

ILLINOIS INDUSTRIAL COMMISSION
NOTICE OF DECISION OF ARBITRATOR

05IWCC0181

Case # 02 WC 29641

Ronald Conklin
Employee/Petitioner

v.

ABF Freight Systems Inc
Employer/Respondent

On May 26 2004, an arbitration decision on this case was filed with the Illinois Industrial Commission in Chicago, a copy of which is enclosed.

A copy of this decision is mailed to the following parties:

2208
02 WC 29641
CADRON & AVERGINOS PC
30 N LASALLE ST*
SUITE 1420
CHICAGO IL 60602

2965
02 WC 29641
KEEFE & ASSOCIATES
118 N CLINTON
SUITE 300
CHICAGO IL 60661

05IWCC0101

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS INDUSTRIAL COMMISSION
ARBITRATION DECISION

RONALD CONKLIN
Employee/Petitioner

Case # 02 WC 29641

v.

ABF FREIGHT SYSTEMS, INC.
Employer/Respondent

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

The matter was heard by the Honorable Gilberto Galicia, Arbitrator of the Industrial Commission, in the city of Chicago, on April 5, 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

- A. Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
- B. Was there an employee-employer relationship?
- C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
- D. What was the date of the accident?
- E. Was timely notice of the accident given to the respondent?
- F. **Is the petitioner's present condition of ill-being causally related to the injury?**
- G. What were the petitioner's earnings?
- H. What was the petitioner's age at the time of the accident?
- I. What was the petitioner's marital status at the time of the accident?
- J. **Were the medical services that were provided to petitioner reasonable and necessary?**
- K. **What amount of compensation is due for Temporary Total Disability?**
- L. What is the nature and extent of the injury?
- M. Should penalties or fees be imposed upon the respondent?
- N. Is the respondent due any credit?
- O. Other _____

Findings:

On March 2, 2002, the Respondent, ABF Freight Systems, Inc., was operating under and subject to the provisions of the Illinois Workers' Compensation Act.

On this date an employee-employer relationship *existed* between the Petitioner, Ronald Conklin and the Respondent.

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

In the year preceding the injury, the petitioner earned \$65,089.44; the average weekly wage was \$1,251.72

At the time of injury, the Petitioner was 47 years of age, *married* and had no children under the age of 18.

Medical services *have* been provided by the Respondent. However, there are out of pocket expenses which remain alleged outstanding in the amount of \$1,898.76.

To date, \$54,479.63 has been paid by the Respondent on account of this injury. Temporary Total Disability benefits have been paid from March 3, 2002 to March 11, 2002 and March 23, 2002 to June 15, 2003.

ORDER

The Respondent shall pay the further sum of \$ 0 for necessary medical services as provided in Section 8(a) of the Act.

The Respondent shall pay \$ 0 in penalties, as provided in section 19(k) of the Act.

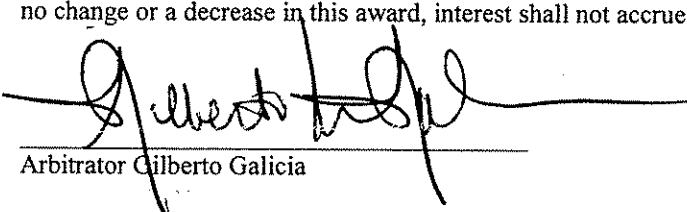
The Respondent shall pay \$ 0 in penalties, as provided in section 19L of the Act.

The Respondent shall pay \$ 0 in fees, as provided in Section 16 of the Act.

The Respondent shall receive a credit for all amounts paid.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 1.37 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.


Arbitrator Gilberto Galicia

MAY 26 2004

525.04

Dated and Entered

DISPUTED ISSUES:

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

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

(K) What amount of compensation is due for Temporary Total Disability?

