*2009 Ill. Wrk. Comp. LEXIS 12, *; 9 IWCC 0011*

FLOYD FOX, PETITIONER, v. KETTERMAN COMMUNICATIONS, RESPONDENT.

NO: 03 WC 32185

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF ADAMS

2009 Ill. Wrk. Comp. LEXIS 12; 9 IWCC 0011

January 5, 2009

CORE TERMS: pain, recommended, leg, arbitrator, lumbar, fracture, spine, crutch, ankle, temporary, walking, surgery, x-stop, foot, heel, light duty, discrepancy, subtalar, stenosis, boot, moon, partial disability, injection, calcaneus, sagittal, epidural, ladder, temporary total disability, causally, commencing

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's present condition of ill-being is causally related to the injury, the reasonableness or necessity of medical, surgical or hospital bills or services, and the amount of compensation due for temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

In so finding, the Commission notes the following facts.

Petitioner worked for Respondent as a satellite dish installer. As a satellite dish installer, Petitioner earned $ 30,451.20 **[*2]** a year, and the parties stipulated that his average weekly wage was $ 585.60. On February 28, 2003, while at a job site, Petitioner fell from a fifteen-foot ladder onto a brick patio, landing on his left ankle. As a result of the fall, Petitioner suffered a left calcaneus fracture.

Respondent sent Petitioner to see Dr. Bansal at Corporate Health Solutions in Springfield, Illinois on March 3, 2003. Dr. Bansal subsequently referred Petitioner to Dr. Idusuyi at Southern Illinois University School of Medicine. On March 17, 2003, Dr. Idusuyi opted to treat Petitioner's injury non-operatively.

Respondent's Section 12 examiner, Dr. David Fletcher, noted on July 24, 2003, that Petitioner could return to work light duty, and that he might have permanent restrictions. Dr. Fletcher also recommended that Petitioner undergo a subtalar fusion, and referred Petitioner to Dr. Clayton Perry.

On July 27, 2003, Petitioner returned to work light duty as a dispatcher. This job involved answering phones, transcribing information, and working on the computer. As a dispatcher, Petitioner earned $ 6.00 per hour and worked forty hours a week.

Petitioner underwent a subtalar fusion, performed by Dr. Clayton **[*3]** Perry, on September 9, 2003. Petitioner remained off work from September 9, 2003, until December 22, 2003, when he returned to light duty work as a dispatcher.

Dr. Perry noted that Petitioner reached maximum medical improvement with respect to his foot and ankle on March 27, 2004. Dr. Perry placed Petitioner on permanent work restrictions of no walking on uneven surfaces, no climbing ladders, and no carrying weights while walking.

On September 1, 2005, Dr. Bansal noted that Petitioner's left leg was one-half inch shorter than his right. He noted that Petitioner developed considerable back pain that radiated down both legs to his feet with intermittent numbness and tingling in December 2003 due to his prolonged use of crutches. Dr. Bansal noted that bending forward, sitting, and standing aggravated Petitioner's low back pain. Dr. Bansal noted, "It is my opinion that the patient's low back pain complaints are resultant from his prolonged use of the crutches following his foot surgery that was exacerbated by his leg length discrepancy." Dr. Bansal took Petitioner off work completely as of February 22, 2006. As of the date of the September 5, 2007, hearing before Arbitrator Tobin, Petitioner **[*4]** had not returned to work.

Based on the foregoing, the Commission hereby modifies the Arbitrator's decision with respect to the award for **temporary partial** disability benefits. Contrary to the Arbitrator's findings, the Commission finds that Petitioner is not entitled to **temporary partial** disability benefits. Instead, pursuant to Section 8(d)1 of the Act, the Commission finds that Petitioner is entitled to temporary total

disability benefits of $ 390.40 per week for the periods during which he was totally disabled from working. Petitioner was totally disabled for a period of 111-6/7 Weeks, commencing on March 1, 2003, and ending on June 26, 2003; commencing on September 9, 2003, and ending on December 21, 2003; and commencing on February 22, 2006, through Sept 5, 2007.

The Commission further finds that Petitioner is entitled to maintenance benefits for the period of time during which he worked light duty for Respondent. Petitioner's light duty work contributed to his physical, mental, and vocational rehabilitation from his injury. Further, Petitioner earned significantly less in his light duty capacity as a dispatcher than he did as a satellite installer. Respondent is obligated to **[*5]** pay maintenance benefits in an amount equal to two-thirds of the difference between Petitioner's light duty wage and his average weekly wage, or $ 230.40 per week.

We find that Petitioner is entitled to maintenance benefits during the period when his condition had not stabilized. Although Petitioner reached maximum medical improvement with respect to his ankle as of March 27, 2004, Petitioner's condition of ill being as it relates to his lower back had not yet stabilized. Petitioner is therefore entitled to maintenance benefits in the amount of $ 230.40 a week for a period of 123-5/7 weeks commencing on June 27, 2003, and ending on September 8, 2003; and commencing on December 22, 2003, and ending on February 21, 2006.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision be modified with respect to the award for **temporary partial** disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 390.40 per week for a period of 111-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing **[*6]** and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner maintenance benefits in the sum of $ 230.40 per week for a period of 123-5/7 weeks, and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 53,770.74 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the "x-stop" surgery as recommended by Dr. Pencek, pursuant to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, **[*7]** if such a written request has been filed.

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

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

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

DATED: JAN 5 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffery Tobin**, Arbitrator of the Commission, in the City of **Quincy**, on **September 5, 2007**. After reviewing all of the evidence presented, the arbitrator hereby makes the findings on the disputed issues checked below **[*8]** and attaches those findings to this document.

DISPUTED ISSUES

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

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

M. Should penalties or fees be imposed upon respondent?

O. Other- Prospective medical under 8(a), Temporary partial disability

FINDINGS

. On **February 28, 2003**, the respondent **Ketterman Communications** was operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship did exist between the petitioner and respondent.
. On this date, the petitioner did sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident was given to the respondent.
. In the year preceding the injury, the petitioner earned **$ 30,451.20**; the average weekly wage was **$ 585.60**.
. At the time of injury, the petitioner was **45** years of age, **married** with **1** child under 18.

. Necessary medical services have not been provided by the respondent.
. To date, **$ 0** has been paid by the respondent for **Temporary Partial** Disability.

ORDER

. **[*9]** The respondent shall pay the petitioner **temporary partial** disability benefits of **$ 230.40**/week for **24- 6/7** weeks, from **June 27, 2003** through **September 9, 2003; December 22, 2003** through **March 15, 2004**, and $ 390.40/week from **August 20, 2007** through **September 5, 2007** which is the period of temporary total disability for which compensation is payable.
. The respondent shall pay the petitioner compensation that has accrued from **February 28, 2003** through **September 5, 2007**, and shall pay the remainder of the award, if any, in weekly payments.
. The respondent shall pay the further sum of **$ 53,770.74** for necessary medical services as provided in Section 8(a) of the Act. The Respondent shall approve and pay for the 'X-Stop' surgery recommended by Dr. Pencek pursuant to the medical fee schedule. The Respondent is to have credit for any related medical expenses paid pursuant to Section 8(j) of the Act and shall provide payment information to Petitioner relative to any credit due.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for **[*10]** a permanent disability, if any.
. The respondent shall pay $ 0 in penalties, as provided in Section 19(k) of the Act.
. The respondent shall pay $ 0 in penalties, as provided in Section 19(l) of the Act.
. The respondent shall pay $ 0 in attorneys' fees, as provided in Section 16 of the Act.

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 If the Commission reviews this award, interest of 3.99% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

10/24/07

Date

OCT 29 2007

The Arbitrator finds the following facts regarding all disputed issues:

The Petitioner was employed as a satellite dish installer for the Respondent on February 28, 2003. Petitioner had been employed by the Respondent for the previous four months but had worked for the Respondent previously. Petitioner described that his general **[*11]** duties included installing satellite dishes on the roofs of customers' homes. Petitioner was provided a company truck, hand tools and a ladder in order to accomplish his job.

On February 28, 2003 the Petitioner was at a customer's house in St. Charles, Missouri installing a satellite dish. The Petitioner climbed a ladder to the roof of the customer's house and was tucking a cable behind some soffit when the ladder slipped back causing the Petitioner to fall to a brick patio below. Petitioner estimated that he was approximately 15 feet off the ground and landed on his left ankle and left side of his body. Petitioner noticed the immediate onset of pain in his left foot and ankle, and noted that when he tried to stand up he felt like his left heel was detached.

Petitioner crawled into the customer's home, who had left momentarily on an errand, and called the Respondent's office and spoke with Jessica Robertson, Respondent's dispatch supervisor. Petitioner's telephone call was transferred to Linda Meese, Respondent's Human Resources Director. Petitioner notified the Respondent of the incident and another technician was dispatched to help the Petitioner drive to the hospital. Petitioner **[*12]** was taken to St. Joseph's Hospital in St. Charles, Missouri. (P.X. 2)

X-rays of the Petitioner's left foot revealed a comminuted fracture of the calcaneus with moderate displacement of the fracture fragments, extending to the subtalar joint. (P.X. 2) The Respondent was contacted by St. Joseph's Health Center staff and advised that the Petitioner wanted to return to the Quincy, Illinois area for treatment. (P.X. 2) A return telephone from the Respondent's workers' compensation carrier indicated that the Petitioner would be referred to Dr. Sunil Bansal. (P.X. 2) Petitioner was instructed to remain off work. (P.X. 2)

On March 3, 2003 the Petitioner was seen by Dr. Sunil Bansal at the request of the Respondent. (P.X. 10) Dr. Bansal diagnosed the Petitioner with a left calcaneal fracture and referred him to Dr. Osaretin Idusuyi, an orthopedic surgeon. (P.X. 10)

On March 3, 2003 Dr. Idusuyi saw the Petitioner in his clinic and noted the work accident and the calcaneal fracture. (P.X. 9) Dr. Idusuyi also noted the Petitioner had diabetes mellitus, and indeed Petitioner testified that he was an insulin dependent diabetic. (P.X. 9) Dr. Idusuyi recommended a CAT scan of his left calcaneus with **[*13]** coronal and axial cuts to assess the amount of displacement and felt the Petitioner was very likely in need of an open reduction, internal fixation of the fracture. (P.X. 9) Petitioner returned to Dr. Idusuyi on March 17, 2003 where it was noted that the Petitioner's calcaneus fracture was highly comminuted but relatively aligned. (P.X. 9) Dr. Idusuyi recommended at this point to treat the fracture non-operatively and placed the Petitioner in a Bledsoe brace due to the history of cigarette smoking and the chance for significant wound complications following his fracture. (P.X. 9)

Petitioner was sent to Dr. David Fletcher by Respondent for a Section 12 medical evaluation on April 25, 2003. (P.X. 13) Dr. Fletcher concurred with the diagnosis and suggested pool therapy for the Petitioner. (P.X. 13) Dr. Idusuyi ordered the pool therapy for the Petitioner on May 8, 2003 but continued to indicate a hesitancy to proceed with surgery.(P.X.9) Physical therapy was recommended and begun at Illini Community Hospital in Pittsfield, IL. On June 18, 2003 the Petitioner returned to Dr. Idusuyi who also

recommended a UCBL brace for the Petitioner. (P.X. 9)

On July 23, 2003 the Petitioner returned **[*14]** to Dr. Idusuyi noting persistent left heel pain and Dr. Idusuyi recommended a left, Galle subtalar fusion with iliac crest bone grafting. (P.X.9) On July 24, 2003 the Petitioner returned to Dr. Fletcher for a repeat Section 12 evaluation and recommended that the Petitioner have a second opinion with a Dr. Clayton Perry (P.X.13)

On August 14, 2003 the Petitioner saw Dr. Clayton Perry at the request of the Respondent. (P.X.12) Dr. Perry recommended a fusion with a bone graft and indicated the Petitioner would be in a cast or a moon boot for about a month. (P.X.12)

Petitioner testified that he was told by a Respondent's case manager that he would have to have the surgery done by Dr. Clayton Perry, and that if he wanted to have Dr. Idusuyi perform the surgery the Petitioner would have to wait a year. Petitioner testified that because he was in so much pain he elected to have Dr. Perry perform the procedure.

On September 9, 2003 the Petitioner underwent an iliac crest bone grafting of the subtalar and fusion of the subtalar joint. (P.X.15)

Petitioner testified that after his surgery he was placed in a large 'moon boot' which was braced with steel and weighed approximately 20 pounds. (P.X. **[*15]** 12) Petitioner was also placed on crutches which he used for about 12 weeks.(P.X. 12) Petitioner noted that after surgery the length of his foot changed and the left leg was 1/2 to 5/8 inches shorter. Petitioner noted that he had to drag his leg with the 'moon boot' along with him and that the 'moon boot' actually made him taller on the left than on the right. Petitioner noted that when he was in the 'moon boot' he would be tilted over leaning to the right.

On December 10, 2003 the Petitioner had stopped using his crutches but continued to walk with his moon boot. The Petitioner began to notice that he was experiencing low back pain. Petitioner's wife, Anne Fox, also testified that it was at the December 10, 2003 visit that the low back pain was first described to Dr. Perry, though Dr. Perry's records do not record the complaint. (P.X.15)

On February 27, 2004 the Petitioner saw Dr. Perry in follow up. (P.X.15) Dr. Perry noted the Petitioner was at that point in an ankle boot, complaining of pain anteriorly over his ankle in alignment with the ankle joint and noting that he had trouble walking over uneven ground or slanted surfaces. (P.X.15) Dr. Perry stated the Petitioner was at maximum **[*16]** medical improvement and released him from his care. Restrictions included no walking on uneven or slanted surfaces, no climbing ladders or carrying weights while he was walking. (P.X.15)

Petitioner continued to call Dr. Perry regarding his low back pain though Dr. Perry's records do not record such calls. However, a Quincy Medical Group report of October 26, 2004 with H. Pete Little, P.T.M.S. indicates Dr. Perry referred the Petitioner to Quincy Medical Group for complaints of problems with his back and for the testing for orthotics. (P.X.14) Physical therapist Pete Little was to cast orthotics that would incorporate a heel wedge to make up leg length discrepancy as well as support the foot with a semi-rigid orthotic. Measurements of the Petitioner's legs indicated that the Petitioner's left leg was a quarter of an inch shorter than the right leg. (P.X.14) Petitioner was given two prosthetics and he felt like he was walking downhill and worsened his back pain.

On March 21, 2005 the Petitioner returned to Dr. Osaretin Idusuyi for low back pain, radiating down the posterior aspect of his buttock and thigh all the way to the level of his knee, right worse than left. (P.X.19) Petitioner **[*17]** noted that his pain was relieved by walking in a bent position, which Dr. Idusuyi noted was a positive "shopping cart" sign. (P.X.19) Dr. Idusuyi noted the Petitioner walked with an antalgic gait with a left slide, splinting limp. On examination Dr. Idusuyi noted tenderness over the lumbosacral spine and into the sciatic notch. (P.X.19) Dr. Idusuyi diagnosed low back pain with spinal stenosis and referred the Petitioner to Dr. Freitag for evaluation and treatment of the low back. (P.X. 19)

Dr. Freitag required an MRI prior to seeing the Petitioner. Petitioner went to his family doctor, Dr. Korhan Raif of the Quincy Medical Group for the purpose of obtaining an MRI. (P.X.14) The Petitioner noted that he had seen Dr. Raif previously but had not complained to him about his low back pain because others were treating his work related injuries. Dr. Raif ordered, and Petitioner underwent, an MRI of his lumbar spine on June 30, 2005 which indicated desiccation of the L4/5 disc with some bulging in the midline, no spinal stenosis and no discrete focal disc herniation. (P.X. 8)

After the MRI the Petitioner returned to Dr. Sunil Bansal for continued care of his lumbar spine. (P.X.10)

Petitioner **[*18]** first returned to Dr. Bansal on September 1, 2005. Dr. Bansal reviewed the Petitioner's work accident and medical treatment subsequent to the work accident. (P.X.10) Dr. Bansal noted the Petitioner's complaint that his left leg was a half an inch shorter than his right and that he had a long rehabilitation course, with use of crutches, and developed back path in December of 2003. (P.X.10) Dr. Bansal diagnosed the Petitioner with low back pain which he felt was resulting from his prolonged use of crutches following his foot surgery and exacerbated by his leg length discrepancy. (P.X.10) Dr. Bansal recommended physical therapy. Physical therapy was performed at the Progressive Wellness Center. (P.X.10) Petitioner returned to Dr. Bansal on October 28, 2005 noting some improvement with physical therapy but continued low back pain. (P.X.10) Petitioner testified that he asked if he could obtain chiropractic treatment and was referred to a chiropractor in Pittsfield, IL. (P.X.10, 21)

Petitioner received chiropractic treatment with Dr. Mark Meleski from December 21, 2005 through February 24, 2006 without significant improvement. (P.X.21)

Thereafter Dr. Bansal referred the Petitioner to Dr. **[*19]** Babu Prasad for epidural steroid injections and for an EMG of his lumbosacral spine. The Petitioner saw Dr. Prasad for the first time on January 24, 2006. Dr. Prasad recommended lumbar epidural steroid injections and referral to Dr. Joshua Warach for an EMG and pain medications. (P.X.22) Dr. Prasad performed a transforaminal lumbar epidural steroid injection with fluoroscopic guidance on January 24, 2006. (P.X.23)

An EMG of the Petitioner's spine taken January 30, 2006 revealed bilateral L5 radiculopathies. (P.X.22)

On February 8, 2006 Dr. Prasad performed a translaminar lumbar epidural steroid injection. (P.X.23) On March 3, 2006 Dr. Prasad performed a translaminar lumbar epidural steroid injection. (P.X.23)

On October 11, 2005 the Petitioner was sent for a Section 12 evaluation by the Respondent. (P.X.20) The Petitioner was seen by Dr. Robert Martin and a complete history on the Petitioner's left ankle and heel fracture and treatment was recorded. Dr. Martin noted the Petitioner underwent a bone graft on the left ankle and screw in September of 2003 and that thereafter he was in a "moon boot" for 12 to 14 weeks and on crutches. (P.X.20) Dr. Martin noted the Petitioner began to complain **[*20]** of low back pain thereafter and

that Dr. Perry indicated that it would just take time. Dr. Martin also noted the Petitioner had lifts made for his shoes because the left leg was shorter. Dr. Martin noted that the Petitioner complained that the lifts just made his low back pain worse and caused his left ankle to swell. (P.X.20) At the time of the examination, the Petitioner complained of a constant dull pain in the center of his back, extending to both sides of the low back and down the buttock. Petitioner also had sharp. pain in the back of both thighs to the knees. Dr. Martin also noted the Petitioner had increasing low back pain with prolonged sitting, riding in a car, standing, walking and bending. (P.X.20)

Dr. Martin noted that the Petitioner's pelvis and hips were not quite level, petitioner had tenderness from L4 to SI directly over the vertebral column itself, tenderness across the sacrum, poor lumbar rounding on the forward flexion maneuver, positive straight leg raising test at 60 degrees bilaterally, and a leg length measurement showing anterior superior iliac crest to the medial malleolus as being 93 centimeters on the right and 92 centimeters on the left. (P.X.20) Dr. **[*21]** Martin diagnosed the Petitioner with a comminuted fracture of the left calcaneus, post-traumatic arthritis of the subtalar area as a result of the fracture of the calcaneus, left leg shortening as compared to right as a result of the calcaneal fracture and low back pain. (P.X.20) Dr. Robert Martin stated that these diagnoses were causally related to his fall at work. (P.X.20) Dr. Martin recommended continued physical therapy.

Dr. Martin further stated that it was his opinion that the real problem was coming from his uncorrected leg length problem combined with his abnormal motion of the left ankle. (P.X.20) Dr. Martin looked at the orthotics that had been made for the Petitioner and noted that the full length arch supports were 1.2 centimeters lift on the left heel, overcorrecting the discrepancy in his left leg length. (P.X.20) Dr. Martin indicated that under the circumstances it was not unusual that this over-correction would worsen his problem. Dr. Martin recommended a change in his heel lift but that he would always have intermittent low back pain. (P.X.20)

Dr. Sunil Bansal referred the Petitioner to Dr. Doug Hankinson for lumbar decompression procedures. (P.X.10,25) Petitioner **[*22]** testified that the decompressions provided some relief but that it did not last for long.

Dr. Robert Martin examined the Petitioner for a second time on May 5, 2006 where he stated his opinion that the treatment for the Petitioner's low back pain, including the epidural injections and chiropractic care was 'excessive' (R. X. 16) The Arbitrator notes that the treatments helped the Petitioner temporarily and the Petitioner did not continue his chiropractic care when it failed to relieve his low back pain. Dr. Martin was of the opinion that the Petitioner's low back pain was not caused by his lumbar bulging disk, but by his leg length discrepancy. (R.X. 16)

On July 28, 2006 the Petitioner returned to Dr. Bansal complaining of severe low back pain with significant pain down the right leg to the foot with intermittent numbness and tingling. (P.X.10) Dr. Bansal recommended a repeat MRI and referred the Petitioner to Dr. Terence Pencek. (P.X.10)

The Petitioner was seen by Dr. Terence Pencek on October 10, 2006. Dr. Pencek reviewed the Petitioner's work accident and his previous medical treatment, and the MRI of the Petitioner's lumbar spine. Dr. Pencek was of the opinion that the Petitioner **[*23]** had congenital stenosis at L4/5 which may have been worsened with the abnormal walking pattern he developed after his fitting. (P.X.27) Dr. Pencek felt the Petitioner probably changed his sagittal balance of his lumbar spine. (P.X.27) The Arbitrator notes that Dr. Robert Martin, Respondent's Section 12 examiner, also noted a change in the Petitioner's pelvic balance. Dr. Pencek recommended an 'X-Stop' procedure at L4/5 to open up his spinal canal. (P.X.27)

Dr. Pencek testified that sagittal balance means that there is a certain alignment of the spine where if you hung a string with a weight at the bottom of it starting at C2 it should land at just about L4/5 on a line. (P.X. 29, page 9)

Dr. Pencek explained that when you change your sagittal balance it changes how the vertebral bodies lay on the discs and the annulus and can change the alignment of the discs. (P.X. 29, page 9-10) Dr. Pencek said that such a change in alignment could put more weight on the back of the disc. (P.X. 29, page 10) Dr. Pencek described than at 'X-Stop' procedure opens up the spinal canal by separating the spinous processes and increasing the angle of the spinous processes between L3/4 or L4/5. (P.X. 29, **[*24]** page 10) Dr. Pencek described that this was a new procedure and he performed the A-Stop' now, for spinal stenosis and that it was a much less invasive way of opening the spinal canal and not fusing a patient. (P.X. 29, page 10-11)

Dr. Pencek testified that the procedure would be designed to treat both the stenosis and the sagittal imbalance. (P.X. 29, page 11) Dr. Pencek described that the procedure would involve implanting a device which is made out of titanium, and placed between the 1,4 and LS spinous processes, to open u p the region at the back of the spine. (P.X. 29, page 14-15) Dr. Pencek felt that the X-stop procedure was a reasonable course of treatment for the Petitioner's condition. (P.X. 29, page 15) Dr. Pencek felt that the Petitioner's disc bulge was not the cause of the Petitioner's problem. (P.X. 29, page 15-16) It was Dr. Pencek's opinion to a reasonable degree of surgical certainty that the Petitioner's leg and foot injury, his use of crutches, the shortening of his leg length and the affect that those things had on his walking and his balance contributed to the condition of sagittal imbalance and his need for surgery. (P.X. 29, page 16-17)

Petitioner was examined **[*25]** by a third Section 12 physician, Dr. Marc Soriano, a neurosurgeon. Dr. Soriano felt the Petitioner's low back pain and findings were not causally related to the accident at issue.(R.X. p. 27) Dr. Soriano was of the opinion that the Petitioner needed no further medical care for his back.(R.X. p. 28) Dr. Soriano felt that Dr. Pencek's opinion that the bulging disk was un-related to the Petitioner's problem was incorrect and the bulge did contribute to the stenosis.(R.X. p. 35) Dr. Soriano felt that the work accident could have temporarily aggravated a soft tissue injury, or a pre-existing degenerative condition but this condition would have resolved within a four to six week time period.(R. X. p. 37-38) Dr. Soriano doubted the accident caused any permanent aggravation of the lumbar spine because Dr. Perry did not record low back complaints.(R.X. p. 38) Dr. Soriano also did not believe that there was a relationship between Petitioner's crutch use and his low back pain, since the use of crutches did not involve the use of the back.(R.X. p. 40) Dr. Soriano again based his opinion on Dr. Perry not recording any back complaints.(R.X. p. 41) Dr. Soriano felt the theory of Petitioner's leg **[*26]** length discrepancy as the, cause of the Petitioner's low back pain was a reasonable theory. (R.X. p.43)

Dr. Soriano was familiar with the 'X-Stop' procedure but did not use it personally.(R.X. p. 45) Dr. Soriano did not believe the petitioner needed the 'X-Stop' procedure.(R.X. p. 47) Dr. Soriano admitted that the 'X-Stop' procedure was FDA approved. (R.X. p. 62)

On cross-examination Dr. Soriano admitted that spinal stenosis can remain asymptomatic and can be aggravated by trauma.(R.X. p. 49) Dr. Soriano was somewhat evasive when questioned as to the number of times that he has examined individuals at the request of Respondent's counsel in the past. (R.X. p. 54-55) Dr. Soriano has been retained as a medical witness in Illinois, Wisconisin, California,

Connecticut, Washington, D.C., Maryland, and Indiana.(R.X. p. 57) Dr. Soriano does not have an office in Wisconsin but performs independent medical exams ten months out of the year, a couple times a month there.(R.X. p. 58-59) Dr. Soriano performs independent medical evaluations for PMRI and Corvel Corporation. (R.X. p. 59) He travels to Bloomington, Illinois to perform independent medical evaluations every six to eight weeks and examines **[*27]** four to five patients, and examined the Petitioner in Bloomington, Illinois.(R.X. p. 59) Dr. Soriano charges $ 950 per IME.(R.X. p. 60) Dr. Soriano charges $ 1,100 for his testimony. (R.X. p. 61)

The Arbitrator concludes as follows:

1. The Petitioner's left heel fracture, and lumbar spine condition of sagittal imbalance making the 'X-Stop' procedure necessary, are causally related to the accident of February 28, 2003: The Arbitrator finds persuasive the opinions of Dr. Sunil Bansal, Dr. Terrence Pencek and the Section 12 physician, Dr. Robert Martin, that the injury to the Petitioner's left heel, and his subsequent use of crutches, antalgic gait and leg length discrepancy, caused the petitioner's low back pain and lumbar spine condition.

2. The 'X-Stop' procedure recommended by Dr. Terrence Pencek is reasonable and necessary and orders the Respondent to authorize and pay for the procedure.

3. The Petitioner is entitled to a **temporary partial** disability benefit of $ 230.40 from June 27, 2003 through September 9, 2003 and then again from December 22, 2003 through March 15, 2004.

4. The bill for an unknown amount for Clinical Radiologists for treatment from 3/03/03 through 3/06/03 **[*28]** is not awarded. The remaining medical expenses submitted were reasonable and necessary ($ 53,770.74) and the Respondent is ordered to pay the medical expenses submitted in Petitioner's Exhibit 17 in accordance with Section 8(a) and the newly adopted medical fee schedule for any services rendered after 2/01/06. Respondent is entitled to credit for any actual payments it made towards the awarded medical bills.

5. Petitioner is entitled to temporary total disability benefits from August 22, 2007 through September 5, 2007.

6. The Arbitrator finds that the Respondent's defense of this claim had a good faith basis and no penalties are awarded.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

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*2009 Ill. Wrk. Comp. LEXIS 179, *; 9 IWCC 0116*

RALPH GRUNDEMAN, PETITIONER NAME, PETITIONER, v. USF HOLLAND INC., RESPONDENT NAME, RESPONDENT.

NO: 06 WC 10293

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 179; 9 IWCC 0116

February 4, 2009

CORE TERMS: arbitrator, shoulder, bilateral, rotator, cuff, diagnosed, tendonitis, claimant, cervical, pain, loss of use, impingement, neck, arm, partial disability, accidental injury, right arm, radiculopathy, prescribed, permanency, temporary, underwent, spine, tear, course of employment, disputed issues, right shoulder, fee schedule, medical care, total amount

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, necessity of medical expenses and the nature and extent of the permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission increases the arbitrator's permanency award under Section 8(d)2 from 2% man as a whole award to 5% man as a whole. The Commission finds that the Arbitrator incorrectly listed the total amount of weeks for all of the permanency awards as 35.30 weeks when the correct amount was 33.50 weeks. The Commission finds that with the modification of the Section 8(d)2 award on Review the total amount of weeks for all of the permanency awards is now 48.50 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 119.88 per week for a period of 25-4/7 weeks, that being the period of **temporary partial** disability benefits under §8(a) of the Act.

IT IS FURTHER ORDERED **[*2]** BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 4,868.50 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 509.14 per week for a period of 48.5 weeks, as provided in §8(d)2 and §8(e) of the Act, for the reason that the injuries sustained caused the 5% loss of a man as a whole, a 5% loss of the left arm and a 5% loss of a 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 of $ 180.00 for all amounts paid 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 $ 32,500.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: FEB 4 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

[*3] 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 **Gilberto Galicia**, arbitrator of the Industrial Commission, in the city of **Chicago**, on **11/14/2007**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
L. What is the nature and extent of the injury?

FINDINGS

. On 12/12/2005, the respondent USF Holland Inc. *was* operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship *did* exist between the petitioner and respondent

. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment

. Timely notice of this accident *was* given to the respondent.

. In the year preceding the injury, the petitioner earned $ 44,125.12; the average weekly wage was $ 848.56,

. At the time of injury, the petitioner was 53 years of [*4] age, *married* with -0- children under 18.

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

. To date, $ -180- has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner **temporary partial** disability benefits of$ 119.88/week for 25 4/7weeks, from 12/14/2005 through 6/11/2006, which is the period of temporary total disability which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 509.14/week for a further period of 35.30 weeks, as provided in Section 8(d) 2 & of the Act, because the injuries sustained caused 2% loss 8(d) 10 of use of a person, 5% loss of use of the left arm and 5% loss of use of the right arm.

. The respondent shall pay the petitioner compensation that has accrued from 12/12/2005 through 11/14/2007, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ 4,868.50, or whatever is approved by the fee schedule, for necessary medical services, as provided in Section 8(a) of the Act, and respondent is entitled to a credit for whatever amounts they may have already paid..

. The respondent [*5] shall pay $ -0- in penalties, as provided in Section 19(k) of the Act.

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

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 3.28% shall accrue from the date listed below to the day before the date of payment however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

12.21.07

Date

DEC 24 2007

FINDINGS OF FACTS

These parties do not dispute Petitioner was an employee of Respondent and suffered an accidental injury when he fell backward onto his hands walking down stairs at work on December 12, 2005. Petitioner first sought medical treatment on December 15, 2005 at Northwest Community Hospital. He complained of bilateral upper arm pain only and was diagnosed [*6] with a bilateral arm strain. Petitioner was prescribed Motrin 600 mg Norco and was discharged on December 15 with light duty restrictions for the following seven days.

The Arbitrator notes claimant lost no time from work for the duration of all medical care, as he was accommodated in a light duty position.

Petitioner followed up with David Schafer, M.D. on December 18, 2005 and was conditionally diagnosed with a left shoulder partial thickness rotator cuff tear with impingement. Dr. Schafer did not have any diagnostic testing to confirm that diagnosis at the time but ordered diagnostic testing.

Petitioner underwent a right shoulder MRI on December 29, 2005, the results of which revealed bursitis with an otherwise intact shoulder/rotator cuff. On that same date Petitioner underwent a left shoulder MRI, the results of which revealed minimal supraspinatus tendinopathy.

On January 3, 2006 Petitioner followed up with Dr. Schafer who found full range of motion of the neck and thoracolumbar spine, no evidence of paraspinal muscle spasm, and full range of motion of the bilateral upper extremities. Dr. Schafer noted mild rotator cuff weakness secondary to pain, worse on the right than the [*7] left. He diagnosed Petitioner with bilateral shoulder impingement and rotator cuff tendonitis.

On February 16, 2006 Petitioner followed up with Dr. Schafer. Dr. Schafer again diagnosed Petitioner with bilateral rotator cuff tendonitis with what he felt was a small tear of the left rotator cuff. The Arbitrator notes there was no confirmation of Dr. Schafer's diagnosis in the left shoulder MRI of December 29, 2005. Dr. Schafer again recorded an assessment of "bilateral rotator cuff tendonitis and impingement."

On March 20, 2006 Dr. Schafer diagnosed Petitioner with bilateral shoulder rotator cuff tendonitis. He prescribed and performed one cortisone injection into each shoulder.

On April 3, 2006 Dr. Schafer again diagnosed Petitioner with bilateral shoulder tendonitis and prescribed a Medrol Dosepak.

On April 24, 2006, Dr. Schafer referred Petitioner for a Functional Capacity Evaluation (FCE).

Petitioner underwent the FCE on May 22, 2006. The results of this evaluation revealed a consistent effort by Petitioner. The results of the examination also document Petitioner was able to perform work in the "heavy" category. It was noted Petitioner's work activities for Respondent fell into **[*8]** the less physically demanding "medium" category. Petitioner was thereby cleared to return to full duty for Respondent.

On June 8, 2006 Petitioner treated with Matthew Ross, M.D., for new complaints of cervical radiculopathy. Dr. Ross recommended Petitioner obtain a cervical spine MRI and released him to continue working at full duty.

Three months later, Petitioner followed up with Dr. Ross on September 5, 2006 and was diagnosed with "resolution of his cervical radiculopathy." The Arbitrator notes claimant appears to have been at maximum medical improvement from any problems with his cervical spine.

Petitioner followed up with Dr. Schafer on March 9, 2007 for his left shoulder. Dr. Schafer diagnosed Petitioner with a left shoulder partial-thickness rotator cuff tear. During examination Dr. Schafer noted Petitioner suffered from no crepitus in the range of motion, no pain to palpitation of the AC joint, no pain to palpitation of the proximal biceps, and no swelling in the shoulder. Dr. Schafer noted Petitioner was able to continue working full time full duty for Respondent pursuant to his FCE.

On June 7, 2007, Petitioner followed up with Dr. Schafer and was diagnosed with right rotator **[*9]** cuff tendonitis. Dr. Schafer once again released Petitioner to return to his regular duties. It would appear claimant was at MMI for any shoulder complaints after June 7, 2007.

On July 9, 2007 petitioner saw Prasant Atluri, M.D. for an Independent medical Evaluation (IME) at the request of Respondent. Dr. Atluri interpreted Petitioner's left shoulder MRI to reveal mild degenerative joint disease of the AC joint with minimal supraspinatus tendinopathy. Dr. Atluri interpreted the right shoulder MRI to reveal bursitis with an otherwise intact shoulder and rotator cuff. Dr. Atluri interpreted Petitioner's cervical MRI from August 26, 2006 to reveal degenerative changes with slight stenosis. Dr. Atluri diagnosed Petitioner with acromioclavicular joint arthritis, bilateral shoulders, possible bilateral shoulder impingement syndrome, and possible right cervical radiculopathy which had resolved. Dr. Atluri found "no specific restrictions are indicated."

Petitioner treated with no additional physicians with regard to his bilateral shoulder or neck pain. He has not seen Dr. Schafer since June 7, 2007 and has not seen Dr. Ross since September 5, 2006.

Petitioner is taking no prescription medications. **[*10]** Petitioner has been working full time, full duty since his full duty release on May 22, 2006, and is earning more now than he was prior to his injury.

The Arbitrator notes claimant voiced complaints consistent with this soft-tissue bilateral shoulder strain.

CONCLUSIONS OF LAW

F. IN SUPPORT OF ITEM (F), WHETHER PETITIONER'S CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES THE FOLLOWING:

On Monday, December 12, 2005 Petitioner slipped and fell backwards onto his outstretched hands descending wet stairs. Uncontradicted testimony established this slip and fall occurred while Petitioner was engaged in his duties and responsibilities as an employee of Respondent. This is clearly a compensable accidental injury to his shoulders that arose out of and occurred in the course of employment.

The Arbitrator further notes the injury was not significantly acute or traumatic, as no first aid, emergency or other medical care was provided to Petitioner on the date of loss. The incident occurred on Monday, December 12, 2005 and Petitioner worked without medical attention until Thursday, December 15, 2005.

The Arbitrator also notes claimant did not complain **[*11]** of nor was he treated for neck pain until June 2006, about six months after this undisputed event.

While Petitioner did work light work for a short time, Petitioner lost no time from work and worked without restriction at heavy work from December 22, 2005 to the date of the hearing.

The Arbitrator notes Petitioner's two prior workers' compensation claims, 88WC002121 and 91WC015071. The Arbitrator further notes in the earlier filed claim Petitioner alleged and injury to his neck and back on September 9, 1987.

Having considered all evidence of record, the Arbitrator finds by a preponderance of evidence that Petitioner's injury of December 12, 2005 constitutes a causative factor in his current condition of ill-being.

L. WITH REGARD TO ITEM (L), WHAT IS THE NATURE AND EXTENT OF PETITIONER'S INJURIES, AND STIPULATED TTD, THE ARBITRATOR CONCLUDES THE FOLLOWING:

Having considered the entire record including testimony of claimant and all medical exhibits, the Arbitrator finds Respondent shall pay Petitioner the sum of $ 509.14 per week for a further period of 12.65 weeks as provided in Section 8(e) of the Act because the injuries sustained caused a loss of use of Petitioner's right arm [*12] to the extent of 5% thereof.

The Arbitrator further finds Respondent shall pay Petitioner the sum of $ 509.14 per week for a period of 12.65 weeks as provided in Section 8(e) of the Act because the injuries sustained caused a loss of use of Petitioner's left arm to the extent of 5% thereof.

Finally, the Arbitrator finds Respondent shall pay Petitioner the sum of $ 509.14 per week for a period of 10 weeks as provided in Section 8(d)(2) of the Act because the injuries sustained caused a loss of use of Petitioner's person as a whole to the extent of 2% thereof.

Finally, Petitioner worked in the employer's Temporary Modified Work Program from December 15, 2005 through June 11, 2006. He was paid at 85% of union scale during this period. The difference in pay totals $ 3,065.52 in unpaid **temporary partial** disability benefits for which Respondent is liable.

O. WITH REGARD TO ITEM (O), RESPONDENT'S LIABILITY FOR UNPAID MEDICAL. BILLS, THE ARBITRATOR CONCLUDES THE FOLLOWING:

The Arbitrator incorporates and adopts the above-referenced findings as pertinent. Petitioner alleged $ 4,868.50 in the following reasonable, related and necessary medical bills, as follows:

. $ 436.50 to Dr. Schafer [*13] for service dates 4-3-06 through 3-9-07;

. $ 85.00 to Dr. Ross for service date 6-8-06;

. $ 2,947.00 to HealthSouth;

. $ 1,400.00 to Parkside MRI for service date 8-26-06.

No evidentiary exhibits were admitted upon the conclusion of trial in support of the reasonableness, relatedness or necessity of these bills. In addition, no evidence was presented to show these bills in fact remain unpaid.

Having carefully reviewed the bills and compared them to evidence of record, the Arbitrator finds Respondent shall pay all of such bills as required by the respective Illinois medical fee schedule and the Act. Respondent is entitled to full credit for all amounts already paid toward the above referenced bills.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

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

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

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Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)

View: Full

Date/Time: Thursday, January 21, 2010 - 6:52 PM EST

*2009 Ill. Wrk. Comp. LEXIS 196, *; 9 IWCC 0133*

HECTOR BAUTISTA, JR., PETITIONER, v. TABLE 52, RESPONDENT.

NO: 07 WC 40347

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 196; 9 IWCC 0133

February 6, 2009

CORE TERMS: arbitrator, temporary, partial disability, thumb, preponderance, earning, proven, temporary total disability, dominant right, pay period, temporarily, totally disabled, full performance, parties agree, medical care, light duty, slicing, accrue, minus, dish, present condition, trigger finger, permanent loss, gross amount, net earnings, restaurant, diminished, two-thirds, dimensions, ill-being

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

OPINION: [*1]

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 issue(s) of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2008 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 6,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: FEB 6 2009

ATTACHMENT:

ILLINOIS WORKERS' [*2] COMPENSATION COMMISSION ARBITRATION DECISION

REGARDING THE NATURE AND EXTENT OF THE INJURY

Chicago, arbitrator Jutila

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 **Gerald Jutila**, arbitrator of the Commission, in the city of **Chicago**, on **March 7, 2008**.

The only disputed issues are the nature and extent of the injury and **temporary partial** disability. By stipulation, the parties agree on the following items:

. On **August 27, 2007**, the respondent **Table 52** was operating under and subject to the provisions of the Act.

. On this date, the relationship of employee and employer did exist between the petitioner and respondent.

. On this date, the petitioner sustained accidental injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 22,464.00**, and the average weekly wage was **$ 432.00**.

. At the time of injury, the petitioner was **30** years of age, ***single*** with **no** children under 18.

. Respondent **[*3]** is liable for any of petitioner's unpaid bills for medical services at the Lincoln Park Hospital and Hammond Clinic up to the sum of **$ 1,916.20** as per the medical fee schedule.

. To date, **nothing** has been paid for **temporary partial,** temporary total disability, or maintenance benefits.

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

ORDER

. The respondent shall pay the petitioner **temporary partial** disability benefits in the amount of **$ 540.13**.

. The respondent shall pay the petitioner the sum of **$ 259.20**/week for a further period of **13.3** weeks, as provided in Section **8(e)1** of the Act, because the injuries sustained caused **the permanent loss of use of petitioner's dominant right thumb to the extent of 17.5%**.

. The respondent shall pay the petitioner compensation that has accrued from **August 29, 2007** through **March 7, 2008** and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay **$ 1,916.20** for medical services, as provided in Section 8(a) of the Act. Respondent is hereby **[*4]** granted a credit for all sums it has previously paid for medical services.

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

STATEMENT OF INTEREST RATE: If this award is reviewed by the Commission, interest of 1.95% 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.

Gerald D. Jutila, arbitrator

June 4, 2008

Date

JUN 6 2008

Finding of facts

Petitioner was employed by the respondent restaurant as a dish washer and food preparer. On occasion he was also assigned to clean and run errands. On August 29, 2007 petitioner was slicing potatoes. The guard on the slicing device malfunctioned with the result that petitioner ended up slicing the thumb of his dominant right hand. The parties agree that this was an accident that arose out of and in the course of petitioner's employment by the respondent, (AX1).

Petitioner received medical care **[*5]** at the Lincoln Park Hospital on the evening of the accident where the avulsion laceration wound was treated by removing the flap, (PX2). Petitioner testified he was instructed not to use the right hand.

On September 1, 2007 petitioner received follow-up care at the Hammond Clinic near his home. Those records were received in evidence as PX3. He was released to return to work light duty with instructions to keep the wound clean and dry avoid dish washing and polishes. On September 4 and 11, 2007 the Clinic advised him to continue to keep the hand dry and avoid forceful or repetitive gripping. On September 18, 2007 he was released to work without restrictions but to wear a thumb guard as needed. (NB: The records also reflect petitioner was diagnosed with a right thumb trigger finger. Petitioner is not claiming that condition was caused by the accident of August 29, 2007.)

The parties agree that petitioner's average gross weekly wage prior to the injury was $ 432.00 or $ 864.00 gross per every two week pay period, (AX1). He worked six days per week, eight hours per day, at an hourly wage of $ 9.00. Petitioner testified that as a result of the restrictions placed on him by the physicians **[*6]** at the Hammond Clinic there was less work available for him at the restaurant resulting in his working fewer hours than normal. Therefore, he argues he is entitled to **temporary partial** disability benefits.

Petitioner earned a net $ 394.22 for the pay period from August 26, 2007 to (sic) September 8, 2007, (PX1). Petitioner earned a net $ 307.74 for the pay period from September 9, 2007 to (sic) September 22, 2007, (PX1). (NB: The arbitrator notes that the common definition of the word "to" when used to describe time dimensions is: "to the beginning of. . ." Conversely, the common definition of the word "through" when used to describe time dimensions is: "to the end of . . .". However, it is obvious that the authors of the petitioner's earnings statements included the last day mentioned in the pay period. Although they used the word "to", they meant "through."

Petitioner testified that he left the employ of the respondent in November 2007. He now works at a job where he installs outdoor satellite dishes. He presently experiences difficulty in holding hand tools, pens for writing, and his guitar pic. The quality of his writing and his music has been diminished. The tip of his dominant **[*7]** thumb is tender and sensation is diminished.

Conclusions

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

The arbitrator concludes that the petitioner has proven by a preponderance of the evidence that his present condition of ill-being relative to his left thumb, with the exception of his left thumb trigger finger, is causally related to the injury on August 29, 2007. This

conclusion is based upon the credible testimony of the petitioner, a review of the corroborating evidence in his medical records, and the absence of evidence of prior or subsequent injuries to petitioner's dominant right thumb.

What amount of compensation is due, if any, for temporary total or temporary partial disability?

Petitioner does not make any claim for temporary total disability benefits inasmuch as the period of temporary total disability was for a period of three days and payment of compensation does not accrue until the fourth day of temporary total disability.

However, petitioner does claim he is entitled to **temporary partial** disability benefits. Section 8(a) of the Act as amended provides that when an employee is working light duty and earns less **[*8]** than he would be earning if employed in the full capacity of the job, then the employee shall be entitled to **temporary partial** disability benefits equal to two-thirds of the difference between the average amount he would be able to earn in the full performance of his duties and the net amount he is earning in the modified job. The arbitrator concludes that petitioner has proven by a preponderance of the evidence that on account of his light duty status and the restrictions imposed on his physical activities by his physicians he earned less than he would have earned if he was able to perform all the duties of his job.

Petitioner's attorney argues that the calculation of **temporary partial** disability benefits should be made by subtracting the petitioner's net pay on his earnings statements from the gross amount he would have earned in the full performance of his duties, i.e., $ 864.00, multiplied by two-thirds. The respondent simply denies petitioner is entitled to **temporary partial** disability benefits and does not make any argument on the method of calculating the benefit.

This is a case of first impression for the arbitrator. However, as to the first earnings period, i.e., August **[*9]** 26, 2007 through September 8, 2007, the arbitrator concludes that the three days petitioner was temporarily totally disabled, August 30, 31, and September 1, 2007, should be deducted from the gross amount petitioner would have earned in the full performance of his duties during this period on account of the exclusion contained in Section 8(b) of the Act. Additionally, it cannot be argued that petitioner was temporarily partially disabled during those three days when he was clearly temporarily totally disabled during those three days.

Therefore, the arbitrator concludes that the **temporary partial** disability benefit should be calculated as follows:

For the period of August 26, 2007 through September 8, 2007 $ 864.00 (petitioner's average gross pay for a two week period prior to the injury), minus $ 216.00 (petitioner's gross pay for the three days he was temporarily totally disabled), equals $ 648.00, minus $ 394.22 (petitioner's actual net earnings), equals $ 253.78, times two thirds, equals **$ 169.19**.

For the period of September 9, 2007 through September 22, 2007 $ 864.00 (petitioner's average gross pay for a two week period prior to the injury), minus $ 307.74 (petitioner's **[*10]** actual net earnings), equals $ 556.26, times two thirds, equals **$ 370.84**.

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that he is entitled to **temporary partial** disability benefits in the total amount of **$ 540.03**.

Were the medical services that were provided to petitioner reasonable and necessary?

The petitioner claims that the respondent is liable for his medical bills for services provided to him at the Lincoln Park Hospital in the amount of $ 1,512.20 and the Hammond Clinic in the amount of $ 404.00, (AX1, PX 2 & 3). Respondent admits it is liable for same and believes it has paid the bills, but was unable to provide proof of payment at the trial of this cause. Petitioner claims he is being dunned for payment by the providers of medical care. The arbitrator concludes that petitioner has proven by a preponderance of the evidence that the bills represent charges for necessary medical care reasonably required to cure or relief him from the effects of his injury. Therefore, the bills are the responsibility of respondent. However, it shall have a credit for same for all sums it previously paid for medical services.

What is the [*11] nature and extent of the injury?

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that he has sustained a permanent loss of use of his dominant right thumb to the extent of 17.5%. This conclusion is based upon a review of the medical records in evidence, the credible testimony of the petitioner and the arbitrator's observation of the petitioner's thumb.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

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09 IWCC 229

*2009 Ill. Wrk. Comp. LEXIS 273, **

LYNN BOGGESS, PETITIONER, v. MCLANE MIDWEST, RESPONDENT.

NO: 02 WC 26488

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF VERMILLION

2009 Ill. Wrk. Comp. LEXIS 273

March 6, 2009

CORE TERMS: pain, symptom, spine, exam, arbitrator, neck, degenerative, cervical, lumbar, deposition, disease, smoking, temporary total disability, testing, magnification, subjective, strain, skill, truck, nerve, restrictions imposed, non-physiologic, overstatement, cross-exam, contusion, decreased, tingling, permanent disability, questionnaire, merchandise

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

The Arbitrator terminated temporary total disability benefits as of 3/19/02, the date that Respondent's first Section 12 Medical Examiner, Dr. Still, found Petitioner at maximum medical improvement and released him to full duty. The Commission notes that he continued to be treated and stayed off work up to a second Section 12 medical examination by Dr. Player on 12/6/06, who also found him to be at MMI and released him to full duty. The Commission also notes that while Dr. Still is an "occupational internal medicine" specialist, Dr. Player is a board-certified orthopedic surgeon. The Commission finds Dr. Player's opinion persuasive and extends temporary total disability benefits to the date of his **[*2]** Section 12 medical examination.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 557.60 per week for a period of 43 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 504.84 per week for a period of 37.5 weeks, as provided in §8(2)d of the Act, for the reason that the injuries sustained caused the loss of 7.5% use of the person as a whole.

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 $ 53,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ILLINOIS [*3] WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator White arbitrator of the Commission, in the city of Danville, on 07/16/2007. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K What amount of compensation is due for temporary total disability?
L What is the nature and extent of the injury?

FINDINGS

. On 09/20/2001, the respondent McLane Midwest was operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship did exist between the petitioner and respondent.

. On this date, the petitioner did sustain injuries that arose out of and in the course of employment..

. Timely notice of this accident was given to the respondent.

[*4] In the year preceding the injury, the petitioner earned $ 43,492.80; the average weekly wage was $ 836.40.

. At the time of injury, the petitioner was 54 years of age, married, with 0 children under 18.

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

. To date $ 3 000.00 has been paid by the respondent for TTD.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ 557.60/week for 5 5/7ths weeks, from 2/08/2002 through 3/19/2002, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 501.84/week for a further period of 37.5 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused permanent disability to the extent of 7.5% of a man as a whole.

. The respondent shall pay the petitioner compensation that has accrued from 9/20/2001 through 7/16/2007 and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ 0.00 for necessary medical services, as provided in Section 8(a) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition* **[*5]** *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 the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.13 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

September 14, 2007

Date

SEP 18, 2007

The Arbitrator finds the followings facts:

Petitioner was employed by Respondent as a truck driver. His job duties required him to deliver merchandise to various Sam's stores, but he was not required to load or unload his truck.

On 9/20/2001, Petitioner opened the back-door of his truck, and several boxes of merchandise fell out striking petitioner. Petitioner testified he was knocked backwards onto his rear and hands. He further testified he experienced pain in his neck, back, legs and arms.

Petitioner completed his route the following day at about 3:00 p.m. When he returned to Danville, he was immediately sent to the Emergency Room and to the Occupational Medicine **[*6]** Division of Proven United Samaritans Medical Center.

The record from Dr. Chen dated 9/21/2001 includes a history provided by Petitioner of having aching pain in his upper neck area and the lower back. He also complained of tingling in the little finger of the right hand. X-rays of the cervical spine and lumbar spine revealed only mild degenerative changes. Dr. Chen diagnosed Petitioner with multiple contusions, with a lumbar and cervical strain.

Petitioner returned to work in a full-duty capacity until 10/24/2001. Petitioner testified his symptoms were worsening. On 10/24/2001, Dr. Chen set forth restrictions on Petitioner's activities.

Petitioner testified Respondent accommodated the restrictions but at a lesser rate of pay. The Arbitrator notes **temporary partial** disability benefits were not available under the Workers' Compensation Act at that time.

Pursuant to Respondent's policies, light-duty work was provided for a limited time period, and effective 2/08/2002, Respondent no longer accommodated Petitioner's restrictions. Respondent began paying TTD benefits effective 2/08/2002.

Petitioner was also examined by Dr. Ronald Michael. The history provided to Dr. Michael on 11/19/2001 **[*7]** suggests Petitioner may have lost consciousness as a result of the accident, but this history is inconsistent with the history provided to Dr. Chen the day after the accident and is inconsistent with Petitioner's testimony at trial. Dr. Michael ordered an MRI of the lumbar spine. An MRI of the cervical spine had been previously performed 11/01/2001. It revealed mild central disc protrusions at C3-4 and C4-5 with no encroachment of the neuroforamina. The MRI of the lumbar spine was performed 12/19/2001. It revealed mild degenerative changes at L1-2 and L2-3.

