*290 Ill. 569, *; 125 N.E. 284, **;*
*1919 Ill. LEXIS 949, ****

EDWARD E. McMORRAN & Co., Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (ALFRED A. HABEL, Defendant in Error.)

No. 12831.

Supreme Court of Illinois

290 Ill. 569; 125 N.E. 284; 1919 Ill. LEXIS 949

December 17, 1919.

PRIOR HISTORY: **[***1]** WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

DISPOSITION: *Reversed and remanded, with directions.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer appealed from a judgment of the Circuit Court of Cook County (Illinois), which confirmed a workmen's compensation award by the Industrial Commission (Illinois) in favor of defendant in error employee. The award was for a total temporary disability and for a permanent partial disability involving a loss of a portion of the employee's finger.

OVERVIEW: The issue before the court concerned the award for the permanent partial loss of the first phalange of the index finger. The evidence showed that the employee lost only the tip of his finger, one-sixteenth of an inch, during an industrial accident. On appeal, the court reversed the judgment and remanded the case to the circuit court with directions to enter a finding and an order for total temporary incapacity only. The court determined that the award for permanent partial disability for the loss of one-sixteenth of the employee's finger was not justified under § 8(e)(6) of the Workmen's Compensation Act (Illinois). The court concluded that the legislature did not intend for a loss of one-sixteenth of an inch of a finger to constitute the loss of the finger. The court noted that a distinction was drawn between such a case and a case where a substantial portion of the finger was lost. Thus, the court held that the Commission erred in making the award for permanent partial disability. However, the award for temporary total incapacity was proper.

OUTCOME: The court reversed the circuit court's judgment and remanded the matter to the circuit court with directions to enter a finding and an order in conformity with the opinion.

CORE TERMS: finger, phalange, bone, tip, index finger, thumb, temporary, disability, interfere, distal, partial disability, susceptible, photograph, workman, cold, heat, dollars per, right hand, incapacity, dollars

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN1 See § 8(e)(6) of the Workmen's Compensation Act (Illinois).

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN2 The "amounts above specified" are set forth in § 8(e)(2) of the Workmen's Compensation Act (Illinois). More Like This Headnote

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN3 See § 8(e)(2) of the Workmen's Compensation Act (Illinois).

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities
Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN4 While a liberal interpretation should be given to the class of cases involving partial loss of a finger, such interpretation should not go to the extent of becoming absurd. It cannot be reasonably said that the loss of one-sixteenth of an inch of the first joint of a finger is the loss of the first phalange or that the legislature (Illinois) so intended. There is, therefore, a distinction to be drawn between a case where but a small tip of the bone is taken without the destruction of the use of the first joint of the finger and a case where a substantial portion of the first phalange is amputated. The loss of one-eighth of an inch of the bone of the first phalange of the second finger does not constitute loss of the phalange within the meaning of the Workmen's Compensation Act (New York). So it is held where a workman loses approximately one-fourth of an inch from the tip of one of his fingers. The loss of the tip of a finger, which loss can be discovered only on examination of an X-ray photograph, is not equivalent to the loss of the first phalange within the meaning of the Workmen's Compensation Act

(New York). The same has been held to be the rule under a statute similar to that in Illinois, where the loss of a part of the first phalange of the thumb cannot be so construed as to provide for an allowance of compensation for the loss of the entire first phalange of the thumb. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: GALLAGHER, KOHLSAAT & RINAKER, for plaintiff in error.

OPINION BY: STONE

OPINION

[*569] **[**284]** Mr. JUSTICE STONE delivered the opinion of the court:

This case is brought to this court on writ of error to the circuit court of Cook county to review a judgment of that court affirming the award of the Industrial Commission.

At the time of the accident in question the plaintiff in error and defendant in error, Alfred A. Habel, were working under and subject to the provisions of the Workmen's Compensation act. The accident arose out of and in the course of the employment. The award was for six dollars for a period of 6 1/4 weeks for total temporary incapacity for work, and a further award of six dollars per week for a period of 17 1/2 weeks, as provided by paragraph (e) of section 8 of the Workmen's Compensation act of 1917, for the reason that the injury sustained caused the loss of the first phalange of the index finger of the right hand. The only issue in this court is to that part of the award which relates to the loss **[***2]** of the first phalange of the index finger.

[*570] On August 3, 1917, the defendant in error, while working for the plaintiff in error and engaged in operating a punch press, injured the tip of the first finger of his right hand. The medical testimony shows from an examination of the finger and from X-ray photographs that about one-sixteenth of an inch of the phalange bone of said finger is missing; that the bone is more callous than usual; that the injury did not interfere with the use of the distal joint, which still remains serviceable; that the tip of the finger would continue to be susceptible to cold and heat; that there remained enough of the bone to give Habel the use of the finger.

It is contended by the plaintiff in error that there is no evidence upon which the arbitrator and the Industrial Commission can base an award for the loss of the first phalange of the finger. The question whether the loss of any portion of the first phalange of the finger is to be considered as the loss of the first phalange and award made therefor under paragraph (e) of section 8 of the Workmen's Compensation act, or **[**285]** whether such disability is to be considered a temporary **[***3]** disability, has not heretofore been passed upon by this court. Clause 6 of paragraph (e) of section 8 of the Workmen's Compensation act provides as follows: *HN1*"The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified." *HN2*The "amounts above specified" are set forth in clause 2 of paragraph (e) of said section 8, as follows: *HN3*"For the loss of a first finger, commonly called the index finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during thirty-five weeks."

Defendant in error has filed no brief or argument in this case, and we are therefore not apprised of his position in the matter. We find, however, upon examination of the abstract, that the judge of the circuit court of Cook county **[*571]** who passed upon the petition for a writ of *certiorari* indicated that he based his decision on the case of *In re Petri*, 215 N.Y. 335. In the *Petri case* it was held, in construing a provision similar to that of this State above quoted, that the applicant should recover for the **[***4]** loss of the entire first phalange, where, as in that case, the applicant had lost more than one-third of the distal phalange of a finger. The court in the *Petri case* says: "We think we should hold that the provisions of the statute become operative and applicable when it appears that substantially all of the portion of the finger so designated was lost." This, we believe, is a reasonable construction of such provision. The facts in this case, however, are not on all-fours with the *Petri case*. The evidence shows, without contradiction, that the applicant lost but one-sixteenth of an inch off the first phalange of the index finger; that the injury did not interfere at all with the use of the distal joint; that the tip of the finger, while susceptible to cold and heat, did not in any way interfere with the use of the entire finger.

*HN4*While we are of the opinion that a liberal interpretation should be given to this class of cases, yet such interpretation should not go to the extent of becoming absurd. It cannot be reasonably said that the loss of one-sixteenth of an inch of the first joint of a finger is the loss of the first phalange or that the legislature so intended. There **[***5]** is, therefore, a distinction to be drawn between this case, where but a small tip of the bone was taken without the destruction of the use of the first joint of the finger, and the *Petri case,* where a substantial portion of the first phalange was amputated. That distinction is also borne in mind in the case of *Ide v. Faul & Timmins,* 179 N.Y. App. Div. 567, where a workman sustained the loss of one-fourth of an inch of the bone of the index finger and one-eighth of an inch of the bone of a second finger, and an award had been made by the Industrial Commission based on a permanent partial disability. This award was set aside by the decision of the **[*572]** Supreme Court of New York on the ground that the award for the loss of the first phalange was not justified and that the award should have been for temporary disability, only. The court there distinguishes that case from the *Petri case.* In the case of *Geiger v. Gotham Can Co.* 163 N.Y. Supp. 678, it was held that the loss of one-eighth of an inch of the bone of the first phalange of the second finger did not constitute loss of the phalange within the meaning of the Workmen's Compensation act. So in the **[***6]** case of *Thomson v. Sherwood Shoe Co.* 164 N.Y. Supp. 869, where a workman lost approximately one-fourth of an inch from the tip of one of his fingers. In the case of *Mockler v. Hawkes,* 158 N.Y. Supp. 759, it was held that the loss of the tip of a finger, which loss could be discovered only on examination of an X-ray photograph, was not equivalent to the loss of the first phalange within the meaning of the Workmen's Compensation act. The same has been held to be the rule under a statute similar to that in this State, in the case of *Packer* v. *Olds Motor Works,* 195 Mich. 497, where it was held that the loss of a part of the first phalange of the thumb could not be so construed as to provide for an allowance of compensation for the loss of the entire first phalange of the thumb.

We are of opinion that the circuit court erred in quashing the writ of *certiorari* issued in this cause, and that the Industrial Commission erred in making an award for 17 1/2 weeks, at six dollars per week, for permanent partial disability, as provided in paragraph (e) of section 8 of the Workmen's Compensation act. The award of six dollars a week for a period of 6 1/4 weeks **[***7]** for total temporary incapacity is a proper award.

The judgment of the circuit court will therefore be reversed and the cause remanded to that court, with directions to enter a finding and order not inconsistent with the views herein expressed.

Service: **Get by LEXSEE®**
Citation: **290 Ill. 569**
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*367 Ill. 458, *; 11 N.E.2d 924, **;*
*1937 Ill. LEXIS 516, ****

THE MACON COUNTY COAL COMPANY, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (RICHARD HENRY FARRAR, Plaintiff in Error.)

No. 24179.

Supreme Court of Illinois

367 Ill. 458; 11 N.E.2d 924; 1937 Ill. LEXIS 516

December 15, 1937.

PRIOR HISTORY: **[***1]** WRIT OF ERROR to the Circuit Court of Macon county; the Hon. CHARLES Y. MILLER, Judge, presiding.

DISPOSITION: *Reversed and remanded, with directions.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs in error, an employee and the Industrial Commission (Illinois), sought review, by a writ of error, of a judgment of the Circuit Court of Macon County (Illinois), which set aside an award to the employee, who **worked** for defendant in error employer. An arbitrator made the award, which had been affirmed by the Commission.

OVERVIEW: At the hearing on the employee's claim for **compensation,** the parties stipulated that they were operating under the **Workmen's Compensation** Act provisions and that the employee had sustained an injury arising out of and in the course of his employment. The arbitrator found that he was entitled to receive an award for 50 percent permanent loss of the use of the second finger on his right hand, which the Commission affirmed. The circuit court reversed the award, finding that the employee had not sustained a permanent and complete loss of the use of his finger. On appeal, the court found that there was no legal basis under the Act for the employer's contention that the award should have been based on 35 percent loss of the finger because, pursuant to Ill. Rev. Stat. ch. 48, para. 145(e)6 (1937), the loss of the first phalange of any finger was to be considered equal to the loss of one-half of such finger and **compensation** was apportioned accordingly. The court concluded that the arbitrator's and Commission's findings that the injury amounted to the loss of the first phalange of the second finger were not contrary to the manifest weight of the evidence and should not have been reversed.

OUTCOME: The court reversed the circuit court's judgment and remanded the cause with directions for the circuit court to enter an order confirming the Commission's order in favor of the employee.

CORE TERMS: finger, phalange, arbitrator, bone, per week, right hand, disability, temporary, nail

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

HN1 The **Workmen's Compensation** Act provides that **compensation** shall be paid for the loss of a second finger, or the permanent and complete loss of its use, 50 percentum of the average weekly wage during 35 weeks. Ill. Rev. Stat. ch. 48, para. 145(e)3 (1937). The loss of the first phalange of any finger is to be considered equal to the loss of one-half of such finger and **compensation** apportioned accordingly. Ill. Rev. Stat. ch. 48, para. 145(e)6 (1937). More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN2 Conclusions of the Industrial Commission (Illinois) on questions of fact will not be disturbed unless contrary to the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: ROBERT H. ALLISON, and THURLOW G. LEWIS, for plaintiff in error.

MONROE & ALLEN, for defendant in error.

OPINION BY: ORR

OPINION

[*458] **[**925]** Mr. JUSTICE ORR delivered the opinion of the court:

Richard Henry Farrar, an employee of the Macon County Coal Company, was injured in an accident arising out of and in the course of his employment. At the hearing **[*459]** on his claim for **compensation** before the arbitrator it was stipulated that the employer and employee were operating under the provisions of the **Workmen's Compensation** act on the date of the accident, that Farrar had sustained an injury arising out of and in the course of his employment, and that temporary **compensation** for the injury had been paid. The only questions before the arbitrator were the nature and extent of disability and the **compensation** rate. At the time of the accident Farrar was earning $26.30 per week. The arbitrator found he was entitled to receive $13.15 per week for a period of four and four-sevenths weeks for temporary disability and the same **[***2]** sum for a further period of seventeen and one-half weeks, or $230.12, for fifty per cent permanent loss of the use of the second finger on his right hand. This award was affirmed by the Industrial Commission but the circuit court of Macon county, on *certiorari,* ordered it set aside because Farrar had not sustained a permanent and complete loss of the use of his finger. We awarded a writ of error to review that decision.

The injury suffered by Farrar resulted in the severing of the end of the second finger on his right hand. One third of the bone of the distal phalange was removed by the doctor and the finger at present is three-eighths of an inch shorter than the corresponding finger on his left hand. The nail has grown back and is now half of its former size and the flesh at the end of the finger has been restored to a point approximately even with the end of the nail. As to loss of use of the phalange, Farrar testified that the finger was tender and that there was a limitation in the flexion of the first joint. In its petition for review before the commission, defendant in error admitted that Farrar was entitled to an award for thirty-five per cent of the amount allowed **[***3]** by the statute for loss of the first phalange of the second finger, or $161.09, but denied liability in excess thereof.

[*460] *HN1*The **Workmen's Compensation** act provides that **compensation** shall be paid "for the loss of a second finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during thirty-five weeks." (Ill. Rev. Stat. 1937, chap. 48, par. 145(*e*)3.) The loss of the first phalange of any finger is to be considered equal to the loss of one-half of such finger and **compensation** apportioned accordingly. (Ill. Rev. Stat. 1937, chap. 48, par. 145(*e*)6.) No legal basis exists for an award based upon thirty-five per cent of the loss of a finger. The findings of the arbitrator and Industrial Commission that the injury amounted to the loss of the first phalange of the second finger were well within the range of the evidence and should not have been reversed by the circuit court, especially in view of a virtual admission of partial liability by defendant in error. We have repeatedly pointed out that *HN2*conclusions of the Industrial Commission on questions of fact will not be disturbed unless contrary to the manifest weight of the evidence. **[***4]** (*Monark Battery Co.* v. *Industrial Com.* 354 Ill. 494; *Ford Motor Co.* v. *Industrial Com.* 357 id. 401; *Panther Creek Mines* v. *Industrial Com.* 347 id. 348.) Here, there was an actual and undisputed loss of a substantial portion of an employee's finger, which entitled him to statutory **compensation** as if he had lost one-half of such finger. The judgment which denied any **compensation** to the employee and taxed the costs of review against him was palpably erroneous.This case is distinguishable from ***McMorran** & Co.* v. *Industrial Com.* 290 Ill. 569, where only a small tip (one-sixteenth of an inch) of the finger bone was destroyed.

The judgment of the circuit court of Macon county is reversed and the cause is remanded to that court, with directions to enter an order confirming the order of the Industrial Commission.

*2007 Ill. Wrk. Comp. LEXIS 370, *; 1 IWCC 0309*

JAY COLBERT, PETITIONER, v. GMP-GENPAK, INC., RESPONDENT.

NO. 03 WC 050105

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCHENRY

2007 Ill. Wrk. Comp. LEXIS 370; 1 IWCC 0309

March 16, 2007

CORE TERMS: arbitrator, finger, middle finger, phalanx, distal, bone, tip, present condition, millimeters, ill-being, causally, temporary total disability, visual inspection, disputed issues, permanent loss, visually, accrued, modifies, notice, accrue, opined

JUDGES: David L. Gore; Paul W. Rink; Mario Basurto

OPINION:

[*1] DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and the Petitioner herein and notice given to all parties, the Commission, after considering the issues of penalties and fees, nature and extent of Petitioner's disability, statutory laws 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 to award § 16 attorney's fees in the amount of $ 1,897.60 as this amount is consistent with § 16 being based on, accrued benefits (statutory loss-$ 9,487.98 X 20%). All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 729.95 per week for a period of 5/7 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 § 542.17 per week for a period of 17.5 weeks ($ 9,498.98), as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the the complete **[*2]** and permanent loss of use of the right long finger to the extent of 50%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 109.20 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 4,743.99 for penalties under § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 1,897.60 for attorney fees under § 16 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 $ 16,800.00. 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION [*3] 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 **Paula A. Gomora,** arbitrator of the Commission, in the city of **WOODSTOCK,** on **11-3-04 & 1-5-05.** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is the petitioner's present condition of ill-being causally related to the injury?
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon the respondent?

FINDINGS

. On **4-23-03,** the respondent **GMP-GENPAK *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 $ **56,936.36;** the average **[*4]** weekly wage was $ **1,094.93.**

. At the time of injury, the petitioner was **36** years of age, ***married*** with **0** children under 18.

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

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

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **729.95/** week for **5/7** weeks, from **4-24-03** through **4-28-03,** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **542.17/** week for a further period of **17.5** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the complete and permanent loss of use of the right long finger to the extent of 50%.**

. The respondent shall pay the petitioner compensation that has accrued from **4-23-03** through **1-5-05,** and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **109.20(Px. # 1, MHS Physicians Services, and shall be entitled [*5] to a credit for all payments made)** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **4,743.99** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay $ **948.80** 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 review this award, interest of 3.17% 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 accrue.

JUN 27 2005

6-24-05

Signature of arbitrator

Date

ATTACHED FINDINGS OF THE ARBITRATOR

The petitioner sustained an accident when he closed his right middle finger in the door of a roll-off dumpster on April 23, 2003, while working for the respondent. **[*6]** Petitioner suffered a crush injury, amputating the tip of his right long finger and a small fracture of the tip of the distal phalanx.

In support of the Arbitrator's decision regarding (F) whether the petitioner's present condition of ill-being is causally related to the injury and (L) the nature and extent of the injury, the Arbitrator finds the following:

Petitioner's treating physician and surgeon, Dr. Paul Dillon, performed surgery, including full thickness debridement of skin, subcutaneous tissue and bone, as well as V-Y advancement flap for wound closure. Dr. Dillon opined by letter of July 16, 2004, that the petitioner sustained a loss of the cortex of the distal phalanx tip of the right long finger. The lateral view of **bone loss** was approximately three millimeters. [Px. 2(a)]

Similarly, Dr. Mark Levin, respondent's section 12 examiner, opined that petitioner lost approximately 2-3 millimeters of bone. The Arbitrator notes that neither the respondent nor Dr. Levin visually inspected petitioner's finger to determine the extent of loss of petitioner's finger. Furthermore, the Arbitrator's visual inspection of petitioner's finger reveals that the finger, by comparison with **[*7]** the opposite, uninvolved finger of the left hand, appears to be shorter by approximately 1/2 of the distal phalanx. Also, the nail bed hooks over the top of the finger. While the petitioner has returned to regular duties, he continues to experience numbness and tingling at the tip of the finger.

The Arbitrator's concludes that the petitioner's present condition of ill-being is causally related to the work injury of April 23, 2003, there being no evidence to the contrary.

The real issue in controversy is whether petitioner sustained a 50% statutory loss of the right long finger due to amputation pursuant to Section 8(e) of the Act. Upon review of Edward E. McMorran & Co. v. Industrial Commission, 290 Ill. 569, 125 N.E. 284 (1919) and Macon County Coal Co. v. Industrial Commission, 367 Ill. 458, 11 N.E.2d 924 (1937), the Arbitrator concludes that petitioner sustained extensive trauma to the right middle finger, to the extent of a 50% statutory loss. Relying upon both Dr. Dillon and Dr. Levin, at the very least, petitioner lost 3 millimeters of bone. Lastly, the Arbitrator determines that the **[*8]** appearance of the right distal phalanx is approximately 1/2 the size of the left distal phalanx. Thus, the respondent shall pay the petitioner 17.5 weeks of permanent partial disability at the rate of $ 542.17, as provided in section 8(e) of the Act, for a 50% statutory loss of a right middle finger.