In support of the Arbitrator's decision relating to (F) whether Petitioner's condition of ill-being is causally related to his employment, the Arbitrator finds the following:

The underlying facts of this case are undisputed. The conclusions to be drawn from the facts are the source of contention. At issue is the cause of Petitioner's ongoing medical condition following a non-work-related high-speed motorcycle accident approximately six weeks after the undisputed work injury.

It is undisputed Petitioner worked as a truck driver for ABF Freight Systems when on March 2, 2002, he fell approximately 6-feet from his cab while cleaning wiper blades. Petitioner sought timely treatment for his injuries at St. Margaret Mary's Hospital. Records reflect complaints of lower back and neck pain, for which he followed-up for treatment at Suburban Heights Medical Center with Dr. Lemmenes.

Petitioner provided Dr. Lemmenes a verbal history of his prior lumbar fusion from September 2001. Dr. Lemmenes confirmed all x-rays of the lumbar and cervical spine were negative and Petitioner denied any complaints of pain or numbness into the legs bilaterally. (Pet. Ex. #4). The working diagnosis was cervical and lumbar strain.

Petitioner continued to treat with his family physician, Dr. Leestma, for pain management and manipulation. Of note, Petitioner's lower back treatment appeared to rapidly subside, with the focus of treatment on right shoulder pain. Petitioner reported primary complaints of neck and shoulder pain, without any reference to the lower back pain by the April 11, 2002 office visit with his family physician. (Resp. Ex. # 1).

Dr. Leestma referred Petitioner to a specialist, Dr. Diveris for an opinion on his right shoulder condition. Dr. Diveris conducted an exam and reviewed MRI diagnostics; following that review, the parties do not dispute Petitioner's treating physician, Dr. Diveris released Petitioner to light duty on April 11, 2002. (Resp. Ex. #2). Dr. Diveris released Petitioner to full duty one month later on May 16, 2002, with no further treatment indicated for the right shoulder. (Resp. Ex. #5).

Petitioner was contacted by Respondent on April 12, 2002 and asked to return to work based upon the release of Dr. Diveris. The testimony from both Petitioner and Mr. Chris Dimopolous (ABF supervisor) was undisputed on this issue. Petitioner admitted to the offer of work in the Alternative Work Program after the work release from Dr. Diveris on April 11, 2002. Mr. Dimopolous confirmed ABF received the work release from Dr. Diveris on April 12th and testified work was available and would continue to be offered to Petitioner until a full duty release could be achieved.

Petitioner testified he refused the light duty assignment because he believed his Oxycontin medication hindered his ability to drive to and from work. However, it is clear Petitioner found himself healthy enough to operate a Harley-Davidson motorcycle for his wife's rental business just days after this refusal to work.

This inconsistency cannot be overlooked. Petitioner was released to light duty by a treating physician, after being referred by his own family doctor. The record is absent any documented work restriction after the April 11th release, until the motorcycle accident occurred.

There is undisputed medical evidence in this record Petitioner suffered severe and disabling injuries while riding a motorcycle at high speed on April 14, 2002. These undisputed facts indicate two things to the Arbitrator. First, Petitioner obviously felt sufficiently recovered from the work event of March 2, 2002 to operate a motorcycle that requires moderate to heavy lifting and use of both arms and legs. Motorcycle operation also requires shifting weight, twisting and turning of the cervical and lumbar spine.

Second, the extent of the motorcycle accident including the five-day hospitalization following it appears to render it difficult to find any of the effects of the March 2, 2002 work event remained—the motorcycle event appears to be a classic example of an intervening and superceding event.

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The Arbitrator also notes Petitioner testified he received a general liability settlement related to disabling injuries received in the motorcycle accident.

Despite the release to work on April 11, 2002, Petitioner testified he remained on a complete work restriction from Dr. Bernstein, his spine surgeon. However, the testimony of Dr. Bernstein and records in evidence do not support this contention. Records reflect Petitioner did not seek additional treatment from Dr. Bernstein until May 2, 2002, *after* the motorcycle accident. (Pet. Ex. #8). Of note, Petitioner testified he called Dr. Bernstein immediately following the motorcycle accident from the emergency room, out of concern for his spinal hardware from prior lumbar surgery.