On 1/14/2002, Dr. Michael interpreted the MRI studies to show disc osteophyte complexes at C5-6 and C6-7 with a disc herniation at

C4-5. He thought the MRI of the lumbar spine was unremarkable. He recommended cervical epidural steroid injections.

At the request of Respondent, Petitioner was examined by Dr. Noah Still 3/19/2002. Dr. Still testified by way of evidence deposition 11/20/2002. He described Petitioner's symptoms and findings as being extremely vague and inconsistent with respect to the description a these symptoms and the locations of the symptoms. (Rx. 1 page 7), Dr. Still also noted Petitioner complained of neck pain [*8] during shoulder range of motion testing, but the shoulder was isolated so there was no stress being placed on the neck or spine. Similarly, Petitioner complained of low back pain when knee tests were being performed which did not strain the lower back. Dr. Still also noted Petitioner's responses with hip flexion testing Were inconsistent with an expected response. (Rx. 1 page 9)

Dr. Still also noted inconsistencies between Petitioner's movements and his claimed symptoms as well as non physiologic upper and lower back pain and extremity pain. (Rx. 1 pages 9-12, 18)

Dr. Still diagnosed Petitioner with a possible contusion or some type of strain. He noted that since Petitioner is a smoker, it may take longer for the conditions to resolve, but it should not exceed 90 days. (Rx. 1 pages 19-20) Dr. Still also testified Petitioner's symptoms were not consistent with any pathology noted on the diagnostic studies. (Rx. 1 page 22) Dr. Still concluded Petitioner did not need any additional medical treatment as of the time of his exam, and no restrictions needed to be imposed on Petitioner's activities. (Rx. 1 page 25)

Petitioner next saw Dr. Harms 4/16/2002. Following an exam, Dr. Harms diagnosed [*9] Petitioner with degenerative disc disease with inflammation or irritation going out into the nerves rather than there being pressure on the nerves. He also noted a history of a neck strain. Dr. Harms did not recommend surgery. Dr. Harms also indicated the degenerative disc disease in Petitioner's neck was aggravated by the work accident. He noted degenerative disc disease in the lumbar spine, but he was not examining Petitioner for his lower back.

At the request of Dr. Harms, Petitioner began treating with Dr. Victoria Johnson. On 6/20/2002, Dr. Johnson made several recommendations including work restrictions, medications and an aquatics program. She also rendered an opinion that there was a causal relationship between Petitioner's symptoms and the work accident.

Petitioner treated with Dr. Johnson for the next several years. Petitioner also attended additional IME's at the request of Respondent with Dr. Player. Dr. Johnson and Dr. Player testified by way of evidence deposition on two occasions each.

Dr. Johnson's first deposition was conducted 11/08/2002. She indicated the history provided by Petitioner was that a pallet with 400 to 500 pounds of merchandise fell out of a truck landing [*10] on top of him causing back and neck discomfort. (Px. 6 page 7) On exam, Dr. Johnson noted reduced range of motion in the cervical spine and lumbar spine. (Px. 6 page 8)

Dr. Johnson rendered an opinion the work accident aggravated Petitioner's pre-existing degenerative disc disease causing it to become symptomatic. However, she also testified it was hard to determine the mechanism of the aggravation. She stated it was unknown if there was a physiological or mechanical change, or whether the condition was biochemical so inflammatory substances were created as Petitioner's body was reacting to trauma. (Px. 6 pages 11-12)

Dr. Johnson rendered an opinion that Petitioner was at maximum medical improvement as of 8/12/2002 (Px. 6 page 15). She imposed restrictions including a 10-pound limit on lifting, pulling and pushing. She also thought Petitioner should avoid bending, twisting at the neck, back and waist, and he should alternate sitting and standing every 15 minutes. Dr. Johnson did not believe Petitioner was capable of returning to his truck driver duties. (Px. 6 page 16)

On cross-exam, Dr. Johnson acknowledged Petitioner's smoking may be inhibiting his recovery and was certainly slowing [*11] or impacting his recovery. (Px. 6 pages 35-36)

With respect to the restriction she imposed on Petitioner's activities, Dr. Johnson testified the restrictions were an educated guess based upon Petitioner's subjective complaints and her assessment of Petitioner. (Px. 6 page 37)

Dr. Johnson did riot believe it was safe for Petitioner to be driving a truck because of his decreased cervical range of motion, but she did not revoke his D.O.T. certificate to drive trucks, and she did not contact the Secretary of State to have any restrictions imposed upon his driver's license. She also indicated Petitioner was capable of driving a regular passenger vehicle. (Px. 6 pages 4647)

Dr. Player gave his first evidence deposition 5/06/2001 His testimony was based upon his exam of Petitioner on 12/06/2002.

Petitioner told Dr. Player his initial pain was in his neck and it radiated into his shoulder with tingling in all of the digits of each hand. He also noted his low back pain was above his belt and radiated down the backs of each leg to the knees. (Rx. 2 page 8) Petitioner further complained of decreased sensation in his right hand which Dr. Player described as glove dysesthesia. Dr. Player described [*12] the hand symptoms as being a non-physiologic finding. (Rx. 2 page 11)

Dr. Player also commented that Petitioner exhibited inappropriate behavior including laughing and giggling as well as pain behaviors such as grunting and groaning. (Rx. 2 page 12) He further commented Petitioner's wife stated their family ignores Petitioner's grunts and groans. (Rx. 12 pages 12-13) Dr. Player explained the grunting and groaning exhibited by Petitioner is associated with symptom magnification and an overstatement of pain. He further explained Petitioner marked a pain diagram showing symptoms all over his body in a symmetrical fashion indicative of a total body pain syndrome which is non-physiologic and indicates symptom magnification and an overstatement of pain. (Rx. 2 pages 13-14) Dr. Player defined a non-physiologic finding as being something that cannot be explained anatomically or physiologically. (Rx. 2 page 15)

Dr. Player also administered written pain questionnaires which again revealed symptom magnification and an overstatement of pain on the part of Petitioner. (Rx. 2 pages 15-17) When conducting an exam for the lower back, Dr. Player performed Waddell's tests in an effort to determine [*13] whether Petitioner was magnifying his symptoms. Each of the Waddell's findings were positive. (Rx. 2 pages 18-19)

After conducting his exam and reviewing the diagnostic studies, Dr. Player concluded there was no objective evidence to explain Petitioner's subjective complaints. He further testified Petitioner did not need any, additional treatment for his neck or lower back as a result of the 9/20/2001 accident. (Rx. 2 pages 22-23) Dr. Player further commented upon Petitioner's smoking. He testified smoking causes changes in microcirculation of all of the organs including discs. He noted a high correlation between smoking and degenerative

disc disease as well as a correlation between smoking and an increased likelihood of aches and pains. (Rx. 2 pages 23-24).

Dr. Player ultimately concluded Petitioner was capable of performing his regular job duties. (Rx. 2 pages 25-26)

On cross-exam, Dr. Player acknowledged Petitioner could have sustained a contusion as a result of the accident, and he could have strained a muscle. He also indicated if Petitioner sustained a strained muscle, it should have resolved within 3 weeks. He also noted a contusion or strain would not explain the numbness in [*14] Petitioner's fingers. (Rx. 2 pages 44-45)

Dr. Player also indicated Petitioner was taking antihypertensive medications, and they were known to cause upper extremity paresthesias. (Rx. 2 pages 45-46)

Dr. Player testified for the second time on 4/28/2005. He examined Petitioner a second time on 11/12/2004. (Rx. 3 page 7) Petitioner's complaints at the time of the second exam were reportedly worse than before. His primary complaint was pain in the neck, arms, back, buttocks and feet. However, Petitioner laughed when describing his pain which Dr. Player interpreted to be inappropriate. (Rx. 3 pages 8-9)

Dr. Player again discussed Petitioner's smoking which was between 2 and 3 packs of cigarette per day for the previous 40 years. Dr. Player explained smoking correlated with a higher incidence of symptom atic degenerative disc disease in both the cervical spine and lumbar spine, and the correlation has been documented in the medical literature. (Rx. 3 page 10) Petitioner was also taking high blood pressure medications which are known to cause peripheral or extremity numbness and tingling. Those types of complaints are indistinguishable from numbness and tingling from nerve conditions or [*15] peripheral neuropathies.' Dr. Player explained those symptoms would affect all digits of the hands or feet as complained of by Petitioner. (Rx. 3 pages 10-11)

During his exam of Petitioner, Dr. Player noted a negative fibromyalgia screen. Petitioner's cervical range of motion was decreased from normal but was the same as during Dr. Player's first exam of Petitioner. No atrophy was noted, and Petitioner had normal strength for each motor group tested. (Rx. 3 pages 13-17)

During the exam, Petitioner complained of low back pain when Dr. Player was testing the muscles involving the ankle. Dr. Player testified the motor groups being tested did not involve the recruitment or function of the back. (Rx. 3 pages 18-20)

The decreased sensation reported everywhere was a non-physiological response. Dr. Player explained if there was nerve damage caused by disc disease or peripheral neuropathy, you would expect dullness in a specific nerve pattern or specific dermatomal pattern. (Rx. 3 pages 20-21) On a written pain diagram; Petitioner marked the entire back of his body in a symmetrical manner, but he only marked the back side. This was noted to be an abnormal and non-physiologic complaint. Dr. [*16] Player explained pain does, not affect only the front half or back half Of a person. (Rx. 3 pages 21-22).

As with his first exam, Dr. Player administered written pain disability questionnaires. The different inventories taken together manifested a propensity for symptom magnification and an overstatement of pain. Also similar to the first exam, all Waddell's testing was positive which Dr. Player again interpreted to show a propensity to magnify symptoms. Dr. Player summarized by noting the pain inventories indicated Petitioner had a propensity to magnify his symptoms, and the symptom magnification was confirmed with physical testing. (Rx. 3 pages 23-26)

Dr. Player concluded Petitioner's subjective complaints in the lumbar spine and cervical spine were not substantiated with objective findings. He did not believe any additional treatment was necessary and he did not believe Petitioner needed any restrictions on his activities. His opinions were based upon a lack of positive objective neurologic findings in the medical records as well as based upon his two exams of Petitioner and his review of Petitioner's medical records. Dr. Player does not believe Petitioner has any disability of [*17] any kind. (Rx. 3 pages 26-31)

Dr. Johnson's second deposition was conducted 5/31/2005. Her diagnosis of Petitioner remained the same which was degenerative disc disease. (Px. 7 pages 4-5)

Dr. Johnson's opinion concerning Petitioner's level of disability changed in that she believed Petitioner to be totally disabled. (Px. 7 page 6) Dr. Johnson explained she did not believe there was a market for Petitioner's services because of an inability to do any sort of gainful activity. (Px. 7 pages 8-9)

On cross-exam, Dr. Johnson acknowledged she does not perform Wadell's testing during her exams of patients; and she does not administer any type of pain questionnaire. (Px. 7 pages 12-14)

Dr. Johnson did acknowledge smokers have more problems with their necks and backs. However, she changed her testimony with respect to her first deposition in that she stated she could not render an opinion as to whether Petitioner's smoking was impacting his recovery. (Px. 7 page 15)

With respect to causation, Dr. Johnson testified there was no way of knowing whether the work-related aggravation was still the cause of Petitioner's problem. (Px. 7 page 19) She further testified she was not able to say whether [*18] the degenerative changes now were any different on the day of the accident. (Px. 7 page 24)

As with her first deposition, Dr. Johnson testified the restrictions she imposed were an educated guess as to what Petitioner's capabilities were. (Px. 7 page 21)

Following the completion of the depositions, Petitioner underwent additional MRI studies of the lumbar spine and cervical spine. Each MRI was performed 8/04/05.

The MRI of the lumbar spine was read to be normal. The MRI of the cervical spine showed a small disc protrusion at C4-5 which the radiologist interpreted to be within normal limits.

During her second deposition, Dr. Johnson testified her opinion concerning Petitioner's capabilities could change depending upon Petitioner's demonstrated activities. Dr. Johnson examined Petitioner 3/13/2006. Petitioner asked for a motorized wheelchair due to complaints of difficulty walking. However, Dr. Johnson observed Petitioner ambulating down the hall with minimal difficulty. (Px. 5)

At trial, Petitioner testified he has continued treating with his family physician, Dr. Karinattu. The records of Dr. Karinattu were offered in evidence by Respondent. Those records fail to document any ongoing [*19] treatment for the neck or lower back. (Rx. 6)

Respondent also offered a surveillance video demonstrating Petitioner's activities 6/04/2005. (Rx. 5) The video depicts Petitioner moving items at what appears to be a sale of some kind. Petitioner testified his wife was having a rummage sale, but Petitioner also acknowledged placing a sign indicating a store was going out of business.

While Petitioner is not observed performing exceptionally strenuous activities, he does not appear to be limited by pain or any other symptoms.

Petitioner presented the testimony of Becky Robinson in an effort to demonstrate there is no reasonably stable labor market for a person with Petitioner's capabilities and limitations. Ms. Robinson is a rehabilitation counselor for the State of Illinois, Division of Rehabilitation Services. (Px. 15 page 3) She testified that based upon the restrictions imposed by Dr. Johnson, there was no regular employment available to Petitioner. (Px. 15 page 10)

On cross-exam, Ms. Robinson indicated Petitioner has a good work ethic and in today's labor market, just being able to be on time is a highly demanded transferrable skill. She also noted Petitioner has good people skills, [*20] good supervisory skills, and has owned his own business. (Px. 15 pages 10-11) Ms. Robinson acknowledged Petitioner's supervisory skills and people skills could lead to a less physically demanding position.

Petitioner testified he attended about 15 meetings at the Department of Rehabilitation Services, but Ms. Robinson testified he attended 4, 5 or 6 work support groups. (Px. 15 page 12)

With respect to Petitioner's physical limitations, Ms. Robinson relied upon the restrictions imposed by Dr. Johnson. She did not receive any medical records or reports from Dr. Still, Dr. Player, the occupational health facility, Dr. Tilton, Dr. Michael, or Dr. Harms. (Px. 15 page 14)

Ms. Robinson testified, Petitioner's condition was such that the Department of Rehabilitation. Services believed they could assist Petitioner in finding competitive employment (Px. 15 pages 17-18) The Department of Rehabilitation Services closed their file noting Petitioner was not interested m finding employment (Px. 15 pages 18-19) Ms. Robinson further stated she never reached a conclusion Petitioner was not capable of returning to work in some capacity, (Px. 15 page 23)

FINDINGS AS TO DISPUTED ISSUES

In support [*21] of the Arbitrator's Decision relating to ***F., Is the petitioner's present condition of ill-being causally related to the injury?***, the Arbitrator finds the following facts:

All of the doctors essentially, agree Petitioner has degenerative disc disease in his neck and lower back. There are considerable disputes, concerning the legitimacy of Petitioner's subjective complaints. Since Dr., Still and Dr. Player actually performed testing during their exams which assessed the legitimacy of Petitioner's complaints, and Dr. Johnson failed to do so, the opinions rendered by Dr. Still and Dr. Player carry more weight on that issue.

When the opinions concerning Petitioner's symptom magnification are viewed in light of the surveillance video which showed Petitioner to be active and not suffering from any apparent symptoms, Petitioner's testimony at trial concerning his symptoms lacked credibility.

Furthermore, if Petitioner's degenerative disc disease was aggravated by the work accident, and if Petitioner's symptoms have worsened over the past several years, it would be reasonable to conclude the level of degeneration in the neck and lower back has also progressed. However, the MRI studies [*22] from 8/04/2005 suggest the degenerative findings are benign.

The Arbitrator finds Petitioner's current condition of ill-being is not causally related to the 9/20/2001 work accident.

In support of the Arbitrator's Decision relating to ***J., Were the medical services that were provided to petitioner reasonable and necessary?***, the Arbitrator finds the following facts:

Based upon the findings set forth above, the Arbitrator concludes Petitioner reached a state of maximum medical improvement with respect to his work injuries as of the time of the exam performed by Dr. Still 3/19/2002. Consequently, Petitioner's claim for the payment of medical bills incurred after that time is denied.

In support of the Arbitrator's Decision relating to, ***K., What amount of compensation is due for temporary total disability?***, the Arbitrator finds the following facts:

Based upon the findings set forth above, Petitioner is entitled to TTD benefits from the time Respondent stopped accommodating his light-duty restrictions until the time Dr. Still rendered an opinion Petitioner was capable of working without restriction. The time period for which Petitioner is entitled to TTD benefits is 2/08/2002 [*23] - 3/19/2002. Respondent shall receive credit for TTD payments previously made.

Petitioner has also demanded maintenance benefits, but in light of a full-duty release 3/19/2002, maintenance benefits are not appropriate.

In support, of the Arbitrator's Decision relating to ***L., What is the nature and extent o the injury?***, the Arbitrator finds the following facts:

The vast majority of the evidence consists of Petitioner's subjective complaints coupled with relatively benign objective findings. Petitioner's subjective complaints have been brought into question by the exams performed by Dr. Still and Dr. Player. Petitioner's primary treating physician, Dr. Johnson, simply took Petitioner at his word without performing any to assess the legitimacy of Petitioner's complaints.

Petitioner is claiming he is permanently totally disabled due to the restrictions imposed by Dr. Johnson and due to his inability to find

employment within those restrictions. The Arbitrator finds Petitioner's job search consisted of applying to about 15 employers over a two-year period followed by a short period of time with the Department of Rehabilitation Services. The records from the Department of Rehabilitation [*24] Services reflect Petitioner stopped working with them because he was not interested in finding employment.

The Arbitrator does find Petitioner sustained permanent disability as a result of the work accident to the extent of 7.5% of man as a whole.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:52 PM EST

*2009 Ill. Wrk. Comp. LEXIS 373, *; 9 IWCC 0361*

KATHLEEN SANBORN, PETITIONER, v. BARRINGTON ORTHOPEDIC ASSOCIATES, RESPONDENT.

NO: 07 WC 27046

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 373; 9 IWCC 0361

April 14, 2009

CORE TERMS: pain, arbitrator, surgery, temporary, medication, symptoms, temporary total disability, partial disability, workers' compensation, lumbar, fusion, amount of compensation, recommended, deposition, leg, causal connection, permanent, present condition, written request, job duties, left leg, degenerative, experienced, aggravation, posterior, co-worker, extremity, ill-being, causation, causally

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing **[*2]** of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

DATED: APR 14 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, arbitrator of the Commission, in the city of **Chicago**, on **6/23/08, 6/30/08, and 8/15/08**. After reviewing all of the **[*3]** evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

N. Other: What amount of compensation is due for **temporary partial** disability?

FINDINGS

. On **11/17/2006**, the respondent **Barrington Orthopedic Specialties *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **30 375.80**; the average weekly wage was $ **584.15**.

. At the time of injury, the **[*4]** petitioner was **45** years of age, ***married*** with **0** children under 18.

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

. To date, $ **3,170.99** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **389.43** /week for **23 3/7th** weeks, from **11/18/06** through **4/29/07** as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **148 560.43** for medical services, as provided in Section 8(a) of the Act.

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

. The respondent shall pay $ **0** in penalties, as provided in Section 190) of the Act.

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

. The petitioner's claim for **temporary partial** disability benefits is denied.

. In no instance shall this award be a bar to subsequent hearing **[*5]** and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Milton Black

Signature of arbitrator

September 15, 2008

Date

SEP 16 2008

STATEMENT OF FACTS

Petitioner testified at the hearing. She began working for Respondent on August 3, 2006 as a personal injury and workers' compensation intake coordinator. She initially worked 8 hours per day for 40 hours per week. Her duties included fielding calls from for patients, verifying insurance information, and scheduling appointments. Petitioner spent 80% to 85% **[*6]** at a work station using either the telephone or computer. She would move around when items needed to be taken to the doctors and when she would go up and down the stairs, as the elevator was too slow. Petitioner worked overtime in October and November while covering for a co-worker, who was out sick.

Petitioner had sporadic low back pain, triggered by activity, between 2000 and 2005. Petitioner saw a chiropractor about once every couple of months for an adjustment, but took no pain medications. Petitioner's job during that period was as an office manager, and she had had no problem performing her job duties.

In May of 2005, Petitioner injured her back when landscaping while carrying a bag of soil. She sought treatment with Dr. Yapor, who referred her to Dr. Butler. She ultimately underwent a surgical decompression of the L4-L5 nerve root, which was performed by Dr. Butler and Dr. Yapor on December 5, 2005. Her symptoms persisted, and Dr. Butler referred her to Dr. Konowitz for pain management (PX1).

Dr. Konowitz diagnosed low back pain and left radiculopathy, and he began Petitioner on a course of pain management, including

physical therapy. She had a caudal epidural steroid injection [*7] on April 25, 2006 and at the L4-L5 nerve root on May 30, 2006. However, she still had low back pain and symptoms down the left lower extremity (PX2).

On June 27, 2006, Petitioner was standing in the ocean in Florida, when she was knocked forward by a wave. Petitioner testified she twisted her lower back and fell over. Petitioner experienced an immediate increase of low back pain with a return of the symptoms down her left lower extremity. Petitioner testified she then had symptoms of pain radiating down her right lower extremity. Thereafter Dr. Konowitz recommended a repeat MRI and a re-evaluation by Dr. Butler (PX2).

When seen by Dr. Butler for follow-up on August 2, 2006, Petitioner reported she continued to experience left leg discomfort, unchanged since before the surgery, and now had a new onset of right leg pain to the posterior aspect of the knee. On examination, Petitioner demonstrated diffuse tenderness about the lumbar spine, decreased flexion and extension, secondary to pain, a negative straight leg raise, and a grossly intact neurovascular exam. Dr. Butler diagnostic impression was lumbar spinal stenosis and lumbar disc disease. He recommended a posterior spinal fusion [*8] at L4-L5. The surgery was to be scheduled at Petitioner's convenience (PX1).

Petitioner was starting a new job as of August 3, 2006, working for a new employer, the Respondent. Petitioner returned to Dr. Konowitz. He recommended continued pain management with medications, a TENS unit, and a caudal epidural steroid injection, which was administered on September 26, 2006 (PX2).

Between August 2, 2006 and the end of September her back pain was improving, but she continued to have pain when she was overtired or had been sitting for too long. Petitioner testified her left leg pain was localized, while her right leg pain was completely gone. She testified she was doing home physical therapy exercises and swimming three times a week. She testified to no difficulty doing her job for Respondent. There were days when she felt the pain more than others. She did not take pain medication until the end of the day, as she could neither work nor drive after taking the medications. Petitioner testified she would lie down when she got home from work and then take the pain medications.

Petitioner testified that she was working for Respondent on November 17, 2006. As she was returning to her desk with [*9] Teddy, a co-worker, Petitioner caught her left foot on the edge of the cement and started to fall to her left. Petitioner quickly jerked her body to the right, did not fall, and felt a pop in her low back followed by a sharp pain and spasms. The pain was different than before, as it was grinding, raw, bone on bone, and very intense. Petitioner last experienced this type of pain following her injury in 2005.

Nancy Farrand, Petitioner's co-worker and a workers' compensation intake coordinator for Respondent testified on behalf of Respondent. Ms. Farrand testified that Petitioner performed all aspects of her job duties and that Petitioner mentioned back pain and back surgery. Petitioner told her she was trying to delay the surgery for as long as possible and only took the pain medication at the end of the day, as she would not work while on the medication. Ms. Farrand was experiencing her own health problems, and the two ate lunch together every day.

In rebuttal Petitioner testified the two occasionally had lunch together and would talk in passing about their respective health issues.

Petitioner returned to Dr. Konowitz on November 20, 2006 and reported the incident of November 17, 2006. [*10] She was having difficulty working, was having increased low back pain, and was having left anterior radicular lateral leg pain. She reported no new weakness of the left leg. Dr. Konowitz recommended continued pain management, a repeat MRI study, and a return to Dr. Butler (PX2). Another MRI study was obtained on November 20, 2006 and was compared to the MRI study of July 14, 2006. According to the radiologist, there were no significant changes, as the same degenerative changes were still evident at the L4-L5 and L5-S1 levels (PX1).

Petitioner was seen by Dr. Butler on November 22, 2006, complaining of pain down the left leg, which Dr. Butler was noted as essentially unchanged. Dr. Butler noted that if anything the numbness in the medial and lateral calf on the left side had intensified. Dr. Butler noted Petitioner had more pain and had some new anterior thigh pain on the right that radiated down to the knee. On physical examination, she had a straight spine, limited extension, forward flexion to the knees with increased pain, positive straight leg raise on the right, and significant paraspinal spasm. Strength wise she was intact, and her sensory exam showed a decrease in the L4 and [*11] L5 dermatomes on the left. Dr. Butler reviewed the November 20th MRI scan, noting it reconfirmed degenerative disc disease at L4-L5 and L5-S1 without evidence of new disc herniation. His impression was a re-aggravation of lumbar disc degeneration due to a slip and twisting injury at work. In his recommendations he charted as follows:

> "While the patient has a significant preexisting condition and was likely to require surgery even without this work incident, it does appear that the work incident has at least temporarily aggravated the situation. We will continue to treat her conservatively and if over the next one or two weeks her symptoms have not abated and her neurological aggravation persists, she should strongly consider the surgical treatment. As far as causality is Concerned, it does appear that the work incident has become an aggravation and it is yet to be determined whether this is a temporary or permanent aggravation." (PX1).

Petitioner's condition did not improve. On February 13, 2007 Dr. Butler performed a lumbar laminectomy and foraminotomy at L4-L5 and posterior spinal fusion at L4 to S1. She was off work from November 18, 2006 to April 29, 2006. Thereafter she [*12] began working elsewhere as a billing clerk for 20 to 30 hours per week.

Dr. Butler testified in an evidence deposition on March 12, 2008. Dr. Butler testified there was a causal connection between the deterioration of Petitioner's symptoms and the incident of November 17, 2006. Dr. Butler testified that before November 17, 2008, Petitioner was moving away from the need for surgery, as she was participating in medical pain management for her degenerative disc disease and was functioning. Dr. Butler testified Petitioner deteriorated after the incident and was neurologically worse after the incident. Dr. Butler opined the fusion surgery was indicated as a result of the November 17, 2006 incident (PX5, pp52-53). Dr. Butler testified that Petitioner would have required surgery, regardless of whether the November 17, 2006 incident had occurred (PX5, p61).

Dr. Julie Wehner testified in an evidence deposition on April 30, 2008. She examined Petitioner at Respondent's request on January 3, 2007. Dr. Welmer reviewed medical records and studies. Dr. Welmer opined that between August 2, 2006 and November 17, 2006, Petitioner was moving away from the need for surgery, as opposed to toward surgery. [*13] She testified Petitioner experienced the

anticipated temporary relief with the pain management care, but was not cured, and would not experience permanent relief of her symptoms. She disagreed with Dr. Butler's assessment of a neurological deterioration after the November 17, 2006 incident (RX1, pp14-15). Dr. Wehner testified there was no causal connection between the incident to November 17, 2006 and the fusion surgery Petitioner underwent in January, 2007. Dr. Wehner testified Petitioner's pain complaints pre-existed the incident, the radiographic findings pre-existed the incident with no change acute or otherwise between the July and November studies, the recommendation for the fusion surgery had already been made to Petitioner and the incident of November 17, 2006 was very low energy and would not have caused the need for surgery (RX1, p17).

On cross examination Dr. Wehner testified that she performs from 230 to 460 independent medical evaluations per year, usually at a rate of $ 1000.00 per exam and report and that some may be re-evaluations at half charge. Dr. Wehner testified that 99% of the independent medical evaluations are referred by insurance companies or respondents [*14] in workers' compensation cases. For depositions she charges $ 800.00 per hour with a 2 hour minimum, and she does 2 to 3 depositions per month (RX1, pp20-22). Dr. Wehner further testified that she did not put in her report that in an October 26, 2006 chart note the Petitioner had reported being 50% pain free, had no difficulty sleeping, and continued the home exercise program. Dr. Wehner further testified that she did not know that at that point Petitioner had been working for Respondent 40 to 50 hours per week (RX1, p38).

On redirect examination Dr. Wehner testified that it would be an incentive to have surgery under the workers' compensation system (RX1, pp48-49).

On re cross examination Dr. Wehner testified that it would not matter if the Petitioner had group health insurance, she did not know if Petitioner had group health insurance, the Petitioner would still be better off financially under the workers' compensation system, and she never asked whether the Petitioner was able to perform all of her job duties as requested by her employer without difficulty (RX1, pp51-54).

In support of the Arbitrator's Decision relating to C, did an accident occur that arose out of and in the [*15] course of Petitioner's employment by Respondent, the Arbitrator finds the following:

Respondent's defense on this issue is based on causation. The November 17, 2006 slip and twist incident was witnessed, medically corroborated, and unrebutted. Therefore the Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent.

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

Petitioner was credible in her testimony. Nancy Farrand was well meaning but not entirely helpful in her testimony. Dr. Butler was convincing and credible in his testimony. Dr. Weimer was advocating for the Respondent and was not credible in her testimony.

The evidence, as viewed by the Arbitrator is that the Petitioner was improving before her accident. We will never know if or when Petitioner would have had the surgery if there were no accident on November 17, 2006. However the medical records corroborate that the accident accelerated the need for surgery.

Based upon the foregoing, the Arbitrator finds that and the Petitioner's [*16] present condition of ill-being is causally related to the injury.

In support of the Arbitrator's Decision relating to J, were the medical services provided to Petitioner reasonable and necessary, the Arbitrator finds the following:

Respondent's defense on this issue is based on causation. Therefore the Arbitrator finds that the claimed medical bills shall be awarded.

In support of the 'Arbitrator's Decision relating to K what amount of compensation is due for temporary total disability, the Arbitrator finds the following:

Respondent's defense on these issues is based on causation. Accordingly, based upon the stipulated average weekly wage and stipulated TTD period, the Arbitrator finds that the claimed temporary total disability of benefits shall be awarded.

In support of the Arbitrator's Decision relating to N what amount of compensation is due for temporary partial disability, the Arbitrator finds the following:

The documentary evidence of **temporary partial** disability benefits consists essentially of subpoenaed, but unexplained, payroll records (PX8). Petitioner's counsel has not explained exactly what these records purport to prove. There is no basis from the documentary [*17] record to determine the amount of **temporary partial** disability benefits, if any. On this record alone, such an award would be speculative. Therefore the claim for **temporary partial** disability benefits is denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions

Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)

View: Full

Date/Time: Thursday, January 21, 2010 - 6:51 PM EST

*2009 Ill. Wrk. Comp. LEXIS 397, *; 9 IWCC 0386*

ANTHONY OLSON, PETITIONER, v. J & M PLATING, INC., RESPONDENT.

NO: 07 WC 37657

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

2009 Ill. Wrk. Comp. LEXIS 397; 9 IWCC 0386

April 21, 2009

CORE TERMS: pain, arbitrator, stimulator, foot, dorsal, column, return to work, burn, video, medication, symptom, block, leg, surveillance, extremity, syndrome, regional, temporary total disability, sympathetic, injection, doctor, returned to work, catheter, epidural, walking, left foot, administered, recommended, diagnosis, dystrophy

JUDGES: David L. Gore; James De Munno; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS AT LAW

1. Petitioner was a, 24 year old employee of Respondent, who described his job as a maintenance worker fixing machines. As of the date of the accident, Petitioner had worked for Respondent for about a year. Petitioner also welded, fabricated things, did electrical and plumbing and pretty **[*2]** much all maintenance aspects. Prior to the accident, Petitioner was not subject to any physical restrictions of limitations that would impact on his abilities to perform his work duties. He was not under medical care before for any physical problems or ailments. He had no prior injuries to his legs or feet that had required medical treatment. On the date of accident, August 4, 2007, Petitioner testified he was working in the basement putting up lighting and there was something on his shoe or the ladder and when he was coming down he slipped off the ladder and his left foot went into a 5 gallon bucket of 100% acetic acid that was on a skid. Petitioner stated that it splashed the acid all over his lower half of his body from the waist down. Petitioner identified photos of his left leg that was burned; Petitioner had taken the photos. His left leg/foot sustained the most burns. He had also burned his right leg and his private parts.

2. Petitioner came under the care of Dr. Hartsough (dermatologist) and last saw her about November 6, 2007. Petitioner stated he had gone to the emergency room a couple of times and his treatment was painkillers and more cream (Silvadine) that he was told **[*3]** to put on with gauze twice per day. Dr. Hartsough did the same thing and she provided Benzoyl cream to help with healing. Petitioner stated his foot would get black and she did not know why; Dr. Hartsough had claimed it was the nerves rejuvenating. Petitioner testified that he returned to work about October 23, 2007 under Dr. Hartsough's direction under limited hours and limited activity. He did work 8 hours per day and it was sedentary, making boxes and other light jobs sitting. Petitioner stated that he had continued doing that work for about 2 months. Petitioner testified that he then came off work again about January 23, 2008 and Dr. Hartsough recommended Petitioner be evaluated by a neurologist and possibly a pain specialist. Petitioner stated that he saw his primary doctor, Dr. Gary who then referred Petitioner to Dr. Gahl, a pain specialist. Petitioner indicated that he had returned to work and had continued to work until about January 23, 2008 and just before he came off of work again, he stated that his pain was increasing and his left foot felt like it was in a freezer. Petitioner stated it would stay cold all the time and it would burn and change colors and it would send **[*4]** shooting pains up his leg to his knee. He stated it was harder to walk and harder to pretty much do all his regular activities. Petitioner stated that his right leg was not bad; it did hurt from time to time but not like the left leg. He indicated that the burns and trauma to the other areas of his body had healed up fairly well.

3. Petitioner had been referred to Dr. Gahl about December 14, 2007 and he had been under his care at that time, January 2008, when he was experiencing the left leg symptoms. Petitioner testified that from January 2008 until hearing, his left leg symptoms had never completely resolved and gone away. Petitioner testified that when he had returned to work (October 2007-January 2008) his left leg problems had gotten worse. During the latter part of December 2007 and early January 2008, Dr. Gahl had performed various blocks, while Petitioner had been working. Around January 23, 2008,

Dr. Gahl had inserted a continuous epidural catheter and after the procedure Petitioner had home health care and Dr. Gahl removed Petitioner from work at that time. Petitioner testified that he had not returned to work from then through date of hearing and neither Dr. Gahl nor any [*5] other treating doctor released him to return to work in any way. Petitioner testified that the catheter was ultimately removed and Petitioner had various injections since that removal. Petitioner also had a stimulator at home and he had the blocks and catheter and he had physical therapy. During his treatment he had been prescribed medication by Dr. Gary and Dr. Gahl.

4. Petitioner indicated the records showed he last saw Dr. Gahl about May 23, 2008 and he was referred to Dr. Dahlberg for evaluation for possible placement of a dorsal column stimulator. Petitioner desired to undergo the stimulator treatment to address his problems. Petitioner testified regarding his left leg/foot that his symptoms had not resolved in any respect. He still experienced the pain in his foot/leg; every day and every night. He barely sleeps. He stated it is worse when a storm is coming, but it is bad all the time. He stated that the pain shoots up past his knee to his thigh now and he still had color changes and everything. He still had the pain in all the areas that were burned. The pain is more as he does not have the medications that had helped before. He had been taking medication prescribed by Dr. [*6] Gary and Dr. Gahl; he still took Gabapentin, Norco, and MS-Contin.T.

5. Petitioner saw Dr. Konowitz at Respondent's request March 2008 and he understood Dr. Konowitz recommended Petitioner take certain medications but not others. Petitioner indicated that he did not continue the medications prescribed by his doctors that Dr. Konowitz disagreed with. Petitioner identified Petitioner's exhibit 7 as charges for medication prescriptions he had purchased that he still takes on a daily basis. Petitioner indicated he still experiences swelling in his foot/ankle along with the pain. He stated that his foot and whole ankle area swells and a little of the arch part. He stated it swells pretty badly and sometimes in his lower leg. Petitioner identified Petitioner's exhibit 9 as photos he had taken of his foot, at the doctor's office the last time he was with Dr. Gahl and 2 were about a month before hearing. The swelling is quite often, 3-4 times per week, and it does not go away at all. Petitioner testified he would observe a difference in color of his foot/leg. He stated it would be a bright red and sometimes it will go all the way black and then it would travel up his leg to his knee area. [*7] It would be either real red or black; other times lighter or real dark; it depended. He stated that he would be lying in bed and it would be black and while sitting around it would turn color or walking too much; it did not really matter. Petitioner testified that it does affect his ability to walk; the pain increased; sometimes just by taking a shower. Any normal activities, he cannot do too much of them. He stated the medications help alleviate symptoms but he is never really pain free completely/symptom free; he stated that it seemed that it was getting worse. He can walk with the leg, but not normally. He cannot just get up and walk everywhere or do activities like he used to; he can walk about 10 minutes, if that long. Petitioner takes the medication and uses the stimulator to shock when there is a lot of pain; sometimes 6-7-10 times in a day; it varied. He indicated his symptoms change daily. Sometimes it takes him a long time to fall asleep and other times he does not sleep for a week; when the pain is so severe, he cannot get comfortable. Other then the dorsal column stimulator proposed by Dr. Gary and Dr. Gahl, Petitioner was not aware of other alternative treatment, he stated [*8] he had tried everything they had thrown at him and did everything they had wanted him to do.

6. Dr. Gahl testified that he is a pain management specialist, board certified. His base specialty is anesthesiology. He treats different pain problems, including reflex sympathetic dystrophy (RSD). He stated it sometimes involves dorsal column stimulators or morphine pumps. Patients are referred to him for pain management. Dr. Gahl stated that Petitioner had initially been treated by Dr. Gale and Dr. Hartsough and was referred to him by Dr. Gale on December 12, 2007. Dr. Gahl stated that Petitioner had acid burns on his left foot and had painful neuropathy. He first saw Petitioner December 14, 2007 and had diagnosed probable post-traumatic RSD (CRPS) on the left foot. He described the different symptoms that were variable. Petitioner had relayed the history of the accident and stepping into the acid that splashed onto his leg and he had sustained the burns, which were essentially healed when he first saw Petitioner. He stated the diagnosis was initially "probable" as it takes a while and a few tests to be able to be rather certain of what it is. He stated that he had Petitioner go through [*9] various tests. The initial procedure was a lumbar sympathetic block. He stated it was difficult mechanically to get the flow right so he had not been able to interpret if it had been an adequate block; he felt it had not gone in the proper place and he then tried a different technique and accomplished a little more. On December 28, 2007 he had performed an epidural steroid injection under fluoroscope. He stated that sympathetic blocks are diagnostic and therapeutic. He stated that besides Petitioner's response to the blocks and epidural injection he noted hypersensitivity to light touch to the limb that pointed strongly to RSD. Dr. Gahl noted the coldness of the extremity, especially the first time. He noted Petitioner had almost a totally blue foot and ankle and lower shin when he first saw him and those were strong factors to make the diagnosis. He stated that the objective symptoms/factors can change (wax and wane). Dr. Gahl saw Petitioner May 23, 2008 and he had noted Petitioner's toes were cold and the foot was blue and the forefoot was somewhat swollen. Petitioner was doing relatively poorly and he was paying for the medications and could not get all. Dr. Gahl stated that he [*10] is very hesitant to prescribe invasive techniques in younger people but in this case, he prescribed a dorsal column stimulator. He stated it is well proven and he had an excellent chance of getting the help he needed; he was not getting better with the blocks and not getting better with medications and he was not able to work and it was delayed due to insurance issues. Dr. Gahl stated that at that time Petitioner saw one of his partners (Dr. Dahlberg) and had a test of dorsal column stimulator; Dr. Gahl testified that as of May 23, 2008, he had pretty much exhausted different methods and forms of treatments to offer Petitioner. He stated typically a trial basis stimulator is inserted first to see if effective. Dr. Gahl stated you want to make sure it will work before implantation. Dr. Gahl stated he had worked with Petitioner for 6 months or more and it did not look as if he would return to work standing (if untreated). He stated Petitioner was depressed. He stated if untreated, it would probably expand to involve a larger amount of the leg with time. Dr. Gahl stated it was rare for RSD to resolve after being present for the time. His recommendation regarding no work or limitation [*11] was based on his evaluations of Petitioner. As of May 23, 2008, he felt Petitioner unable to work

The Commission finds Petitioner has met the burden of proving entitlement to the temporary total disability benefits and the proposed medical benefits. Petitioner clearly suffered an injury causally related to work, the issue was the extent (of TTD and treatment with both Petitioner's treating doctors and Respondent's §12 examiner indicating there is RSD also related to the accident).

The Commission notes that a Petitioner must prove that he did not work and also that he was unable to work to be entitled to TTD benefits. There is no doubt that Petitioner had remained off work since January 23, 2008. It is also clear that he had been authorized off work by Dr. Gahl for the period through hearing. Respondent's §12 examiner, Dr. Koniwitz, however, opined that Petitioner was

capable to return to work with restrictions on a graduated basis to get to full work. Petitioner testified that he was aware of Dr. Konowitz opinion regarding return to work as was Dr. Gahl. Dr. Gahl still felt Petitioner was not currently capable and as such, Petitioner listened to his treating doctor and did not [*12] attempt to return to work in any fashion after March 18, 2008. Contrary to the Arbitrator finding no basis for Petitioner to remain off work, obviously the basis is the treating doctor's (Dr. Gahl) opinion that he should be off. Respondent had previously accommodated Petitioner's restrictions and would appear that they would accommodate return to work per Dr. Konowitz. Dr. Gahl stated there was a differing opinion regarding Petitioner's ability to return to work; Dr. Konowitz had felt he was ready. Dr. Gahl did not feel Petitioner could do a job on his feet all day. He indicated if pain was brought under control something sedentary might be indicated. Then Petitioner would not be focusing on the pain and could focus on the job. Dr. Gahl had noted that Petitioner had been written up prior to coming off work January 2008 as he had been having difficulty with the pain and had not been doing his work adequately; this would draw question to Petitioner's ability to perform satisfactorily without focusing on the pain after March 18, 2008 if he had returned to work per Dr. Konowitz. Dr. Gahl stated that Petitioner had trouble even wearing a shoe so it was difficult for him to be on his feet [*13] for any period. He stated it would behoove him to get a functional capacity evaluation (FCE) and put him through objective testing to see what he was really capable of. The FCE would determine physical capabilities; he does recommend such tests. He stated that his objective throughout was to try to fix the pain problem, once fixed, you may still need to see what he is capable of doing. Dr. Gahl believed that Petitioner was capable of walking a block. When he saw Petitioner, he was usually not even wearing a shoe. Dr. Konowitz had apparently viewed some video of Petitioner (from March) which was not introduced into evidence nor were any reports entered for that period. Part of Dr. Konowitz's opinion regarding return to work is based on this surveillance and does draw some questions. Also even the video and reports admitted into evidence is for only about 16 minutes. Of note in the reports it states early footage showing Petitioner walking (doing lawn work) apparently normally and later footage described in the report as Petitioner walking with a limp and another later date noted severe, exaggerated limp. This would clearly more support Petitioner's and Dr. Gahl's testimony that Petitioner [*14] could be on his feet for short times and then it would get worse. It is also a part of RSD per Dr. Gahl that there can be somewhat of a waxing and waning, again this supports Petitioner's testimony. There is mention of Petitioner having coping problems and depression however there is no evidence this was his normal prior accident state, but regardless, an employer takes the employee as they are. The testimony finds that Petitioner did not work. The evidence and credible testimony further finds that after March 18, 2008, Petitioner had been authorized still off work by Dr. Gahl (and could not work) and Dr. Dahlberg had been waiting to proceed with the dorsal column stimulator trial. The evidence and credible testimony does find that Petitioner did meet the burden of proving not only the period of TTD awarded but also the TM March 19, 2008 through date of hearing. The opinion of Dr. Gahl being found more credible then the Respondent's §12 IME opinion of Dr. Konowitz who saw Petitioner one time and later viewed some unknown video, as well as the admitted video. The Commission affirms and adopts the Arbitrator's awarded total temporary disability and awards further modifying to include [*15] TTD March 19, 2008 through date of hearing. (August 5, 2007 through October 23, 2007 & January 23, 2008 through August 22, 2008; 41-4/7 weeks at $ 326.48 per week [total TTD=$ 13,572.24; Respondent being entitled to credit for TTD previously paid]).

The Commission finds Dr. Gahl, Dr. Dahlberg and Respondent's §12, Dr. Konowitz agreed Petitioner had RSD/CRPS. Dr. Konowitz opined it as mild and opined Petitioner was at MMI and that the dorsal column stimulator was not in order (at the time of his examination March 2008). Dr. Konwotz in his later March 11, 2008, letter to Respondent insurance noted that he had reviewed video ((from March--no report or video admitted for that period-not known as to time or length of surveillance) and noted antalgic gait intermittently and able to walk significant distances and stated patient reported he was not able to ambulate as well as seen throughout video and opines better then Petitioner reported. Dr. Gahl had been seeing Petitioner over an extended period of time and had testified of the relationship with Petitioner and the validity of his symptoms. On January 4, 2008 he noted difficulty in providing epidural and lumbar sympathetic blocks [*16] probably due to anatomic variability and pain was still 9/10; he had noted 3-4 hour relief from prior block; he states the left foot looked pinker and cooler then the prior week-(not like ice when he first saw patient). He further strongly believed Petitioner had RSD, but pretty engrained. He had provided another sympathetic block and noted after no somatic symptoms and indeed a good pure block with excellent warmth after; markedly improved and first then talked about possible stimulator. Dr. Gahl's January 22, 2008 exam noted calf warm, ankle cool and foot/toes cold; the foot looked fairly white and slightly pink and only slightly darkened; his impression was very resistant RSD. Dr. Gahl provided an epidural catheter and the patient's pain almost immediately went away and a decent increase in warmth to left foot; still cool, but improved. Dr. Gahl's January 23, 2008 note stated he did an injection to the continuous epidural catheter. Petitioner had noted difficulty at work due to pain and the catheter and Dr. Gahl took Petitioner off work. Dr. Gahl's January 29, 2008 record noted the foot looked better then in past and is cool but not icy with minor dark coloration at ankle, but it [*17] still burned. Dr. Gahl provided another injection and after noted foot/toes completely warm and normal looking; noted Petitioner had a successful block. Dr. Gahl's February 8, 2008 record noted patient noted coldness every day and burning on and off with pain 6/10, and noted some blueness in extremity. The February 19, 2008 record noted pain at 10/10, still pain and burning and it was modestly purple. Problems walking were noted and he further noted Petitioner was better with the pump and further stated the next step probably as dorsal column stimulator. Dr. Gahl's April 18, 2008 record noted Petitioner saw Dr. Konowitz. Dr. Gahl noted Petitioner's foot slightly cool to touch and also noted Dr. Konowitz recommendations and Dr. Konowitz recommendation against the dorsal column stimulator with return to work on graduated basis. Dr. Gahl noted foot fairly pink and slightly cool tips of toes and Dr. Gahl presumed Petitioner to be valid with the amount of invasive procedures he had undergone. Dr. Gahl saw no overt manipulation and he kept Petitioner off work and again stated he thought Petitioner needed the trial dorsal column stimulator as he was running out of options. Dr. Gahl's record [*18] of May 2, 2008 noted Petitioner's foot somewhat discolored again but not like blue when first seen and he found medications counterproductive and next step to be was the dorsal column stimulator. Dr. Gahl on May 23, 2008 noted pain back up to 10/10 and noted Petitioner's problem wearing a shoe. Dr. Gahl noted he had pretty much ran out of ideas short of dorsal column stimulator and he was frustrated with the insurance failing to cooperate. He also asked Dr. Dahlberg to evaluate Petitioner regarding the stimulator. On July 7, 2008, Dr. Dahlberg noted the referral regarding stimulator for Petitioner's severe left foot neuropathic pain/CRPS and noted the history of accident. Dr. Dahlberg's exam record noted slightly purplish and edematous compared to right and noted Petitioner did have hyperalgesia along the entire plantar aspect of foot and medial half. He recorded that Petitioner was interested in getting the stimulator and was to try to get approval for trial. On July 9, 2008 Dr. Dahlberg noted Petitioner would like to proceed with stimulator and further stated Petitioner would make an excellent candidate. The medical records and Dr. Gahl's testimony clearly indicate that a dorsal [*19] column stimulator is indeed reasonable and necessary given that Petitioner appeared to have the ongoing problems and seemed to be having some increase in symptoms since the medication regimen suggested by Dr. Koniwitz had been followed without success. Contrary to Dr. Konowitz' opinion Dr. Gahl clearly found the stimulator to be the next option and that is supported by Dr. Dahlberg. While Dr. Gahl indicated the diagnosis was a little "muddy", Petitioner's RSD condition is also apparently complicated with the residual somatic foot pain and the stimulator is evidenced as the next reasonable and necessary option to "fix" the RSD situation. The evidence and credible testimony finds that Petitioner did meet the burden of proving entitlement to the recommended stimulator by both Dr. Gahl and Dr. Dahlberg-(finding him a good candidate). The Commission therefore reverses the Arbitrator's decision and hereby awards the prospective medical (dorsal column stimulator.) as recommended by Dr. Gahl.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 326.48 per week for a

period of 41-4/7 weeks, that being the period of temporary total incapacity for **[*20]** work under §8(b), and that as provided in §8 (b)/§ 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay to for the proposed medical care suggested by Dr. Gahl as reasonable and necessary prospective medical care under §8(a) of the Act and associated temporary total disability related to such treatment.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner **[*21]** 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 $ 12,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: APR 21 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Peter Akemann, arbitrator of the Commission, in the city of Rockford, on August 22, 2008. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
N. Other **[*22]** Prospective Medical

FINDINGS OF THE ARBITRATOR

. On August 4, 2007, the respondent J & M Plating was operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship existed between the petitioner and respondent.

. On this date, the petitioner sustained injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 25,465.44; the average weekly wage was $ 489.72

. At the time of injury, the petitioner was 24 years of age, single with no children under 18.

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

. To date, $ 6,965.53 has been paid by the respondent for TTD and/or maintenance benefits.

ORDERS OF THE ARBITRATOR

. The respondent shall pay the petitioner temporary total disability benefits of $ 326.48 per week for 19.2 weeks, from 8/5/2007 through 10/23/2007 and again from 1/23/2008 through 3/18/2008, as provided in Section 8(b) of the Act.

. The respondent shall pay $ -0- for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ 0 in **[*23]** penalties, as provided in Section 19(k) of the Act.

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

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Peter Akemann
Arbitrator Peter Akemann

October 2, 2008

OCT 8 2008

In support of the arbitrator's findings under (F) Causal Connection; the arbitrator finds the following facts and [*24] conclusions of law:

The petitioner, Anthony Olson; was an employee of respondent for approximately one year as of August 4, 2007. He was employed as a maintenance worker fixing machines. On August 4, 2007, he was working in a basement on lighting. He was coming down a ladder and stepped into a bucket of acetic acid. His left foot and a portion of his lower leg went into the bucket. The acetic acid splashed up both lower extremities, primarily involving the left.

The petitioner was taken to the emergency room of Swedish American Health System where he was diagnosed with chemical burns to the lower extremities. Examination revealed primarily first-degree burns to the right lower extremity and left lower extremity measuring eight percent of the total body surface area. There was an area on the dorsum of the left foot measuring less than 1% body surface area of second-degree burns. The petitioner was given pain medication and Silvadene to apply to the burns. The petitioner was authorized off of work. (Pet. Ex. 3)

On August 22, 2007, the petitioner came under the care of Dr. Nicole Hartsough for burn care. Dr. Hartsough essentially diagnosed first and second degree burns of the lower **[*25]** extremities with some epidural loss. The petitioner's burn wounds slowly healed though the petitioner continued to report fairly significant pain. (Pet. Ex. 1)

Effective October 24, 2007, the petitioner was released to return to seated work by Dr. Hartsough. The employer accommodated the restrictions and the petitioner returned to work effective October 24, 2007. His job involved primarily making boxes. (Pet. Ex. 1)

On or around November 6, 2007, Dr. Hartsough indicated that she was not qualified to ascertain any permanent nerve damage as a result of the injury. She recommended an evaluation by a neurologist or a pain specialist. The petitioner was referred to Dr. Dale Gray. (Pet. Ex. 1)

The petitioner saw Dr. Gray on December 1, 2007. At that time, he reported some numbness in the lower extremities as well as temperature changes in the left foot. The petitioner indicated that the foot would turn red at times and seemed to burn. The petitioner reported little improvement with medication. Dr. Gray diagnosed painful neuropathy status post acid burn. He referred, the petitioner for a possible pain management evaluation and possible nerve blocks. (Pet. Ex. 2)

The petitioner first came **[*26]** under the care of Dr. Frederick Gahl on December 14, 2007. The petitioner was seen by Dr. Gahl at the request of Dr. Dale Gray. Dr. Gahl diagnosed probable post traumatic reflex sympathetic dystrophy of the left foot. He recommended and administered a lumbar block. (Pet. Ex. 6)

By the time the petitioner saw Dr. Gahl in December of 2007, the burns wounds had healed sufficiently such that they required no additional treatment. The petitioner had been discharged from the care of Dr. Hartsough. The petitioner was continuing to work in a seated position. (Pet. Ex. 6)

The petitioner returned to Dr. Gahl on January 22, 2008. Dr. Gahl again opined that the petitioner had resistant reflex sympathetic dystrophy. He recommended an epidural catheter to keep the area sympathetically blocked on a daily basis for seven to ten days to see if the sympathetic dystrophy could be treated. At this time, Dr. Gahl authorized the petitioner off of work completely. (Pet. Ex. 6)

Over roughly a five-month span, Dr. Gahl treated the petitioner with a series of injections and prescription medication. He also had experimented with the epidural catheter to keep the area sympathetically blocked. During these months, **[*27]** Dr. Gahl continued to authorize the petitioner off of work. (Pet. Ex. 6)

By the end of May, 2008, Dr. Gahl had "run out of ideas". He suggested that the only suggestion he had would be surgery for a dorsal column stimulator. As he did not perform that type of treatment, the petitioner was referred to his partner, Dr. Dahlberg. (Pet. Ex. 6)

On March 11, 2008, the petitioner was seen for a Section 12 examination at the request of the respondent by Dr. Howard Konowitz. Dr. Konowitz diagnosed possible mild complex regional pain syndrome as well as poor coping skills and possible depression. Despite this diagnosis, due to the fact that there was no significant allodynia or temperature changes in the foot, Dr. Konowitz did not believe the petitioner, was a candidate for implantation of a dorsal column stimulator. He recommended medication that was somewhat different than that proposed by Dr. Gahl. (Res. Ex. 1)

With regard to work activities, Dr. Konowitz felt the petitioner could return to work in a graduated fashion. He suggested that the petitioner work three hours a day for two weeks then progressing to four hours a day for two weeks and ultimately up to eight hours a day. (Res. Ex. **[*28]** 1)

In supplemental reports, Dr. Konowitz commented on his review of surveillance video that he indicated confirmed his opinion that the petitioner could certainly return to work and was not in need of a dorsal column stimulator. (Res. Ex. 1)

The Arbitrator observed surveillance video taken on two separate occasions. The Arbitrator notes with interest that, in both tapes, the petitioner was observed in the parking lot of the doctor's office. The arbitrator observed the petitioner other activities including using lawn maintenance equipment. (Res. Ex.4)

ANALYSIS

The parties are in agreement that the petitioner suffered a compensable accident at work resulting in an injury to his lower extremities on August 4, 2007 when his left foot stepped into a bucket of acetic acid while he was descending a ladder. The add splashed onto his lower extremities, primarily the left lower extremity. The acetic acid caused first and second degree burns as per

the medical records. The petitioner's burn wounds, per the treating doctor, essentially healed by November of 2007 without significant incident.