In support of the Arbitrator's decision regarding penalties and attorney's fees, the Arbitrator finds the following:

The respondent failed to visually inspect petitioner's right middle finger prior to hearing, despite the issue arising from the medical evidence. Instead, respondent chose to rely upon Dr. Levin's report as justification to deny payment of a 50% statutory loss to petitioner's right middle finger.

By following the law, specifically Macon County Coal Co., and applying the facts, 2004; including a visual inspection, the respondent could have reasonably determined that it was obligated to pay a 50% statutory loss. Since the 50% statutory loss of the right middle finger was never tendered and the loss was plainly apparent, the Arbitrator awards petitioner penalties pursuant to section 19(k). The Arbitrator has taken into consideration that the first time the amount of **[*9] bone loss** was quantified was July 16, 2004, in awarding these penalties.

Hence, the respondent shall pay the petitioner 1/2 of the total award of $ 9,487.98, or $ 4,743.99, in 19(k) penalties for its unreasonable and vexatious refusal to timely pay the 50% statutory loss. The respondent shall also pay the petitioner attorney's fees, calculated as 20% of the 19(k) penalty, or $ 948.80, pursuant to section 16 of the Act.

6-24-05

Arbitrator Paula A. Gomora

Date

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

Service: Get by LEXSEE®
Citation: 256 Ill. App. 3d 520

*256 Ill. App. 3d 520, *; 628 N.E.2d 191, **;*
*1993 Ill. App. LEXIS 1602, ***; 194 Ill. Dec. 694*

ROBERT LESTER, appellant, v. THE INDUSTRIAL COMMISSION et al. (Ford Motor Company, Appellee).

NO. 1-92-4387WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

256 Ill. App. 3d 520; 628 N.E.2d 191; 1993 Ill. App. LEXIS 1602; 194 Ill. Dec. 694

October 21, 1993, Decided

SUBSEQUENT HISTORY: [***1] Released for Publication March 9, 1994.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. No. 92-L-50190. Honorable Mary M. Conrad, Judge Presiding

DISPOSITION: Judgment reversed; award reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review of a decision of the Circuit Court of Cook County (Illinois), which vacated a penalty award granted by respondent, the Industrial Commission, to the claimant in his action to recover benefits under the Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1991).

OVERVIEW: The middle, ring, and little fingers of the claimant's left hand were amputated following a work-related injury. He filed an application for workers' compensation benefits, and an arbitrator awarded him benefits. The arbitrator also found that his employer's delay of over 14 months in paying the amount owed for the amputations was unreasonable and vexatious. Thus, the arbitrator imposed a penalty on the employer pursuant to Ill. Rev. Stat. ch. 48, para. 138.19(k). The Commission affirmed the award, but reduced the penalty award. The trial court vacated the penalty award. On appeal, the court reversed, concluding that the claimant was entitled to a penalty award because the employer failed to carry its burden of demonstrating that the payment delay was reasonable. The court also determined that the Commission properly calculated the penalty and attorney fees based on the benefits that had accrued to the claimant prior to the tender of payment by the employer.

OUTCOME: The court reversed the decision of the trial court and reinstated the decision of the Commission.

CORE TERMS: arbitrator, amount owed, finger, paying, amputation, attorney fees, tendered, Act Ill, negotiations, automatic, claimant's, industrial, accrued, injury arose, vexatious, Compensation Act, calculated, manifest, prompt, employment relationship, arbitrator's decision, unreasonable delay, amount awarded, little fingers, statutory construction, accidental injuries, disability, settlement, penalized, amounting

LEXISNEXIS® HEADNOTES Hide

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 In construing the provisions of the Workers' Compensation Act, all portions must be read as a whole and in such a manner as to give to them the practical and liberal interpretation intended by the legislature. The purpose of the Act is to provide employees with a prompt, sure remedy for their injuries and to require that the cost of industrial accidents be borne by the industry rather than its individualmembers. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

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

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

HN2 Ill. Rev. Stat. ch. 48, para. 138.8(e) (1991) provides: For accidental injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such accidental injury, under subparagraph 1 of paragraph (b) of this Section, and shall receive in addition thereto compensation for a further period for the specific loss herein mentioned, but shall not receive any compensation under any other provisions of the Workers' Compensation Act. The following listed amounts apply to either the loss of or the permanent and complete loss of use of the member specified, such compensation for the length of time as follows: Second, or middle finger - 35 weeks; Third, or ring finger - 25 weeks; Fourth, or little finger - 20 weeks. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN3 If an employer delays paying compensation, the employer has the burden of showing that it had a reasonable belief that

the delay was justified. The Industrial Commission's determination on this issue will not be disturbed on review unless it is against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN4 Under section 16a(F)(3) of the Workers' Compensation Act, when there is no dispute to pay compensation in a timely manner or in the proper amount and there is no dispute that the accident has resulted in the amputation of a finger, the legal fees, if any, for services rendered are to be fixed by the Industrial Commission at a nominal amount, not exceeding $ 100. Ill. Rev. Stat. ch. 48, par. 16a(F)(3) (1991). More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Cronin & Peters, of Chicago (Kenneth D. Peters, of counsel), for appellant.

Ridge, Condon & Saunders, of Chicago (Yvonne D. Arvanitis, of counsel), for appellee.

JUDGES: SLATER, McCULLOUGH, RAKOWSKI, WOODWARD, RARICK

OPINION BY: SLATER

OPINION

[*521] **[**192]** JUSTICE SLATER delivered the opinion of the court:

The claimant, Robert Lester, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (Ill. Rev. Stat. 1991, ch. 48, par. 138.1 *et seq.*). He sought to recover benefits for an injury which arose out of and in the course of his employment with the employer, Ford Motor Company (Ford). The arbitrator found that Lester's injury arose out of his employment and that the sustained injury caused the claimant to lose 75% of the use of his left hand. In addition, the arbitrator imposed sanctions against Ford for unreasonable delay in paying Lester's 80 weeks of compensation for the amputation of three of his fingers. The Industrial **[*522]** Commission affirmed the arbitrator's decision but modified the amount of penalties imposed. **[***2]** The circuit court set aside the penalty awards.

The record shows that Lester's left middle, ring, and little fingers were amputated on October 12, 1988, following a work injury. Lester returned to work on December 12, 1988. Thereafter, on March 1, 1990, Ford issued a check to Lester in payment for the amputation of his fingers. It was undisputed that an employment relationship existed between the parties at the time of the incident and that the accident arose out of and in the course of that employment relationship.

On February 5, 1991, the arbitrator found that Lester was entitled to 10-1/7 weeks of temporary total disability and 142 1/2 weeks of permanent partial disability. The arbitrator also found that Ford's delay of over 14 months in paying the amount owed for the amputations was unreasonable and vexatious and awarded Lester $ 12,540.40 in penalties under section 19(k) of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 138.19(k)) and $ 5,016.16 in attorney fees under section 16 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 138.16).

[193]** The 19(k) amount was based on the arbitrator's finding that Lester was entitled to an automatic 80 weeks of compensation at the rate of $ 313.51 per **[***3]** week. The arbitrator, pursuant to section 19(k), awarded 50% that amount as a penalty, and, pursuant to section 16, 20% of that amount for attorney fees.

The Commission affirmed the arbitrator's decision but modified the penalty awards. It found that the amount awarded pursuant to section 19(k) should have been $ 10,368.25 and the amount awarded pursuant to section 16 should have been $ 4,147.30 It based this finding on the fact that 66 1/7 weeks, not the full 80 weeks, had occurred when Ford tendered its payment.

The trial court set aside the penalty awards finding that Ford could not be penalized for unreasonable delay in paying because no compensation award had been entered by the arbitrator when Ford was penalized for nonpayment. The court found that the arbitrator and the Commission erred in finding that compensation pursuant to section 8(e) of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 138.8 (e)) was automatic.

On appeal, Lester argues that the trial court erred in vacating the penalty awards. He contends that since section 8(e) of the Act provides for automatic payment of compensation, Ford's 14-month delay was unreasonable and vexatious.

Our courts have apparently not previously **[***4]** addressed the issue of whether section 8(e) provides for automatic compensation. We note that **[*523]** that section provides no assistance in determining when compensation is due to the employee. As such, we must consider the rules of statutory construction to ascertain and give effect to the legislature's intent.

It is well-established law that HN1 in construing the provisions of the Workers' Compensation Act, all portions must be read as a whole and in such a manner as to give to them the practical and liberal interpretation intended by the legislature. (*Laffoon v. Bell & Zoller Coal Co.* (1976), 65 Ill. 2d 437, 359 N.E.2d 125.) The purpose of the Act is to provide employees with a prompt, sure remedy for their injuries and to require that the cost of industrial accidents be borne by the industry rather than its individual members. *Mier v. Staley* (1975), 28 Ill. App. 3d 373, 329 N.E.2d 1.

The section in question states in relevant part:

HN2 "For accidental injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such **[***5]** accidental injury, under subparagraph 1 of paragraph (b) of this Section, and shall receive in addition thereto compensation for a further period for the specific loss herein mentioned, but shall not receive any compensation under any other provisions of this Act. The following listed amounts apply to either the loss of or the permanent and complete loss of use of the member specified, such compensation for the length of time as follows:

3. Second, or middle finger - 35 weeks.

4. Third, or ring finger - 25 weeks.

5. Fourth, or little finger - 20 weeks."

Ill. Rev. Stat. 1991, ch. 48, par. 138.8(e).

Applying the above statutory construction principles to the statute, we find that the legislature intended that individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment. Such a result is consistent with the legislature's intent because prompt payment alleviates the possibility that an employee will be faced with unnecessary financial burdens. Requiring immediate payment is not unfair to the employer because statutorily it would have to pay the amount owed at some point in **[***6]** time. It is consistent with the purpose of the Act to require the amount owed to be paid promptly. The employer can pay the amount owed immediately since section 8(e) clearly sets forth the compensation an employer is obligated to pay. As such, it is unreasonable that an employee should have to wait for a judgment to be entered before receiving the compensation clearly owed.

[*524] We now turn to the question of whether the Commission erred in finding that Ford's delay in paying Lester's compensation for the loss of his fingers was unreasonable and **[**194]** vexatious. Ford argues that it delayed paying the amount it knew it owed because it was involved in settlement negotiations with Lester. Once the negotiations failed, it immediately tendered a check to Lester for the amount owed for the amputations.

HN3 If an employer delays paying compensation, the employer has the burden of showing that it had a reasonable belief that the delay was justified. The Commission's determination on this issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Howlett's Tree Service v. Industrial Comm'n* (1987), 160 Ill. App. 3d 190, 513 N.E.2d 82. **[***7]**

Here, while Ford alleges that its delay of payment was reasonable, the record is devoid of any evidence showing that it was. Ford never contested the claimant's loss of the three fingers. Nor did it contest that the injury arose out of or in the course of his employment. Ford argued that it was in negotiations with Lester. Certainly, any negotiations could not have concerned the claimant's right to 80 weeks compensation under section 8(e).

We cannot find any evidence, other than Ford's statements on appeal, that the parties were trying to negotiate a settlement. Since Ford presented no evidence to the Commission to meet its burden of proof on this issue, the Commission's decision was not against the manifest weight of the evidence.

The final argument on appeal is that the Commission erred in reducing the amount of penalties awarded. The Commission found that Lester was only entitled to penalties on the amount of compensation that had already accrued at the time payment was tendered by Ford. Citing *Moore v. Industrial Comm'n* (1989), 188 Ill. App. 3d 31, 543 N.E.2d 1062, Lester contends that once a penalty is imposed for failure to pay a **[***8]** benefit, the penalty is to be calculated on the entire amount of that type of benefit, not just the amount that had accrued prior to payment. In *Moore*, unlike the case *sub judice*, the employer did not raise the issue of credit for compensation previously paid at arbitration. Here the Commission properly calculated penalties and attorney fees based only on the amount accrued until payment was tendered. Penalties should not be based on benefits which have yet to accrue.

The Commission, pursuant to section 19(k) of the Act, awarded Lester penalties amounting to 50% of the amount owed, and, pursuant to section 16 of the Act, awarded Lester attorney fees amounting to 20% of the amount owed. These findings are supported by the evidence. **[*525]** There is further justification for imposing penalties. In reviewing the Act, it is noted that pursuant to HN4 section 16a(F)(3), when there is no dispute to pay compensation in a timely manner or in the proper amount and there is no dispute that the accident has resulted in the amputation of a finger, the legal fees, if any, for services rendered are to be fixed by the Industrial Commission at a nominal amount, not exceeding $ 100. (Ill. Rev. Stat. 1991, **[***9]** ch. 48, par. 16a(F)(3).) We therefore reverse the circuit court of Cook County and reinstate the Commission's decision.

Judgment reversed; award reinstated.

McCULLOUGH, P.J., and RAKOWSKI, WOODWARD and RARICK, J.J., concur.

*2006 Ill. Wrk. Comp. LEXIS 952, *; 6 IWCC 0901*

CINDY **LIERLY**, PETITIONER, v. METHODE ELECTRONICS, RESPONDENT

NO. 01 WC 49292

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF ADAMS

2006 Ill. Wrk. Comp. LEXIS 952; 6 IWCC 0901

October 23, 2006

CORE TERMS: training, arbitrator, certificate, finger, earning, temporary total disability, return to work, rehabilitation, semester, vocational, left hand, vocational rehabilitation, wage differential, amputation, bartender, adjuster, surgery, route, placement, confirmed, permanent, machinist, authorize, average weekly wage, claimant, delivery, driver, skill, leg, supervisor

JUDGES: Nancy Lindsay; James F. DeMunno; Susan O. Pigott

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 benefit rates, evidentiary ruling, penalties and fees, permanent partial disability, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 2, 2004 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 $ 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 therefore and deposited with the Office **[*2]** of the Secretary of the Commission.

DATED: October 23, 2006

ATTACHMENT I

ARBITRATION DECISION

CINDY **LIERLY**
Employee/Petitioner v.
METHODE ELECTRONICS
Employer/Respondent

Case # 01 WC 49292

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 Industrial Commission, in the city of Quincy, on July 7, 2004. 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
G. What were the petitioner's earnings?
K. What amount of compensation is due for Temporary Total Disability?
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon the respondent?
N. Is the respondent due any credit?

FINDINGS
. On May 23, 2001, the respondent Methode Electronics. Inc. *was was not* operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship *did did not* exist between the petitioner and respondent.
[*3] . On this date, the petitioner *did did not* sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident *was was not* given to the respondent.
. In the year preceding the injury, the petitioner earned $ 21,508.76; the average weekly wage was $ 413.63.
. At the time of injury, the petitioner was 47 years of age, *married single* with 0 children under 18.
. Necessary medical services *have have not* been provided by the respondent.
. To date, $ 5.278.55 has been paid by the respondent on account of this injury.

ORDER
. The respondent shall pay the petitioner Temporary Total Disability benefits of $ 275.75 /week for 1 5/7 weeks, from 5-24-01 through 6-5-01, which is the period of Temporary Total Disability for which compensation is payable. All TTD is paid; see attachment.
. The respondent shall pay the petitioner the sum of $ 248.17 /week for a further period of 21 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused a 60% permanent partial disability to the left middle finger.
. The respondent shall pay the petitioner compensation that has accrued **[*4]** from 05-23-01 through 7-7-04, 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.
. The respondent shall pay $ 0.00 in penalties, as provided in Section of the Act.
. The respondent shall pay $ 0.00 in penalties, as provided in Section 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 LNTEREST RATE If the Commission reviews this award, interest of 1.73 % 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

7/28/04

Date

ATTACHMENT II:

CINDY **LIERLY,**
Petitioner,
vs.
METHODE ELECTRONICS,
Respondent,

Case No: 01 WC 49292

PROPOSED ARBITRATOR' DECISION RIDER

With respect to the issue of (K) What amount of compensation is [*5] due for temporary total disability, the arbitrator makes the following findings of fact and conclusions of law:

Pursuant to petitioner's testimony, respondent's Exhibit # 1 evidencing temporary total disability and permanency payments and further pursuant to petitioner's stipulation during the course of the hearing to the fact that all temporary total disability benefits were properly and timely paid, the arbitrator finds that no further compensation for temporary total disability is due pursuant to this award. All temporary total disability benefits payable and owing are in fact paid.

With respect to (G) average weekly wage, the arbitrator makes the following findings of fact and conclusions of law:

Respondent's Exhibit 1 evidences wage records and earnings history and supports a finding of average weekly wage in the amount of $ 413.63. The arbitrator hereby finds the average weekly wage applicable to this claim therefore to be $ 413.63.

With respect to (L) what is the nature and extent of the injury, the arbitrator makes the following findings of fact an conclusions of law:

The medical records admitted as Petitioner's Exhibits 2 though 6 and Respondent's Exhibit 2 establish **[*6]** that petitioner did sustain accidental injuries on May 23, 2003. On that date, she sustained a crush injury to her left middle finger while operating a machine press. She was treated at Blessing Hospital in Quincy, Illinois on the same date with revision amputation of the left middle finger to the DIP level.

Petitioner testified that she returned to work on June 6, 2001. She testified that there was a period of approximately 30 days where her difficulties with the finger gave her problems with earning incentive pay, but that this limitation lasted only approximately 30 days. Petitioner testified that she subsequently bid to another job and that she continues to work for the respondent with no particular restrictions imposed by an physician as a result of this injury.

The medical evidence indicates petitioner was most recently evaluated by Dr. Ronald Palmer on July 22, 2002 (Resp. Exh. # 2, Pet. Exh. # 5). Examination on that date revealed a well healed partial amputation just distal to the DIP crease. Excellent contour was noted. No swelling was noted. Excellent range of motion was noted. Dr. Palmer recorded a complaint of tenderness at the tip of the finger with some discomfort and **[*7]** tightness, which is consistent with petitioner's trial testimony. Dr. Palmer noted that when petitioner uses the finger at work, she does not need to put pressure on the tip but instead puts more pressure on the radial side and she has no difficulty doing this. Dr. Palmer indicated that he does not expect any permanent problems.

Pursuant to the above, the arbitrator finds the petitioner to have sustained a permanent partial loss of use of the left index finger to the extent of 60% pursuant to section 8(e) of the Workers' Compensation Act.

With respect to (N) (Credit) the arbitrator makes the following findings of fact an conclusions of law:

Respondent's Exhibit # 1 establishes respondent's entitlement to a credit against permanent partial disability benefits in the amount of $ 4,963.40.

60% loss of use of the finger at petitioner's PPD rate totals $ 5,211.57. After applying respondent's credit, the amount due pursuant to this award equals $ 248.17.

With respect to (M) (penalties and attorneys' fees) the arbitrator makes the following findings of fact an conclusions of law:

Petitioner claims entitlement to penalties and attorneys' fees for alleged late payment of permanent **[*8]** partial disability compensation because the case involves an amputation. The evidence indicates, however, that petitioner's temporary total disability benefits were paid in a timely manner and that petitioner continued to follow-up and treat for this condition, with her last visit to Dr. Palmer and final release from treatment being on or about July 22, 2002 (See Resp. Exh. # 2, Pet's Exh. # 5). The arbitrator further notes that this matter was brought to trial pursuant to respondent's motion for trial date certain which was heard on May 5, 2004. As of the date of respondent's filing of the motion for trial date certain, petitioner's counsel had filed no petition for penalties. The records reflects that the petition for penalties was filed and served on or July 1, 2004, 6 calendar days prior to trial.

Petitioner's permanent partial disability benefits were paid, as reflected in Respondent's Exhibit # 1, approximately three years prior to trial and within approximately 60 days of the date of accident.

Petitioner cites Lester v. The Industrial Commission, 256 Ill. App.3d 520. While it was granted that Lester stands for the proposition that amounts owed **[*9]** pursuant to statutory amputation be paid promptly, the arbitrator finds herein that petitioner has failed to establish that the permanent partial disability payments were not paid promptly, so as to then shift the burden to respondent to justify the delay. The arbitrator notes that Lester involved a fourteen (14) month delay and that a review of pertinent Industrial Commission and Appellate Court Decisions supporting the imposition of penalties involve lengthy periods of delay, most often involving multiple years. See Pulliam v. Metz Baking Company, 99 I.I.C. 0690 (3 years). See also, Lee v. Applied Automation and Controls, 01 I.I.C. 0161 (5 years). The arbitrator further notes in Modern Drop Forge Corporation v. The Industrial Commission, 284 Ill. App.3d 259, involved a period of three years delay. In order to bring the facts of the present case in line with Modern Drop Forge Corporation or the other cases in this area, the respondent herein would have had to delay payment of permanent partial disability benefits up to the date of the trial on July 7, 2004. Instead, said benefits were in fact paid approximately three years **[*10]** prior to trial.

