Supra* ¶ 44. I submit that the foregoing concerns are precisely why respondent provides each officer with a locker at the police station to store equipment. Indeed, it is unclear to me how the garage of claimant's personal residence constitutes a more secure location for such items than a locker at the police station. Moreover, while claimant testified that there was no policy prohibiting officers from taking home their duty bags for safekeeping, there was no evidence that respondent approved of this practice or that it was even aware that such a practice was common among its officers.

¶ 67 The Commission also pointed out that, as a police officer, claimant would be considered on-call 24 hours a day. However, claimant presented no evidence that he was always on call. See *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562, 563 (1964) (where evidence was presented that the employee, a deputy sheriff, was considered "on call" 24 hours a day). Moreover, even if we assume that claimant was always on call, it does not necessarily follow that the injury occurred in the course of employment. *Siens v. Industrial Comm'n*, 84 Ill. 2d 361, 364 (1981). To be compensable, the injury must occur while the officer is engaged in an activity that is incidental to his position. *Siens*, 84 Ill. 2d at 364; 2 Arthur Larson, Larson's Workers' Compensation Law § 20, at 20-1 (2010). An activity is incidental to the employment if it carries out the employer's purposes or advances its interests, either directly or indirectly. 2 Arthur Larson, Larson's Workers' Compensation Law § 20, at 20-1 (2010); see also *Bertoch v. NBD Corp.*, 813

N.E. 2d 1159, 1161 (Ind. 2004) ("An action that directly or indirectly advances an employer's interest or is for the mutual benefit of the employer and employee may be incidental to and arise in the course of employment."). As noted above, claimant expressly testified that he was not required to take his duty bag home and he could have left it in his locker at the police station. Nevertheless, claimant elected to take his duty bag home simply because he did not want to bear the burden of transporting his bag to and from his locker at work to his squad car. Under these circumstances, I cannot find that the act in which claimant was engaged at the time of his alleged injury—placing his duty bag in the trunk of his personal vehicle prior to leaving his home for work—advanced respondent's interests, either directly or indirectly. Consequently, the act of transferring the duty bag from claimant's garage to his personal vehicle prior to the start of his work shift was not incidental to claimant's employment as a police officer.

¶ 68 Finally, I believe that the majority's opinion could have far-reaching and unintended consequences. Conceivably, under the majority's reasoning, any employer who does not institute a policy expressly prohibiting an employee from taking home work-related equipment could potentially be liable for injuries occurring at the employee's residence while the employee is loading and unloading the equipment even if the purpose for taking the equipment is unrelated to the employment. In essence, the holding espoused by the majority imposes a duty upon the employer to monitor the comings and goings of its employees. I do not believe that the scope of the Act was intended to be so broad. In light of the foregoing, I must therefore dissent.

¶ 69 JUSTICE HARRIS joins in this dissent.

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

Tommy Oliver,

Petitioner,

vs.

No. 11WC028718

12IWCC1290

Rausch Construction Company Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, the necessity of medical services, temporary total disability, section 19(l) and section 19(k) penalties, and section 16 attorney fees, and being advised of the facts and law, modifies the decision of the Arbitrator by vacating the award of penalties and fees, corrects 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.

On October 3, 2011, Petitioner filed a petition for penalties pursuant to sections 19(l) and 19(k) and attorney fees pursuant to section 16, claiming that Respondent had not paid temporary total disability benefits or Petitioner's medical bills. On October 4, 2011, Respondent filed a response asserting that it had subpoenaed Petitioner's medical records and informed Petitioner's attorney of its need for additional medical records to determine compensability. The Arbitrator found that Respondent's failure to pay Petitioner temporary total disability benefits and medical expenses was unreasonable and vexatious as Respondent did not rely on the medical records as a

basis for disputing liability at the arbitration hearing. The Arbitrator awarded section 19(l) penalties in the sum of $4,230.00, section 19(k) penalties in the sum of $17,011.59 and section 16 attorney fees in the sum of $6,804.64.

On review, Respondent argues that the Arbitrator erred in awarding penalties and fees. Respondent maintains that Petitioner's failure to report a work injury on the alleged date of accident was a reasonable basis for challenging liability. Respondent relies on the testimony of Patrick Kutzer, Respondent's site superintendant, who testified at the February 21, 2012, arbitration hearing that he supervised Petitioner on the alleged accident date, Petitioner did not report an accident and Petitioner did not appear to be in pain on that date. Petitioner counters that Respondent's failure to pay temporary total disability and Petitioner's medical bills was unreasonable, vexatious and solely for the purpose of delay as the medical records fully support Petitioner's claim.

The Commission finds that penalties pursuant to sections 19(k) and 19(l), and attorney fees pursuant to section 16 should not be imposed against Respondent in the present case. Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious as there were legitimate issues in dispute with respect to accident and causal connection, such as Petitioner's failure to report a work accident on his last day of work, Petitioner's request to fill out an accident report six days after the reported work injury and Mr. Kutzer's testimony.

In regards to the Arbitrator's decision, the Commission corrects the Arbitrator's award to reflect that Respondent shall pay Petitioner temporary total disability benefits for 12-2/7 weeks.

The Commission corrects the word "had" in the ninth sentence of the first full paragraph on page three of the Arbitrator's decision to state "hand."

The Commission corrects the tenth sentence in the first full paragraph on page three of the Arbitrator's decision to state, "July 19, 2011."

The Commission strikes the word "his" from the first sentence of the first paragraph of the Arbitrator's conclusions on page four.

The Commission strikes the word "is" in the third to last sentence of the seventh paragraph of the Arbitrator's conclusions on page five.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on March 9, 2012, is hereby modified and corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $20,510.37 for medical expenses under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $1,087.20 per week for 12-2/7 weeks, from August 1, 2011, through October 25, 2011, which is the period of temporary total disability for which compensation is payable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $695.78 per week for a period of 50.6 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused permanent partial disability equivalent to 20 percent loss of the right arm in addition to Petitioner's previous loss of use of 20 percent of the right arm. Respondent shall have credit for Petitioner's prior loss of use of the right arm, to the extent of 47 weeks. Petitioner now has a 40 percent loss of use of the right arm.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $69,200.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Yolaine Dauphin

Charles J. DeVriendt

Ruth W. White

DATED: NOV 2 6 2012
YD/db
o-10/10/12
44

12IWCC1290

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tommy Oliver
Employee/Petitioner

v.

Rausch Construction Co., Inc.
Employer/Respondent

Case # **11** WC **28718**

Consolidated cases: **n/a**

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 **J. Kinnaman**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **2/21/2012**. 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. [x] 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. [x] Was timely notice of the accident given to Respondent?
F. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **credit**

12IWCC1290

FINDINGS

On **7/19/2011**, 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 $**84,801.60**; the average weekly wage was $**1,630.80**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **2** 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 $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,087.20/week for 12.429 weeks, commencing 8/1/2011 through 10/25/2011, as provided in Section 8(b) of the Act.
Respondent shall pay reasonable and necessary medical services of $20,510.37, as provided in Sections 8(a) and 8.2 of the Act.
Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 50.6 weeks, because the injuries sustained caused the 20% loss of the right arm, in addition to Petitioner's previous loss of use of 20% of the right arm, as provided in Section 8(e) of the Act. Respondent shall have credit for Petitioner's prior loss of use of the right arm, to the extent of 47 weeks. Petitioner now has a 40% loss of use of the right arm.
Respondent shall pay to Petitioner attorneys' fees of $6,804.64, as provided in Section 16 of the Act; and penalties of $17,011.59, as provided in Section 19(k) of the Act; and $4,230.00, as provided in Section 19(l) 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

March 6, 2012
Date

MAR - 9 2012

12IWCC1290

This matter was originally tried before Arb. Galicia on Oct. 4, 2011. After the close of proofs, Arb. Galicia's appointment terminated and the case was assigned to the undersigned. On Nov. 10, 2011, Respondent filed a motion for a new hearing, which was allowed. ARBXGroupX4. The claim was tried de novo on Feb. 21, 2012.

Petitioner testified he is a pile driver. A pile driver constructs foundation walls for high rise buildings and to hold back water. He cited the corrugated steel walls used to hold back Lake Michigan around the Shedd aquarium or the walls shown in PX6A around Belmont Harbor as examples. Pile drivers batter a pile into the earth to hold up the sheets and do tie backs to secure the steel walls to the piles. They also do a lot of heavy lifting of things like chain, cable and shackles, lifting up to 150 to 200 lbs. Pile drivers cut and weld the steel sheets, wearing a protective face shield and protective leather so they don't get burned. Petitioner testified he gets bumps and bruises on the job; he doesn't report each one.

Petitioner testified he was working for Respondent on July 19, 2011. They were burning a wall at Belmont Harbor to cut it to grade. This means they were cutting the steel wall so it was level with the ground behind it and the concrete cap could be placed on top. Some of the sheets had chemical in them, which the pile drivers burn off. Petitioner was wearing protective clothing and goggles, not a helmet, because he was just burning, not welding. He was using an acetylene and oxygen torch to cut the steel. He was working with Tita Gosten, a co-worker, to burn off pieces of steel. Petitioner marked PX6A with an X to show where he was positioned. As he was cutting the wall to grade, the fire from the torch on the sheeting and the chemical in the sheeting was extremely hot and caused him to strike the back of his right elbow on the steel. Petitioner testified he said "Damn, it hurts" but figured it wasn't that bad. He kept working and was laid off as of the end of the day. At that time, he noticed there was a little swelling and he had busted the skin a little bit. He did not report the bump to his elbow that day. He testified he is left handed.

Petitioner noticed over the next few days that his arm started swelling. He saw Dr. Waxman on July 25, 2011. The doctor's note shows Petitioner reported he hit his elbow on a metal beam at work a week or so ago. He complained of swelling and some discomfort that night. Dr. Waxman also noted Petitioner had a triceps avulsion which had been repaired 10 or so years earlier. On exam there was swelling over the olecranon bursa of the right elbow with significant weakness of elbow extension. The doctor suspected another triceps avulsion, noting a little bone fragment proximally in the posterior arm. He ordered an MRI. It was done the next day, July 26, 2011 and showed a full-thickness tear of the triceps tendon. PX1.

Petitioner testified he called Respondent on Monday, July 25, 2011 after seeing Dr. Waxman. He spoke to a secretary and asked to get an accident report done. She referred him to Pat, his foreman. He called Pat Kutzer on July 25, 2011and told him he "...wanted to report it because I think I'm hurt." Tr.30. Petitioner testified Pat told him he should

have reported it that day, and would not give him an accident report, even though Petitioner tried to explain he didn't know he was hurt at the time. Petitioner filed this claim on July 28, 2011. ARBX2.

Petitioner underwent surgery on Aug. 1, 2011, a "repair of rerupture, right biceps tendon.". Petitioner's prior surgery and the incident in which he hit his elbow on a steel beam 10 days earlier were both noted in the operative report. It also shows Dr. Waxman identified a defect in the triceps tendon and observed a significant amount of bursal and scar tissue overlying the triceps. The doctor wrote that the appearance of the tissue and all the scar tissue, made it appear Petitioner's ruptured left triceps tendon may not have been just two weeks old, "although the injury and swelling were certainly just at that point, and he had no real significant issues prior to that, so some of the scar tissue certainly could have been from the prior triceps repair." PX2. Petitioner followed up with Dr. Waxman post-surgery and underwent physical therapy beginning Aug. 18, 2011. The therapist recorded Petitioner's report that he was injured when welding and a piece of fire/slag fell on his chest and burned him, causing him to react and hit his elbow on a steel support, rupturing his triceps. Petitioner was discharged from therapy on Oct. 24, 2001. PX3.

Dr. Waxman released Petitioner to return to work with no lifting over 15 lbs. with the right arm and told him to continue his strengthening exercises and not trying to do too much too quickly, particularly at work. On Dec. 14, 2011, Dr. Waxman noted Petitioner was "pretty much doing all of his normal activities" but advised him to slowly get back to heavy lifting writing it could take six to nine months to do so. At that time, Petitioner had full range of motion with some mild triceps weakness, good flexion strength and no tenderness. PX1.