Dr. Gahl, the petitioners treating physician with regard to complex regional pain syndrome, acknowledged [*29] that the petitioner was no better off despite the significant treatment and injections administered by his office. Per the petitioner's own testimony, none of the treatment administered by Dr. Gahl provided any benefit. The petitioners pain complaints were as significant in May of 2008 and August of 2008 as they were in January of 2008. This certainly calls into question whether or not the petitioner even has complex regional pain syndrome as Dr. Gahl suggests.

The Arbitrator notes the deposition transcript of Dr. Gahl wherein he acknowledges that the injections that he administered were supposed to be both therapeutic and diagnostic. Dr. Gahl acknowledged that the tests were not diagnostic for complex regional pain syndrome. Dr. Gahl also acknowledged that the petitioner had several positive Waddell's signs, which could be suggestive of symptom magnification or secondary gain. The Arbitrator also notes with interest that Dr. Gahl did not administer several of the medically accepted tests used to diagnose complex regional pain syndrome/reflex sympathetic dystrophy. The Arbitrator does not Dr. Gahl's explanations as to why those tests were not administered satisfactory.

The injections [*30] administered by Dr. Gahl to diagnose the Petitioners condition of ill being, were, at best, equivocal. At worst, they proved a diagnosis of complex regional pain syndrome was not appropriate. Dr. Gahl acknowledged that the diagnosis was "muddy". He suggested the possibility that the petitioner simply does not have complex regional pain syndrome/reflex sympathetic dystrophy.

The Arbitrator finds that if complex regional pain syndrome exists in this petitioner, it is not severe. This conclusion is based in part by the surveillance video and reports offered into evidence by the Respondent. The video and reports show that the Petitioner's disability was significantly worse walking in and out of the doctor's office as compared to other times during the day. The Petitioner was seen walking with an exaggerated limp into and out of the doctor's office.

At other times, during the same day(s), the Petitioner was ambulating without a limp and was seen uses lawn care equipment without difficulty. Thus, the Arbitrator finds the Petitioners testimony regarding his complaints suspect.

In support of the arbitrator's findings under (J) Medical Payments: the arbitrator finds the following facts [*31] and conclusions of law:

The parties have agreed by stipulation to preserve the issue of medical until a later hearing. Accordingly, the Arbitrator makes no specific findings regarding medical expenses to date. This is not to the prejudice of either party.

In support of the arbitrator's findings under (K) Temporary Total Disability; the arbitrator finds the following facts and conclusions of law:

Following the work accident, the petitioner was authorized off of work while undergoing care for his first and second degree burns. He remained authorized off of work primarily by Dr. Hartsough through October 23, 2007. Effective October 24, 2007, the petitioner was released to return to work with restrictions. He was essentially restricted to sedentary work. The respondent was able to accommodate those restrictions and the petitioner returned to work effective October 24, 2008.

Per the testimony of the petitioner, his work was essentially sedentary in nature. He was primarily making boxes while in a seated position. The petitioner continued to work in that capacity for approximately three months through January 22, 2008.

Effective January 23, 2008, the petitioner was authorized [*32] off of all work by Dr. Frederick Gahl. The petitioner remained authorized off of work by Dr. Gahl through his last visit of May 23, 2008.

The petitioner was seen for a Section 12 examination by Dr. Konowitz on March 11, 2008. Due to the relatively minimal findings, Dr. Konowitz saw no reason why the petitioner could not return to work in some capacity. He suggested the petitioner return to work in a graduated fashion. Consistent with the opinions of Dr. Konowitz, light duty work was offered to the petitioner.

Despite the job offer, the petitioner did not return to work. In fact, he did not even attempt to return to work within the restrictions suggested by Dr. Konowitz. He did not contact the Respondent regarding the job that was available. He was not aware even what would have been asked of him. He simply did nothing.

The petitioner received all appropriate temporary total disability benefits from August 5, 2007 through October 23, 2007 and again beginning January 23, 2008 through March 18, 2008. Beginning March 19, 2008 and continuing through. April 1, 2008, the petitioner received **temporary partial** disability benefits at a rate of $ 124.08 per week. The arbitrator notes that the [*33] petitioner never returned to work or attempted a return. Effective April 2, 2008 and continuing through April 15, 2008, the petitioner received **temporary partial** disability benefits of $ 56.61 per week. Again, he received these benefits despite the fact that he never even attempted a return to light duty work.

The petitioner is seeking temporary total disability benefits from March 19, 2008 and continuing through the date of hearing.

The Arbitrator notes that it is the petitioners burden to prove all the elements of his claim by a preponderance of credible evidence. To receive temporary total disability compensation, it is not enough to prove that the petitioner did not work. Rather, the petitioner must prove that he could not work. The Arbitrator finds that the petitioner failed to sustain that burden placed upon him.

Although Dr. Gahl authorized the petitioner completely off of work as of January 23, 2008, the Arbitrator finds no basis for that continued lost time after March 18, 2008.

While the petitioner may have had on-going symptoms primarily in the left lower extremity due to mild complex regional pain syndrome, there is nothing to suggest that the petitioner could not have [*34] returned to work at the very least in a sedentary capacity. At the very least, the petitioner should have attempted to return to work on March 19, 2008.

The Arbitrator finds the surveillance video and, reports dispositive on the issue of the petitioner's ability to return to work. In the surveillance video from June of 2008, the petitioner was seen for an extended period of time performing what appeared to be yard

work, lifting and carrying lawn equipment and loading the equipment onto a truck. During that time, the petitioner displayed no outward signs of difficulty lifting, carrying, walking, standing or bending. Dr. Konowitz had the benefit of the surveillance video to support his position that the petitioner could return to work in some capacity. Dr. Gahl did not have the benefit of reviewing this surveillance video or the surveillance reports.

While the petitioner proved that he did not work subsequent to March 19, 2008, he failed to prove that he was unable to return to work. Accordingly, temporary total disability benefits subsequent to March 19, 2008 are denied.

In support of the arbitrator's findings under (O) Prospective Medical: the arbitrator finds the following facts [*35] and conclusions of law:

Dr. Gahl has suggested the petitioner is a candidate for implantation of a dorsal column stimulator. Dr. Gahl believed the treatment was appropriate in light of his diagnosis of complex regional pain syndrome/reflex sympathetic dystrophy. Dr. Konowitz has offered an opposite opinion.

The Arbitrator finds Dr. Gahl's recommendation for the invasive treatment unreasonable. The Arbitrator finds it significant that the petitioner has failed to report a single improvement in his condition despite the numerous injections administered by Dr. Gahl for the alleged diagnosis of complex regional pain syndrome. There is no rational explanation as to why this type of treatment would be beneficial in light of the apparent absolute failure of all other treatment proposed by Dr. Gahl. The injections and medication administered through the catheter are essentially to perform the same functions of a dorsal column stimulator. If they failed to provide any benefit to the petitioner, the dorsal column stimulator would also fail to provide benefit.

The petitioner's findings upon physical examination were minimal. In fact, while the petitioner was being seen by medical providers, [*36] treating or evaluating, the visual symptoms were almost non-existent. The petitioner suggested that his foot would change color and become almost black on occasion. He also documented temperature changes, color changes, and sweat pattern changes. None of these were supported in the medical records.

The Arbitrator also places significance on the surveillance video taken on two separate occasions in June and July of 2008. The surveillance shows the petitioner to be walking with a significant, almost too overstated, limp favoring his left leg. Later in the afternoon in June of 2008, the petitioner was seen performing fairly significant work during which he displayed no outward symptoms of complex regional pain syndrome or difficulties with his left or right lower extremity. In the surveillance taken in July of 2008, limited video was available. However, again, there was no outward sign of disability.

The Arbitrator finds that the petitioner failed to sustain the burden placed upon him in showing that perspective medical care suggested by Dr. Gahl is reasonable and necessary in accordance with Section 8(a) of the Illinois Workers' Compensation Act. Accordingly, authorization for same [*37] is denied.

Legal Topics:

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:51 PM EST

*2009 Ill. Wrk. Comp. LEXIS 411, *; 9 IWCC 0400*

EDWARD KOLPACKI, PETITIONER, v. NATIONAL DECORATING SERVICE, RESPONDENT,

NO: 07WC 10039

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF DUPAGE

2009 Ill. Wrk. Comp. LEXIS 411; 9 IWCC 0400

April 22, 2009

CORE TERMS: right shoulder, pain, tear, weakness, partial disability, temporary, arbitrator, tendon, right arm, underwent, modified, rotator, cuff, biceps, supraspinatus, ladder, full-thickness, permanent, temporary total disability, physical therapy, return to work, bone marrow, partial-thickness, post-operative, glenohumeral, dislocation, tendinosis, resisted, thinning, totally

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

OPINION: [*1]

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 temporary total disability, permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Arbitrator's Decision, decreasing Petitioner's permanent partial disability award from 35% to 30% loss of the right arm pursuant to Section 8(e)10 of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 894.66 per week for a period of 19 6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 591.77 per week for a period of 75.9 weeks, as provided in §8(e)10 of the Act, for the reason that the injuries sustained caused the permanent partial loss of use of 30% of the right arm.

IT IS FURTHER ORDERED BY THE **[*2]** COMMISSION that Respondent shall pay to Petitioner **temporary partial** disability benefits of $ 4,185.83 pursuant to §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 26,300.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: APR 22 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, arbitrator of the Commission, in the city of **Wheaton**, on **July 11, 2008**. After reviewing all of the evidence presented, **[*3]** the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. El Is the petitioner's present condition of ill-being causally related to the injury?
L. What is the nature and extent of the injury?
O. Other: **amount due for temporary partial disability, if any**

AGREED FINDINGS

. On **April 21, 2006**, the respondent, **National Decorating Service, *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **69,783.48**; the average weekly wage was $ **1,341.99**.

. At the time of injury, the petitioner was **52** years of age, ***married*** with **1** child under 18.

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

. To date $ **17,764.20** has been paid by the respondent for TTD and/or maintenance benefits and **[*4]** $ **22,866.21** has been paid by the respondent for TPD.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **894.66** per week for **19-6/7** weeks, from **April 22, 2006** through **May 15, 2006** from **October 6, 2006** through **December 18, 2006**, and from **January 30, 2007** through **March 11, 2007**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **591.77** per week for a further period of **88.55** weeks, as provided in Section **8 (e)10** of the Act, because the injuries sustained caused **the permanent partial loss of use of 35% of the right arm.**

. The respondent shall pay the petitioner **temporary partial** disability benefits of $ **4,185.83** pursuant to §8(a) of the Act.

. The respondent shall pay the petitioner compensation that has accrued from **April 22, 2006** through **July 11, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

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 **[*5]** 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.

Peter M. O'Malley

Signature of arbitrator

8/8/08

AUG 15 2008

STATEMENT OF FACTS:

Petitioner, a 52 year old union painter, testified that he had been employed by Respondent for approximately thirty (30) years prior to alleged date of accident.

On April 21, 2006 while performing his job duties for Respondent, Petitioner was standing on a ladder when the side rail of the ladder broke causing the Petitioner to fall to the ground on his right side. As he fell, his right arm hit the ladder and he noted immediate pain in his right shoulder.

Petitioner presented to the emergency room at Edwards Hospital on the date of the accident with complaints of pain about his right shoulder and a noted deformity to the right shoulder. X-rays were taken which disclosed an anterior **[*6]** shoulder dislocation and also what appeared to be a small chip fracture off of the head of the humerus. Closed reduction of the right shoulder dislocation was carried out under sedation. (PX1).

Petitioner then followed up with Dr. Gregory Markarian of Orthopedic Associates of Naperville on April 27, 2006. It was thought that Petitioner might have a concurrent rotator cuff tear and an MRI performed on April 29, 2006 showed mild atrophy of the supraspinatus and infraspinatus tendons with no evidence of tendinosis or partial-thickness or full-thickness tear. There was a large amount of fluid distending the subacromial-subdeltoid bursa and moderate glenohumeral joint effusion suggesting either changes related to recent trauma or capsulosynovial inflammation. It was also noted that there was bone marrow edema totally defined throughout the humeral head, neck, and metaphysis with additional area of signal intensity representing an impaction injury with associated bone marrow edema. Petitioner underwent a course of physical therapy and was eventually released to return to work with restrictions on May 11, 2006. (PX3).

Respondent did provide work within the restrictions of lifting five **[*7]** pounds maximum and occasionally lifting and/or carrying small articles with one-handed work. At the time of the release to restricted work on May 11, 2006, it was noted that the Petitioner was to have an EMG on June 12, 2006 as Petitioner continued to complain of weakness about the right shoulder. Nerve conduction study performed on June 12, 2006 was abnormal, suggestive of a mild right median neuropathy at the wrist. (PX3).

Petitioner continued working restricted duty with complaints of pain and weakness about the right shoulder. An EMG was then performed on August 14, 2006 which was reported as normal. An MRI arthrogram of the right shoulder was performed on August 14, 2006 which disclosed marked thinning of the supraspinatus tendon with a full-thickness tear without significant atrophy or retraction,

tendinosis and thinning of the subscapularis tendon, the fraying of the labrum without an actual labral tear, and severe hypertrophic arthrosis of the acromioclavicular joint. On August 25, 2006, the Petitioner underwent a CT of the right shoulder with therapeutic injection of the bicipital tendon. (PX3).

Petitioner continued to have complaints of pain and weakness about his right [*8] shoulder and on October 4, 2006 underwent arthroscopic surgery to the right shoulder consisting of a subacromial decompression, biceps tenotomy, synovectomy of the glenohumeral joint for synovitis, and arthroscopic rotator cuff repair with one anchor. The preoperative and post-operative diagnosis was the same, namely, right shoulder rotator cuff tear and biceps tear. (PX2 & PX3).

Petitioner again underwent physical therapy following surgery and was off of work from October 4, 2006 through December 18, 2006.

Petitioner returned to work for Respondent on December 19, 2006 with restrictions of light sedentary work with no use of the right arm. Petitioner worked within these restrictions for Respondent through January 29, 2007.

On January 30, 2007 Petitioner was again authorized totally off of work as he participated in work conditioning. He participated in work conditioning and was released to and did return to work on March 12, 2007 with the restriction of working half days. Again this work was provided by Respondent. Petitioner was to return to his treating doctor three months after working half days and on June 7, 2007 was released to and did return to work at his regular job duties. [*9] (PX3).

There was a notice of work status dated March 8, 2007 indicating Petitioner was released to modified duty of half days for three months at heavy work. A subsequent notice of work status dated March 9, 2007 indicated that Petitioner was released to modified duty of four (4) hours full duty and four (4) hours no overhead work. (PX3).

At the request of his attorney Petitioner was examined by Dr. Jeffrey Coe on October 9, 2007. Upon examination, Dr. Coe noted 10 degrees loss of abduction on the right, weakness of the right shoulder girdle musculature in resisted forward elevation and stressing of the supraspinatus, weakness of the right upper arm in resisted flexion at the elbow, and associated post-operative scarring of the right shoulder. (PX4).

At arbitration Petitioner complained of pain in his right shoulder if he reaches out too far, a pulling sensation when reaching, an aching/pain in his right shoulder, and weakness and stiffness of the right shoulder.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that several years prior to the accident in [*10] question he had injured his right shoulder. He was x-rayed, treated with anti-inflammatory medication, injection and some physical therapy. Petitioner testified that his right shoulder symptoms had resolved prior to the accident of April 21, 2006. There is also no evidence of any subsequent or intervening accidents.

Petitioner testified that on April 21, 2006, while performing his job duties for Respondent, he was standing on a ladder when the side rail of the ladder broke causing him to fall to the ground on his right side. As he fell, his right arm hit the ladder and he noted immediate pain in his right shoulder.

Petitioner presented to the emergency room at Edwards Hospital on the date of the accident with complaints of pain about his right shoulder and a noted deformity to the right shoulder. X-rays were taken which disclosed an anterior shoulder dislocation and also what appeared to be a small chip fracture off of the head of the humerus. Closed reduction of the right shoulder dislocation was carried out under sedation. (PX1).

Petitioner then followed up with Dr. Gregory Markarian of Orthopedic Associates of Naperville on April 27, 2006. It was thought that Petitioner might [*11] have a concurrent rotator cuff tear and an MRI performed on April 29, 2006 showed mild atrophy of the supraspinatus and infraspinatus tendons with no evidence of tendinosis or partial-thickness or full-thickness tear. However, there was a large amount of fluid distending the subacromial-subdeltoid bursa and moderate glenohumeral joint effusion suggesting either changes related to recent trauma or capsulosynovial inflammation. It was also noted that there was bone marrow edema totally defined throughout the humeral head, neck, and metaphysis with additional area of signal intensity representing an impaction injury with associated bone marrow edema. Petitioner underwent a course of physical therapy and was eventually released to return to work with restrictions on May 11, 2006. (PX3).

Petitioner continued to complain of weakness about the right shoulder. Nerve conduction study performed on June 12, 2006 was abnormal, suggestive of a mild right median neuropathy at the wrist. (PX3).

Petitioner continued working restricted duty with complaints of pain and weakness about the right shoulder. An EMG was then performed on August 14, 2006 which was reported as normal. An MRI arthrogram of [*12] the right shoulder was performed on August 14, 2006 which disclosed marked thinning of the supraspinatus tendon with a full-thickness tear without significant atrophy or retraction, tendinosis and thinning of the subscapularis tendon, the fraying of the labrum without an actual labral tear, and severe hypertrophic arthrosis of the acromioclavicular joint. On August 25, 2006, the Petitioner underwent a CT of the right shoulder with therapeutic injection of the bicipital tendon. (PX3).

Petitioner continued to have complaints of pain and weakness about his right shoulder and on October 4, 2006 underwent arthroscopic surgery to the right shoulder consisting of a subacromial decompression, biceps tenotomy, synovectomy of the glenohumeral joint for synovitis, and arthroscopic rotator cuff repair with one anchor. The preoperative and post-operative diagnosis was the same, namely, right shoulder rotator cuff tear and biceps tear. (PX2 & PX3).

Based on the above, and the record taken as a whole, including Petitioner's unrebutted testimony as well as the opinion of the Petitioner's examining doctor, the Arbitrator finds that the Petitioner's current condition of ill-being relative to his [*13] right shoulder is causally related to the work accident he sustained on April 21, 2006.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As a result of the accidental injury of April 21, 2006 Petitioner underwent conservative medical treatment until surgical intervention

on October 4, 2006 to repair a full-thickness tear with significant partial-thickness tearing, greater than 50%, on the undersurface of the right rotator cuff as well as partial-thickness tearing, greater than 50%, of the right biceps. (PX2 & PX3).

Petitioner continued to treat post-surgery and after working periods of modified work duties for Respondent. He was eventually released to return to full duties on June 7, 2007.

At the request of his attorney Petitioner was examined by Dr. Jeffrey Coe who noted Petitioner's ongoing complaints of pain, stiffness, and weakness of the right shoulder and pain in the front of the right shoulder extending into the right biceps made worse by pulling with his right arm. Dr. Coe also noted post-operative scarring of the right shoulder, associated decreased range of motion of the right shoulder in abduction and associated **[*14]** weakness of the right shoulder girdle musculature, and resisted forward elevation and stressing of the supraspinatus with weakness of the right upper-arm in resisted flexion at the elbow. (PX4).

At arbitration Petitioner complained of continuing pain in his right shoulder if he reaches out too far, a pulling sensation when reaching, an ache/pain in his right shoulder and weakness/stiffness of the right shoulder.

Based on the above, and the record taken as a whole, particularly the diagnosed and surgically repaired tears of the right rotator cuff and right biceps tendon, as well as the Petitioner's ongoing complaints at time of arbitration, the Arbitrator finds that Petitioner sustained the permanent partial loss of use of 35% of his right arm pursuant to §8(e)10 of the Act.

WITH RESPECT TO ISSUE (O), WHAT AMOUNT OF COMPENSATION IS DUE, IF ANY, FOR TEMPORARY PARTIAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

At various times throughout Petitioner's conservative medical treatment as well as post-surgical treatment he was released to and did perform modified work for Respondent. During the periods of time he was on modified/light work he received a paycheck from Respondent **[*15]** as well as a **temporary partial** disability check from Respondent's insurance carrier, Seabright.

The Arbitrator notes that pursuant to §8(a) of the Act, as amended, when an employee is working light duty on a part-time basis or full-time basis and earns less than he would be earning if employed in the full capacity of his job then the employee is entitled to **temporary partial** disability benefits which shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the net amount which he is earning in the modified job.

Petitioner introduced into evidence copies of all of his pay stubs received from the employer while working modified duties as well as corresponding check stubs from Seabright Insurance regarding payments made for both **temporary partial** disability and temporary total disability for those periods of time in which Petitioner was authorized totally off of work. (PX5). Petitioner also introduced into evidence an analysis of the weekly pay stubs and check stubs received for **temporary partial** disability. Acomparison **[*16]** of the two exhibits reveals an underpayment of $ 4,185.83 for **temporary partial** disability benefits during the period Petitioner was provided modified/light work by the Respondent: (PX6).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to **temporary partial** disability benefits in the amount of $ 4,185.83 pursuant to §8(a) of the Act.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
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09 IWCC 489

*2009 Ill. Wrk. Comp. LEXIS 510, **

ANGELA DILLION, PETITIONER, v. NORTH LOGAN HEALTHCARE, RESPONDENT.

NO: 06 WC 13801

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF VERMILION

2009 Ill. Wrk. Comp. LEXIS 510

May 20, 2009

CORE TERMS: pain, arbitrator, degenerative, causally, lifting, temporary total disability, ill-being, scoliosis, symptoms, pound, present condition, chiropractor, permanent, partial disability, symptomatic, deposition, diagnosed, episode, maximum, patient, lumbar, strain, amount of compensation, average weekly wage, accidental injury, medical treatment, returned to work, disputed issues, failed to prove, set forth

JUDGES: Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical expenses, temporary total disability, and 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 July 12, 2007 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 100.00. 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.

DATED: MAY 20 2009

ATTACHMENT:

ILLINOIS INDUSTRIAL COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party.

The matter was heard by the Honorable Ruth White, arbitrator of the Industrial Commission, in the City of Danville, on May 14, 2007. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for Temporary Total Disability?
L. What is the nature and extent of the injury?

FINDINGS

. On February 2, 2006, the respondent *was* operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship *did* exist between the petitioner and respondent.

. On this date, the petitioner *did* sustain injuries that arose out of and in **[*3]** the course of employment.

. Timely notice of this accident *was* given to the respondent.

. In the year preceding the injury, the petitioner's average weekly wage was $ 363.60.

. At the time of injury, the petitioner was 19 years of age, single with one child under 18.

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

. To date, $ 4.758.40 has been paid by the respondent on account of this injury.

. Petitioner failed to prove that her present condition of ill-being is causally connected to the accident of February 2, 2006.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 242.40 /week for 6 weeks, from February 3, 2006 through March 16, 2006, which is the period of Temporary Total Disability for which compensation is payable. This award is subject to benefits already paid as shown above.

. The disputed medical bills are denied.

. Claim for further compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the **[*4]** Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.85% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

July 9, 2007

Date

JUL 12 2007

In support of the Arbitrator's Decision relating to *F., Is the petitioner's present condition of ill-being causally related to the injury?*, and, the Arbitrator fords the following facts:

Petitioner was working for Respondent, a nursing home, as a CNA 2/02/06. On that date, Petitioner was assisting a patient. When she glanced behind her, the patient threw himself backwards causing Petitioner to fall sideways at an awkward angle.

Petitioner testified she immediately experienced low back pain.

Petitioner's first medical care was with Dr. Alison Jones 2/03/06. Petitioner provided a consistent history of the accident. Dr. Jones noted Petitioner's weight was 286 pounds, and following her exam, she diagnosed Petitioner with an acute lumbar strain. Dr. Jones imposed restrictions on Petitioner's activities. Respondent was unable to **[*5]** accommodate the restrictions, and Respondent paid TTD benefits.

An MRI of the lumbar spine was performed 2/23/06. It revealed a small protrusion at L5-S1 and a small protrusion to the left of L4-5. The radiologist also noted scoliosis.

At the request of Dr. Jones, Petitioner was examined by Dr. Robert Hurford 3/16/06. Petitioner complained of buttock pain as well as low back pain. Dr. Hurford noted the buttock pain was referred from degenerative disc disease and back pain.

Petitioner testified she returned to work for Respondent in a light-duty capacity 3/24/06.

Petitioner continued treating with Dr. Jones, and on 7/10/06, Dr. Jones indicated in her office note Petitioner was at maximum medical improvement with a 40-pound lifting restriction.

Both Dr. Hurford and Dr. Jones testified by way of evidence deposition. Dr. Hurford's deposition was conducted 12/19/06.

Dr. Hurford is an orthopedic surgeon, and he only performs spine surgeries. He testified after reviewing the MRI films, he did not think there was any type of lumbar radiculopathy. (Px. 6 page 6) He diagnosed Petitioner with back pain secondary to degenerative disc disease or arthritis in her back. (Px. 6 page 7) Dr. Hurford **[*6]** did not believe Petitioner was a surgical candidate, and he did not impose any restrictions on her activities. He testified he would leave the issue of restrictions to the occupational medicine physician. (Px. 6 pages 9-10)

When discussing whether Petitioner's condition was permanent, Dr. Hurford first testified he would be speculating to render such an opinion. (Px. 6 page 12) He then testified if Petitioner did not have any prior episodes of low back pain before the work accident, then it was reasonable to say the lifting injury caused Petitioner to develop chronic back pain. (Px. 6 page 13)

On cross-exam, Dr. Hurford indicated that if Petitioner saw a chiropractor before the date of injury, Petitioner's back pain existed prior to the injury, and if the chiropractor treated Petitioner for low back pain, Dr. Hurford's causation opinion would be affected. (Px. 6 pages 15-16)

The office notes from Dr. Jones dated 3/20/06 indicates Petitioner previously saw a chiropractor for back pain. At trial, Petitioner

denied ever seeing a chiropractor. Petitioner did admit to a minor episode of back pain for which she underwent x-rays and took medications.

The deposition of Dr. Jones was taken [*7] 4/27/07. Dr. Jones practices in occupational and environmental medicine. She testified she initially diagnosed Petitioner with a strain which she thought would be a temporary condition. (Rx. 4 page 8)

Dr. Jones further testified Petitioner's symptoms in her lower back were affected by her weight noting increased weight was a factor with Petitioner's degenerative back problems and related symptoms. She also attributed Petitioner's scoliosis to being a cause of Petitioner's back pain. Furthermore, the scoliosis can be an additional complicating factor in someone as heavy as Petitioner. (Rx 4 pages 10-11)

Dr. Jones noted it was possible Petitioner's symptoms in her lower back were from a muscle strain and not from the disc pathology noted on the diagnostic studies. She pointed out Petitioner had a negative straight leg raising test which indicated there was no nerve root irritation. (Rx. 4 pages 14-16)

Dr. Jones rendered an opinion Petitioner was at maximum medical improvement as of 7/10/06. Petitioner was tolerating her return to work successfully. Dr. Jones recommended ongoing care for the degenerative condition in Petitioner's back as well as for the scoliosis. (Rx. 4 page 19)

Dr. [*8] Jones also rendered an opinion that as of 7/10/06, Petitioner's injuries from 2/06/06 had resolved and any ongoing complaints were due to Petitioner's weight and degenerative condition in her back. She further stated Petitioner's failure to comply with a physical therapy program slowed down her recovery. (Rx. 4 pages 19-21)

With respect to Petitioner's 40-pound restriction, Dr. Jones testified it was imposed for a variety of reasons including Petitioner's degenerative back condition, Petitioner's scoliosis, and Petitioner's weight. Dr. Jones did not testify to the work accident as being a contributing factor in the need for the 40-pound lifting restriction. (Rx. 4 pages 25-26)

Dr. Jones also testified Petitioner's job duties as of August 2006 involved more extensive walking duties than at the time of the work accident. The extensive walking duties were aggravating Petitioner's low back condition and possibly making her symptoms worse. (Rx. 4 page 23)

With respect to TTD benefits, Petitioner testified she returned to work for North Logan Health Care 3/24/06. She also testified that as of 7/24/06, Respondent no longer accommodated her restrictions. However, as of 7/10/06, Petitioner [*9] was working in a full-time capacity for Provena United Samaritans Medical Center. Her duties were those of a CNA which was the same job title as Petitioner bad for Respondent.

Petitioner's current earnings for Provena are $ 11.14 per hour which includes a shift differential. Petitioner testified she is working 40 hours per week.

Based upon the testimony of Dr. Jones who was Petitioner's primary treating physician following the work accident, the Arbitrator finds Petitioner's work-related injuries reached maximum medical improvement as of 7/10/06. The restrictions imposed by Dr. Jones were not made necessary by the work accident.

The Arbitrator further concludes that based upon the testimony of Dr. Jones, Petitioner's current condition of ill-being is not causally related to the work accident.

In support of the Arbitrator's Decision relating to *K., What amount of compensation is due for temporary total disability?*, the Arbitrator fords the following facts:

The findings of fact stated above are adopted and incorporated by reference here.

Petitioner is claiming entitlement to TTD benefits from 7/24/06 through 5/14/07. Presumably, this is based upon Respondent refusing to [*10] accommodate the 40-pound lifting restriction. However, Petitioner was working in a full-time capacity for a different employer throughout the entire time period for which TTD benefits are being claimed. Furthermore, Petitioner is earning significantly more than her average weekly wage, so **temporary partial** disability benefits are not appropriate. Petitioner's claim for TTD benefits from 7/24/06 through 5/14/07 is denied. Petitioner is entitled to TTD benefits from 2/03/06 through 3/24/06.

In support of the Arbitrator's Decision relating to *J. Were the medical services that were provided to petitioner reasonable and necessary?*, the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates herein the findings set forth in Sections F and K above.

Based upon the foregoing findings, the medical treatment received by Petitioner through the 7/10/06 visit with Dr. Jones was causally related to the work accident. However, the medical bills submitted by Petitioner as Petitioner's Exhibit 7 only include charges incurred after 7/10/06. Furthermore, the submitted charges include treatment entirely unrelated to the work accident A charge in the amount of $ 2,380.00 [*11] was submitted for a colonoscopy performed 3/07/07. This charge is clearly not related to Petitioner's lower back complaints. Petitioner also underwent an upper gastro exam with a biopsy 3/17/07 for which charges were rendered in the amount of $ 1,700.00.

Petitioner's claim for the payment of medical bills is denied.

In support of the Arbitrator's Decision relating to *L. What is the nature and extent of the injury?*, the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates herein the findings set forth in Sections F, J and K above. Petitioner failed to prove that her present condition of ill-being is causally connected to the accident of February 2, 2006 rendering the issue of "nature and extent" moot.

DISSENTBY: BARBARA A. SHERMAN

DISSENT: It appears that Petitioner had experienced a few prior episodes of low back pain for which she received minimal medical treatment and apparently recovered. The most recent treatment before her accident on February 2, 2006, was in December 2003. From that time forward she continued to perform her regular work for Respondent including frequent lifting and maneuvering of patients. There is no evidence that her back was symptomatic or **[*12]** required treatment in that period. She has been symptomatic and has had a lifting restriction since the accident. While Dr. Hurford testified that knowledge of prior symptoms and treatment might change his opinion as to causation, clearly it would depend upon what and when the prior treatment was. Petitioner's prior treatment was remote in time from this accident, her treatment was apparently minimal, and she apparently recovered and was able to perform her regular work for two years without incident. Consistent with the testimony of Dr. Hurford, I would find that Petitioner was susceptible to injury as a result of her pre-existing degenerative disease, that her condition became symptomatic as a result of the accidental injury herein, and that her chronic back pain since the accident represents a permanent aggravation of her underlying condition resulting in some degree of permanent partial disability. I therefore dissent from the majority's decision.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

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

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions

Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)

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Date/Time: Thursday, January 21, 2010 - 6:51 PM EST

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*2009 Ill. Wrk. Comp. LEXIS 585, **

KWESI HOPKINS, PETITIONER, v. HYDE PARK CO-OP, RESPONDENT.

NO: 03 WC 30368

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 585

June 17, 2009

CORE TERMS: robbery, arbitrator, symptoms, disorder, teaching, robber, rope, return to work, counting room, neuropsychologist, claustrophobia, psychiatric, medication, traumatic, interview, diagnosis, anxiety, trauma, totally disabled, temporary total disability, claustrophobic, psychological, psychiatrist, grievance, classroom, flashbacks, emotional, demeanor, teacher, thrown

JUDGES: Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, the nature and extent of Petitioner's 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 September 8, 2008, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 11,200.00. 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 [*2] Secretary of the Commission.

DATED: JUN 17 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Jutila**, arbitrator of the Commission, in the city of **Chicago**, on June **12, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **April 18, 2003**, the respondent **Hyde Park Coop *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and [*3] in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 22,534.20**; the average weekly wage was **$ 433.35**.

. At the time of injury, the petitioner was **54** years of age, ***single*** with **no** children under 18.

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

. To date, **nothing** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. Petitioner's claim for temporary total disability benefits is denied.

. The respondent shall pay the petitioner the sum of **$ 260.01**/week for a period of **37-1/2** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **the permanent loss of use of petitioner's whole person to the extent of 7-1/2%**.

. The respondent shall pay the petitioner compensation that has accrued from **April 19, 2003** through **June 12, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

The respondent shall pay the further sum of **$ 1,369.26** for necessary medical services, as provided in Section 8(a) of the Act.

RULES REGARDING [*4] 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.

Gerald D. Jutila

September 7, 2008

Date

SEP 8 2008

FINDING OF FACTS

Petitioner testified that on April 18, 2003 he was employed at the Hyde Park Cooperative market as a part-time bagger. At about 11:15 p.m. he was confronted by an armed robber after coming down from the upstairs locker room at the end of his work day. The robber was dressed entirely in black. The robber was pointing a gun at petitioner and ordered him to put his hands up and go lay on the floor. Petitioner was then bound at his hands and feet. Shortly thereafter, the store manager was ordered to lie next to petitioner.

One of the robbers **[*5]** put a gun to the store manager's head. Shortly thereafter, the petitioner was dragged to the counting room at the front of the store and was thrown into the room. Minutes later, one of the security guards was thrown on top of him. Petitioner stated he had some difficulty breathing but was able to shift his body to alleviate the breathing obstruction. While shifting his body, the rope on his left hand loosened. Petitioner was able to cut the rope binding him with a penknife he had in his pocket. Petitioner then freed the security guard.

Next, petitioner looked out the window in the door of the counting room and did not see any of the robbers. Petitioner then ran out of the counting room, ran out of the store and ran five blocks home. When he arrived home, he called 911. The dispatcher told him to return to the Coop as police would be there when he arrived. Petitioner walked back to the Coop and encountered approximately 25 police officers. Petitioner was interviewed and about two hours later was allowed to return home.

Petitioner testified that no shots were fired during the approximately 30 minutes that he was involved in the robbery. The physical injuries he sustained were limited **[*6]** to rope burns on this wrists and ankles. These burns have long ago healed. Petitioner could not sleep when he returned home and has had problems sleeping since the incident. In addition, petitioner said he has experienced flashbacks of the robbery and recurrent nightmares. Petitioner said that since the robbery he has been very vigilant including frequently checking to make sure his doors and windows are locked. Three months after the robbery, petitioner moved four to five blocks away from his residence at the time of the robbery because he was concerned the robbers knew who he was and where he lived.

Petitioner returned to work at the Coop the day after the robbery in the same position he occupied before the robbery. Petitioner worked steadily at the Coop through October 30, 2003 doing his regular job and working his normal part-time hours. Petitioner initially did not recall why he stopped working on October 30, 2003, but on cross-examination acknowledged that he had been found in violation of the Coop's purchasing policy and had been suspended five days. Petitioner acknowledged that he was a union member and there was a union steward available to pursue grievances on behalf of petitioner. **[*7]** Petitioner had filed a grievance to recover money that was stolen from him personally during the robbery. Petitioner did not explain why he did not return to work after the five day suspension.

Petitioner returned to his 1st grade teaching job at the Chicago Board of Education for one day not long after the robbery and could not complete his work day because of the claustrophobia he felt in the classroom. Petitioner has not taught since.

Petitioner has not worked in any capacity since October 30, 2008.

Petitioner testified that he had a Bachelor of Arts in Psychology from Chicago State University that he obtained in 1972. Thereafter, petitioner obtained a master's degree equivalent in family therapy from University of Illinois, Chicago in 1982. In 1995, petitioner obtained a Master Gardener certificate from the University of Illinois, Chicago. Petitioner worked for the Coop on a part-time basis starting in May 2002. He started in the garden department. After the gardening season ended, petitioner transferred to a

bagging/clerk position inside the store. Petitioner worked as a Chicago public school teacher for 13 1/2 years from 1990 to 2003. Before that, petitioner worked as a juvenile [*8] probation officer for Cook County for 17 1/2 years.

Petitioner first sought treatment at the Komed/Homan Medical Clinic on May 19, 2003 based on a recommendation from one of the police officers who investigated the robbery. On said date, petitioner saw a nurse practitioner, Nathan Jaisingh, and his complaints included flashbacks of seeing the robbers, poor sleep, anxiety, claustrophobia, and poor appetite. Jaisingh noted that petitioner's was calm, friendly, cooperative, depressed and had an organized thought process. Jaisingh assessed depression, general anxiety disorder, rule out PTSD and rule out psychosis. It was recommended that petitioner take 1 mg Risperdal at bedtime. It was noted that on a drug abuse screen, the petitioner tested positive for cannabinoid. Petitioner saw Mr. Jaisingh on three more occasions in June and July 2003. On June 2, petitioner was told to start taking Zoloft and was referred to social services for individual therapy. On July 28, 2003, trazadone was recommended as an additional medication. (Pet. Ex. L.; Resp. Ex. 1)

On August 21, 2003, petitioner saw Dr. Tibbetts who, noted that the petitioner ran out of medications but did not come in for a refill. [*9] Dr. Tibbetts assessment was rule out PTSD. (Pet. Ex. 2; Resp. Ex. 1) On August 26, 2003, Mr. Jaisingh filled out a one page "Standard Form of Doctor's Report." Therein, he listed a medical diagnosis of PTSD versus another diagnosis that is illegible. He stated that it was undetermined when petitioner could resume either regular or light work, and checked the "yes" box following the question: "Please state whether patient's condition is a result of the injury claimed." (Pet. Ex. 3)

On February 19, 2004, Dr. Tibbetts notes that the petitioner has been off medications since August 2003, he is attending school twice a week for several hours with 49 other people, he is riding public transportation and his spirits are better. Dr. Tibbetts assessment was "history of traumatic crime symptoms improving, off meds, functioning quite well, r/o PTSD, r/o Schizotypal Personality Disorder." On June 3, 2004, Dr. Tibbetts notes that petitioner's affect is stable, he looks relaxed, he is attending school, he wants to open a store, he feels claustrophobic 3 times a week, he is not avoiding things, he has flashbacks of being tied up, he is doing yoga and mediation. (Pet. Ex. 2; Resp. Ex. 1 at 4)

In April [*10] 18, 2005, petitioner came under the care of psychiatrist, Dr. Roueen Rafeyen, at Michael Reese Hospital. Dr. Rafeyen's credentials were not offered into evidence. Dr. Rafeyen noted subjective complaints including flashbacks, hypervigilance, claustrophobia, nightmares, anxiety, depression and fear of leaving his house. Dr. Refayan's behavioral observsations included anxious, linear thought process and oriented with no auditory or visual hallucinations or paranoia. Dr. Refayan diagnosed PTSD and prescribed Seroquel and Zoloft. (Pet. Ex. 4; Resp. Ex. 1 at 4) Dr. Refayan completed the same one page "Standard Form of Doctor's Repot" form that was completed by Mr. Jaisingh. Therein, Dr. Rafeyen additionally checked that it was undetermined when petitioner would be able to resume regular or light work. He also checked the "Yes" box in responding to the question of whether the patient's condition is related to the injury claimed. (Pet. Ex. 5)

Thereafter, Dr. Rafeyen saw petitioner on six occasions between December 15, 2005 and February 1, 2007. (Pet. Ex. 4) On July 28, 2007, Dr. Rafeyen completed another "Standard Form for Doctor's Report." Therein, Dr. Rafeyen notes chronic post traumatic [*11] disorder and states that petitioner is unable to work and again checks the "YES" box stating that the petitioner's condition is result of the injury claimed. (Pet. Ex. 6)

Other than Dr. Rafeyen's office notes referenced above and the two Standard Form For Doctor's Reports, there was no additional evidence regarding Dr. Rafeyen's treatment, such as deposition testimony or a narrative report, entered into evidence. Petitioner did testify that he last saw Dr. Rafeyen in January 2008 and was again prescribed Zoloft and a sleeping medication.

On September 29, 2005, petitioner was examined and tested by Gregory Malo, a neuropsychologist, at the request of the respondent. Dr. Malo noted that during psychological testing the petitioner's "speech is goal directed with no evidence of delusions, hallucinations, loose associations, tangentiality, circumstantiality, pressured speech, flight of ideas or paranoid delusions. He is hypervigilant and suspicious but remains polite and cooperative throughout diagnostic interview and psychological testing. Dr. Malo concluded that "Psychological testing reveals no evidence of thought disorder, bi-polar disorder, or paranoia. Mr. Hopkins presents with a [*12] surprisingly severe and long lasting case of posttraumatic [sic] stress disorder which, although atypical, is not at all impossible." (Pet. Ex. 7)

Thereafter, the testing results and Dr. Malo's report were reviewed by Robert Hanlon, another neuropsychologist. Dr. Hanlon disagreed with Dr. Malo's diagnosis of PTSD. He stated that there are no MMPI-2 scales that are definitive with respect to PTSD and there no MMPI-2 scales that are individually diagnostic with respect to PTSD. Dr. Hanlon was of the opinion that petitioner had a Somatoform Disorder or a Conversion Disorder. (Resp. Ex. 1 at 5)

On December 22, 2005, petitioner underwent a face-to-face interview with Dr. Susan Pearlson, for approximately two hours. (Resp. Ex. 1) Dr. Pearlson is a forensic psychiatrist and assistant professor in the Department of Psychiatry at The Feinberg School of Medicine at Northwestern University. Dr. Pearlson graduated from the Mayo Medical School in Rochester, Minnesota and was a resident in psychiatry at the Mayo Graduate School of Medicine for four years. She has been board certified in Psychiatry and Neurology since 1994 and has been a Diplomate in the subspecialty of Forensic Psychiatry since [*13] 1999. Dr. Pearlson has been involved in leadership positions with the American Academy of Psychiatry and Law since 2005 and has made numerous presentations on various psychiatric topics including Post Traumatic Stress Disorder. (Resp. Ex. 2)

Following her interview with petitioner, Dr. Pearlson produced a comprehensive eight page report. (Resp. Ex. 1) Dr. Pearlson noted petitioner's education and work history. She summarized records from Komed/Holman Health Center from May 19, 2003 through June 3, 2004, and Dr. Rafeyen's psychiatric evaluation on April 18, 2005. The test results and assessments from the neuropsychologists Malo and Hanlon were noted and commented on by Dr. Pearlson as follows:

> "Psychological testing was interpreted differently by Dr. Malo and Dr. Hanlon. My examination supports the hypothesis that Mr. Hopkins may suffer from mild anxiety, but not from any major psychiatric disorder that causes disability or friability to engage in a particular form of work including teaching. There was no evidence during this examination that Mr. Hopkins suffered from either Conversion or Somatization disorder, as he did not describe any physical problems at all. As noted above, [*14] neither are his reported symptoms consistent with a diagnosis of PTSD." (Resp. Ex. 1 at 7)

The report also included a lengthy discussion section on Post Traumatic Stress Disorder and Dr. Pearlson's analysis as to whether the

petitioner suffered from PTSD. Dr. Pearlson stated that the widely accepted criteria for the diagnosis of PTSD consists of a "traumatic event" that is persistently re-experienced; the person persistently avoids stimuli associated with the trauma; the person experiences persistent symptoms of increased arousal; the disturbance lasts longer than one month; and causes significant distress or impairment in social, occupational, or other important areas of functioning. (Resp. Ex. 1 at 7-8)

In support of her conclusion that petitioner did not have PTSD, Dr. Pearlson noted that the records from Komed/Holman clinic documented that petitioner's symptoms resolved over several months as indicated by petitioner's ability to function without medications, to attend classroom sessions, to ride pubic transportation and to return to work at the place the events occurred. She further noted that while some of petitioner's symptoms were consistent with PTSD, others were not. Of **[*15]** particular significance, Dr. Pearlson stated:

> "Mr. Hopkins' ability to return to work at the Coop, the scene of the trauma, but not at school, a site removed from the scene of the trauma, is inconsistent with the diagnosis of PTSD. Traumatized persons have most difficulty in the location the trauma occurred or in locations similar to it. Avoidance of closed spaces could follow a traumatic experience. However one would expect a generalized avoidance, not avoidance limited to a specific classroom setting but which allowed productive work at the location where the trauma occurred." (Resp. Ex. 1 at 7)

The history provided by petitioner was noted in detail, and is consistent with the testimony of the petitioner at hearing. Regarding petitioner's employment as a teacher, Dr. Pearlson noted that petitioner said he initially stopped teaching because he felt "claustrophobic" in the classroom and continues to feel unable to teach because he is tired of working with children after 17 1/2 years as a probation officer and 13 1/2 years as a teacher. Mr. Hopkins said: "I don't have it an ore. Since I been away from it. Teaching adults maybe, not children." (Resp. Ex. 1 at 6)

In the "Mental **[*16]** Status Examination" section of her report, Dr. Pearlson noted that petitioner was on time for the interview, he was neatly dressed and well groomed, he made good eye contact and established an adequate rapport, his affect was calm, relaxed and full range, there was no evidence of anxiety or discomfort, he sat comfortably in his chair, his speech was normal in rate, tone and production, he was logical and articulate, he related his account of the robbery in a calm, story-telling manner without any hesitation or emotional difficulty, his thought content was normal. (Resp. Ex. 1 at 5-6)

Dr. Pearlson noted that her interview lasted approximately two hours in a small office and at no time did the petitioner say or indicate that he was claustrophobic. Dr. Pearlson concluded that the petitioner did not have PTSD or any other major mental disorder; he may have experienced a brief period of emotional distress following the robbery, but his symptoms had largely resolved and are not disabling; there is no psychiatric contraindication to teaching and petitioner does not have any psychiatric disorder that caused disability or inability to engage in any particular form of work including teaching; **[*17]** and there is no clear necessity for additional psychiatric or psychological intervention. (Resp. Ex. 1 at 7-8)

Dr. Pearlson's description of petitioner's manner, behavior and affect, was entirely consistent with petitioner's manner, behavior and affect at the hearing. Petitioner was dressed appropriately and well-groomed. He spoke logically and articulately. He was attentive. He was animated. He fully explained what happened in a story-like manner. He was detailed as to what happened. He exhibited the same general tone and demeanor throughout direct and cross examination including when talking about the gun being pointed at him, the gun being put to the head of his manager, being dragged to the counting room, being thrown into the counting room, having a co-worker being thrown onto him, freeing himself from the rope that bound him, escaping the store, running home, calling 911, returning to the scene and recounting his experience to the investigating police officers. There was no hesitation or emotional difficulty at any point during petitioner's testimony.

Petitioner testified for approximately one hour at the hearing, and remained in the hearing room when exhibits were introduced **[*18]** into evidence. The door was closed to the hearing room during his testimony. At no time did the petitioner ask that the door be opened or that he be allowed to leave the room because he was claustrophobic. Dr. Pearlson recounts the same experience when she interviewed the petitioner for about two hours in December 2005.

Petitioner did not dispute any of the statements attributed to him by Dr. Pearlson in her report nor did he dispute any of the descriptions of his appearance, manner and behavior contained in Dr. Pearlson's report.

CONCLUSION

Is the petitioner's present condition of ill-being causally connected to the injury?

This case involves a claimed psychological injury following a traumatic event involving physical injury in the form of rope burns on the wrists and hands. The rope burns resolved not long after the incident without any residual deficits. As set forth above, petitioner's treating medical providers and the two neuropsychologists and the psychiatrist that were involved in evaluating the petitioner for the respondent reach a variety of conclusions regarding petitioner's condition.

After reviewing the medical evidence submitted and considering the petitioner's **[*19]** testimony and demeanor at the hearing, the opinions of Dr. Pearlson are the most persuasive and her analysis the most compelling. The history set forth in Dr. Pearlson's report is thorough and entirely consistent with the petitioner's testimony at the hearing. More importantly, her observations regarding petitioner's manner, affect and behavior were entirely consistent with how petitioner presented himself at the hearing. As stated by Dr. Pearlson: "Mr. Hopkins' demeanor revealed a relaxed, calm man at ease with himself and his surroundings. His discussion of events during the robbery was articulate, complete and had the quality of story often told. He did not demonstrate either the emotional reactivity or the emotional numbing that would be characteristic of someone suffering from chronic symptoms of PTSD." (Resp. Ex. 1 at 7-8) This description equally applies to petitioner's demeanor and recounting of the events of the robbery at the hearing.

In addition, Dr. Pearlson noted that petitioner did not express signs of claustrophobia while being interviewed for two hours in her small office. Likewise, petitioner did not express any signs of claustrophobia while in a small hearing room **[*20]** for over one hour.

Further, petitioner was able to return to work at the Coop within a day or two of the robbery and continued to work regularly at the

Coop until October 30, 2008, a period of over six months. He inexplicably failed to return to work at the Coop after a five day suspension related to violation of the Coop's purchasing policy. The medical records reveal that he was able to resume other activities such as using public transportation and taking classes not long after the robbery.

Finally, Dr. Pearlson's explanation of PTSD and her application of the medical criteria for PTSD to the facts of this case is very persuasive. Dr. Pearlson's superior educational background and experience lend significant credibility to her opinions. The Arbitrator notes there is no elaboration of any kind by any of petitioner's treating doctors. As for the neuropsychologists Malo and Hanlon, they reach different conclusions and disagree on the criteria for PTSD. The Arbitrator places more weight on the opinions of Dr. Pearlson, a medical doctor and psychiatrist than the opinions of Malo and Hanlon, who do not have medical degrees, but rather Ph. D.'s in psychology.

The Arbitrator adopts the **[*21]** opinions of Dr. Pearlson and concludes that while petitioner may have experienced a brief period of emotional distress directly following the robbery, those symptoms have largely resolved.

Were the medical services that were provided to petitioner reasonable and necessary?

The Arbitrator finds that the $ 1,369.26 medical bills claimed by the petitioner were for reasonable and necessary treatment and should be paid by respondent.

What amount of compensation is due for temporary total disability?