Taking into account the totality of the evidence, the arbitrator finds that respondent paid the relevant benefits promptly and that petitioner has failed to carry her burden of establishing unreasonable and vexatious conduct. Penalties and attorney's fees are denied.

Industrial Commission of Illinois

State of Illinois

County of Cook

KENNETH PULLIAM, Petitioner

v.

METZ BAKING COMPANY, Respondent

No. 93 W.C. 65532, No. 99 I.I.C. 0690

July 21, 1999

DECISION AND OPINION ON REVIEW

Respondent and Petitioner appeal the Decision of Arbitrator Peiler finding that Petitioner suffered accidental injuries arising out of and in the course of his employment on October 18, 1993, that Petitioner's earnings during the year preceding the injury were $ 40,560.00 and the average weekly was $ 780.00, that Petitioner was entitled to a wage differential award of $ 172.00 per week for the duration of his disability under Section 8(d)(1) of the Act, and assessing penalties under Section 19(k) and attorney's fees under Section 16 of the Act for the vexatious and unreasonable delay in payment of permanency benefits under Section 8(e) of the Act for the below the knee amputation of Petitioner's **[*11]** left leg. The issues on Review are the amount of Petitioner's earnings in the year preceding the accident and his corresponding average weekly wage, the nature and extent of any permanent disability including the propriety of an award of wage differential under Section 8(d)(1), whether the Arbitrator erred in not admitting Respondent's Exhibit 1 and in admitting Petitioner's Exhibit 5 at Arbitration, and whether penalties under Section 19(k) and attorney's fees under Section 16 of the Act should be assessed against Respondent. The Commission, after considering the entire record, modifies the Arbitrator's Decision and finds that Petitioner is entitled to penalties under Section 19(k) of the Act in the amount of $ 19,588.14, and attorney's fees under Section 16 of the Act in the amount of $ 3,917.63, and that the Arbitrator erred in rejecting Respondent's exhibit 1 at Arbitration, all else is otherwise affirmed, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 33 year old bread truck delivery route driver, was employed by Respondent for 8 years on October 18, 1993. T. 9. His job duties required him to deliver bakery products **[*12]** from the warehouse to Respondent's customers. T. 9. Petitioner testified that the bed of the delivery truck was five feet from the ground and that he had to climb three steps to get into the driver's seat. T.25. Petitioner was required to climb into the back of the truck by stepping on the bumper. On occasion, Petitioner was required to pull a bread cart up a ramp or a flight of stairs during a delivery. Petitioner was required to bend, pull, and reach while stocking shelves. At that time, there were 35 stores on Petitioner's delivery route. T.26

2. On October 18, 1993, Petitioner was delivering products on his route when he was struck by a car in the left leg. The leg was severely crushed and had to be amputated below the left knee shortly after the accident. T. 10-11. Petitioner was hospitalized for six weeks and underwent five operations to try and save the leg. PX 1, PX 2. After the amputation, Petitioner received physical therapy to improve his range of motion and regain the ability to walk. T.12. Petitioner suffered from breakdowns in the stump area following a physical therapy session which included leakage and bleeding. Petitioner was fitted with a prosthesis. T.13.

3. Petitioner **[*13]** testified that in June 1994, Respondent's human resource manager offered Petitioner a "floater" position in the office citing Petitioner's above par work performance and his degree in economics, which he received in 1994. T.20. Petitioner refused the position citing the difference in pay between the office job and his previous position as a route driver. T.21, RX 1. The floater position paid $ 10.50 per hour and Petitioner was paid union wages of $ 19.50 per hour as a truck driver. T.21-22. At that time, Petitioner believed he could return to his position as a delivery route driver and entered the work hardening program prescribed by Dr. Ludwig in January 1995, in order to achieve that goal. T.39-40, PX 1.

4. Petitioner completed the work hardening program on February 10, 1995, and was released to full work duty as a delivery route driver on February 19, 1995. PX 1, T.14, 36, 39. At that time, Petitioner suffered continued swelling and leaking in his left leg. T.14-15. His regular activities decreased in that he was not able to walk for more than 15 minutes and he took constant breaks because of swelling and throbbing in his leg. Petitioner had difficulty climbing stairs and frequently **[*14]** switched legs while standing. T.15-19.

5. After Petitioner completed work hardening in February 1995, he was prepared to return to his route sales job and notified Respondent of his release to work. T.40. Respondent's human resource manager again offered Petitioner a job in the office instead of a route sales position. T.21,40-41. Petitioner again refused the job stating that the pay differential was too great. T. 22-23. The Respondent's general manager, Gary Ford, told Petitioner that he would make a good addition to the office, and increased the initial offer to $ 11.50 per hour assuring Petitioner that within two years he should be in management earning the same pay he was making as a delivery truck driver. T. 24, 41. Petitioner accepted the offer on the assurance that the salary reduction was only temporary. T. 24. Petitioner also testified that despite his full work release, he felt that in time he would not be able to perform his job as a truck driver in that it would be too much wear and tear on his leg to jump on and off the truck. T. 25.

6. Petitioner currently works 40 hours per week in Respondent's accounts payable department earning $ 13.05 per hour. T. 27, 32. Petitioner **[*15]** worked 40 to 47-1/2 hours per week when he drove the truck. T. 32.

7. Petitioner received temporary total disability benefits commencing October 19, 1993 through February 19, 1995. Although his TTD payments ended on February 19, 1995, Petitioner did not receive any payment under Section 8(e) for his amputation until September 27, 1996, when he received $ 32,317.32 from Respondent. The parties agree this amount was too low. Petitioner received a corrected check in the amount of $ 32,829.40 on October 16, 1996. T.29-30. Petitioner has received timely payments since that time. T. 31.

8. At the request of Petitioner's attorney, and with Respondent's agreement, Dr. Yarkony examined Petitioner in September 1997, and provided his evaluation of the nature and cost of necessary future medical care. T. 32-33, 49, 56-58.

9. Respondent offered the reports of treating physicians Drs. Kalimuth and Morgan, and Respondent's independent medical examiner Dr. Joseph as RX 4, 3, and 2, respectively. Dr. Kalimuth discharged Petitioner from treatment on August 25, 1994, noting that Petitioner could tolerate his prosthesis. Dr. Moran discharged Petitioner on October 31, 1994, noting that Petitioner will **[*16]** continue "ambulating as tolerated," and in January and February 1995, Dr. Joseph opined that following work hardening, Petitioner should be able to return to full duty work without restrictions.

Based on the above, and the record taken as a whole, the Commission finds that the Arbitrator did not err in admitting the report of Dr. Yarkony at PX 5. The record reflects that Petitioner's attorney suggested Dr. Yarkony's name to Respondent's counsel for the purpose of providing an opinion on the cost of future medical care for Petitioner. T.47-49. Respondent's counsel stated at Arbitration that he agreed Dr. Yarkony would be acceptable. T.49. The record further reflects that the Arbitrator admitted Dr. Yarkony's report, over Respondent's objection, for the limited purpose of assessing the cost of future medical care for Petitioner. The Arbitrator clarified that Dr. Yarkony's opinions on the nature and extent of Petitioner's condition would in no way be attributed to Respondent under an agency theory or agreement. T. 57. Finally, it is clear from the Decision that the Arbitrator did not rely on Dr. Yarkony's report in deciding any issue at Arbitration, including the nature and extent of **[*17]** Petitioner's condition.

The Commission further finds that the Arbitrator erred in rejecting RX 1, the November 24, 1994 letter to Respondent's insurer authored by Petitioner's counsel conveying Petitioner's rejection of the "office" job based on the wage discrepancy and requesting work hardening from Respondent. The Arbitrator rejected the exhibit on the basis of relevance. The Commission finds that RX 1 is in fact relevant to the issue of why Petitioner refused the first offer of an office job and corroborates Petitioner's testimony. Because of this, the exclusion of RX 1 was a harmless error in that it does not change the Commission's decision.

The Commission affirms the Arbitrator's Decision on the issue of Petitioner's pre-injury wage. Petitioner testified that he worked up to 47-1/2 hours per week as a truck driver before the accident. T. 32. His pay was union scale at $ 19.50 per hour. The Commission finds that based on Petitioner's unrebutted testimony, the Arbitrator correctly calculated Petitioner's yearly salary of $ 40,560.00 preceding this accident, and Petitioner's average weekly wage of $ 780.00 per week based on a 40 hour week.

The Commission further affirms the Arbitrator's **[*18]** award of wage differential benefits under Section 8(d)(1) of the Act. The Commission finds that Petitioner is partially incapacitated from pursuing his usual and customary employment as a delivery route driver as a result of the below the knee amputation of his left leg. In making his finding, the Commission places greater weight on the testimony of Petitioner than on the opinions of Respondent's examiner Dr. Joseph and Petitioner's physical therapist on the issue of whether Petitioner could return to his former occupation as a delivery route driver. Petitioner testified that although he was willing to attempt a return to work, he felt that in time he would not be able to perform his job as a route driver in that it would be too much wear and tear on his leg. The Commission further notes that using his prosthetic leg, Petitioner would have to climb in and out of the front and back of the truck many times per day and agrees with Petitioner as to the inevitable wear and tear on the prosthesis.

Further, the Commission finds that Petitioner did not voluntarily choose to reduce his wages by accepting the office job with Respondent, thus eliminating Petitioner's entitlement to an award **[*19]** under Section 8(d)(1) of the Act. Petitioner testified that he requested work hardening in an attempt to return to this previous job and his pre-injury wage. Petitioner testified that he was aware of his full work release following his completion of the work hardening program and testified as to his willingness to attempt a return to his delivery job at that time. Respondent again offered Petitioner an office job at substantially less pay than his delivery route wage. The record, including RX 1, clearly indicates that Petitioner voiced his reservations to Respondent about accepting the office job

because of the wage differential on two occasions. At the time of the second offer, Respondent offered the job with the assertion that Petitioner could make the same wage he was previously making as a truck driver in two years time. Petitioner testified that he decided to accept the office job based on Respondent's assurance and his impression that the wage decrease was only temporary. Despite Respondent's assertions that the truck driving job was available and that it believed Petitioner could perform the job, there is no evidence in the record that indicates the truck driving job was in **[*20]** fact offered to Petitioner by Respondent. Rather, it appears from the record that Respondent did nothing but promote the office job at lesser pay. The Commission affirms the award of wage differential benefits to Petitioner.

Petitioner returned to work for Respondent on February 20, 1995. Respondent's first payment to Petitioner of permanency benefits for his amputation was made on September 27, 1996, 1-1/2 years after Petitioner returned to work for Respondent. The September 27, 1996 check was in the amount of $ 32,317.32 which the parties agree was the wrong amount. Respondent sent a check for the correct amount of $ 37,829.40 on October 16, 1996. The Commission finds that Respondent's delay in paying permanency benefits under Section 8(e) for the below the knee amputation of Petitioner's left leg was unreasonable and vexatious so as to justify penalties against Respondent under Section 19(k) and attorney's fees under Section 16. Absent a good faith challenge on the issues of accident and causal connection, the Commission finds that compensation to Petitioner for this amputation should have started immediately. Petitioner is entitled to immediate payment of the statutory benefits **[*21]** allowed under the Act even when there is some question as to whether Petitioner has elected to proceed under Section 8(d)(1) of the Act. Lester v. Industrial Commission, 628 N.E.2d 191, 256 Ill.App.3d 520 (1993); Modern Drop Forge Corp. v. Industrial Commission 671 N.E. 2d 753, 284 Ill.App.3d 259 (1996).

The Commission modifies the Decision of the Arbitrator and awards 19(k) penalties on a delay in payment of Section 8(e) benefits for 83-5/7 weeks commencing February 20, 1995 through September 27, 1996. The Commission finds that the penalties are appropriately calculated using the average weekly wage of $ 780.00 awarded by the Arbitrator. Petitioner is entitled to $ 19,588.14 in penalties under Section 19(k) and attorney's fees under Section 16 in the amount of $ 3,917.63.

All other aspects of the Arbitrator's Decision are otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that commencing on April 28, 1998, Respondent pay to Petitioner the sum of $ 172.00 per week for the duration of his disability, as provided in Section 8(d)(1) of the Act, for the reasons that the injuries sustained permanently **[*22]** incapacitate him from pursuing the duties of his usual and customary line of employment

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner additional compensation in the amount of $ 19,588.14, as provided in Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to attorney for the Petitioner legal fees in the amount of $ 3,917.63, as provided in Section 16 of the Act; the balance of attorney fees to be paid by Petitioner to his attorney.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 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 $ 75,000.00 The probable cost of the record to be filed as return to Summons in the sum of $ 35.00; payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Jacqueline A. Kinnaman

Richard Gilgis

Michael L. **[*23]** Weaver

93 IL.W.C. 65,532, 1999 WL 33326700 (Ill.Indus.Com'n), 99 I.I.C. 0690

In fixing the amount of money which will reasonably and fairly compensate Plaintiff for any of the elements of damages proved by the evidence to have resulted from the liability of Defendants, Bryan Bouchez and/or Two Can Do, Inc., you are to complete separate verdict forms for each Defendant.

In doing so, you cannot duplicate the same damages on the issue of medical/hospital bills.

Defendant Two Can Do, Inc.'s Proposed Non-IPI Instruction No. 1

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant, Bryan Bouchez, was negligent in one or more of the following respects:

A. Defendant, Bryan Bouchez, failed to keep a proper lookout ahead;

B. Defendant, Bryan Bouchez, failed to maintain proper control over his vehicle;

C. Defendant, Bryan Bouchez, violated 625 ILCS 5/11-601(a), in that the Defendant, Bryan Bouchez, failed to decrease the speed of his vehicle to avoid colliding with the Plaintiff's vehicle;

D. Defendant, Bryan Bouchez, violated 625 ILCS 5/11-501(a)(1) **[*24]** , in that the Defendant operated his motor vehicle with a blood alcohol concentration in excess of 0.10;

E. Defendant, Bryan Bouchez, violated 625 ILCS 5/11-501(a)(2), when operating his motor vehicle while under the influence of alcohol;

F. Defendant, Bryan Bouchez, violated 625 ILCS 5/11-503, when operating his motor vehicle in a reckless manner;

G. Defendant, Bryan Bouchez, negligently drove his vehicle into the Plaintiff's lane of traffic, colliding with Plaintiff's vehicle.

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[9] The defendant, Bryan Bouchez, further denies that the plaintiff was injured or sustained damages to the extent claimed.

Industrial Commission of Illinois

State of Illinois

County of Cook

RAYMOND LEE, Petitioner

v.

APPLIED AUTOMATION & CONTROLS, Respondent

No. 94 W.C. 39829, No. 01 I.I.C. 0161

February 21, 2001

DECISION AND OPINION ON REVIEW

Petitioner appeals the Decision of Arbitrator Williams finding in a proceeding under § 8(b) of the Illinois Workers' Compensation Act that as a result of accidental injuries **[*25]** arising out of and in the course of his employment on June 10, 1994, Petitioner was temporarily totally disabled for a period of 242-4/7 weeks, is not entitled to additional compensation under § 19(k), § 19(1) of the Act, or to attorneys fees under § 16 of the Act, and is permanently disabled to the extent of 35% under § 8(d)2 of the Act. The issues on Review are the nature and extent of Petitioner's permanent disability, the amount of Petitioner's average weekly wage, whether Petitioner is entitled to additional compensation under § 19(k), § 19(1) and to attorneys fees under § 16 of the Act, and whether Petitioner is entitled to an award under § 8(d)1 of the Act. The Commission, after considering the entire record, reverses the Decision of the Arbitrator filed on December 10, 1999 on the wage differential issue, and finds that as the result of accidental injuries arising out of and in the course of his employment on June 10, 1994, Petitioner was temporarily totally disabled for a period of 118-1/7 weeks, is entitled to maintenance benefits in the amount of temporary total disability compensation for a period of 124-3/7 weeks, is entitled to a wage differential in the amount of $ **[*26]** 312.99 per week commencing February 1, 1999, and to additional compensation under § 19(1) of the Act in the amount of $ 390.00, to additional compensation in the amount of $ 11,423.16 under § 19(k) of the Act, and to Attorneys' fees in the amount of $ 2,284.63 of the Act under § 16 of the Act, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 33 year old, right-handed machinist and assembler, testified that on June 10, 1994, while making a safety guard, a piece of plastic caught in the machine and dragged Petitioner's left hand across the blade. Petitioner immediately noticed blood and pain in his left hand.

2. On June 10, 1994, Respondent was operating under and subject to the provisions of the Illinois Workers' Compensation Act; on this date the relationship of employee and employer existed between the Petitioner and Respondent; on the above-mentioned date, Petitioner sustained accidental injuries which arose out of and in the course of the employment by Respondent; timely notice of this accident was given the Respondent.

3. The earnings of Petitioner in the year next preceding the injury were $ 33,000.00 and the average **[*27]** weekly wage was $ 634.62, based on the testimony of owner John Cammarata, and Petitioner's wage statement (PX3), which contained a clerical error in that Petitioner was paid twice a month rather than every two weeks. Petitioner at the time of injury was married and had no children under 18 years of age.

4. Parties stipulated that Petitioner is entitled to have and receive from Respondent the sum of $ 423.08 per week for a period of 242-4/7 weeks, that being the period of temporary total incapacity from work for which compensation is payable.

5. Petitioner received emergency medical care at Northwestern Memorial Hospital from Dr. Charles Carroll of Orthopaedic Associates of Chicago, Ltd. His left ring finger was amputated, the laceration on the tip of his left thumb was sutured, and his left index, long and little finger were revascularized and reconstructed with repair of the lacerated tendons, arteries and nerves. The next day he had a revision of the microvascular reconstruction of his index finger. On June 28, 1994, the Petitioner's index finger was amputated at the middle phalanx.

6. Tenolysis of the Petitioner's flexor tendons of his left long finger was performed on November **[*28]** 10, 1994. Petitioner had further surgery on January 17, 1995 to his left long and little fingers that included tenolysis, stage I plantar grafting with tendon rods. On May 16, 1995, Petitioner had a stage II flexor tendon grafting of his left long and little fingers. On October 24, 1995, he had further tenolysis and grafting of the flexor tendons of his left long and little fingers. Petitioner underwent a pulley reconstruction of his left long and little fingers. Petitioner underwent a pulley reconstruction of his left long finger on February 13, 1996.

7. On August 21, 1996, Petitioner underwent a functional capacity evaluation by Candice Brattstrom of Orthopaedic Associates of Chicago, Ltd., at which time it was confirmed that Petitioner could use his left hand only as an assist. It was reported that he had significantly less grip strength in the left hand when compared with established norms, essentially functional range of motion but decreased flexion in his long and small fingers, and diminished sensibility in the long and small fingers. For his gross motor skills, Lee's time of manipulation for "placing" with the left hand was 22% greater than the right, and for "turning" it **[*29]** was 56% greater. For fine motor skills, he scored in the 48th percentile with his right hand, but with the left he scored below the first percentile. The evaluation found that he was not fully able to fulfill requirements of medium work under the U.S. Department of Labor guidelines, but he could fulfill the light duty requirements. Dr. Carroll advised Petitioner not to return to work as a machinist.

8. Petitioner further testified that he located a job as a bartender at Fado, an Irish pub in Chicago, working 40 hours per week commencing February 1, 1999 and earning approximately $ 400.00 per week including tips. His gross pay for the two weeks ending February 14, 1999 was $ 748.91; ending February 28, 1999 it was $ 813.24; and for the period ending March 14, 1999, it was $ 975.79. Respondent submitted into evidence RX6, a surveillance videotape of Petitioner performing his bartender duties.