Petitioner testified that when he was released Oct. 25, 2011, he went back to work with the help of others. Most of the time, Petitioner is a foreman. He testified he notices he doesn't have full use of his arm. When he's welding it hurts to keep his right arm elevated. He has pain in the joints of the arm. Lifting hurts especially, lifting something into a truck. He understands this is just something he has to live with. He has not been back to Dr. Waxman. The doctor gave him some pain pills, but he doesn't use them unless it's bad. Petitioner testified he injured his right arm in 1999 when he fell 20 feet while working. He did not remember when he stopped treating for that injury but thought it was about a year later. From 2000 until July19, 2011 he had no treatment for his right arm. Petitioner also testified Respondent has never paid any benefits related to the July 19, 2011 injury, telling him only it was because he didn't report the accident on the day it happened.

On cross-examination, Petitioner testified he had been a pile driver for more than 20 years at the time of his injury. He assumes Tita Gosten saw him bump his elbow. Tita told Petitioner he heard him say he hurt himself and asked Petitioner if he was ok. He hollered out a little bit after he bumped his elbow. But "I didn't holler out because I

thumped by elbow. I hollered out because the fire hit me in the chest. When I hit my elbow, I said oh, shit... and then he asked me, was I okay?" Tr. 47. When he left for the day on July 19, 2011, he knew the job was over. Petitioner testified first that the accident probably occurred in the afternoon, then that it was probably before noon and then that he was assuming it happened sometime in the afternoon. Tr.48-9. In the period from July 20, 2011 to July 25, 2011, he didn't work or do any work around the house or play any sports. On July 19, 2011, he noticed bruising when he got in his truck and pulled off his clothes. He noticed a little blood but didn't pay it any mind and then it started swelling that night and got worse over the next couple of days. He didn't call Respondent or go to a doctor during this period. He only worked for Respondent for three days. They gave him paperwork that included their accident reporting policy that he could have read if he wanted. He fell about 20 ft. on May 4, 1998 and injured his right elbow. He had surgery for that accident. From roughly 2000 to 2011, he never treated for his right elbow. After the rehab, which was painful, his arm was good and he worked full time. He did no gym activities where he was lifting weights in the period from July 19 to July 25, 2011. After he was released to work Oct. 25, 2011, he had a job working for Aretha Construction, but he didn't know the dates when he started and when he was laid off. He last treated for his right elbow injury Dec. 14, 2011.

Patrick Kutzer testified for Respondent. He is a union carpenter working for Respondent as a site superintendent. In July, 2011 he was working for Respondent at Belmont Harbor. Petitioner worked for him as one of a four-man pile driving crew on a Friday, Monday, and Tuesday, which would be July 15, 18, and 19, 2011. During those three days he interacted with Petitioner before work started, at break times and lunch times. On July 19, 2011Kutzer supervised Petitioner's work all day. When he saw Petitioner in the course of the day, he didn't notice Petitioner having any pain or problems. He testified first that he didn't recall speaking to Petitioner that day but then testified he knew they spoke after work because it was Petitioner's last day. Kutzer testified he shook Petitioner's had and thanked him for his help and said he hoped to run into him again on another job. He has not seen Petitioner since July 19, 201. The following Monday Petitioner called to say he wanted Kutzer to fill out an accident report for the last day he was there because he had hurt himself at work. This would have been on July 25, 2011. Kutzer said he "couldn't fill out an accident report a week after the incident occurred." Tr. 67. It was Kutzer's experience as a superintendent or a job foreman that "we have always had to fill it out the day of the incident. I didn't know you could even fill one out after the fact." Tr.68. After July 19, 2011 the job continued at Belmont Harbor but they didn't have work for a four- man crew anymore; other pile drivers were also laid off. Kutzer has burned sheet pile with a torch hundreds of times. You are cutting it with an oxy-acetylene torch. "....sometimes that molten metal or sparks or slag will blow back at you in your direction, not away from you...It happens regularly. Tr.70-1. On cross-examination, Kutzer testified he knows of no factual basis to dispute that Petitioner got injured at work on July 19, 2011, or of any medical basis to dispute the injury. As far as Kutzer knows, the only issue the employer has with this case is that Petitioner reported it six days after the accident.

12IWCC1290

PX4 consists of Petitioner's medical bills. He is claiming reimbursement pursuant to sec. 8(a) and 8.2 of the Act for unpaid amounts as follows: $13,047.33, Highland Park Hospital; $8,424.72, Illinois Bone & Joint; $1,431.17, Northshore University Health System Anesthesia; $168.78, Northshore University Health System Lab; $429.70, Northshore University Health System Physician Billing; $23,501.70 total. Respondent questioned whether the bills had been fully reduced to the amounts allowed by the medical fee schedule and was given time to do its own analysis of the bills. In its proposed decision, Respondent argued it was not liable for any of the bills. If liability were found, Respondent argued Highland Park Hospital was only entitled to $10,056.00 representing 76% of its charges because the bill did not include CPT codes.

RX2 is a certified copy of the Commission's records in 98WC56083 showing Petitioner's prior settlement for 20% loss of use of his right arm for an accident on May 4, 1998. Petitioner agreed Respondent was entitled to credit for that settlement. Tr.82. In his proposed decision, Petitioner claimed interest on his unpaid medical bills pursuant to sec. 8.2(d)(3) of the Act.

The Arbitrator concludes:

1. Petitioner sustained a compensable accident on July 19, 2011 when he struck his the back of his right elbow on a steel wall. He testified he was cutting the wall using a torch when he was struck by molten metal and, in reaction, hit his elbow. His job superintendent, Pat Kutzer testified sparks or metal or slag regularly blow back on workers. Petitioner described the accident to treating doctor Waxman and his physical therapist. Although Petitioner did not report the accident the same day, his testimony that he did not realize he'd suffered a serious injury was credible. Striking one's elbow is often acutely, but temporarily, painful so a reasonable person might not realize serious there was a serious injury.
2. Petitioner gave timely notice of his accident. Respondent's witness, Pat Kutzer, corroborated Petitioner's testimony that he reported the accident on July 15, 2011, six days after the accident and well within the 45 days allowed by the Act.
3. Petitioner's right triceps rupture was causally connected to his accident of July 19, 2011. Petitioner had a prior right triceps rupture in 1998 which resulted in surgery. There is no evidence he had any complaints, restrictions, lost time or medical treatment to his right triceps in the period between his return to the heavy work of a pile driver in 2000 and July 19, 2011. Dr. Waxman's surgery was to repair the rerupture and he identified the defect, although he was surprised at the amount of scar tissue he found.
4. Petitioner was temporarily totally disabled commencing Aug. 1, 2011 through Oct. 25, 2011, a period of 12-3/7 weeks. This is based on the records of Dr. Waxman showing Petitioner underwent surgery Aug. 1, 2011 and was released with restrictions on Oct. 25, 2011. Although the first off work authorization is dated Aug. 4, 2011, it is apparent Petitioner was physically unable to work beginning the day of his surgery.

2015 IL App (1st) 143836WC

NO. 1-14-3836WC

Opinion filed: December 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

TOMMY OLIVER,	)	Appeal from the
	)	Circuit Court of
Appellee,	)	Cook County.
	)	
v.	)	No. 14-L-50328
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	James M. McGing,
(Rausch Construction, Appellant).	)	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 On July 28, 2011, the claimant, Tommy Oliver, 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 July 19, 2011, while working for the employer, Rausch Construction.

¶ 2 On October 3, 2011, the claimant filed a petition for penalties under sections 19(*k*) and 19(*l*) of the Act (820 ILCS 305/19(*k*), (*l*) (West 2010)) and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2010)), claiming that the employer had not paid temporary total disability (TTD) benefits or his medical bills. The employer filed a response, asserting that it had subpoenaed the claimant's medical records and informed the claimant's attorney of its need for additional records to determine compensability.

¶ 3 On February 21, 2013, the claim proceeded to an arbitration hearing. On March 9, 2012, the arbitrator filed a decision, awarding the claimant TTD benefits of $1,087.20 per week for 12.429 weeks, from August 1 through October 25, 2011; $20,510.37 in medical expenses; and permanent partial disability (PPD) benefits of $695.78 per week for 50.6 weeks, representing a 20% loss of use of the right arm. The arbitrator also awarded the claimant $4,230 in section 19(*l*) penalties, $17,011.50 in section 19(*k*) penalties, and $6,804.64 in section 16 attorney fees, finding that the employer's refusal to pay him TTD benefits and medical expenses was unreasonable and vexatious. The arbitrator noted that the employer did not dispute liability based on the claimant's medical records; instead, the employer denied benefits based on the fact that the claimant did not report the accident until six days after it occurred.

¶ 4 The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On November 26, 2012, the Commission filed its decision, finding that penalties and attorney fees should not be imposed against the employer because the employer's conduct in the defense of this claim was neither unreasonable nor vexatious. The Commission reversed the arbitrator's award

of penalties and attorney fees, corrected the arbitrator's decision to reflect an award of TTD benefits for 12 2/7 weeks, corrected several minor typographical errors, and otherwise affirmed and adopted the arbitrator's decision.

¶ 5 The claimant filed a timely petition for judicial review in the circuit court of Cook County. The circuit court remanded the matter to the Commission for further findings of fact regarding the Commission's decision as to penalties and attorney fees. The employer appealed the circuit court's decision to the appellate court, but the appeal was dismissed for lack of jurisdiction because the circuit court's remand order was not a final order.

¶ 6 On March 18, 2014, the Commission issued its decision on remand. In its decision on remand, the Commission restated its reasons for denying penalties and attorney fees in its original decision.

¶ 7 The claimant filed a timely petition for judicial review in the circuit court. On December 2, 2014, the circuit court entered its opinion, finding that the Commission's decision as to penalties and attorney fees was against the manifest weight of the evidence. The circuit court, therefore, reversed the Commission's decision and reinstated the arbitrator's decision with respect to penalties and attorney fees.

¶ 8 The employer filed a timely appeal. On appeal, the employer argues that the Commission's decision as to penalties and attorney fees was not against the manifest weight of the evidence. For the reasons that follow, we affirm the judgment of the circuit court, which reversed the Commission's decision and reinstated the arbitrator's decision with respect to penalties and attorney fees.

¶ 9 BACKGROUND

¶ 10 On July 28, 2011, the claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for injuries he allegedly sustained on July 19, 2011, while working for the employer.

¶ 11 On October 3, 2011, the claimant filed a petition for penalties under sections 19(*k*) and 19(*l*) of the Act and attorney fees under section 16 of the Act, claiming that the employer had not paid TTD benefits or his medical bills. The employer filed a response, asserting that it had subpoenaed the claimant's medical records and informed his attorney of its need for additional records to determine compensability.

¶ 12 On February 21, 2012, the claim proceeded to an arbitration hearing. The pertinent evidence presented at the arbitration hearing can be summarized as follows.

¶ 13 The claimant testified that, on July 19, 2011, he was working as a pile driver for the employer on a project at Belmont Harbor, which is on the shore of Lake Michigan in Chicago. The only other days he had worked for the employer were July 15 and 18, 2011. He stated that, on the day of the accident, he was standing on a small barge using an acetylene and oxygen torch to cut steel when some sparks or fire flew out and struck him in the chest. He testified that, in response, he jerked his right arm back, striking his right elbow against a steel wall. He stated that, when he hit his elbow, he "hollered out." He testified that a co-worker, Tita Gosten, heard him holler out and asked if he was hurt.

¶ 14 The claimant testified that, after he hit his elbow, he worked the rest of the day and was laid off at the end of the day. At that time, he noticed bruising and a little blood. He testified that he did not report the accident that day because he thought it was just a regular injury that comes with construction work. He explained that he did not report

every bump and bruise he received on the job. That evening, his elbow began swelling, and, over the next several days, the swelling and discomfort worsened.

¶ 15 On July 25, 2011, the claimant saw Dr. Bryan Waxman, an orthopedic surgeon at the Illinois Bone and Joint Institute, reporting that he had injured his right elbow at work approximately a week earlier when he hit his elbow on a metal beam and that he had noticed swelling and some discomfort that night. The doctor noted that, approximately 10 years earlier, the claimant had a triceps avulsion, which had been surgically repaired, and that his elbow had been fine since that time. Dr. Waxman suspected another triceps avulsion and ordered a magnetic resonance imaging (MRI) scan, which showed a full-thickness tear involving the triceps tendon.

¶ 16 After seeing Dr. Waxman on July 25, 2011, the claimant called the employer to report his accident. His call was directed to Patrick Kutzer, the employer's site superintendent. The claimant testified that Kutzer told him that he should have reported the accident on the day it occurred and that Kutzer would not allow him to fill out an accident report even though he tried to explain that he was not aware of the extent of his injuries on the day of the accident.