Petitioner claims that he has been temporarily totally disabled from October 30, 2003 through July 26, 2007, a period of 195-1/7 weeks. The Arbitrator concludes that petitioner has failed to prove by a preponderance of the evidence that he was temporarily totally disabled. The issue is whether the petitioner's mental condition following the robbery precluded him from working for any period of time since the robbery. One is temporarily totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *Pemble v. Industrial Commission*, 181 Ill. App. 3d 409, 536 N.E. 2d 1349, 1354, 130 Ill. Dec. 138 (3rd Dist. 1989). **[*22]** Here, the petitioner returned to his job at the Coop the day after the robbery. He performed the same duties and worked the same amount of hours per week through October 30, 2003 until he was suspended for violating the Coop's purchasing policy. Petitioner had no recollection as to why he did not return to work after the suspension. He had a union steward available and was familiar with the grievance process, having filed a grievance for recovery of the money that was stolen from him personally during the robbery. There is no evidence that petitioner stopped working at the Coop because of his mental health.

As to the petitioner's teaching position, while Dr. Malo concluded that the petitioner could not teach, he did not conclude that the petitioner could not work in another capacity. While Dr. Rafeyen stated the petitioner could not work on two one page reports, there is nothing in his records explaining how petitioner could work for six plus months after the accident at the scene of the robbery, but not work in some capacity thereafter. Dr. Pearlson concluded that there was nothing preventing the petitioner from working as a teacher or in any capacity for that matter.

As an aside, **[*23]** the Arbitrator notes regardless of whether the petitioner could or could not work as a teacher as a result of the robbery, at the time of this accident the Workers' Compensation Act did not provide for **temporary partial** disability. Further, petitioner failed to submit any payroll records to explain what portion of petitioner's average weekly wage was attributed to the teaching job and what portion was attributed to the Coop job.

The Arbitrator concludes that the petitioner is not entitled to any TTD.

What is the nature and extent of the injury?

Petitioner claims that he is permanently and totally permanently disabled from work since July 27, 2007 as a result of the effects from the robbery. The Arbitrator concludes that petitioner has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. Having concluded that the petitioner sustained a brief period of emotional distress directly following the robbery, and that his symptoms have largely resolved, and that petitioner was capable of working in some capacity after the robbery through the date of hearing, the Arbitrator concludes that the petitioner is entitled to an award of 7.5% loss of **[*24]** use of the person as a whole. (See attached awards for psychological injuries obtained from Q-Dex during the years 2002 to 2006.)

The Arbitrator declines to award benefits under either section 8(d)(1) or section 8(f). In this case, the petitioner is well educated, well-spoken, and has a variety of job experiences. No evidence was presented that petitioner undertook a job search. No evidence was presented by a vocational placement counselor stating that petitioner could not find a job given his age, education, training and experience. The Arbitrator agrees with Dr. Pearlson that the petitioner has been capable of working since the accident, as clearly evidenced by his ability to work at the Coop for six plus months after the robbery

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Collective Bargaining & Labor Relations > Discipline, Layoff & Termination
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:37 PM EST

*2009 Ill. Wrk. Comp. LEXIS 586, **

09 IWCC 613

DEBRA ANZELMO, PETITIONER, v. GLENDALE NISSAN, INC., RESPONDENT.

NO: 06 WC 23419

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF DUPAGE

2009 Ill. Wrk. Comp. LEXIS 586

June 17, 2009

CORE TERMS: pain, arbitrator, chair, tailbone, symptom, recommended, temporary total disability, injection, lumbar, time clock, stool, physical therapy, right leg, feet, medication, return to work, workstation, epidural, mid-back, leg, temporary, impression, herniation, deposition, underwent, horseplay, coworker, treating, shoulder, pushed

JUDGES: Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice having been given to all parties, the Commission, after having considered the issues of accident, causal connection, medical expenses, temporary total disability benefits, penalties and attorneys' fees, and Section 8(j) credit, and having been advised of the facts and law, hereby modifies the Arbitrator's decision as stated below and otherwise affirms and adopts the Arbitrator's decision, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the Arbitrator's decision with respect to accident, causal connection, and medical expenses. We modify the Arbitrator's decision with respect to temporary total disability benefits and penalties and attorneys' fees. The Arbitrator awarded **[*2]** Petitioner 98-2/7 weeks of temporary total disability benefits representing the periods from April 5, 2006, to February 25, 2007, and from April 28, 2007, to April 22, 2008. The Commission reduces the temporary total disability award and finds that Petitioner is entitled to 60-3/7 weeks of temporary total disability benefits representing the periods from April 5, 2006, through November 1, 2006, and from September 24, 2007, the date on which Petitioner returned to see Dr. DiGianfilippo again after November 2006, through April 23, 2008, the date of the arbitration hearing. On November 1, 2006, Dr. DiGianfilippo indicated that it was okay for Petitioner to return to work and recommended that Petitioner avoid hyperflexion and hyperextension. Although Dr. DiGianfilippo indicated on November 13, 2006, that he recommended that Petitioner not return to work, we find that Dr. DiGianfilippo made such recommendation because he understood that Petitioner's job duties included getting in and out of the cars a lot. On direct examination, Petitioner did not testify that one of her job duties was to get in and out of cars. On cross examination, after having been confronted with Dr. DiGianfilippo's **[*3]** record, Petitioner testified that she was required to get in and out of approximately an average of 40 cars per day. We find that Petitioner's testimony on cross examination that she had to get in and out of an average of 40 cars per day is not credible, particularly because her testimony on direct examination about her job duties as a service dispatcher reveals that her job primarily involved handing out work orders to the technicians, which we find is sedentary and involved very light work, if any. Further, Robert Hall testified that Petitioner rarely had occasion to get in cars in the performance of her duties.

Another concern that the Commission has with the issue of whether Petitioner was able to work is the fact that she did work with another employer for about eight weeks. Petitioner testified that she worked with Woody GMC full time for about eight weeks. Petitioner stated that her job with Woody GMC was that of a service advisor and that her duties were the exact same duties that she had with Respondent. The Commission questions why Petitioner was able to perform her job at Woody GMC but not with Respondent if both jobs required her to perform similar duties. Respondent's **[*4]** witness, Joya Sanders, the human resources and payroll administrator for Woody GMC, testified that there were no notes regarding any work restrictions in Petitioner's personnel file.

We also find that Petitioner's testimony as to why she left her employment with Woody GMC to be not credible. Petitioner testified that she left Woody GMC because of her pain. Petitioner's personnel file with Woody GMC indicates that Petitioner left her employment there because of issues that she had with some of her coworkers. Petitioner's personnel file with Woody GMC contains her letter of resignation, dated April 29, 2007, which clearly represents that she resigned because of her coworkers. Her personnel file also contains letters documenting her complaints about her coworkers. Thus, we find that Petitioner's testimony that she left her employment with Woody GMC because of her pain is not credible.

The Commission is concerned with Petitioner's credibility also because of the charge that Petitioner filed at the Equal Employment Opportunity Commission. Petitioner's charge at the EEOC contradicts her testimony at arbitration completely. Petitioner and Mr. Hall testified that there was no animosity between **[*5]** them. Petitioner testified that she had an amicable relationship with Mr. Hall, that they were friendly, and that the slaps or taps on the backs were greeting gestures. In the EEOC charge, however, Petitioner described

a different picture of her relationship with Mr. Hall. Petitioner attested in the EEOC charge that Mr. Hall retaliated against her and physically hurt her. On redirect examination, Petitioner testified that when she signed the EEOC charge on August 14, it was her feeling at that time that Robert shoved her her chair because she had complained about his sexual harassing behavior. At trial, however, Petitioner testified that immediately after the incident, she told management that it was not Mr. Hall's fault and that she did not want him to get in trouble, which we find are disbelieving actions of an individual who sustained physical retribution from a coworker. Moreover, we note that at arbitration, while Petitioner testified that Robert has engaged in horseplay before, she never mentioned anything about his having made sexual comments or any of the other allegations that she made in the EEOC charge.

Given the concerns with Petitioner's credibility and given the fact **[*6]** that Petitioner has demonstrated that she can work in a similar, if not the same, position as the one she held with Respondent, the Commission reduces the award of temporary total disability benefits to a total of 60-3/7 weeks.

Concerning the issue of penalties and attorneys' fees, the Commission hereby reverses penalties and attorneys' fees awarded based on the credibility concerns we noted above. While the Commission believes that the accident occurred and that the circumstances of the accident did not involve horseplay, Petitioner's conduct after leaving Respondent's employ and her testimony at arbitration were not wholly credible.

The Commission also awards Section 8(j) credit for amounts paid on account of the injury. Petitioner testified that her group insurance company through her employment by Respondent paid some of her bills.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 491.47 per week for a period of 60-3/7 weeks, that having been the period of temporary total incapacity for work under §8(b), and that as provided in § **[*7]** 19 (b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 108,389.90 for medical expenses under §8(a) of the Act, subject to the medical fee schedule in Section 8.2 of the Act. Respondent is entitled to Section 8(j) credit for amounts it paid on account of the injury.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. **[*8]**

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

DATED: JUN 17 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Leo Hennessy**, arbitrator of the Commission, in the city of **Wheaton**, on **4/22/2008**, After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and **[*9]** necessary?
K. What amount of compensation is due for temporary total disability?
L. Should penalties or fees be imposed upon the respondent?
M. Is the respondent due any credit?

FINDINGS

. On **4/4/2006**, the respondent **Glendale Nissan, Inc.** ***was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **38.334.51**; the average weekly wage was $ **737.20**.

. At the time of injury, the petitioner was **47** years of age, ***single*** with **0** children under 18.

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

. To date, $ **4,263.48** has been paid by the respondent for TTD and/or maintenace benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **491.47**/week for **98-2/7** weeks, from **4/5/06** through **2/26/07** and 4/28/07 through **[*10]** 4/22/08, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of petitioner, the disabling condition is temporary and has not yet reached a perinanent condition, pursuant of Section 19(b) of the Act.

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

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

. The respondent shall pay $ See Decision in panalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ See Decision in atorneys' fees, as provided in Section 16 of the Act.

. In no instance shall this award be a bar to subsquent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest 2.35% shall **[*11]** 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 arbitratior

6-17-08

Date

JUN 18 2008

FACTS

A. Accident

Petitioner testified that she was employed as a Service Writer/Dispatcher at the Respondent's dealership on April 4, 2006. Her job as a Dispatcher entailed taking the job orders from the Service Writers and distributing them to the Service Technicians. Petitioner testified that she was essentially the middle person between the Service Writers and the Service Technicians with the responsibility of making sure the work orders were distributed evenly and completed in a timely manner. At the time of April 4, 2006, Petitioner stood five feet and seven inches tall and weighed approximately one hundred ten pounds. Petitioner testified that prior to April 4, 2006 she never had any problems with her mid or lower bath nor had She ever required medical treatment in that area.

Petitioners workstation was located in the front of the shop at the end of the center walkway. The shop as illustrated by Petitioner's drawing (PX1) **[*12]** consisted of a center walkway with service stalls on each side of the walkway. Petitioners workstation was positioned at the front of the center walkway so that she could oversee the technicians. As illustrated, the workspace had two walls, a side wall and a back wall. (PX1) The workspace was open from the front and the opposite side. (PX1) Petitioners workspace consisted of an elevated desk standing five feet tall, an adjustable swivel stool chair, a file cabinet, file wall cabinets and the dealership time clock. Petitioner presented a drawing of her workstation which illustrated the position of the objects in her workspace. (PX2) Petitioner also introduced and identified a catalog picture of the stool chair that she used. (PX3) As pictured, the stool chair sat on five wheels and had a round metal ring towards the bottom to rest her feet. (PX3) Petitioner testified that her stool chair was raised to four feet to meet her desk. At that height her feet could not touch the ground. The time clock was situated directly behind the Petitioner if she was facing towards her desk. Petitioner testified that when she was sitting in the stool chair, the space between the back of her stool chair **[*13]** and the time clock was approximately two feet. Petitioner stated that all of the employees of the dealership except the sales people used the time clock to punch in and out. Petitioner stated that the employees were able to access the time clock without interfering with her at her workstation except for one employee, Robert Hall, Petitioner stated that Mr. Hall was a large gentleman approximately six feet tall and three hundred pounds and because of his size she would have to move her stool chair to accommodate him. Mr. Hall indicated during his testimony that he was actually six feet four inches and weighed approximately three hundred fifty pounds at the time of accident.

On April 4, 2006, Petitioner testified that she was seated at her desk facing the shop floor. Petitioner saw Mr. Hall enter the shop floor from the back. Mr. Hall then walked down the center walkway towards her workstation to punch into the time clock. As Mr. Hall approached, Petitioner testified that she pushed her stool chair away from her desk and situated herself with her back against the file cabinets to make more room for Mr.Hall. Petitioner stated that she was sitting on the front portion of the cushion with **[*14]** her feet on the round rung of the stool. As Mr. Hall went towards the time clock, Petitioner reached out with her hand, patted him on the shoulder and said "what's up Lump". Petitioner clarified that "Lump" was Mr. Hall's nickname. Mr. Hall then turned and proceeded to move towards her to push Petitioner back. Petitioner testified that she warned him not to push her because she could fall off the chair. Petitioner stated that the next thing she knew she felt a push and her chair fell out from under her and she fell backwards. Petitioner's back hit against the file cabinets and she landed on the floor right on her tailbone. Petitioner indicated that she felt immediate pain in her tailbone and back.

After the fall, Petitioner was helped by the Service Manager, Len Cegielski. Petitioner informed Mr. Cegielski of what occurred. Len Cegielski testified that he did not witness the incident, but Petitioner told him a similar account of the injury as she testified. Mr. Cegielski also prepared a statement which he identified at hearing. (PX5) During his testimony Mr. Cegielski confirmed the details of Petitioner's workstation as described by Petitioner.

Respondent presented as a witness, Keith [*15] Narozny, the dealership's general manager. Mr. Narozny testified that after Petitioner's fall he came downstairs to inquire what occurred and was given a similar account of circumstances of the injury.

Respondent also presented Robert Hall. Mr. Hall testified that when he went to punch into the time clock, Petitioner was turned toward him and "lapped" him in a friendly manner on the shoulder and said "what's up Lump". Mr. Hall stated that Petitioner was standing on the bottom rung of her chair and he then similarly "tapped" Petitioner on the shoulder and said "what's up Deb". Mr. Hall stated that Petitioner then warned her not to push her because she could fall off her chair. Mr. Hall stated that without touching her, Petitioner fell off her chair as described.

B. Medical Treatment

After the accident, paramedics were called. Petitioner was then transported by paramedics to Glen Oaks Hospital. Petitioner stated that the paramedics injected her with pain medication to relieve her pain.

At Glen Oaks Hospital, Petitioner related complaints of tailbone pain. (PX7) The emergency room physician diagnosed her with a sacrococcyx contusion and discharged her home with instructions [*16] to follow up with her primary care physician and with a prescription for Motrin and Vicodin. (PX7)

Petitioner testified that she followed up with her primary physician, Dr. Shah on April 6, 2006 and then subsequently saw an orthopedic physician, Bruce Montella, M.D. on April 8, 2006. On Petitioner's initial visit with Dr. Montella, Petitioner gave Dr. Mohtella a history of being pushed off her chair and related ongoing difficulties with activity related back pain and tailbone pain into her hips. (PX8) After examining Petitioner, Dr. Montella assessed that Petitioner's back pain was consistent with a lumbar disc injury and radiculitis. (PX8) Dr. Montella recommended non-operative management including activity modification, anti-inflammatories, physical therapy and chiropractic care. (PX8) Dr. Montella also prescribed a lumbar MRI and indicated that Petitioner was not to participate in work in anyway. (PX8)

Petitioner began physical therapy with Midwest Physical Therapy on April 18, 2006. On April 19, 2006, Petitioner underwent an MRI to her lower back. The radiologist's impression was degenerative disc disease most notable at the T12-L1 level with considerable disc bulging, probably [*17] herniation causing spinal stenosis and compression of the thecal sac. (PX8).

On May 3, 2006, Petitioner followed up with Dr. Montella. On that visit, Petitioner continued to report a lot of difficulties with her back and radiating leg pain consistent with lumbar disc herniation and radiculitis. (PX8) Dr. Montella again indicated that non-operative management was appropriate. (PX8)

At the request of the Respondent, Petitioner was seen by its hired examiner, Jay Levin, M.D. Petitioner related to Dr. Levin a consistent history of her injury. (RX3,dep.ex.2) Petitioner reported pain shooting down both legs to her toes, pain in both sides of her buttocks and low back pain. (RX3,dep.ex.2) Dr. Levin examined Petitioner and reviewed her MRI films. It was Dr. Levin's impression that Petitioner had degenerative changes at T12-L1 which were unrelated to her complaints. (RX3,dep.ex.2) Dr. Levin also indicated that Petitioner's injury was a lower lumbar contusion which could be treated with physical therapy and be resolved with nine sessions of physical therapy. (RX3,dep.ex.2) Dr. Levin indicated that she was to be off of work until she completed treatment. (RX3,dep.ex.2)

Petitioner followed up [*18] with Dr. Montella on May 25, 2006. Dr. Montella felt that Petitioners exam was unchanged from previous visits. (PX8) Dr. Montella felt that it was unreasonable for Petitioner to return to work in any way. (PX8) Petitioner was advised to continue with physical therapy and medications. (PX8).

On June 3, 2006, Respondent sent a letter to Petitioner indicating that she was expected to return to work per the opinions of their examining physician, Dr. Levin. (RX1). Petitioner testified that she did not return to work and that her workers' compensation benefits were terminated.

Petitioner continued to treat with Dr. Montella. On June 9, 2006, Petitioner still reported severe symptoms. Dr. Montella recommended the same non-operative care and also recommended that Petitioner proceed with epidural steroid injections. (PX8) Dr. Montella further stated that Petitioner was to be off of work. (PX8)

Petitioner underwent a lumbar epidural injection at T12-L1 on June 30, 2006. (PX17) Petitioner was seen on July 7, 2006 by Dr. Montella. Petitioner symptoms appeared to be without change on that visit. (PX8) Dr. Montella recommended the same medical care plan. (PX8)

On July 12, 2006, Dr. Levin re-examined [*19] Petitioner. Petitioner reported no relief from the epidural injection and was waiting to have a second injection. (RX3,dep.ex.3) Petitioner informed Dr. Levin that she had sharp pain in her mid and lower back, bilateral buttocks pain and right leg pain to the foot. (RX3,dep.ex.3) Dr. Levin indicated that he stood by his previous diagnosis of a lower lumbar contusion and that her continued subjective complaints were not supported by objective imaging studies. (RX3,dep.ex.3)

On July 25, 2006, Petitioner underwent a lumbar epidural steroid injection at right L4-5 space. Petitioner followed up with Dr. Montella on August 3, 2006. Again, Dr. Montella indicated that Petitioner was to remain off of work and continue with narcotic pain medication and another epidural steroid injection. (PX8) On August 8, 2006, Dr. Montella administered a lumbar epidural to both the right S1 transforaminal space and to the left S1 transforaminal space. (PX8)

Petitioner continued with the non-operative management recommended by Dr. Montella. She was seen on August 31, 2006 at which time Dr. Montella continued the same recommendations. (PX8) On Petitioner's next visit with Dr. Montella on September 28, 2006, [*20] Dr. Montella indicated that he was referring Petitioner for a neurosurgical consultation. (PX8)

On October 23, 2006, Petitioner was seen by a Anthony DiGianfillipo, M.D., a neurosurgeon. Her main complaints were back pain and pain down the right leg mainly to about the knee. (PX9) Dr. DiGianfillipo examined Petitioner and reviewed her MRI. It was Dr. DiGianfillipo's impression that Petitioner had a lumbar radiculopathy. (PX9) Dr. DiGianfillipo was concerned with the S1 area and the T12-L1 area. (PX9) Dr. DiGianfillipo recommended that Petitioner undergo a myelogram. (PX9) The myelogram CT scan was performed on October 26, 2006 revealed a broad based posterior disc protrusion at T12-L1 with accompanying endplate osteophyte, compression of the thecal sac with moderate narrowing at the central canal and the thecal sac. (PX9)

Dr. DiGianfillipo reviewed the myelogram with Petitioner on November 13, 2006. Dr. DiGianfillipo seemed to express uncertainty as to the involvement of the T12-L1 disc. (PX9) Dr. DiGianfillipo did not think Petitioner was a surgical candidate and advised Petitioner that she could resume therapy or even another injection. (PX9) Dr. DiGianfillipo did not think Petitioner **[*21]** could return to her line of work. (PX9)

After consulting with Dr. DiGianfillipo, Petitioner continued with the course of care recommended by Dr. Montella. Petitioner testified that she took the prescribed medications and followed up with Dr. Montella on a monthly basis. Petitioner was seen on November 22, 2006, January 3, 2007, January 31, 2007, March 17, 2007 and April 19, 2007. On each of those visits Dr. Montella's recommendations remained the same. (PX8)

On May 14, 2007, Petitioner sought another opinion for herself with Babak Lami, M.D., an orthopedic surgeon. Petitioner gave a history of the incident and related her symptoms of back and sacral pain. (PX15) Dr. Lami examined Petitioner and reviewed the MRI and myelogram. (PX15) It was Dr. Lami's impression that Petitioner had low back pain with no deficit and coccyodynia. (PX15) Dr. Lami recommended a trigger point injection to the sacrum area. (PX15) Dr. Lauri also recommended that Petitioner be seen by a pain specialist. (PX15)

On May 17, 2007, Petitioner was seen by Sonal Patel, M.D., a pain specialist at St. Alexius Medical Center. On that visit, Dr. Patel examined Petitioner and diagnosed Petitioner with Coccygodynia localized **[*22]** pain secondary to the trauma to the coccygeal area. (PX12) Dr. Patel administered a trigger point injection to the coccygeal areal. (PX12) Petitioner pain increased after the injection which necessitated her to visit the emergency room at St. Alexius Medical Center on May 21, 2007. (PX13) Petitioner visited with Dr. Patel on May 22, 2007. Dr. Patel discontinued the injections and continued treating with her medications. (PX12).

Petitioner was seen by Dr. Anita Rao of the St. Alexian Medical Center on August 2, 2007. Petitioner reported continued pain in the mid-back and coccyx with radiating pain to the lateral aspect of her right foot (PX12) Petitioner indicated that her pain was aggravated with physical activity and prolonged sitting and that the medications were not significantly helping her pain. (PX12) Dr. Rao recommended that Petitioner undergo a lumbosacral MRI. (PX12) MR's were performed on August 8, 2007 at St. Alexius Medical Center to both Petitioner's lumbar and thoracic spine. The MRIs revealed a large central disc herniation at T12-L1 with effacement of the ventral CSF, moderate spinal stenosis and posterior displacement of the conus medullaris. (PX12) Petitioner also **[*23]** underwent an MRI of the pelvis area on August 16, 2007. The MRI of the pelvis revealed Tarlov cysts at the S1-52 level. (PX12) On August 22, 2007, Dr. Rao examined the Petitioner. Dr. Rao felt that the majority of her tailbone pain was likely related to the fall onto her coccyx which likely produced or aggravated the Tarlov cysts. (PX12) With regard to her mid-thoracic pain, Dr. Rao administered an epidural steroid injection at T12-L1. (PX12)

Petitioner saw Dr. Lami again on September 5, 2007. Petitioner still related tailbone pain. Dr. Lami suggested that Petitioner try a trigger point injection to the tailbone. (PX15) Dr. Lami indicated that there really no intervention for tailbone pain other than modalities and anti-inflammatories. (PX15)

On September 24, 2007, Petitioner consulted again with Dr. DiGianfillipo Petitioner reported significant discomfort in her tailbone, mid-back and right leg including her groin area. (PX9) Dr. DiGianfillipo reviewed the new MRI studies. (PX9). It was Dr. Gianfillipo's impression that Tarlov cysts were more of a normal finding. (PX9) Dr. Gianfillipo, however, was concerned with the T12-L1 disc. Dr. Gianfillipo indicated that her symptoms could **[*24]** be radiating down form that disc, but was not certain at that time. (PX9) Dr. DiGianfillipo felt that it was appropriate to perform surgery to the T12-L1 disc.

On October 16, 2007, Petitioner underwent a T12-L1 laminectomy with bilateral foraminotomy and decompression of the spinal canal and nerve roots at Alexian Brother Medical Center. (PX9)(PX13) Dr. DiGianfillipo opined that during the surgery he found the T12-L1 disc was more compressed than thought. (PX11,p.24) Petitioner was an inpatient at Alexian Brothers Medical Center and discharged on October 21, 2007. (PX13)

On or about November 1, 2007, Petitioner was notified by the Respondent that the health insurance she still had from the Respondent was stopped.

Petitioner followed up with Dr. DiGianfillipo on November 5, 2007. On that visit, Petitioner reported she was doing well. (PX9) Petitioner indicated that she still had problems with the spasms down the right leg, but she did not have the tailbone pain that she had prior to surgery. (PX9) Dr. DiGianfillippo recommended that she try to increase her activity and probably start a therapy program in a month. (PX9) On deposition, Dr. DiGianfillipo felt that there was a correlation **[*25]** with the surgical decompression of the T12-L1 disk and the relief of Petitioner's tailbone pain. (PX11,p.25)

On November 26, 2007, Petitioner was seen by Dr. DiGianfillippo. Petitioner related that she had significant pain more down her left leg and left buttock area. (PX9) Dr. DiGianfillipo felt that her symptoms were fairly common postoperatively, but was concerned about the intensity of her pain. (PX9) Dr. DiGianfillipo discussed a pain center evaluation as well as physical therapy and a repeat MRI scan. (PX9) Due to Petitioner's insurance issues, Dr. DiGianfillipo could only prescribe medications. (PX11,p.29)

Petitioner testified that due to her health insurance being stopped by the Respondent she could not get herself immediately into physical therapy. Petitioner stated that she was finally able to work out an arrangement with her physical therapist and was able to begin a physical therapy program on January 10, 2008 at Midwest Physical Therapy. (PX14)

Petitioner followed up with Dr. DiGianfillipo on February 4, 2008. On that visit she stated that was doing better. (PX10) She stated that she still had spasms in her legs, but her tailbone pain was nonexistent since surgery. (PX10) **[*26]** Petitioner reported that she could not sit more than 15 minutes and her spasms could be either side. (PX10) Dr. DiGianfillipo recommended that she continue with physical therapy and the prescribed medications. (PX10)

On deposition, Dr. DiGianfillipo identified Petitioner's reported symptoms in three specific areas, the mid-back pain, lumbar pain and right leg pain. (PX11,p.38) With regard to Petitioner's right leg pain, Dr. DiGianfillipo indicated that he was unable to find a source of her pain, but believed that the accident may or could have caused her clinical symptoms. (PX11,p.38)Dr. DiGianfillipo indicated that the objective tests of an MRI and myelogram did not show a S1 radiculopathy, but on clinical exam Petitioner did evidence a absent right ankle jerk reflex which is indicative of a S1 radiculopathy. (PX11,p.84) Dr. Levin also noted an absent right ankle jerk reflex oh his July 12, 2006 examination. (RX3,p.40; dep.ex.3) As to causation, Dr. DiGianfillipo indicated that there was a relationship between Petitioner's right leg pain and the work related injury based on the onset of her symptoms immediately after the accident (RX3,p.40; dep.ex.3)

As to the tailbone pain, Dr. [*27] DiGianfillipo pointed to the T12-L1 disc and pointed out the fact that the decompression relieved her discomfort. (PX11,p.42) Dr. DiGianfillipo indicated that the fall of the chair could have aggravated a pre-existing herniation. (PX11,p.42) Dr. DiGianfillipo presented a similar opinion as to Petitioners mid-back pain indicating that was a combination of stenosis at T12-L1 and some muscular or myofascial component. (PX11,p.42)

At deposition, both Dr. DiGianfillipo and Dr. Levin were presented the report of CT scan of Petitioner's abdomen dated February 25, 2004 showing that Petitioner had evidence of a herniation at T12-L1 at that time. Both doctors acknowledged that the finding on the CT scan was just an incidental finding. (RX3,p.35,36)(PX11,p.85,86).

Dr. DiGianfillipo testified that as of the date of deposition, Petitioner was unable to return to work. (PX11,p.88)

FINDINGS

With regard to (C) Did an accident occur that arose out of and in the course of Petitioner's employment with the Respondent, the Arbitrator finds the following:

Petitioner presented a detailed account of her workstation and the circumstances of her injury. Additional testimony with regard to the [*28] details of the incident were provided by the other person involved, Robert Hall. Though a few details of the incident differ, what is evident from all of the accounts is that Petitioner fell from her stool chair while she was performing the duties of her job. The Petitioner sat in an elevated stool chair raised to four feet. Petitioner's feet could not touch the floor. In order to accommodate Mr. Hall's girth so that he could access the time clock Petitioner moved herself away from her desk and against the wall. When Petitioner and Mr. Hall greeted each other, Petitioner was leaned forward on her seat cushion and standing on the lower rung of the chair. Petitioner then greeted Mr. Hall with a small pat or tap on the shoulder which the Arbitrator finds was not out of the ordinary nor did it any way deviate from normal conduct in the workplace. Thereafter, Petitioner either was pushed off the chair by Mr. Hall as Petitioner contends or somehow lost her balance as Mr. Hall claims. If Petitioner was pushed, the Arbitrator cannot find anything within Petitioners conduct that would constitute an act of horseplay to provoke a response of being pushed off a chair. From all accounts, it appears [*29] that Petitioner was a diligent worker and had no history of horseplay on the job. Mr. Hall, on the other hand, appears to sometimes engage in horseplay with his co-workers that could be outside the scope of employment If there was any horseplay involved in Petitioner's accident it would have been on the part of Mr. Hall based on his actions after being warned not to push the Petitioner.

If Petitioner's fall occurred not because she was pushed but somehow lost her balance, the Arbitrator can certainly look to Petitioner's actions of moving out of Mr. Hall's way and the awkward way she was situated in her chair to explain her fall. These actions were all done to accommodate a coworker so that he could punch into the time clock.

Regardless of whose account of the injury is true, it is the Arbitrators finding that Petitioners fall did arise out of and in the course of Petitioner's employment. The Arbitrator relies on the fact that Petitioner chair was somewhat unstable based on the height of elevation, the small distance between Petitioner's chair and the time clock, the fact that she had to move herself to accommodate. Mr. Hall, the awkward way that she had sat in the chair at the time, [*30] and the fact that she merely greeted Mr. Hall with a pat on the shoulder which as discussed was not out of the ordinary.

With regard to (F) Is the Petitioner present condition of ill-being causally related to the injury, the Arbitrator finds the following:

Prior to the injury, Petitioner had no history of back problems. After the injury, Petitioner reported immediate pain in her tailbone pain. Thereafter, Petitioner consistently reported ongoing pain in her tailbone and back throughout her course of treatment.

Early on, Respondent had Petitioner examined by Jay Levin, M.D. After performing his clinical evaluation and reviewing the lumbar MRI, Dr. Levin Opined that he could not find objective evidence to support a diagnosis to Petitioner's radiating leg pain: (PX11,p.20,21) Dr. Levin stated that the pain in both sides of her buttocks could be consistent with a lumbar strain. (PX11,p.20,21) It was Dr. Levin's impression that Petitioner had degenerative Changes at T12-L1 which were unrelated to her complaints. (RX3,dep.ex.2) Overall, Dr. Levin felt that Petitioner had symptom magnification based on a lack of correlation between her subjective complaints, the objective findings, [*31] and the mechanism of injury. (PX11,p.22) On re-examination on July 12, 2006, Dr. Levin, after conducting another exam, reaffirmed the same conclusions and stated that he did not believe Petitioner required any further medical care and could work full duty. (PX11,p.27) On cross-examination, Dr. Levin acknowledged an absent right ankle reflex. (PX11,p.38,39) He also testified that he does approximately two hundred medical exams annually of which ninety-five percent of them are done on behalf of employers. (PX11,p.42,44)

Petitioner was under the course of care of Dr. Bruce Montella from April 8, 2006 through April 19, 2007. Throughout the entire period Petitioner treated with Dr. Montella, she consistently reported back and leg pain. (PX8) It was Dr. Montella's opinion that the work related injury caused her pre-existing degenerative condition to become symptomatic. (PX8,1/3/07 office note) Dr. Montella made note that she was working full duty prior to the fall without any formal treatment to her disc. (PX8, 1/3/07 office note) It was Dr. Montella's opinion on each of his office visits with the Petitioner that it was unreasonable for her to participate in work in anyway. (PX8) In Dr. [*32] Montella's last Work Restriction Order dated April 19, 2007, he did permit Petitioner to work light duty with significant restrictions. (PX8)

Dr. DiGianfillipo wrote a narrative report and gave his deposition as to this matter. It was his opinion from a clinical standpoint that Petitioner's symptoms were related to her fall off the chair. (PX11,dep.ex.2,p.5) Dr. DiGianfillippo expounded his opinions during the deposition to state that he believed that Petitioner's right leg pain, tailbone pain and mid-back pain were all associated with the fall. (PX11,p.40-42) Dr. DiGianfillipo attributed the tailbone pain and mid-back pain to the herniated T12-L1 disc which he believed became symptomatic after the fall. (PX11,p.42) With regard to Petitioners right leg pain, Dr. DiGianfillipo explained that he had difficulty assessing he source of the right leg pain, but believed that her leg pain was related to the fall given that he had no other history of problems beforehand. (PX11,p.40,41)

The Arbitrator has taken into consideration the opinions of the treating physicians and Respondent's hired examiner and finds that the opinions of the treating physicians, Dr. Montella and Dr. DiGianfillipo [*33] to be more persuasive. The medical records show an immediate onset of tailbone symptoms from the moment she fell off the chair. Her other symptoms with regard to leg pain and upper back pain followed shortly thereafter evidenced by Dr. Montella's first examination of the Petitioner on April 8, 2006. (PX8). From that

time and on, Petitioner's symptoms never subsided until she eventually had surgery on October 16, 2007. At that time, Petitioner underwent a decompression of the T12-L1 disc which provided her immediate relief to her tailbone pain. The very fact that Petitioner's tailbone pain disappeared post-surgery provides to the Arbitrator clear evidence that the T12-L1 disc was the source of Petitioner's tailbone and mid-back symptoms all along. Although it was established that the herniation at the T12-L1 level was present as early as February of 2004 based on an incident finding of a CT scan of the abdomen, there is no evidence that Petitioner had any symptoms of any kind before the accident that resembled the symptoms she developed immediately thereafter. It is apparent that the fall against the metal cabinets and onto the floor aggravated a previously asymptomatic condition. For **[*34]** the reasons stated, the Arbitrator finds that the Petitioner's present medical condition is causally related to incident that occurred on April 4, 2006.

With regard to (J) Were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds the following:

The Petitioner identified medical bills that she incurred during the course of time she treated for her work related injuries. (PX4) The medical bills all correspond to reasonable and necessary medical treatment or prescriptions that Petitioner received from her treating physicians. The Arbitrator has reviewed the medical bills and finds that the Respondent is to pay the Petitioner the medical charges submitted as Petitioner's Group Exhibit 4 subject to the medical fee schedule established by Section 8 of the Illinois Workers' Compensation Act.

With regard to (K), What amount of compensation is due for temporary total disability, the Arbitrator finds the following:

Beginning on the date of injury, Petitioner was disabled from work. Dr. Montella consistently indicated that he did not believe that Petitioner was to work in any way beginning with his first appointment on April 8, **[*35]** 2006 up until his last visit on April 19, 2007 wherein he permitted the Petitioner to work with restrictions. (PX8) Specifically, Dr. Montella indicated that Petitioner could work light duty with no excessive twisting, turning, bending, sitting or standing. Furthermore, no stair climbing, kneeling, squatting, pushing, pulling, overhead lifting and no lifting greater than ten to fifteen pounds. (PX8) Respondent initially paid temporary total disability but discontinued them on June 3, 2006, based on the reliance of its hired medical examiner, Jay Levin, M.D.

Petitioner acknowledged that due to her lack of finances and upon the advice of her first legal counsel she attempted to work between the period of February 27, 2007 and April 27, 2007. Petitioner testified that she worked as Service Writer at Woody BPG, Inc. According to Petitioner and Respondent's witness, Joya Sanders, she earned $ 500.00 per week plus $ 2,000.00 in monthly commissions. (RX8) Petitioner testified that she was in a lot of pain during the time period she worked and that is one of the primary reasons why she had to resign her position. It also apparent from Petitioners personnel file at Woody BPG that she had some **[*36]** issues with some of her coworkers behavior which contributed to her decision to resign. (RX8)

After Petitioner's unsuccessful attempt to work, Petitioner remained off of work thereafter. Petitioner discontinued treating with Dr. Montella and treated with Dr. Lami, Dr. Patel and Dr. Rao, and Dr. DiGianfilipo.

Based on the medical records and the opinions of the treating physicians, the Arbitrator finds that the Petitioner was temporary totally disabled from April 5, 2006 to February 25, 2007 and from April 28, 2007 to the date of hearing, April 22, 2008. The Petitioner is not entitled to any **temporary partial** disability for the time period she attempted to work since her earnings at Woody BPG exceeded her average weekly wage that she earned for Respondent. Accordingly, the Arbitrator orders the Respondent to pay to Petitioner temporary total disability benefits at the rate of $ 491.47 per week for 98 2/7 weeks or $ 48,304.48 less Respondent's credit of $ 4,263.48 or $ 44,041.00.

With regard to (L), Should penalties or fees be imposed upon the Respondent, the Arbitrator finds the following:

Respondents has presented two defenses to Petitioner's claim. The first was that it contended **[*37]** that Petitioner's injury did not arise in the course of employment and second that it was justified in stopping benefits based on the opinion of its hired examiner, Jay Levin, M.D.

As to its defense that an accident did not arise out of the course of employment, it is obvious that theory had no support, especially in light of the fact that Mr. Hall acknowledged the fact that Petitioner merely tapped him on the shoulder with a cordial greeting. Respondent's own general manager indicated that he was provided that history by both Petitioner and Mr. Hall immediately after the injury. For Respondent to contend that its stoppage of benefits was justified based on the theory that Petitioner accident did not arise out of the course of employment was inconsistent with the evidence presented in this matter.

The second defense that Respondent presents is that its examiner presented an orthopedic opinion indicating that Petitioner could return back to work full duty. However, a considerable amount of evidence was presented in this matter by various doctors, clearly suggesting that the Petitioner did suffer a condition of ill-being as consequence of her falling off the chair at her place of employment. **[*38]** The Arbitrator further notes that while Dr. Levin is a respected examiner in this kind of matter, his findings and opinions concerning the Petitioner are not acceptable. Unfortunately, Respondent relying solely on Dr. Levin's assessment without considering Petitioner's own treating physician, Dr. Montella, stopped her benefits.

In this case it was clear that Petitioner sustained a serious incident. In this case, it was clear that Petitioner sustained a serious incident. Petitioner exhibited clear and consistent symptoms thereafter. Dr. Levin examined Petitioner on May 10, 2006 and speculated without seeing her again, that she could return to work after nine physical therapy sessions. (RX3,dep.ex.2)

The Arbitrator finds the basis of Respondents denial to be unpersuasive. Respondents defense in denying benefits was frivolous and its actions justify the imposition of penalties pursuant to Sections 19(k) and 19(l) and attorneys fees under Section 16. Pursuant to Section 19(l), the Arbitrator awards Petitioner the sum of $ 10,000.00, which is the maximum allowed under the statute.

With regard to Section 19(k) penalties, the Arbitrator awards 50% of the owed temporary total disability or **[*39]** $ 22,020.50. The Arbitrator also awards to Petitioner 50% of the unpaid medical bills after they are reduced by the medical fee schedule.

Lastly with regard to Section 16 attorneys fees, the Arbitrator orders the Respondent to pay to Petitioner's attorney, 20% of the total unpaid TTD.

With regard to (M), Is the Respondent due any credit, the Arbitrator finds the following:

Respondent has indicated that it claims a Section 8(j) credit as to all the bills paid by the group medical plan, but has not introduced any evidence or testimony to reflect the amount of its claimed credit. Accordingly, the Arbitrator is unable to extend Respondent its claimed credit.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:37 PM EST

*9 IWCC 621; 2009 Ill. Wrk. Comp. LEXIS 594, **

JESSICA RICHARDSON, PETITIONER, v. VERMILION MANOR NURSING HOME, RESPONDENT.

NO: 06WC29968

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF VERMILION

9 IWCC 621; 2009 Ill. Wrk. Comp. LEXIS 594

June 18, 2009

CORE TERMS: arbitrator, temporary total disability, worker's compensation, group health, carrier, covering, finger, mileage, little finger, maximum, date of service, termination, terminated, functional, fracture, partial, amount of compensation, partial disability, physical therapy, disputed issues, return to work, loss of use, left hand, intermittently, medication, steadily, cardiac, surgery, notice, splint

JUDGES: Nancy Lindsay; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, and medical expenses, 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 20, 2008 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 5,800.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUN [*2] 18 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ruth White**, arbitrator of the Commission, in the city of **Danville**, on **April 21, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?
O. Other **mileage**

FINDINGS

. On **5/22/06**, the respondent **Jessica Richardson *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the [*3] year preceding the injury, the petitioner earned $ **18,581.16**; the average weekly wage was $ **357.33**.

. At the time of injury, the petitioner was **21** years of age, ***single*** with **0** children under 18.

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

. To date $ **11,872.21** has been paid by the respondent for both TTD and maintenance benefits and an advance against permanency.

ORDER

. The respondent has paid the petitioner temporary total disability benefits of $ **238.22**/week intermittently from **7/25/06** through **12/2/06**. The respondent shall pay the petitioner temporary total disability benefits of $ **238.22**/week for a further period of **9 and 2/7** weeks from and including **12/3/06** through **2/8/07** which is the period of temporary total disability for which compensation is payable. Claim for further temporary total disability benefits is denied.

. The respondent shall pay the petitioner the sum of $ **214.40**/week for a further period of **30.75** weeks, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **loss of use of the left hand to the extent of 15% thereof.**

. The [*4] respondent shall pay the petitioner compensation that has accrued from **5/22/06** through **4/21/08**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **8,734.29** for necessary medical services, as provided in Section 8(a) of the Act.

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

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

. The respondent shall pay $ **N/A** in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF RATE If the Commission reviews this award, interest of 1.88% 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

May 15, 2008

Date

MAY 20 2008

In support of the Arbitrator's [*5] decision relating to (L) what is the nature and extent of the injury, the Arbitrator finds as follows:

The Petitioner was in the course of her usual employment for the Respondent when she fell to the floor while dealing with a troublesome resident, striking her left small finger. She was diagnosed with a fracture of the little finger, and received extensive treatment in the form of physical therapy and medication from various physicians at Carle Clinic, including Dr. Sobeski, an orthopedic surgeon. Ultimately it was decided that she needed a complex surgery on the finger, which, according to the records and the Petitioner's testimony, the physicians at Cade did not feel they were qualified to perform. Consequently, she was referred by Dr. Sobeski to the Indiana Hand Center where she was treated by Dr. Kaplan.

Dr. Kaplan performed surgery on the Petitioner's left little finger to repair the fracture on September 25, 2006. Thereafter, the Petitioner saw Dr. Kaplan several times in follow-up. According to Dr. Kaplan's last note (Respondent's Exhibit 8, also contained in Petitioner's Exhibit 7) dated February 8, 2007, the Petitioner declined further treatment. Dr. Kaplan then declared [*6] she was at maximum medical improvement and could return to work without restrictions.

In the meantime, the Petitioner had been working light duty for the Respondent during which time she was paid a partial temporary disability benefit as documented on Petitioner's Exhibit 17. Petitioner was terminated by letter dated December 18, 2006 from her employment on the grounds of insubordination (Respondent's Exhibit 4). At trial, the Petitioner acknowledged the termination, but denied that she had been insubordinate. Respondent's Exhibit 4, the termination letter from Joan C. Dan, Administrator, is not entirely inconsistent with Petitioner's Exhibit 15, a letter of recommendation from Karen Malone, Schedule Coordinator, which describes only performance of duties.

At trial, the Petitioner displayed the left little finger, which was in a flexed position. The Petitioner testified she has a limited range of motion in the finger and, demonstrated that range for the Arbitrator. Petitioner testified the finger hurts when it hits anything, sometimes sending sensations up her arm. She also alleged she is limited in her ability to pick up heavy objects with the left hand. As of the time of trial Petitioner [*7] had not seen any physician for a period of approximately one year. She was taking no prescription medications but did occasionally take over the counter ibuprofen for pain.

As of the trial, the Petitioner was unemployed although she testified that she was in an active job search. She did not produce any documentation of a job search. Her testimony on this point was vague and she did not identify specific businesses to which she had applied.

The Arbitrator finds the Petitioner's injury is limited to the fracture to her left small finger; however, that injury has impaired her hand. Petitioner testified that she is right handed and the left is her non-dominate hand. The Arbitrator finds the Petitioner sustained

a loss of use of the left hand to the extent of 10% thereof.

In support of the Arbitrator's decision relating to (K) what amount of compensation is due for temporary total disability, the Arbitrator finds as follows:

The Arbitrator finds the facts as indicated in the section above.

It was agreed that the Petitioner began losing time on July 25, 2006 according to Petitioner's Exhibit 17, which the parties agree is a partial record of payments made by the Respondent's handling **[*8]** agency. She was paid TTD steadily from that date through September 4, 2006 and then was on **temporary partial** disability through September 23, 2006, and back on temporary total disability effective September 24, 2006. She was paid the TTD steadily through November 25, 2006, when she went back on partial temporary disability beginning on November 26, 2006 through December 2, 2006 and her termination of employment. At that time she was still under the care of Dr. Kaplan and was released at maximum medical improvement on February 8, 2007.

Following her release by the treating specialist, Dr. Sobeski issued one note dated April 23, 2007. (Petitioner's Exhibit 1) Dr. Sobeski does not note any change in the Petitioner's condition as compared to when she had been released by Dr. Kaplan over two and half months earlier. Although Dr. Sobeski mentions a functional capacity evaluation, no such report was included in the Petitioner's exhibits. Dr. Sobeski referred the Petitioner to Dr. Kaplan as the expert on this type of injury. The arbitrator finds Dr. Kaplan's release of the Petitioner to be determinative.

Petitioner is awarded TTD and maintenance intermittently beginning July 25, 2006 through **[*9]** December 2, 2006 when she was terminated. The period in dispute is from the date of termination, December 2, 2006, through the date of arbitration. When Petitioner was terminated she had not reached maximum medical improvement. Dr. Kaplan released Petitioner at maximum medical improvement, February 8, 2007. Petitioner is entitled to additional temporary total disability benefits from December 2, 2006 through February 8, 2007, a period of 9 and 2/7 weeks. This period is awarded in addition to the period of intermittent total and partial disability from July 24 to December 2, 2006.

All other claims for temporary total disability are denied.

In support of the Arbitrator's decision relating to (J) were the medical services that were provided to petitioner reasonable and necessary, the Arbitrator finds as follows:

The Arbitrator finds the facts as indicated in the sections above.

The medical bills the Petitioner presented at trial are contained in her Exhibits 2, 5, 7, 9, 10, 11 and 14. The following dispositions are made:

Exhibit 2, a bill from Carle Clinic Association date July 15, 2006 covering dates of service of May 1, 2006 to July 12, 2006 in the total amount of $ 3,266.00, is **[*10]** awarded in favor of the Petitioner. The Arbitrator notes this bill specifically states that it does not account for payments made. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

As to Exhibit 5, a bill from Cade Foundation Hospital for physical therapy services in the amount of $ 521.00, with no date of service listed, this bill is awarded. This is a balance forwarding billing not showing a date of service or record of payment. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

As to Exhibit 7, the last four pages of this Exhibit is the account record from Indiana Hand Center showing a balance due of $ 187.00. This bill is awarded in favor of the Petitioner. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

Petitioner's Exhibit 9 contains a bill from Provena United Samaritan Medical Center dated December 27, 2006 covering dates of service from November 14, 2006 through December 14, 2006. **[*11]** This bill shows no balance due.

Petitioner's Exhibit 10, a bill for $ 10.99 from CVS Pharmacy for the date of service of September 29, 2006 is awarded in favor of the Petitioner. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

Petitioner's Exhibit 11, a bill from Provena United Samaritan Medical Center dated October 15, 2007, covering dates of service from January 9, 2007 through March 30, 2007, shows no balance owing.

Petitioner's Exhibit 14, contains several bills including three separate bills from Provena United Samaritan Medical Center. The bill covering the admission date of November 25, 2006 in the amount of $ 1,020.40 is awarded in favor of the Petitioner. The bill covering the admission date of January 9, 2007 in the amount of $ 1,542.10 is awarded in favor of the Petitioner. As to both of those bills, Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

Petitioner's Exhibit 14 also includes a bill from Provena United Samaritan Medical Center covering an admission on September **[*12]** 13, 2006. This bill is denied, with the exception of a charge for $ 71.20 for a wrist splint and $ 167.10 for the application of said splint which is awarded the Petitioner. The basis for denial of this bill is that the rest of the treatment thereon is for cardiac complaints. Petitioner presented no testimony from any physician as to how a broken little finger could cause cardiac difficulties. For the same reason a charge contained in Petitioner Exhibit 14 from Illiana Emergency Physicians LLP with a service date of September 13, 2006 is denied.

Petitioner's Exhibit 14 also contains another bill from Illiana Emergency Physicians LLP with a service date of November 25, 2006 and a balance or $ 208.00. That bill is awarded in favor of the Petitioner. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

Petitioner's Exhibit 14 also contains a bill from Carle Clinic Association for x-rays taken June 15, 2006 in the amount of $ 110.00. That

bill is awarded in favor of the Petitioner. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation [*13] claim or its group health carrier.

Petitioner's Exhibit 14 also contains a bill from Carle Foundation Hospital for therapy services with an admission date of 11/03/06 in the amount of $ 1,630.50. This bill is awarded in favor of the Petitioner. Respondent is awarded credit for any and all payments made on this bill whether through this worker's compensation claim or its group health carrier.

Lastly, Petitioner's Exhibit 14 contains a bill from Indiana Hand Center dated July 6, 2007 showing a balance of $ 187.00. The Arbitrator finds that this is the same bill contained in Petitioner's Exhibit 7, dealt with above.

In support of the Arbitrator's decision relating to (O) mileage, the Arbitrator finds as follows:

The Arbitrator finds the facts as indicated above.

Petitioner's Exhibit 13 is a mileage log kept by the Petitioner for her trips to the Indianapolis, Indiana area for treatment by Dr. Kaplan. This records shows a total 1,047 miles traveled. The Petitioner treated with Dr. Kaplan from the later part of 2006 into the very early part of 2007. At that time, the State of Illinois reimbursement rate for mileage was 45 cents per mile.

The Arbitrator awards the Petitioner the sum [*14] of $ 471.15 in mileage reimbursement.

CONCURBY: MOLLY C. MASON

DISSENTBY: MOLLY C. MASON

DISSENT: Partial Concurrence and Dissent

I agree with all aspects of the majority opinion other than the denial of temporary total disability benefits after February 8, 2007. While it is true that Petitioner asked Dr. Kaplan to discharge her from treatment on February 8, 2007, it is reasonable to infer that she did so because she needed to return to work for financial reasons. Petitioner was still symptomatic as of February 8, 2007 and obtained a refill of Ultracet on that date. PX 7. I would have awarded additional temporary total disability benefits from April 24, 2007 through December 18, 2007 (the date on which Petitioner failed to attend a Section 12 examination with Dr. Naam). When Petitioner resumed care on April 23, 2007, she told Dr. Sobeski that she was still having difficulty flexing and extending her finger and he indicated she might benefit from a fusion. He also imposed multiple restrictions, including no lifting over five pounds with the left hand, and prescribed an EMG and a functional capacity evaluation. He made Respondent aware of his restrictions and treatment recommendations (PX 1, pp. 2-3 of 17) but [*15] Petitioner never underwent the EMG or functional capacity evaluation. I view Petitioner's medical condition as unstable as of April 23, 2007. Freeman United Coal v. Industrial Commission, 318 Ill.App.3d 170, 177 (5th Dist. 2000).

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Awards > Credits
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:37 PM EST

09 IWCC 658

*2009 Ill. Wrk. Comp. LEXIS 685, **

KAREN S. BATTS, PETITIONER, v. BARNES & NOBLE, RESPONDENT.

NO: 07WC6330

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF PEORIA

2009 Ill. Wrk. Comp. LEXIS 685

June 29, 2009

CORE TERMS: knee, left knee, pain, therapy, physical therapy, patient, ankle, arbitrator, replacement, right foot, bone, surgery, arthritis, temporary, x-rays, patellofemoral, femur, degenerative arthritis, medical treatment, exacerbation, recommended, impression, peroneal, lateral, tendon, floor, foot, left leg, symptoms, doctor

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission modifies the Arbitrator's causation findings. The Commission agrees with the Arbitrator's denial of prospective left knee replacement surgery but finds that the undisputed accident of September 25, 2006, in combination with a new accident or event that occurred after Petitioner resumed **[*2]** working in the spring of 2007, gave rise to the need for the conservative left knee care that Petitioner underwent in June and July of 2007, before the knee replacement was recommended.