9. Petitioner further testified that he currently notices that his left thumb is numb where it was sliced off, that his left index finger is amputated, that middle finger is numb, shrunken, and has limited flexion; his ring finger is amputated, and his small finger is totally numb underneath. He **[*30]** has shooting pain occasionally in his fingers and is tender around the base of his fingers. He was fitted for prosthesis for his two amputated fingers, and in winter, he notices tingling in the left hand from the cold, for which he always wears a glove. He has a little fine motor coordination and uses his left hand while bartending.

10. On August 23, 1994, Dr. Charles Carroll sent a report to Liberty Mutual's adjuster and R.N. case manager describing Petitioner's condition and anticipated future treatment. He further stated:

"Vocational rehabilitation should be performed for this patient. He will be able to use the left hand in the future as an assist to the right and probably not be able to return to gripping, grasping or heavy lifting. This will allow his rehabilitation to proceed in an expeditious fashion ... He cannot work at this time. Surgery will be scheduled sometime in October. I will keep you informed as to his progress."

Petitioner testified that Rosemary Meyers, the registered nurse employed by Liberty Mutual, attended all his appointments with Dr. Carroll and Dr. Carroll's records also confirm that he promptly provided medical information to Liberty Mutual on an ongoing **[*31]** basis.

11. Petitioner testified that after this evaluation in which Dr. Carroll informed him that he would be able to use his left hand as an assist and would not be able to return to work as a machinist, he met with Kim Steele, a vocational counselor, in September 1994, that vocational activity was suspended in October 1994 because he didn't have a medical release, and that his vocational case was reopened in July 1995, at which time he told Ms. Steele he would like to pursue CAD training, because it was similar to engineering but done at a desk, drawing on a computer, which he would be able to do without his left hand. (T.29-31). He testified that in September and October 1995, he looked and applied for jobs in the plastics industry without success (T. 31-33). He then had further surgery, and in December 1995, again requested CAD training, but Steele told him no. At her request, he continued to look for jobs, which was suspended at times due to surgery. (T.33-34). He testified that after he was released to work by Dr. Carroll on September 4, 1996, he again requested CAD training, and Ms. Steele again told him no (T.34).

12. Petitioner testified that in February 1997, he met with **[*32]** his former employer, John Cammarata, at Applied Automation to discuss returning at a position other than machinist, since he couldn't return as a machinist. They discussed his returning as a CNC programmer, where you program computer numerical controlled machines, as it's not hands-on machining, but rather writing the programs and doing drawings which could be done with his dominant right hand. Mr. Cammarata told Petitioner that he told Kim Steele that if the right position came up, Petitioner could come back to work for him and Ms. Steele told Mr. Cammarata Petitioner would be in touch with him. At the meeting, Mr. Cammarata told Petitioner if he got a certificate in CNC machining, he could come back to work for him. Petitioner again requested authorization to start taking courses in CAD training. He received authorization in summer 1997, at which time he began classes. Thereafter, each semester he took all courses available to him going towards a certificate (T.34-37).

13. Petitioner testified he was never authorized to receive a certificate, which he wanted because there was no way with his training that he was going to be able to get a good job (T. 39). Petitioner testified he **[*33]** again met with Mr. Cammarata in March 1998 to see if he could return to work while he was taking classes, but he was not allowed to return to work, and continued taking classes through the fall of 1998, with the intention of returning to work in December 1998 or January 1999 (T.39-41).

14. In October 1998, Petitioner learned that Respondent, his employer, had gone out of business. He attempted to contact Kim Steele, but was told she was off work sick by Ms. Steele's supervisor, Denise Vogrich, who said she would be in touch with him. A month later she called him back, and told him to send out resumes, which he had already been doing in response to newspaper job ads. He applied mostly to engineering, plastic and metal companies for production supervisor positions while continuing in school (T.41-42).

15. He completed his classes that semester on December 17, 1998, but did not obtain a certificate and had not been authorized to obtain a certificate. He continued to seek a job on his own and through job leads provided to him by Kim Steele. He received no responses to his employment applications. He also sent a resume and spoke to an engineering head hunter about supervisor positions, **[*34]** quality control or metal or plastic, without getting any job leads from her (T.44-46). Petitioner testified that he learned that if you haven't got a certificate, you may as well not be looking for a job, and that he still had 35-40% of the classes to complete for a certificate (T.46, 47).

Also in December 1998, Liberty Mutual stopped sending Petitioner his weekly compensation. On January 26, 1999, they sent him a check in payment for 5 weeks of compensation which had not been paid in December and January. (T.47, PX 7). He testified that at the end of January he told Ms. Steele he had gotten a job as a bartender starting February 1, 1999, and that Ms. Steele then cancelled a meeting they had scheduled for February 3, 1999, telling him Mr. Wulf (Liberty Mutual's claims adjuster) told her to cancel it (T.48-40).

16. Petitioner testified he has been earning an average of $ 400.00 per week as a bartender and that he has continued to look for other work in CAD, plastics, metal and other engineering industry (T.50, 51). Thirty days after he started working, Kim Steele called him and wished him the best (T. 51).

Petitioner testified that an experienced machinist such as himself currently **[*35]** earns approximately $ 1,000.00 per week (T. 52).

17. On cross-examination Petitioner testified that prior to his injury and since 1978, he had worked as a tool and die maker, machinist, and production supervisor for a plastics company. (T.60-63). He further testified that he only took an average of 2 classes per semester after he began school in the summer of 1997, because only certain classes were offered each semester (T. 68).

18. Respondent's witness John Cammarata testified that he was the owner of Respondent Applied Automation, and that his company

had 4 or 5 employees, including Petitioner, in 1994. He testified that in late 1996, Petitioner came to see him for the second time since his injury about returning to work, and that upon seeing his hand, they agreed his machinist days were over, and they talked about his becoming their CAM operator, for which he had no training at that time. Petitioner said he would be interested in the job and was working with the rehabilitation company and would try to get some schooling to do this. Mr. Cammarata testified that at that time he made no recommendations as to the type of classes Petitioner should take. He testified that approximately **[*36]** six months later Petitioner called him again and said he was taking some courses, trying to get an associates' degree in computer-aided design and manufacturing. Petitioner said he was arguing with the insurance company over getting a full degree or course work and that I would need to talk to somebody abou t what courses he needed to take to come back to work.

19. On cross-examination, Mr. Cammarata confirmed that in March 1997 he told Kim Steele that Petitioner didn't have the background for the job he was considering him for, and that in his opinion he needed to obtain a certificate in CAD-CAM technology with CNC in order to come back to work for hi m. Mr. Cammarata testified that he knew that Petitioner never completed the certificate, that Petitioner told him he was having trouble with the insurance company in getting the certificate and that someone would contact him. He further testified, based on a survey from the Tooling & Manufacturing Association, that a journey machinist makes between $ 18 and $ 25 per hour, and that the average earned is $ 22.32 per hour according to that survey.

20. Respondent called Patricia Zacharias, a rehabilitation consultant, who testified that on **[*37]** March 8, 1999, she prepared a labor market survey report which listed CAD/CAM positions in the Chicago area that ranged in pay fom $ 9.00 to $ 25.00 per hour. On cross-examination, Zacharias stated that almost every position she surveyed required either prior experience or a CAD/CAM certificate.

21. Rehabilitation Consultant Kim Steele also testified on behalf of Respondent. She testified that as part of the vocational rehabilitation program she is required to prepare reports on a monthly basis unless otherwise directed by the insurance carrier, and that the report is sent to the insurance carrier, with copies to the defense firm and to the plaintiff's attorney. She identified Respondent's Exhibit 1 as consisting primarily of her reports, and Respondent's Exhibit 1 was received in evidence. In addition to the matters contained in her reports, Ms. Steele testified that Petitioner did not register for classes in the spring of 1999 "because job search was ensued (sic), and he was not going back to work with his employer", that they never discussed whether he should continue classes, and that it is her opinion that he should continue his classes at Triton College to receive his certificate **[*38]** to make him more marketable in the work force.

22. On cross-examination, Ms. Steele confirmed that when she initially met Petitioner in 1994, she knew his left ring and index fingers had been amputated, and that his other fingers had also been injured and were being treated, so she suspended vocational activity because there was no medical release, and that her file was reopened in July 1995. She testified she was aware at that time that he could no longer return to his previous occupation and that Dr. Carroll's opinion was that the use of his left hand would really be only to assist the right hand. Petitioner stated he was interested in being retrained as a CAD-CAM operator, which she wondered about because of his limited left-hand use, but asked the insurance company if they would authorize retraining since he couldn't go back to his regular job. In August 1995, the insurance company refused to authorize retraining. She testified that she then started contacting employers to see what he might be able to do with his restrictions and background, and then she stopped looking for jobs because he was having more surgery. She further confirmed that in November and December 1995, Petitioner **[*39]** continued to ask for retraining while he was undergoing his surgical procedures so he coul d get a certificate as an auto-CAD operator, that she again addressed this with Liberty Mutual, who again refused to authorize any program. She also confirmed that she continued to suspend vocational activity for the next several months, because he was still under care and didn't have a medical release to return to work, and training wasn't authorized by the insurance company.

Ms. Steele confirmed that after 8 surgical procedures, in August 1996 Petitioner underwent a functional capacity evaluation which she reviewed, that he again expressed his strong interest in auto-CAD training and that he had contacted Illinois Institute of Technology (sic) about a program and that they wanted him to come in and be interviewed, and that in October 1996 the insurance company continued to refuse to authorize training. She testified that the case was transferred to a different adjuster and vocational activity was again suspended in December 1996. She confirmed that in January 1997, the new adjuster assigned to the case authorized her to contact Illinois Institute of Technology (sic) to see if they were still **[*40]** interested in Petitioner, and to get more information about the courses. She testified that in March 1997, she spoke with Petitioner's employer Mr. Cammarata who indicated interest in taking Petitioner back, but he didn't have the background for the job, that she discussed with the adjuster that the quickest, shortest possible training would be authorized to get him back to work, and that Mr. Cammarata determined which courses that would be.

She further confirmed that she was aware that Petitioner was experiencing continuing problems in being reimbursed his tuition and expenses by Liberty Mutual. She also testified that although she was not working and was on a leave of absence from October 23, 1998 to January 17, 1999, when Petitioner met with her on January 20, 1999, he brought it to her attention that Liberty Mutual stopped paying his weekly compensation benefits and he hadn't been paid since December 18, 1998 (the day after he finished his authorized classes). As another consultant had initiated a job placement plan in her absence, after Respondent had gone out of business and the potential position for which Petitioner had been taking classes no longer existed, Ms. Steele testified **[*41]** she picked up where the substituting consultant left off, and told Petitioner places to look for jobs an d to fill out and submit job search forms she provided. He was given some job leads in January, and more were sent on February 1, but when Ms. Steele learned he became employed on February 1, she notified the job developer there was no need to continue sending him job leads. She testified that when she met with Petitioner on January 20, 1999 to direct him in job search activities, she did not tell him he was authorized to continue with classes to obtain his certificate at Triton because at that time what Liberty Mutual had authorized was a job search plan. She was uncertain as to how many more classes he would need for certification, but her first guess was five. She testified that it was fair to say that she recommended that Petitioner be authorized to obtain a certificate because in her opinion he would be more marketable, and that had been her opinion all along, and that she had shared that opinion with Liberty Mutual.

23. On re-direct examination, Ms. Steele testified that Petitioner could seek employment without a certificate, but that she believed his employment opportunities **[*42]** would be limited if he is competing with people who have a certificate or two-or-four-year degree.

24. Respondent's Exhibit 1, consisting of correspondence by Ms. Steele reveals the following:

On September 7, 1994, Ms. Steele, notified Petitioner's attorney that Liberty Mutual had referred him to Cascade for an initial evaluation and plan proposal. She stated that the purpose of the initial interview would be to get Mr. Lee's understanding of his medical condition to date, to review his work history to determine his transferable skills, if any, and to review his educational background and training. She further indicated that vocational testing might be recommended to further assist in identifying alternate

occupations (Resp. Gr. Ex. 1). On September 13, 1994, Ms. Steele wrote another letter confirming that Petitioner's attorney had authorized Cascade to provide vocational rehabilitation services as requested by Liberty Mutual.

In her initial evaluation report dated September 30, 1994, Ms. Steele reported that the evaluation took place on September 20, 1994 and that Petitioner's chief vocational strengths included college training for tool and die making, managerial and supervisory **[*43]** experience, a stable work history and an expressed desire to return to gainful employment. She stated that his chief barriers to employment were his physical limitations caused by his injury. By way of educational background, she noted that he had attended four years of college in which he received training in tool and die making and that he had attended the Environmental Technical Institute in Bensenville for 6 months, receiving training in electronics for machinery.

Notwithstanding that Dr. Carroll had already set forth Petitioner's anticipated permanent limitations so that vocational rehabilitation could proceed in an expeditious fashion, Ms. Steele concluded that once a "Work Release" was obtained she would be in a better position to assess what type of jobs could be further explored to assist Petitioner in returning to gainful employment.

In a progress report dated November 22, 1994, Ms. Steele reported that she had been in contact with Liberty Mutual Insurance Company's claims adjuster, and concluded that "until the work release is received we cannot proceed with Vocational Services as requested."

On December 27, 1994, Ms. Steele reported that as Petitioner had recently had **[*44]** further surgery and would need further medical treatment, she recommended case closure which was authorized by the Liberty Mutual.

On July 5, 1995, at the request of Liberty Mutual, Cascade Counseling reopened its file for Petitioner "to reactivate the rehabilitation services. Ms. Steele met with Petitioner again on July 15, 1995, and in her report dated July 21, 1995, stated she read Dr. Carroll's June 22, 1995 report, stating "Mr. Lee will not be able to return to work using the left hand in a normal fashion and will probably use it to assist his right hand. Therefore, these restrictions preclude him from working in his normal occupation." She noted that Dr. Carroll stated he would not yet predict final restrictions pending Petitioner's participation in a therapy program. She stated that in discussing with Mr. Lee the type of work he might be capable of performing,

Mr. Lee's impression is that he would like to pursue something with CAD (Computer Aided Drafting) as he is self-taught in this area but feels that he could be further trained in this area. However, since this is a computer operated system the use of both hands (sic) and since he is limited with the left hand the Rehabilitation **[*45]** Consultant questioned this line of work. Other vocational areas were discussed and reviewed using the Occupational Handbook. Positions of Phlebotomist and X-ray Technician and Pharmacy Technician were also discussed.

Ms. Steele concluded that she would discuss these positions with Liberty Mutual's claims adjuster as it related to training and her opinion regarding whether Liberty Mutual would authorize training.

On August 17, 1995, Ms. Steele reported that Liberty Mutual indicated that all possibilities in the management field within the industry in which Petitioner had skill and experience should be explored and exhausted before training would be considered. Thereafter, Ms. Steele and Petitioner discussed possible positions, and he provided her with a resume. She indicated she would explore industries to determine market stability for possible positions.

In her report of September 20, 1995, Ms. Steele reported that Liberty Mutual had authorized her to contact employers regarding potential employment for Petitioner. She contacted 16 employers, 15 of which were not hiring because the industry was slow.

In her report of October 20, 1995, Ms. Steele noted that Petitioner was to undergo **[*46]** further outpatient surgery on his hand that week. She further noted that Petitioner had contacted the one potential employer to whom she had referred him, that Petitioner expressed interest in the position and felt he could dc it despite his disability, but as he was about to undergo further surgery, he thought he would not be able to return to work until after the first of January, and wondered whether they would be willing to hire him now or postpone hiring until after the first of the year. He further indicated a willingness to start work earlier, if possible, and attempt to schedule therapy and treatment to accommodate a work schedule.

In her report dated November 17, 1995, Ms. Steele noted that she provided Petitioner with a current resume, completed job seeking skills training with him, told him to send his resume to the previously identified potential employer, and learned that Petitioner had undergone surgery, was attending therapy three times a week, might have to undergo another surgery in the future, but would not know for at least a couple of months. She stated that Petitioner thought he needed to be retrained, and that she would discuss his concerns with Liberty Mutual. **[*47]**

On December 8, 1995, Ms. Steele reported that Liberty Mutual had authorized job placement services. She stated that she discussed the job goal of Quality Assurance/Quality Control Inspector with him, and that he felt that, depending upon the employer, he could perform in that capacity, but that he felt he would be more marketable if he could receive the ISO 9000 certificate. He also expressed interest in being retrained perhaps as an X-ray technician or Auto-CAD operator. Liberty Mutual indicated that at that time they would not authorize training in any program for Mr. Lee. Ms. Steele stated that it was her opinion "that if it is found that employers are not willing to hire Mr. Lee because he does not possess the necessary training or hold a certificate in any specific area that this would then be addressed with the insurance company." Petitioner also informed her that he had seen Dr. Carroll again, that Dr. Carroll felt he should not return to his previous line of work as he might injure his right hand, that Dr. Carroll advised him to avoid work around machinery, and that he might have to perform another surgery to the left hand, and that Petitioner was still attending therapy twice **[*48]** a week.

On December 11, 1995, Ms. Steele provided Petitioner with a "Job Placement Plan", essentially to look for jobs in newspaper want ads, the Illinois Job Service Office, the placement office of Wright Junior College, and job leads provided by Cascade, to attempt to contact at least 20 employers a week, and provide written reports of his contacts to Cascade.

Cascade reported that it provided Petitioner with 15 to 27 job leads between December 27, 1995 and January 15, 1996. Petitioner was evaluated by Dr. Carroll on January 17, 1996, who stated that he needed further surgery which was scheduled on February 13, 1996, that he was to continue therapy, and there would probably not be a final medical release until June 1996. Job placement services by Cascade were suspended on January 22, 1996 per instructions of Liberty Mutual, until Petitioner was released for work by Dr. Carroll. Petitioner provided Steele with a note from Dr. Carroll dated January 17, 1996 stating no change in long term restrictions was proposed.

In September 1996, Liberty Mutual authorized Ms. Steele to again meet with Petitioner to "begin" the vocational and job placement process. On September 13, 1996, she reported **[*49]** that Mr. Lee expressed a strong interest in AutoCAD training and that he had investigated the ITT Institute with regard to their training program. Liberty Mutual authorized Steele to contact the program to determine the length and cost of the program. Ms. Steele determined that the program was 72 weeks long, 4 hours a day, five days a week, day or evening, with 88% placement at salaries of $ 24,000.00 and up, depending upon experience, and a total program cost of $ 19,050, and that he could come for an interview to determine if it was the program for him.

As of October 4, 1996, Steele reported that Liberty Mutual had not decided whether to authorize the training program. She further reported that although she had received the Work Evaluation Report from Orthopedic Associates of Chicago (Dr. Carroll's office), as she did not yet have a written work release from Dr. Carroll, Cascade could not proceed with job placement services even if authorized by Liberty Mutual.

Ms. Steele's report of November 5, 1996 indicates that Liberty Mutual had assigned Petitioner's claim to a different adjuster, and that the former adjuster had appeared interested in the idea of retraining Petitioner. She **[*50]** further stated that Petitioner believed that by being trained in CAD technology, he would be able to make earnings similar to what he had earned in the past and that he would not have difficulty in seeking employment. Ms. Steele stated that if Liberty Mutual was to authorize the program, she recommended a Labor Market Survey be undertaken to determine employability and physical demands within that industry.

On December 3, 1996, Ms. Steele reported she had received Dr. Carroll's work release of September 10, 1996, releasing Petitioner to return to the light to medium work level, away from sharp objects. She further stated a Labor Market Survey for the position of CAD-CAM Operator was being conducted. The December 13, 1996 Labor Market Survey indicates a stable market in that field, with median earnings in 1992 of $ 27,400.00.

On January 28, 1997, Liberty Mutual authorized Cascade Counseling to determine whether Petitioner would have to take all of the 90 credits required for the ITT's 72 week program, given his education and work background. They also authorized exploration of other job opportunities.

In her report of February 27, 1997, Ms. Steele noted that in a meeting with Petitioner, **[*51]** he again stated he thought he would need further training to assist him in a job search. She stated that she had discussed that issue with the new adjuster assigned to the case and he had authorized her to investigate training programs as well as to identify jobs within his transferable skills and physical limitations. She further reported that this adjuster had spoken with its insured (Petitioner's employer at the time of the accident), that they were looking for a CAM Operator and would be interested in Petitioner, but felt he needed to be trained to do the job. After a conference between the insurance adjuster, the insured, and Ms. Steele, Ms. Steele told Petitioner to meet with Mr. Cammarata to discuss the position. After the meeting, Petitioner informed Steele that they were looking for a CNC Operator, a position for which he would need training.