¶ 17 Dr. Waxman surgically repaired the claimant's right triceps tendon on August 1, 2011. The claimant followed up with Dr. Waxman after surgery and underwent physical therapy from August 18 through October 24, 2011. Dr. Waxman released him to return to work with a 15 pound lifting restriction on his right arm on October 25, 2011. He testified that he then went to work for Aretha Construction, where he was a foreman most of the time. Dr. Waxman released him from his care on December 14, 2011, noting that

he was "pretty much doing all of his normal activities." The doctor advised him to slowly get back to heavy lifting, noting that it could take him six to nine months to do so.

¶ 18 The claimant testified that he still did not have full use of his right arm and that he was still experiencing pain when welding, especially when working overhead. He stated that he could not keep his arm in the same spot for very long when it was elevated because it was painful. He testified that he had pain in the joints of his arm. He stated that lifting was also painful, especially lifting something into a truck. He testified that he understood that this was just something he had to live with. He stated that he had not been back to Dr. Waxman and that the doctor had given him pain pills, which he only used when he had to. He denied injuring his right arm since the day of the accident.

¶ 19 The claimant testified that he had injured his right arm in a work-related accident in 1999. As a result, he had undergone surgery to repair his triceps tendon and had received a settlement of 20% loss of use of his right arm. He stated that he had stopped treating for that injury about a year later and that he had returned to work. He testified that, from approximately 2000 until his injury on July 19, 2011, he had received no treatment for his right arm.

¶ 20 At the time of the arbitration hearing, the employer had not paid any workers' compensation benefits or medical bills related to the claimant's July 19, 2011, injury. The claimant testified that the only reason the employer had given him for refusing to pay him benefits was that he did not report the accident on the day it occurred.

¶ 21 Patrick Kutzer, the employer's site superintendent at Belmont Harbor, testified on the employer's behalf. The claimant worked for him as a pile driver on July 15, 18, and

19, 2011. He testified that, during those three days, he interacted with the claimant before work, at break times, and at the end of the day. He stated that, when he saw the claimant periodically throughout the day on July 19, 2011, he did not notice the claimant having any pain or problems. He testified that he had spoken to the claimant after work that day because it was the claimant's last day.

¶ 22 Kutzer testified that on July 25, 2011, the claimant called to say that he wanted Kutzer to fill out an accident report for the last day he was there because he had hurt himself on the job. Kutzer stated that he told the claimant that he could not fill out an accident report a week after the accident occurred. He testified that it was his experience as a superintendent or job foreman that the accident report had to be filled out the day of the accident. He stated that he "didn't know you could even fill one out after the fact."

¶ 23 Kutzer testified that he had burned sheet pile with a torch hundreds of times. He stated that, when cutting with a torch, it was common for molten metal, sparks, or slag to blow back in the direction of the person doing the cutting.

¶ 24 On cross-examination, Kutzer acknowledged that he knew of no factual or medical basis to dispute that the claimant was injured at work on July 19, 2011. He testified that, as far as he knew, the only issue the employer had with this case was that the claimant reported his accident six days after it occurred.

¶ 25 On March 9, 2012, the arbitrator issued a decision, awarding the claimant TTD benefits of $1,087.20 per week for 12.429 weeks, from August 1 through October 25, 2011; $20,510.37 in medical expenses; and PPD benefits of $695.78 per week for 50.6 weeks, representing a 20% loss of use of his right arm. The arbitrator also awarded the

claimant $4,230 in section 19(*l*) penalties; $17,011.59 in section 19(*k*) penalties; and $6,804.64 in section 16 attorney fees, finding that the employer's refusal to pay him TTD benefits and medical expenses was unreasonable and vexatious. The arbitrator explained her reasoning as follows:

> "[The claimant's] Petition for Penalties and Attorneys' Fees was filed Oct. 3, 2011. [Citation.] [The employer] filed a Response on Oct. 4, 2011, indicating it had informed [the claimant's] counsel additional medical records were needed to determine compensability and that it had subpoenaed those records. The Arbitrator takes [the employer] at its word and notes [the employer] did not rely on the medical records as a basis for disputing liability at trial. The only reason for denying benefits apparent from the record is that [the claimant] waited six days to report the accident. [The employer's] only witness testified that was the only basis for dispute as far as he knew. Since the accident consisted of bumping the back of his right elbow against a metal wall, [the claimant's] hope that his injury would be just another of many bumps and bruises not requiring medical care or an accident report, was *** entirely reasonable. The denial of benefits for this reason in the face of the medical records was not reasonable."

¶ 26 The employer sought review of the arbitrator's decision before the Commission, arguing that the arbitrator erred in awarding penalties and attorney fees because the claimant's failure to report a work injury on the day it occurred was a reasonable basis for challenging liability. The employer relied on Kutzer's testimony that the claimant did not

appear to be in pain, that the claimant did not report an accident on that day, and that the claimant did not inform Kutzer of his injury until six days later.

¶ 27 In response, the claimant argued that the employer's failure to pay TTD benefits and medical bills was unreasonable, vexatious, and solely for the purpose of delay as the medical records fully supported his claim. He argued that the fact that he reported the accident six days after it occurred does not create a reasonable basis for the employer's failure to pay benefits as he credibly testified that his right elbow condition worsened after he went home on the day of the accident.

¶ 28 On November 26, 2012, the Commission filed its opinion, finding that penalties and attorney fees "should not be imposed against [the employer] in the present case" because "[the employer's] conduct in the defense of this claim was neither unreasonable nor vexatious as there were legitimate issues in dispute with respect to accident and causal connection, such as [the claimant's] failure to report a work accident on his last day of work, [the claimant's] request to fill out an accident report six days after the reported work injury and Mr. Kutzer's testimony." The Commission reversed the arbitrator's award of penalties and attorney fees, corrected the arbitrator's decision to reflect an award of TTD benefits for 12 2/7 weeks, corrected several minor typographical errors, and otherwise affirmed and adopted the arbitrator's decision.

¶ 29 The claimant filed a timely petition for judicial review in the circuit court. The circuit court remanded the matter to the Commission for further findings of fact regarding the Commission's decision as to penalties and attorneys fees. The employer appealed the

circuit court's decision to the appellate court, but the appeal was dismissed for lack of jurisdiction because the circuit court's remand order was not a final order.

¶ 30 On March 18, 2014, the Commission issued its decision on remand, which provides, in pertinent part, as follows:

> "In compliance with the circuit court's order, the Commission expands on the reasons why it found [the claimant] ineligible for penalties and attorney fees as stated in its November 26, 2012, Decision and Opinion on Review. The Commission denies [the claimant's] request for penalties pursuant to sections 19(k) and 19(l) and attorney fees pursuant to section 16 based on the following: (1) although [the claimant] alleged he injured his right elbow on his last day of work, he failed to report he had sustained a work accident that day; (2) [the claimant] sought medical treatment and requested to complete an accident report six days after the reported work injury; and (3) Mr. Kutzer, [the claimant's] supervisor on the day of the accident, testified that [the claimant] did not appear to be in pain and did not report an accident on the day he claimed it occurred. These facts provide reasonable explanation for [the employer's] denial of [the claimant's] claim and show that [the employer's] refusal to pay benefits was not frivolous, vexatious or solely for the purpose of delay."

¶ 31 The claimant filed a timely petition for judicial review in the circuit court, arguing that the Commission's decision as to penalties and attorney fees was against the manifest weight of the evidence. The circuit court agreed and, on December 2, 2014, entered an order, reversing the Commission's decision and reinstating the arbitrator's decision with

respect to penalties and attorney fees. The circuit court explained its reasoning as follows:

"All three (3) of the Commission's purported reasons to support its decision are, in reality, the same reason. That [the claimant] did not report his accident on the day it happened and waited six (6) days to file an accident report with the [e]mployer. The Commission attempts to set a precedent that cannot be allowed; that an employee must report an accident on the day it occurs in order to be eligible for benefits. Such an idea is specifically prohibited by the Act, which provides that an accident must be reported within 45 days of its occurrence. 820 ILCS 305/6(c).

Further, and more importantly, the [c]ourt notes that the [employer] refused to allow [the claimant] to file an accident report six (6) days after the alleged accident. The [employer] then attempts to argue that it reasonably believed that there was no causal connection between the work accident and [the claimant's] current condition of ill-being. The [employer] never allowed [the claimant] to file a report and therefore never conducted an investigation into the accident. An employer cannot be allowed to willfully decide not to investigate a matter and then argue that, even though [it] did not look into it, [it] reasonably believed [it] did not have to pay benefits.

Had the [employer] allowed [the claimant] to file an accident report, investigated it, and *then* determined that there was no causal connection, then [its] delay in paying benefits would be wholly reasonable and not vexatious. This point

becomes even more important as [the claimant] testified before the Arbitrator that a fellow employee was present when he was injured, and noticed his reaction to the accident. That is something the [employer] would likely have found out had [it] investigated the accident. The [employer] stuck its head in the sand and then argued that it could not see or hear anything so it was reasonable for [it] to think nothing was there. That is a dangerous precedent that cannot be allowed." (Emphasis in original)

¶ 32 ANALYSIS

¶ 33 On appeal, the employer argues that the Commission's decision as to penalties and attorney fees was not against the manifest weight of the evidence. The intent of sections 19(*l*), 19(*k*), and 16 of the Act "is to implement the Act's purpose to expedite the compensation of industrially injured workers and penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due an employee." *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301, 412 N.E.2d 468, 470 (1980). "Penalties for delayed payment are not intended to inhibit contests of liability *** by employers who honestly believe an employee not entitled to compensation; they are intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *Id.* at 301-02, 412 N.E.2d at 470.

¶ 34 The standard for awarding penalties under section 19(*l*) differs from the standard for awarding penalties and attorney fees under sections 19(*k*) and 16. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552-53 (1998).

¶ 35 We begin our analysis by considering the Commission's denial of penalties under section 19(*l*) of the Act, which provides, in pertinent part, as follows:

> "In case the employer or his or her insurance carrier shall *without good and just cause* fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission *shall* allow to the employee additional compensation in the sum of $30 per day for each day that the benefits *** have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." (Emphasis added). 820 ILCS 305/19(*l*) (West 2010).

¶ 36 Penalties imposed under section 19(*l*) are "in the nature of a late fee." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Moreover, the award of section 19(*l*) penalties is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *Id.* "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865 (1982). The Commission's determination of the reasonableness of the delay is a question of fact, which will not be disturbed unless it is against the manifest weight of the evidence. *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772. The Commission's

decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 822 (2009).

¶ 37 Here, the Commission found that the employer's refusal to pay benefits was reasonable because (1) although the claimant alleged he was injured on his last day of work, he did not report the accident that day; (2) he sought medical treatment and asked to complete an accident report six days later; and (3) his supervisor on the day of the accident testified that he did not appear to be in pain and did not report an accident on the day it occurred.

¶ 38 As the circuit court noted in its order, "[a]ll three (3) of the Commission's purported reasons to support its decision are, in reality, the same reason." All of the Commission's purported reasons center around the fact that the claimant did not report his accident on the day it occurred. This is not a legitimate basis for denying workers' compensation benefits.

¶ 39 According to the Act, notice of an accident must be reported to the employer within 45 days of the accident. 820 ILCS 305/6(c) (West 2010). Here, there is no dispute that the claimant reported the accident to the employer six days after it occurred.

¶ 40 "The purpose of the notice requirement is to enable the employer to investigate the alleged accident." *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95, 411 N.E.2d 249, 252 (1980). "Compliance with the requirement is accomplished by placing the employer in possession of the known facts related to the accident within the statutory period." *Id.*

¶ 41 Here, the claimant's notice after six days clearly fulfilled the purpose of the Act's notice requirement and was not a legitimate basis for withholding benefits. The circuit court astutely described the employer's unreasonable conduct in this case. After the claimant reported his accident to Kutzer, he was denied the opportunity to fill out a formal accident report, and there is no evidence that the employer investigated the claim in any manner. Instead, the employer denied the claim off-hand, simply because it was not reported on the day of the accident. Kutzer acknowledged that, as far as he knew, the employer had no factual or medical basis to deny the claim, and the only basis he knew of for the denial of the claim was that the claimant reported the accident six days after it occurred. The employer had ample opportunity to investigate the facts and circumstances of this claim but chose not to do so.

¶ 42 In its brief to this court, the employer further argues that Kutzer's testimony that he did not notice the claimant's pain on the day of the accident somehow creates a reasonable basis for denial of benefits. However, whether Kutzer, a lay witness, noticed that the claimant was experiencing symptoms after his accident is of no consequence in the face of clear and undisputed medical records, which detail the claimant's work accident and injury. Again, Kutzer acknowledged that the only issue the employer had with the claim was that the claimant reported his accident six days after it occurred.