The Commission finds the Arbitrator's recitation of facts relating to Petitioner's left knee condition to be incomplete. There is no question that Petitioner injured both her left knee and her right foot when she fell at work on September 25, 2006. There is also no question that she reported some left knee symptoms in October of 2006. She also claimed that these symptoms returned when she resumed activity after her January 5, 2007 right foot surgery and began therapy for her foot. She testified that she informed her therapist, Traci Reach, of these symptoms. T. 18. The Arbitrator viewed this testimony as inconsistent with the treatment records. While it is true that the April and May 2007 therapy records do not mention left knee complaints, Traci Reach's therapy evaluation of June 13, 2007 reflects that Petitioner began experiencing increased left knee pain "after she had surgery on her right ankle and was placing more stress through her left knee." This evaluation also reflects that Petitioner had **[*3]** "cleaned floors at work [the preceding] weekend on her hands and knees" and described her left knee pain as "even worse" following this activity. PX 4. When Petitioner saw Dr. Merkley on June 18, 2007, she again reported that her left knee pain had increased "during therapy for her right foot." She also reported that she had recently resumed working four hours per day and that she was having "difficulty with kneeling, squatting and cleaning activities that require her to be on her hands and knees." The doctor injected her left knee and released her to restricted duty. On July 26, 2007, Dr. Smith noted complaints of anterior left knee pain and commented that this pain "seems to be simply a flare of [Petitioner's] osteoarthritis." He released her to her normal 40-hour work week. PX 4.

The records described above would support an award of expenses associated with the conservative left knee care that Petitioner underwent between June 2007 and July 26, 2007 but Petitioner did not claim or submit any bills relating to this care. Arb Exh 1.

Petitioner did claim prospective care in the form of the left knee replacement surgery recommended by Dr. Merkley. The Arbitrator properly relied on Respondent's **[*4]** examiner, Dr. Lehman, in denying this claim but could have also relied on records and diary entries concerning the left knee injury that Petitionr sustained as a child. While Petitioner tended to downplay or omit mention of this injury when providing histories to various physicians after the work accident, her records show that she was hit by a bus at age five, that she spent two years in a hospital after this accident and that this accident left her with a chronic left knee condition. In her initial diary entry of September 25, 2006, Petitioner noted that customers offered her assistance after she fell but that she preferred to use her own methods to get to her feet: "I know how to handle my leg due to an old childhood injury in the left knee (still remains to this day something I have to take care of)." PX 5.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 286.66 per week for a period of 33 weeks, that being the period of temporary total incapacity for work under §8(b), and **temporary partial** disability through August 18, 2007, with Respondent receiving credit for the $ 10,980.52 in benefits it paid prior to hearing, as stipulated to **[*5]** on

the Request for Hearing form, and that as provided in §19(b) of the Act this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

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

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

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 **[*6]** of the Commission.

Dated: JUN 29 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Neva Neal**, arbitrator of the Commission, in the city of **Peoria**, on **October 16, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
O. Other **Prospective medical treatment for left leg**

FINDINGS

. On **September 25, 2006**, the respondent **Barnes & Noble *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner **[*7]** earned **$ 22,360.00**; the average weekly wage was **$ 430.00**.

. At the time of injury, the petitioner was **57** years of age, ***married*** with **0** children under 18.

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

. To date **$ 10,980.52** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ from 09/26/2006 through 05/14/2007 the respondent is obligated to pay TTD benefits. Temporary partial disability benefits were paid through 08/18/2007. All TTD and temporary partial has been paid**/week for **n/a** weeks, from **n/a** through **n/a**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ n/a**/week for a further period of n/a weeks, as provided in Section **n/a** of the Act, because the injuries sustained caused **n/a**.

. The respondent shall pay the petitioner compensation that has accrued from **09-25-2006** through **10-16-2008**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further **[*8]** sum of **$ 0** for necessary medical services, as provided in Section 8(a) of the Act. **Claim for prospective medical to the left leg is hereby denied.**

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

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

. The respondent shall pay **$ n/a** in attorneys' fees, as provided in Section 16 of the Act.

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

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

11/4/08

Date

NOV 6 2006

STATEMENT OF FACTS

On September 25, 2006 the petitioner worked maintenance and custodial staff for Barnes & Noble. **[*9]** As she was performing her job duties cleaning up dishes in the area she slipped on a wet spot on the floor and fell forward on both of her knees. She also hurt her right foot.

She was taken to OSF Medical Center on Route 91 and both of her knees were swollen and her right ankle was injured. On September 27, 2006 she came under the care of Dr. Terry E. Smith. X-rays were done and were unremarkable. The diagnosis was multiple contusions in mild sprains. She saw Dr. Smith on October 3, 2006 for left knee pain and right foot pain. On October 17, 2006 she saw Dr. Smith again. Her left knee pain was improving. The joint lines were good and range of motion of the left knee was good. She was walking with a limp of the right foot. On November 7, 2006 she saw Dr. Smith. Right foot continued to be very painful after physical therapy. Knees, shoulder and chest were feeling well. The hip and knee looked great. Dr. Smith recommended a referral to an orthopedic and an MRI. The petitioner was next seen on November 14, 2008. Had continuing right foot pain. The Petitioner was referred to Dr. D'Souza. He saw the petitioner on December 7, 2006. An MRI was done which was consistent with significant attenuation **[*10]** of the peroneal brevis tendon. Dr. D'Souza recommended surgery to the right ankle. When the petitioner first saw Dr. D'Souza she did not register any complaints with respect to her left knee. On January 5, 2007 Dr. D'Souza performed surgery on the right ankle. The post-operative diagnosis was:

1. Complete rupture of the right peroneal brevis tendon;
2. Extensive tendonopathy of the right peroneal longus tendon;
3. Right hind foot varus;
4. Attenuated calcaneofibular and anterior talofibular ligament.

Post-operatively the petitioner underwent physical therapy. The petitioner testified that during physical therapy she had complaints of left knee pain and problems. She continued to receive periodic care from Dr. Terry Smith.

On or about May 5, 2007 she returned to work part time and eventually returned to work full time working a split 8 hour shift 4 hours in the morning and 4 hours in the afternoon.

The petitioner saw Dr. Michael S. Merkley on June 18, 2007 on a referral from his partner Dr. D'Souza. As a part of the referral the petitioner gave a history of landing on her knees on September 25, 2006. The petitioner received a cortisone injection and received some short term **[*11]** relief. She was seen on June 19th by the doctor's physician assistant.

The petitioner then saw Dr. Levine on March 14, 2008 for problems with her left knee.

The petitioner also testified that after she had been back to work full duty on December 15, 2007 she was mopping the floor and at the end of the day her left knee locked up and she went to see Dr. Smith about the incident. The petitioner testified she had had no prior treatment to her left knee. The petitioner testified to a childhood injury to her left femur. She testified she had no actual treatment to her left knee when she was under the care of Dr. D'Souza and no therapy was given to the left knee when she was recovering from her right ankle injury. From late. June of 2007 until she was seen on March 14, 2008 by Dr. Levine she had no additional medical treatment to her left knee. She saw Dr. Terry Smith on January 10, 2008 after the incident of December 15, 2007 when her knee popped while she was mopping the floor at work.

The petitioner at the time of the hearing was continuing to work. She testified that she wanted to have the left knee replacement.

F. **Is the petitioner's present condition of ill-being causally related [*12] to the injury?**

O. Other **Prospective medical treatment for left leg**

On September 25, 2006 the petitioner sustained a significant injury to the right ankle and also by way of history landed on both her right and left knee at the time of the accident. When she first saw Dr. Smith on September 27, 2006 she did make complaints of pain to the left knee and the right ankle. On October 3, 2006 when she saw Dr. Smith she still had complaints of problems with the left medial aspect of the knee. On October 17, 2006 the left knee was slightly tender on the lateral inferior border of the patella. Otherwise, the joint lines were good and range of motion of the left knee was good based on Dr. Smith's examination. On November 7, 2006 Dr. Terry Smith noted the knees, shoulder and chest were feeling well. He stated: "hip and knee look great."

On November 14, 2006 she was walking with a cane to reduce stress on the left leg.

When she was seen on December 11, 2006 Dr. Smith examined her knee and indicated: "her knee is nontender." The right foot pain was increasing. When she saw Dr. D'Souza on December 7, 2006 the focus of medical treatment was to the right foot. There were no complaints **[*13]** nor was there any examination to the left knee. (*See* Resp. Exh. # 6 and Pet. Exh. # 5). After the right knee surgery was done on January 5, 2007 she saw Dr. D'Souza on January 18, 2007. There were no complaints of any left leg pain in that office visit.

On February 20, 2007 she saw Dr. D'Souza again and there were no complaints of left knee pain.

Dr. D'Souza recommended that she begin physical therapy for the right foot. Physical therapy began on February 22, 2007. In the initial therapy visit there were no complaints of problems with the left knee. The medical note in the physical therapy visit of February 22, 2007 did indicate degenerative joint disease of the knee. Therapy notes of February 26, 2007 make no reference to complaints with respect to the left knee.

Physical therapy notes of February 28, 2007 make no reference to any complaints with respect to the left knee.

The physical therapy note of March 2, 2007 makes no reference to any left knee complaints. The therapy note of March 6, 2007 makes no reference to the left knee complaints. The March 7, 2007 therapy note makes no reference to left knee problems. The physical therapy note of March 9, 2007 makes no reference to [*14] complaints with respect to the left knee nor does the physical therapy note of March 12, 2007. The March 14, 2007 therapy note makes no reference to any problems with the left knee. The March 16, 2007 therapy note makes no reference to problems with the left knee.

The physical therapy of March 19, 2007 and March 26, 2007 make no reference to any complaints with respect to the left knee.

The March 28, 2007 therapy note and the March 30, 2007 therapy note makes no reference to complaints with the left knee.

The physical therapy note of April 3, 2007 and April 5, 2007 make no reference to complaints with respect to the left knee.

The physical therapy note of April 9, 2007 and April 11, 2007 make no reference to complaints with respect to the left knee.

The petitioner did indicate that she was on her feet a quite a bit over the Easter weekend and the therapy notes noted some increased edema in the right ankle area. The physical therapy note of April 13, 2007 and April 16, 2007 make no reference to any complaints of pain with respect to the left knee.

The physical therapy note of April 17, 2007 and April 19, 2007 make no reference to complaints of pain in the left knee. The petitioner [*15] then was released to work 20 hours per week progressing to full time as needed as April 19, 2007. On April 19, 2007 Dr. D'Souza released her to return to work with certain restrictions and was going to see her back on an as needed basis. The petitioner was also at that time released from physical therapy.

The petitioner however went back to see the therapist on April 25, 2007 and had purchased supportive shoes. The petitioner was referred back to physical therapy by her family physician for additional treatment for right heel pain. On April 27, 2007, May 1, 2007, May 3, 2007 and May 8, 2007 the petitioner continued therapy for heel pain with no complaints of left leg pain.

On May 10, 2007 the petitioner had returned to work for 4 hour shifts where she was standing and that increased the discomfort but that was to the right foot.

When she was seen on May 15, 2007 and May 18, 2007 she had no complaints of left knee pain.

When the petitioner was seen on May 21, 2007 and May 23, 2007 for physical therapy there were no complaints of left knee pain.

When she was seen on May 25, 2007 and May 29, 2007 she had no complaints of left knee pain.

When she was seen on June 7, 2007 that is the first [*16] time that she registered a complaint and indicated that her family physician Dr. Terry Smith wanted her to continue therapy for her right heel and then for her left knee. The therapist's note says: "initiate treatment for left knee at next treatment." On June 13, 2007 she was initially evaluated for left knee pain and instability.

Dr. Merkley's deposition was introduced into evidence by the petitioner as Petitioner's Exhibit # 3. Dr. Merkley testified that the petitioner was referred to him by his partner Dr. D'Souza. He first saw the petitioner on June 18, 2007. As a part of the history the petitioner told him that she noticed increasing left knee pain during the therapy for the foot. This would be inconsistent based on the therapy notes from February of 2007 through May of 2007. When Dr. Merkley examined the petitioner he examined both the right knee and the left knee. X-rays were taken of the left knee which showed moderate lateral joint compartment degenerative changes and severe pateliofemoral arthrosis with loss of the lateral patellofemoral joint base. She had arthritis in her left knee. He gave her injections. He advised her that given the severity of the arthritic changes [*17] if she did not receive relief from the injections she would be referred to Dr. Levine or Dr. Mulvey who are specialists in total joint reconstruction. Dr. Merkley indicated he does not do total joint reconstruction as that is outside of his subspecialty. Dr. Merkley testified at page 10 that it was his opinion that the accident of September 25, 2006 would be an aggravation of a pre-existing condition. He defined the aggravation as chronicity of the problem. He indicated that if you have symptoms more than 12 weeks after an injury that would suggest an aggravation.

It should be noted that based on the physical therapy records and the records of Dr. Terry Smith that the petitioner's knee based on Dr. Smith's records was asymptomatic as of November 7, 2006. The symptomatology based on the records did not resurface until June of 2007.

On cross examination the doctor agreed that the radiography showed loss of lateral patellofemoral joint space.

He testified that that is basically bone on bone contact of the outside of the kneecap joint when looking at a patellofemoral kneecap view. He indicated those findings would have been in existence prior to September 25, 2006. He also noted that [*18] the petitioner was 5'6" 250lbs. and her weight would be a contributing factor to the deterioration of her left knee.

He also indicated the weight in and of itself could be an aggravating factor to the knee causing the need for additional medical treatment to the left knee. That was based on a reasonable degree of medical certainty. (*See* pg. 17 of the deposition).

The doctor also indicated that at no time during the course of his treatment or the history that he took did he ever receive any history of an incident taking place on December 15, 2007 that the petitioner claimed caused her problem. Dr. Merkley offered no opinion testimony whatsoever in relationship to the incident of December 15, 2007 and the petitioner's left knee condition. The respondent introduced into evidence as Respondent's Exhibit # 4 a 5 page report from Dr. Richard C. Lehman who did a records review of all the medical records in the case and also examined the petitioner on July 29, 2008.

Dr. Lehman testified:

> "It is my impression that this patient has end stage degenerative arthritis, which is fairly severe. I believe the patient had long-term degenerative arthritis that far predates her work related injury. **[*19]** I have reviewed her medial records from arbitrating physicians. I have reviewed her typed, written notes from both her ankle and her knee injury. I have reviewed her accident dated 12/15/07 and I have reviewed all of her x-rays and all of her films. It is my impression to answer your specific questions that the accident of 09/25/06 created a soft tissue contusion to her knee. The patient was in need of an arthroplasty prior to her fall. It appears that her x-rays showed end stage degenerative arthritis early on. It is my impression that she has had end stage degenerative arthritis, which far predates her injury. It should be clear that looking at her care and treatment including x-rays of 06/18/07 and x-rays taken today. The patient has had end stage degenerative arthritis in both knees with end stage patellofemoral arthritis in both knees."
>
> It is my impression that she is in fact a candidate for a total knee replacement bilaterally but I do not believe that her 09/25/06 fall has in any way contributed to this process. I do believe that she had a contusion. I do believe that she has soreness in her knee. I believe that she has soreness and grinding in both knees. It appears that **[*20]** the patient was a candidate for a total knee replacement prior to her fall. I do not believe that the accident in any way changed this course in treatment. I believe that the patient's need for a total knee replacement has to do with her obesity, has to do with the extreme valgus in her knees, which are congenital and the fact that both knees have the exact same conformity with severe end stage changes.
>
> In answer to your question number two, the patient had right ankle surgery for degenerative changes and chronic peroneal tendon changes, as well as what appears to be ankle instability.
>
> It is my impression that the patient's ankle did not contribute to her need for arthroplasty and I do not believe that the patient's end stage degenerative arthritis in her knees have been caused by or exacerbated by her ankle surgery. She has clearly had a long-term process with ankle instability and breakdown of her peroneal tendons but I do not believe that this contributed to her pre-existing arthritis. I think that her pre-existing arthritis was long term in nature. Again, based on the valgus stress placed on her knee due to the alignment of her knee, as well as an acute exacerbation when she **[*21]** was five years old having a fractured femur, which also would have congenitally or progressively changed the alignment of her knee. She had a femoral traction pin through the distal portion of her femur and had care and treatment for her femur fracture, which would have altered the alignment of her distal femur. The patient had an exacerbation of her knee on 12/15/07. At that time, the patient gave a history of being at work. She was mopping the floor. Her left knee popped and locked. She subsequently had significant discomfort in her knee. I do not believe that this materially changed Ms. Batts' knee. I believe that the patient was already in need of a total knee replacement at that time. I believe that she had a manifestation of her arthritis but I do not believe that it was a contributing factor for the need for a total knee replacement. I believe that the total knee replacement is the nature of severe malalignment, as well as an exacerbation from her femur fracture in the left knee when she was young. I also feel that both of the patient's knees are the same. Her patellofemoral joints have bone on bone changes. Her lateral compartments have bone on bone changes. I believe that **[*22]** her left knee has progressed significantly due to wear and tear and long-term malalignment. Again, I believe that the patient has had a bone on bone process for a long period of time. I do not believe at this juncture that either injury has materially contributed to an exacerbation of arthritis. There was nothing to exacerbate. She was already bone on bone and had absolutely no evidence of exacerbation based on the fact that her knee really could not get any worse. She was already in need for a total knee replacement. I believe that this process has taken many, many years and far predates her fall. She is a very sweet woman and she is in need of a total knee replacement on both sides but again, this is not related to her work injury."

The Arbitrator having considered the Petitioner's Exhibits I through 5 and Respondent's Exhibits 1 through 8 concludes that the petitioner's need for a total knee replacement on the left knee is not causally connected to the accident of September 25, 2006. Claim for compensation is hereby denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:36 PM EST

09 IWCC 670

*2009 Ill. Wrk. Comp. LEXIS 792, **

MARTIN OLIVER, PETITIONER, v. UNITED STATES STEEL CORPORATION, RESPONDENT.

NO: 05 WC 26521

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MADISON

2009 Ill. Wrk. Comp. LEXIS 792

July 1, 2009

CORE TERMS: arbitrator, degenerative, knee, lifting, return to work, disease, temporary total disability, loss of use, temporary, physical therapy, left knee, machinist, authorize, meniscus, stenosis, stooping, bending, lumbar, tear, disputed issues, light duty, left leg, attachment, retrolisthesis, debridement, extradural, multilevel, myelogram, diagnosed, probable

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

OPINION: [*1]

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 temporary total disability, nature and extent, 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 February 27, 2008 is hereby affirmed and adopted.

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

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

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

DATED: JUL 1 2009

ATTACHMENT: **[*2]**

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Andrew Nalefski, arbitrator of the Commission, in the city of Collinsville, on 1/29/08. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On 05/25/05, the respondent United States Steel Corporation ***was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ 84,727.24; the average weekly wage was $ 1.629.37.

. At the time of injury, [*3] the petitioner was 49 years of age, ***married*** with 0 children under 18.

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

. To date, $ 60,523.55 has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ 1,051.99/week for 57-4/7 weeks, from 6/22/05 through 6/11/06 and 6/22/06 through 11/12/06, which is the period of temporary total disability for which compensation is payable. Respondent shall pay Petitioner $ 54.31 a day from 6/12/06 through 6/21/06 for **temporary partial** disability. Respondent is entitled to credit for amounts previously paid.

. The respondent shall pay the petitioner the sum of $ 567.87/week for a further period of 175 weeks, as provided in Sections 8(d)(2) and 8(e) of the Act, because the injuries sustained caused 25% loss of use to the man as a whole and 25% loss of use to the left leg.

. The respondent shall pay the petitioner compensation that has accrued from 5/25/05 through 01/29/08, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ N/A for necessary [*4] medical services, as provided in Section 8(a) of the Act.

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

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

. The respondent shall pay **$ N/A** in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 2.07 % 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

2-25-08

Date

FEB 27 2008

The Arbitrator finds the following facts:

Petitioner was employed by Respondent as a machinist. On 5/25/05 he stepped into a pit which was approximately knee deep, causing injury to both his left knee and his low back.

Petitioner sought treatment at Respondent's clinic. [*5] A lumbar MRI of 5/31/05 revealed a mild to moderate midline disc protrusion at L2-3 with a suspected small annular tear and slight bulging at L3-4 and L4-5 with a probable small annular tear at L4-5. A MRI of the left knee showed a complete tear of the anterior cruciate ligament from its femoral attachment, prominent degenerative signal in the posterior horn of medial meniscus and also the anterior horn of the lateral meniscus without evidence of tearing and small knee joint effusion and a small popliteal cyst.

Petitioner came under the care of Dr. Richard Lehman, an orthopedic surgeon, who performed a left knee arthroscopy on 6/22/05, which consisted of a trephine intercondylar notch ACL repair to address a partial split in the tendon; a debridement of the patellofemoral notch.; and a debridement of the lateral meniscus. Post-operatively, Petitioner underwent physical therapy. He was released to full duty work as far as it concerned the knee on 8/9/05. On 10/20/05 Dr. Lehman's records support there was an excellent range of motion; outstanding stability; no swelling; very good mechanics; full flexion and extension; and the ACL was intact with no instability. Petitioner was released [*6] at maximum medical improvement and was to return to work with no restrictions as it pertained to his knee only. Petitioner testified that other than an intervening incident when he bumped his knee requiring two weeks of physical therapy in March, 2006, he is having few problems with his left knee.

Petitioner saw Dr. David Kennedy, a neurosurgeon, for the low back condition on 9/1/05. Petitioner was diagnosed with significant degenerative changes in the lumbar spine. A lumbar myelogram on 1/27/06 revealed multilevel degenerative disc disease with an extradural defect producing stenosis at L2-3, extradural effacement with retrolisthesis at L3-4 and mildly diminished filling of both L5 root sleeves. A post-myelogram CT demonstrated multilevel degenerative disc disease and facet disease, herniation at L2-3 with stenosis, diffuse degenerative disc disease at L1-2 and L3-4 with mild retrolisthesis of L3 on L4, diffuse bulging disc at L4-5 extending into the foramen and severe facet osteoarthritis at L5-S1. Surgery was not recommended. Petitioner received trigger point injections by Dr. Feinberg and physical therapy.

There is a dispute regarding temporary total benefits. Petitioner claims [*7] entitlement to temporary total benefits from 6/22/05 through 11/12/06. Respondent agrees that Petitioner is entitled to TTD benefits from 6/22/05 through 6/11/06 and 9/16/06 through 11/12/06. The basis of the dispute was whether Petitioner availed himself of light or sedentary duty which Respondent made available to him.

The medical records reflect that as of 6/8/06 Dr. Kennedy had continued to authorize Petitioner off work. On 6/12/06 Respondent contacted Dr. Kennedy and informed him that light duty work was available. Petitioner was released by to return to work with restrictions of no lifting over 10 lbs., no bending, stooping, twisting, pushing, pulling or overhead lifting and to sit 2 hours with a 10 minute break for only a 6 hour work day. Petitioner was tendered work within those restrictions as of that date. Petitioner did not

attempt to return to work. He returned to Dr. Kennedy on 6/22/06 who took him totally off work.

Petitioner was examined at Respondent's request by Dr. Robson on 7/13/06. Dr. Robson diagnosed a strain imposed on a pre-existing degenerative disc disease with some stenosis. He proposed Petitioner return to work with a 20 pound lifting restriction with [*8] no repetitive bending, stooping or lifting. Respondent offered work within those restrictions and Petitioner refused, electing to abide by his doctors orders.

Petitioner returned to Dr. Kennedy on 8/2/06. Dr. Kennedy acknowledged Dr. Robson's restrictions and thought they were reasonable. However, he continued to authorize Petitioner off work until 9/13/06.

On 9/13/06 Dr. Kennedy suggested a myelogram and post-myelographic CT scan and continued to authorize Petitioner off work.

Petitioner was seen at Respondent's request by Dr. Robson on 9/14/06. He agreed with Dr. Kennedy's recommendations both as to the testing and agreed Petitioner should remain off work until the testing was completed. Respondent thereafter reinstated temporary total benefits as of 9/16/06 and continued until 11/12/06.

Petitioner was released to return to work as of 11/13/06 with permanent restrictions of 20 pounds lifting and to avoid repeated bending, lifting or stooping. Petitioner was instructed that he should be able to move about as necessary if he develops back pain while working in one position. Petitioner returned to work with those restrictions and has continued to work with those restrictions as [*9] a machinist.

At arbitration Petitioner testified that he is having few problems with his left knee. Regarding his low back, he testified that he is performing his job as a machinist. However, when he is on his feet for 30 to 45 minutes, he must sit for a while. He stated the employer has worked with him and he is able to conduct his work activities within his restrictions. He has not received any additional treatment since November 2006. He uses over-the-counter medications at work but does continue to use Vicodin as necessary when he is away from the workplace.

Therefore the Arbitrator concludes;

1. There is no dispute that Petitioner is entitled to TTD benefits from 6/22/05 through 6/11/06 and then from 9/16/06 through 11/12/06. Petitioner is entitled to TTD benefits from 6/22/06 through 9/15/06. During this period he was authorized off work by his treating physician. Petitioner is not entitled to TTD benefits from 6/11/06 through 6/22/06 as he was released for light duty for 6 hours a day which Respondent could accommodate and which he refused. However, Petitioner is entitled to TPD benefits for the 2 hours missed daily (at 2/3s of the lost time) during this period.

2. Petitioner [*10] sustained injuries to his left knee and low back. Regarding his left knee, Petitioner has sustained 25% loss of use to the left leg. Regarding his low back Petitioner has sustained 25% loss of use to the body as a whole for the aggravation of his underlying degenerative condition which resulted in rather significant work restrictions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:36 PM EST

09 IWCC 705

*2009 Ill. Wrk. Comp. LEXIS 826, **

NICOLE BERGEN, PETITIONER, v. TCF BANK, RESPONDENT.

NO: 08 WC 03838

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

2009 Ill. Wrk. Comp. LEXIS 826

July 9, 2009

CORE TERMS: arbitrator, counselor, petitioner testified, therapist, temporary total disability, return to work, depressed, session, opined, interpersonal, customer, disorder, recommended, medication, counseling, scheduled, maternity, symptom, anxiety, resume, switch, stress, severe, temporary, notice, counseling session, returned to work, written request, post-traumatic, psychological

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, prospective medical and being advised of the facts and law, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

In his Decision the Arbitrator correctly noted that Petitioner decided not to see therapist Bruce Person any longer. The Arbitrator further noted that the new therapist Jenni O'Connell had not yet seen Petitioner as the therapist was on maternity leave (Arb. Dec., p. 6) The Commission corrects this portion of the Decision as Petitioner had switched therapists [*2] prior to arbitration and was working with Jenni O'Connell. Furthermore, Ms. O'Connell had seen Petitioner on at least one occasion. (PX 1) Petitioner did testify she had not seen Ms. O'Connell in the last couple of months prior to arbitration as Ms. O'Connell was on maternity leave. (T.A.,p. 46) The Commission also corrects the third sentence of the fourth paragraph on page 5 of the Arbitrator's Decision by deleting the word "weeks" and substituting the word "months" so as to conform to Petitioner's testimony.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 17, 2008, is hereby corrected as stated herein and otherwise affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § [*3] 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 $ 15,700.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUL 9 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Peter Akemann, arbitrator of the Commission, in the city of Rockford on 09/16/2008. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to

this document.

DISPUTED ISSUES
F. Is the petitioners present condition of ill-being causally related to the injury?
K. What [*4] amount of compensation is due for temporary total disability?
N. Is the petitioner entitled to perspective medical treatment?

FINDINGS OF THE ARBITRATOR:

. On 10/31/2007, the respondent; TCF Bank, was operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship existed between the petitioner and respondent.

. On this date, the petitioner sustained injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 48,000.16; the average weekly wage was $ 923.08.

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

. Necessary medical services have been provided by the respondent.

. To date, $ 12,572.44 has been paid by the respondent for temporary total disability/maintenance benefits.

ORDERS OF THE ARBITRATOR

. The respondent shall pay the petitioner temporary total disability benefits of $ 615.39 per week for 45.6 weeks, from 11/01/2007 through 09/16/2008, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the [*5] petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ -0- for medical services, as provided in Section 8(a) of the Act.

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

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

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the Notice of Decision of Arbitrator shall accrue from the date listed below to the day before the date of payment; however, if an employee's [*6] appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Peter Akemann

October 14, 2008

OCT 17 2008

In support of the arbitrators findings under (F) Causal Connection AND (K) Temporary Total Disability the arbitrator finds the following facts:

The petitioner testified that she was employed by TCF Bank as a loan officer for 3 years: Petitioner testified that on October 31, 2007 she was instructed by her supervisor, Tom Torossian, to accompany the branch manager, Connie Zarembski, on door-to-door collection efforts. They were sent to an area in Rockford, Illinois located at Kishwaukee Avenue and 15th Street, where they were instructed to go to a customer's home to try to collect on a past due mortgage. Petitioner testified that when they were descending the stairs of the third floor apartment they were approached by two black men who robbed them and forced them to the ground. Petitioner testified that she was terrified during the incident and immediately thereafter, and that she feared for her life. Petitioner testified that following the attack, her and her co-worker remained on the ground for a short while until they arose, went [*7] to their vehicle, and called the police. Petitioner testified that she then met the police at the nearby McDonalds and filed a police report. She also testified that she notified Mr. Torossian that the incident had occurred.

The petitioner testified as a result of the incident she saw her primary care physician, Dr. Coates on November 3, 2007 because she was having trouble sleeping and she was depressed. Petitioner testified Dr. Coates referred her to Dr. Marianne Geiger, a psychiatrist. Petitioner testified that she was seen by Dr. Geiger on November 14, 2007. Petitioner testified that Dr. Geiger recommended treatment including counseling and medication. Petitioner testified that Dr. Geiger also took her off of work from November 1, 2007 through January 22, 2008. The initial treatment consisted of weekly counseling sessions and monthly. therapy sessions with Dr. Geiger, along with medication. (Pet. Ex. 1) December 6, 2007 medical records from Dr. Geiger notes that Petitioner was still suffering from anxiety, nausea, flashbacks, and dreams of the event, hyper vigilance, and nervousness as a result of the incident that occurred.

The petitioner testified that as a result of the incident [*8] and her ID being taken by the robbers, she relocated her family to a different house temporarily. On January 23, 2008, she was seen by her counselor who noted that Petitioner felt insecure and depressed. (Pet. Ex. 1) The counselor noted that the Petitioner was very depressed and was very teary during the session. It was

discussed that the counselor felt there needed to be a plan implemented fro increased psychotherapy sessions and adjustments with medication. (Pet. Ex. 1) On that date her Paxil was increased to 50 mg. The next appointment was scheduled with Dr. Geiger for January 29, 2008. It was also noted that following that counseling session was the first time Petitioner was scheduled to return to work.

Petitioner testified that Dr. Geiger had returned her to work as of January 23, 2008 for two hours per day. Petitioner testified that she reported to work on January 2008 after a counseling session. Petitioner testified that she was expected to perform her regular work duties and have constant contact with clients. Petitioner testified that on her first day returned to work she was extremely depressed, anxious, and cried the entire time. Petitioner testified that she actually threw **[*9]** up as a result of being returned to work. Petitioner testified that despite her reaction on the 23rd, she did return to work on the 24th with a similar reaction. Petitioner testified that she also returned to work on the 25th and again on the 28th, with similar reactions. Petitioner testified that over the weekend of January 26th and 27th, she was extremely withdrawn, depressed, sick, anxious, and upset at having to return to work and deal with customers and having to report back to work the following week.

Petitioner testified that on January 29, 2008, she was contacted by Connie Zarembski, her direct supervisor, and was informed not to return to work. Petitioner testified that she was informed the basis for not returning to work was that the Respondent was investigating a loan that had been generated the year prior by Petitioner. Petitioner testified that Ms. Zarembski informed her that because the Respondent suspected wrongdoing-on the part of the. Petitioner in generating the loan, that she was likely being fired.

The petitioner testified that the loan that was being investigated had in fad been investigated in May of 2007, and that in June of 2007 she received an email confirmation **[*10]** that the Respondent had completed its investigation of her loan and found no wrongdoing and was taking no further action on it. Petitioner testified that it was not brought up again until her return to work following the October 31, 2007 incident.

The petitioner had a follow up visit with Dr. Geiger on January 29, 2008. It was noted that her effect was tearful and mood was anxious on that date. (Pet. Ex. 1) Petitioner was then seen by her counselor January 30, 2008. At that time, it was noted that Petitioner found it challenging to work. She cried and expressed anxiety. It was also noted that she was feeling loss of control. Petitioner continued to be on restrictions of 2 hours a day from January 23, 2008 through February 25, 2008, per Dr. Geiger. (Pet. Ex. 1) On February 26, 2008 Dr. Geiger modified her work restrictions. In her February 26, 2008 work note, Dr. Geiger indicated "It is my recommendation that she consider not returning to the bank industry due to the high stress associated with the job duties. She would perform very well not having to directly interact with customers. She should start out on a modified work day schedule of 2 hours per day for now." (Pet. Ex. 1). Petitioner **[*11]** testified as of the date of trial she was under the same restrictions as the February 26, 2008 work note.

The petitioner testified that on approximately February 18, 2008. She received notice of an Independent Medical Examination scheduled for February 21, 2008, with Dr. Hartman at the request of the Respondent. Petitioner testified that she received a travel expense check by direct deposit on February 20, 2008. Petitioner testified that although she received notice of the IME on approximately February 18, 2007, she did not have sufficient time to arrange for day care for her children to attend the all day examination in Chicago. Petitioner testified that had she been given notice earlier she would have been able to arrange for day care. Therefore, Petitioner was not able to attend the IME appointment. Petitioner testified that she had been receiving **temporary partial** disability benefits from January 23, 2008 through February 22, 2008, when the TPD benefits were terminated because of her failure to attend the IME on the 21st. Petitioner testified that the examination was rescheduled for March 19, 2008 and that she did receive sufficient notice of the examination and was able to attend **[*12]** it.

The petitioner was examined by Dr. Hartman for an Independent Medical Examination on March 19, 2008 at the request of the Respondent. (Res. Ex. 3) Dr. Hartman noted on page 3 of his report that the MMPI2 and SIMS and FBS tests all indicate that the Petitioner was not malingering or symptom magnifying any of her symptoms or condition. Dr. Hartman noted that general cognitive function tests indicated general cognitive inefficiency with complex problem solving. He also noted that personality test results, or the SRASI-4 test, suggested general personality and emotional maladjustment with dysfunctional interpersonal and emotional symptoms predominating.

Dr. Hartman noted the MMPI2 test suggested active major depression and a ruminative socially withdrawn individually and difficulties with work related functioning and negative attitudes. Dr. Hartman noted the personality assessment inventory test was valid and had a pattern very close to the statistical fit of post-traumatic stress disorder. Dr. Hartman noted that her PAI pattern also suggests anxiety and tension that interfere with concentration. Dr. Hartman opined that the Petitioner's post-traumatic stress disorder and major depression **[*13]** likely predated the 2007 robbery that the Petitioner's post-traumatic stress disorder and acute re-occurrence of symptoms." (Res. Ex. 1) He also indicated there was a longstanding interpersonal and emotional maladjustment, which would be consistent with the diagnosis of mixed personality disorder. Dr. Hartman went on to note that her current psychological presentation suggests "depression anxiety and unpaired interpersonal functioning." Dr. Hartman recommended that. Petitioner change counselors as she was not connecting well with her current counselor, Bruce. Petitioner testified at trial that she in fact agreed with Dr. Hartman's opinion to change counselors and did so in April of 2008.

Dr. Hartman's original report of March 19, 2008 indicated "it is not likely from either a common sense consideration of personal safety or psychological basis that Ms. Bergren could be persuaded to resume Mortgage collection activities. It is recommended that if she wishes to continue her career in banking that she initially perform office duties that do not involve interpersonal customer contact" He went on to indicate "vocational counseling and rapid reentry into the work place is recommended to **[*14]** avoid iatrogenic effects of isolation and loss of support from a structured work environment." (Res. Ex. 3)

Dr. Hartman authored an addendum report, which the Arbitrator notes was admitted as Respondent's Exhibit 4. However, the report is unsigned by the doctor. In the report, Dr. Hartman opined the October 31, 2007 "event was additive to her other stressors and more likely than not reopened PTSD related issues that were inactive prior to the work incident." (Res. Ex. 4)

Petitioner testified that subsequent to the evaluation by Dr. Hartman, she was seen at the request of her attorney for an Independent Medical Examination by Dr. Wayne Stillings. Dr. Stillings noted in the examination that Petitioner was distant and constricted, detached from reality, very clinically depressed, easily distracted, and her verbal comprehension was fair at best. (Pet. Ex. 2) Dr. Stillings diagnosed Petitioner with PTSD chronic and severe, major depressive disorder severe, and opined that her condition was a result of a life threatening trauma at work on October 31, 2007. Dr. Stillings went on to opine that "the October 31, 2007 work incident has caused Ms. Bergren to experience active chronic and severe **[*15]** PTSD and a severe major depressive disorder which are impairing her ability to function occupationally from a psychiatric standpoint." In an addendum report dated June 20, 2008, Dr.

Stillings clarified his opinion regarding her ability to return to work in stating "I am of the opinion that Ms. Bergren is psychiatrically disabled from work for an indefinite period of time." (Pet. Ex. 2)

The petitioner testified that she applied for unemployment benefits and began receiving those at the end of March, 2008. Petitioner testified that she has maintained a job search and has listed resumes online and has been looking in newspapers for job openings, but has not yet received any job offers within the restrictions as stated by Dr. Geiger.

Petitioner testified that she is, at the time of the trial, still under the care of Dr. Geiger, which involves therapy sessions with Dr. Geiger on a monthly basis and weekly counseling sessions. Petitioner testified that subsequent to Dr. Hartman's examination she agreed that it was in her interest to switch counselors from Bruce and she in fact did so. Petitioner testified at the time of trial, that her new counselor was on maternity leave and so she had **[*16]** not had a counseling session for a couple weeks. However, Petitioner testified that there were no other therapists available for her to switch to and that Dr. Geiger and Petitioner felt it would be counter-productive to switch to a new therapist. Again, the parties stipulated to most issues at trial. The only issue in dispute is Petitioners entitlement to total temporary disability benefits.

ANALYSIS

The Arbitrator notes that the Petitioners treating physician, Dr. Geiger, has opined as of February 26, 2008, that Petitioner cannot return to her job in the banking industry and that she should find other employment working only two hours a day.

The Arbitrator notes that Dr. Hartman opined that the petitioner would not likely "from either common sense consideration of personal safety or a psychological basis" be persuaded to resume mortgage collection activities. Dr. Hartman did opine that if Petitioner did resume her career in banking that she initially perform activities that "do not involve interpersonal customer contact."

Dr. Wayne Stillings opined that the Petitioner was occupationally disabled from any type of work at the time that he saw her in May of 2008.

The Arbitrator **[*17]** notes that the Petitioner has searched for work since being terminated from TCF and has not yet received any job offers as a result of her job search.

The arbitrator finds that the petitioner's current condition of ill-being is causally connected to her work related injury of October 31, 2007

The arbitrator further finds that the petitioner is temporarily and totally disabled from work from 11/01/2007 through the date of the hearing.

In support of the arbitrator's findings under (N) Prospective Medical; the arbitrator finds the following facts:

The Arbitrator concludes that the petitioner has not yet reached maximum medical improvement. She is still in need of psychotherapy as well as pharmacotherapy therapy and Medication for her condition. This is consistent with the opinions of all physicians who treated and evaluated the petitioner.

The arbitrator, while noting the petitioner is in need of these treatments, concludes that she is not getting them, The petitioner testified at the time of hearing, that she was seeing Dr. Geiger approximately every two to three months. She indicated that she was not undergoing any psychotherapy as she indicated she did not wish **[*18]** to see Mr. Bruce Person any longer. The therapist that the petitioner had been suggested to see after her requested switch from Mr. Bruce Person had not yet seen her as she was on maternity leave. There were no scheduled appointments at the time of the hearing. No treating records from Dr. Geiger or Mr. Bruce Person were offered into evidence subsequent to March 10, 2008.

While the arbitrator has ordered benefits through the date of this hearing, the petitioner needs to be actively engaged in a treatment regime that will return her to the workforce. Future benefits will be in jeopardy should this treatment regime, as prescribed by all her doctors, not occur.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
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Date/Time: Thursday, January 21, 2010 - 6:36 PM EST

*2009 Ill. Wrk. Comp. LEXIS 834, **

09IWCC 713

TWILA B. CLINE, PETITIONER, v. HONEYWELL, RESPONDENT.

NO: 05 WC 47977

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF SANGAMON

2009 Ill. Wrk. Comp. LEXIS 834

July 10, 2009

CORE TERMS: arbitrator, pain, temporary total disability, temporary, amount of compensation, degenerative, discogram, lumbar, partial disability, aggravation, disease, marked, permanent, lifting, sit, temporarily, aggravated, symptom, present condition, full release, arbitration, recommended, abdominal, severe, pounds, parties stipulated, totally disabled, health insurance, return to work, confirmed

JUDGES: Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

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 the amount of compensation due for temporary total disability; the reasonableness or necessity of medical, surgical or hospital bills or services; the amount of compensation due for **temporary partial** disability; and the nature and extent of the injury, and being advised of the facts and law, modifies the Decision of the Arbitrator with respect to the amount of compensation due for temporary total disability, medical expenses, and the amount of compensation due for **temporary partial** disability, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission hereby modifies the Arbitrator's decision with respect to the amount of compensation due for temporary total disability. In his decision, the Arbitrator awarded temporary total disability benefits of $ 345.60/week for a period of 8 weeks commencing on August 22, 2005, and ending on October 15, 2005, "plus additional **temporary partial** disability." On the Request for Hearing, however, **[*2]** the parties stipulated to a period of temporary total disability of 7-6/7 weeks, commencing on August 22, 2005, and ending on October 15, 2005. Because we find that Petitioner is not entitled to **temporary partial** disability benefits, we therefore modify the award for temporary total disability benefits in accordance with the period of temporary total disability to which the parties stipulated on the Request for Hearing. reason that the injuries sustained caused the loss of use of 7.5% of the whole person

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 8,376.37 for medical expenses under § 8(a) of the Act. This amount excludes medical expenses already paid by Respondent. Respondent is therefore due no credit against medical expenses awarded herein.

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 $ 3,448.78 paid 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 $ 19,400.00. The probable **[*3]** cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUL 10 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Stephen Mathis**, arbitrator of the Commission, in the city of **Springfield**, on **December 7, 2007**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

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

J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?
O. Other **Temporary Partial Disability**

FINDINGS

. On **August 22, 2005**, the respondent **[*4] Honeywell *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 26,956.80**; the average weekly wage was **$ 518.40**.

. At the time of injury, the petitioner was **48** years of age, ***single*** with **0** children under 18.

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

. To date, **$ 3,448.78** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 345.60**/week for **8** weeks, from **08/22/05** through **10/15/05 plus additional temporary partial disability (see attached findings of facts)**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ 311.04**/week for a further period **[*5]** of **37.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **7.5% loss of use of the person as a whole.**

. The respondent shall pay the petitioner compensation that has accrued from through and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ for necessary medical services, as provided in Section 8(a) of the Act.

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

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

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 2.08% 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 **[*6]** this award, interest shall not accrue.

Signature of arbitrator

2-1-08

Date

FEB 15 2008

ATTACHMENT F & L

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

What is the nature and extent of the injury?

In support of the Arbitrator's decision relating to F and L, the Arbitrator finds the following facts:

At arbitration Petitioner testified that she had been employed by Respondent since December, 2003. Her job duties for the Respondent involved various assembly line activities including building and assembling parts and packing the finished products for shipment.

Petitioner testified that on the date of accident she was assigned to either the, "Allison line" or the packing department. While performing her job duties Petitioner testified she picked up a table weighting approximately fifteen (15) pounds. Upon doing so she noticed a stabbing pain in her low back radiating into her buttocks. Petitioner testified she notified the plant manager, Matt Hohemier. Mr. Hoheimer apparently took her into a conference room so that she could lie down and put ice on her back. She was then sent to Dr. Bansal by the plant safety director. Dr. Bansal's records **[*7]** were marked and introduced as Petitioner's Exhibit 1.

A review of Dr. Bansal's records confirms Petitioner's description of accident and onset of symptoms. Petitioner was diagnosed initially with lumbar strain and was prescribed medication and other conservative treatment. She was placed on light duty restrictions which apparently the Respondent was initially unable to accommodate. Petitioner was then referred by Dr. Bansal to Dr. Smucker. Dr.

Smucker's records were marked and introduced as Petitioner's Exhibit 3.

Petitioner was seen by Dr. Smucker for further treatment by referral from Dr. Bansal. Based on his examination and Petitioner's complaints, Dr. Smucker ordered a lumbar MRI. He also took Petitioner off of work and temporarily suspended physical therapy. The MRI performed on August 26, 2005 revealed moderate facet arthropathy without foraminal canal or foraminal stenosis at the L4-L5 level and more significant degenerative change with disc bulge into the right neural foramin at the L5-S1 level. Dr. Smucker also recommended a lumbar injection which was performed at that time.

On August 29, 2005 Petitioner returned to see Dr. Smucker complaining of intense low back pain. With **[*8]** respect to her medical history Petitioner advised Dr. Smucker that she had a history of back problems in the past and when being treated at that time recalls having an epidural injection which caused her pain to increase. She also advised Dr. Smucker that she had been doing well with respect to her low back for the past two to three years until she lifted the table at work on August 22, 2005. Dr. Smucker's diagnosis at that time was lumbar degenerative disc disease with acute exacerbation on August 21, 2005. Dr. Smucker initiated a course of lumbar epidural steroid injections and kept Petitioner off of work.

On September 21, 2005 Petitioner reported to Dr. Smucker that she had been hospitalized for abdominal pain. She also noted improvement in her low back and buttock pain. Dr. Smucker continued to keep Petitioner off work. He also discontinued some of the medications which he believed may have been associated with some of Petitioner's abdominal complaints.

At arbitration Petitioner testified that she had had a history of kidney stones. When asked to compare the pain she developed after her accident on August 22, 2005 and the pain associated with kidney stones, Petitioner testified **[*9]** that the location of the pain as well as the nature of type of pain was very different. On October 14, 2005 Petitioner advised Dr. Smucker that she had continued low back pain radiating into her left thigh with some pain in her left abdomen. Dr. Smucker diagnosed Petitioner with lumbar degenerative disc disease at L3-4, L4-5 and L5-S1, most severe at L5-S1, "where there is disc compression." He recommended a lower EMG and physical therapy. He also allowed Petitioner to return to work four hours per day with a sit or stand option and no lifting, bending or twisting at the waist. He further noted that Petitioner was being referred by Dr. Townsend, her family physician to see Dr. Pineda.

Petitioner was seen by Dr. Pineda on November 1, 2005. Petitioner testified at arbitration that she had seen Dr. Pineda in the past for low back pain in 1999 or 2000. With regard to earlier treatment by Dr. Pineda, Petitioner testified that after a period of treatment she had no residual back pain and was doing well from 1999 until her date of accident of August 22, 2005. Dr. Pineda's office notes were marked and introduced as Petitioner's Exhibit 7. At her office visit of November 1, 2005, Petitioner **[*10]** described her current symptoms to involve pain in her low back radiating towards both legs. She again notes that her previous back pain five years ago had resolved although she reported to Dr. Pineda that there have been episodes, "where the pain has come and gone periodically although it has never lasted this long." Dr. Pineda recommended observation. He also discussed with Petitioner the possibility that she may require surgery in the future.

On January 20, 2006 Petitioner returned to see Dr. Pineda. Dr. Pineda recommended that she undergo a discogram. The discogram performed on February 13, 2006 was marked and introduced at Petitioner's Exhibit 9. The report states that at L4-5 disc pressurization produced severe concordant low back back at moderate pressure levels. At L5-S1 disc pressurization produced intense concordant pain at modest pressure levels. The Arbitrator notes that the information contained in the patient history form attached to Dr. Pineda's office notes contained in Petitioner's Exhibit 3 completed by the Petitioner is consistent with Petitioner's testimony and information introduced in other medical exhibits introduced at arbitration.

In his narrative report dated **[*11]** February 21, 2006 marked and introduced as Petitioner's Exhibit 8, Dr. Pineda summarizes his recent treatment of Petitioner and acknowledges having seen her six or seven years ago. With respect to the relationship between her accident of August 22, 2005 and her current condition, Dr. Pineda stated,

> The difficult question obviously that exists is whether or not this aggravation is temporary or permanent. Thus far, to the best of my knowledge the pain from this additional aggravation has persisted. In my experience individuals with degenerative disc disease will have intermittent aggravation of their pain and often times they will return to baseline. However, over time, some of those aggravations may or can become permanent, and that surgical therapy may be considered at that time.

In a narrative report dated April 27, 2006 from Dr. Smucker marked and introduced as Petitioner's Exhibit 10, Dr. Smucker states that the discogram was scheduled in relation to Petitioner's injury of August 22, 2005. Dr. Smucker discusses some of Petitioner's treatment options including a fusion or disc replacement. He also clarifies that at that time he did not believe Petitioner was at maximum medical **[*12]** improvement and that the treatment she was receiving was both reasonable and necessary. He also confirmed that the restrictions he had placed on Ms. Cline, "are related to her August 22, 2005 accident."

In his evidence deposition dated November 14, 2006 marked and introduced as Petitioner's Exhibit 11, Dr. Pineda confirmed that he had treated Petitioner during two periods of time, the first being from August 16, 1999 through April, 2001 and the second beginning on November 1, 2005 involving Petitioner's accident of August 22, 2005. Dr. Pineda was also asked to compare a discogram that had been performed on January 1, 2000 prior to Petitioner's accident and the most recent discogram performed on February 13, 2006. It was Dr. Pineda's opinion that the previous discogram was positive at L4-5 and L5-S1 but there had been a slight progression or change at the L3-4 level. Dr. Pineda confirmed that the discogram results were consistent with Petitioner's pain complaints in her low back.

Dr. Pineda was asked whether within a reasonable degree of medical certainty Petitioner's accident of August 22, 2005 could have aggravated a pre-existing degenerative condition in her lumbar spine. Dr. Pineda **[*13]** stated that Petitioner's accident probably aggravated but did not cause Petitioner's degenerative disc disease. At to whether the aggravation was permanent or temporary, Dr. Pineda stated that assuming Petitioner continues to have pain, then the accident caused a permanent aggravation of her permanent disc disease. On cross-examination Dr. Pineda was unable to provide an opinion as to whether Petitioner's kidney stone and abdominal pain treatment may have caused or aggravated Petitioner's low back condition (p. 39-40).

Petitioner was examined at the request of the Respondent by Dr. Zelby on December 5, 2005. Dr. Zelby's office is located in Maywood, Illinois, a suburb of Chicago. Petitioner lives in Springfield. It was Dr. Zelby's conclusion that Petitioner has degenerative

disc disease that was not aggravated or accelerated by her work accident or injury although her work injury may have caused a temporary exacerbation of her condition. In his evidence deposition dated December 14, 2006 Dr. Zelby stated that Petitioner had positive Waddell's signs indicating symptom magnification. The Arbitrator notes however that Dr. Smucker who treated Petitioner for nine months did not note any [*14] positive Waddell's signs indicating no symptom magnification.

Petitioner testified that at no time had Dr. Smucker lifted the restrictions he had placed on her of no lifting greater than twenty pounds with a sit/stand option. Petitioner testified however that she was told by Ralph from the Human Resources Department that in order for her to continue working it would be necessary for her to obtain a full release from her doctor. It appears that Petitioner felt she had no choice but to obtain a full release from one of her doctors. She therefore approached her family doctor, Dr. Townsend and obtained a full release.

With respect to her present condition Petitioner testified that she continues to experience low back and leg pain. Certain activities, especially lifting increase her pain levels. Petitioner also notices pain and stiffness with prolonged standing or sitting. Petitioner she has not ruled out the possibility that she may ultimately need to undergo surgery for the condition of her low back.

The Arbitrator concludes that Petitioner's accident of August 22, 2005 aggravated her pre-existing degenerative disc disease in her lumbar spine. Based on Petitioner's description of her [*15] symptoms both before and after her accident and the testimony and opinions of Dr. Pineda and Dr. Smucker, the Arbitrator concludes that Petitioner's accident caused a permanent aggravation of Petitioner's degenerative low back condition and is a contributing factor to her present condition. In this regard the Arbitrator has taken into account the opinion of Dr. Zelby but gives his opinion less weight than that of Dr. Smucker and Dr. Pineda who treated Petitioner over an extended period of time. There is also no evidence that Petitioner's kidney stones or abdominal condition is an intervening accident.

The Arbitrator further concludes that Petitioner is permanently partially disabled as a result of her accident of August 22, 2005 to the extent of 7.5% loss of use of the person as a whole. In that regard the Arbitrator notes that Dr. Smucker had placed restrictions on Petitioner of no lifting greater than twenty (20) pounds with a sit/stand option. Although Petitioner testified she received a full release from Dr. Townsend, the release was only obtained according to Petitioner's unrebutted testimony at the request of the Respondent's Human Resources representative.

ATTACHMENT J [*16]

Were the medical services that were provided to Petitioner reasonable and necessary?

In support of the Arbitrator's decision relating to (J), the Arbitrator finds the following facts:

The Arbitrator has reviewed medical bills and a summary contained in Petitioner's Exhibit 12. The Arbitrator notes that payments have been made toward the bills by workers compensation and health insurance. The Arbitrator also notes that Petitioner has made payments toward the balance on some of the bills. According to the summary the total amount of the original bills is approximately $ 22,489.70. Approximately $ 5,568 10 has been paid by workers compensation and Petitioner has paid approximately $ 217.60. Taking into account payments made by health insurance, it appears the balance due to the medical providers is $ 6,352.35.