On March 13, 1997, Ms. Steele noted that Liberty Mutual had authorized her to contact Mr. Cammarata to determine the type of computer training needed for Petitioner to be able to perform the job under consideration, and to then contact schools to determine whether appropriate courses were offered, the time frame and cost. Ms. Steele **[*52]** confirmed with Petitioner's employer that he was interested in returning him to work, but that Petitioner lacked the background for the job for which he was considering him. Mr. Cammarata indicated that Petitioner would need to obtain, at minimum, a certificate in CAD-CAM technology with CNC from a local junior college in order to provide him with work within Dr. Carroll's restrictions. Mr. Cammarata stated that Petitioner would also need an Introduction to Computers with emphasis on Windows, some CAM, some AutoCad, as well as word processing.

Ms. Steele determined that Triton College was the nearest community college offering an advanced certificate program in CNC/CAM. Liberty Mutual authorized Petitioner to enroll in a CAM 100 course at Triton from June 10, 1997 through August 1, 1997. Ms. Steele had determined that no other courses for the program were offered in the summer. Liberty Mutual also requested that Ms. Steele determine whether Mr. Cammarata would require a full certificate or just certain classes in order to return to work.

In August 1997, Ms. Steele reported that Petitioner had completed the CAM 100 class, and on August 25, 1997 would begin a CAD class and a CAM class, **[*53]** but was unable to register for a CNC machining class because it was full. She further reported that Liberty Mutual had authorized her to maintain contact with Petitioner while he was in his training program. She noted that in order to expedite the registration process, Petitioner had paid tuition out of his own pocket and she directed him to forward bills to her for reimbursement. On August 29, 1997 Steele noted that she had forwarded his tuition bills to Liberty Mutual and on October 1, 1997, noted Petitioner was still awaiting reimbursement of over $ 560.00 for tuition and books. She noted he was attending school two evenings and one morning per week. She further reported that the Advanced Certificate for Computer Numerical Control/Computer Aided Manufacturing required 44 semester hours, and that Mr. Cammarata felt Petitioner would benefit from all but "some five" classes short of the full certificate. Thereafter, the Liberty Mutual adjuster informed Ms. Steele that Petitioner must take as many classes were available to him each semester, and that Liberty Mutual would pay only for those courses that Mr. Cammarata had recommended for the position which he planned to offer to Petitioner. **[*54]**

In January 1998, Steele reported that Petitioner had registered for the only two required courses that were offered and for which he was eligible. Again, she noted Petitioner had paid his own tuition and would submit his bills for reimbursement. In December and January, Petitioner attempted to contact Mr. Cammarata to discuss the courses he was to take and employment opportunities with Mr. Cammarata. In February 1998, at the direction of Liberty Mutual, Ms. Steele contacted Mr. Cammarata to see if he would accommodate Petitioner with any employment while he was attending classes. She reported that Mr. Cammarata said he would like to discuss the matter directly with Petitioner, and that Petitioner had attempted to contact Mr. Cammarata in that regard, without success.

On March 26, 1998, Ms. Steele reported she had spoken with Mr. Cammarata who was of the opinion that Petitioner needed to take more classes before he would be prepared to return to work. It had been agreed that Petitioner would follow-up with Mr. Cammarata when he completed the Spring semester. On April 27, 1998, Steele reported that Petitioner still had not been reimbursed for his tuition and expenses for the training **[*55]** program.

On May 20, 1998, Ms. Steele reported that Petitioner had completed final exams for the previous semester and had registered for QCN-111 Dimensional Metrology I. Ms. Steele stated that she told Petitioner the course was not on the lists of courses required by Mr. Cammarata, and therefore he would have to pay for it himself. Petitioner stated he understood from his last meeting from Mr. Cammarata that he could take what he wanted, so Ms. Steele again contacted Mr. Cammarata who reportedly stated he didn't recall

that and he thought he had reviewed the list of classes and recommended what he thought would be of most benefit to Petitioner, and that he would contact Petitioner to discuss employment opportunities.

On June 16, 1998, Steele reported that the QCN-111 Dimensional Metrology class had been cancelled due to limited enrollment, that Petitioner had spoken with his employer who said he had a job for him when he completed school and that he needed to take more CAM courses in order to be able to perform the job he had for him. Petitioner stated his intention was to register for as many classes as he possibly could in the fall, and intended to return to work in December 1998 **[*56]** or January 1999. On July 13, 1998, she reported that he had registered for two CAM classes in the fall. Her August 20, 1998 reported his grades for the previous semester and that she had received and forwarded to Liberty Mutual his request for tuition reimbursement. On September 18, 1998, she reported that he stated he had reimbursed for in Spring 1998 tuition and expenses. She told him to contact Mr. Cammarata at the end of the Fall semester to determine his start date for employment.

On October 23, 1998, Steele reported that Petitioner was continuing his training at Triton College and that the Liberty Mutual adjuster had informed her that Petitioner's employer had gone out of business effective September 30, 1998. She stated that, "Given this, Mr. Lee's vocational plan will have to be re-evaluated and adjusted with Mr. Wulf (the claims adjuster) with regard to future vocational planning."

Ms. Steele subsequently took time off work, and Denise Vogrich of Cascade Disability Management, became involved in Petitioner's case during her absence.

On December 8, 1998, Vogrich sent him a letter confirming an agreement that they would meet on December 9, 1998 to discuss his progress in school **[*57]** and establishing vocational alternatives as his employer had closed. Her progress report to Liberty Mutual dated December 10, 1998 states that she gave Petitioner some suggestions about refining his resume and sending out cover letters with resumes, that he advised her that his current grades were 88% or better, that he had learned to develop programs for computer numeric control machines from drawings, and that she requested him to provide her with transcripts at the end of the semester. Her reported rehabilitation plan was to follow-up with the adjuster "to determine if additional services should be provided or if this file should be closed."

On January 20, 1999, Denise Vogrich sent Petitioner a "Job Placement Plan" with the stated goal of "Direct job placement with new employer via exploration of job opportunities which accommodate Mr. Lee's physical abilities and transferable skills". She identified job goals within Petitioner's abilities as Production Supervisor, Production Manager, Manufacturing/Production (Plastics, Recycling, Paper, Metal), and Quality Control, stating that goals will be re-evaluated and may be adjusted during the placement process. She directed Petitioner **[*58]** to look for jobs by reviewing newspaper classified ads, weekly visits to the Illinois Job Service, visits to the placement offices of Triton and Wright Junior College, the Illinois/Indiana Service Directory, and Illinois Manufacturers Directory. She directed him to provide Cascade with accurate and complete reports describing job contacts made and the results, to maintain a goal of contacting a minimum of 20 employers a week, contact Cascade at least once a week, and notify Cascade immediately when a job offer is made, including job title, company name, supervisor's name, rate of pay, start date and responsibilities. She forwarded Job Search Record Forms to him.

Thereafter, Ms. Steele returned to work, and on February 1, 1999 wrote Petitioner, cancelling a meeting that had been scheduled the following day because he informed her he had accepted a job offer as a bartender, that he was in training receiving $ 5.50 per hour, and that hourly earnings would be $ 5.50 per hour and tips. She further stated she would remain on his file for at least 30 days to assess his return to work adjustment, that it had been a pleasure working with him and that she wished him success in his new position **[*59]** as a bartender.

On February 4, 1999, in a Job Placement Progress Report to Liberty Mutual, Ms. Steele confirmed that Petitioner had secured employment as a bartender on February 1, 1999, reviewed the job placement activities Cascade had conducted in her absence, and that she had received and forwarded Petitioner's class grades to Liberty Mutual. She reported that she had met with Petitioner on January 20, 1999 and reviewed job seeking activities with him. She stated that on February 2, 1999 Petitioner informed her of the bartender position he had started the day before, that she notified Liberty Mutual the same day and, as he had secured employment, a meeting she had scheduled with him the following day was cancelled, and that she had authorization to follow-up for at least 30 days to assess his adjustment to his new position. She reported that as he had obtained employment, the Job Developer would no longer be providing job leads to Petitioner.

On March 5, 1999, Steele reported that she had spoken with Petitioner, that he had received $ 5.50 per hour training pay for only 2 days, and subsequently was earning $ 3.09 per hour plus tips, and that all was going well in his new job.

Based **[*60]** on the foregoing evidence and for the reasons that follow, the Commission finds that Petitioner has proved entitlement to wage differential benefits pursuant to Section 8(d)(1) of the Act.

Among the reasons cited by the Arbitrator for his determination that Petitioner failed to prove entitlement to a wage differential award was that Petitioner's "job search was inadequate and was targeted only towards supervisors and managers positions". The Commission notes that such positions are exactly what Liberty Mutual instructed the vocational counselor to explore in the fall of 1995, as shown by her progress reports, and exactly the types of positions Denise Vogrich, Ms. Steele's supervisor who worked on Petitioner's case during Ms. Steele's absence, directed Petitioner to pursue in 1999. There is no evidence in the record to support the conclusion that his job search was inadequate in any other respect - the evidence is uncontradicted that he pursued leads provided by Cascade, that he pursued jobs in want ads, and that he sought the services of a "head hunter" for the occupations recommended by Liberty Mutual and Cascade on his own initiative, and that on several occasions he expressed the **[*61]** desire to return to work either while still undergoing medical treatment or before completing CNC/CAM training. Thus, these factual findings of the Arbitrator are plainly contrary to the evidence.

The Arbitrator further found that Petitioner's testimony of current earnings of an average of $ 400.00 per week was not supported by the evidence and was not credible. Again, this finding is directly contrary to the evidence. His testimony was corroborated by his paycheck stubs from the time he started employment through the day he testified.

As his final reason for denying wage differential benefits, the Arbitrator found that "Petitioner failed to prove that the income from his present job is representative of his earning capacity." This conclusion is also unsupported by the evidence. Petitioner testified without contradiction as to his unsuccessful search for employment in CAD, production, metal, plastic and other engineering industry. Kim Steele, through her testimony and by her reports, confirms that when Petitioner informed her he had gotten a job as a bartender, at

Liberty Mutual's direction she cancelled a meeting she had scheduled with Petitioner to continue job search activities, **[*62]** directed the job developer to discontinue providing job leads to Petitioner, sent Petitioner a letter telling him it had been a pleasure working with him and wishing him success in his new position, and a month later, confirmed his wages and that he was doing well in his new employment and again wished him well. Respondent clearly gave tacit approval to the suitability of this employment. Further, Petitioner lacked basic qualifications for almost all of the jobs included in Cascade's March, 1999 Labor Market Survey in that, by Cascade's description, almost all required education and/or experience that Petitioner did not possess. Responde nt's witness Ms. Steele testified that Petitioner could seek employment without a certificate, but that she believed his employment opportunities would be limited as he would be competing with people who have a certificate or a two-or four-year degree. Her testimony corroborates that which Petitioner said he learned, i.e. that if he didn't have a certificate, he might as well not be looking.

The Commission further finds Respondent's argument to the Arbitrator and to the Commission, that Petitioner's failure to continue taking classes to obtain certification **[*63]** was a refusal to cooperate with vocational rehabilitation, disingenous at best. The Commission notes that in addition to omitting or ignoring many salient facts in its Response to Peti tioner's Statement of Exceptions, Respondent misrepresented the evidence in several instances, including the suggestion that Petitioner was taking fewer classes than possible at any time after his participation in classes was authorized by Respondent (the evidence is that he took all available "authorized" classes at the earliest possible time after they had been authorized in the program authorized by Liberty Mutual, and even attempted to take an "unauthorized" but related course at his own expense during a summer semester when no authorized courses were offered); that Petitioner cancelled the meeting that had been scheduled with the rehabilitation counselor on February 3, 1999 (the evidence is absolutely clear that Kim Steele cancelled the meeting at the direction of the claims adjuster handling the case, and she also told the job developer to discontinue finding job leads for Petitioner), that Petitioner testified that he only started the classes to get the certificate because he was going to go back **[*64]** to work at Applied Automation and he was no longer interested in finishing the certification program (Petitioner never testified he was no longer interested in finishing the program). The evidence shows that notwithstanding that Petitioner was requesting training for CAD certification for 2 to 3 years, Respondent would not authorize any training for nearly three years from the time Dr. Carroll told them as early as August 1994 that Petitioner would not be able to return to his former occupation in the future, would probably not be able to return to gripping, grasping or heavy lifting, that he would be able to use his left as an assist to the right, that vocational rehabilitation should be provided to Petitioner and that the early opinion he was providing as to Petitioner's expected final outcome was given to allow his rehabilitation to proceed in an expeditious fashion. Liberty Mutual did not authorize any training until May 1997, when Mr. Cammarata said he could give him a job if he received training. Liberty Mutual refused to authorize training for full certification, stressing to Petitioner that the only classes he was permitted to take were those specified by Mr. Cammarata for **[*65]** return to a specific job that never materialized. Petitioner testified that after he completed the semester during which Respondent went out of business he didn't enroll for the following semester because "I was supposed to go back to work January and they were not to pay anymore." The evidence is uncontroverted that after it was learned that Respondent had gone out of business, Kim Steele reported in October 1998 that the vocational plan would therefore have to be evaluated and adjusted with Liberty Mutual's claims adjuster with regard to future vocational planning. Thereafter, due to Ms. Steele's leave of absence, Petitioner spoke with her supervisor at Cascade, Denise Vogrich, about what he should do next. In her report of December 10, 1998, Ms. Vogrich states that she told him to forward his grades to her when the semester was completed, that he should send out resumes looking for a job, and that she would follow with the adjuster "to determine if additional services should be provided or if this file should be closed." Vogrich's report is completely consistent with Petitioner's testimony as to what she told him to do and what he did. Petitioner completed classes that semester **[*66]** on December 17. Respondent terminated payment of compensation to him the next day. Thereafter, he continued to seek employment, and did not hear from Cascade or Liberty Mutual again for a month, at which time he was told to continue looking for a job. He found one, wasn't paid past due temporary total disability until he obtained that job, at which time Cascade cancelled further meetings, stopped sending job leads, told him had been a pleasure working with him and wished him well. Under these circumstances, Respondent's suggestion that Petitioner didn't obtain a CAD/CNC certificate because he wasn't interested is absurd.

The Commission finds that Petitioner fully cooperated in vocational rehabilitation, and that failure to cooperate with meaningful vocational rehabilitation in this case occurred only on the part of Respondent and/or its agents. Its own rehabilitation counselor admitted that it was always her opinion that Petitioner should complete training to obtain a certificate, but that training was not authorized until the potential of a position with his employer arose. Her reports show that notwithstanding that Mr. Cammarata stated that Petitioner would need a certificate to **[*67]** return to work for him, the adjuster directed her to prevail upon Mr. Cammarata to take Petitioner back to work without obtaining a certificate and to specify the minimum courses he would require to take him back to work. Noteworthy for showing Ms. Steele's allegiance to Liberty Mutual, who retained her, is the fact that her opinion that Petitioner should have completed training for a certification to make him more marketable does not appear in any of her reports until after she had wished him good luck in his new job, ended communication with him, and the case had gone to trial before the Arbitrator on April 6, 1999.

Much that occurred in this case under the guise of "vocational rehabilitation", consisted primarily of the rehabilitation counselor doing the bidding of the insurance carrier, i.e., obtaining information from Petitioner sought by the insurance carrier, directing the claimant in the course of acti on the insurance carrier wanted him to follow, and monitoring Petitioner's compliance with the insurance carrier's instructions. This falls far short of meaningful rehabilitation that is contemplated by the Act, case law, and rules of the Commission, i.e., an independent and **[*68]** professional assessment taking into account multiple factors including the nature of the injury and impairment, loss of economic job security caused by the impairment, the age, education, skills, training and motivation of the injured employee, the relative costs and benefits of a course of tra ining or other form of voc ational rehabilitation to make a claimant competitive in a reasonably stable labor market for suitable alternative employment, and payment of the expenses involved in a reasonable course of rehabilitation.

An inflexible standard cannot be applied to determine what is appropriate rehabilitation in any given case. An unsuccessful job search is not required before education or training can be determined to be an appropriate course of rehabilitation program. It is not unusual, as should have occurred in this case, that an employee may obtain training while still undergoing treatment before being released to work and before reaching maximum medical treatment, as was clearly Dr. Carroll's intention and Petitioner's desire. The existence of jobs with a claimant's physical abilities does not, in and of itself, without regard to an employee's age, education, experience, skills **[*69]** and earnings potential, negate the need for education or training. As eventually occurred in this case, the potential existence of one specific job created by a small business to accommodate an existing employee if he completed a course of training specific to that one job does not compel the conclusion that training for that specific potential job is the appropriate course of rehabilitation for that claimant. That training will make an employee qualified in a suitable occupation for which there is a stable labor market does not mean that the employer must provide such training, if equally suitable employment is sufficiently available to a claimant without training or education.

That Respondent's provision of vocational rehabilitation in this case was shortsighted, misguided, and unduly parsimonious and

grudging is amply demonstrated by that which transpired. Certainly, a purpose of rehabilitation is to minimize disability caused by impairment. Respondent's conduct was directly responsible for protracting Petitioner's disability and disruption of his life. Had Respondent followed the early recommendation of Dr. Carroll, the opinion of its own rehabilitation consultant, and Petitioner's **[*70]** demonstrably well-founded requests, Petitioner likely could have completed training and obtained employment by the time they got around to authorizing training which was so limited as to qualify him for nothing. Rather than provide appropriate rehabilitation, Respondent repeatedly suspended vocational rehabilitation for the sole reason that Petitioner hadn't been released to work.

25. Petitioner filed a Petition for Penalties and Attorneys fees, claiming 39 days of delay in payment of temporary total disability benefits as provided under § 19(1) of the Act, and further claimed unreasonable delay in payment of permanent statutory disability related to the amputations.

Based on the record as a whole and a preponderance of the evidence, the Commission concludes that the Decision of the Arbitrator filed on December 10, 1999 should be reversed on the wage differential issue. The Commission notes that the parties stipulated that as the result of accidental injuries arising out of and in the course of his employment on June 10, 1994, Petitioner was temporarily totally disabled for a period of 242-4/7 weeks, the period from the date of accident until Petitioner returned to work on February **[*71]** 1, 1999. The Commission finds that Petitioner reached maximum medical improvement on September 10, 1996, the date Dr. Carroll released him to return to work with restrictions. Therefore, Petitioner is entitled to TTD from June 10, 1994 through September 10, 1996, and thereafter is entitled to maintenance benefits in the amount of TTD compensation from September 11, 1996 throughout the course of vocational rehabilitation, until his return to work on February 1, 1999. See, Freeman United Coal Mining Company a/k/a Freeman United Coal v. The Industrial Commission, No. 5-00-0132 WC (5th Dist. App. Ct., Filed Dec. 27, 2000). The Commission therefore finds Petitioner was temporarily totally disabled for a period of 118-1/7 weeks and is entitled to maintenance benefits in the amount of temporary total disability compensation for a period of 124-3/7 weeks. The Commission further finds Petitioner is entitled to a wage differential in the amount of $ 312.99 per week commencing February 1, 1999, to additional compensation under § 19(1) of the Act in the amount of $ 390.00 for the 39 day delay in payment of temporary total disability benefits, to additional compensation under § 19(k) of the Act **[*72]** in the amount of $ 11,423.16, and to Attorneys' fees under § 16 of the Act in the amount of $ 2,284.63.

The Commission finds that Petitioner would currently earn $ 892.80 weekly in performance of his usual duties as a tool and die maker. The Commission relies on PX8 and the testimony of Respondent's witness, John Cammarata. Petitioner currently earns $ 423.32 as a bartender based on check stubs introduced into evidence. The Commission finds that Petitioner's employment as a bartender, provides a valid basis for the calculation of a § 8(d)1 wage differential award.

The Commission grants Petitioner's Petition under § 19(1) to the extent of $ 390.00. Respondent offered no justification whatsoever for terminating payment of compensation to Petitioner on December 18, 1998. Benefits were not paid for the 6 weeks commencing December 19, 1998 until January 26, 1999, a delay of 39 days at $ 10.00 per day.