¶ 43 Furthermore, when examined along with the medical records and the claimant's testimony, the six-day delay in reporting the accident was reasonable. The claimant's injury worsened over the several days after his accident and did not respond to rest at home. He, therefore, sought medical treatment and reported his accident to the employer

six days later. The employer did not dispute the claim based on medical evidence or witness testimony. Instead, it disputed the claim based solely on the fact that the claimant did not report his accident on the day it occurred.

¶ 44 To reach its conclusions in this case, the Commission had to ignore the letter of the law in finding that reporting an accident six days after it occurred is a reasonable basis for disputing a workers' compensation claim. As noted above, a claimant has 45 days to report an accident to an employer under the Act. The Commission did not cite any legal authority to support its position that not reporting an accident on the day it occurred is a reasonable basis for disputing a claim; nor did the employer cite such legal authority in its appellate brief. Furthermore, the Commission did not even attempt to explain how the employer's refusal to pay the claimant benefits in this case was reasonable in the face of medical records and testimony, which clearly demonstrate a work-related accident and injury.

¶ 45 As the circuit court noted in its decision in this case:

> "The Commission attempts to set a precedent that cannot be allowed; that an employee must report an accident on the day it occurs in order to be eligible for benefits. Such an idea is specifically prohibited by the Act, which provides that an accident must be reported within 45 days of its occurrence. 820 ILCS 305/6(c)."

¶ 46 The Commission seemingly found that an employer can deny benefits on any claim that is not reported on the day of the accident. Kutzer testified that he did not know that he was even allowed to fill out an accident report after the accident date, evidencing the employer's apparent one day reporting policy. Such a position is in direct contrast to

the clear language of the Act, which allows 45 days to report an accident to an employer. Furthermore, such a position is unreasonable based upon the fact that many workplace injuries do not manifest themselves until days after the accident, and many claimants are not in a position to report their accident on the day it occurred. The employer argues that the claimant should have reported his accident on the day it occurred because he began feeling some symptoms that day. Again, the employer's position is unsupported by any authority and is not supported by the record in this case. The record shows that the claimant tried to give his injury time to improve, believing at first that it was a common workplace injury that did not require medical treatment or an accident report; however, when the injury did not improve over the next several days, he decided that he needed to seek medical treatment and reported the accident to the employer. His course of action was reasonable and is not a legitimate basis for the employer's denial of benefits.

¶ 47 The burden of providing a reasonable basis for denial of benefits falls solely on the employer. The record is clear that the employer denied this claim, without any investigation, solely because the claimant did not report the accident on the day it occurred. As the employer has provided no authority for such a denial, it has failed to provide a reasonable basis for that denial. Therefore, we find that the Commission's determination that the employer's refusal to pay benefits was reasonable is against the manifest weight of the evidence. Under section 19(*l*), when the employer's refusal to pay benefits is without good and just cause, penalties are mandatory. Accordingly, we affirm the circuit court's order reversing the Commission's decision and reinstating the arbitrator's decision with respect to penalties under section 19(*l*).

¶ 48 We turn now to the Commission's denial of penalties and attorney fees under sections 19(*k*) and 16 of the Act. Section 19(*k*) provides, in pertinent part, that "where there has been any *unreasonable or vexatious delay* of payment *** the Commission *may* award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." (Emphasis added). 820 ILCS 305/19(*k*) (West 2010). Section 16 provides for an award of attorney fees and costs when an award of additional compensation under section 19(*k*) is appropriate. 820 ILCS 305/16 (West 2010). The amount of attorney fees to be awarded is a matter within the discretion of the Commission. *Jacobo*, 2011 IL App (3d) 100807WC ¶ 22, 959 N.E.2d 772.

¶ 49 The standard for awarding penalties and attorney fees under sections 19(*k*) and 16 is higher than the standard for awarding penalties under section 19(*l*) because sections 19(*k*) and (16) require more than an "unreasonable delay" in payment of benefits. *McMahan*, 183 Ill. 2d at 514-15, 702 N.E.2d at 552. For the award of penalties and attorney fees under sections 19(*k*) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *Id.* at 515, 702 N.E.2d at 552. Instead, penalties and attorney fees under sections 19(*k*) and 16 are "intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.*, 702 N.E.2d at 553. In addition, while section 19(*l*) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(*k*) and 16 is discretionary. *Id.*

¶ 50 Accordingly, our review of the Commission's decision to deny section 19(*k*) penalties and section 16 attorney fees differs from our analysis of the Commission's decision to deny section 19(*l*) penalties. A review of the Commission's decision to deny section 19(*k*) penalties and section 16 attorney fees involves a two-part analysis. *Id.* at 516, 702 N.E.2d at 553. First, we must determine whether the Commission's finding that the facts do not justify section 19(*k*) penalties and section 16 attorney fees is against the manifest weight of the evidence. *Id.* Second, we must determine whether the Commission abused its discretion in refusing to award such penalties and attorney fees under the facts in the present case. *Id.* An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the Commission. *Blum v. Koster*, 235 Ill. 2d 21, 36, 919 N.E.2d 333, 342 (2009).

¶ 51 We agree with the circuit court's conclusion that section 19(*k*) penalties and section 16 attorney fees should have been awarded in this case. The employer's conduct was not the result of simple inadvertence or neglect. More was involved than just a lack of good and just cause. The employer made a deliberate decision not to honor its statutory obligations to the claimant, and it did so simply because the claimant did not report the accident on the day it occurred. Based on the testimony of the employer's only witness in this case, the claimant's supervisor, the employer's refusal to pay benefits in this case was apparently the product of its established policy that if an accident is not reported on the day it occurs, it cannot be reported at all, and no benefits will be paid. This policy contravenes section 6 of the Act, which allows an employee 45 days to report

an accident. See 820 ILCS 305/6(c) (West 2010). Under these circumstances, the Commission's determination that the facts do not support section 19(*k*) penalties and section 16 attorney fees is against the manifest weight of the evidence. We further hold that, under the facts of this case, the Commission's refusal to award such penalties and attorney fees was an abuse of discretion.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which reversed the Commission's decision and reinstated the arbitrator's decision with respect to penalties and attorney fees.

¶ 54 Affirmed.

Kathy Jenkins v. Jackson Park
13 IWCC 891

This matter had previously been heard and the Decision of the Arbitrator had been filed June 21, 2011. Respondent and Petitioner filed timely Petitions for Review. The Commission affirmed and adopted the Decision of the Arbitrator finding causal connection and awarding 22-5/7 weeks of temporary total disability benefits (9/13/06-2/18/07) at a rate of $ 570.08 per week under § 8(b) of the Act, $ 12,654.58 for reasonable and necessary medical expenses under § 8(a) of the Act, and an award of a 40% loss of use of Petitioner's person as a whole under § 8(d)(2) of the Act (200 weeks at $ 513.07 per week = $ 102,614.00 total PPD). Respondent subsequently sought review in the Cook County Circuit Court, which subsequently remanded the case to the Commission to modify the award as follows:

BACKGROUND

This matter was heard before Arbitrator Cronin on April 21, 2011 with a Decision filed on June 21, 2011. The Arbitrator ruled as stated in the above paragraph. The Decision included language noting that, although Petitioner was under permanent light duty restrictions and was unable to continue her duties as a Stationary Engineer, Respondent still paid **[2]** her regular Stationary Engineer wages despite the fact that Petitioner was working as a Public Safety Officer.

Both Respondent and Petitioner timely filed for Review, and the matter was set for oral arguments on April 5, 2012. Notices were sent to both parties on February 29, 2012. However, Petitioner's attorney claimed that Notice was not received, thus oral arguments were continued.

Subsequently, Petitioner was laid-off by Respondent on April 16, 2012 due to economic circumstances. On April 27, 2012 Petitioner filed an Emergency Motion to Continue oral arguments so that Petitioner's motion to remand the case to the Arbitrator to re-open proofs could be heard (The motion cited a dramatic change in circumstances since the Arbitration hearing). Petitioner argued in its motion that a wage differential award was proper, which is the same argument Petitioner made at Arbitration.

The Commission denied said motion, stating that, but-for Petitioner's attorney claim of no notice, the case on review would have been heard prior to Petitioner's unfortunate lay-off. The Commission also noted that the notice for oral arguments was sent to the same address that Petitioner's attorney used in its **[3]** subsequent Motion to Continue.

The Commission also noted that there was no claim of ambiguity in the record to warrant a re-opening of proofs. Moreover, the Commission found that Petitioner had failed to prove entitlement to a wage differential award, as Petitioner was earning her customary Stationary Engineer wages even while she worked as a Public Safety Officer. Thus, there was no diminution of wages.

In denying the Motion to Continue, the Commission effectively denied Petitioner a second chance to prove entitlement to a wage differential. This would have unjustly prejudiced Respondent.

Oral arguments before the Commission took place on November 1, 2012, and a Decision was subsequently filed by the Commission affirming the Arbitrator's Decision.

Petitioner appealed said Decision to the Circuit Court, who then remanded the case to the Commission with instructions.

ORDER ON REMAND

The Commission finds no evidence in the record that warrants altering its Decision, however, pursuant to the Circuit Court order, the Commission hereby modifies it's permanent partial disability award, and grants Petitioner a wage differential award of $ 389.60 per week, from February 19, 2007 through **[4]** the duration of her disability, under§ 8(d)(1) of the Act. This wage differential represents 2/3 of the difference between the $ 23.61/hour Petitioner would be able to earn in the full performance of her occupation as a Stationary Engineer and the $ 9.00/ hour she would be able to earn in some suitable alternative employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to a wage differential award of $ 389.60 per week, from February 19, 2007 through the duration of her disability, under§ 8(d)(1) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The 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.

Kathy Jenkins v. Jackson Park
12 IWCC 1225

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 21, 2011 hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited **[2]** with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

Kathy Jenkins
Empoyee/Petitioner

v.

Jackson Park Hospital Foundation
Employer/Respondent

Case # **05** WC **48729**

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **April 21, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical

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

FINDINGS

On **10/25/05**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship **[3]** ***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 $ **44,466.24**; the average weekly wage was $ **855.12**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **2** 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 $ **12,946.52** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **12,946.52**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **570.08**/week for **22-5/7** weeks, commencing **9/13/06** through **2/18/07**, as provided in Section 8(b) of the Act.

[4] Respondent shall be given a credit of $ **12,946.52** for temporary total disability benefits that have been paid.

Respondent shall pay petitioner $ **12,654.58** for the following reasonable and necessary medical services, pursuant to Section 8(a) of the Act and in accordance with Section 8.2 of the Act: $ **1,133.60 - Elite Physical Therapy** , $ **2,619.46 - Dr. Richard Egwele**, $ **263.00 - Cottage Emergency Physicians**, and $ **8,638.52 - Trinity Hospital**. Respondent is entitled to a credit for previous payment of any portion of the above outstanding medical bills.

Respondent shall pay Petitioner permanent partial disability benefits of $ **513.07**/week for **200** weeks, because the injuries sustained caused a permanent loss of use, man as a whole,

to the extent of **40%** thereof since the petitioner has suffered a loss of trade as a result of the 10/25/05 accidental injury.

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 **[5]** 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.

June 19, 2011

Date

KATHY JENKINS v. JACKSON PARK HOSPITAL FOUNDATION

05 WC 48729

Addendum to Arbitrator's Decision

I. STATEMENT OF FACTS

On October 25, 2005, petitioner suffered a work-related injury to her neck, low back and left knee. Arbitrator Peter O'Malley previously heard this matter on September 12, 2006. His 19 (b) award of November 14, 2006, which became a final order of the Commission, awarded medical, TTD and Section 19(l) penalties. (P.Ex.5).

This matter returns for subsequent hearing to address additional medical bills, causal connection and the nature and extent of petitioner's work-related injury.

It is undisputed that subsequent to the September 12, 2006 19(b) Hearing, petitioner remained temporarily and totally disabled through February 18, 2007 for a total of 22-5/7 weeks.

Since the 19(b) Hearing, petitioner continued treating with her surgeon, Dr. Egwele. **[6]** Specifically, she continued to undergo physical therapy for her low back and left knee at Trinity Hospital. (P.Ex.7). In February 2007, Dr. Egwele ordered a Functional Capacity Evaluation ("FCE") which petitioner underwent on February 8, 2007 at Elite Physical Therapy. The evaluator concluded that petitioner performed at the light physical demand level, and therefore, was unable to perform the specific activities of her prior job as a Stationary Engineer. (P.Ex.8). Specifically, the evaluator noted that petitioner was unable to perform any prolonged stooping, kneeling or squatting, was unable to lift or carry loads up to 50 pounds and was unable to perform any prolonged standing or walking. (P.Ex.8).