The Arbitrator has reviewed the medical records associated with the unpaid bills. After reviewing the medical records and based on the Arbitrator's findings pertaining to (F) above, concludes that the bills are both reasonable and necessary and related to Petitioner's accident of August 22, 2005. It is therefore the responsibility of the Respondent to pay any of the unpaid [*17] bills and reimburse either the Petitioner or Petitioner's health insurance for payments made toward these bills.

ATTACHMENT K & O

What amount of compensation is due for temporary total disability?

What amount of compensation is due for temporary partial disability?

In support of the Arbitrator's decision relating to (K) and (O), the Arbitrator fords the following facts:

The parties stipulated that Petitioner was temporarily totally disabled from August 22, 2005 through October 15, 2005 representing eight (8) weeks. The Arbitrator finds therefore that Petitioner was temporarily totally disabled for this period of time, the parties further agree that Respondent has paid $ 3,448.78 in TTD benefits.

Petitioner testified that while under Dr. Smucker's care he allowed her to return to work on a light duty basis limiting not only her lifting and requiring a sit/stand option but also limiting the number of hours she could work. The Arbitrator notes that Dr. Pineda agreed the use of restrictions by Dr. Smucker was an appropriate means of pain management. Petitioner testified that Dr. Smucker allowed her to return to work as of October 16, 2005 working four hours per day, no [*18] lifting, no bending or twisting a the waist, sit stand option. These restrictions, including working only four (4) hours per day were continued until Petitioner's office visit of December 8, 2005. At that time Dr Smucker modified those restrictions recommending that she go to an eight (8) hour day per work schedule, maximum forty (40) hours per week. She was allowed to lift up to twenty (20) pounds, sit/stand option.

The Arbitrator notes that on December 15, 2005 a nurse's note in Dr. Smucker's records indicates the Petitioner was again restricted to four (4) hours daily for one week, then six (6) hours daily for one week, then eight (8) hours per day thereafter. Petitioner was again allowed to return eight (8) hours per day as of January 20, 2006 according to Dr. Smucker's records.

It also appears that Petitioner was taken off of work on February 13, 2006 and February 14, 2006 due to an onset of severe back pain subsequent to her discogram on February 13, 2006. On February 15, 2006 the period of time off was extended until February 20, 2006. In response to a call from Petitioner on February 22, 2006 complaining of having to leave work early due to severe back pain, Dr. Smucker excused [*19] Petitioner from work from February 21, 2006 through February 24, 2006.

The Arbitrator concludes that Petitioner was temporarily partially disabled from October 16, 2005 through December 8, 2005 and December 15, 2006 through January 20, 2006. During these periods of time, Petitioner is entitled to **temporary partial** disability benefits as defined in Section 8(a) of the Act. It also appears Petitioner was temporarily totally disabled from February 13, 2006 through February 24, 2006.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:36 PM EST

*2009 IWCC 746; 2009 Ill. Wrk. Comp. LEXIS 768, **

SUANNE PALAZZOLO, PETITIONER, v. ABSOLUTE CLEANING, RESPONDENT.

NO: 06WC51399, 07WC10507

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF SANGAMON

2009 IWCC 746; 2009 Ill. Wrk. Comp. LEXIS 768

July 17, 2009

CORE TERMS: pain, arbitrator, cervical, chiropractic, neck, spine, lumbar, arm, degenerative, disease, surgery, temporary, herniation, symptom, temporary total disability, injection, doctor, light duty, degeneration, posterior, partial disability, contiguous, diskectomy, epidural, chiropractor, replacement, appointment, diagnosed, causally, trash

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by 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, and doctor choice limitation, and being advised of the facts and law, corrects, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator addressed both of Petitioner's claims in one Decision. The Commission elects to do the same. After considering the entire record, the Commission corrects one of the Arbitrator's findings and otherwise affirms and adopts the Decision. On page 15 of the Decision, the Arbitrator found that "P.A. Sprinkle [sic] referred the Petitioner to Dr. Hertel [*2] and Dr. Pencek." The Commission finds that it was Dr. Calloway who referred Petitioner to Drs. Hertel and Pencek and that, in fact, all of the referrals in this case emanated from Dr. Calloway.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 20, 2008 is hereby corrected, affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 34,500.00. The probable cost of the record to be filed [*3] as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Dated: JUL 17 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the City of **Springfield**, on **August 5, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes the findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to the petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
N. Other: Prospective Medical

FINDINGS

. On **May 9, 2006 and November 6, 2006**, the respondent **Absolute Cleaning** was operating **[*4]** under and subject to the provisions of the Act.

. On these dates, an employee-employer relationship did exist between the petitioner and respondent.

. On these dates, the petitioner did sustain injuries that arose out of and in the course of employment.

. Timely notice of these accidents were given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 18,101.16**; the average weekly wage was **349.83**.

. At the time of injury, the petitioner was **27** years of age, **single** with **2** children under 18.

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

. To date, **$ 7,934.04** has been paid by the respondent for TTD and **temporary partial** disability benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 233.22** /week for **49 & 6/7** weeks, from **November 16, 2006 through May 20, 2007 and again from February 23, 2008 through the date of arbitration August 5 2008**, which is the period of temporary total disability for which compensation is payable. The Respondent shall also pay to the Petitioner **temporary partial** disability benefits in the amount of **$ 6,692.07**.

[*5] . The respondent shall pay the petitioner compensation that has accrued from **May 9, 2006 and November 6, 2006** through **May 8, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of **$ 24,012.37** for necessary medical services as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner.

. The respondent shall authorize the diskectomy and disk replacement surgery recommended by Dr. Terrence Pencek.

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a Petition for Review within 30 days after receipt of this decision, and **[*6]** 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 If the Commission reviews this award, interest of 1.10% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

10-8-08

Date

OCT 20 2008

ATTACHMENT F

In support of the Arbitrator's findings on the issue of **(F) Is the petitioner's present condition of ill-being causally related to the injury?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

On May 9, 2006, the Petitioner was employed by the Respondent as a cleaner. The Respondent operates a cleaning business that cleans businesses and homes. The Petitioner was assigned to clean the offices and shower rooms of coal mines in Elkhart and Williamsville, Illinois. Petitioner described that her duties included mopping shower rooms, emptying trash, dusting, wiping and cleaning windows in both the shower rooms **[*7]** for the miners and the offices above ground. She also operated a machine scrubber that mopped the shower room floor and used high pressure water hoses. About 4 1/2 hours of her eight hour shift would be spent cleaning in the shower room.

Petitioner began working for the Respondent on September 26, 2005 and had been working consistently 40 hours per week since that date. Petitioner testified that she might have missed a couple of days because of her children being sick.

On May 9, 2006 Petitioner was mopping in the small building at one of the mines. Petitioner testified that it had recently rained, and the floor was very muddy, and she had to lift a mop bucket to empty out the water. Approximately the third time she lifted the mop bucket she felt a sharp pain in her neck and in her left arm and left leg. Petitioner notified her boss and sought treatment with chiropractor Kelly Calloway. Petitioner testified that she had never received chiropractic treatment prior to that point.

Dr. Calloway's history notes that one week prior the Petitioner had gone to a Dr. Wahab for mid back pain going into her left arm. Petitioner testified that Dr. Calloway was mistaken and that she had not seen [*8] Dr. Wahab for a number of years. Petitioner testified credibly on this issue. Petitioner also notified Dr. Calloway of the work accident, noting that she had been sweeping, mopping and lifting buckets of water. (P.X.2) Petitioner also notified the doctor that she had previously been hurt by her ex-boyfriend who had pulled her hair and injured her head. Dr. Calloway diagnosed the Petitioner with lumbar, thoracic and cervical pain and began a course of conservative chiropractic care which lasted for approximately 5 visits. Petitioner was removed from work for three days and stopped attending chiropractic care because she had lost her public aid medical card. (P.X.2) Petitioner testified that she did not receive any medical care between the date she ended her chiropractic care with Dr. Calloway and November 6, 2006. Petitioner did state that she asked her employer for a back brace and was given a back brace. Petitioner returned to her previous occupation and continued to perform all of the activities mentioned above.

On November 6, 2006 the Petitioner was working at the Williamsville Viper mine for the Respondent in the early morning hours. Petitioner testified that she was lifting, [*9] trash bags from a trash barrel and that the trash bags were filled with compound sand which weighed approximately 25-30 pounds. Petitioner had picked up the bag to put it into the 'cododial', a larger trash bin, at a level 3-4 feet off the ground when she felt a ripping pain down her neck and right arm. Petitioner stopped working and notified her employer later that day. Petitioner again sought treatment with Dr. Kelly Calloway, a chiropractic physician.

Petitioner told Dr. Calloway of the incident as described during her testimony. (P.X.2) Dr. Calloway noted the Petitioner told her that when she lifted the bag she felt a sharp pain in to her neck, back, in the back of her right shoulder and around her shoulder blade. Dr. Calloway noted that the Petitioner told her that the pain did not go away and it would shoot *hen she moved. (P.X.2) Dr. Calloway diagnosed the Petitioner with cervical radiculitis and a sprain and strain. Dr. Calloway removed the Petitioner from work for at least a week.

On November 8, 2006 the Petitioner asked Dr. Calloway to look at her lower hack because she was having pain in her lower back and left leg. (P.X.2) Dr. Calloway noted the Petitioner was having pain [*10] in the left calf and foot on the big toe since being off from work. Petitioner described that her pain was so bad she had to lie down and she could not sleep. Dr. Calloway began a course of conservative care that included manipulations, ultrasound, ice and heat. (P.X.2) Petitioner also testified that Dr. Calloway referred her to her family physician for pain medications since the chiropractor could not provide such treatment to her.

Petitioner saw her family physician, Christopher Sprinkle, a physician's assistant for Macoupin Family Practice, on November 8, 2006. There is a handwritten notation on P.A. Sprinkle's records which indicate that authorization was received from 'Mike' at Absolute Cleaning for one visit for an injection. (P.X.3) P.A. Sprinkle was provided with a history of the prior medical treatment in May of 2006 where the Petitioner sought treatment from Chiropractor Kelly. P.A. Sprinkle was provided with the same history of the work accident of November 6, 2006 and that Petitioner had pain in her neck and the right shoulder posterior region and into the back. (P.X.3) P.A. Sprinkle noted the Petitioner had been having problems with her lower back off and on for the previous [*11] three months since her previous injury. (P.X.3) P.A. Sprinkle also noted the Petitioner complained of tingling sensations down the arm but denied any numbness or weakness in the arm. (P.X. 3) On examination, P.A. Sprinkle noted pain when pulling down on the head and neck, tenderness over the left lower lumbar area and a positive straight leg raise in the lower back and thigh bilaterally at 45 degrees. (P.X.3) P.A. Sprinkle diagnosed the Petitioner with neck and low back pain and placed her on a Medrol Dose Pak and Naprosyn.(P.X.3) P.A. Sprinkle further noted that Petitioner was going to continue with her chiropractor appointments and follow up in a week if there was no improvement. (P.X.3)

On November 21, 2006 Dr. Sprinkle's records document that Respondent wanted her to see Dr. Timothy VanFleet but that Dr. VanFleet would not see her without a referral from P.A. Sprinkle. P.A. Sprinkle attempted to contact Dr. VanFleet. A visit with Dr. VanFleet was never scheduled. (P.X.3)

Dr. Calloway continued to treat the Petitioner with chiropractic treatments and the Petitioner continued to follow up with P.A. Christopher Sprinkle for pain medication and continued lower back pain and neck pain. [*12] (P.X. 2 & 3)

Petitioner testified that she was advised to be seen by "a hack specialist" and was advised by her former attorney of the name of a Dr. Ronald C. Hertel. Petitioner testified that she cound not see Dr. Hertel without authorization and rather the appointment with Dr. Hertel was set up by the Respondent. Petitioner described that she was examined by Dr. Hertel and Dr. Hertel's examination report of December 28, 2006 was offered into evidence. The letter of December 28, 2006 is addressed to AIG Claims Services, Attention: Robert Probst and states that the Petitioner was referred by her attorney, Scott Hasselbrock, for evaluation of symptoms and physical findings. Dr. Hertel recorded that the Petitioner had two injuries, one of which she could not recall the exact date. Dr. Hertel described the incident of May 9, 2006 while she was picking up a mop bucket to empty into a dumpster and experienced pain in her lower back. Dr. Hertel recorded that Petitioner had chiropractic care and returned to work after a three day period and continued to do her regular job for the next 4-5 months. Dr. Hertel also noted the November 6, 2006 incident. Dr. Hertel's records indicate that the [*13] history he received was that on November 6, 2006 the Petitioner lifted a bag of "trash" with her right upper limb and had the onset of pain in the right shoulder and that presently her pain was present in both the right and left upper limb. Dr. Hertel was of the opinion that the Petitioner's symptoms were far in excess of what could be substantiated by any objective physical finding. The Arbitrator notes that in making this statement, Dr. Hertel did not have the benefit of any MRI scans on the day of his examination of December 28, 2006. Dr. Hertel suggested that to rule out any extrinsic pressure on the cervical or lumbar spine, an MRI of the cervical and lumbar spine should be accomplished. Petitioner testified that when she left Dr. Hertel's office she was in tears and Dr. Hertel's records confirm that the Petitioner told him that she felt that he had spent no time with her and was rude and for that reason, Dr. Hertel refused to make any further follow up appointments.

A MRI scan of the lumbar spine was performed on January 19, 2007 at Springfield MRI and Imaging Center. The MRI revealed a posterior disc protrusion at L3/4 causing deformity of the contiguous thecal sac, annular [*14] tear versus posterior disc protrusion at L4/5 causing deformity of the contiguous thecal sac, and a degenerative disc disease at L3/4 and L4/5. (P.X.4) An MRI of the

Petitioner's cervical spine was obtained on January 26, 2007 and revealed a posterior left paracentral disc prolapse at C5/6 causing deformity of the contiguous thecal sac and the contiguous spinal cord, posterior left paracentral disc protrusion at C4/5, causing deformity of the contiguous thecal sac and the contiguous spinal cord, a posterior central disc protrusion at C6/7 without significant neural encroachment, spinal stenosis at C5/6 and degenerative disc disease at C5/6. (P.X.4)

Petitioner continued to remain on light duty restrictions and receive chiropractic care from Dr. Kelly Calloway and continued to follow up with physician's assistant, Christopher Sprinkle. (P.X.2, 3) Petitioner returned to work on light duty and was provided with a light duty position. During this time period, she received **temporary partial** disability payments.

The Petitioner noted that she continued to receive chiropractic care because it provided her with temporary relief of her pain or reduction in her pain. Petitioner testified, and **[*15]** Dr. Calloway's records reflect, that Petitioner was to be referred to Dr. Per Freitag for further treatment. Petitioner decided instead that she wanted to be treated by Dr. Terrence Pencek. Dr. Calloway referred the Petitioner to Dr. Terrence Pencek. (P.X.12, p.7) Petitioner was first seen by Dr. Pencek on March 12, 2007 and was provided with the history of both work accidents of May 9, 2006 and November 6, 2006. (P.X.12, p.7-8)

Dr. Pencek was deposed and stated his opinions to a reasonable degree of neurosurgical certainty. On examination, Dr. Pencek noted the Petitioner's range of motion in her neck was normal and the rest of her general medical examination was unremarkable except for the musculoskeletal exam where there was tenderness over the left trapezius and over the left posterior neck. (P.X.12, p.8)

When Dr. Pencek performed a neurological exam of the Petitioner, he noted weakness in Petitioner's left arm, limited by pain, and in the left leg, limited by pain (P.X. 12, p.8-9) Dr. Pencek also reviewed MRI films which he interpreted as showing a disc herniation to the left at C4/5 and C5/6, spinal stenosis of C5/6, a black disc, meaning degenerative disc, at L4/5 and L3/4 and **[*16]** a retrolisthesis at L4/5, where one vertebral bone slipped slightly on the other bone. (P.X.12, p.9) Dr. Pencek described the retrolisthesis as being either congenital or one of the events that happens in women who deliver children in that the pelvis just tilts a little bit. (P.X.12, p.9-10) Dr. Pencek diagnosed the Petitioner as having disc herniations at C5/6 and at C4/5 which he believed could have been causing her left trapezius discomfort, and recommended physical therapy, epidural steroids to see if he could cut the pain down. (P.X.12, p.10) Dr. Pencek was of the opinion that the Petitioner might require surgery at C4/5 and C5/6 because the dura was indented and is extending to the same side. (P.X.12, p.11) Dr. Pencek did not feel the Petitioner needed surgery in the lumbar spine but she might need a myelogram in the future for that condition. (P.X.12, p.11)

Petitioner underwent two epidural injections into her cervical spine and two epidural injections into her lumbar spine at Memorial Medical Center by Dr. Hyunchul Jung. (P.X.12, p.10) Petitioner returned to Dr. Pencek on May 21, 2007 after undergoing epidural steroid injections and physical therapy. (P.X.12, p.11) Petitioner **[*17]** had no relief from the injections in the neck but the injections into her lumbar spine did provide her with some relief (P.X.12, p.11)

After Petitioner's epidural injection, Petitioner continued to complain of burning and aching in her neck and in her shoulder blade, left arm pain and left trapezius pain. (P.X.12, p.11) Dr. Pencek was of the opinion that Petitioner's disc herniation at C5/6 may have been the source of Petitioner's pain. (P.X.12, p.11) Dr. Pencek stated that the pain in Petitioner's scapula, left arm and hand were related to nerve roots at the C5/6 level and dermatomes at those levels. (P.X.12, p.12) Dr. Pencek felt that Petitioner showed early degeneration in the lumbar and cervical spine for her age, height and weight. (P.X.12, p.13, 39)

On October 30, 2007, Dr. Pencek re-evaluated the Petitioner and changed his recommendation from a two level fusion at C4/5 and C5/6 to a C5/6 anterior diskectomy with a total disc replacement or an artificial disc. (P.X.12, p.13-14) Dr. Pencek was of the opinion that performing a diskectomy with the implantation of an artificial disc would be more beneficial to the Petitioner than a two level fusion. (P.X.12, p.14-15) Dr. Pencek **[*18]** did not recommend any specific treatment to the lumbar spine at the time of his deposition, although he previously suggested a myeleogram might be performed. (P.X.12, p.15)

Dr. Pencek stated that it was more likely true than not that the work accidents incidents above her waist could have caused her cervical disc herniations at C4/5 and C5/6. (P.X.12, p.15-16) Dr. Pencek was of the opinion that Petitioner probably had pre-existing degeneration in her lumbar spine because of the black discs he described. (P.X.12, p.16-17) Dr. Pencek stated that although the radiologist noted the Petitioner had degenerative disc disease Dr. Pencek did not feel that she did. (P.X.12, p., 17, 40) Dr. Pencek did not feel the Petitioner had anything more than mild degenerative disk disease in her cervical spine based the radiologists report of the MRI. Dr. Pencek noted there were no osteophytes only some degeneration at C5/6. (P.X.12, p.17) Dr. Pencek did not feel that genetic predisposition accelerated or made degeneration of the spine more likely at an earlier age. (P.X.12, p.42) Dr. Pencek did state however that just due to a person's body, degeneration of the spine can occur at a faster pace. (P.X.12, **[*19]** p.42-43) Dr. Pencek agreed that smoking can accelerate degeneration and arthritis. (P.X.12, p.43) Dr. Pencek also acknowledged that individuals with degenerative disc disease can develop disc herniations and spinal stenosis. (P.X.12, p.43) Dr. Pencek felt that spinal stenosis was congenital. (P.X.12, p.44) Dr. Pencek testified that the MRI did not help in determining whether the disc herniations were caused by trauma or degeneration. (P.X.12, p.44) Dr. Pencek stated that disc prolapse and herniation were terms that meant the same thing, that the disc is outside its normal anatomic space. (P.X.12, p.44-45) Dr. Pencek also agreed that engaging in everyday activities can aggravate degenerative disc disease. (P.X.12, p.45) Dr. Pencek stated that lifting a child could aggravate degenerative disc disease if her complaints changed. (P.X.12, p.46-47) Petitioner testified that she did lift her child but that her symptoms did not change from the symptoms she developed after her work accidents.

Dr. Pencek was provided with a description of the Petitioner's pre-accident history of cervical and lumbar pain complaints. Dr. Pencek testified that any events of left arm pain 3 years prior to her work **[*20]** accident would have been irrelevant to her present situation. (P.X.12, p.18) Dr. Pencek felt that Petitioner was credible and based his opinions on the Petitioner's credibility. (P.X.12, p.16,19) Dr. Pencek testified that the Petitioner's work accidents could have aggravated her lumbar disc disease and black disc at L4/5. (P.X.12, p.20-21)

Dr. Pencek admitted that the Petitioner did not advise him of any emergency room treatment for back pain prior to the work accidents nor did the Petitioner tell Dr. Pencek of any assault by a boyfriend. (P.X.12, p.24-25) Dr. Pencek stated, however, that there were certain things that patients won't tell their doctors and, certainly personal ones, and that it is at depositions that he sometimes finds out for the first times about these things. (P.X.12, p.25)

Dr. Pencek also had the opportunity to review Dr. Hertel's examination Dr. Pencek also noted that there were inconsistencies between the history contained in Dr. Hertel's report and the history that the Petitioner provided to Dr. Pencek. (P.X.12, p.38) The Arbitrator notes that Dr. Hertel is the only doctor who recorded a history different from those of all other physicians, including respondent's **[*21]** IME physician discussed below. Dr. Pencek explained that all pain was subjective and that people react to pain

and experience pain differently. (P.X. 12, p.57) Dr. Pencek felt that all humans limit their activities as the result of pain. (P.X.12, p.58) Dr. Pencek felt that the Petitioner's performance on grip strength testing might be impacted by her pain and cervical radiculopathy. (P.X.12, p.58-59). Dr. Pencek noted that Dr. Hertel made his conclusions and diagnoses prior to receiving an MRI film. (P.X.12, p.59-60) Dr. Pencek noted that Dr. Hertel's physical examination of the Petitioner was different from the one he performed and that Dr. Hertel specifically did not test the Petitioner's strength. (P.X.1 2, p.64-65) Dr. Pencek explained that as a neurosurgeon he evaluates a patient's findings differently from an orthopedic surgeon, like Dr. Hertel, and that he places a great deal of emphasis on strength or weakness because Dr. Pencek's discipline deals with deficits of the nervous system starting with the brain going out to the peripheral nerves and not deficits of mechanical factors which an orthopedic surgeon would be looking for. (P.X.12, p.65-66)

Dr. Pencek testified that he **[*22]** did not believe that electrical studies to document the radiculopathy were necessary. (P.X.12, p.52-53) Dr. Pencek does not put work restrictions on his patients until he performs surgery. (P.X.12, p.55-56)

Dr. Pencek stated that he did not recommend to the Petitioner that she return for chiropractic treatment because he does not know enough about chiropractic to be able to determine whether it is efficacious for an individual's complaints and that he did not have any expertise in that matter. (P.X.12, p.56)

Dr. Pencek testified that even assuming predisposing factors such as degenerative disc disease, which may have predated the Petitioner's work accidents, smoking, body habitues, and everyday life, it was still his opinion to a reasonable degree of neurosurgical certainty that the Petitioner's work accidents were a contributing factor to the development of her disc injury at C4/5 and C5/6 and the symptoms that she experienced thereafter. (P.X.12, p.61-62) It was Dr. Pencek's opinion to a reasonable degree of neurosurgical certainty that the Petitioner's need for the anterior diskectomy and disc replacement surgery at C5/6 was the result of an aggravation that she experienced from **[*23]** one of her work accidents, notwithstanding her preexisting or predisposing factors. (P.X.12, p.62)

Respondent offered the deposition testimony of Dr. Sandra Tate, a doctor board certified in physical medicine and rehabilitation. (R.X.11, p.5 in Deposition Exhibit 1) Dr. Tate described that the specialty of physical medicine and rehabilitation is involved with the conservative treatment of individuals with neuromuscular and skeletal pain and is like "being a non-operative Orthopedist/neurologist". (R.X.11, p. 8) Dr. Tate also performs electro diagnostic studies. (R.X.11, p.9) Petitioner provided Dr. Tate with a history consistent with her testimony. (R.X.11, p.14-15)

Dr. Tate was of the opinion that the Petitioner's degenerative disc disease in the lumbar and cervical spine pre-dated the Petitioner's work accidents in May of 2006 and November of 2006. (R.X.11, p.27) Dr. Tate did not believe the MRI films showed any evidence of disc herniation or nerve root irritation. (R.X.11, p.28) Dr. Tate was of the opinion that the Petitioner's mechanical back pain, or sacroiliac joint dysfunction, could be causally related to the November 6, 2006 injury and felt the patient would benefit from **[*24]** additional treatment and therapy to correct the mechanical problems of her SI joint dysfunction. (R.X.11, p.28)

Dr. Tate examined the Petitioner for a second time on July 12, 2007 and received additional history. (R.X.11, p.29) Dr. Tate felt that the Petitioner's subjective complaints were not verified by her physical examination. (R.X.11, p.32-33) Dr. Tate felt the Petitioner was a symptom magnifier based upon Waddell's testing of 3 out of 5 and 5 out of 5. (R.X.11, p.33) Dr. Tate felt that upon her examination of July 12, 2007 she did not document any clinical findings of cervical radiculopathy. (R.X.11, p.34) Dr. Tate did not believe the Petitioner needed additional chiropractic care as of her examination of July 12, 2007. (R.X.11, p.35) Dr. Tate did not believe the surgery recommended by Dr. Pencek was needed. (R.X.11, p.36-37) Dr. Tate did believe the Petitioner should have restrictions on her work activities including a 50 pound restriction. (R.X.11, p.37-38) Dr. Tate did not feel that the need for the restriction was the result of a work injury. (R.X.11, p.38)

Dr. Tate admitted that she was not a surgeon and that her area of specialty involves the non-operative care of musculoskeletal **[*25]** conditions. (R.X.11, p.38) Dr. Tate admitted On cross examination that the Petitioner noted occipital headaches that began 6 months prior to November 16, 2006 which she believed corresponded to the Petitioner's first work accident of May 9, 2006. (R.X.11, p.39) Dr. Tate admitted that she appreciated tightness and tenderness in the upper trapezius muscles in her examination of the Petitioner's cervical spine both on January 31, 2007 and July 12, 2007. (R.X.11, p.40) Dr. Tate noted that side bending was reduced in her examination of the Petitioner's cervical spine on January 31, 2007 but not July 12, 2007. (R.N.11, p.40) Dr. Tate noted numerous negative findings on various physical examinations but admitted that many of the negative findings were for testing that had nothing to do with the Petitioner's cervical spine but in fact tested for thoracic outlet syndrome, impingement syndrome, cubital tunnel syndrome, carpal tunnel syndrome. (R.X.11, p.40) Dr. Tate admitted that the lack of positive findings on cubital, carpal and impingement testing confirmed merely that the Petitioner had no distal impingement, or impingement of the nerves or tendons in her shoulder. (R.X.11, p.41)

Dr. Tate **[*26]** admitted that it was her opinion that the Petitioner's left sacroiliac joint dysfunction was causally related to the November 6, 2006 injury and that her neck and back complaints were exacerbated by the May 2006 injury. (R.X.11, p.46) Dr. Tate acknowledged that, by the Petitioner's history, her condition with respect to the cervical and lumbar spine worsened after the work accidents of May 9, 2006 and November 6, 2006. (R.X.11, p.48) It was Dr. Tate's opinion that if surgery was to take place, a fusion would be more appropriate than a disc replacement. (R.X.11, p.48) However, as noted above D. Tate is not a surgeon and the Arbitrator places less weight on her opinion regarding the appropriateness of surgery.

The Arbitrator notes that the Respondent offered various pre-accident medical records. Respondent offered medical records from Memorial Medical Center dated October 27, 1999 in which the Petitioner felt a twinge in her low back which had become constant low back pain radiating from her left sacroiliac joint area down the lateral aspect of the left thigh to the knee. (R.X.1) A Carlinville Area Hospital record of January 1, 2003 documents the Petitioner complained of pain down her **[*27]** neck and left arm and it was sharp and felt numb. (R.X.3) The record also documents the Petitioner had pain and numbness in her left leg. (R.X.2) Petitioner was diagnosed with a cervical strain and Prescribed medication. Respondent also submitted the Petitioner's Midwest Rehabilitation records as R.X.7 documenting that the Petitioner cancelled some physical therapy appointments for various reasons including oversleeping, picking up her son from school, having epidural injections, and car problems.

Petitioner testified credibly and admitted that prior to her work accidents she had problems with her lower back and neck before. The medical records offered by the Respondent indicate the Petitioner did have prior complaints of neck pain, arm pain, back pain, and left leg pain. The Petitioner was able to carry out her work activities for the Respondent for eight months prior to her work accident of May 9, 2006. The records indicate that after the May 9, 2006 work accident the Petitioner received only very minor chiropractic care and returned to work performing all of her regular activities until November 6, 2006 at which time the symptoms in her neck and back increased to the point where **[*28]** she could no longer avoid medical care.

The Petitioner credibly testified that she had severe, stabbing pain in her left arm, into her neck and occasionally into her right arm since the accident. Petitioner testified that her back pain and leg pain were so severe that she could not stand and had to take Norco to relieve her pain. The Arbitrator discounts the opinions of Dr. Hertel since he did not have the benefit of any MRI studies and it was clear that the doctor and the Petitioner did not have a good relationship. The Arbitrator further notes that Dr. Sandra Tate, Respondent's examining physician, testified to a causal relationship between the Petitioner's low back pain as a result of the November 6, 2006 accident and an aggravation of the Petitioner's neck pain as a result of the May 9, 2006 accident.

Dr. Pencek testified credibly and the Arbitrator adopts Dr. Pencek's opinions on causation and specifically finds that the Petitioner's work accidents of May 9, 2006 and November 6, 2006 aggravated a pre-existing lumbar degenerative disc disease and caused or aggravated the Petitioner's cervical disc herniations at C4/5 and C5/6 and aggravated the Petitioner's degenerative cervical [*29] disc disease.

ATTACHMENT J

In support of the Arbitrator's findings on the issue of **(J) Were the medical services that were provided to the petitioner reasonable and necessary?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

The Arbitrator finds that the medical and chiropractic expenses submitted in Petitioner's Exhibit 11 were reasonable and necessary. The Arbitrator finds that the Petitioner did not exceed the chain of referral from two physicians. The Arbitrator notes that Petitioner's chiropractor advised her to seek her family physician for medications, and is in essence a referral to P.A. Sprinkle. P.A. Sprinkle referred the Petitioner to Dr. Hertel and Dr. Pencek. Dr. Pencek referred the Petitioner to Dr. Jung.

Petitioner testified that she continued to receive chiropractic care even after Dr. Pencek took over her care. Dr. Pencek testified that he was not an expert in chiropractic care but would not have referred the Petitioner for continued chiropractic care. Petitioner testified that the chiropractic care she received provided her with temporary relief from [*30] her pain. The Arbitrator finds that Petitioner's chiropractic care has not been excessive and has been reasonable and necessary treatment for pain relief from these injuries. All other medical treatment to Petitioner have been reasonable and necessary to treat the condition of ill-being herein established. The Arbitrator orders the Respondent to pay the unpaid medical and chiropractic expenses directly to the Petitioner as follows:

Calloway Chiropractic, 5/10/06-4/15/08	$ 3974.62
Dr. Terrence Pencek, 3/12/07-10/30/07	$ 90.00
Illinois Diagnostic Imaging, 1/19-1/26/07	$ 1100.00
Associated Anesthesiologists, 3/20-6/27/07	$ 3697.00
Memorial Medical Center, 6/27/07	$ 150.00
5/4/07	$ 2518.15
4/17/07	$ 2518.15
4/3/07	$ 2630.90
3/20/07	$ 2624.90
Memorial Medical Center 1/3/08	$ 2602.65
7/17-7/30/07	$ 1114.00
8/1-8/14/07	$ 992.00
TOTAL:	$ 24012.37

Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due.

ATTACHMENT [*31] K

In support of the Arbitrator's findings on the issue of **(K) What amount of compensation is due for Temporary Total Disability?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Respondent's Exhibit 13 establishes that the Petitioner was disabled from November 16, 2006 through May 20, 2007 at which time the Petitioner returned to work, working 20 hours per week. Respondent disputed that it was liable for any temporary total or **temporary partial** disability benefits for that period during which the Petitioner worked light duty at reduced hours for the Respondent. Petitioner and Respondent did stipulate and agree that if the Petitioner's claim is found compensable then she would be entitled to a total of $ 6,692.07 in **temporary partial** disability benefits from May 20, 2007 through February 23, 2008, at which time the Petitioner was terminated from her employment. From February 23, 2008 through the date of arbitration, the Petitioner claims entitlement to temporary total disability benefits and the Respondent denies liability for same.

The Petitioner has been on work restrictions [*32] since February 5, 2007 and, periodically, removed from work for appointments with her doctor. Petitioner has continued to be on light duty restrictions, according to her testimony and Dr. Calloway's records, and was on light duty when she was terminated by her employer on February 23, 2008. (P.X.2) There is some dispute as to whether the Petitioner's termination was due to. an unwillingness to accommodate her restrictions versus an economic lay-off

Petitioner's un-rebutted testimony was that the Respondent told her she was laid off because the Respondent had lost its contracts with the mines at which she was working at the time of her accident. Petitioner was working in Decatur for the Respondent when she was laid off and not at any of the mines. Petitioner's un-rebutted testimony was that the Respondent cleans numerous commercial and residential buildings. The Respondent is still operating its business and employs other individuals. This evidence was un-rebutted. The parties stipulated that as of the date of arbitration the Petitioner continues to be off work pursuant to the aforementioned light duty restrictions.

The Arbitrator finds that the Respondent has failed to prove that [*33] the Petitioner's termination was due to an economic lay-off and further finds that Petitioner was temporarily and totally disabled as a result of this accident from February 23, 2008 to August 5, 2008, the date of arbitration.

The Arbitrator notes the Petitioner testified that she worked for the Respondent part time and received a temporary wage differential. The Arbitrator finds the Petitioner was temporarily and partially incapacitated from her employment from May 20, 2007 through February 23, 2008 and the petitioner is entitled to the aforementioned stipulated **temporary partial** disability benefits totaling $ 6,692.07.

ATTACHMENT O

In support of the Arbitrator's findings on the issue of **(O). Prospective Medical**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Dr. Pencek testified that Petitioner is a candidate for an anterior cervical diskectomy at C5/6 with an implantation of an artificial disc. As the only surgeon to comment on the appropriateness of surgical care was Dr. Pencek, the Arbitrator adopts the opinions of Dr. Pencek on the issue of prospective medical [*34] care and the need for the anterior diskectomy and disc replacement surgery and orders the Respondent to authorize the same.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision affirming and adopting the Arbitrator's Decision finding that Petitioner's current condition of ill-being and need for neck surgery is causally related to her work accidents of May 9, 2006 and November 6, 2006. Given certain discrepancies between Petitioner's testimony and the actual medical records, as well as documented evidence of symptom magnification on multiple instances, I would have found Dr. Tate's opinions more credible than those of Dr. Pencek's and concluded that Petitioner reached maximum medical improvement as a result of both accidents on July 31, 2007, when re-examined by Dr. Tate. As a result I would have vacated the award of prospective surgery as recommended by Dr. Pencek, vacated the award of temporary total disability benefits in 2008, and vacated the award of any medical bills incurred after Dr. Tate's July 31, 2007, examination. Dr. Calloway's note of May 10, 2006 indicates that Petitioner had been seen one week earlier by Dr. Wahab for mid-back pain going into her left arm. [*35] Petitioner attempted to explain this earlier treatment but failed to introduce Dr. Wahab's records into evidence -- records which were clearly within her reach to obtain and which might have clarified exactly when and why Petitioner had treated with him. Instead, by their omission one may infer that they would not have supported her testimony and, thus, she apparently was undergoing some treatment to her mid-back and left arm a week before the accident at work. She initially put her medical care through her personal insurance and stopped treating when her personal insurance ended. That was May 26, 2006. She sought no further treatment. She filed no claim for benefits. She resumed full-time work. On November 6, 2006 Petitioner returned to Dr. Calloway complaining of shooting pain in her neck and the back of her right shoulder, going down her right arm. There were no low back complaints and no left arm complaints noted. On November 8, 2006 Dr. Calloway notes that Petitioner told her that she had left work two weeks earlier (sometime in late October) because of back pain and two weeks before that she had been given a back brace to wear at work (which, according to her testimony, she [*36] had requested). On November 10, 2006, Petitioner sought treatment for her low back complaints. The chronology and completeness of this history is important as Dr. Pencek's opinions were based upon the history Petitioner provided to him -- a history which was clearly incorrect and incomplete. Dr. Tate reviewed the records and the MRI. She examined Petitioner on two occasions. Her findings included symptom magnification. Her opinions were well-explained and based upon accurate information. For these reasons, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:35 PM EST

*2009 Ill. Wrk. Comp. LEXIS 944, **

09 IWCC 908

BENJAMIN MANLEY, PETITIONER, v. CATERPILLAR, RESPONDENT.

NO: 06WC40080

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MACON

2009 Ill. Wrk. Comp. LEXIS 944

September 10, 2009

CORE TERMS: doctor, pain, arbitrator, temporary, stimulator, symptoms, temporary total disability, partial disability, implant, rehab, leg, hip, causally, average weekly wage, disability benefits, reduction, injection, implanted, non-work, assigned, causal connection, fact stated, patient, steroid, nerve, root, permanent disability, permanent, modifies, returned to work

JUDGES: Nancy Lindsay; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by 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, § 19(k) and § 19(l) penalties, and § 16 attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, the Commission modifies the Decision of the Arbitrator in several respects.

The Commission modifies the Arbitrator's award of medical expenses by noting that those expenses relating to treatment rendered on or after February 1, 2006 are **[*2]** awarded subject to the medical fee schedule.

The Commission deletes the language at the bottom of page nine of the Decision ordering Respondent to pay temporary total disability benefits "until, at least, the Petitioner attains maximum medical improvement." This order is inconsistent with Section 19(b). Respondent is only liable for paying temporary total disability benefits through November 24, 2008, the date of hearing, as reflected on the second page of the Decision.

The Commission vacates the Arbitrator's award of **temporary partial** disability benefits from April 18, 2007 through January 18, 2008. The record contains conflicting evidence concerning Petitioner's work status during this period. The Decision correctly reflects that Petitioner was placed in a "rehab," or light duty, category at work in 2006 and that Petitioner remained in this category thereafter, with his hourly wage dropping to $ 11.75 per hour in early April 2007 (T. 49), but the Arbitrator was apparently unaware that Petitioner's treating physician, Dr. Furry, released Petitioner to unrestricted duty as of April 16, 2007. Dr. Furry continued to treat Petitioner after April 16, 2007 and in fact came to view him **[*3]** as a candidate for a spinal cord stimulator, but did not impose any work restrictions. It appears to the Commission that Respondent opted to keep Petitioner in the "rehab" category, despite Dr. Furry's full-duty release, based on safety considerations and the recommendations of its in-house physician. In the Commission's view, the award of **temporary partial** disability benefits is at odds with Dr. Furry's full-duty release.

The Commission also vacates the Arbitrator's award of penalties and fees. The Arbitrator viewed Respondent as acting in an objectively unreasonable manner in refusing to pay **temporary partial** disability benefits from April 18, 2007 through January 18, 2008 and in failing to pay temporary total disability benefits from January 19, 2008 through November 24, 2008, the date of hearing. The Commission views the evidence differently, noting Dr. Furry's full-duty release, Respondent's payment of group disability benefits, the examination findings and opinions of Dr. Graham and Stephen Rathnow's rather reluctant endorsement of a stimulator trial.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 434.00 per week for a period of **[*4]** 44-3/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of **temporary partial** disability benefits of $ 120.67 per week for 39-3/7 weeks from April 18, 2007 through January 18, 2008 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of § 19(k) penalties, § 19(l) penalties and § 16 attorney fees is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 153,800.66 for medical expenses under § 8(a) of the Act with those expenses relating to treatment rendered on or after February 1, 2006 awarded subject to the medical fee schedule. Respondent is entitled to credit for any amounts paid on the awarded bills by Respondent either directly or through a group policy that falls within the purview of Section 8(j) of the Act. To the extent that 8(j) credit exists, Respondent shall keep Petitioner [*5] safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments pursuant to Section 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $ 9,983.36 under § 8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

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

Bond for the removal [*6] of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: SEP 10 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Ruth White, arbitrator of the Commission, in the City of Decatur, on November 24, 2008. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for **Temporary Partial** Disability and Temporary Total Disability?
L. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On November 22, 2005, the respondent [*7] Caterpillar ***was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ 33,852.00; the average weekly wage was $ 651.00.

. At the time of injury, the petitioner was 43 years of age, ***married*** with 2 children under 18.

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

. To date, no compensation has been paid by the respondent. Respondent has paid group nonoccupational disability benefits in the amount of $ **9,983.36** for which Respondent is entitled to creditu pursuant to Section 8(j) of the Act.

ORDER

. The respondent shall pay the petitioner **Temporary Partial** Disability benefits of $ 120.67/week for 39 3/7 weeks, from April 18 2007 through January 18, 2008 and Temporary Total Disability benefits of $ 434.00 /week for 44 3/7 weeks, from January 19, 2008 through November 24, 2008, as provided [*8] In Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ 153,800.66 for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any amounts paid on the awarded bills by Respondent either directly or through a group policy that falls within the purview of Section 8(j) of the Act. To the extent that 8(j) credit exists, Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments pursuant to Section 8(j) of the Act.

. The respondent shall pay $ 7,028.18 in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ 9,420.00 in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ 3,289.64 in attorneys' fees, as provided in Section 16 of the Act.

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, **[*9]** or compensation for a permanent disability, if any.

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

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

Signature of arbitrator

January 22, 2009

Date

JAN 28 2009

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F) WHETHER PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

On November 22, 2005, the Petitioner, Benjamin Manley, was employed at the Respondent's Decatur facility assisting in the assembly of heavy equipment. He was then 43 years of age and had worked all his adult life with an ambulance service, as a pipefitter, with a trucking company, as a janitor, security, **[*10]** and as a foreman. He had taken and passed physical examinations for many of these positions, and on November 22, 2005, was totally pain free without any physical symptoms or restrictions.

The Petitioner described an injury to his mid-back in 1994 which caused him to miss 1 day of work, see the company doctor on only 1 occasion, and returned to work the day following the accident with no restrictions and no symptoms thereafter. The Petitioner did not file a work injury claim and had no back or other pain and symptoms as a result of this incident. On November 22, 2005, the Petitioner was completely free of back, hip or leg pain and symptoms and was able to fully perform his work duties.

On November 22, 2005, the Petitioner was using a mechanical hoist to move heavy steel plates, standing with his left hand on the hoist control box and his right hand steadying the load. He tripped over a pallet which had been left in his work area and fell, twisting his back, but did not fall to the ground. The Petitioner had immediate low back pain which had not been present before this incident. He continued working the 90 minute remaining on his shift and in the evening at home, took Ibuprofen and **[*11]** applied an ice pack for his low back pain. The Respondent does not dispute that the Petitioner suffered a work injury on November 22, 2005.

The Petitioner worked the following day, November 23, 2005, with low back pain and the presence of some left leg pain. He declined medical treatment at this time with the expectation that his symptoms would subside. He did not work the next day, November 24, 2005, Thanksgiving Day.

On November 25, 2005, the Petitioner requested a referral to the Respondent's Medical Department; however, the Medical Department was closed following Thanksgiving. He worked with his continuing low back and leg symptoms on November 25 and November 26. On November 28, 2005, he had a kidney stone which caused back pain but this problem immediately resolved.

On November 28, 2005, the Petitioner went to the Respondent's Medical Department to see the company doctor for his work related back and leg pain and symptoms. He was not able to see the company doctor, as requested, until December 22, 2005. The company doctor referred the Petitioner to DMH Corporate Health/SHORE where he was evaluated, received physical therapy, and given home exercises. The Petitioner was returned **[*12]** to his regular duties but worked with the low back and leg symptoms which had been present since his work accident on November 22, 2005. The Petitioner did not work during the period January 31, 2006, through June 29, 2006, due to a work problem, not related to his work injury.

In February 2006, the Petitioner sought medical treatment for his continuing symptoms at Doctors Family Practice, and coincidentally, was examined by the Respondent's company doctor, Doctor Fahey, who prescribed Ibuprofen and Flexeril for the Petitioner's symptoms. On March 9, 2006, the Petitioner saw his family physician, Doctor Scribner, for his back and leg pain described in his November 22, 2005, work injury and continuing low back pain which

radiates into his left hip (Petitioner's Exhibit 3, p 1). Doctor Scribner prescribed Ultram and ordered physical therapy and an MRI which was performed April 27, 2006, and showed anterior disc bulging at the L5-S1 spine level (Petitioner's Exhibit 4, p. 1). Doctor Scribner referred the Petitioner to the St. Mary's Hospital Pain Treatment Center, Doctors Furry and Fancher, for further evaluation and treatment.

The Petitioner first saw Doctor Fancher at the St. Mary's **[*13]** Hospital Pain Treatment Center on May 24, 2006, and gave an injury history that on November 22, 2005, he slipped twisting over a pallet and had onset of pain (Petitioner's Exhibit 6, p. 1; Petitioner's Exhibit 19 - Dr. Furry dep, p. 8). He then began a long series of both diagnostic and therapeutic treatment including:

06/05/06 - Lumbar epidural steroid injection

06/14/06 - Facet joint injections L4-5, L5-S1 on left, L5 nerve root block

06/27/06 - Medial branch blocks L4, L5, S1

07/26/06 - Radiofrequency L4-5, S1 (left)

01/22/07 - Transforaminal epidural steroid injections L5-S1

01/29/07 - L5-S1 Transforaminal steroid injections (identified pain generators as L5-S1 nerve root)

04/09/07 - Radiofrequency L4, 5, S1 (left)

06/04/07 - Transforaminal epidural steroid injections L4-5 (left)

09/21/07 - Radiofrequency L4, 5, S1 (left)

Doctor Furry testified that each of the procedures reduced the Petitioner's back and leg pain; however, symptoms always returned. Doctor Furry further testified that as a physician who specializes in pain management, his goal is long term reduction in pain and symptoms. While each procedure was effective, especially in reducing back pain, no long term benefit [*14] was obtained for the Petitioner. Doctor Furry's final diagnosis was low back pain coming from facet joints and radicular pain in the left leg (Petitioner's Exhibit 19 - Dr. Furry dep, p. 20).

On June 11, 2007, Doctor Furry recommended a neurostimulator spinal implant based upon the Petitioner's diagnostic studies and treatment which had only provided temporary relief of symptoms. Protocol requires that a patient undergo a psychological evaluation to determine if the patient is a good candidate for the stimulator implant. On September 19, 2007, the Petitioner was seen by Stephen Rathnow, a licensed clinical psychologist, who reported to Doctor Furry that "Despite depressive symptoms, there does not seem to be a reason to deny Mr. Manley a trial with the spinal cord stimulator" (Petitioner's Exhibit 18, pp. 9-10). Also, protocol requires a trial stimulator implant before a permanent stimulator is implanted.

In January 2008, Doctor Furry referred the Petitioner to Dr. Chu for a surgical consultation as a treatment option. Doctor Pencek, a neurosurgeon, also reviewed the Petitioner's case, and both Doctors Chu and Pencek recommended against surgery as treatment for the Petitioner.

Doctor [*15] Furry also reviewed an EMG performed December 19, 2006, by Doctor DevlescHoward and noted Doctor DevlescHoward's comment that the EMG testing showed subtle abnormalities which support a diagnosis of radicular pain and that Doctor DevlescHoward suspected a S1 nerve root distribution problem (Petitioner's Exhibit 19 - Doctor Furry dep, p. 21).

On February 14, 2007, at the Respondent's request, the Petitioner was examined by Dr. Oliver Dold, a neurosurgeon, and gave an injury history that on November 22, 2005, he was "picking up plates with hoist - caught foot and twisted - immediately felt low back pain" (Petitioner's Exhibit 9, p. 1). Doctor Dold opined that the Petitioner has chronic back and leg pain commencing with his November 22, 2005, injury (Petitioner's Exhibit 9, p. 9).

The Petitioner testified that on July 29, 2008, Doctor Furry implanted a trial stimulator and that he had a significant, 80 percent, reduction in his hip and leg pain which had been continuous since his November 22, 2005, accident. Therefore, with this good result, on August 27, 2008, Doctor Furry implanted a permanent neurostimulator.

The Petitioner testified that before the implant stimulator he had constant [*16] left hip and leg pain, even with no activity. After the stimulator was implanted, his left hip and leg pain was reduced by 80 percent, he had no pain when inactive, and only moderate pain with activity such as extended walking. Before the stimulator implant, he took Oxycontin twice daily and Darvocet once daily for pain; after the implant, he takes Oxycontin only once daily and no Darvocet. Before the implant, he could only walk a brief time 10-15 minutes, before the onset of severe hip and leg pain which was disabling; after the implant, he can walk 45-60 minutes and then only experience moderate pain and no leg pain.

Doctor Furry opined that the Petitioner's work injury on November 22, 2005, is the cause of the symptoms, pain and problems which he treated (Petitioner's Exhibit 19 - Dr. Furry dep, pp. 42-43).

The Petitioner submitted to an independent medical exam performed by Doctor Graham on September 4, 20077 Doctor Graham testified that the Petitioner's complaints of low back, hip and leg pain are symptoms of radicular pain caused by impingement of a nerve root. Also, that a twisting of below back Can cause injury to the low back, spine and surrounding tissues (Respondent's Exhibit [*17] 1 - Dr. Graham dep, p. 28). He further testified that procedures used by Doctors Furry and Fancher, not including the spinal stimulator implant, are recognized treatments which he uses in treating patients, that the results following the medial branch block on June 27, 2006, does indicate that the facet joints are pain generators (Respondent's Exhibit 1 - Dr. Graham dep, p. 39). However, he testified that whether a patient reports reduced pain following a procedure is not necessarily a valid test as to the effectiveness of the procedure. His explanation was not persuasive. (Respondent's Exhibit 1 - Dr. Graham dep, p. 44) He further testified that the fact that the implant stimulator caused relief of symptoms is "immaterial" (Respondent's Exhibit 1 - Dr. Graham dep, pp. 50, 52-53).

In formulating opinions that the Petitioner's condition of ill-being is not causally related to the November 22, 2005, work accident, Doctor Graham assumed inaccurate facts, including that the Petitioner had radiofrequency treatments on July 9, 2007, and repeated soon after on July 26, 2007 (Respondent's Exhibit 1 - Dr. Graham dep, p.20). In fact, the Petitioner had radiofrequency treatments on July 26, [*18] 2006, April 9, 2007, and September 21, 2007. He also stated that the Petitioner did not have a proper psychological evaluation in preparation for the stimulator implant by a psychiatrist or psychologist but only was evaluated by a social worker (Respondent's Exhibit 1 - Dr. Graham dep, p. 23). In fact, the Petitioner was evaluated for this procedure by a licensed clinical psychologist, Stephen Rathnow, who approved the stimulator implant procedure. The Arbitrator finds that Doctor Graham's opinion as to causal connection and the appropriateness of the spinal stimulator implant are not credible.

The Respondent does not dispute that the Petitioner suffered a work injury to his back on November 22, 2005, and in fact, the Petitioner's condition was regularly reviewed by the Respondent's Medical Department and doctor. Progress Notes documenting the Petitioner's attendance and evaluation at the Respondent's Medical Department from his first examination on December 22, 2005, following the accident were regularly sent to the Respondent's Worker's Compensation Department for review (Petitioner's Exhibit 25, pp. 9-15). The Progress Notes, at no time, indicate that the Petitioner's condition [*19] is not work related. From initial treatment on May 24, 2006, through treatment on June 18, 2007, all charges for treatment by Doctors Furry and Fancher at the St. Mary's Hospital Pain Treatment Center were paid as "Caterpillar Workers' Comp" (Petitioner's Exhibit 23, pp. 5-7).

The Petitioner received a letter from the Respondent dated July 1, 2007, indicating, for the first time, that the Petitioner's medical condition is not related to his November 22, 2005, injury (Petitioner's Exhibit 26). However, prior to July 1, 2007, the Petitioner had last been seen by the Respondent's doctor on February 7, 2007; there is no indication in this medical record on this date that the

Petitioner's condition is not work related. Doctor Graham's opinion on causal connection was not rendered until after the Independent Medical Exam on September 4, 2007. No other physician, including the Respondent's doctors, or any medical person has indicated that the Petitioner's condition is not work related.

The Petitioner was examined by Respondent's physician, Doctor Rothman, on July 9, 2007, in the Respondent's Medical Department. There is no indication in the record for this visit that the Petitioner's condition [*20] is not work related and the record was sent to the Respondent's Worker's Compensation Department, as usual. On that date, the Petitioner asked Doctor Ruthman why the Respondent was now considering his condition to be "non-work related"; the doctor responded that he had no idea why the Petitioner's condition was now being considered a non-work related injury.