At trial, Petitioner testified to a 50+ mph motor vehicle accident where he fell from a motorcycle, fracturing rib⁵ and his right clavicle. There is indication in the treatment records his lumbar and shoulder conditions were made demonstratively worse by this event. The emergency room records and follow-up treatment records during the five-day hospitalization demonstrate (Resp. Ex. #3):

1. Low back and right clavicle pain upon presentation to the emergency room on April 14, 2002. A clavicle fracture was diagnosed;
2. Progress notes from April 16, 2002 indicate pain in the lower back was the main complaint; Petitioner refused to get up on this date and refused to go home due to "severe back pain".
3. Low back pain with radiation into the right lower extremity was documented on April 18, 2002; a neurological assessment was noted due to the pain.
4. The release of April 19, 2002 indicated a Vicodin prescription for severe back pain.

These emergency room records demonstrate a significant aggravation of Petitioner's pre-existing lower back and shoulder conditions. The undisputed medical evidence suggests Petitioner's condition was measurably worsened by this event; so much so that it is impossible to weigh any lasting impact of the work event of March 2, 2002.

Dr. Avi Bernstein

Dr. Bernstein testified Petitioner's ongoing lower back complaints stem from both the work injury and the motorcycle accident. (Bernstein dep., p. 10). Petitioner did not seek any consultation from Dr. Bernstein immediately following the work injury. Dr. Bernstein testified Petitioner's first visit since his release from lumbar surgery in 2001 was on May 2, 2002; with complaints of severe groin, right hip, and lower back pain. This office visit and examination findings followed the motorcycle accident—Dr. Bernstein didn't see Petitioner after the work injury but prior to the motorcycle accident. (*Id.* at 7).

Dr. Bernstein confirmed upon further testimony records from St. Mary's Hospital reveal Petitioner's lower back complaints increased significantly after the motorcycle accident, with consistent recorded complaints of Petitioner's lower back pain. (*Id.* at 20-23, referring to St. Mary's records at Resp. Ex. #3). Finally, Dr. Bernstein testified Petitioner's complaints upon his last exam in November 2003 were of severe hip pain; with *no correlation to the lumbar spine*. (*Id.* at 24, *emphasis added*).

At this time, Dr. Bernstein was at a loss to explain ongoing complaints of pain offered by Petitioner. Accordingly, Petitioner's request for an Oxycontin prescription was denied.

Dr. Eric Leestma

Dr. Leestma testified upon deposition to his course of treatment as Petitioner's family physician. Dr. Leestma confirmed Petitioner was a chronic pain patient of his for several years prior to the work injury. (Leestma dep. p. 18). Dr. Leestma testified in summary to his knowledge of Petitioner's prior lumbar surgery in 2001 and treatment thereafter. (Leestma dep. p. 4).

Dr. Leestma testified to his course of treatment after the work injury of March 2, 2002. He opined Petitioner's lower back pain was a result of his work injury as well as the motorcycle accident. However, Dr. Leestma had not reviewed any of the medical documentation related to the motorcycle crash before offering this opinion. (*Id.* at 20).

An examination of the treatment records by the Arbitrator demonstrates a clear shift in treatment focus following the non-work-related motorcycle

accident. Of particular relevance, Dr. Leestma testified there were no reported complaints of lower back pain by Petitioner after March 28, 2002, until the motorcycle accident occurred (*Id.* at 19). Upon review of treatment records, Dr. Leestma agreed Petitioner's five-day stay at the hospital after the motorcycle crash was due to complaints of severe back pain. (*Id.* at 22). Finally, Dr. Leestma, Petitioner's family physician testified there was "no question" the high speed motorcycle crash had a negative effect on Petitioner's prior fusion. (*Id.*, at 23).