Thereafter, on February 28, 2007, Dr. Egwele indicated that petitioner could return to work at the sedentary level only on a permanent basis. (P.Ex.6). Petitioner provided unrebutted testimony that Dr. Egwele never lifted or modified her restrictions since he issued the permanent work restrictions on February 28, 2007.

Petitioner testified that her prior job as a Stationary Engineer was not within the restrictions issued by the FCE or Dr. Egwele in that such job required extensive walking, **[7]** bending, squatting, and carrying heavy tools.

Petitioner also treated with Dr. Egwele from 2009 through April 2010 during which time she received further physical therapy at Trinity Hospital for a flare-up in her knee and back pain. (P.Ex.6 and P.Ex.7).

Prior to February 19, 2007, respondent refused to offer petitioner any light-duty work. (*See*, P.Ex.5 and P.Ex.9). On February 19, 2007, respondent first offered petitioner modified work in the accounting department. Petitioner returned to work and performed clerical duties that included sorting, stapling and filing papers. When she performed these clerical tasks, she noticed that her left knee was stiff and that she had low back pain, especially if she sat for more than an hour. She could handle this job because it allowed her to sit and stand as needed and only required minimal walking. She modified the job because of her leg limitations by utilizing a chair and sitting while performing filing. She performed this job for approximately three months and was paid her regular Stationary Engineer pay for the job. Thereafter, petitioner worked in the employee health department where she performed similar clerical duties for approximately **[8]** two months.

Then, in the summer of 2007, respondent transferred petitioner to the security department to assume the role of a Public Safety Officer. Initially, her duties included watching monitors. She was able to alternate her sitting and standing while she performed such job. She noticed that her left knee and low back would get stiff and painful if she sat for longer than an hour. As she performed this; job, she again was paid her regular pay as a Stationary Engineer.

After about two months of working as a Public Safety Officer, respondent kept petitioner in the security department but relocated her to the security tower in the parking lot. There, petitioner was required to climb eight to nine stairs into the tower and watch over the parking lot. If she observed any problems, she was to call the security office or call the police. Petitioner did not engage in any altercations with any individuals in connection with this job. Additionally, about once a month, petitioner is required to ride downtown in a van with another Public Safety Officer in order to drop off and pick up documents. Physically, petitioner would ride in the passenger's seat and then when the driver exited the **[9]** vehicle to deliver or pick up documents, she would move to the driver's seat and drive the van around the block until her co-worker returned. Petitioner also is required to occasionally replace another Public Safety Officer in either lobby of the hospital when he or she goes to lunch. There, she sits for approximately one hour where she welcomes visitors and provides visitor badges. Lastly, respondent asked the petitioner to place fliers on the windshield of approximately 200 cars in the parking lot.

Petitioner modifies her job in the security tower by driving her personal car one block from the hospital building to the security tower. She does this in order to minimize the discomfort to her left knee. Further, petitioner limits the number of trips she takes in and out of the tower because the pain in her left knee increases when she traverses the stairs. Lastly,

petitioner alternates her sitting and standing in order to minimize her low back pain and left knee pain and stiffness.

Petitioner has been performing this light-duty job of Public Safety Officer from approximately July 2007 through the present. This job is within her restrictions. She has never refused any modified job that **[10]** respondent has provided her. Presently, petitioner is paid $ 23.61 per hour, which is the current pay rate for a Stationary Engineer. She works 40 hours per week.

Presently, there are approximately 25 Public Safety Officers on staff at the hospital. There was a similar number of Public Safety Officers in 2007. Petitioner testified without rebuttal that a Public Safety Officer's pay starts at $ 8.34 per hour and that a Public Safety Officer is required to (1) undergo a 20-hour certification class and, (2) possess a high school diploma. Petitioner has not undergone such certification class and does not have a high school diploma. The parties stipulated that all of respondent's other public safety employees are paid between $ 8.00 and $ 10.00 per hour.

Petitioner testified that the highest level of education that she has completed is the 8th grade. She has more recently attended GED test preparation classes in Griffith, Indiana. She has taken the GEO test on two occasions, but she has failed the test twice. (P.Ex.11).

Petitioner also testified that other than the City of Chicago-issued Stationary Engineer license, which she has held for approximately 16 or 17 years, she possesses no **[11]** other professional licenses or certifications. Specifically, petitioner noted that she has never undergone any training as a Security Guard, she does not possess a PERC card or FOID card, she is not licensed to carry a weapon, and she is not a licensed as Security Guard by the State of Illinois.

Certified Vocational Rehabilitation Counselor Edward J. Rascati performed an initial vocational assessment of petitioner on March 30, 2010. In his April 2, 2010 report, Mr. Rascati noted that in the Chicagoland area, Security Guard positions usually pay between $ 9.00 and $ 11.00 per hour and that petitioner's present earnings in excess of $ 23.00 are not indicative of other security positions throughout the Chicago area. (P.Ex.2). Mr. Rascati went on to note that petitioner's vocational potential is limited by the fact that she does not possess a GED and her skills as a Stationary Engineer fall into an area which are no longer transferrable, given her restrictions. Mr. Rascati concluded that given her restrictions and lack of a GED, there is presently not a viable or stable labor market for petitioner. However, she might be able to procure alternative employment as a cashier, gas station attendant, **[12]** parking lot attendant or central station monitor -- each of which would pay her between $ 8.00 and $ 9.00 an hour.

Petitioner underwent a Section 12 examination on August 30, 2010. Dr. Troy R. Karlsson performed such examination at respondent's request. Dr. Karlsson, who did not address petitioner's neck or low back complaints, indicated that petitioner's medial meniscal tear that was treated surgically, was not related to her October 25, 2005 work injury. Instead, he opined, such knee injury occurred on February 24, 2006. (R.Ex.2). Additionally, Dr. Karlsson indicated that petitioner had no restrictions from her injuries and was capable of performing full-duty work.

II. CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to (F) IS THE PETITIONER'S CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

In his initial decision, Arbitrator O'Malley found that a causal relationship existed between petitioner's current condition of ill-being involving her neck/ right, shoulder area, low back and left leg and her work accident of October 25, 2005. (P.Ex.5). Respondent did not file a Petition for Review of said decision. Therefore, **[13]** said decision became a final award of the Commission.

Following that hearing, petitioner remained under the care of Dr. Egwele who continued to render her conservative treatment for the left knee and low back including the use of medications and physical therapy. The Arbitrator notes that, in addition to the continuity of treatment, throughout Dr. Egwele's records, he makes continual reference to petitioner's work injury as being the cause of the conditions for which he treated her. (P.Ex.6).

The only evidence offered at arbitration that refiites causal connection were the opinions of Dr. Karlsson. Dr. Karlsson opined that the left knee medial meniscal tear was caused by a February 24, 2006 fall rather than the October 25, 2005 work accident. (R.Ex.2). The Arbitrator notes that respondent is estopped from re-challenging initial causal connection at this point as this issue was already resolved and decided in the 19(b) Decision.

Rather, the Arbitrator is persuaded by the opinions of Dr. Egwele which are consistent with subsequent treatment records including those of Trinity Hospital and Elite Physical Therapy and finds that petitioner's present condition of ill-being involving her **[14]** neck/ right shoulder, low back and left knee are still causally related to her October 25, 2005 work injury.

In support of the Arbitrator's decision relating to (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONALBE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following:

At arbitration, petitioner identified Petitioner's Exhibit 4 as the outstanding medical bills that she received in connection with her accident-related treatment. The Arbitrator notes the respondent only objected to liability for said bills. Given the Arbitrator's above decision as to causal connection, the Arbitrator orders respondent to pay petitioner $ 12,654.58 for reasonable and necessary medical charges which have already been adjusted pursuant to the medical fee schedule as is required by Section 8.2 of the Act.

In support of the Arbitrator's decision relating to (D WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

Petitioner was diagnosed with cervical and lumbar strains for which she required injections and physical therapy. (P.Ex.5). Additionally, with regard **[15]** to her left knee, Dr. Egwele's post-operative diagnosis was an unstable undersurface tear of the posterior horn of the medial meniscus, chondromalacia of the patella and medial femoral condyle, hypertrophic synovitis, and a contusion to the anterior cruciate ligament. (P.Ex.7).

Post-operatively, petitioner continued to require physical therapy and she continued to treat for the knee and back into 2010. (P.Ex.7).

Dr. Egwele ordered an FCE. Such FCE was conducted at Elite Physical Therapy on February 8, 2007. That evaluation revealed that petitioner, after exhibiting "a full and consistent effort," could only perform at the light demand level as outlined by the U.S. Department of Labor. (P.Ex.8). Specifically, the evaluator concluded that petitioner could not perform prolonged stooping, kneeling or squatting, that she could not lift loads up to 50 pounds and that she was unable to stand or walk for a long period of time. (P.Ex.8). Thereafter, Dr. Egwele, on February 28, 2007 advised petitioner that she could return to work at a sedentary level on a permanent basis. (P.Ex. 6).

Respondent first offered petitioner light-duty work that she accepted on February 19, 2007. Prior to this job **[16]** offer, respondent refused to offer petitioner any light-duty job. (*See*, P.Ex. 5 and P.Ex.9). After performing two clerical jobs for a total of approximately five months, respondent placed petitioner in the security department to work as a Public Safety Officer where she has worked continuously ever since.

Petitioner's major job duty involves sitting in the tower of the parking lot. Such job requires her to climb eight to nine stairs and to monitor the parking lot. She is able to sit and stand as needed. She does not engage in any altercation with any potential scofflaw. Rather, if she sees anything unusual or peculiar, she reports it to the security office. She has the ability to call the police. Petitioner indicated that this job is within her restrictions. In order to accommodate her injury-related disabilities, she alternates sitting and standing as needed, she drives her personal car to and from the main hospital so she does not have to walk the one block distance and she minimizes the number of times she climbs the stairs into the security tower because climbing stairs increases her left knee pain.

In addition to working in the security tower, petitioner occasionally rides **[17]** downtown in a van with another Public Safety Officer. She occasionally replaces other Public Safety Officers in the hospital main lobby during the one-hour lunch break. Respondent has also requested that petitioner place fliers on the windshield of approximately 200 cars in the parking lot.

Petitioner has not been offered any other light-duty job outside of her employment with respondent. Respondent has never offered any vocational rehabilitation. Petitioner presently earns $ 23.61 per hour and works 40 hours per week. This rate is the rate that she would be earning as a full-time Stationary Engineer. (P.Ex.10).

Petitioner testified that, presently, approximately once a month she has pain in her neck and right shoulder, for which she applies a heating pad and takes Tylenol. As for her low back, if she sits for longer than one hour, the pain increases and her back begins to tighten up. She testified that she experiences this pain approximately once a week, for which she applies a heating pad and takes Tylenol.

As for her left knee, petitioner testified, she presently notices that if she sits for longer than one hour, her knee aches and stiffens. Additionally, if she walks for longer **[18]** than 15

minutes, her left knee swells and aches. Petitioner testified that she experiences this swelling approximately every other day and that she treats it with elevation, ice and Tylenol.

The Arbitrator notes that petitioner has not sought treatment for her neck, shoulder or back since 2006. Petitioner has never been diagnosed with anything more than a strain of these body parts. Moreover, there have been gaps in the treatment of her left knee. She did not treat from October 25, 2007 through March 23, 2009, from November 6, 2009 through April 8, 2010 and from April 10, 2010 through April 21, 2011 (the date of the arbitration hearing) for any left knee complaints.

The Arbitrator finds that Dr. Egwele's instructions for petitioner to keep up with her home exercise program fell on deaf ears. Dr. Egwele noted a quad insufficiency. It is clear to the Arbitrator that the only home exercise that she has performed has been to hold her leg up for 10 seconds.

Petitioner indicated that she has adjusted her lifestyle as a result of this work injury. Specifically, she no longer goes on long shopping trips to the mall with her daughter since standing for more than 15 minutes causes her left **[19]** knee to ache and swell. Additionally, when she exits her vehicle, she has to place both feet on the ground outside of the car and pull herself up out of the car. Further, when climbing stairs, petitioner always leads with her right foot in order to avoid left knee pain. Lastly, when cleaning around her house, she notices back and knee pain while mopping. She modifies the way that she cleans her bathroom so that she may avoid kneeling on her left knee. Instead of kneeling, she sits on the side of the tub and reaches down to clean the tub.