The Respondent does not dispute that the Petitioner injured his back in a work accident on November 22, 2005, and paid for treatment of accidental injuries through June 2007. The Petitioner, in reports to his doctors and in testimony, gave a consistent history of his accident. The Respondent asserts that the Petitioner's written report of accident dated November 25, 2005, states he "stumbled" when his foot caught on a pallet causing lower back discomfort (Petitioner's Exhibit 24) and does not indicate he "twisted" his back. The Arbitrator finds that this is a "distinction without a difference" and is not inconsistent with the Petitioner's report of injury.

Doctor Furry credibly testified that the Petitioner's condition is related to his November 22, 2005, accident and injury. The Arbitrator finds that there is a causal connection [*21] between the Petitioner's undisputed work accident on November 22, 2005, and his condition and treatment as documented by testimony and reports received into evidence.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (G) WHAT WERE THE PETITIONER EARNINGS, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The findings of fact stated above are adopted and incorporated by reference here.

Petitioner testified that the hourly rate of pay was $ 15.00 per hour. He further testified that he worked overtime in the 52 weeks preceding the injury and that the overtime was not mandatory. The average weekly wage is $ 651.00 based upon the Respondent's wage records (Rx. 2).

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J) WHETHER MEDICAL SERVICES THAT WERE PROVIDED TO THE PETITIONER WERE REASONABLE AND NECESSARY, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The findings of fact stated above are adopted and incorporated by reference here.

The parties have stipulated that on November 22, 2005, the Petitioner sustained a work injury to his back, and the Arbitrator has found that the Petitioner's condition of ill-being as documented by his testimony and medical reports received into evidence [*22] is causally related to his accidental injuries on that date.

The Arbitrator finds that the treatment which the Petitioner has received for his work injuries is reasonable and necessary and further finds that the bills for said treatment totaling $ 153,800.66, as shown on Petitioner's Exhibit 23, shall be paid by the Respondent, a list of said bills attached to the Request for Hearing (Arbitrator's Exhibit 1).

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY PARTIAL DISABILITY AND TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The findings of fact stated above are adopted and incorporated by reference here.

The Respondent agrees that the Petitioner sustained an accidental work injury to his back on November 22, 2005. The Respondent accepted the Petitioner's condition resulting from his work accident as work related until July 1, 2007. The Arbitrator has found that the Petitioner's condition and treatment are causally related to his work accident on November 22, 2005.

The Petitioner worked without physician imposed restrictions from date of accident, November 22, 2005, until January 31, 2006. During the [*23] period January 31, 2006, through June 29, 2006, the Petitioner did not work due to a problem, not related to his work injury. When he returned to work on June 30, 2006, his family physician, Dr. Kenneth Scribner, imposed work restrictions duet) the Petitioner's work related condition. At the Respondent's request and on a Respondent medical restriction form, Dr. Scribner ordered no overtime work, no lifting over 20 pounds, no bending over 30 [degrees], no standing over 4 hours, no climbing 3 or more stairs, no reaching more than 10 times per hour and no jarring of back or body. These restrictions were transmitted to the Respondent and are a part of the Respondent's medical record for the Petitioner (Petitioner's Exhibit 25). The Respondent did not dispute Doctor Scribner's work restrictions and now does not dispute that the restrictions were reasonable and necessary. In fact, the Petitioner was examined on frequent occasions by Respondent's doctors who also imposed work restrictions as included in Respondent's medical record for the Petitioner (Petitioner's Exhibit 25).

When the Petitioner returned to work, he was assigned to "rehab" because of his work restrictions and performed very [*24] few duties. The Petitioner was paid his regular wage during his initial period in "rehab," but on April 18, 2007, his hourly wage was reduced to $ 11.75/hour because he continued to be assigned to "rehab" due to his work restrictions. The Respondent does not dispute that on April 18, 2007, the Petitioner's hourly wage was reduced to $ 11.75/hour. The Respondent agrees that the Petitioner's average weekly wage is $ 651.00.

The Petitioner continued to work in "rehab" until January 18, 2008, when he was advised by the Respondent that his time allotment in "rehab" had expired and that he could not return to work for the Respondent until his work restrictions had been eliminated. The Respondent does not dispute that the Petitioner was barred in such way from active work with the Respondent. The Petitioner has received non-work related disability benefits from the Respondent totaling $ 9,983.36 since January 18, 2008.

The Petitioner is due **temporary partial** disability benefits for the 39 3/7 week period, April 18, 2007 - January 18, 2008, when the Petitioner worked in "rehab" with a reduced wage. **Temporary partial** disability benefits due the Petitioner are calculated as follows:

Regular [*25] Wage:

$ 651.00/wk (AWW) x 39 3/7 wks = $ 25,668.00

Rehab Wage:
$ 11.75/hr x 40 hrs/wk x 39 3/7 wks = 18,531.43

Difference: $ 7,136.57

Temporary Partial Disability Due:
$ 7,136.57 x 2/3 =$ 4,757.71

The Respondent terminated the Petitioner's active employment on January 18, 2008, and he has not received any temporary total disability benefits for the period January 19, 2008 - November 24, 2008 (the date of arbitration hearing), a total of 44 3/7 weeks. The Petitioner's average weekly wage is $ 651.00. Temporary total disability benefits due to the Petitioner for said period are calculated as follows:

$ 651.00/wk x 2/3 x 44 3/7 wks = $ 19,282.00

In summary, the Arbitrator finds the Petitioner is due benefits as follows:

Temporary Partial Disability: $ 4,757.71
Temporary Total Disability: $ 19,282.00

$ 24,039.71

The Respondent is entitled to an 8(j) credit for $ 9,983.36 in disability benefits paid. After said credit, the Arbitrator awards **temporary partial** disability and temporary total disability to the Petitioner in the amount of $ 14,056.35.

On August 27, 2008, Doctor Furry implanted a stimulator in the Petitioner's spine, and the Petitioner's work restrictions continue; the Respondent **[*26]** prevents the Petitioner from returning to work with these restrictions. The Respondent shall pay temporary total disability benefits to the Petitioner at the rate of $ 434.00 per week until, at least, the Petitioner attains maximum medical improvement.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L) WHETHER PENALTIES OR FEES SHOULD BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The findings of fact stated above are adopted and incorporated by reference here.

The Petitioner filed a Petition for Penalties under Sections 19(l), 19(k) and for an award of Section 16 Attorney Fees alleging that the Respondent failed to pay **temporary partial** disability and temporary total disability to the Petitioner.

The Respondent does not dispute that the Petitioner sustained a work injury to his back on November 22, 2005, nor does the Respondent dispute that the Petitioner's physician-imposed work restrictions caused the Petitioner to be assigned to "rehab" with a pay reduction, or that the Petitioner's active employment with the Respondent was terminated on January 18, 2008. The Arbitrator has found that the Petitioner's condition requiring work restrictions is **[*27]** causally related to his November 22, 2005, work accident.

On April 18, 2007, while the Petitioner was assigned to "rehab," the Respondent agrees that his average weekly wage, $ 651.00, was reduced to $ 470.00/week ($ 11.75/hr x 49 hrs). On July 20, 2007, the Petitioner's counsel made a demand upon the Respondent to pay **temporary partial** disability benefits to the Petitioner (Petitioner's Exhibit 27, p. 1). The Respondent refused to pay any such benefits, even though the Respondent had paid the Petitioner's treatment bills as work related until June 2007.

The Respondent accepted the Petitioner's condition and treatment as related to his November 22, 2005, work injury until June 2007. The Arbitrator also notes that no medical evidence or opinion existed in June 2007 or on July 1, 2007, when the "denial" letter (Plaintiff's Exhibit 26) was sent by the Respondent to the Petitioner that the Petitioner's condition was not work related. The Respondent's own records from its Medical Department continuously refer to "workers compensation," and on July 9, 2007, Respondent's physician, Dr. Ruthman, stated to the Petitioner that he had no idea why the Respondent was now considering his condition **[*28]** to be non-work related.

The Respondent's July 1, 2007, letter to the Petitioner did not explain or state any evidence as to the reason his condition is now being treated as non-work related. It was not until September 2007 when Doctor Graham performed an IME that the Respondent obtained any opinion that the Petitioner's condition is not work related. The Arbitrator has found that Doctor Graham's opinions on causation are not credible.

The Respondent terminated the Petitioner's "rehab" assignment and all active employment on January 18, 2008, stating that he would not be allowed to return to work until his physical restrictions were removed; this is not disputed by the Respondent. All work restrictions arose due to the Petitioner's November 22, 2005, work injury. The Respondent has refused to pay TTD benefits to the Petitioner; TTD due to the Petitioner for the period January 19, 2008 - November 24, 2008 (the date of arbitration hearing) is $ 19,282.00. The Petitioner has only received the Respondent's group disability benefits available to any employee during periods of disability.

The Arbitrator has found that the Respondent owes the Petitioner **temporary partial** disability benefits **[*29]** and temporary total disability benefits, after 8(j) credit, in the total amount of $ 14,056.35. The Arbitrator finds that the Respondent's failure to pay such benefits to the Petitioner is unreasonable.

The Supreme Court has established a test of "objective reasonableness" to determine whether 19(k) Penalties should be awarded. In Board of Education of the City of Chicago vs. Industrial Commission, 93 Ill.2d.1 (442 N.E.2d861, 66 Ill.Dec.300) I982), the Court stated, "Thus, it is not good enough to merely assert honest belief that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts, which a reasonable person in the employer's position

would have, would justify it." 66 Ill.Dec. at p. 304.

The burden of proving the reasonableness of its conduct is upon the Respondent. When a delay has occurred in the payment of Workers' Compensation benefits, the employer has the burden of justifying the delay. City of Chicago vs. Industrial Commission, 63 Ill.2d.99, (345 N.E.2d477) 1976).

Penalties under 19(k) are awarded to the Petitioner in the amount of $ 7,028.18 being 50% of the **[*30]** benefits payable as of November 24, 2008.

On July 20, 2007, the Petitioner made a written demand upon the Respondent for payment of **temporary partial** disability following the Petitioner's pay reduction on April 18, 2007 (Petitioner's Exhibit 27, p. 1). The Respondent did not explain the reason for the non-payment of benefits and only made the conclusory written statement to Petitioner on July 1, 2007, that his injuries were now considered not work related (Petitioner's Exhibit 26). This conclusion was made without any supporting medical basis or opinion and after the Respondent had treated the Petitioner's condition as work related for 19 months. The Respondent has failed to pay compensation to the Petitioner for the periods April 18, 2007 - January 18, 2008 (**temporary partial** disability) and January 19, 2008 - November 24, 2008 (temporary total disability), a total of 314 days. The Arbitrator awards the Petitioner penalties under 19(l) in the amount of $ 9,420.00 being $ 30.00 per day x 314 days.

Pursuant to Section 16, the Arbitrator awards attorneys' fees to the Petitioner in the amount of $ 3,289.64 being 20% of the penalties awarded herein.

CONCURBY: MOLLY C. MASON

DISSENTBY: MOLLY C. MASON

DISSENT: PARTIAL **[*31]** CONCURRENCE AND DISSENT

I disagree with the majority's decision to vacate the Arbitrator's award of **temporary partial** disability benefits. While it is true that Dr. Furry released Petitioner to full duty as of April 16, 2007, he did not release Petitioner from treatment. By June of 2007, he was recommending a spinal cord stimulator. Once Dr. Furry made this recommendation, Petitioner could have claimed temporary total disability, since his medical condition was no longer stable (Freeman United Coal Mining Company v. Industrial Commission, 318 Ill.App.3d 170, 175 (5th Dist.2000)), but he continued working, having been assigned to light "rehab" duty by Respondent. After Respondent learned of the recommendation, it reacted by reducing Petitioner's wages. Contrary to the assertions made by Respondent in its Statement of Exceptions and at oral arguments, Petitioner filed a grievance concerning this reduction. T. 52. Respondent continued to pay Petitioner at a lower rate until January 18, 2008, when Petitioner was told that the only "rehab" job available was one that exceeded restrictions imposed by Respondent's own physician. T. 63-64. Respondent had reasons, **[*32]** and probably good ones, for limiting Petitioner's duties but should not have also limited his earnings.

I respectfully dissent.

Legal Topics:

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:36 PM EST

09 IWCC 1012

*2009 Ill. Wrk. Comp. LEXIS 1176, **

GIOVANNA DIPASQUALE, PETITIONER, v. J.C. PENNEY, RESPONDENT,

NO: 07WC36440

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

2009 Ill. Wrk. Comp. LEXIS 1176

October 7, 2009

CORE TERMS: pain, cervical, shoulder, elbow, arbitrator, syndrome, right shoulder, medication, lbs, temporary, sensation, chronic, rotator, cuff, jewelry, therapy, symptoms, surgery, muscle, nerve, tear, arm, partial disability, degenerative, diagnosis, diagnoses, pulling, radial, doctor, finger

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 7, 2009 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written **[*2]** request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 2,700.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 7 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **J. Kinnaman**, arbitrator of the Commission, in the city of **Geneva, [*3] IL**, on **March 13, 2009** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
N. Other **TPD, future medical**

FINDINGS

. On **March 6, 2007**, the respondent **J.C.Penney** ***was*** operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident ***did*** given to the respondent.
. In the year preceding the injury, the petitioner earned $ **37,454.04**; the average weekly wage was $ **720.27**.
. At the time of injury, the petitioner was **43** years of age, ***married*** with **1** children under 18.
. Necessary medical services ***have not*** been provided by the respondent.
. To date, $ **16,326.12** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay **[*4]** the petitioner temporary total disability benefits of $ **480.18** /week for **34** weeks, from **3/7/07** through **10/30/07**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **3,584.32** for medical services, as provided in Section 8(a) of the Act.

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

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

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

Respondent shall pay the petitioner temporary partial disability benefits of $ 348.35/week for 17-3/7 weeks from 6/1/08 through 9/30/08 as provided in Section 8(a) of the Act Respondent has paid $ 7,148.59 in TPD benefits for the period [*5] from 2/10/08 through 5/31/08.

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

April 3, 2009

Date

APR 7 2009

On March 6, 2007 Petitioner slipped on ice and fell on her right side as she was on her way to work. She had pain in her entire right upper body. She has been a fine jewelry salesperson for more than five years. Accident is not in dispute.

She went to Good Shepherd Hospital after work that same day. There she reported falling on her right elbow and the gradual onset of severe shoulder pain. The pain extended down to her wrist. X-rays of the right elbow were negative for a fracture or dislocation. Vicodin **[*6]** and five days rest were prescribed. PX1.

Petitioner saw Dr. Stamelos on March 7, 2007. His office note of that date does not include any exam findings. He diagnosed pain with internal derangement and prescribed injection therapy, medication and no work. On March 19, 2007 he wrote she had an AC separation, right arm pain and the low back was tight. An MRI was done March 22, 2007. It showed a full thickness tear of the supraspinatus tendon with mild retraction of the muscle and a possible tear of the superior horn of the glenoid labrum and mild capsular hypertrophy of the acromioclavicular joint. On April 9, 2007 Dr. Stamelos wrote that petitioner needed a rotator cuff repair. His impression was adhesive capsulitis, bursitis, tendonitis, impingement syndrome and rotator cuff tear of the shoulder. On April 23, 2007, the doctor thought Petitioner might be depresses. She also needed surgery for a full thickness rotator cuff tear. PX3.

Petitioner saw Dr. Freedberg on May 31, 2007. He noted a referral from Dr. Radice who had been overseeing her therapy. Based on his examination findings and the MRI, Freedberg diagnosed traumatic right rotator cuff tear and healed right radial head fracture. **[*7]** On June 29, 2007, he did arthroscopic surgery of the right shoulder, debriding the labrum, repairing the rotator cuff, resecting the distal clavicle and performing an anterior acromioplasty with insertion of platelet gel concentrate. She was doing very well with minimal complaints when she saw Dr. Freedberg on July 5, 2007. On Aug. 2, 2007, Dr. Freedberg wrote that Petitioner had been trying to do exercises. She stated she felt muscles pulling, that her hands were stiff and she was unable to make a fist and that her sutures were sticking out of the portal. "This young lady is the patient that continues to verbalize without listening." Her exam was "pitiful". She had almost no motion of the shoulder but argues that the motion was okay. He started therapy immediately, ordered and ERMI device and showed her a home exercise program. He demonstrated the Codman's exercises but concluded: "There is no question that we have been run into big trouble if she does not work hard and do everything that has been asked of her. I truly lit a fire under her today. She understands there is an impending disaster if she continues this course." PX2.

Petitioner testified she became displeased with Dr. **[*8]** Freedberg and returned to Dr. Stamelos. On Aug. 13, 2007, his diagnoses were adhesive capsulitis, bursitis, tendonitis and impingement syndrome of the shoulder. An EMG/NCV was done Aug. 22, 2007 by Dr. Naveed but did not indicate any clearcut evidence of mononeuropathy or cervical plexopathy. A right shoulder MRI at Bloomingdale Open MRI on Aug. 23, 2007 showed free fluid in the subacromial subdeltoid bursa and thinning and irregularity of the supraspinatus tendon suspicious for retear. There were also degenerative changes of the acromioclavicular joint and a thickened coracohumeral ligament which appeared to be a new finding. A cervical MRI the same day showed cervical spondylosis and a small right sided disc herniation at C5/6. On Sept. 10, 2007, Dr. Stamelos noted Petitioner's differences with Dr. Freedberg he thought she was about 60% better and that PT was helping. He gave her an injection that day. On Oct. 1, 2007 he wrote that she had a C5/6 herniation on the right in addition to her right shoulder pain. She complained PT was not helping. He referred her to Dr. Pupillo, a

neurosurgeon. A cervical MRI on Oct. 9, 2007 showed disc bulges and degenerative changes at C3/4, C4/5 [*9] and C5/6. On Oct. 15, 2007, Dr. Stamelos compared the two cervical MRIs, opining there was a possible worsening of her condition. There was a herniated disc at C5/6 that was caused by the accident of March 6, 2007 "but it has been progressing and becoming more symptomatic after the shoulder surgery." He thought PT could possibly help the C-spine. The shoulder was better, but very weak. She was given an injection. Petitioner saw Dr. Pupillo on Oct. 23, 2007. He reviewed her history, noting she was in an abduction brace for about five weeks after her surgery. When she came out of the brace and underwent PT she developed a pain syndrome with burning dysesthesia along the right deltopectoral area and clavicle and a chronic pain and pulling sensation in the arm when she tried to move. He thought the MRIs showed degenerative disc disease which was chronic and not acute. On exam her cervical range of motion was normal. There was no tenderness over the ulnar groove, no Tinel's sign, no dysarthria, good facial nerve function. She had hyperpathic sensation to light touch and pin-like sensation in the right finger in the right pectoral, deltoid and clavicular areas. There was slight hyperpathic [*10] sensation on the right index finger. Muscle strength and reflexes in the extremities were symmetric. Dr. Pupillo's diagnosis was complex regional pain syndrome. He did not believe Petitioner's pain was from her chronic cervical disc problem. He recommended a stellate ganglion block. On Oct. 29, 2007, Dr. Stamelos added cervical syndrome to his diagnoses. He noted her complaints started after her surgery. He released her to work light duty, not to exceed 5 lbs. lifting, pushing or pulling and no work with the right hand or arm at all. He continued these restrictions on Nov. 19, 2007 but also restricted Petitioner to 5 hours of work every other day. He also referred her to Dr. Diesfield for evaluation of RSD. On Dec. 3, 2007, Dr. Stamelos wrote that Petitioner's condition had plateaued. He again restricted her from working more than 5 hrs. every other day. He also wrote prescription for more therapy, an EEG and MRIs of both the brain and C-spine. PX3.

Petitioner saw Dr. Diesfield on Dec. 12, 2007. He noted that her pain was constant and associated with weakness. On examination there was guarding of the right shoulder, tenderness to palpation in the supraclavicular region at the brachial [*11] plexus, allodynia and dysesthesia of the arthroscopic scars, decreased right hand grip and incomplete flexion of the fingers. There was decreased range of motion of the right shoulder and cervical spin. His impression was post surgical deconditiong and neuralgia of the right shoulder with scar neuralgia, supraclavicular brachial plexopathy and C3-4-5-6 herniated discs. He administered a peripheral nerve scar neuralgia infiltration and supraclavicular brachial plexus block. He thought "a large factor in her complex pain syndrome is coming from the 3 herniated cervical discs" and that it likely occurred at the time of her fall but was masked by her shoulder pain and elbow fracture. She was given pain medication. An EMG/NCV was done and showed hypocsthetic dysfunction at the right C2,C3 and C6 nerves with hyperesthesia of the left C7 radial nerve and bilateral C8 ulnar nerve. In a letter dated Jan. 23, 2008, Dr. Diesfield wrote the EMG/NCV was necessary to formulate a diagnosis and treatment plan. PX5.

Petitioner continued to see Dr. Stamelos in 2008. The restrictions on her working hours continued. Her diagnoses varied and included: whiplash (1/2/08), reflex sympathetic dystrophy (RSD) [*12] (1/16/08), lateral epicondylitis and medial elbow pain (2/18/08). On March 3, 2008, Dr. Stamelos wrote that "working causes anxiety, pain, and inability to function." She seemed to have RSD and a severe inappropriate pain syndrome. But "she is markedly improved" despite "very little support and cooperation by the insurance carrier for the work-related injury." PX4.

Petitioner saw Dr. Carroll at Respondent's request on May 16, 2008. His report indicates he reviewed 429 pages of records. On examination he found no obvious RSD. There was full range of motion in the cervical spine with no tenderness or radiculitis. The left shoulder was normal. She had 90 degrees of forward flexion and abduction on the right. The impingement sign was positive. There was discomfort to palpation. In the elbow, there was full range of motion with some discomfort and possible inflammation around the olecranon on the radial side. He made no findings regarding the right forearm, wrist, hand or fingers. Neurologic testing revealed no radial, median or ulnar nerve compression. Sensation was intact in each hand. There was no atrophy in the muscles of the upper extremity. Muscle function of both hands was intact. [*13] Grip strength was 40 lbs. on the right and 30 lbs. on the left. He reviewed her elbow x-rays and concluded the right elbow injury had healed. He thought she had an injury to her right rotator cuff injury causally related to her accident on March 6, 2007. Her treatment had been timely, reasonable and necessary and related to the accident. She has residual chronic pain. Medication was appropriate as was home therapy. He was concerned that further surgery to the shoulder might have greater risks than benefits. He thought she could work light duty lifting no more than 5 lbs. to the chest level or above and 5 to 10 lbs. to the waist. He suggested an FCE and thought she would then be at MMI after that evaluation. RX1.

Dr. Stamelos continued to see Petitioner, continuing her restrictions, noting she had RSD. On June 23, 2008 he noted that she was going to stop taking hydrocodone and start ibuprofen and on Aug. 18, 2008 he wrote that he would reduce her medication and detox her. However, in his Dec. 15, 2008 note, Dr. Stamelos wrote that Petitioner had a permanent condition and needed medication. As of Jan. 21, 2009 Dr. Stamelos was prescribing Hydrocodone, Ranitidine (Zantac), Zolpidem [*14] (Ambien), Amitriptoline and Lyrica. PX4.

An FCE was done on Sept. 30, 2008 and showed Petitioner could lift in the light physical demand category, 20 lbs. occasionally, and that aerobic capacity testing was consistent with medium work for 8 hrs. RX2.

Respondent had Petitioner examined by Dr. Konowitz on March 4, 2009. On examination her neck was supple and not tender. Cervical range of motion produced some trapezius tightness on the right. The extremities were without tactile allodynia, pitting edema, or signs of chronic stasis dermatitis. Palpation of the clavicle produced radiation into the arm. Alcohol sensation was slightly less on the right extremity. Shoulder range of motion was nearly full. Elbow and wrist range of motion was normal. Reflexes were + 1 and symmetric. Dr. Konowitz' diagnosis was shoulder injury with subsequent repair and postoperative frozen shoulder. She had a mild brachioplexopathy which the doctor opined was consistent with a fall and subsequent trauma. She also had cervical degenerative disc disease that was not causing her arm symptoms. Her cervical symptoms were resolving. He recommended treatment with Cymbalta and Trileptal and the discontinuation of [*15] Lyrica. He thought she could increase her working hours once Cymbalta and Trileptal were initiated and that eventually she should be able to work 40 hours a week. He found no clinical indication of RSD. RX3.

Petitioner has been working part time since June 1, 2008. She has averaged 15 hours a week, but sometimes it's 8 hours and sometimes it's 9 hours. On March 6, 2007, the accident date, she was paid $ 10.25 per hour plus commission. When she became a part time employee her hourly rate was $ 8.00 plus commission. Her commission was reduced from 5% when she was full time to 1.5% as a part time employee. Full time employees take turns opening and closing the store which involves putting jewelry out in cases in the morning and pulling them back at night. The jewelry goes into cases and the eases go into bins which may weight 20 to 30 lbs. You need both hands to do that job. PX9 includes copies of her pay checks. The check of June 20, 2008 shows her regular hourly rate and the various commission payments she earned, including a commission for opening credit card accounts and for installing watch batteries. On cross-examination Petitioner testified that Respondent always accommodated [*16] Dr. Stamelos' restrictions on the hours she worked of 5 hours a day, 3 days a week.

Leslie Powers is the fine jewelry supervisor for Respondent. She sets schedules, sets goals, does selling and supervises the area.

Petitioner reports to her. A full time employee works 35 hours. She now works 15 hours a week every other day, Tuesday, Thursday and Saturday. She has hours available to schedule Petitioner as a full time employee. There hasn't been a reduction in employee hours. Jewelry associates work on Sunday but Petitioner has requested not to for personal reasons. On cross examination, Powers testified Petitioner asked not to work Sundays before her accident. She was accommodated because Petitioner was her best salesperson. Petitioner hasn't been scheduled for 35 hours a week due to her doctor's notes.

Petitioner notices it's hard for her to have her right arm in a fixed position for long. It locks up and hurts from the neck down. It's the elbow that locks. The fingers swell. She also has pain in the left arm, but not the shoulder. She feels pain in her neck. If she turns to the right, the pain shoots. She takes Lyrica twice a day, Vicodin for pain and amitriptoline. She testified **[*17]** she wanted to have the three MRIs prescribed by Dr. Stamelos.

Petitioner offered the following medical bills: $ 1,469.92, Dr. Stamelos (PX6); $ 1,746.70, Pain Management Center (PX7); $ 367.70, Dr. Pupillo (PX10), a total of $ 3,584.32. The amounts claimed are consistent with the medical fee schedule, sec. 8.2 of the Act. Respondent's only dispute was to liability.

The Arbitrator concludes:

1. Petitioner's right shoulder condition is causally connected to her undisputed accident of March 6, 2007. This is based on her credible testimony about the onset of her symptoms in the hours following the fall, the records of Good Shepherd Hospital and Dr. Freedberg and the causal connection opinions of Dr. Carroll and Dr. Konowitz. Dr. Pupillo agreed Petitioner's symptoms were due to her cervical condition. Dr. Stamelos' diagnoses varied from appointment to appointment and were rarely supported by any examination findings; his opinions are not credible. Based on the findings documented in all the doctors' records, Petitioner developed a chronic pain syndrome related to her injury. However, the opinion of Dr. Konowitz that the findings do not support a diagnosis of RSD/CRPS is more credible **[*18]** than the opinions of Drs. Diesfield and Pupillo. Her condition reached permanency on Sept. 30, 2008 when the FCE, established she could perform light duty work. Dr. Stamelos' records show her condition had stabilized and Dr. Carroll opined she would be at MMI following the FCE.
2. Petitioner is entitled to **temporary partial** disability benefits of $ 348.34 for the period from June 1, 2008 through Septa 30, 2008, a period of 17-3/7 weeks when her condition became permanent. The parties agreed she was entitled to TTD from March 7, 2007 through Oct. 30, 2007. In addition, Respondent paid **temporary partial** disability benefits from Feb. 20, 2008 through May 31, 2008. Petitioner sought TPD benefits from June 1, 2008 through Feb. 21, 2009. It is not clear why Respondent paid TPD only through May 31, 2008 since Dr. Carroll said he expected her to come to MMI after the FCE. The significance of Feb. 21, 2009 is even less clear. The TPD benefit is calculated as follows: $ 3,655.81 (gross earnings 6/1/08 through 9/20/08) - $ 491.80 (taxes withheld 6/1/08 through 9/20/08) = $ 3,164.01/16 weeks (6/1/08 through 9/20/08) - $ 197.75. $ 720.27 (AWW pre-accident, ARBX1) - $ 197.75= $ 522.52 x 2/3= $ **[*19]** 348.35.
3. Petitioner is entitled to reimbursement for medical expenses of $ 3,584.32 for the bills of Dr. Stamelos, Dr. Pupillo and the Pain Management Center pursuant to sec. 8(a) and 8.2 of the Act. This is based on Dr. Carroll's opinion that all of Petitioner's medical treatment to the date of his exam, May 16, 2008, had been reasonable and necessary.
4. Petitioner failed to prove she is entitled to any specific future medical care. There is no prescription for three MRIs by Dr. Stamelos. However, she takes a number of prescription medications and Dr. Konowitz thought she needed continued, though different, medications related to her residual pain symptoms.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:34 PM EST

09 IWCC 1054

*2009 Ill. Wrk. Comp. LEXIS 1029, **

CONNIE ZAREMBSKI, PETITIONER, v. TCF BANK, RESPONDENT.

NO: 08 WC 03840

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

2009 Ill. Wrk. Comp. LEXIS 1029

October 19, 2009

CORE TERMS: arbitrator, collection, temporary total disability, temporary, medical care, return to work, doctor, partial disability, effective, medication, therapy, modifies, lending, appointment, spreadsheet, co-worker, permanent disability, notice, supplemental report, leave of absence, ability to work, written request, door to door, conversation, occupational, performing, scheduled, partaking, disorder, coming

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, and prospective medical care, and being advised of the facts and law, modifies, clarifies, and 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

After considering the entire record, and viewing the video (RX5), the Commission modifies the award of temporary total disability benefits. In the order section of the Decision, the Arbitrator ordered temporary total disability benefits for 11 1/7 weeks (from November 1, 2007 through November 17, 2007 and from February **[*2]** 27, 2008 through April 27, 2008). The Arbitrator also awarded Petitioner **temporary partial** disability benefits from November 18, 2007 through February 26, 2008.

With regard to the period of temporary total disability awarded from February 27, 2008 through April 27, 2008, the Arbitrator found that the period of temporary total disability began when Dr. Geiger (Petitioner's treating doctor) suggested a three month leave of absence. However, the evidence showed that Dr. Geiger took Petitioner off work beginning March 6, 2008, not February 27, 2008. This is also consistent with Petitioner's testimony that Dr. Geiger took her off again in March. (PX1, T.24) The Commission modifies the award of temporary total disability so that it begins on March 6, 2008.

The Arbitrator awarded Petitioner temporary total disability benefits through April 27, 2008 based upon Dr. Hartman's (Respondent's Section 12 examiner) opinion that as of March 18, 2008, Petitioner was capable of full-time work without any direct client contact dealing with collection work. Petitioner was asked to return to work and did so on April 28, 2008. She worked only three days that week. The Arbitrator found that Petitioner did **[*3]** not engage in collection calls and was not asked to leave the office. Petitioner testified that there was nothing she was asked to do that was contrary to the restrictions given by Dr. Hartman. Despite that, Petitioner simply stopped coming to work as of May 1, 2008 and was subsequently terminated.

The Arbitrator further found that Dr. Stillings (Petitioner's Section 12 examiner) opined on May 15, 2008 that Petitioner could continue working full duty without any direct client contact. The doctor believed Petitioner was properly restricted from making or partaking in any collection calls, and door to door calls in the community. The Arbitrator noted Dr. Stillings' supplemental report suggesting that Petitioner be restricted from any direct client contact within the bank or outside of the bank for the purpose of collections or any other occupational function. The Arbitrator placed little significance on the report in light of the fact that the doctor did not see Petitioner again; did not review additional medical records; and wrote the report at the request of Petitioner's attorney. The Arbitrator noted further that Petitioner was never asked to have any direct client contact; and that **[*4]** Petitioner remained in the office, and prepared a spreadsheet. The Arbitrator noted there was no dispute that Petitioner could return to work per the opinions of Dr. Hartman and Dr. Stillings and that both doctors suggested a return to work would speed up her recovery. The Arbitrator concluded that there was nothing about the job offered by Respondent on April 28, 2008 that was inconsistent with the opinion of Dr. Stillings or Dr. Hartman.

Petitioner offered no documentation to show she looked for employment. She simply testified she looked at a website. The Arbitrator concluded that Petitioner did not sustain her burden of proving she was unable to work.

The Commission views the evidence differently and extends the period of temporary total disability after her termination from the bank through May 15, 2008. The evidence shows that on April 22, 2008, Respondent sent Petitioner a letter offering her a job in her

previous position as a Branch Lending Manager, with accommodations for her restrictions. (RX4) Petitioner returned to work and the job provided was in stark contrast to what she was offered. Petitioner testified that she worked eight hours on April 28, 2008. She went to her [*5] office and called Chad Loucks, her direct supervisor, to ask him what to do. He did not return her call. She sat in her office all day and could hear others talking about collections. (T.28,29) The next day, Petitioner went to work and called Chad Loucks again. He did not return her call, and again Petitioner sat in her office all day long, listening to conversations regarding collections. (T.30,31) On the third day, Petitioner went to work and finally spoke to Mr. Loucks. He said he did not know she was returning to work and he did not have anything for her to do that did not involve collections. Petitioner sat in her office again and did one spread sheet for Tom Torossian (the divisional manager). (T.14,32,33) Also, that day, Petitioner had conversations with Mr. Torossian and was asked if she could handle working. He was generally concerned and told her she was not doing herself any good by being at work. After the conversation, Petitioner felt emotional and left work at Tom's suggestion. (T.34,35) In the Commission's view, Respondent's job offer was a sham and did not amount to a good faith offer within Petitioner's restrictions. Since Respondent was unable to provide Petitioner [*6] with a true job within her restrictions, Respondent is obligated to continue paying temporary total disability benefits.

On May 15, 2008, Petitioner returned to see Dr. Stillings and he felt she could work with restrictions. In the Commission's view, as of May 15, 2008, it was incumbent upon Petitioner to look for work within those restrictions including contacting Respondent to see if there was a job within those restrictions. Petitioner failed to prove entitlement to temporary total disability benefits beyond May 15, 2008. Based on the above, the Commission finds that Petitioner was temporarily disabled for 12 2/7 weeks from November 1, 2007 through November 17, 2007 and from March 6, 2008 through May 15, 2008. The Commission also modifies the temporary total disability rate from $ 1,179.49 to $ 1,164.37, the applicable maximum rate in effect at the time of the accident. The Commission notes that the Arbitrator also awarded Petitioner **temporary partial** disability from November 18, 2007 through February 26, 2008.

With regard to prospective medical care, the Arbitrator found that Petitioner had not yet reached maximum medical improvement and was in need of additional medical care [*7] as recommended by Dr. Hartman. The Decision lacked an order ordering Respondent to provide prospective medical care. The Commission hereby orders Respondent to provide prospective medical care consistent with the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 8, 2008 is hereby modified and corrected as stated herein and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 1,164.37 per week for a period of 12 2/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner **temporary partial** disability pursuant to Section 8(a) for the period of November 18, 2007 through February 26, 2008.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 640.00 for medical expenses under § 8(a) of [*8] the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide Petitioner with prospective medical care in the form of therapy (including cognitive behavioral therapy) and medication consistent with Dr. Hartman's opinions.

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, including but not limited to the sum of $ 18,032.41, to or on behalf of Petitioner on account of said accidental injury.

The probable cost of the record to be filed as a return to Summons if this cause is removed to the Circuit Court is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check [*9] or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 19 2009

ATTACHMENT:

ILLINOIS WORKERS COMPENSATION COMMISSION NOTICE OF 19(b) DECISION OF ARBITRATOR

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 Peter Akemann, arbitrator of the Commission, in the city of Rockford, on August 22, 2008. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
N. Other Prospective Medical

FINDINGS OF THE ARBITRATOR:

. On October 31, 2007, the respondent TCF Bank was operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship existed between the petitioner and respondent.

. On this date, the petitioner sustained injuries [*10] that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 91,999.96; the average weekly wage was $ 1769.23

. At the time of injury, the petitioner was 32 years of age, married with one child under 18.

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

. To date, $ 18,032.41 has been paid by the respondent for TTD and/or maintenance benefits.

ORDERS OF THE ARBITRATOR

. The respondent shall pay the petitioner temporary total disability benefits of $ 1,179.49/ week for 11-1/7 weeks, from 11/1/2007 through 11/17/2007 and again from 2/27/2008 through 4/27/2008 (Plus TPD from 11/18/2007 through February 26, 2008), as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ 640.00 for medical services, as provided in Section 8(a) of the Act.

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

. The respondent [*11] shall pay $ 0 in penalties, as provided in Section 19(l) of the Act.

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Arbitrator Peter Akemann

October 3, 2008

OCT 8 2008

In support of the arbitrator's findings under (F) Causal Connection; the arbitrator finds the following facts:

The petitioner, Connie Zarembski, was employed by TCF Bank as a [*12] branch lending manager. She managed a three person lending office. As it was a lending office, collection work dealing with the loans was not generally part of her job. There was a separate collections office for TCF Bank. However, on October 31, 2007, she was sent out in the field to make a collection call on a late mortgage payment. She, along with a co-worker, while on the collection call, in an apartment building, were robbed by two individuals. The petitioner's purse was forcibly taken from her. She, along with the co-worker, were asked to lie down on the floor face down and not move. After the robbery, the assailants fled the area. After lying face down for several minutes, the petitioner and her co-worker ran out of the apartment complex and drove to a nearby restaurant and called the police.

The petitioner was initially seen at a walk-in clinic in Morsay, Illinois. She was treated for bruises on both arms along with a scrape. She followed up with her primary care physician, Dr. Coates, who is affiliated with the Rockford Health System. She was seen with difficulty sleeping and recurrent thoughts of the event. Dr. Coates was concerned about post-traumatic stress and, thus, referred [*13] the petitioner for counseling.

The petitioner began seeing Dr. Geiger, a clinical psychiatrist, on November 12, 2007. She was provided a script for medication and advised to see a social work, Bruce Person for therapy. Her treatment with Dr. Geiger and Mr. Person has been fairly consistent since the initial visit.

Immediately following the assault, the Petitioner began losing time from work. She remained off work for several weeks. Effective November 18, 2007 and continuing through February 22, 2008, the petitioner worked anywhere from 2-5 hours per day in the lending office. She was essentially performing her usual job. She was not asked to perform any collection work. This was not a problem as collection work was not part of her regular job. She continued to work in this capacity through March 6, 2008 when Dr. Geiger suggested a 3-month "medical leave of absence."

The petitioner was scheduled to see Dr. Hartman for an independent medical evaluation on February 20, 2008. She did not attend the appointment as she indicated that she did not receive timely notice of the examination. The examination was rescheduled for March 18, 2008. This examination was attended. Dr. Hartman felt it [*14] was in the petitioner's best interests to return to gainful employment He recommended the petitioner return to work without any direct client contact concerning collection work. He suggested that she not be sent on collection calls.

Consistent with Dr. Hartman's opinion, the Petitioner was offered a position with TCF in the branch office. The petitioner returned to work effective April 28, 2008. She worked through April 30, 2008 without having to make any collection calls. She testified that she simply did almost nothing around the office. She testified that she completed one spreadsheet that she was asked to prepare. There

was no problem with the spreadsheet. It was prepared satisfactorily and up to business standards.

The Petitioner's job remained available subsequent to April 30, 2008. However, the Petitioner simply stopped coming in to work. The Petitioner testified that there was nothing about the job she was offered and performing that was inconsistent with the opinion of Dr. Hartman regarding her ability to work.

Dr. Stillings saw the petitioner, at the request of her attorney. Dr. Stillings agreed with Dr. Hartman that the Petitioner was capable of full time employment. He [*15] diagnosed posttraumatic stress disorder, chronic and severe, along with major depressive disorder, single episode, moderate to severe. With regard to work, Dr. Stillings' initial report included the following language, "Ms. Zarembski is able to continue working full duty without any direct client contact. She is restricted from making collection calls, partaking in conference collection calls, or making door to door collection calls in the community." Dr. Stillings opined that this would speed the petitioner's recovery and assist in her treatment protocol. He felt she could be a very productive employee within these restrictions. The job offered the Petitioner on April 28, 2008 was consistent with that restriction.

In a supplemental report dated July 28, 2008, Dr. Stillings changed his opinion regarding the petitioner's work status without having seen the petitioner again. The letter was prepared in response to a request from counsel. In the subsequent report, Dr. Stillings suggested that the petitioner is restricted from any direct client contact within the bank or outside the bank. The report suggests this was for the purposes of collections or any other occupational functions. [*16] There is no stated basis for this change as the Petitioner was not seen again nor was any additional records or tests provided. There is reported justification for the change. Regardless, the job offered the Petitioner on April 28, 2008 was not inconsistent with this opinion regarding the Petitioners work status.

At the time of trial, the petitioner was continuing with some cognitive and behavioral therapy with Bruce, the social worker. She was seeing Dr. Geiger on a more limited basis. She was taking medication including Zoloft, Xanax, and Clonazepam.

ANALYSIS

The petitioner testified that she did not have issues with regard to post traumatic stress disorder or depression prior to October 31, 2007. There is no question that she suffered a compensable accident at work when she and a co-worker were accosted by two assailants. She felt that her life was in danger at the time. Subsequent to the work accident, the petitioner sought immediate medical treatment not only for bruises to her upper extremity but also for psychiatric issues faced as a result of the injury.

The Arbitrator finds that the petitioner's condition of ill-being causally related to her work accident of October [*17] 31, 2007.

In support of the arbitrator's findings under (K) Temporary Total Disability; the arbitrator finds the following facts:

The petitioner began losing work immediately following the accident She was authorized off of work completely from November 1, 2007 through November 17, 2007. Effective November 18, 2007 and continuing through February 27, 2008, the petitioner worked anywhere from 2-5 hours per day. She received **temporary partial** disability compensation as she was earning less than her ordinary wage. There is no dispute regarding benefits up through February 22, 2008.

Subsequent to February 27, 2008, the petitioner was advised to remain off of work by Dr. Geiger. Dr. Geiger on February 27, 2008 suggested a 3-month leave of absence. Other than a divorce being finalized, there is nothing significant in Dr. Geiger's records to substantiate the change.

A Section 12 examination was arranged with Dr. David Hartman on behalf of the insured. The initial examination was scheduled for February 20, 2008.

The Arbitrator finds that the petitioner did not receive appropriate notice of that appointment Accordingly, a suspension of benefits at that time would not be appropriate [*18] .

Due to the confusion regarding the scheduling of the appointment, the Respondent scheduled an appointment with Dr. Hartman for March 18, 2008.

The petitioner attended the evaluation with Dr. Hartman on March 18, 2008. Dr. Hartman offered an opinion that the petitioner was capable of working full time without direct client contact dealing with collection work.

Consistent with the opinion of Dr. Hartman, restricted work was offered to the petitioner. The petitioner was advised that full time work without performing mortgage collection visits in person would be available. The petitioner was asked to return to work effective Monday, April 28, 2008.

Effective Monday, April 28, 2008, the petitioner did return to work for TCF Bank. She worked for three days during that week. During those three days, the petitioner was not asked to deal in any way with collection calls. She was not asked to leave the office to make in person collection calls. In addition, she was never asked to contact any clients of TCF Bank regarding collection activity. This is confirmed by the petitioners' testimony that there was nothing that she was asked to do that was in contradiction to the restrictions suggested [*19] by Dr. Hartman.

Despite the above, the petitioner simply stopped coming to work as of May 1, 2008. Ultimately, the Petitioner's employment relationship was terminated as the Petitioner was away from work too long.

To address the Petitioner's ability to work, the petitioner was evaluated, at the request of her attorney, by Dr. Wayne Stillings, a neuro-psychologist practicing in St. Louis, Missouri. Dr. Stillings prepared a seven page report following his examination and review of records. He also administered a number of tests, some of which had been administered by Dr. Hartman. On Page 7 of his report, Dr. Stillings addressed his comments regarding the petitioner's ability to work. He stated the following, "Ms. Zarembski is able to continue working full duty without indirect client contact. She is restricted from making collection calls, partaking in conference collection calls, or making door to door collection calls in the community." The Arbitrator finds that there is nothing about the job offered on April 28, 2008 that was inconsistent with the opinion of Dr. Stillings. Of course, Dr. Stillings' opinion was not available at that time.

Dr. Stillings prepared a supplemental report **[*20]** at the request of Petitioner's counsel dated July 28, 2008 more than almost two and a half months after the original report. It was not prepared following any review of additional records or an additional evaluation of the petitioner. Accordingly, the Arbitrator places little significance on this report. In the report, Dr. Stillings suggests that the petitioner is restricted from any direct client contact within the bank or outside the bank for purposes of collections or any other occupational functions. Regardless of the veracity of this report, the Arbitrator finds there is nothing inconsistent with the job offered to the petitioner in April of 2008 with those restrictions. At no time was the petitioner asked to conduct any direct client contact. All she did was remain in her office and prepare a spreadsheet.

Moreover, there is no dispute between the petitioner's expert and respondent's experts regarding the petitioner's ability to return to work. In fact, both Dr. Hartman and Dr. Stillings suggest that it would be beneficial to the petitioner and speed her recovery. Since her termination from TCF Bank, the petitioner offered no documented evidence to support the fact that she has **[*21]** looked for employment of any kind. She suggested that she periodically has checked one website looking for work. No other efforts were made to find employment.

It is not enough that the petitioner received benefits due to the fact that she did not work. Rather, the petitioner must prove that she was unable to work. In this case, the petitioner failed to sustain her burden.

The Arbitrator finds the petitioner entitled to temporary total disability benefits from November 1, 2007 through November 17, 2007. He finds the petitioner entitled to **temporary partial** disability benefits from November 18, 2007 through February 27, 2008. The Arbitrator finds the petitioner entitled to temporary total disability benefits from February 23, 2008 through April 27, 2008. Thereafter, no benefits would be due and owing this petitioner as she was not temporarily totally disabled.

In support of the arbitrator's findings under (J) Medical Payments; the arbitrator finds the following facts:

The petitioner offered into evidence Exhibit # 3, an alleged unpaid medical bill from Geiger Psychiatric Care. The invoice concerned treatment rendered from April 28, 2008 through May 9, 2008. Consistent with **[*22]** the recommendations of Dr. Geiger and Dr. Stillings, the Arbitrator finds this medical treatment reasonable and necessary and related to the work accident. Accordingly, the invoice in the amount of $ 640.00 is awarded. Payment should be made pursuant to the Medical Fee Schedule directly to the petitioner. Upon payment to the petitioner, the respondent is absolved of liability regarding that bill.

Per stipulation of the parties, if any portion of this bill was placed in line for payment and not reflected in the statement offered into evidence, the respondent is to receive a credit for those payments.

In support of the arbitrator's findings under (O) Prospective Medical treatment; the arbitrator finds the following facts:

The Arbitrator finds the petitioner has not yet reached maximum medical improvement She is still in need of therapy and prescription medication for her condition. This is consistent with the opinions of all physicians who have treated and evaluated the Petitioner.

With regard to specific treatment, the Arbitrator finds the opinions of Dr. Hartman most dispositive on this issue. With regard to prospective medical care, the Arbitrator finds his recommendations **[*23]** for treatment and medication most appropriate and awards care consistent with his opinion.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision finding that Petitioner is entitled to an award of temporary total disability benefits through May 15, 2008. I believe the Arbitrator correctly determined that temporary total disability benefits should have ended on April 27, 2008. Respondent's job offer was not a sham and it was done in good faith. Petitioner was provided with a suitable position, was not required to interact with customers, and was paid her regular salary. She left the job on May 1, 2008 of her own accord. No one in a supervisory position over Petitioner told her to go home on May 1, 2008. The doctors wanted Petitioner to work. The doctors felt she was capable of working. Respondent offered her a job consistent with her restrictions. She was offered a "true job" but did not really give it a chance. Petitioner failed to prove she could not work after April 27, 2008, not May 15, 2008. For this reason, I dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:34 PM EST

*2009 Ill. Wrk. Comp. LEXIS 1025, **

09 IWCC 1058

JOSEFA AMARO, PETITIONER, v. WEBER-STEPHENS, INC., RESPONDENT.

NO: 05 WC 9412

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCHENRY

2009 Ill. Wrk. Comp. LEXIS 1025

October 21, 2009

CORE TERMS: arbitrator, fracture, pain, sacral, temporary, partial disability, opined, temporary total disability, recommended, doctor, treating, physical therapy, return to work, pregnancy, secondary, coccyx, regular, causally, symptoms, lumbar, nondisplaced, ill-being, hrs, deconditioning, diagnosis, pregnant, delivery, strain, returned to work, dysfunction

JUDGES: Paul W. Rink; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, **temporary partial** disability, penalties under § 19(k) and § 19(l) of the Act and attorneys' fees under § 16 of the Act and being advised of the facts and law, clarifies the Arbitrator's decision as to temporary permanent disability award and affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, as to all other issues. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E. 2d 1322, 35 Ill. Dec. 794 (1980).

The Commission notes that the Arbitrator found Petitioner entitled to an award of $ 2,301.92 in **temporary partial** disability benefits. The Commission finds that the Arbitrator found Petitioner entitled to **temporary partial** disability **[*2]** benefits from June 27, 2006 through August 31, 2006 and from October 3, 2006 through October 23, 2006, the dates to which Petitioner stipulated on the request for hearing form. The Arbitrator calculated these benefits pursuant to § 8(a) of the Act explaining that Petitioner was entitled to **temporary partial** disability benefits equal to 2/3 of the difference between the average amount she would have earned in the full performance of her job duties in the occupation she was engaged in at the time of the accident and the net amount which she earned in the modified job provided by the Respondent or any job in which she was working.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to the Petitioner the amount of $ 2,301.92 in **temporary partial** disability benefits under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 17, 2007 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired **[*3]** without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 49,500.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 21 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was

heard by the Honorable Richard A Peterson, arbitrator of the Industrial Commission, in the cities of Woodstock and Chicago, on July 11 and 24, [*4] 2007. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues highlighted below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for Temporary Total Disability?
L. Should penalties or fees be imposed upon the respondent?

FINDINGS

. On January 19, 2005, the respondent, Weber-Stephens, Inc., *was* operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship *did* exist between the petitioner and respondent.

. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 22,141.08; the average weekly wage was $ 425.79.

. At the time of injury, the petitioner was 31 years of age *married* with -2- children under 18.

. Necessary medical services *have* been provided **[*5]** by the respondent.

. To date, $ 19,253.24 has been paid by the respondent on account of this injury.

ORDER

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 283.86/week for 41 3/7ths weeks, from January 19, 2005, through January 31, 2005, February 3 through 7, 2005; May 9 through July 27, 2005; January 11 through June 19, 2006; and, September 1 through October 2, 2006, and total **temporary partial** disability benefits equal to $ 2,301.90, as provided in Section 8 (b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ 35,331.90 for medical services, as provided in Section 8(a) of the Act.

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

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of Temporary Total Disability, medical benefits, or compensation for a permanent disability, **[*6]** if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4-13% 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

September 18, 2007

Date

SEP 19 2007

FINDINGS OF FACT

At the time of the hearing, Petitioner was thirty-four years of age, approximately 5 feet 2 inches tall and weighed 150 lbs. Petitioner started working for Respondent, Weber-Stephens, Inc., on an assembly line putting grills together. Her job required her to stand for 8 hours but she did have two breaks of 10 minutes and a half-hour break for lunch. She bent over frequently and carried the assembled grills to place on a line that was in front of her and behind her. The height of the line was at or just below her waist.

On January 19, 2005, Petitioner had arrived in **[*7]** the company parking lot and exited her vehicle when, while walking to her building, she slipped on ice and fell to the ground. This occurred about 5:30 a.m. Petitioner struck the rear part of her back. Petitioner did not start work but did not appear at the local emergency facility until about two hours later. The hospital records document her injury and an x-ray of Petitioner's coccyx showed a possible nondisplaced fracture. The nursing notes from that visit also indicated that Petitioner advised the nurse her "lower back" aches. Petitioner was referred for an orthopedic evaluation. (PetEx1)

The next day, Petitioner consulted with Dr. Timothy Petsche at Fox Valley Orthopedics. He noted her complaints of pain directly in the area of the coccyx. He found mild tenderness in the tissues of the buttocks. His assessment of her condition was a coccyx fracture. On that date, January 20, 2005, he recommended that she stay off work for a w eek and a half, to return to work on January 31 without restrictions. Petitioner returned to work on February 1, 2005. She worked that day and the next. Petitioner returned to Dr. Petsche on February 7, 2005. Dr. Petsche noted that Petitioner's previous symptoms **[*8]** were mainly in the sacrum, but since then has developed pain mainly in the low back that radiates down the thighs He diagnosed a healing coccyx fracture and a lumbar strain. He

referred her to physical therapy. Dr. Petsche also referred her for physical therapy. She returned to work on February 8. (PetEx2)

Petitioner received physical therapy for the rear of her back at Cosport Physical Therapy from February 22, 2005 through May 9, 2005. The diagnosis on the CoSport Physical Therapy treatment records is lumbar strain / coccyx fracture. (PetEx3) Therapy did not significantly help her pain.