Dr. Marc A. Levin

Dr. Marc A. Levin conducted a medical examination of Petitioner on December 19, 2002. After examination, the doctor opined Petitioner's subjective complaints were out of proportion with the objective findings (similar to the conclusion of Dr. Bernstein one year later). Dr. Levin commented he was uncertain how Petitioner could have been operating a motorcycle if claimant was in such severe pain after March 2, 2002.

Dr. Levin states there was "no doubt in [his] mind that the accident [Petitioner] had on his motorcycle quite aggravated his lower back and leg condition." (Resp. Ex. #4a).

Dr. Mark N. Levin

Dr. Mark N. Levin conducted an examination of Petitioner on June 6, 2002. Dr. Levin concluded Petitioner demonstrated subjective related complaints which appeared "out of proportion to the objective findings and consistent with symptom magnification." The doctor questioned Petitioner's subjective complaints, due to the obvious fact he was operating a motorcycle when involved in a recent crash. Dr. Levin recommended an FCE with validity measurement due to the discrepancies upon examination. Dr. Levin opined Petitioner was capable of light duty work in a supervisory position. (Resp. Ex. #4).

Thereafter, Dr. Levin was provided additional medical documentation regarding Petitioner's ongoing treatment. All diagnostics were negative for spinal stenosis or disc herniation. Dr. Levin again suggested an FCE to test the validity of complaints. Finally, Dr. Levin concluded Petitioner aggravated his pre-existing lower back condition as a result of the motorcycle accident.

The following year, Petitioner confirmed his mobility improved after implantation of a morphine pump by Dr. Hytham Rifai on July 11, 2003.

More recently, Petitioner resumed treatment for right shoulder pain with Dr. Bruce Thoma. Petitioner testified to shoulder surgery by Dr. Thoma just days before this arbitration. Petitioner is currently recovering from the procedure.

The Arbitrator notes there are no professional medical expert opinions in the record which relate Petitioner's recent shoulder surgery to his work injury. The undisputed treatment records indicate Petitioner was released to full duty without restriction by Dr. Diveris for the shoulder condition on May 16, 2002. Petitioner did not treat or otherwise complain to his treating doctors of any work-related shoulder pain for over one year before his most recent treatment with Dr. Thoma.

Conclusion

Petitioner has the burden of establishing his ongoing medical condition is causally related to his work injury of March 2, 2002. Based upon the undisputed lay and medical evidence and expert opinions of record, the Arbitrator finds this record presents a classic demonstration of an intervening and superceding occurrence.

It is clear from the record that, in the days and weeks following the undisputed event of March 2, 2002, Petitioner recovered sufficiently to feel capable of operating a motorcycle, involving the use of both arms and legs and the cervical and lumbar spine. The undisputed facts further show Petitioner suffered significant intervening injuries to the same body parts involved in the work event when he crashed his motorcycle while traveling at high speeds of over 50+ mph on April 14, 2002.

The evidence supports the conclusion of the Arbitrator that Petitioner had effectively recovered from the soft-tissue strains of March 2, 2002 by April 14, 2002. The record also demonstrates Petitioner's lower back and right shoulder condition was made significantly worse by the unfortunate motorcycle crash. Petitioner acknowledged on cross-examination that a five-day stay at Provena St. Mary's emergency facility was necessitated by the motorcycle accident. The records for treatment at that institution and thereafter clearly reflect a significant focus of treatment to Petitioner's lower back.

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All treating and expert physicians who opined on the motorcycle accident acknowledge an aggravation of the pre-existing injury occurred on April 14, 2002. The treatment records themselves clearly demonstrate the extent of the aggravation to the lower back.

With regard to the right shoulder, Petitioner was released from care to full duty by his treating shoulder specialist, Dr. Diveris on May 16, 2002. The record is absent any causal opinion which would relate the most recent shoulder surgery by Dr. Thoma to his work injury.

Additionally, the records clearly reflect a right clavicle fracture at the time of the motorcycle accident, which supports the contention that the right shoulder was significantly worsened in the crash. Accordingly, the Arbitrator concludes Petitioner's ongoing medical condition after April 14, 2002 is no longer attributable to his work injury of March 2, 2002.