The Commission grants Petitioner's Petition under § 19(k) to the extent of $ 11,423.16, representing 50% of the compensation payable for the statutory loss of the left index and ring fingers. The Commission finds that it was not unreasonable for Respondent to dispute whether the accident **[*73]** caused the loss or loss of use of four digits, resulting in the statutory loss of his hand. However, there is no basis for disputing that on the date of accident Petitioner, as a result of amputation, had sustained 100% statutory loss of his ring finger, and on June 28, 1994, the 100% statutory loss of his index finger. Petitioner reached maximum medical improvement and therefore his temporary total disability ended on September 10, 1996. Respondent made no tender in payment for the statutory losses until the day this case proceeded to trial, April 6, 1999. At that time compensation was tendered for 100% of the ring finger, but only 50% of the index finger. Compensation for the remaining 50% of the index finger was not issued until April 19, 1999. The Commission finds Respondent's delay in payment for the 100% statutory losses of the index and ring fingers was unreasonable. See, Lester v. Industrial Commission, 628 N.E. 2d 191, 256 Ill. App. 3d 520 (1st Dist. 1993); Modern Drop Forge v. Industrial Commission, 284 Ill. App. 3d 259, 671 N.E. 2d 753 (1st Dist. 1996).

The Commission grants Petitioner's **[*74]** Petition for Attorneys' Fees under § 16 in the amount of $ 2,284.63, representing 20% of the additional compensation awarded under § 19(k).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 423.08 per week for a period of 118-1/7 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 the Petitioner the sum of $ 423.08 per week for a period of 124-3/7 weeks, that being the period for which maintenance benefits are payable under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on February 1, 1999, Respondent pay to Petitioner the sum of $ 312.99 per week for the duration of his disability, as provided in § 8(d)l of the Act, for the reason that the injuries sustained permanently incapacitated him from pursuing the duties of his usual and customary line of employment as a tool and die maker.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation in the amount of $ 390.00 as provided in § 19(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional **[*75]** compensation in the amount of $ 11,423.16 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for Petitioner attorneys' fees in the amount of $ 2,284.63 as provided in § 16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Barbara A. Sherman

Diane Dickett Smart

DISSENT

I dissent from the Decision of the Majority.

Claimant suffered a severe injury to his left hand, requiring several surgeries. The functional evaluation was that he could perform **[*76]** light duty, but should not return to his former job of machinist. Claimant then became a bartender.

The Arbitrator awarded claimant 35% of the man as a whole, 175 weeks at $ 312.99 per week, in addition to TT for 242 weeks at $ 423.08 per week.

The Commission converts the Arbitrator's award into a "loss of earnings" award, $ 312.99 per week for life, plus penalties under Section 19(k) of $ 11,423.16, and Attorney fees under Section 16 of $ 2,294.63, and $ 390.00 under Section 19(1). It also criticizes employer's vocational rehabilitation efforts. (In passing, I question the accuracy of a payroll record showing the post accident earnings of a bartender.)

When the injury is solely to the hand, any award must be under Section 8(e), not Section 8(d)1.

There is no dispute that the injury here is solely to the left hand, and specifically covered by Section 8(e)9.

If a disability is covered by Section 8(e), that expressly excludes any award under Section 8(d)1. Section 8(d)1 applies to "partial incapacity from pursuing the usual and customary employment ... except in cases compensated under the specific schedule set forth in paragraph (e) of this section."

These are the express words of the **[*77]** statute, and limit our authority to "pick and choose" whatever portion of the statute we think best serves a claimant. If covered by 8(e), an award under 8(d)l is error.

This was expressly held by the Supreme Court in D'Amico v. Industrial Commission, 44 Ill. 2d 519,256 N.E.2d 9 (1970). The Commission awarded compensation for an eye under Section 8(e) and for disfigurement under Section 8(c). Section 8(c) had an exclusion much like the Section 8(d) 1 exclusion described above: "no compensation is payable under this paragraph [c)] where compensation is payable under paragraphs (d), (e), or (f)."

The Supreme Court reversed the Commission award for the disfigurement, stating: "Section 8(c) relating to disfigurement itself states that no compensation shall be payable ... where compensation is payable under paragraphs (d), (e), or (f) ... so this language causes Section 8(e) to control this case." 256 N.E.2d 9 at p. 12

Of course, if there are injuries to separate parts of the body, one covered under 8(e) and the other under some other section, a foot injury and a fractured vertebrae for example, then compensation can be awarded under **[*78]** both sections. R.C. Mahon v. Industrial Commission, Ill. Supreme Court 1970, 259 N.E.2d 274.

Here the injury is solely to the hand, and Section 8(e) controls. An award under 8(d) is error. D'Amico, supra.

Douglas F. Stevenson

94 IL.W.C. 39,829, 2001 WL 1142120 (Ill.Indus.Com'n), 01 I.I.C. 0161

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 > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

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

*284 Ill. App. 3d 259, *; 671 N.E.2d 753, **;*
*1996 Ill. App. LEXIS 619, ***; 219 Ill. Dec. 586*

MODERN DROP FORGE CORPORATION, Plaintiff-Appellant, v. THE INDUSTRIAL COMMISSION, et al. (Roger Koenig, Appellee).

NO. 1-95-2336WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

284 Ill. App. 3d 259; 671 N.E.2d 753; 1996 Ill. App. LEXIS 619; 219 Ill. Dec. 586

August 16, 1996, Decided

SUBSEQUENT HISTORY: [*1]** Rehearing Denied October 23, 1996. Released for Publication November 18, 1996.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. No. 91-L-50423. Honorable Alexander P. White, Judge Presiding.

DISPOSITION: Affirmed in part, reversed in part; Commission's decision confirmed as modified.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a judgment of the Circuit Court of Cook County (Illinois), which confirmed appellee commission's award of benefits under the **Workers' Compensation** Act (Act) to an employee injured in a job-related accident. The employer challenged the **rate** at which benefits were awarded, the award of penalties and attorney fees, and the finding that the employee's left carpal tunnel syndrome was related to the accident.

OVERVIEW: After an employee's right arm was amputated and his left hand fractured in an on-the-job accident, he briefly returned to work, but resigned and was diagnosed with left carpal tunnel syndrome due to overuse after the **amputation** of his right hand. An arbitrator awarded disability payments for partial loss of use of his left hand and finger and total loss of use of his right arm. The commission raised the **rate** at which the employee was paid for statutory **amputation,** and awarded penalties and attorney fees. The circuit court confirmed the commission's decision, and on further appeal, the court: 1) reversed and modified the commission's order by reducing the employee's compensation for statutory **amputation** to 60 percent, holding that 820 Ill. Comp. Stat. 305/8(b)(2.1) (1992) of the Act required such limitation; 2) affirmed the award of penalties and attorney fees in light of the employer's delay in paying benefits; and 3) affirmed the commission's award of benefits for partial loss of use of the left hand and finger, holding that the evidence supported the commission's findings that the employee's left hand disability was causally related to the **amputation** of his right arm.

OUTCOME: The court reversed and modified the judgment of the circuit court in part by reducing the **rate** at which the commission awarded benefits to the injured employee for statutory **amputation.** The court affirmed the part of the judgment of the circuit court, which confirmed the commission's award of penalties and attorney fees to the employee and the finding that the employee's left carpal tunnel syndrome was causally related to the accident.

CORE TERMS: claimant, amputation, average weekly wage, carpal tunnel syndrome, loss of use, right arm, compensation rates, arbitrator's, awarding, middle finger, manifest, maximum, arm, attorney fees, per week, right hand, disfigurement, enucleation, confirmed, modified, weekly, drop, total disability, partial disability, amount owed, authority to award, differential, wage-loss, paying, temporary

LEXISNEXIS® HEADNOTES Hide

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN1 Section 8(b)(4) of the **Workers' Compensation** Act, which reads in part: All weekly compensation **rates** provided under subparagraphs 1, 2 and 2.1 of this paragraph (b) of this Section shall be subject to the following limitations: from July 1, 1977 and thereafter such **maximum** weekly compensation **rate** for **amputation** of a member or enucleation of an eye under paragraph (e) of this Section shall be increased to 133 1/3 % of the State's average weekly wage in covered industries under the Unemployment Insurance Act. 820 Ill. Comp. Stat. 305/8(b)(4) (1992). More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Benefit Entitlements
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN2 Section 8(b)(2.1) of the **Workers' Compensation** Act (Act) provides that the compensation **rate** in all cases under paragraph (e) of this Section shall be equal to 60% of the employee's average weekly wage. 820 Ill. Comp. Stat. 305/8(b)

(2.1) (1992). Section 8(e) of the Act is the statutory enumeration of specific compensation due for total loss of particular body parts. 820 Ill. Comp. Stat. 305/8(e) (1992). Section 8(e)(10) of the Act sets the statutory compensation **rate** for loss of an arm at 235 weeks. 820 Ill. Comp. Stat. 305/8(e)(10) (1992). More Like This Headnote | *Shepardize:* Restrict By Headnote

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities
HN3 The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature, which is best evidenced by the clear and unambiguous language of the statute. All portions of the **Workers' Compensation** Act must be read as a whole and in such a manner as to give them the practical and liberal interpretation intended by the legislature. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities
Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities
HN4 Section 8(b)(2) of the **Workers' Compensation** Act (Act) provides that the compensation **rate** in all cases, 820 Ill. Comp. Stat. 305/8(b)(2) (1992), shall be 66 2/3 % of the average weekly wage other than for (1) temporary total disability (TTD) , (2) serious and permanent disfigurement to the arm under section 8(c) of the Act, 820 Ill. Comp. Stat. 305/8(c) (1992), (3) permanent partial disability (PPD) under section 8(d)(2) of the Act, 820 Ill. Comp. Stat. 305/8(d)(2) (1992), and (4) recovery under section 8(e). Other than as to TTD, section 8(b)(2.1) provides the compensation **rate** for the exceptions set out in section 8(b)(2). Section 8(b)(2.1) provides that 60% of the employee's average weekly wage shall be the compensation **rate** in all cases of (1) serious and permanent disfigurement under section 8(c), (2) PPD under section 8(d)(2), and (3) recovery under section 8(e). 820 Ill. Comp. Stat. 305/8(b)(2.1) (1992). More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities
HN5 Section 8(b)(4) of the **Workers' Compensation** Act (Act), 820 Ill. Comp. Stat. 305/8(b)(4) (1992), sets **maximum** limits. That section states that all weekly compensation **rates** provided under subparagraphs 1, 2 and 2.1 of this paragraph (b) of this section shall be subject to the following limitations, 820 Ill. Comp. Stat. 305/8(b)(4) (1992): Section 8(b)(4) of the Act, in limiting recovery, provides that the **maximum** recovery under paragraphs 1, 2, and 2.1, after July 1, 1977, for **amputation** of a member shall be increased to 133 1/3 % of the state's average weekly wage. The term "increased to" in the last paragraph of § 8(b)(4), 820 Ill. Comp. Stat. 305/8(b)(4) (1992), is in relation to the limitation of 100% of the State's average weekly wage which was set forth in the second paragraph of § 8(b)(4) and which existed prior to July 1, 1977. Ill. Rev. Stat. ch. 48, para. 138.8(b)(4) (1975). More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN6 If an employer delays paying compensation, the employer bears the burden of showing that it had a reasonable belief that the delay was justified. The Industrial Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN7 The determination of causation is a question of fact to be resolved by the Industrial Commission. In resolving questions of fact, it is the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence and draw reasonable inferences from the evidence. More Like This Headnote

COUNSEL: For Modern Drop Forge Corporation, APPELLANT: Nyhan, Pfister, Bambrick & Kinzie, P.C., Chicago (Miles P. Cahill and Micaela M. Cassidy, of counsel).

For The Industrial Commission, APPELLEE: Cronin & Peters, of Chicago (Patricia C. Cook, of counsel).

JUDGES: PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court: RAKOWSKI and HOLDRIDGE, JJ., concur. COLWELL, J., dissents part. RARICK, J., joins in the dissent.

OPINION BY: McCULLOUGH

OPINION

[*261] **[**754]** PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court:

Respondent employer Modern Drop Forge appeals the judgment of the circuit court of Cook County confirming the Industrial Commission's decision awarding benefits to the claimant, Robert Koenig. The respondent contends that (1) the Commission erred in awarding benefits at the **rate** of 66 2/3 % of average weekly wage for a statutory **amputation**, rather than at the 60% **rate;** (2) the award of penalties and attorney fees was against the manifest weight of the evidence; and (3) the Commission's finding that the claimant's carpal tunnel syndrome in **[***2]** his left hand is causally related to the accident in which his right hand was severed is against the manifest weight of the evidence. We affirm in part and reverse in part the judgment of the circuit court, and confirm the Commission decision as modified.

[755]** The claimant was injured on December 15, 1988, at Modern Drop Forge's Blue Island plant when a 1,500 pound "drop

hammer" crushed his right forearm and broke his left middle finger at the base of the proximal phalanx. His right arm was subsequently amputated approximately 8 to 10 centimeters below the bend of the elbow. Prior to the accident, Koenig was right-handed. The claimant's initial treating physician, Dr. Neal Zimmerman, offered the claimant surgical and nonsurgical options for repair of the injured finger. Even though the nonsurgical option might result in less than anatomic correction of the fracture, claimant refused surgery on the left hand.

The claimant was fitted with a prosthetic device, and attended physical therapy for both the right arm and left hand. He returned to work on June 12, 1989. Upon his return to work, the claimant was no longer physically able to perform his previous job, which had paid $ 9.25 per hour **[***3]** for a 40-hour week. Instead, he went to work in the respondent's code inspection shop, where he was paid $ 6 to $ 6.50 per hour and worked only 22 to 26 hours per week. This position required the claimant to lift steel machine parts, place them on a table, measure them with a micrometer and then replace them in a bin. The claimant attempted to perform this job using only his remaining left hand, and was not given any vocational rehabilitation.

The claimant testified that soon after he returned to work, he began to notice numbness and tingling in his left hand. Prior to his accident, the claimant had never experienced any problem with his **[*262]** left hand. He also said that he was slower than the other inspectors in performing his job.

On August 18, 1989, the claimant resigned from Modern Drop Forge. He testified that he was having trouble using the prosthetic device, he was having numbness and tingling in his left hand, he could not keep up with his work, and he was "really depressed." He moved to Buffalo, New York, to be near his family. He attended some vocational rehabilitation in New York, attempted to return to school (but had difficulty learning to write left-handed) and received **[***4]** services from the New York State Department of Education for Individuals with Disabilities. He was not employed at the time of the hearing before the arbitrator.

From the time of the accident through March 16, 1992, the respondent had paid the claimant $ 6,173.76 in temporary total disability (TTD) benefits, and had "loaned" him $ 1,000 against his statutory compensation entitlement for the loss of his right arm. This "loan" was made on August 4, 1989, after the claimant informed the respondent that he was having trouble paying his bills. On March 12, 1992, the claimant filed a petition for penalties and attorney fees regarding the delay in payment of the permanent partial disability (PPD) benefits for the **amputation** of an arm. On March 18, 1992, the respondent paid the amount of PPD benefits that had accrued to that point ($ 39,559.48), and thereafter made regular periodic payments.

Dr. Andrew C. Matteliano became the claimant's treating physician in Buffalo and, in January 1991, diagnosed the claimant as suffering from left carpal tunnel syndrome resulting from overuse following the **amputation** of the dominant right hand. An electromyography (EMG) and nerve conduction velocity test **[***5]** performed on March 6, 1992, were compatible for left carpal tunnel syndrome. Matteliano believed the carpal tunnel syndrome was related to the loss of the dominant arm. He acknowledged that the claimant suffered a fall in December 1990, for which claimant did not give a history of striking the left hand.

At the request of the employer, the claimant was examined on March 16, 1992, by Dr. Janet Elliot. She found no indication of carpal tunnel syndrome. She opined that the claimant suffered from tendonitis. She testified that she got the impression from the claimant that his left hand symptoms were "intermittent" and that he had returned to school and was using his left hand for writing. In her report to the respondent, she acknowledged that the EMG performed at Matteliano's request did show mild evidence of carpal tunnel syndrome. It was her opinion that claimant's left hand symptoms were not caused by the work he performed for respondent in 1989 **[*263]** following the **amputation** **[**756]** of the right arm. She explained that tendonitis could come and go.

Following hearings on June 15 and November 13, 1992, the arbitrator awarded the claimant $ 246.95 per week for 25 3/7 weeks for TTD (820 ILCS 305/8(b) **[***6]** (West 1992)) and $ 222.25 per week for 272 1/4 weeks for PPD. The PPD was awarded for loss of 15% use of the left hand, 25% loss of use of the left middle finger, and 100% loss of use of the right arm. 820 ILCS 305/8(e)(a), (e)(3), (e)10) (West 1992). The arbitrator specifically found that the respondent's delay in paying benefits was unreasonable and vexatious, but said he believed he was without authority to award penalties, as only the Commission is specifically authorized to do so. The arbitrator directed the claimant to present his claims for penalties and fees to the Commission.

The Commission modified the arbitrator's award in the following respects by awarding (1) PPD for 100% loss of an arm at the **rate** of $ 246.95 (66 2/3% of claimant's average weekly wage) for 235 weeks; (2) PPD at $ 222.25 per week (60% of the average weekly wage) for a total of 37.25 weeks for loss of use of the left hand (28.5 weeks) and left middle finger (8.75 weeks); and (3) $ 18,874.39 in penalties pursuant to section 19(k) of the **Workers' Compensation** Act (Act) (820 ILCS 305/19(k) (West 1992)) and $ 3,774.88 in attorney fees pursuant to section 16a(B) of the Act (820 ILCS 305/16a(B) (West 1992)). **[***7]** The circuit court confirmed the Commission's decision.

The respondent first contends that the Commission erred in awarding the claimant benefits for the loss of his arm at the **rate** of 66 2/3 % rather than at 60%. In making the award, the Commission cited [HN1] section 8(b)(4) of the Act, which reads in pertinent part:

> "All weekly compensation **rates** provided under subparagraphs 1, 2 and 2.1 of this paragraph (b) of this Section shall be subject to the following limitations:
>
> * * *
>
> From July 1, 1977 and thereafter such **maximum** weekly compensation **rate** *** for **amputation** of a member or enucleation of an eye under paragraph (e) of this Section shall be increased to 133 1/3 % of the State's average weekly wage in covered industries under the Unemployment Insurance Act." 820 ILCS 305/8(b)(4) (West 1992).

The respondent argues that the plain language of section 8(b)(2.1) of the Act limits compensation for a statutory **amputation** to 60%. [HN2] Section 8(b)(2.1) reads in pertinent part:

> "The compensation **rate** in all cases *** under paragraph (e) of this Section shall be equal to 60% of the employee's average weekly wage ***." 820 ILCS 305/8(b)(2.1) (West 1992).

[*264] Section 8(e) of the Act **[***8]** is the statutory enumeration of specific compensation due for total loss of particular body parts. 820 ILCS 305/8(e) (West 1992). Section 8(e)(10) of the Act sets the statutory compensation **rate** for loss of an arm at 235 weeks. 820 ILCS 305/8(e)(10) (West 1992).

HN3 The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature, which is best evidenced by the clear and unambiguous language of the statute. *Kraft, Inc. v. Edgar,* 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661, 149 Ill. Dec. 286 (1990). All portions of the Act must be read as a whole and in such a manner as to give them the practical and liberal interpretation intended by the legislature. *Vaught v. Industrial Comm'n,* 52 Ill. 2d 158, 165, 287 N.E.2d 701, 705 (1972). The purpose of the Act is to provide employees with a prompt, sure remedy for their injuries and to require that the cost of industrial accidents be borne by the industry rather than by its individual members. *Lester v. Industrial Comm'n,* 256 Ill. App. 3d 520, 523, 628 N.E.2d 191, 193, 194 Ill. Dec. 694 (1993).