The highest level of education petitioner has completed is the 8th grade. She has also undergone some GED test preparation coursework in Griffith, Indiana and has taken the GED test on two occasions, once in February 2010 and February 2011. Unfortunately, she did not pass either examination. (P.Ex.11). She is scheduled to take the examination again in August when she is next eligible.

Petitioner testified that she does possess her license issued by the City of Chicago to work as a Stationary Engineer. However, that work is outside of her restrictions as it requires bending, stooping, climbing, excessive standing, walking and lifting. Certified Vocational **[20]** Rehabilitation Counselor Edward J. Rascati opined, with no rebuttal, that petitioner's prior work as a Stationary Engineer exceeds her current restrictions. (P.Ex.2).

Dr. Karlsson opined that with regard to the left knee, petitioner should be able to return to regular-duty work. Yet, given Dr. Karlsson's apparent dismissal of the valid FCE, the Arbitrator is not persuaded by Dr. Karlsson's nature and extent opinion.

Rather, the Arbitrator finds the FCE results and Dr. Egwele's records to be persuasive. Consequently, the Arbitrator concludes that as a result of her October 25, 2005 work injury, petitioner is no longer able to perform her usual and customary occupation as a Stationary Engineer. Thus, this case represents a loss of occupation.

Mr. Rascati performed a vocational assessment on petitioner, generated a report and offered his testimony regarding same. Specifically, Mr. Rascati concluded that without her high school

diploma or GED, it is unlikely petitioner could obtain any employment outside of her work for respondent. If she were able to do so, Mr. Rascati opined, the only type of employment for which she may be suitable would be entry-level work that includes such occupations **[21]** as a cashier, gas station attendant, parking lot attendant or central station monitor/ security. Such positions pay from $ 8.00 to $ 9.00 per hour. (P.Ex.2).

Mr. Rascati noted that petitioner's occupation as a Stationary Engineer requires medium-level functioning, which exceeds her present physical abilities. (P.Ex.2). Lastly, Mr. Rascati noted that although respondent is currently paying petitioner in excess of $ 23.00 an hour for her role as a Security Guard, such hourly rate is not indicative of the hourly earnings of similarly-situated Security Guards in the Chicago area. (P.Ex.2, P. Ex. 3, p.14). Mr. Rascati indicated that these similarly-situated Security Guards earn anywhere between $ 9.00 and $ 11.00 per hour.

Petitioner also testified, without rebuttal, that to be hired as a Public Safety Officer for respondent, one is required to possess a high school diploma or equivalent, undergo a 20 hour certification course, and become licensed/certified by the State of Illinois. Petitioner possesses none of these qualifications.

Based on the above, the Arbitrator finds that as a result of her October 25, 2005 work injury, petitioner is unable to physically perform the required physical **[22]** activities of her prior occupation of Stationary Engineer. However, petitioner is presently not suffering any impairment of earnings as she continues to earn the same rate of pay that she would have been earning as a Stationary Engineer. Nonetheless, she is incapacitated from pursuing other suitable occupations and as such significantly limits her ability to locate suitable employment in the labor market. As such, the Arbitrator concludes that as a result of her October 25, 2005 work injury, petitioner has sustained a 40% loss of use, man as a whole, pursuant to Section 8(d)(2) of the Act.

2016 IL App (1st) 142431WC

NO. 1-14-2431WC

Opinion filed: January 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JACKSON PARK HOSPITAL, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Kathy Jenkins, Appellee).	)))))))))	Appeal from the Circuit Court of Cook County. No. 13-L-051034 Honorable Edward S. Harmening, 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, Kathy Jenkins, worked as a stationary engineer for the employer, Jackson Park Hospital. She sustained injuries to her neck, low back, and left knee in a work-related accident and can no longer perform the job duties required of a stationary engineer. She filed a claim pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)). During the course of litigating the claimant's

compensation claim, numerous contested issues arose between the parties. At this point in the proceeding, however, it is undisputed that the claimant is permanently and partially disabled because of her workplace accident and can no longer pursue the duties of her usual and customary line of employment. What remains in dispute is what benefits she is entitled to receive because of her permanent partial disability.

¶ 2 Section 8(d) of the Act governs this issue. It provides for the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." 820 ILCS 305/8(d) (West 2012). Section 8(d) details two alternative types of compensation for employees who are permanently and partially disabled. Section 8(d)(1) provides for a wage differential award; alternatively, section 8(d)(2) provides for a percentage-of-the-person-as-a-whole award. 820 ILCS 305/8(d)(1), (2) (West 2012). The claimant argues that she is entitled to an award under section 8(d)(1), while the employer argues that she is entitled to an award under section 8(d)(2).

¶ 3 Although the claimant can no longer perform the duties required of a stationary engineer, at the time of the arbitration hearing, the employer continued to employ the claimant as a public safety officer at the same wage that she would have earned as a stationary engineer. The Commission, therefore, concluded that the claimant was not entitled to a wage differential award under section 8(d)(1) because she had not suffered any loss in wages. This finding lies at the heart of this appeal.

¶ 4 There is considerable procedural history leading up to this appeal that is critical to understanding and addressing the parties' contentions. Therefore, we will first briefly

outline the proceedings below before detailing the factual background relevant to our analysis.

¶ 5 The parties' first hearing before an arbitrator took place on September 12, 2006, and was an expedited hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)). The arbitrator awarded the claimant medical expenses, temporary total disability benefits, and penalties. The arbitrator's findings and awards made at that hearing are not at issue in this appeal.

¶ 6 The parties appeared before an arbitrator a second time almost five years later, on April 11, 2011, for a hearing on additional issues, including the claimant's request for permanent partial disability (PPD) benefits. The claimant requested a PPD award based on a wage differential pursuant to section 8(d)(1) of the Act. The arbitrator, however, denied the claimant's request for an award under section 8(d)(1) and awarded her PPD benefits based on a percentage of the person as a whole under section 8(d)(2).

¶ 7 The arbitrator based his decision concerning the proper PPD award on a finding that the claimant had not suffered any reduction in her income because of her disability. The arbitrator acknowledged that the claimant could no longer perform the duties of a stationary engineer. However, the arbitrator focused on evidence that the employer continued to pay the claimant her previous wage rate while employing her in a light-duty, security officer position. The arbitrator concluded, therefore, that, because the claimant could not show an actual reduction in her income, she was not entitled to a wage differential award under section 8(d)(1). The claimant sought a review of the arbitrator's decision before the Commission.

¶ 8 Prior to the oral arguments in the review hearing before the Commission, the employer terminated the claimant's employment so that she no longer worked as a public safety officer and no longer earned the wage on which the arbitrator relied in denying her request for a wage differential award. Therefore, the claimant filed an emergency motion to remand the case to the arbitrator in order to reopen proofs to allow additional evidence of her termination.

¶ 9 The Commission denied her request to reopen the proofs. Subsequently, after oral arguments, it affirmed and adopted the arbitrator's decision without additional comment, denying the claimant's request for a PPD award under section 8(d)(1) and affirming and adopting the arbitrator's PPD award under section 8(d)(2). The claimant appealed the Commission's decision to the circuit court. The circuit court reversed the Commission's award under section 8(d)(2), finding that it was against the manifest weight of the evidence. The court remanded the claim to the Commission with directions for the Commission to enter a wage-differential award under section 8(d)(1).

¶ 10 On remand, the Commission entered a wage differential award. The employer appealed this decision to the circuit court, which entered a judgment that confirmed the Commission's decision on remand. The employer now appeals the circuit court's judgment.

¶ 11 On appeal, the employer asks this Court to reinstate the Commission's original PPD award under section 8(d)(2), arguing that it was not against the manifest weight of the evidence. The claimant asks us to affirm the Commission's wage differential award that it entered on remand under section 8(d)(1). Alternatively, she asks us to vacate both

PPD awards and remand her claim to the Commission for an additional hearing on her request for a wage differential based upon the following claims: (1) the Commission abused its discretion in refusing to reopen proofs so she could present evidence of her employment termination, and (2) the Commission abused its discretion at the time it entered the original PPD award under section 8(d)(2) by limiting the admission of certain evidence that was relevant to her request for an award under section 8(d)(1).

¶ 12 For the reasons explained below, we agree with the claimant's latter contention. The Commission abused its discretion by limiting the admission of an evidentiary stipulation the parties' submitted. In addition, the Commission failed to consider other evidence relevant to the issue of whether the claimant is entitled to a wage differential award. Therefore, we reverse the judgment of the circuit court that confirmed the Commission's decision on remand, vacate the circuit court's order that remanded this case to the Commission for a wage differential award, vacate both of the Commission's PPD awards, and remand this matter to the Commission for further proceedings on the claimant's request for a PPD award under section 8(d)(1).

¶ 13 BACKGROUND

¶ 14 The claimant's job as a stationary engineer required her to address all maintenance issues throughout the employer's hospital facility, including HVAC, plumbing, electrical, and other duties. The claimant's workplace accident occurred on October 25, 2005, when she attempted to gain entry into a locked office through a sliding glass window. She climbed through the window, into a dark office, and onto an unsteady desk. She then stepped onto a desk chair that rolled away from her. She fell toward the ground and

twisted her body. She immediately experienced pain in her left lower back. The pain went down her left leg and to her knee.

¶ 15 Following the accident, the claimant underwent a course of medical treatment for neck, knee, and low back pain. Her treatments included an emergency room visit, physical therapy, medications, and trigger point injections. Her treating physician, Dr. Herman Morgan, released her to light-duty work on January 18, 2006, with a restriction of lifting no more than 30 pounds. The employer did not offer the claimant light-duty work at that time. Due to financial hardship, the claimant requested that Dr. Morgan release her to full-duty work, which he did effective January 30, 2006. The claimant returned to full-duty work on that day.

¶ 16 After the claimant returned to full-duty work, she noticed increased pain in her left lower back and left knee. Dr. Morgan took the claimant off work and referred her to Dr. Egwele. On April 29, 2006, Dr. Egwele performed surgery on the claimant's left knee. Dr. Egwele's postoperative diagnoses involved various left knee conditions, including an unstable undersurface tear of the posterior horn of the medial meniscus, chondromalacia of the patella and medial femoral condyle, hypertrophic synovitis, and contusion of the anterior cruciate ligament. Following the surgery, the claimant underwent physical therapy, and Dr. Egwele released the claimant to return to work in a sedentary position as of June 1, 2006. At that time, the employer did not offer the claimant any work within her restrictions.

¶ 17 The parties appeared before an arbitrator on September 12, 2006, for an expedited hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)). At the

hearing, the claimant testified that she suffered from pain and stiffness in her left knee and occasionally in her left low back, especially while walking, standing, or climbing stairs. At that time, she remained under the care of Dr. Egwele, had not returned to work anywhere, and had not been released to full duty work.

¶ 18 The arbitrator found that the claimant sustained an injury that arose out of and in the course of her employment. The arbitrator also found that there was a causal relationship between the accident and the claimant's "conditions of ill-being involving her neck/right shoulder area, low back[,] and left leg." The arbitrator awarded the claimant medical expenses, temporary total disability benefits, and section 19(*l*) penalties (820 ILCS 305/19(*l*) (West 2006)). Neither party sought review of this decision, and it became a final award of the Commission.

¶ 19 After the September 12, 2006, 19(b) hearing, the claimant continued treating with Dr. Egwele, and her treatments included physical therapy for her low back and left knee pain and stiffness. In February 2007, she underwent a functional capacity evaluation, which placed her at the light physical demand level and unable to perform the job duties required of her previous position as a stationary engineer. The evaluator noted that the claimant was unable to perform any prolonged stooping, kneeling, or squatting; was unable to lift or carry loads up to 50 pounds; and was unable to perform any prolonged standing or walking. After the evaluation, Dr. Egwele concluded that the claimant could return to work only at the sedentary level on a permanent basis.

¶ 20 On February 19, 2007, the employer first offered the claimant light-duty work in its accounting department. She returned to work and performed clerical duties that

included sorting, stapling, and filing papers. She testified that she experienced left knee stiffness and low back pain if she sat more than one hour, but she could handle the job because it allowed her to sit and stand as needed and only required minimal walking. She performed this job for approximately three months, and the employer paid her compensation at the same rate as a stationary engineer. The employer then transferred her to its employee health department where she performed similar clerical duties for two months at the same rate of pay.