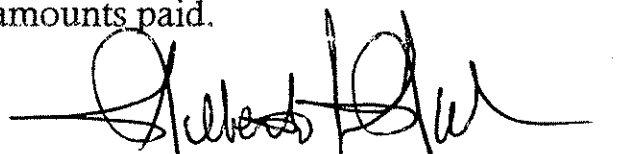
(J) Were the medical services that were provided to Petitioner reasonable and necessary?

In accordance with the Arbitrator's findings in Section (F) of this decision, Petitioner's request for payment of outstanding out of pocket medical expenses is moot.

(K) What amount of compensation is due for Temporary Total Disability?

Consistent with the findings in Section (F) of this decision, the Arbitrator finds Petitioner to be entitled to no additional temporary total disability benefits after the intervening and superceding event of April 14, 2002.

Respondent shall receive credit for all amounts paid.



Arbitrator Gilberto Galicia

5.24.04

Dated and Entered

Rec'd 3-29-05

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION
COMMISSION

Ronald Conklin,
Petitioner,

05IWCC0181

vs.

NO. 02WC29641

ABF Freight Systems, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of causal connection, temporary total disability and medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.


IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 26, 2005 is hereby affirmed and adopted.

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


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

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 of the Secretary of the Commission.

DATED: MAR 17 2005



Susan O. Pigott



James F. DeMunno



Mario Barsurto

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION**

RONALD CONKLIN,
Plaintiff,

vs.

ILLINOIS WORKERS' COMPENSATION
COMMISSION and ABF FREIGHT SYSTEMS, INC.,
Defendants.

No. 05 L 50373

MEMORANDUM DECISION AND JUDGMENT

This matter comes before the Court on appeal from a final order of the Illinois Workers' Compensation Commission (Commission), finding that Ronald Conklin's (Plaintiff) condition of ill being was unrelated to his March 2, 2002 work injury and therefore denying benefits under the Illinois Workers' Compensation Act (Act). Plaintiff appeals to this Court.

STATEMENT OF FACTS

Pre-Work Injury Surgeries.

Dr. Thoma performed Plaintiff's first shoulder surgery in December of 1984. After the surgery, Plaintiff returned to his work as an over-the-road truck driver. He underwent a second debridement in October of 2000, which Dr. Thoma also performed. He also returned to driving following the 2000 surgery.

Dr. Bernstein later performed low back surgery on Plaintiff on September 4, 2001. This surgery consisted of a laminectomy and a lumbar fusion, with instrumentation placement in the back. As of November 26, 2001, Dr. Bernstein characterized Plaintiff's condition as an almost completely healed fusion, with no residual pain and an excellent result. He felt that Plaintiff

could perform significant physical activity, including work, but he should not load or unload trucks for six months. Plaintiff was released to work following the low back surgery and returned to his employment on or about December 4, 2001.

Between his return to work in 2001 and the incident before the Court, Plaintiff treated with his family physician, Dr. Leestma. Dr. Leestma monitored Plaintiff's medications and gave him back adjustments. Plaintiff testified that during this period, Dr. Leestma's treatment focused on his upper and middle back.

Work Accident

On March 2, 2002, Plaintiff was preparing to leave Minnesota. While he prepared his truck, Plaintiff climbed onto its hood to de-ice the windshield wiper blades. As he climbed down, Plaintiff hit a rail and fell six or seven feet to the ground. He fell onto the balls of his feet and then backwards, landing on his buttocks and back. Plaintiff felt pain in his back, right shoulder and neck but was able to drive into the southern part of Chicago.

Treatment Immediately After the Work Accident

Plaintiff immediately drove to St. Margaret Mercy Hospital's emergency room. After he was treated and released from the emergency room, he continued his follow-up treatment there. Plaintiff treated at the company clinic, Suburban Heights Medical Center, on March 6, 2002. Treatment at the clinic lasted a week and was largely comprised of physical therapy. During the time Plaintiff treated at the company clinic, he continued to follow up with Dr. Leestma.