Sections 8(b)(2), 8(b)(2.1) and 8(b)(4) of the Act (820 ILCS 305/8(b)(2), 8(b)(2.1), 8(b)(4) (West **[***9]** 1992)), concern the method of determining benefits. HN4 Section 8(b)(2) of the Act provides "the compensation **rate** in all cases" (820 ILCS 305/8(b)(2) (West 1992)) shall be 66 2/3 % of the average weekly wage other than for (1) TTD, (2) serious and permanent **[**757]** disfigurement to the arm under section 8(c) of the Act (820 ILCS 305/8(c) (West 1992)), (3) PPD under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 1992)), and (4) recovery under section 8(e). Other than as to TTD, section 8(b)(2.1) provides the compensation **rate** for the exceptions set out in section 8(b)(2). Section 8(b)(2.1) provides that "60% of the employee's average weekly wage" shall be "the compensation **rate** in all cases of" (1) serious and permanent disfigurement under section 8(c), (2) PPD under section 8(d)(2), and (3) recovery under section 8(e). 820 ILCS 305/8(b)(2.1) (West 1992).

The arbitrator awarded benefits using the 60% **rate,** 100% (235 weeks) for loss of use of the right arm, 15% (28 1/2 weeks) for loss of use of left hand and 25% (8 3/4 weeks) for loss of use of the left middle finger. The Commission referred to section 8(b)(4) of the Act, and with no other explanation awarded the 66 2/3 % **rate** for the **[***10]** loss of use of the right arm. The Commission affirmed the arbitrator's 60% award for loss of use of the left hand and left middle finger. The circuit court confirmed, also referring only to section 8(b)(4), saying the "**maximum rate** available" to claimant "is 66 2/3 % of his average weekly wage."

HN5 Section 8(b)(4) of the Act sets **maximum** limits. That section states, "All weekly compensation **rates** provided under subparagraphs **[*265]** 1, 2 and 2.1 of this paragraph (b) of this Section shall be subject to the following limitations." 820 ILCS 305/8(b)(4) (West 1992).

Section 8(b)(4) of the Act, in limiting recovery, provides that the **maximum** recovery under paragraphs 1, 2, and 2.1, after July 1, 1977, for **amputation** of a member shall be increased to 133 1/3 % of the state's average weekly wage. The term "increased to" in the last paragraph of section 8(b)(4) (820 ILCS 305/8(b)(4) (West 1992)) is in relation to the limitation of 100% of the State's average weekly wage which was set forth in the second paragraph of section 8(b)(4) and which existed prior to July 1, 1977. See Ill. Rev. Stat. 1975, ch. 48, par. 138.8(b)(4).

The portion of section 8(b)(4) of the Act referred to by the Commission would **[***11]** be applicable only if the recovery awarded under sections 8(b)(1) (820 ILCS 305/8(b)(1) (West 1992)), (b)(2), and (b)(2.1) of the Act exceeded 133 1/3 % of the State's average weekly wage. No argument is made by either party that the recovery exceeded the limit of section 8(b)(4).

Once again, as stated in the first paragraph of section 8(b)(4) of the Act, its purpose is to limit recoveries. See *Bohannon v. Industrial Comm'n,* 237 Ill. App. 3d 989, 993-94, 606 N.E.2d 527, 529-30, 179 Ill. Dec. 695 (1992). Under the facts of this case, it is clear section 8(b)(2.1) applies and the proper **rate** of compensation for the three PPD awards made by the Commission was 60% of the claimant's average weekly wage. For this reason, we modify the Commission's decision to award claimant $ 222.25 per week for 235 weeks for 100% loss of the use of his right arm.

The respondent's next contention is that the Commission erred in awarding penalties to the claimant pursuant to section 19(k) of the Act and attorney fees pursuant to section 16a(B) of the Act. 820 ILCS 305/19(k), 16a(B) (West 1992). In awarding penalties, the Commission relied on *Lester.* The *Lester* court applied the principles of **[***12]** statutory construction to section 8(e) of the Act and said:

> "We find that the legislature intended that individuals who receive **amputations** should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment. Such a result is consistent with the legislature's intent because prompt payment alleviates the possibility that an employee will be faced with unnecessary financial burdens. Requiring immediate payment is not unfair to the employer because statutorily it would have to pay the amount owed at some point in time. It is consistent with the purpose of the Act to require the amount owed to be paid promptly. The employer can pay the amount owed immediately since section 8(e) **[*266]** clearly sets forth the compensation an employer is obligated to pay. As such, it is unreasonable that an employee should **[**758]** have to wait for a judgment to be entered before receiving the compensation clearly owed." *Lester,* 256 Ill. App. 3d at 523, 628 N.E.2d at 193.

HN6 If an employer delays paying compensation, the employer bears the burden of showing that it had a reasonable belief that the delay was justified. *Lester,* 256 Ill. App. 3d at **[***13]** 524, 628 N.E.2d at 194. The Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. *Howlett's Tree Service v. Industrial Comm'n,* 160 Ill. App. 3d 190, 197, 513 N.E.2d 82, 86, 111 Ill. Dec. 836 (1987).

In the instant case, the respondent contends that the claimant failed to notify it of his choice of remedies; that is, whether he would elect statutory compensation under section 8(e) of the Act, or a wage-loss differential under section 8(d)(1) of the Act. Thus, respondent argues, it was reasonable for it to delay payment until the claimant's new counsel moved for an immediate hearing in 1992, some three years after the injury. We find this argument unpersuasive. As the claimant notes in his brief, the respondent is entitled to credit for any compensation already paid toward permanency at the time of arbitration. There is no reasonable argument that a claimant would choose a section 8(d)(1) wage-loss differential award if the amount he is likely to receive under that provision is *less* than his statutory entitlement under section 8(e). The respondent risks nothing when it begins payments for an undisputed section **[***14]** 8(e) injury, such as an **amputation**. Should the claimant later elect a wage-loss differential, the employer will still

be entitled to credit for amounts paid, and additional amounts will necessarily remain to be paid. The Commission's decision to award penalties under section 19(k) of the Act and attorney fees under section 16a(B) of the Act was not against the manifest weight of the evidence.

The claimant argues that the Commission incorrectly calculated the amount of fees due under section 16 of the Act, basing its fee calculation on a figure representing 20% of the amount of penalties due rather than on 20% of the total amount of compensation unreasonably withheld up to the time of arbitration. This contention is not properly before this court because the claimant failed to bring it on cross-appeal, and the respondent does not contest the amount of fees awarded, but only the applicability of the provisions allowing for the award of penalties and fees.

Finally, we turn to the respondent's contention that the Commission's determination that the claimant's left carpal tunnel **[*267]** syndrome is causally related to the December 1988 accident is against the manifest weight of the evidence. HN7 **[***15]** The determination of causation is a question of fact to be resolved by the Commission. *Illinois Mutual Insurance Co. v. Industrial Comm'n*, 201 Ill. App. 3d 1018, 1038, 559 N.E.2d 1019, 1033, 147 Ill. Dec. 679 (1990). In resolving questions of fact, it is the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence and draw reasonable inferences from the evidence. *Kirkwood v. Industrial Comm'n*, 84 Ill. 2d 14, 20, 416 N.E.2d 1078, 1080, 48 Ill. Dec. 556 (1981).

We note that claimant's treating physician gave an opinion that the claimant's carpal tunnel syndrome was primarily caused by the overuse of his left hand following the loss of his dominant right hand. The loss of the right hand was a precipitating factor in the claimant's development of left carpal tunnel syndrome. Thus, if not for the **amputation**, the claimant would not have developed carpal tunnel syndrome in his left upper extremity. While this condition was undoubtedly accelerated by the claimant's attempt to return to work from June through August 1989, Matteliano's opinion suggested that the syndrome would likely have developed **[***16]** anyway, simply by virtue of the claimant's constant use of a hand that was little-used during most of his life when he had a dominant right hand. The Commission could reasonably find that the **amputation** was a causative factor in the claimant's development of left carpal tunnel syndrome. The Commission's decision to award benefits for partial loss of use of the left hand and left middle finger was not against the manifest weight of the evidence.

[759]** For the foregoing reasons, the judgment of the circuit court of Cook County confirming the Commission's decision is affirmed in part, and reversed in part. The Commission decision is confirmed as modified by this decision.

Affirmed in part, reversed in part; Commission's decision confirmed as modified.

RAKOWSKI and HOLDRIDGE, JJ., concur.

COLWELL, J., dissents part.

RARICK, J., joins in the dissent.

DISSENT BY: COLWELL (In Part)

DISSENT

JUSTICE COLWELL, dissenting in part:

I respectfully dissent in part because I believe the majority misconstrues the legislature's intent with regard to the Commission's authority to award compensation at a higher **rate** for a statutory **amputation**. I believe the Commission correctly found that it was within its authority **[***17]** to award the claimant PPD compensation at the **rate** of 66 2/3 percent of his average weekly wage, rather than the 60 percent **rate** espoused by the majority.

[*268] Construing sections 8(b)(2.1) and (4) in accordance with paragraph (e), as the Commission did, I would find that section 8(b)(4), by its express terms, applies to **amputations**. Section 8(b)(2.1) applies to all other awards under paragraph (e) other than **amputations** and enucleations. All of the remaining paragraphs to which section 8(b)(4) applies relate to death, permanent *total* disability and temporary total disability. Put another way, the *only* PPD claims covered by section 8(b)(4) are **amputations** and enucleations. 820 ILCS 305/8(b)(4) (West 1992). Thus, my review of the provisions of the sections in question reveals that the Commission was correct in its reading of the statute.

Further, the paragraphs and subparagraphs to which section 8(b)(2) apply are much broader than the portions to which section 8(b)(4) applies. As noted, Section 8(b)(4) limits the increase in **maximum** weekly compensation to only instances of death, permanent or temporary total incapacity, **amputation** of a member and enucleation of an eye. 820 ILCS **[***18]** 305/8(b)(4) (West 1992). It does not apply to "all cases of serious and permanent disfigurement" and of "permanent partial disability" as does section 8(b)(2.1). 820 ILCS 305/8(b)(2.1) (West 1992). Thus, construing the statute as a whole and for its practical and liberal interpretation (See *Vaught*, 52 Ill. 2d at 165), I believe that the legislature clearly intended that only the most serious cases be afforded a higher **maximum** level of compensation. This does not negate the meaning of section 8(b)(2.1), because that section still applies to all other cases of serious and permanent disfigurement and permanent partial disability *except* cases of death, total incapacity, **amputation** or enucleation. Paragraph (e) allows PPD awards for loss of use other than **amputations** and enucleations, and those awards are still subject to the 60 percent limitation. Thus, I believe the Commission did not err in awarding the claimant benefits at the **rate** of 66 2/3 percent for his **amputation**. Thus, I dissent as to that portion of the majority's opinion, and concur in the remainder of the disposition.

RARICK, J., joins this dissent.

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

BEFORE THE INDUSTRIAL COMMISSION
OF ILLINOIS

Robert Lippens,

Petitioner,

vs.

NO. 88 WC 13719

91 IIC 25

A.J.L. Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed and notice given to all parties, the Commission, upon consideration of the entire record and being advised of the facts and law affirms the Decision of the Arbitrator which is attached hereto and made a part thereof.

The Commission affirms the Arbitrator's Decision regarding the issue of permanent partial disability. The Commission finds that the injuries sustained caused the Petitioner the permanent loss of 100% of the use of the left index finger.

In support thereof, the Commission finds that Petitioner sustained a severe crushing injury to the left index finger which resulted in the amputation into the second phalanx of the left index finger. Therefore, the injuries sustained caused the Petitioner the permanent loss of 100% of the use of the left index finger.

The Commission finds that there is no award for the loss of use of the left hand.

The Commission affirms the Arbitrator's Decision regarding the permanency rate for the 100% loss of use for the amputated left index finger. The Commission finds that the rate awarded pursuant to §8(b)4 is properly applied to Petitioner's loss of 100% use of the left index finger as a result of the amputation into the second phalanx.

In support thereof, the Commission finds that the Act is consistent within §8(e) that a finger is a member. The Act in §8(e) states:

> "The following listed amounts apply to either the loss of or the permanent and complete loss of use of the member specified, such compensation for the length of time as follows:
> 1. Thumb -- 70 weeks
> 2. First, or index finger -- 40 weeks
> 3. Second, or middle finger -- 35 weeks
> 4. Third, or ring finger -- 25 weeks
> 5. Fourth, or little finger -- 20 weeks
> ...." (emphasis added)

This establishes the use of the term "member" to include "finger." The Act in §8(e)(17) further states:

> "17. In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury." (emphasis added)

The Act as cited above, refers to "fingers" as "members" several times within §8. The Commission finds that the 100% loss of a finger through amputation is the loss of a member under §8(e) and therefore §8(b)(4) allows the permanency rate for "amputation of a member" to be increased to the rate awarded to Petitioner at Arbitration.

The Commission awards Petitioner penalties to be accessed against Respondent under §19(k) of the Act. The Commission finds Respondent liable and awards to Petitioner the amount of $10,666.60 under §19(k) of the Act.

In support of said finding, the Commission finds that Respondent failed to begin payment for statutory amputation of Petitioner's left index finger. Respondent paid no additional compensation after Petitioner's period of temporary total incapacity ended on March 6, 1988.

NOW THEREFORE IT IS ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 20, 1988, is hereby affirmed.

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IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $533.33 per week for a period of 26-6/7 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 $533.33 per week for a period of 40 weeks, as provided in $8(e) of the Act, for the reason that the injuries sustained caused the Petitioner the permanent loss of 100% of the use of the left index finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,961.05 for necessary medical expenses under $8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the Petitioner additional compensation of $10,666.60 as provided in $19(k) of the Act.

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

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 the removal of this cause to the Circuit Court by the Respondent is hereby fixed at the sum of $20,900.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JAN 0 2 1991

Robert Lazar

Norman Brown

Zenia S. Goodman

BWM/lcw
o11/01/90
68

*1996 Ill. Wrk. Comp. LEXIS 181, *; 96 IIC 0320*

GEORGE **PORTER,** PETITIONER, V. **SELECTABILITY** INC., RESPONDENT.

No. 92 WC 798

INDUSTRIAL COMMISSION OF ILLINOIS

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

1996 Ill. Wrk. Comp. LEXIS 181; 96 IIC 0320

March 26, 1996

CORE TERMS: arbitrator, finger, phalanx, Illinois Workers' Compensation Act, permanent disability, average weekly wage, total incapacity, loss of use, left hand, first aid, amputations, temporary, accrued, notice, digit

JUDGES: Barry A. Ketter; Linzey D. Jones; John W. Hallock, Jr.

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, upon consideration of the entire record 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.

1. The parties do not dispute the Arbitrator's finding that Petitioner's left index and left middle fingers were amputated beyond the first phalanx of each digit as a result of a work-related injury on December 10, 1991, and that, pursuant to § 8(e) of the Act, compensation for 100% loss of use of the index finger equals 40 weeks, and compensation for 100% loss of use of the middle finger equals 35 weeks. On Review, the sole dispute is the rate at which the permanent disability is awarded. The Commission is of the opinion that the Arbitrator's Decision should be modified and that the correct permanency rate is 50% of Petitioner's average weekly wage, or $ 111.60 per week. The Commission finds that fingers are not members within the meaning of this provision, but rather, fall under the **[*2]** meaning of § 8(b) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 124.00 per week for a period of 5-6/7 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 $ 111.60 per week for a period of 75 weeks, as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of Petitioner's left ring and index fingers to the extent of 100% for each finger.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the 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 the removal of this cause to the Circuit Court by the Respondent is hereby fixed at the sum of $ 8,400.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with **[*3]** the Office of the Secretary of the Commission.

ATTACHMENT:

NOTICE OF DECISION OF ARBITRATOR

George W. **Porter,** Petitioner, vs. **Selectability** Inc, Respondent.

CASE NO. 92 WC 798

Take notice that on July 7 1995, there was filed with the Industrial Commission, at Chicago, Illinois, the Decision of the Arbitrator in the above entitled matter, a copy of which Decision is enclosed to you herewith.

You are further notified that unless a Petition for Review is filed with the Industrial Commission within thirty (30) days after receipt of this decision, and a Review perfected in accordance with the Workers' Compensation Act and the Rules of the Industrial Commission, then the Decision of the Arbitrator shall be entered as the decision of the Industrial Commission. Subject to Section 19(n) of the Illinois Workers' Compensation Act, the interest rate for purposes of an appeal in this case is 5.46%. However, should an Employee's appeal of this case result in either no change or a decrease in this award, interest shall not further accrue from the date of such appeal.

DECISION MAILED TO:

92 WC 798

(1155)

CACCIATORE, WILLIAM T

321 W STATE ST *

900 TALCOTT BLDG

ROCKFORD IL 61101

92 WC 798

(2228) **[*4]**

TADEN, MICHAEL L LAW OFFICE

200 S WACKER DR *

CHICAGO IL 60606

BY STIPULATION--NATURE AND EXTENT IN DISPUTE

COUNTY OF WINNEBAGO

GEORGE W. **PORTER** Petitioner, vs. **SELECTABILITY,** INC. Respondent.

X Specific Loss with TT

___ Specific Loss without TT

___ 19(b)

___ 19(b) with Medical

___ 19(b) with Rehabilitation

___ Death

___ Permanent Total

___ Compensation Denied

___ DWP

___ Occupational Disease

CLAIM # 92 WC 000798

MEMORANDUM OF DECISION OF ARBITRATOR

An application for adjustment of claim was filed in this matter and notice of hearing mailed to each party. The matter was heard by an Arbitrator designated by the Commission in the City of Rockford, said County and State, on June 19, 1995. By stipulation the parties agree:

On December 10, 1991, the Respondent **SELECTABILITY** INC., was operating under and subject to the provisions of the Illinois Workers' Compensation Act; and on this date the relationship of employee and employer existed between the Petitioner GEORGE W. **PORTER,** and said Respondent; on the above mentioned date the Petitioner sustained accidental injuries which arose out of and in the course of the employment by the Respondent; timely notice of this **[*5]** accident was given the Respondent.

The earnings of the Petitioner during the year next preceding the injury were $ 9,672.00 and that the average weekly wage was $ 186.00.

Petitioner at time of injury was 32 years of age, married, and had -0- children under 18 years of age.

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

Petitioner is entitled to have and receive from said Respondent the sum of $ 124.00 per week for a period of 5 6/7 weeks, that being the period of temporary total incapacity for work, for which compensation is payable.

The sum of $ 761.71 has been paid on account of this injury.

The sole issue in dispute in this cause is the nature and the extent of the injury. After hearing the proofs and allegations of the parties and having made careful inquiry in this matter the arbitrator concludes:

Petitioner is entitled to have and receive from Respondent the sum of $ 124.00 per week for a further period of 75 weeks, as provided in paragraph (e) of Section 8 of seld Act, as amended, because the injuries sustained caused permanent disability to the extent of

100% of each of the index and the middle fingers of of the **[*6]** left hand.

This conclusion is based on:

The Arbitrator made a visual inspection of the Petitioner's left hand, and finds that the Petitioner sustained amputations of the left index and middle fingers beyond the first phalanx of each digit. The Arbitrator further relies on the medical records from Swedish American Hospital (Px 1) and Dr. Scott Nyquist (Px 2) which demonstrate the amputations beyond the first phalanx of both the index and middle fingers of the left hand.

Petitioner is now entitled to receive from the Respondent compensation that has accrued from December 10, 1991 through June 19, 1995, and the remainder, if any, of the award to be paid to Petitioner by Respondent in weekly payments. Respondent shall pay the further sum of $ (none accrued) for necessary first aid, medical, surgical and hospital services, as provided in paragraph (a) of Section 8.

DATED AND ENTERED June 29, 1995

[ILLEGIBLE WORDS]

Legal Topics:

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

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation

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: **porter and selectability** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, March 23, 2010 - 4:54 PM EDT

1 of 1 DOCUMENT

BOBBY D. KINNAIRD, JR., PETITIONER, v. GREENE WELDING & HARDWARE, RESPONDENT.