¶ 21 In July 2007, the employer transferred the claimant to its security department where she worked as a public safety officer. The evidence presented at the arbitration hearing established that the claimant did not meet the employer's requirements to work as a public safety officer and that the employer's public safety officers earned less than a stationary engineer. Nonetheless, the employer transferred the claimant to perform the duties of a safety officer and paid her the same wage that she would have earned as a stationary engineer.

¶ 22 Initially, the claimant's duties included watching monitors, and she could alternate her sitting and standing positions while she performed this job. She noticed that her left knee and low back got stiff and painful if she sat for longer than one hour. After working in this capacity for two months, the employer relocated her to its security tower, which required her to climb stairs into the tower and watch over the parking lot. She also rode in a van once a month to drop off and pick up documents. She occasionally filled in for another safety officer in the hospital's lobby over the lunch hour. While performing these

job duties, she was able to alternate her sitting and standing with sufficient frequency to minimize her low back pain and left knee pain and stiffness.

¶ 23 On June 21, 2011, the parties appeared before an arbitrator for a hearing to determine additional medical expenses, causal connection, the nature and extent of her work-related injury, and her request for PPD benefits. At the time of the June 21 hearing, the claimant still worked as a public safety officer for the employer, and the arbitrator found that this job was within her work restrictions.

¶ 24 The evidence at the arbitration hearing established that the employer employed 25 public safety officers. The claimant testified that the employer's public safety officers started at a wage of $8.34 per hour and that they were required to (1) undergo a 20-hour certification class and (2) possess a high school diploma. She testified that she never underwent the certification class and did not have a high school diploma. She had an eighth grade education and had failed the GED test on two occasions.

¶ 25 The evidence presented at the arbitration hearing included a stipulation entered into between the parties. The stipulation arose because the claimant subpoenaed two hospital employees to testify at the hearing: the security department supervisor and the payroll coordinator. In order to "alleviate the necessity of those two individuals missing work," the parties stipulated to two issues of fact to which the witnesses would have testified. The first stipulation was that the witnesses would testify that "ever since [the employer] has been providing [the claimant] light duty work, [the employer has] maintained her pay at her stationary engineer union pay rate, $23.61 per hour." The second stipulation was that the witnesses would testify that, at the time of the hearing, the

claimant was "working as a public safety officer" for the employer and that the employer's "other public safety officers [were] presently paid between $8 and $10 per hour."

¶ 26 Although the employer stipulated to the facts to which the witnesses would have testified, it objected to the relevancy of the testimony. The arbitrator ruled that the stipulated facts were relevant "only as far as an [8(d)(2)] award, but not relevant to any kind of wage loss because she doesn't have a wage loss, at this time." In response, the claimant made an "offer of proof" by requesting that the "facts be admitted for all purposes" and "[s]pecifically *** for a potential [8(d)(1)] or wage differential consideration or award."

¶ 27 The claimant testified that she had a stationary engineer license issued by the City of Chicago but had no other professional licenses or certifications. She had never undergone any training as a security guard, did not possess a Permanent Employee Registration (PERC) card or a Firearm Owner Identification (FOID) card, did not have a license to carry a weapon, and was not licensed by the State of Illinois as a security guard.

¶ 28 The evidence presented at the arbitration hearing included a vocational assessment report prepared by a certified vocational rehabilitation counselor, Edward J. Rascati. Rascati concluded that, in the Chicago area, security guard positions usually pay between $9 and $11 per hour and that the claimant's earnings in excess of $23.00 per hour were not indicative of other security positions in the Chicago area. Rascati opined that the claimant's vocational potential was limited by her lack of a GED and because her skills as

a stationary engineer were no longer transferable due to her work restrictions. He concluded that, because of her restrictions and lack of a GED, she was at a "severe disadvantage" in the competitive job market. Rascati went as far as to conclude that "there is not presently a viable and stable labor market for [the claimant]." However, he believed that "if she were able to find an employer willing to hire her without a degree/GED," then she might be suitable for employment as a cashier, gas station attendant, parking lot attendant, or central station monitor, positions that would pay between $8 and $9 per hour.

¶ 29 At the conclusion of the arbitration hearing, the arbitrator found that the claimant was unable to perform the required physical activities of her prior occupation of stationary engineer. However, the arbitrator also concluded that the claimant had not proven an impairment of earning capacity as a result of her physical incapacity. Therefore, he denied her request for a wage differential award. Specifically, the arbitrator found as follows:

> "[The claimant] is presently not suffering any impairment of earnings as she continues to earn the same rate of pay that she would have been earning as a [s]tationary [e]ngineer. Nonetheless, she is incapacitated from pursuing other suitable occupations and as such significantly limits her ability to locate suitable employment in the labor market. As such, the [arbitrator] concludes that as a result of her October 25, 2005, work injury, [the claimant] has sustained a 40% loss of use, man as a whole, pursuant to Section 8(d)(2) of the Act."

¶ 30 The claimant and the employer both sought a review of the arbitrator's decision before the Commission. The Commission originally scheduled oral arguments in the matter for April 5, 2012, but the claimant's attorney stated that he did not receive notice of the hearing. Therefore, the Commission rescheduled the arguments for a later date.

¶ 31 On April 16, 2012, the employer terminated the claimant's employment. Eleven days later, her attorney filed an emergency motion to continue oral arguments before the Commission and to reopen the proofs before the arbitrator in order to present evidence of her employment termination. The claimant argued in the motion that her termination was relevant to her pending request for a wage differential award.

¶ 32 The Commission conducted a hearing on the motion to reopen proofs on May 8, 2012. On August 12, 2012, the Commission entered an order denying the claimant's request to reopen proofs. In denying the motion, the Commission stated that "there is no ambiguity claimed in the record herein to warrant reopening the proofs." The Commission also stated that, "other than the lay-off, there is no change in [the claimant's] condition from the time of hearing to justify remanding the matter to re-open proofs." The Commission added that, but-for the claimant's attorney's claim that he did not receive notice of the April 5, 2012, hearing, the case would have been heard and decided before the claimant's "unfortunate lay-off." The Commission further explained its ruling as follows:

> "[The claimant] at hearing failed in their [*sic*] attempt to prove wage differential given [the claimant] was earning her same wages then working in security under permanent light duty restrictions. To remand this matter to the

[a]rbitrator at this time in order to re-open proofs would give [the claimant] a second chance at proving wage differential while unjustly prejudicing [the employer]. The Review is still pending and oral arguments should proceed thereon for the Commission's consideration and determination as to whether the award was appropriate or not. [The claimant's] motion is herein denied and orders the matter to proceed for oral arguments under the pending Review."

¶ 33 The matter proceeded to oral argument before the Commission. On November 5, 2012, the Commission entered an order affirming and adopting the arbitrator's decision without further comment.

¶ 34 The claimant appealed the Commission's decision to the circuit court and challenged the Commission's award of benefits under section 8(d)(2) of the Act. In addition, she argued that the Commission abused its discretion by refusing to grant her motion to remand the case to the arbitrator to reopen the proofs and in limiting the purpose for the submission of the parties' factual stipulation concerning the wages earned by the employer's public safety officers.

¶ 35 On judicial review, the circuit court held that the Commission's award of section 8(d)(2) benefits was against the manifest weight of the evidence. The court remanded the case to the Commission for the determination of a wage differential award pursuant to section 8(d)(1) of the Act.

¶ 36 On remand, the Commission stated in its decision that it found no evidence in the record that warranted altering its prior decision. However, in compliance with the circuit court's order, it modified its PPD award and granted the claimant a wage differential of

$389.60 per week, from February 19, 2007, through the duration of her disability, under section 8(d)(1) of the Act. The Commission noted that the "wage differential represents 2/3 of the difference between the 23.61/hour [the claimant] would be able to earn in the full performance of her occupation as a [s]tationary [e]ngineer and the $9.00/hour she would be able to earn in some suitable alternative employment."

¶ 37 The employer appealed the Commission's decision on remand, and the circuit court entered a judgment confirming the decision. The employer now appeals the circuit court's final judgment.

¶ 38 ANALYSIS

¶ 39 The employer does not dispute the Commission's finding that the claimant has sustained a work-related permanent partial disability. Under the Act, when a claimant sustains a disability, an issue arises concerning what type of compensation she is entitled to receive, a wage differential award (8(d)(1)) or a percentage-of-the person-as-a-whole award (8(d)(2)). 820 ILCS 305/8(d) (West 2012); *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487 (2000). The supreme court has expressed a preference for wage-differential awards. *Id.* (citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 674 (1982)). The purpose of a wage differential award under section 8(d)(1) is to compensate an injured claimant for her reduced earning capacity. *Dawson v. Workers' Compensation Comm'n,* 382 Ill. App. 3d 581, 586, 888 N.E.2d 135, 139.

¶ 40 Section 8(d)(1) of the Act sets out the two requirements for a wage differential award. Under section 8(d)(1), an impaired worker is entitled to a wage differential award

when (1) she is "partially incapacitated from pursuing [her] usual and customary line of employment" and (2) there is a "difference between the average amount which [she] would be able to earn in the full performance of [her] duties in the occupation in which [she] was engaged at the time of the accident and the average amount which [she] is earning or is able to earn in some *suitable employment* or business after the accident." (Emphasis added.) 820 ILCS 305/8(d)(1) (West 2012).

¶ 41 Alternatively, section 8(d)(2) of the Act provides for a PPD award based on a percentage-of-the-person-as-a-whole, rather than a wage differential, under three circumstances (only one of which is relevant in the present case): when the claimant's injuries do not prevent her from pursuing the duties of her employment but she is disabled from pursuing other occupations or is otherwise physically impaired; when her "*injuries partially incapacitate [her] from pursuing the duties of [her] usual and customary line of employment but do not result in an impairment of earning capacity*;" or when the claimant having suffered an "impairment of earning capacity *** elects to waive [her] right to recover under [8(d)(1)]." (Emphasis added.) 820 ILCS 305/8(d)(2) (West 2012).

¶ 42 When section 8(d)(1) is construed in conjunction with section 8(d)(2), it becomes clear that the crucial issue in the present case in determining which type of PPD award is appropriate is whether the claimant has suffered an impairment of her "earning capacity." The employer does not dispute the Commission's finding that the claimant is incapacitated from pursuing her "usual and customary line of employment." Therefore, a percentage-of-the-person-as-a-whole award under 8(d)(2) would be appropriate *only* if

she has suffered no loss in her "earning capacity," or having suffered a loss in "earning capacity," she elected to waive her right to an award under 8(d)(1). 820 ILCS 305/8(d)(2) (West 2002); *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 48, 29 N.E.2d 648; *Gallianetti*, 315 Ill. App. 3d at 728, 734 N.E.2d at 488 ("the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of *earning capacity*"). (Emphasis added.).

¶ 43 The claimant in the present case has not waived her right to a section 8(d)(1) award. Therefore, the linchpin factual issue in the present case is a determination of whether the claimant's work-related injuries have resulted in an "impairment of earning capacity." 820 ILCS 305/8(d)(2) (West 2002)

¶ 44 The Commission in the present case did not evaluate the claimant's "earning capacity." Instead, the Commission simply looked at the claimant's post-injury wages and denied her request for a wage differential award because "she does not have any wage loss, at this time." This analysis is flawed. The supreme court has held that "[a]lthough wages are indicative of earning capacity, they are not necessarily dispositive." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 531, 844 N.E.2d 414, 425 (2006). The test does not focus exclusively on the amount earned, but instead focuses on the *capacity* to earn. *Id.* "[P]ost-injury earnings and earning capacity are not synonymous" because other evidence can show that "the actual earnings do not fairly reflect claimant's capacity." 4 A. Larson & L. Larson, *Larson's Workers' Compensation Law* § 81.03[1] (2005). For example, "[w]ages paid an injured employee

out of sympathy, or in consideration of long service with the employer, clearly do not reflect his or her actual earning capacity *** and should be discounted accordingly." 4 A. Larson & L. Larson, *Larson's Workers' Compensation Law* § 81.06 (2005).

¶ 45 Therefore, whether the claimant has sustained an impairment of earning capacity cannot be determined by simply comparing pre- and post-injury income. The analysis requires consideration of other factors, including the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market.