Suburban Heights Medical Center's treatment for the back consisted of daily physical therapy that later changed in frequency to two to three times a week. On March 6, 2002, the doctor ordered Plaintiff an ultrasound and a transcutaneous electro-nerve stimulator (TENS) unit. Notes from Suburban Heights Medical Center dated March 14, 2002 revealed that the TENS unit

helped Plaintiff's neck but not his lower back. Dr. Leestma's note dated April 11, 2002 indicated that he referred Plaintiff to Dr. Bernstein for his low back condition. However, Dr. Bernstein did not see Plaintiff until May 2, 2002.

Dr. Leestma also referred Plaintiff to Dr. Diveris for shoulder treatment. Plaintiff treated with Dr. Diveris in April 2002.

Return to Work Following the March 2, 2002 Incident

Initially, Plaintiff returned to work shortly after the work accident. From March 12, 2002 through March 22, 2002, he participated in Defendant's Alternative Work Program (AWP). This program consisted of light duty activities in the office. According to Plaintiff's testimony, he stopped working in AWP because his shoulder flared up and the assistant manager told him he should not continue in the program while injured. Defendant's records indicate that on March 27, 2002, Defendant removed Plaintiff from the program on order of his treating physician.

On April 11, 2002, Dr. Diveris, the physician treating Plaintiff's shoulder, released him to light duty work. Consequently, on April 12, 2002, Defendant again contacted Plaintiff about returning to the AWP. However, Plaintiff refused. He gave alternate reasons. One, he thought another physician, either Dr. Leestma or Bernstein, had restricted him from working. Second, he testified: "I was doing four Oxycontin a day and I really had no business driving back and forth anywhere. I mean, I didn't feel I was in a position to work." (R. 68). On May 16, 2002, Dr. Diveris released Plaintiff to work with no restrictions related to his shoulder. Other physicians, including Dr. Leestma, did not think Plaintiff could return to work due to his back condition. Plaintiff has not held any employment since March 22, 2002.

Motorcycle Accident

On April 14, 2002, Plaintiff rode out to Peotone to retrieve a motorcycle he rented through a motorcycle renting business belonging to his wife and him. As he was riding the motorcycle outside of Kankakee, traveling at about 50 miles an hour, a driver failed to see Plaintiff's approach and pulled out of her driveway. Plaintiff threw his motorcycle to the left and then back to the right in an attempt to avoid the collision. However, his motorcycle slid out from under him. The record is not clear as to the mechanics of what specifically happened to Plaintiff following the motorcycle accident, how Plaintiff was injured or by what means he arrived at Provena St. Mary's Hospital's emergency room.

Following the accident, according to his testimony, he felt no difference in his low back. In the motorcycle accident, Plaintiff broke his collar bone and two ribs, all on the right side. Plaintiff sued the driver involved in the motorcycle accident and settled his claims. Plaintiff denied that he was compensated for re-injury to his low back.

Treatment After April 14, 2002

Plaintiff reported to Provena St. Mary's Hospital following the collision. Despite his testimony to the contrary, emergency room records reflect that Plaintiff primarily complained about low back pain. An MRI of Plaintiff's lumbar spine showed evidence of grade 1 spondylolisthesis of L5 and S1, with evidence of instrumentation at L4-S1. While in the hospital, Plaintiff contacted Dr. Bernstein to express concern about his back, and Dr. Bernstein ordered an MRI of the cervical spine. Hospital records also reflect that Plaintiff later refused to be discharged, complaining of back pain.