After therapy, Petitioner returned to Dr. Petsche on March 7, 2005. His office note of that date contains the diagnoses of healing coccyx fracture and "persistent symptoms secondary to lumbar strain." In the Plan section of the report Dr. Petsche wrote:

> %
> "Again, I have explained to the patient [that] I think her symptoms are directly related to the lumbar strain and I do not think they are related to the coccyx fracture. ..."

Petitioner had a lot of pain in the lower part of her back especially when she needed to stand for a long time and carry anything. Dr. Petsche released Petitioner for **[*9]** light duty consisting of no lifting over 10 lbs, no repetitive bending and no work for more than 4 hrs/day. Dr. Petsche's office note of March 7, 2005 also mentions the fact that Petitioner was pregnant as of that date.

Petitioner was seen by Dr. Petsche on May 9, 2005 and was taken off-work by him at that time. The *Fox Valley Orthopaedic Institute Physician Report* of that date gives the expected duration of disability as "at least until after delivery of baby." He indicated her prior work restrictions were for her low back injury, although Petitioner was pregnant which Dr. Petsche noted on May 10, 2005. Dr. Petsche also recommended an MRI; but, it could not be performed because of her pregnancy. On May 16, 2005, Dr. Petsche noted that Respondent could no longer accommodate Petitioner. On July 11, 2005, Respondent contacted Dr. Petsche's office requesting the doctor to release Petitioner to return to work. After consulting with Petitioner, Dr. Petsche did release Petitioner for full duty on July 27, 2005. (PetEx2)

On August 26, 2005, Petitioner contacted Dr. Petsche advising him that she is in severe pain; that she was working eight hours and she cannot continue. Dr. Petsche advised **[*10]** Petitioner to contact her ob-gyne. (PetEx2)

Petitioner changed treating doctors when, on October 13, 2005, she was seen by Mark A. Lorenz, M.D. of Hinsdale Orthopaedic Associates, S.C. On that date Dr. Lorenz's diagnosis was "Hairline sacral fracture secondary to a fall with some deconditioning secondary to the fracture and to the pregnancy." (PetEx4). Dr. Lorenz opined that, once Petitioner delivers her baby, he would recommend a back rehab program. On October 16, 2005, Petitioner delivered her baby. (PetEx4)

After the delivery of her baby Petitioner resumed medical treatment to her low back with a January 11, 2006, office visit with Dr. Lorenz. This was the second time that Dr. Lorenz had seen Petitioner. Petitioner advised Dr. Lorenz that her employer wanted her at full duty or off duty. He kept Petitioner off-work and recommended further physical therapy. In his "Work Status Report" of January 11, 2006, Dr. Lorenz gives Petitioner's diagnosis as status post sacral fracture. His target regular-duty return to work date in that report is one month later. Dr. Lorenz noted that Petitioner still had pain and recommended she be off work until additional physical therapy completed. (PetEx4) **[*11]** Petitioner attended physical therapy at ATI from January 19, 2006 through May 5, 2006. (PetEx5) On February 15, 2006, Dr. Lorenz diagnosed Petitioner with and "chronic back pain" and referred her to Dr. Kirincic, also of Hinsdale Orthopaedics, for conservative care.

Petitioner first saw Dr. Kirincic on March 14, 2006. Dr. Kirincic recommended work hardening, then injections to Petitioner's low back. Dr. Kirncic diagnosed myofascial pain syndrome, referred pain from previous healed sacral fracture, abdominal Diastasis and deconditioning secondary to recent pregnancy. Dr. Kirincic administered a trigger point injection. Dr. Kirincic also prescribed Petitioner remain off work. On April 10, 2006, Dr. Kirincic noted the injection did not help much; recommended Petitioner finish physical therapy and start a work hardening program and prescribed a lumbar corset. (PetEx4)

Petitioner attended work hardening from May 9, 2006 through Jun 9, 2006. On June 12, Dr. Kirincic noted that Petitioner had difficulty with prolonged standing/walking and lifting over 30 lbs. In her June 12, 2006 Work Status Note, Dr. Kirincic gives Petitioner's diagnosis as a healed sacral fracture. She returned Petitioner **[*12]** to light duty work for four hours per day from June 27 through August 31, 2006. PetEx4. On June 26, 2006, Dr. Kirincic noted Petitioner's pain increased with she return to work but continued her on 4 hrs per day. (PetEx4)

On July 18, 2006, Petitioner attended a Section 12 examination with Dr. J. Scott Player, at Respondent's request. In his report of that date Dr. Player found that Petitioner suffered a nondisplaced fracture through the third sacral segment because of the slip-and-fall accident of January 19, 2005. He opined that a nondisplaced sacral fracture should heal within three to six months following the injury event, and that therefore Petitioner reached maximum medical improvement from the January 19 incident no later than July 16, 2005. Dr. Player opined that there is a causal connection between the nondisplaced fracture through the 3rd sacral segment and her work injury. Dr. Player also opined that because Petitioner developed lower back pains Dr. Player noted that Petitioner's lower back pain did not experience any low back pain until the first week of February 2005, "on or about the time she also became pregnant". He also opined that, the low back condition was related **[*13]** to Petitioner's pregnancy and there is no causal connection between her injury and her lower back complaints. Dr. Player opined that Petitioner was at MMI for her sacral fracture on July 16, 2006, and that she could have returned to work full duty for the sacral fracture on June 19, 2005. (RespEx1)

Two days after the examination, Petitioner returned to see Dr. Kirincic who recommended an MRI of her lower back and pelvic area. Dr. Kirincic continued Petitioner on 4 hrs per day. Petitioner underwent an MRI of her lower back and of her sacrum. The MRI of her lumbar spine showed minimal L5-S1 disk bulging and minimal L5-S1 retrolisthesis. The MRI of the sacrum showed no evidence of acute sacral fracture. On August 7, 2006, Dr. Kirincic made a diagnosis of myofascial pain syndrome, deconditioning, history of healed hairline sacral fracture, abdominal Diastasis, deconditioning due to pregnancy and fatigue probably related to taking care of multiple children at home. Dr. Kirincic also recommended she advance slowly to regular duty on a graduated basis (6 hrs for 2 weeks then 8 hrs). (PetEx4)

On August 31, 2006, Dr. Kirincic noted that Petitioner had worked regular duty since August 22, 2006 **[*14]** but, because she was bending over for a prolonged period of time, her back pain flared. Dr. Kirincic found that Petitioner had positive L-S1 joint testing and recommended she receive chiropractic treatment. Dr. Kirincic referred Petitioner to David A. Rominski, D.C.

On September 6, 2006, Petitioner presented with Dr. D. Rominski, a chiropractor. Petitioner received treatment from Dr. Rominski from September 6, 2006 through December 11, 2006. (PetEx6) The history Petitioner reported to the Chiropractor was that "she slipped and fell while working and landed on her buttock. As a result of this fall she has severe pain in the low back with numbness in the legs." Chiropractor Rominski's reports do not reference any medical treatment records. His history comes solely from Petitioner. He treated Petitioner until December 11, 2006.

During this time period Petitioner was restricted from work stating on September 6, 2006 but allowed to return on restricted duty on October 3, 2006. (PetEx4 and 9) Petitioner was in a lot of pain in her lower part of her back when she stood for a long time at work or when she bent over. Petitioner worked her regular job for four days as an assembler after Dr. **[*15]** Kirincic released her for regular duty on October 23, 2006. (PetEx4)

Petitioner returned to Dr. Rominski on October 27, 2006 complaining that she had to do a lot of lifting and a lot of walking and bending. (PetEx6) Petitioner also returned to see Dr. Kirincic on December 12, 2006. Dr. Kirincic advised the client to return to work regular duty and if unable to do so, to obtain an FCE. (PetEx4) Petitioner did undergo an FCE on January 11, 2007. The FCE indicated Petitioner put forth a consistent effort and tested at the light physical demand level. The therapist opined that Petitioner's job is at the light to medium level (occasionally lifting over 50lbs). (PetEx5)

Petitioner gave the light duty note, of Dr. Rominski from October 27, 2006, to her employer. No light duty was offered to Petitioner.

Petitioner was seen by Dr. Kirincic on December 12, 2006. In her chart note of that date Dr. Kirincic documented her Impression as:

> Resolved sacroiliac joint dysfunction, thoracolumbar segmental dysfunction, and healed sacral fracture from injury on 01/19/05. The patient had multiple other injuries from her deliveries with abdominal diastasis, fatigue, myofascial pain syndrome, and ongoing **[*16]** deconditioning.

Dr. Kirincic stated, in the Plan section of the December 12, 2006 note:

> I do not think her symptoms are related to her initial work related injury and she has received enough treatment in the past. We will provide her with healing and postural retraining. I have to suspect ongoing complaints to gain secondary benefits from her employer. ... (PetEx4)

Petitioner saw Dr. Kirincic one more time after the December 12, 2006 office visit, on January 23, 2007, after the FCE. Dr. Kirincic opined that she may return to work with permanent restrictions of no lifting over 20 lbs, maximum 3 hrs standing per day, allowing a 5-10 minute change in position when standing for 30 minutes, maximum walking 3-4 hrs per day, no limit with sitting and may work eight hours. Dr. Kirincic's Progress Note of that date included, under the heading Physical Examination, the entry:

> Today, her SI joint testing was negative. She still has abdominal diastasis status post her baby delivery, fatigue, myofascial pain syndrome, and poor core strength, but this is unrelated to her initial sacral nondisplaced fracture and SI joint dysfunction. (PetEx4)

Petitioner sent her restrictions to Respondent **[*17]** by facsimile the same day she saw Dr. Kirincic. Petitioner was advised she had too many restrictions. Petitioner has not seen any doctors for this injury since January 27, 2007.

At arbitration hearing, Petitioner complained of pain. She drove an hour to the hearing site and developed pain while sitting for that period of time. She had pain in her lower back; and, if she sits for 45 minutes or stands for over two hours, her pain increases. She is not on medication and has seen no other physicians. Petitioner completed the 9th grade in Mexico and cannot read, write or speak in English very well. Petitioner does not know how to use a computer.

Respondent was Petitioner's first job ever in the United States. She did not complete an ESL class and she found her last job through a temp agency by filling out an application in English with the help of her husband.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

On January 19, 2005, Petitioner slipped on ice in Respondent's parking lot and fell to the ground. She went to the local emergency **[*18]** room; the hospital records document her injury and an x-ray of Petitioner's coccyx showed a possible nondisplaced fracture. The nursing notes from that visit also indicated that Petitioner advised the nurse her "lower back" aches. The next day, was treated by Dr. Petsche. Petitioner returned to Dr. Petsche on February 7, 2005. Dr. Petsche noted that Petitioner's previous symptoms were mainly in the sacrum, but since then has developed pain mainly in the low back that radiates down the thighs He diagnosed a healing coccyx fracture and a lumbar strain. By then, Petitioner was also pregnant. Petitioner received physical therapy and then discontinued treatment during her pregnancy.

Petitioner changed treating doctors when, on October 13, 2005, she was seen by Dr. Lorenz. On that date Dr. Lorenz's diagnosis was "Hairline sacral fracture secondary to a fall with some deconditioning secondary to the fracture and to the pregnancy." Dr. Lorenz referred Petitioner to Dr. Marie Kirincic. Dr. Kirincic treated Petitioner for resolving sacral fracture and for other conditions resulting from her pregnancy. By October 23, 2006, she opined that Petitioner had "...resolved left SI joint testing. Healed **[*19]** sacral fracture from injury on 01/19/05..." On December 12, 2006, she opined that Petitioner had "...Resolved sacroiliac joint dysfunction...had multiple other injuries from her deliveries...I do not think her symptoms are related to her initial work injury and she has received enough treatment in the past...I have to suspect ongoing complaints to gain secondary benefits her employer...she wants to do is work four hours regular duty and have the rest four hours paid by her, employer... in view of her exam and negative

testing in the past, I am placing her on regular duty..." On January 23, 2007, Dr. Kirincic released Petitioner with restrictions but noted that Petitioner's limitations were "...unrelated to her initial sacral nondisplaced fracture and SI joint dysfunction."

Petitioner did not report a lumbar strain for almost 3 weeks until she was pregnant. There was disagreement amongst the treating and examining doctors as to what extent her low back problems were associated with her fall and with her pregnancy. The Arbitrator concludes that Dr. Kirincic, Petitioner's treating doctor, is credible. She reported problems related to Petitioner's work injury until October 23, 2006, she **[*20]** then found Petitioner's problems on and after that date to be related to her delivery. Petitioner's motivation of secondary gain raises additional credibility questions concerning her original reports of low back pain. However, her treating doctors provide enough evidence to counter the opinion of Dr. Player that her injury related condition had resolved by July 16, 2006. Accordingly, the Arbitrator concludes that Petitioner's condition of ill-being until October 23, 2006, was causally connected to her work related injury of January 19, 2005; but, Petitioner's condition of ill-being after October 23, 2006, is not causally related to her work related injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator, concluded above that Petitioner's condition of ill-being through October 23, 2006, was causally connected to her work related injury of January 19, 2005; but, Petitioner's condition of ill-being after October 23, 2006, is not causally related to her work related injury. The Arbitrator therefore concludes that the treatment provided to **[*21]** Petitioner from January 19, 2005, through October 23, 2006, for her sacral, coccyx and lower back complaints was both reasonable and necessary. Respondent is ordered to pay the outstanding medical expenses in accordance with the fee schedule as follows:

Reference Code:	Provider:	Allowed Charged-Fee Schedule
21314-97750	$ 28,901.54 (ATI)	No applicable code modifiers.
99213	$ 855 (Hinsdale)	$ 82.18
99214	$ 548	$ 124.69
99204	$ 223	$ 208.86
99243/25	$ 234	$ 215.72
72220	$ 354	$ 136.97
20552	$ 202	$ 212.54
72190	$ 209	$ 170.04
72148	$ 4,954	$ 2,010.19
J0704/114	$ 555	No applicable code modifiers
99283	$ 214 (Conner)	$ 218.21
97014	$ 420 (Rominski)	$ 36.84
99203	$ 190	$ 141.70
72010	$ 135	$ 155.87
98941	$ 1120	$ 50.07
95851	$ 225	$ 85.02
97530	$ 1539	$ 47.23
97110	$ 1566	$ 58.61
98940	$ 750	$ 40.62
9711259, S9090, 97010, 97035,9921225	$ 1880	No applicable code modifiers

Reference Code:	Amount Due:
21314-97750	$ 28,901.54
99213	$ 82.18
99214	$ 124.69
99204	$ 208.86
99243/25	$ 215.72
72220	$ 136.97
20552	$ 212.54
72190	$ 170.04
72148	$ 2,010.19
J0704/114	$ 555
99283	$ 218.21
97014	$ 36.84
99203	$ 141.70
72010	$ 155.87
98941	$ 50.07

95851	$ 85.02
97530	$ 47.23
97110	$ 58.61
98940	$ 40.62
9711259, S9090, 97010, 97035,9921225	$ 1880

[*22] The total amount of medical expenses owed by Respondent equals $ 35,331.90.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO K, WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The parties stipulated that Petitioner was temporarily and totally disabled intermittently from January 20, 2005 through July 16, 2005. (ArbEx1) Additionally, Petitioner is claiming temporary total disability from July 17, 2005 through July 27, 2005; January 11, 2006 through June 19, 2006; September 1, 2006 through October 2, 2006; October 27, 2006 through November 14, 2006 and January 23, 2007 through the date of hearing of July 11, 2007.

The medical records indicated that Dr. Timothy Petsche, one of Petitioner's treating physicians, did not release Petitioner to return to work until July 27, 2005. (PetEx2) No other medical evidence exists that contradicts this release prior to that date. On January 11, 2006, Dr. Mark Lorenz opined that Petitioner should remain off work while physical therapy is completed. (PetEx4) Physical therapy and work hardening were not completed until June 9, 2006. (PetEx5) On June 12, 2006, Dr. Kirincic recommended Petitioner [*23] return to work regular duty but only four hours per day. Petitioner testified she returned to work on June 20, 2006. Again, no other medical evidence contradicts these restrictions of off work during this period.

On August 31, 2006, Dr. Kirincic released Petitioner to modified duty staring on September 1, 2006. (PetEx4) Petitioner's unrebutted testimony indicated Respondent could not accommodate these restrictions. Therefore, Petitioner remained off work until she returned to work partial hours on October 3, 2006. By this date, Dr. Player had already opined that Petitioner could return to work regular duty on July 18, 2006. (RX # 1)) The Arbitrator concludes that the opinions of Dr. Kirincic are more compatible with the symptoms and condition of Petitioner. Petitioner's unrebutted testimony is that Respondent could not accommodate her restrictions once again on October 27, 2006 through November 14, 2006. However, the Arbitrator has concluded above that the opinion of Petitioner's treating doctor, Dr. Kirincic is credible and that Petitioner's condition of ill-being after October 23, 2006, is not causally related to her work related injury.

On January 23, 2007, Dr. Kirincic prescribed [*24] Petitioner permanent work restrictions. (PetEx4) Again, Petitioner's unrebutted testimony indicated that no accommodation of these restrictions has been provided by Respondent through the date of hearing. However, the Arbitrator has concluded above that the opinion of Petitioner's treating doctor, Dr. Kirincic is credible and that Petitioner's condition of ill-being after October 23, 2006, is not causally related to her work related injury.

Based upon all of the above, the Arbitrator finds that Petitioner is entitled to receive 41 3/7ths weeks of temporary total disability for the following periods:

> January 19 through 31, 2005; February 3 through 7, 2005; May 9 through July 27, 2005; January 11 through June 19, 2006; and, September 1 through October 2, 2006

Petitioner is also claiming **temporary partial** disability for the period from June 27, 2006 through August 31, 2006 and October 3, 2006 through October 23, 2006 for a period of twelve weeks.

> "When the employee is working light-duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to **temporary partial** [*25] disability benefits. **Temporary partial** disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engage at the time of accident and the net amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working." 820 ILCS 305/8(a).

Here, Dr. Kirincic opined on June 12, 2006, that Ms. Amaro could return to work with a restriction of working only 4 hours per day. (PetEx4) Petitioner submitted wage records to substantiate her claim for temporary total disability or **temporary partial** disability. (PetEx9) The Arbitrator has reviewed the records submitted and concludes as follows:

From June 27 through August 31, 2006, a period of 9 and 2/7ths weeks, petitioner earned $ 11.15 per hour. The total gross amount that she would have been earned if she worked 40 hours would equal $ 4,192.40. Based upon the pay stubs submitted, the total net earned by Petitioner during this period equaled $ 1,691.32. Calculating 2/3rds of [*26] this difference equals $ 1,667.38. (PetEx9)

From October 3 through 23, 2006, a period of 2 and 6/7ths weeks, petitioner earned $ 11.15 per hour. The total gross amount that she would have earned if she worked 40 hours per week would equal $ 1,427.20. Based upon the pay stubs submitted, the total net earned by Petitioner equaled $ 475.39. (PetEx9) Calculating 2/3rds of the difference between the gross amount that could have been earned and her net amount, equals $ 634.54. Thus, the total **temporary partial** disability benefits owed Petitioner equal $ 2,301.92.

Respondent is entitled to a credit of $ 19,253 which shall be applied against all temporary total disability and **temporary partial**

disability benefits owed Petitioner.

Petitioner claimed to be entitled to vocational rehabilitation and continuing maintenance. The Arbitrator has concluded above that her condition of ill being after October 23, 2006, is not causally related to her work related injury. Therefore, the Arbitrator concludes that that any inability for Petitioner to obtain employment as lucrative as that which she enjoyed prior to January 19, 2005 is not related to the accidental injuries of that date. Petitioner is therefore **[*27]** not entitled to vocational rehabilitation benefits at Respondent's expense.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, SHOULD PENALTIES OR FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because of Petitioner's not reporting complaints of low back pain for 3 weeks until she was pregnant, there was disagreement amongst the treating and examining doctors as to whether her low back pain was related to her injury or to her pregnancy. The Arbitrator concludes that there was reason for this disagreement and that Respondent was not unreasonable in relying of the opinion of Dr. Player. Petitioner's own treating doctor, Dr. Kirincic, expressed concern that Petitioner was reporting pain complaints for secondary gain reasons; thus Respondent was even more reasonable in its reliance on Dr. Player and belief that Petitioner had recovered from her work related injury. The Arbitrator notes that Respondent has paid Petitioner temporary total disability benefits in excess of the amounts to which she has subsequently proven herself entitled. Petitioner has not shown Respondent to be dilatory in the payment of benefits in this case whatsoever. The Arbitrator **[*28]** therefore finds that no penalties or fees should be imposed upon Respondent in this case.

CONCURBY: MOLLY C. MASON

DISSENTBY: MOLLY C. MASON

DISSENT: I agree with all aspects of the Arbitrator's and majority's findings other than those relating to causation, temporary total disability and penalties/fees.

I would have found that Petitioner established causation through December 12, 2006. I also would have awarded additional temporary total disability benefits from October 27, 2006 through November 14, 2006 and additional **temporary partial** disability benefits from November 15, 2006 through December 12, 2006. The Arbitrator and majority relied on Dr. Kirincic in evaluating causation and finding that Petitioner reached maximum medical improvement on October 23, 2006 but the doctor's note of that date reflects that she recommended that Petitioner undergo additional care with her chiropractor, Dr. Rominski. PX 4. It is clear that Dr. Kirincic recommended this care due to Petitioner's persistent sacral tenderness and Respondent never disputed the sacral injury. Petitioner continued seeing Dr. Rominski and also attempted to resume full duty per Dr. Kirincic but quickly developed increasing symptoms, which prompted Dr. Rominski **[*29]** to impose restrictions on October 27, 2006. Respondent was unable to accommodate these restrictions. T. 32. It was not until November 14, 2006 that Dr. Rominski modified the restrictions to allow Petitioner to begin working four hours per day. PX 6. Petitioner worked on this basis thereafter until December 12, 2006, when Dr. Kirincic released her to full duty. PX 4.

I also would have awarded Section 19(k) penalties and attorney fees on those awarded medical expenses relating to treatment rendered prior to December 12, 2006. Respondent lacked a reasonably objective basis for relying on its Section 12 examiner, Dr. Player, in refusing to pay said expenses. Dr. Player found causation only as to the sacral fracture but based this finding on the incorrect assumption that Petitioner did not complain of lower back pain until approximately three weeks after her undisputed fall of January 19, 2005. RX 1. Petitioner's records show that she complained of lower back pain at the Emergency Room on the day of her fall. PX 1. Dr. Player's finding that Petitioner reached maximum medical improvement on either June 19, 2005 or July 16, 2005 (inexplicably, his report states both dates) is in conflict **[*30]** with the treating records. In my view, the physicians who treated Petitioner over an extended period were in a better position to comment on causation and treatment than Dr. Player, who saw Petitioner once.

I respectfully dissent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:34 PM EST

*2009 Ill. Wrk. Comp. LEXIS 1024, **

09 IWCC 1059

JAMES WUTTKE, PETITIONER, v. ALDI, RESPONDENT.

NO. 07 WC 10783

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

2009 Ill. Wrk. Comp. LEXIS 1024

October 21, 2009

CORE TERMS: arbitrator, doctor, ankle, feet, recommended, pain, surgery, temporary total disability, foot, temporary, ill-being, causally, nerve, ultrasound, crush, medical care, recommend, maximum, causal connection, gainful employment, medical evaluation, right foot, recommendation, neuropraxia, bilateral, neuritis, scan, permanent disability, modifies, current condition

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, and prospective medical care, and being advised of the facts and law, modifies and 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After considering the entire record, the Commission modifies the Arbitrator's Decision with respect to causal connection, temporary total disability, and prospective medical care. With regard to the issue of causal connection, the Arbitrator found that Petitioner's complaints of ankle pain were not related to the [*2] accident of August 4, 2006. The Arbitrator found that the accident resulted in crush injuries to both feet which had resolved to the point where he could return to gainful employment. The Arbitrator further stated that Dr. Komanduri deferred recommendation of treatment to Dr. Vargo and Dr. Holmes who both found that Petitioner was not in need of any surgery. Based upon the foregoing, the Arbitrator concluded that Petitioner's current condition of ill-being is not causally related to the accident of August 4, 2006. However, the Arbitrator did not distinguish between Petitioner's condition of ill-being of his feet and the alleged ankle complaints. While the Commission agrees with the Arbitrator that Petitioner failed to prove that his current ankle condition of ill-being is causally related to the work accident and that Petitioner does not need surgery to his left ankle, the Commission finds that Petitioner's current bilateral foot condition of ill-being is causally related to the accident of August 4, 2006. Furthermore, the Commission finds that Petitioner's condition in his feet had not yet stabilized as of the date of the hearing and that Petitioner is entitled to prospective medical [*3] care for the condition of his feet as recommended by Dr. Holmes.

Dr. Holmes, Jr., examined Petitioner pursuant to Section 12 of the Act on November 15, 2007. In conjunction with his exam, the doctor took a history, reviewed medical records and performed a physical examination. Petitioner indicated an electric pallet jack ran over both of his feet on August 4, 2006. Petitioner was seen in the emergency room the same day and was diagnosed with a Lisfranc injury to his right foot. (RX10, pp. 8,9) Petitioner told Dr. Holmes that he had bilateral foot complaints. The doctor's physical exam revealed that Petitioner had some atrophy in the left calf. Both ankles were stable, his feet had good color, turgor and were neurovascularly intact. Petitioner complained of pain in the dorsum of the right foot in the vicinity of the Lisfranc area. He complained of a sporadic, burning sensation in his left foot which was aggravated by activities such as walking, climbing, standing, running, and going up and down stairs. Dr. Holmes testified that the areas of complaints of pain had nothing to do with the ankle. The doctor noted that Petitioner did not complain of any ankle pain. X-rays of the feet and [*4] ankle were negative and there was no evidence of disuse or sympathetic mediated pain syndrome. (RX 10, p.10-15).

Dr. Holmes was of the opinion that, as a result of the accident, Petitioner sustained contusions of both feet and post-contusion neuritis (an injury to the nerves as a result of a local crush injury). Dr. Holmes testified that Petitioner did not need a broad umbrella of care including surgery or shoe modification, but testified he had made suggestions for care on page 8 of his written report. (RX10, p.17) Dr. Holmes testified that Petitioner might benefit from a Lidoderm patch or an RS4 stimulator (similar to a TENS unit), both of which are used for a number of weeks, not a lifetime. The doctor testified that it would not be unreasonable to obtain an EMG to see if there are other issues concerning the nerves. The doctor explained that the condition of neuritis usually resolves after a period of up to two years. Petitioner had not received treatment for his condition. The doctor explained that there are additional treatment modalities not elucidated at the time of his examination. The treatment should be started and then one can get a better idea to predict how soon over [*5] time the symptoms will resolve. (RX10, pp.16-19, 21-23) Dr. Holmes disagreed with Dr. Komanduri's recommendations for treatment. While Dr. Komanduri noted multiple areas of pain in Petitioner's foot, including the ankle joint, Dr. Holmes noted inconsistencies in the areas and that Petitioner had no ankle joint complaints when he examined him. (RX 10, pp.27, 28, 30). The doctor explained that the fact Petitioner felt relief after Dr. Komandrul injected his feet is a good sign that he will

improve with the modalities discussed during his deposition. (PX10, pp.32, 33) Petitioner was capable of full duty work with no restrictions. Petitioner had no objective parameters of a dysfunctional foot, no atrophy, swelling, joint dysfunction, or arthritis. The doctor explained that the nerves involved are not intrinsic to the function of the foot. The nerves involved are sensory nerves. (RX10, pp.17, 25).

Petitioner was also examined by Dr. Armen Kelikian on March 13, 2007 pursuant to Section 12 of the Act. Dr. Kelikian noted Petitioner's chief complaint was to both his feet, right more than left. Like Dr. Holmes, Dr. Kelikian felt Petitioner suffered from neuropraxia following the accident. The **[*6]** doctor also felt that Petitioner had type 2 complex regional pain syndrome. He anticipated maximum medical improvement within about two months and anticipated a return to gainful employment after an FCE was performed. He further stated, "This is not a reflex sympathetic dystrophy or in any way typifies one, but just a contusion from the crush injury." The doctor noted the only objective finding was numbness which was subjectively based on the testing the doctor performed. All x-rays were normal. Dr. Kelikian felt there was no evidence of any Lisfranc injury or fractures, but a crush injury to the foot. The MRI was essentially unremarkable except for a questionable peroneus brevis tear. The doctor recommended an ultrasound and the use of medication such as Lyrica and Neurontin. Dr. Kelikian indicated Petitioner's prognosis was excellent and Petitioner should be at maximum medical improvement in about two months. The doctor saw no reason why Petitioner could not return to gainful employment with no restrictions. The doctor suggested a functional capacity evaluation and felt that care should be managed by a pain specialist. On June 15, 2007, Dr. Kelikian authored a second report after **[*7]** review of the ultrasound which was performed subsequent to his initial report. Dr. Kelikian noted that the ultrasound was normal and did not show a tendon tear or ankle impingement. The MRI scans in the past were also normal and did not reveal anything to justify arthroscopic surgery to the ankle. Dr. Kelikian indicated that he felt Petitioner did not have an intraarticular problem or ankle joint problem. The doctor confirmed that Petitioner's condition should be managed by a pain specialist at this point. (RX13, RX14)

Petitioner was seen by Dr. Vargo for a second opinion on December 20, 2006. Dr. Vargo made a diagnosis of chronic regional pain syndrome post-contusion and recommended treatment. The doctor noted that the bone scan performed shortly after the injury was essentially negative in these areas. (PX6) Petitioner was also seen by Dr. League on February 2, 2007. Dr. League concluded that Petitioner had no mechanical injuries in his feet or ankles. The doctor felt Petitioner had nerve hypersensitivity in his bilateral lower extremities as a result of his crush injury. Dr. League recommended referral to a pain specialist. (RX7)

The Commission concludes that other than Dr. Komanduri, **[*8]** all the doctors essentially agreed that Petitioner sustained crushing injuries to his feet which resulted in a nerve injury. Dr. Holmes and Dr. Kelikian agreed that Petitioner is suffering from neuropraxia. All the doctors agreed that Petitioner was in need of specialized care for his bilateral foot condition. The Commission notes that Dr. Holmes authored a written report after examining Petitioner on November 15, 2007, and referenced the report when discussing treatment options during his deposition. The report, however, was not admitted into evidence. Thus, the entire range of treatment options discussed by Dr. Holmes is not entirely known. In any event, Petitioner has not received the type of care recommended by Dr. Holmes.

Based on the above, the Commission finds that Petitioner's current conditions of ill-being in his left and right feet are causally related to the accident. The Commission affirms and adopts the findings of the Arbitrator that Petitioner's current ankle condition of ill-being of is not causally related to the accident and that Petitioner does not need surgery to his left ankle. However, the Commission concludes that Petitioner has not yet reached maximum medical **[*9]** improvement and is in need of additional medical care for his condition of neuropraxia in his feet as recommended by Dr. Holmes, including a possible Lidoderm patch, RS4 stimulator, and an EMG. Depending on Petitioner's response to treatment, Dr. Holmes testified that there are additional treatment modalities that could be used. The Commission notes Dr. Holmes' testimony that Petitioner had not received treatment for the diagnosis of neuritis.

In keeping with its findings on causal connection, the Commission further modifies the Arbitrator's Decision regarding the award of temporary total disability benefits. The Arbitrator awarded temporary total disability benefits from August 5, 2006 through September 18, 2006 and from October 9, 2006 through January 5, 2008 (a period of 68 5/7 weeks). The Arbitrator noted that as of January 5, 2008, Dr. Holmes found Petitioner capable of returning to work full duty. The Arbitrator found that in three and one half months, Petitioner only looked for twenty jobs, what amounted to an inadequate job search. The Arbitrator also found that the restrictions placed on Petitioner were not related to the accident. Lastly, the Arbitrator found that Petitioner **[*10]** did not offer any testimony as to the wages he earned during the time he worked part-time for Respondent from September 19, 2006 through October 8, 2006. The Arbitrator concluded that he, therefore, could not calculate an award of **temporary partial** benefits during this period.

In the Commission's view, Petitioner was temporarily totally disabled for a total period of 83 4/7 weeks. That period includes the period for which the Arbitrator awarded temporary total disability (August 5, 2006 through September 18, 2006 and October 9, 2006 through January 5, 2008). The Commission also finds that Petitioner was temporarily totally disabled from January 6, 2008 through April 19, 2008, a period of 14 6/7 weeks. This additional period of temporary totally disability is based on the Commission's finding that Petitioner is in need of additional treatment and his condition has not yet stabilized. Petitioner has not yet reached maximum medical improvement.

On April 20, 2008, Petitioner testified he found a job at "Just Tires". He earns $ 440.00 per week. (T.7-9, 32) The parties stipulated that while employed by Respondent Petitioner's average weekly wage was $ 821.81. The Commission finds that, **[*11]** in addition to temporary total disability, Petitioner is entitled to **temporary partial** disability beginning on April 20, 2008 and ending on June 24, 2008, the date of the arbitration hearing, a period of 9 2/7 weeks at the rate of $ 254.54 per week (2/3 x (821.81 - 440.00)).

Finally, the Commission makes one minor correction with respect to the Arbitrator's Decision so that the Order portion of the Decision conforms to Respondent's stipulation. The Arbitrator's Decision (on the next to last page, first full paragraph) indicates Petitioner went off work on October 19, 2006. The parties stipulated, and the Order reflects, that Petitioner went off work on October 9, 2006. The Commission hereby corrects the Arbitrator's Decision to reflect October 9, 2006, as the beginning date for the second period of temporary total disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on September 3, 2008 is modified and corrected as stated herein and all else is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 547.88 per week for a period of 83 4/7 weeks, that being the period of temporary **[*12]** total incapacity for work under § 8(b). In addition, Respondent shall pay to Petitioner the sum of $ 254.54 per week for a period of 9 2/7 weeks, that being the period of **temporary partial** incapacity for work under Section 8(a). In addition, as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide Petitioner with prospective medical care as recommended by Dr. Holmes for the treatment of his left and right feet including, but not limited to, a Lidoderm patch, RS4 stimulator, and an EMG. Respondent is ordered to pay for Petitioner to attend one visit with Dr. Holmes to formulate a current treatment plan and to provide for the treatment recommended by Dr. Holmes. (RX10, pp, 18, 23).

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing **[*13]** of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, including, but not limited to $ 45,940.82, 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 $ 2,300.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: OCT 21 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Leo Hennessy**, arbitrator of the Commission, in the city of **Joliet**, on **6/24/2008**. After reviewing **[*14]** all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. Should penalties or fees be imposed upon the respondent?
N. Other **future medical**

FINDINGS

. On **8/04/2006**, the respondent **Aldi, Inc.** ***was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 42,734.12**; the average weekly wage was **$ 821.81**.

. At the time of injury, the petitioner was **26** years of age, ***married*** with **5** children under 18.

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

. To date, **$ 45,940.82** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 547.88** /week for **68-5/7** weeks, from **8/05/2006** through **9/18/2006**, and **10/09/2006** through **1/05/2008**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay **$ 0** for medical services, as provided in Section 8(a) of the Act.

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

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

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

. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS [*16] Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 1.89% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award,

interest shall not accrue.

Signature of arbitrator

8-18-08

Date

SEP 3 2008

FINDINGS OF FACT

The petitioner testified that on August 4, 2006, he was employed by the respondent as a store manager-trainee. On that date, a forklift ran over his feet. The left foot was run over by the wheel and the right one was under the fork. His foot was run over twice when they backed the forklift up to get it off his feet, and ran over his foot a second time. He continued to work that day for three or four hours. After that, his wife drove him to the hospital. At the hospital, he was given pain medication and crutches. He began treating with Dr. Komanduri. Dr. Komanduri put him in a walking boot and cast and prescribed **[*17]** medicine, physical therapy, and an injection. The last time he saw Dr. Komanduri was in January 2008. The doctor at that time was recommending surgery. He also allowed him to return to work with restrictions of no lifting greater than 20 pounds, no climbing, squatting or kneeling. At one point, he did return to Aldi's within those restrictions, however he only worked for six weeks. Aldi told him they could not accommodate his restrictions for more than six weeks. He is able to perform his job for Aldi's, however they will not take him back with restrictions. He began looking for another job in February 2008. From that time until April 28 2007, when he began his current employment, he applied for approximately 20 jobs.

Dr. Komanduri recommended a second opinion. He gave the petitioner his choice of seeing either Dr. Vargo or Dr. Holmes. The petitioner elected to have a second opinion with Dr. Vargo. Dr. Vargo did not recommend any surgery. The petitioner was sent to Dr. Holmes for an independent medical evaluation, who also did not recommend any surgery. On January 17, 2007, Dr. Komanduri released him from care stating there was essentially nothing on the MRI or bone scan to warrant **[*18]** further care or treatment, and he was considered at maximum medical improvement. The petitioner then returned to Dr. Komanduri on April 30, 2007, at which time Dr. Komanduri's treatment recommendations changed and he began recommending the surgery. Of the six doctors seen by the petitioner, Dr. Komanduri is the only one to recommend surgery. All the other doctors feels that conservative care would be appropriate.

The petitioner returned to work for Just Tires on April 28, 2008, and continues to work there through the present. That job involves standing on his feet, walking and sitting.

CONCLUSIONS OF LAW

In support of the arbitrator's decision whether or not the petitioner's present condition of ill-being is causally related to the injury, the arbitrator finds the following facts:

The petitioner began treating with Dr. Komanduri after the accident. On December 13, 2006, Dr. Komanduri recommended that the petitioner seek a second opinion with either Dr. Holmes or Dr. Vargo. (Respondent's Exhibit 2). The petitioner elected to be seen by Dr. Vargo, and was seen by her on December 20, 2006. After that examination, Dr. Vargo found that she saw no indication of permanent structural **[*19]** damage and did note there was a possibility of nerve damage from which it would take 12 to 18 months to recover. She felt that he may actually achieve full recovery in this regard. (Respondent's Exhibit 3) The petitioner was then seen by Dr. League on February 2, 2007. Dr. League found no mechanical injuries in the petitioner's feet or ankles. X-rays were taken and there was no indication of any injuries to his feet. Dr. League did not feel surgery was appropriate. (Respondent's Exhibit 7) The petitioner was referred to Dr. Chinthagada by Dr. League. He saw Dr. Chinthagada on February 8, 2007. After examination, Dr. Chinthagada felt that no surgery was recommended, that the petitioner needed conservative care. The petitioner was seen by Dr. Kelikian on March 13, 2007. Dr. Kelikian felt that the petitioner had neuropraxia and recommended an ultrasound. He did not feel that surgery was needed. (Respondent's Exhibit 13) Dr. Kelikian ordered an ultrasound, which was performed on February 22, 2007. (Respondent's Exhibit 9) His review of the ultrasound showed only an asymmetrical extension of the left peroneous bravos muscle and no tear or acute problems. There was also no evidence of any **[*20]** ankle impingement. (Respondent's Exhibit 14) The petitioner Was then seen by Dr. Holmes for an independent medical evaluation. Dr. Holmes' diagnosis was contusion of both feet and post-concussion neuritis. He could find no objective findings to support the subjective complaints. (Respondent's Exhibit 10) Dr. Holmes recommended conservative care for six to seven weeks. (Respondent's Exhibit 10) Dr. Holmes in his testimony did state that the history given to him was taken by the physicians assistant or nurse, and he went over the history with the patient. He specifically testified he measure the petitioner's calf, ankle and right foot, and tested the stability of the ankle. He then drew on the petitioner's foot the areas of pain being complained of by the petitioner, and specifically put a red dot over the exact spot of the pain. (Respondent's Exhibit 10) The doctor noted that the area of pain is not related in any way to the ankle (Respondent's Exhibit 10) He stated he would not recommend the treatment recommended by Dr. Komanduri. (Respondent's Exhibit 10) He also noted that at no time during the examination or the taking of the history did the petitioner complain of ankle pain. (Respondent's **[*21]** Exhibit 10)

Based upon all the medical evidence, the arbitrator finds that the petitioner's complaints of ankle pain are not related to the accident of August 4, 2006, involving the petitioner's foot. The arbitrator finds that the petitioner suffered a crush injury to his left foot and right foot, which has resolved to the point that the petitioner can return to gainful employment. Dr. Komanduri deferred recommendation of treatment to Dr. Vargo and Dr. Holmes who both found that the petitioner was not in need of any surgery. Based upon this, the arbitrator finds that the petitioner's current condition of ill-being is not causally related to the accident of August 4, 2006.

In support of the arbitrator's decision regarding were the medical services that were provided to petitioner reasonable and necessary, the arbitrator finds the following facts:

The petitioner did not put any medical bills into evidence, therefore the arbitrator finds that the petitioner is not entitled to an award of any medical bills.

In support of the amount of compensation due for temporary total disability, the arbitrator the following facts:

The petitioner was off work from August 5, 2006, through September **[*22]** 18, 2006, then returned to work part-time from September 19, 2006, through October 8, 2006. The petitioner then went off work on October 19, 2006, and was paid temporary total disability benefits for that time through January 5, 2008. It was at that time that he was provided with a copy of Dr. Holmes' independent medical evaluation, which found that the petitioner was capable of returning to work full duty. The petitioner testified that in three-and-a-half months he only looked for 20 jobs. The arbitrator does not find that this was an adequate job search. The arbitrator also finds that the restrictions placed on the petitioner are not related to the accident of August 4, 2006.

The petitioner did not offer any testimony as to what wages he was earning during the time he was working part-time from September 19, 2006, through October 8, 2006, for the respondent. Based upon that, the arbitrator is incapable of awarding the petitioner any **temporary partial** disability payments.

After review of the medical records and the petitioner's testimony, the arbitrator finds that the petitioner is entitled to temporary total disability benefits from August 5, 2006, through September 18, 2006, and **[*23]** then again from October 9, 2006, through January 5, 2008.

In support of the arbitrator's decision regarding whether or not penalties and fees should be imposed upon the respondent, the arbitrator finds the following facts:

The petitioner is requesting penalties for non-payment of temporary total disability benefits. As the arbitrator has found that the petitioner's current condition of ill-being is not causally related to the accident of August 4, 2006, the petitioner is not entitled to penalties for the non-payment of temporary total disability benefits. Dr. Komanduri, the petitioner's treating physician, recommended a second opinion with Dr. Holmes. The petitioner was seen by Dr. Holmes for an independent medical evaluation, and Dr. Holmes felt that the petitioner could return to work full duty. That examination was done on November 15, 2007. Temporary total disability benefits were paid through January 5, 2008. Based upon this, the arbitrator finds that the petitioner is not entitled to penalties against the respondent.

In support of the arbitrator's decision regarding whether or not the petitioner is entitled to future medical benefits, the arbitrator finds the following facts: **[*24]**

The petitioner has been seen by six doctors. Dr. Komanduri is the only one to recommend surgery. Dr. Komanduri recommended that the petitioner seek a second opinion with either Dr. Vargo or Dr. Holmes. The petitioner was seen by both for a second opinion, and neither of those doctors recommended surgery. In January 2007, Dr. Komanduri stated that there was nothing on the MRI or bone scan to warrant further care or treatment. Based upon the testimony of the medical experts in this case, the arbitrator finds that the surgery recommended by Dr. Komanduri is not related to any accident arising out of and in the course of petitioner's employment on August 4, 2006.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: "temporary partial" (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, January 21, 2010 - 6:34 PM EST

*2009 Ill. Wrk. Comp. LEXIS 949, **

09 IWCC 914

DYIAN MCBRIDE, PETITIONER, v. STATE OF ILLINOIS-LUDEMAN DEVELOPMENT CENTER, RESPONDENT.

NO: 06 WC 28019

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 949

September 15, 2009

CORE TERMS: settlement, partial disability, temporary, overtime, loss of use, arbitrator, right hand, earning, time period, fracture, distal, partial loss, permanency, radius, wrist, average weekly wage, full capacity, light duty, calculation, underwent, one-year, totaled, screw, amount of credit, amount of money, present value, body part, subtracting, amputation, calculated

JUDGES: Kevin W. Lamborn; Barbara A. Sherman; Paul W. Rink

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

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

> "[i]n computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury **[*2]** resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." 820 ILCS 305/8(e) 17 (2007).

On review, Respondent argued that credit shall be calculated by subtracting the percentage of the present value of the injury minus the percentage of the credit Respondent has from prior injuries to the same body part. In support of its argument, Respondent cited General Motors Corp v. Industrial Commission, 62 Ill.2d 106, 113 (1975), in which the Illinois Supreme Court agreed with the Circuit Court that the employer was entitled to a credit for a previous settlement, but reversed the Circuit Court's decision finding that the credit was limited to the amount of money **[*3]** paid in the prior settlement. However, neither § 8(e)17 of the Act or General Motors state that credit **shall** be calculated by subtracting the percentage of the present value of the injury minus the percentage of the credit Respondent has from prior injuries to the same body part. (Emphasis added.)

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

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

In Isaacs v. Industrial Commission, 138 Ill.App.3d 392, 396 (1985), the Appellate Court explained that "[c]redits which operate as partial exceptions to the liabilities created by the Act should, therefore, be narrowly construed where granted and not be extended **[*4]** by implication unless necessary to accomplish the purpose of the Act."

As noted by Petitioner in her brief, since General Motors was decided, the Illinois Workers' Compensation Act was amended and the maximum number of weeks payable for loss of use of the hand has been increased from 190 weeks to 205 weeks. Under Petitioner's

prior settlement, Petitioner received 17% loss of use of the hand totaling 32.3 weeks. If the Commission were to award credit of 17% loss of use of the hand under the current Act, Respondent would receive a credit for 34.85 weeks even though Petitioner was never paid that amount. It would be inequitable to provide Respondent with a credit for 2.55 weeks of compensation that Petitioner never received. Therefore, the Commission finds that the appropriate means of determining the prior amount of credit, consistent with the humane and remedial purposes of the Act, is to award Respondent credit for the amount of weeks actually paid Petitioner and not the percentage of loss provided for in the prior settlement.

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

IT IS FURTHER ORDERED **[*5]** BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: SEP 15 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kathleen A. Hagan**, arbitrator of the Commission, in the city of **Chicago**, on **July 15, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
L. What is the nature and extent of the injury?
O. Other **Is petitioner entitled to temporary partial disability benefits? What is proper calculation of credit for prior settlements.**

FINDINGS

. On **June 13, 2008**, the respondent **State of Illinois *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain **[*6]** injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **28,629.12**; the average weekly wage was $ **550.56**.

. At the time of injury, the petitioner was **52** years of age, ***single*** with **1** children under 18.

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

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

ORDER

. The respondent shall pay the petitioner **temporary partial** disability benefits of $ 3,781.88 for the time period from **6/19/06** through **10/19/06**, which is the period for which **temporary partial** disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **330.04**/week for a further period of **59.95** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused loss of use of the petitioner's right hand to the extent of 45% thereof (92.25 weeks), less a credit of 32.3 weeks, for a net award of 59.95 weeks.

. The respondent shall pay the petitioner compensation that has accrued **[*7]** from **6/19/06** through **7/15/08**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **0** for necessary medical services, as provided in Section 8(a) of the Act.

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

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

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

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

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

Kathleen A. Hagan

September 24, 2008

Date

Attachment to Arbitration Decision

[*8] Dylan McBride vs. State of IL - Ludeman Development Center
06WC028019

L. What is the nature and extent of the injury and proper calculation of credit for prior settlements?

The Petitioner is employed by Respondent as a mental health technician. Her job duties include assisting mentally disabled individuals with activities of daily living. On June 13, 2006, while exiting a residence, the Petitioner slipped and fell, injuring her right hand and arm. She was taken by ambulance to St. James Hospital, where x-rays revealed a dorsally displaced right distal radius fracture, an impacted fracture of the distal radius with dorsal angulation, and fracture of the styloid process of the ulna (Pet. Ex. 1). Petitioner underwent surgery by Dr. Davis, who noted a widely displaced right distal radius fracture. He performed an open reduction internal fixation of the right distal radius fracture with Acumed-Acu-LOC plate with two 3.5 CM cortical locking screws, one 3.5 MM cortical screw, and six distal locking screws (Pet. Ex. 1 and 3).

The Petitioner then underwent a course of occupational therapy at St. James Hospital approximately two times per week (Pet. Ex. 2). The treatment consisted of exercise, [*9] soft tissue massage, iontophoresis, moist heat, icing, cryotherapy and home exercise. The Petitioner underwent occupational therapy from July 12, 2006 through September 21, 2006 for twenty-two visits (Pet. Ex. 2).

When last seen by Dr. Davis on September 26, 2006, slight decreased grip on the right was noted; as well as right wrist tender to palpation, some tenderness to palpation and some tenderness to extension of the right wrist. Dr. Davis prescribed ice as needed and to take Tylenol as needed. He also noted probable cubital tunnel syndrome and released Petitioner to full duty as tolerated. (Pet Ex. 3). The Petitioner returned to work on a full duty basis on October 20, 2006.

At arbitration, the Petitioner credibly testified as to stiffness about her right wrist, particularly in the morning and after work. There is sometimes throbbing every day. There is sometimes swelling, particularly if doing something physical, which occurs once every two weeks. The range of motion is good, except when her wrist is stiff. She has difficulty pinching and gripping with heavy items. She continues to do home exercise as well as use heat and ice. She no longer notes numbness. Based upon the foregoing, [*10] the Arbitrator awards Petitioner 45% loss of use of her right hand.

The Respondent introduced evidence of Petitioners two prior workers' compensation settlements. In case 00 WC 068669, the Petitioner received a settlement for 12% loss of use of the right hand for a fracture, which totaled 22.8 weeks of permanency (Resp. Ex. 1). In case 02 WC 029191, Petitioner received a net settlement of 5% loss of use of the right hand, representing a total of 17%, less a credit for the prior 12% settlement. This was for 9.5 weeks of permanency. (Resp. Ex. 2) The total number weeks of permanency received by the Petitioner was 32.3 weeks, and the Arbitrator awards Respondent a credit for those weeks against the current award of 45% loss of use of the Petitioners right hand (92.25 weeks) for a net award of 59.95 weeks.

O. Is Petitioner entitled to temporary partial disability benefits?

The Petitioner testified that prior to her accident on June 13, 2006, she regularly worked voluntary overtime. In the pay periods for the one-year prior to the date of the accident, she worked overtime in all but one of those pay periods, as is also evidenced in the wage records from Respondent (Pet. Ex. 4), and [*11] summarized below. After Petitioner was injured and only able to return to light duty work, her duties were limited to doing paperwork and she was unable to perform the normal duties assisting the mentally disabled residents. She was therefore unable to perform the full capacity of her job and unable to earn any overtime during the time period for which she worked light duty from June 19, 2006 through October 19, 2006, which is a period of 17-4/7 weeks.

Section 8(a) of the Illinois Workers' Compensation Act provides that when an employee is working light duty and earning less than he or she would be earning if employed in the full capacity of her job, the employee should be entitled to **temporary partial** disability benefits of 2/3 of the difference between the average amount that the employee would be able to earn in the full employment of her duties in which she was engaged at the time of the accident and the net amount which he or she is earning in the modified job. 820 ILCS 305/8(a).

In the one-year period prior to the date of Petitioner's accident; it is stipulated that petitioners average weekly wage was $ 28,629,12. In the one-year time [*12] period prior to the date of Petitioner's injury, she had overtime earnings of $ 9,548.07 or $ 183.62 per week as is summarized below.

During the time period for which **temporary partial** benefits are sought, the Petitioner's net earnings for the weeks ending July 1, 2006 through October 1, 2006 totaled $ 6,266.45. The Petitioner's gross earnings during that period, without overtime, totaled $ 9,368.60. The average overtime earnings that Petitioner would have made of $ 183.62 during that time period would total $ 2,570.00. The amount of money that the Petitioner would have made in the full capacity of her job would be the gross wages of $ 9,368.60 plus the overtime earnings of $ 2,570.00, for a total of $ 11,939.28. The net earnings for that same time period pursuant to Section 8(a) would be $ 6,266.45, leaving a difference of $ 5,672.83. The Petitioner is entitled to 2/3 of that figure as **temporary partial** disability, which totals $ 3,781.88.

The Arbitrator notes that Section 8(a) of the Act regarding **temporary partial** disability places none of the average weekly wage limitations found in Section 10 of the Act regarding overtime, nor does it limit overtime to straight-time rate.

[*13] Dylan McBride vs. State of Illinois-Ludeman Development Center
Case No. 06WC028019

LIGHT DUTY EARNINGS

Pay Period Ending Date	Net	Gross	Average Overtime
7/1/06	$ 987.83	$ 1,434.80	$ 367.24
7/16/06	$ 888.44	$ 1,295.00	$ 367.24

	8/1/06	$ 894.80	$ 1,304.00	$ 367.24
	8/16/06	$ 894.80	$ 1,304.00	$ 367.24
	9/1/06	$ 886.32	$ 1,292.00	$ 367.24
	9/16/06	$ 857.15	$ 1,304.00	$ 367.24
	10/1/06	$ 857.15	$ 1,434.80	$ 367.24
Total		$ 6,266.45	$ 9,368.60	$ 2,570.68
Plus Overtime			$ 2,570.68	
			$ 11,939.28	
Less Net Earnings			$ 6,266.45	
			$ 5,672.83	
			times 2/3	
Temporary Partial			$ 3,781.88	

Legal Topics:

For related research and practice materials, see the following legal topics:

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

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

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

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