¶ 46 In the present case, the Commission did not conduct any analysis to determine whether the claimant's post-injury wages reflected her true earning capacity in a competitive job market. On the contrary, at the arbitration hearing, the claimant attempted to present evidence that her income as a public safety officer was not a true representation of her earning capacity, but the Commission refused to consider the evidence. The claimant presented evidence, by way of the stipulation, that although she was earning $23.61 per hour as a safety officer for the employer, all of the employer's other safety officers earned between $8 and $10 per hour. The Commission refused to admit this stipulation for purposes relevant to the claimant's request for a wage differential award. It admitted the stipulation "only as far as an [8(d)(2)] award."

¶ 47 We review evidentiary rulings made during the course of a workers' compensation proceeding under the abuse of discretion standard. *Greaney v. Industrial Comm'n,* 358 Ill. App. 3d 1002, 1010, 832 N.E.2d 331, 340 (2005). An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission. *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d

197, 204, 941 N.E.2d 878, 884 (2010). In the present case, the Commission abused its discretion in limiting the admission of the stipulation.

¶ 48 The evidence presented at the arbitration hearing also included testimony that the claimant had only an eighth-grade education and that her job skills as a stationary engineer were not transferable because of her physical limitations. The only vocational expert who testified at the hearing, Rascati, offered an unrebutted opinion that the claimant might be able to procure entry level, unskilled employment as a cashier, gas station attendant, parking lot attendant, or central station monitor. In these positions, the claimant would earn between $8 and $9 per hour, far less than the $23.61 per hour the employer paid the claimant at the time of the hearing. The evidence presented at the hearing included testimony that the claimant did not actually meet the qualifications necessary to work as a public safety officer for the employer and that safety officers in the Chicago area, including all of the employer's other safety officers, typically earned between $8 and $11 per hour. Rascati told the Commission in his report that the claimant's earnings in excess of $23 per hour were not indicative of other security positions in the Chicago area.

¶ 49 Despite this evidence, the Commission concluded that the claimant's earning capacity was unaffected by her work-related disability and based its decision entirely on the post-injury wages that the employer paid the claimant at the time of the hearing. Because the Commission failed to consider and analyze all of the evidence that is relevant to the claimant's true earning capacity in the competitive job market, we must

vacate the Commission's PPD awards and remand for a proper hearing on the claimant's request for a wage differential PPD award.

¶ 50 We acknowledge that the employer's argument on appeal raises a competing concern, *i.e.*, that the Commission's focus solely on the claimant's post-injury income is proper because, otherwise, there is a danger that a person could be awarded a wage differential award while still earning the same wages. However, under the Act, the claimant is entitled to a wage differential award if there has been an impairment of her earning capacity, and, as noted above, the supreme court has held that income and capacity are not synonymous. *Cassens Transport Co.*, 218 Ill. 2d at 531, 844 N.E.2d at 425. Therefore, the Commission's analysis cannot focus exclusively on a comparison of pre- and post-injury income when other evidence is offered that is relevant to the employee's earning capacity in the competitive job market.

¶ 51 Furthermore, under the employer's interpretation of the Act, an injured worker could be denied a wage differential award simply because the employer pays the injured worker an inflated wage in an employer-controlled job that does not otherwise exist in the labor market and which may be temporary in duration. If other employers would not hire the employee with her limitations at a comparable wage level, the post-injury wage cannot be considered an accurate reflection of the claimant's earning capacity. Denying such a claimant a wage differential award undermines the purpose of such awards, which is to compensate the injured worker for her reduced earning capacity. *Dawson,* 382 Ill. App. at 586, 888 N.E.2d at 139. It is essential for the Commission to consider all of the evidence relevant to the claimant's actual earning capacity in the competitive job market

in determining whether the claimant is entitled to a wage differential award.[1] In the present case, because the Commission did not conduct the proper analysis and limited the admission of relevant evidence, we must vacate the Commission's PPD awards and remand for further proceedings on this issue.

¶ 52 In remanding this case to the Commission for additional proceedings, we find the case of *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260, 719 N.E.2d 329 (1999), to be instructive. In that case, the claimant worked as a security supervisor officer, injured her shoulder in a work-related accident, and could no longer perform her job duties as a result of the accident. An arbitrator awarded the claimant PPD benefits based on a wage differential award under section 8(d)(1), but the Commission vacated that award and granted a PPD award under section 8(d)(2). *Id.* at 264, 719 N.E.2d at 332. On appeal, the court held that the Commission's finding that the claimant failed to prove a reduced earning capacity was against the manifest weight of the evidence. Therefore, the court reinstated the arbitrator's wage differential award. *Id.* at 267-68, 719 N.E.2d at 335.

¶ 53 In *Smith*, the claimant earned $14.70 per hour in the year preceding her accident. After being off work for some time, she returned to work for the employer in a position within her impairment restrictions, earning $9.75 per hour, which was the same rate as

---

[1] Although this case involves a claim that the claimant's wages were artificially inflated, we also note that an employer who believes that a claimant's current earnings are artificially low should be allowed to present evidence that those earnings do not represent the claimant's true earning capacity. Such evidence should be considered by the Commission to determine whether the claimant is entitled to a wage differential award and, if so, in what amount.

other employees working in the same capacity and with the same seniority. However, the employer subsequently increased the claimant's wage to $15 per hour and did not provide her with any reason for the wage increase. *Id.* at 266, 719 N.E.2d at 333-34. Her duties remained the same, and other employees working in the same capacity continued to earn $9.75 per hour. *Id.* at 266, 719 N.E.2d at 334. The employer's security manager "acknowledged that he might have been involved in conversations wherein claimant's workers' compensation supervisor told him to raise her wages due to the pending workers' compensation case." *Id*

¶ 54 In determining whether a wage differential award was appropriate, the Commission in *Smith* made the same error as the Commission in the present case; it simply looked at the claimant's wage at the time of the hearing and concluded that an award under section 8(d)(2) was more appropriate without considering any other factors relevant to the claimant's true earning capacity. *Id.* On appeal, however, the court held that the $15 per hour that the claimant was being paid at the time of the hearing did not truly reflect what she was able to earn; the court stated that the employer artificially raised her wage above what is normally paid for the services she performed. *Id.* at 267, 719 N.E.2d at 334. The court held that the claimant's actual earning capacity was the normal pay rate of $9.75 per hour. *Id.* The court further explained as follows:

> "Here, although at the time of hearing claimant was being paid at the rate of her previous position as a security supervisor officer, we cannot ignore the fact that the arbitrator, the Commission, and the circuit court all recognized that the employer raised claimant's wages in an attempt to avoid a [wage differential]

award. This fact, in and of itself, supports a finding that claimant's actual earning capacity was $9.75 per hour. We believe, therefore, that claimant proved impaired earning capacity, and as a result, the Commission's decision not to affirm the arbitrator's [wage differential] award was against the manifest weight of the evidence." *Id.* at 267, 719 N.E.2d at 334-35.

¶ 55 In the present case, the record includes evidence that the employer paid the claimant to perform job duties that she was not qualified to perform and paid her a wage "above what is normally paid for such services." See, *Id.* at 267, 719 N.E.2d at 334. The Commission did not consider this evidence but simply adopted the arbitrator's incorrect conclusion that the evidence "was not relevant to any kind of wage loss because she does not have a wage loss, at this time." For the reasons noted above, this evidence is relevant in analyzing the factual issue of whether the claimant has suffered an impairment to her earning capacity, which is the crucial issue in determining whether the claimant is entitled to a wage differential award.

¶ 56 The employer argues that *Smith* is distinguishable because, in *Smith,* there was evidence that the employer artificially raised the employee's wage in an attempt to defeat the employee's wage differential claim. We agree with the employer that, in contrast, in the present case, there is no evidence in the record to support a finding that the employer artificially inflated the claimant's wages for the specific purpose of defeating her claim for a wage differential award. Nonetheless, this fact does not make *Smith* irrelevant to our analysis.

¶ 57 In *Smith*, the court's task was to review the record to determine whether the claimant proved an impairment to her "earning capacity." *Id.* at 267, 719 N.E.2d at 334-34 ("We believe *** that claimant proved impairment of *earning capacity*, and as a result, the Commission's decision to not affirm the arbitrator's [wage differential] award was against the manifest weight of the evidence."). (Emphasis added.). The court's task was not to review the record to determine whether there was a basis to penalize the employer for its conduct. The court's analysis in *Smith* focused on whether the wage that the employee earned at the time of the arbitration hearing accurately reflected her earning capacity. The facts in *Smith* included evidence that the employer artificially inflated the claimant's wage in an attempt to avoid a wage differential award, and the court found that this fact was enough to conclude that the employee's wages at the time of the hearing did not accurately reflect her earning capacity and that her actual earning capacity was $9.75 per hour.

¶ 58 In the present case, the Commission's task is identical to its task in *Smith*. That task is to admit and consider all evidence relevant to the claimant's earning capacity, including evidence relevant to the issue of whether the post-injury wage that the claimant earned at the time of the arbitration hearing accurately reflected her true earning capacity. Although the facts of the present case do not include evidence of an intentional effort on the part of the employer to defeat the claimant's wage differential claim by manipulating her wage, the facts of the present case include other evidence relevant to determining whether $23.61 per hour accurately represents the claimant's true earning potential in a competitive job market. The Commission erred in failing to consider this evidence.

¶ 59 In addition to *Smith*, cases from other jurisdictions support our analysis. In *Allen v. Industrial Comm'n*, 347 P.2d 710 (Ariz. 1959), a salesperson who was injured in a work-related accident returned to work after the accident. *Id.* at 711-12. His doctor testified that he could not work as efficiently as before the accident, and other evidence established that the employee would not be employed by other similar companies and that the employer would not have hired a person in the employee's condition if not for the company's policy to keep disabled workers on the job at the same pay. *Id.* at 712.

¶ 60 The Arizona Industrial Commission found that the employee suffered no loss of earning capacity because he was employed after his injury at no reduction in wages. *Id.* The Arizona Supreme Court reversed, holding that post-accident earnings were not the conclusive measure of earning capacity. *Id.* at 716. The court noted that other considerations must be factored to determine whether post-injury earnings exaggerated the injured workers earning capacity and were only temporary in nature. *Id.* The court noted that the only evidence in support of the Commission's finding was the actual post-injury earnings. *Id.* at 717-18. The court concluded that the Commission erred in not evaluating the earnings in light of other relevant evidence, including the employer's policy to retain injured workers at their previous wages. *Id.* The court concluded, "Thus, wages may reflect not the employee's earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or secure equivalent employment." *Id.* at 718.

¶ 61 In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437-38 (1986), the Supreme Court of North Carolina highlighted the problem with blindly accepting an employer's payment (or offer of payment) of post-injury wages as the measure of earning capacity without considering it in reference to the competitive job market. The court stated:

> "The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated. Termination of the employee would not necessarily signal a bad motive on the part of the employer. An employer facing a business decline reasonably could determine that continued retention of the employee was not feasible. The employee could also be dismissed for misconduct. The employer could, for reasons beyond its control, simply cease doing business." *Id.* at 438.

See also, *Magma Copper Co. v. Industrial Comm'n*, 395 P.2d 616, 619 (Ariz. 1964) ("[T]he proper test in finding the loss of earning capacity is to determine as nearly as possible whether in a competitive labor market the subject in his injured condition can probably sell his services and for how much."); *Doles v. Industrial Comm'n of Arizona*, 810 P.2d 602, 605 (Ariz. 1991) ("Earning capacity *** cannot be accurately measured by make-work or sheltered work.");

¶ 62 In the present case, it was the duty of the Commission to admit and factor all of the evidence concerning the nature of the claimant's post-injury employment with the employer, not simply compare her pre- and post-injury wages. It was also the duty of the Commission to factor other evidence concerning positions available to the claimant in the

competitive job market based on her restrictions and job skills and determine whether her disability has resulted in an impairment of earning capacity. The Commission did not do so. Therefore, we must remand this case for further hearings on the issue of the claimant's request for a wage differential award, during which the Commission shall admit and consider all evidence relevant to the claimant's actual earning capacity in the competitive job market.

¶ 63 CONCLUSION

¶ 64 For the foregoing reasons, we reverse the judgment of the circuit court entered on July 15, 2014, that confirmed the Commission's decision. We also vacate the Commission's October 21, 2013, PPD award on remand under section 8(d)(1), vacate the circuit court's May 29, 2013, order remanding the case to the Commission with directions to enter a wage differential award under section 8(d)(1), vacate the Commission's PPD award under section 8(d)(2) that was entered on November 5, 2012, and remand to the Commission for further proceedings consistent with this opinion.

¶ 65 Circuit court's judgment reversed; circuit court's remand order vacated; Commission's decisions vacated, in part; cause remanded.