Plaintiff returned to Dr. Bernstein on May 2, 2002, and the doctor renewed Plaintiff's treatment. Once Dr. Bernstein resumed Plaintiff's treatment, he reviewed X-rays of Plaintiff's

low back, which revealed a healed fusion from L4-S1 and some mild degenerative change. Dr. Bernstein also reviewed the MRIs done to Plaintiff's back while he was hospitalized at St. Mary's Hospital. After reviewing these MRIs, Dr. Bernstein recommended Plaintiff undergo a series of three epidural injections and symptomatic care. He also prescribed a myelogram, which was done in August of 2002, and an electromyogram, which was done in October of 2002. Upon completion of these diagnostic tests, Dr. Bernstein recommended Plaintiff undergo a discogram. However, the procedure was not performed because the workers' compensation carrier would not authorize it.

In lieu of the discogram, Plaintiff worked with a medical management nurse who recommended a physician for a pain consultation. Ultimately, Plaintiff consulted with Dr. Stanos. This doctor noted in his April 18, 2003 report that Plaintiff suffered from lumbar spondylolisthesis, lumbar discectomy, L4-S1 status post fusion, chronic low back and right leg pain, severe myofascial pain syndrome, right hip, lumbosacral region, and right shoulder contracture status post rotator cuff tear and repair. Dr. Stanos felt that Plaintiff would not benefit from a pain management program until all surgical options were exhausted.

On June 6, 2002, Dr. Mark Levin examined Plaintiff at Defendant's request. Dr. Levin wrote to Plaintiff's risk management department, indicating that he was concerned that Plaintiff's complaints of back pain were subjective and out of proportion to the objective findings. He also questioned how Plaintiff was driving a motorcycle if he was experiencing such severe back pain. Dr. Levin concluded that Plaintiff should be capable of performing "transitional work activities" and recommended an FCE with validity measurement to determine Plaintiff's true capacity in light of the discrepancies between his subjective complaints and the objective findings. Subsequently, on October 8, 2002, Dr. Mark Levin submitted an additional

report. In it, he continued to question the discrepancies between Plaintiff's clinical exam and his subjective complaints. He did not see a need for a discogram but recommended on EMG study. He also noted that the accident caused a right clavicle fracture and fractured ribs on the right side.

On December 19, 2002, Plaintiff sought a second opinion with Dr. Marc Levin of the Spinal Care Institute on the recommended of Dr. Bernstein. At that time, Plaintiff complained of low back, right buttock, hip and leg pain. He also complained of right shoulder and arm pain, with tingling in his right arm. In this evaluation, Plaintiff reported that during the March 2, 2002 work accident, he grabbed and held himself by his arm, apparently while slipping off the hood of the truck. After the exam, Dr. Levin concluded that Plaintiff had low back pain and lumbar radiculopathy. He also felt Plaintiff's subjective complaints were out of proportion to the objective findings. Dr. Levin recommended treatment at a comprehensive pain clinic, as well as a psychological evaluation. He felt that a discogram might be necessary in the future. He opined that, as of the date of his examination, Plaintiff was unable to return to work. Dr. Levin also stated: "I would also like to comment that if he was having such severe pain on March 2, 2002, I am not sure how he could be riding his motorcycle on April 18, 2002." (R. 482). Dr. Levin ultimately opined that he had "no doubt" that the motorcycle accident "quite aggravated" Plaintiff's lower back and leg condition. (R. 482).

Following Dr. Stanos' recommendation regarding the pain management program for Plaintiff's back, Dr. Leestma referred Plaintiff to Dr. Rifai, a neurosurgeon, to discuss a pain management procedure. Plaintiff treated with Dr. Rifai on June 5, 2003, when a morphine pump was installed to reduce pain in Plaintiff's back. Plaintiff testified that the pump was effective and that he continues to get it serviced every eight to ten weeks.