NO. 06 WC 08348

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF VERMILION

2008 Ill. Wrk. Comp. LEXIS 837; 8 IWCC 0812

July 3, 2008

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

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 nature and extent of injury and penalties and attorney fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below (regarding penalties and attorney fees) and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner suffered traumatic amputation of part of the right ring finger and part of the right middle finger, on his dominant hand. A complete amputation of Petitioner's right ring finger was performed by Dr. Ashraf, which consisted of a complete amputation of the right ring finger at the distal phalanx and a debridement of the right middle finger. Petitioner continued to suffer pain at the tip of the middle finger and required a second surgical procedure. The second surgery performed in July 2006, resulted in a loss of about one half of the nail bed and the radial and ulnar aspects of the middle phalynx.

The operative report from December 9, 2005 (the date of accident), [*2] noted complete amputation right ring finger at the distal phalanx level and right middle finger debridement of skin, soft tissue and bone. The pre-operative diagnosis was noted as partial amputation of the right ring finger and partial amputation of the right middle finger.

The Commission demonstrates no basis for dispute as to Petitioner having sustained a compensable injury that resulted in statutory partial amputations of the right ring finger and right middle finger. Petitioner testified that he returned to work full time, on light duty restrictions, on January 16, 2006. Petitioner reached maximum medical improvement (MMI), Respondent assumes, on or about February 15, 2006.

Respondent contends that payment is not due regarding a statutory amputation until the claimant has reached MMI. The Appellate Court in *Lester v. Industrial Commission, 256 Ill. App.3d 520, 628 N.E.2d 191 (1993),* stated that it was the intent of the legislature that an employee who suffers amputation should be compensated immediately when no dispute exists as to the compensability of the accident. Here there was a clear statutory amputation injury with no dispute [*3] existing and Petitioner had returned to work January 16, 2006. Respondent's argument that Petitioner had not reached maximum medical improvement, and, consequently, payment was not yet due, is without merit. There are no cases cited in support of such an argument and such requirement is not found within the language of the Act to indicate such a legislative intent. Respondent provided no acceptable explanation to show any reasonable belief to justify the delay in payment for this statutory loss injury. In the case at hand, there are clear, unquestionable statutory amputations and Petitioner had returned to light duty work almost a month and a half before the first check was issued to Petitioner

(and about 80 days from the accident date). This is consistent with a recent Commission decision of *Lierly v. Methode Electronics, 06 IWCC 0901* where payment of statutory payment of PPD was found unreasonable within 60 days.

The Commission finds that Respondent did not pay any statutory benefits until after Petitioner had retained counsel. Respondent finally tendered the first statutory benefits with a check issued on or about February 27, 2006, and received by Petitioner in early March [*4] 2006. The Commission finds the period from December 9, 2005 through February 27, 2006, to be 11-4/7 weeks, and he appropriate benefit rate to be $ 200.47 per week with the total accrued, towards the statutory loss, during this time being $ 2,322.27. The Commission finds there was an unreasonable and vexatious delay. Respondent further failed to timely pay a bill of $ 735.00 for treatment at the emergency room by Hoopeston Emergency Medical Specialists, that resulted in the bill going to collection against Petitioner. Respondent also failed to timely pay the $ 47.00 bill for services rendered by Danville Polyclinic on June 30, 2006. The Commission finds Respondent's failure to pay these bills unreasonable and vexatious. Penalties and attorney fees are therefore assessed on those amounts.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 222.99 per week for a period of 2-3/7 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 $ 381.91 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION [*5] that Respondent pay to Petitioner the sum of $ 200.69 per week for a period of 42.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 100% loss of use of the right ring finger (25 weeks) and 50% loss of use of the right middle finger (17.5 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 1,552.14 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $ 620.85 as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 $ 2,500.00. 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 [*6] Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUL 3 2008

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 White, Arbitrator of the Industrial Commission, at the City of Danville, on 12/11/06. makes findings on the disputed issues indicated below, and attaches those findings to this document.

DISPUTED ISSUES
J. Were the medical services that were provided to Petitioner reasonable and necessary?
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon the respondent?

FINDINGS

On 12/9/05, the respondent, Greene Welding, *was* operating under and subject to the provisions of the Illinois Workers' Compensation Act.

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

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

[*7] . Timely notice of this accident *was* given to the respondent herein,

. In the year preceding the injury, the petitioner earned $ 17,392.46, the average weekly wage of $ 334.48.

. At the time of the injury, the petitioner was 22 years of age, *single* with 1 children under 18.

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

. To date, $ 9,187.11 has been paid on account of this injury as both temporary total disability and permanent partial disability.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ 222.99 per week for 2/3/7 weeks, from 1-9-06 and 7/18/06 through 1/15/06 and 7/27/06, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 200.69 per week for a further period of 42.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 100% loss of use of the right ring finger (25 weeks) and 50% loss of use of the right middle finger (17.5) weeks.

. The respondent shall pay the petitioner compensation that has accrued from 12/9/05.

The respondent shall pay the further sum of $ 381.91 for [*8] necessary medical services, as provided in Section 8(a) of the Act with Respondent entitled to credit for all bills paid. 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.

Petition for Penalties and Fees is denied.

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

STATEMENT OF INTEREST RATE If this award is review by the Commission, interest of **4-95%** 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.

Signature of Arbitrator

February 2, 2007

Date

FINDINGS:

[*9] In support of the Arbitrator's Decision relating to "J", the reasonable and necessary medical expenses the Petitioner incurred, the Arbitrator finds the following facts:

1. Respondent acknowledged at trial that it was responsible for the bills presented by the Petitioner's counsel (Petitioner's Exhibits 2 and 4). The Arbitrator therefore awards the bills (Petitioner's Exhibit No. 2, $ 334.91, and the Petitioner's Exhibit No. 4, $ 47.00). The Respondent is to receive credit for all medical bills paid.

2. In support of the Arbitrator's Decision relating to "M" whether or not the Petitioner is entitled to penalties and attorney's fees pursuant to section 19(k) of the Illinois Workers' Compensation Act and Section 16 of the Illinois Workers' Compensation Act. The Arbitrator finds the following facts:

Petitioner testified that subsequent to his accident, he received restrictions which were primarily one-handed work only. He also had restrictions about his ability to drive when using medication. Petitioner testified that the owners of Respondent, Rex and Rhoda Greene complied with the doctor's restrictions and provided him work within the restrictions as outlined by his treating physicians. [*10] Moreover, they also volunteered to and did agree to pick Petitioner up and drive him to and from work when necessary. Furthermore, the Arbitrator finds that it is undisputed that the Petitioner testified that as of his last date of employment (anywhere between January 31, 2006 and February 2, 2006) he was still operating under restrictions set forth by his treating physician, Dr. Greenberg. (Petitioner's Exhibit No. 3)

Petitioner eventually admitted that he only received a full duty release from Dr. Greenberg effective on or about February 15, 2006. Petitioner never spoke with anyone at Synergy Solutions regarding payment of PPD benefits after this appointment with the doctor. Petitioner admitted that he did not present a copy of the full duty release to Synergy Solutions, however, he presumed that the doctor's office had forwarded a copy to Synergy. The Arbitrator notes that Petitioner's Exhibit No. 9 is a copy of the check sent to Mr. Kinnard documenting payment of 12 weeks of PPD benefits on February 28, 2005. The Arbitrator further notes that the Respondent paid all mileage expenses and travel expenses as it was obligated to under the Illinois Workers' Compensation Act. The Arbitrator [*11] finds that Respondent's conduct on this matter was neither unreasonable nor vexatious. The Arbitrator finds that the Petitioner's Petition for Penalties and Request for Attorney's Fees is denied.

3. In support of the Arbitrator's Decision relating to "K" the nature and extent of the Petitioner's injuries, the Arbitrator finds the following facts:

> It is undisputed that the Petitioner suffered amputation injuries to his right ring and right middle fingers. The Petitioner testified that his right hand is his dominant hand. The Arbitrator has reviewed the medical records (Petitioner's Exhibit No. 3, 4, 5, 6 and 7) and finds that Petitioner did suffer loss of bone to the right middle finger into the distal phalanx which results in a statutory award of 50% loss of use of the middle finger (17.5 weeks of PPD benefits). Furthermore, the Arbitrator finds that the Petitioner suffered bone loss below the distal phalanx resulting in his entitlement to 100% loss of use of the right ring finger (25 weeks of PPD benefits).
>
> Additionally, Petitioner testified that he experiences problems with cold on the tips of both effected fingers. He described feeling needles like sensation at the tips of [*12] his fingers when it is cold. He also testified that he has difficulty gripping and lifting items like he did prior to the accident. The Arbitrator notes that with regard to his middle finger, that the Petitioner still had most of the nail bed left of his middle finger. Based on Petitioner's testimony on the medical records, the Arbitrator believes that the Petitioner is entitled to 100% loss of use of the right ring finger and 50% loss of use of the right middle finger. The Arbitrator finds that those statutory losses/payments adequately compensate Petitioner for his losses as a result of the accident.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsEmployee RightsWorkers' Compensation & SSDICompensabilityCourse of EmploymentBusiness TravelersWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

GREENE WELDING AND HARDWARE, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, et al. (Bobby D. Kinnaird, Jr., Appellees.

No. 4-09-0144WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, WORKERS COMPENSATION COMMISSION DIVISION

919 N.E.2d 1129; *2009 Ill. App. LEXIS 1377*; *336 Ill. Dec. 204*

December 23, 2009, Filed

PRIOR HISTORY: [**1]

Appeal from the Circuit Court of Vermillion County, Illinois. No. 08-MR-155. Honorable Gordon R. Stipp, Judge, Presiding.

DISPOSITION: Affirmed.

JUDGES: JUSTICE HOLDRIDGE delivered the opinion of the court. HOLDRIDGE, J., with McCULLOUGH, P.J., and HOFFMAN, HUDSON, and DONOVAN, JJ., concurring.

OPINION BY: HOLDRIDGE

OPINION

[*1130] **[***205]** JUSTICE HOLDRIDGE delivered the opinion of the court:

Bobby D. Kinnaird, Jr., filed an application for adjustment of claim against his employer, Greene Welding & Hardware, seeking workers' compensation benefits for injuries due to the total amputation of his right ring finger and the partial amputation of his right middle finger due to an industrial accident on December 9, 2005. The matter proceeded to an arbitration hearing under section 19(b) of the Workers' Compensation Act (the Act) (*820 ILCS 305/19(b)* **[**2]** (West 2002)). The arbitrator found that claimant's injuries arose out of and in the course of his employment and awarded claimant permanent partial disability (PPD) benefits reflecting 100% loss of the use of the right ring finger and 50% loss of use of the right middle finger. The arbitrator also awarded $ 381.91 in medical expenses. The arbitrator denied claimant's request for penalties and attorney fees.

The claimant sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). The Commission affirmed and adopted the decision of the arbitrator with regard to PPD but reversed the arbitrator on the issue of penalties and attorney fees **[*1131]** **[***206]** and awarded penalties pursuant to section 19(k) of the Act (*820 ILCS 305/19(k)* (West 2002)) in the amount of $ 1,552.14 and attorney fees in the amount of $ 620.85 pursuant to section 16 of the Act (*820 ILCS 305/16* (West 2002)).

The employer then sought review of the Commission's decision in the circuit court of Vermillion County, which confirmed the Commission's decision. Claimant sought additional attorney fees against employer as a sanction for its challenge in the circuit court. The court denied claimant's **[**3]** request for fees. The employer then appealed to this court.

BACKGROUND

On December 9, 2005, claimant was running parts through a machine when the glove on his right hand was caught in the machine. Before he could pull his hand out of the glove, the machine started and claimant's right ring and middle fingers were amputated by the machine. Claimant was taken to Hoopeston Hospital by ambulance. He was later transferred to Indiana Hand Center, where he underwent surgery to repair some of the lingering damage from the amputation of his fingers.

Claimant was told that he could return to work immediately as long as he did not use his right hand. Claimant was also instructed not to drive while taking prescribed pain medication. Claimant's supervisors, Rex and Rhonda Greene, agreed to furnish claimant a ride to

work whenever he was in need. Claimant worked as much as he could over the next month. He worked light duty most days and was paid temporary total disability (TTD) benefits on those days when he could not work due to the pain. Claimant was taken completely off duty by his physician for the week of January 9, 2006, through January 15, 2006. He received a check for TTD benefits for that **[**4]** week. Claimant was released by his physician to return to light duty on January 16, 2006. He worked light duty until he quit working at Greene on February 2, 2006. Claimant testified that he quit due to his problems with the work, an inability to tolerate the pain medication and an allergic reaction to a rubber bandage that was being used to reduce scarring.

Claimant testified that he did not receive any payment for permanent partial disability until after he hired an attorney and the attorney contacted the employer. On March 4, 2006, claimant received a check dated February 28, 2006, for $ 2,309.16 which indicated it was for 12 weeks PPD. Thereafter, claimant began receiving weekly checks until early November 2006.

With regard to medical expenses, admitted into evidence was a bill dated February 16, 2006, for $ 735 from Hoopeston Emergency Medical Specialists for emergency room care on December 9, 2005. Also admitted into evidence were notices from Creditors Collection Bureau dated April 6, 2006, for $ 735 and October 12, 2006, for an unpaid balance of $ 334.91. Included in the record was a letter from claimant's attorney to employer's claims adjuster dated March 13, 2006, requesting **[**5]** payment of the $ 735 bill from Hoopeston Emergency Medical Specialists. Finally, the record contained a bill from Danville Polyclinic for $ 47 for an office visit on June 30, 2006.

The Commission found that employer's failure to pay $ 735 to Hoopeston Emergency Specialists and $ 47 to Danville Polyclinic was unreasonable and vexatious. It assessed penalties and attorney fees.

The employer then sought review in the circuit court of Vermillion County, which confirmed the decision of the Commission. The employer now appeals to this court. Claimant seeks additional attorney fees **[*1132]** **[***207]** and costs under *Illinois Supreme Court Rule 375(b)* (155 Ill. 2d R. 375(b)), alleging that employer's appeals to the circuit and appellate courts were made in bad faith.

DISCUSSION

1. Penalties and Fees

If an employer delays paying compensation, the employer has the burden of showing that it had a reasonable belief that the delay was justified, and the Commission's determination on that issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Howlett's Tree Service v. Industrial Comm'n, 160 Ill. App. 3d 190, 513 N.E.2d 82, 111 Ill. Dec. 836 (1987).* At issue in the instant matter are two allegedly unreasonable delays **[**6]** in paying compensation: (1) statutory amputation benefits; and (2) medical expenses for two providers totaling $ 782.

With regard to the statutory amputation benefits, the record is clear that claimant suffered amputations of his right middle finger and right ring finger on December 9, 2005. There was no dispute that the amputations arose out of and in the course of claimant's employment, and there was no dispute that claimant was entitled to statutory losses of 50% of the right middle finger and 100% of the right ring finger. There also was no dispute as to the corresponding dollar amount to which claimant was entitled under the Act. Claimant returned to light duty within days of the accident and, with the exception of the week of January 9, 2006, through January 15, 2006, was cleared for light duty work.

The Commission, relying upon *Lester v. Industrial Comm'n, 256 Ill. App. 3d 520, 628 N.E.2d 191, 194 Ill. Dec. 694 (1993)*, determined that employer's delay in paying statutory amputation benefits until after claimant had hired an attorney was unreasonable and vexatious. In *Lester*, the court noted that section 8(e) of the Act ((*820 ILCS 305/8(e)* (West 2002)) provides for "immediate" payment of statutory amputation benefits. **[**7]** The court noted:

> "[W]e find that the legislature intended that individuals who receive amputations should be *immediately* compensated when no dispute exists as to whether the injury arose out of and in the course of employment. Such result is consistent with the legislature's intent because *prompt* payment alleviates the possibility that an employee will be faced with unnecessary financial burdens. Requiring *immediate* payment is not unfair to the employer because statutorily it would have to pay the amount owed at some point in time. It is consistent with the purpose of the Act to require the amount owed to be paid *promptly*. The employer can pay the amount owed immediately since *section 8(e)* clearly sets forth the compensation an employer is obligated to pay." (Emphases added). *Lester, 256 Ill. App. 3d at 523.*

Employer maintains that the court in *Lester* was unclear as to when payment of statutory amputation bene-

fits were to be paid. We find the *Lester* court's holding to be clear. Statutory amputations benefits are to be paid "immediately" and "promptly." The *Lester* court observed that once there was no dispute that the amputation arose out of and in the course of employment, payment should **[**8]** be immediately and promptly forthcoming. *Lester, 256 Ill. App. 3d at 523.*

In *Modern Drop Forge Corp. v. Industrial Comm'n, 284 Ill. App. 3d 259, 265-267, 671 N.E.2d 753, 219 Ill. Dec. 586 (1996)*, the court cited the same passage from *Lester* cited above in affirming the Commission's finding of unreasonable and vexatious delay even where the employer's rationale for delaying payment was to see if the **[*1133]** **[***208]** claimant would elect a wage-differential remedy under *section 8(d)(1)* of the Act instead of the *section 8(e)* amputation benefit. The court in *Modern Drop Forge* noted that even if the claimant later elected a wage-differential remedy, any amount he previously received under *section 8(a)* would be offset against the future award. *Modern Drop Forge, 284 Ill. App. 3d at 266.*

Here, the employer maintained before the Commission that it delayed payment of *section 8(e)* benefits until claimant achieved maximum medical improvement (MMI). The Commission rejected that as a justification, noting that there was no logical reason to withhold the statutory amputation benefit until claimant reached MMI. Before this court, employer abandons the MMI argument and argues that it did not have sufficient guidance from the court or the Commission to **[**9]** know when it should pay the statutory amputation benefit.

The employer also maintained that the Commission had previously provided a "grace period" of 60 days in which an employer could delay payment of statutory amputation benefits. See *Lierly v. Methode Electronics*, Ill. Workers' Comp. Comm'n No. 01--49292, 2006 Ill. Wrk. Comp. LEXIS 952 (October 23, 2006). We reject any implication that a grace period exists in paying statutory benefits under *section 8(e)* of the Act. Rather, we hold that the Act established a bright-line test for payment of such benefits. Where there is no dispute regarding whether a claimant's amputation injuries arose out of and in the course of his or her employment, statutory benefits for amputation are to be paid no later than the time at which the employer reasonably knows the extent of the amputation and is capable of calculating the appropriate average weekly wage.

The Commission held that benefits were unreasonably and vexatiously delayed when they were not paid until after claimant sought assistance of legal counsel to secure the payment of those benefits. It also noted that at least 80 days had passed since the accident, and there was no dispute that claimant's injuries arose out of and **[**10]** in the course of his employment. Further, employer had made no showing that the delay was justified. We cannot say that the Commission's finding that claimant was entitled to penalties and attorney fees was against the manifest weight of the evidence.

As to the unpaid medical bills, the Commission held that the employer was obligated to pay the bills and that the bills were presented for payment but were not paid in a timely manner. The record contains sufficient evidence to indicate that the bills were presented to the employer but were not paid. The bill for $ 735 for emergency room service on December 9, 2005, the date of the accident, appears to have been presented to the employer both before and after it was placed with a collection agency. Likewise, the bill for $ 47 from Danville Polyclinic for postoperative treatment to claimant's right hand on or about June 30, 2006, was in evidence. Based upon the record, it cannot be said that the Commission's findings that the employer failed to pay these bills in a timely manner was against the manifest weight of the evidence.

2. Sanctions

Claimant maintains that employer's appeal to both the circuit court and to this court was taken in bad **[**11]** faith in contravention of *Supreme Court Rule 375(b)* (155 Ill. 2d R. 375(b)). *Rule 375(b)* calls for sanctions where an appeal is not reasonably well-grounded in law or fact and is made in bad faith or to avoid paying an award. Claimant's argument is that the **[*1134]** **[***209]** employer's position that the holding in *Lester* was confusing as to when it should pay *section 8(a)* benefits amounts to a frivolous appeal made in bad faith. The employer maintains simply that its appeals were appropriate. We find that although the employer's argument is unpersuasive, it is not so lacking in foundation in law and evidence as to merit sanctions. See *Eward Gray Corp. v. Industrial Comm'n, 316 Ill. App. 3d 1217, 1223, 738 N.E.2d 139, 250 Ill. Dec. 175 (2000).*

CONCLUSION

For the foregoing reasons, the decision of the Commission is affirmed.

Affirmed.

HOLDRIDGE, J., with McCULLOUGH, P.J., and HOFFMAN, HUDSON, and DONOVAN, JJ., concurring.