With regard to Plaintiff's shoulder condition, the course of treatment was sometimes overlapping with his back treatment but somewhat more irregular. As indicated above, Plaintiff treated with Dr. Diveris on Dr. Leestma's referral first on April 4, 2002, after the work accident but before the motorcycle accident. Based on the medical records, Dr. Leestma's referral took place on March 28, 2002, immediately after Plaintiff's brief return to work in the AWP. Before this time, Plaintiff had not complained of a shoulder injury. For example, the records from St. Margaret Mercy's emergency room of March 3, 2002 reflect Plaintiff's report of back pain and his description that his neck hit the fender of the truck. The only reference to his shoulder was in the past history section of the triage assessment where his prior shoulder surgery was noted. Similarly, when Plaintiff reported to Suburban Heights Medical Center in the days right after the work accident, he complained only of cervical and lumbar pain. He described the work accident to St. Margaret Mercy's and Suburban Heights' staff in a similar fashion. He stepped off the footstep of his truck, hit his neck and upper back on the truck and fell to the ground.

Plaintiff saw Dr. Diveris approximately three times in the six months following the work accident. On April 11, 2002, Dr. Diveris reviewed an old and more recent MRI. His report notes confusion about Plaintiff's description of his prior surgery and what the doctor could view on the old MRI. Dr. Diveris did note that Plaintiff had cystic changes in the area of the proximal humerus and a significant amount of fluid through the space of his shoulder joint. He also noted an area "that could be a V shaped injury to his supraspinatus tendon." (R. 325). Dr. Diveris determined that Plaintiff's strength was excellent and that the injection gave him "marked improvement in his symptoms." (R 326). The mechanism of injury is described as "wiping ice of [sic] windshield wipers on truck @ work – fell off." (R. 326). Dr. Diveris released Plaintiff to light-duty work, as stated previously. Plaintiff next saw Dr. Diveris, about

one month later on May 16, 2002. At this time, he found Plaintiff to be “virtually symptom free after his subacromial injection.” (R. 324). He did not recommend any further treatment. He recommended return to work with no restrictions. He also suggested that Plaintiff return in three to four months after returning to work.

Although Plaintiff did not return to Dr. Diveris until September 20, 2002, he continued to treat with Dr. Leestma in the intervening months. Dr. Leestma’s records from May 2002 until January 2003 reflect Plaintiff’s complaints of neck or back pain and stiffness. Some records in May refer to the broken ribs and the clavicle injuries from the motorcycle accident. They indicate at first that Plaintiff felt pain in his collar bone and ribs and later that those injuries were healing. On June 10, 2002, Plaintiff reported shoulder stiffness, without further complaints of pain.

In early September 2002, Dr. Leestma completed a questionnaire sent to him by Respondent’s insurer. The question stated:

Mr. Conklin injured his right shoulder in which he had surgery performed in September of 2000 and has had on-going back problems dating back to 1984. Is the patient’s current disability an aggravation of previous injuries?

Yes X No

In a hand written annotation, Dr. Leestma wrote: “only shoulder pain part of problem - not back problem.” (R. 298).

On September 20, 2002, Plaintiff returned to Dr. Diveris. The doctor found his range of motion “markedly diminished” from his last visit but also noted that Plaintiff guarded his movements and thus prevented a “good evaluation” of his movement capacity. (Pet. Ex. 7, p.1). Dr. Diveris gave Plaintiff a subacromial space injection and determined that Plaintiff might need an articular injection, depending on the results of this procedure. The doctor recommended

physical therapy and a reevaluation within a week. Dr. Diveris' records do not indicate that Plaintiff ever returned.

On September 25, 2002, the Social Security Administration obtained a medical examination of Plaintiff in connection with an application for disability benefits. The history of present illness makes the following reference to Plaintiff's shoulder injury:

He complained to have right shoulder pain since his injury in 1998. He was diagnosed with rotator cuff and had surgery in 1998 and in 2000. His pain is burning and sharp in nature and has it reaching his shoulder above his heart. His pain gets worse with reaching up and better with rest.

(R. 280). That examination revealed "no anatomic abnormality of upper extremity" and disclosed no cyanosis, clubbing or edema. It did reveal a surgical scar in the right shoulder. (R. 281). The diagnostic impression was for right shoulder pain with history of surgery for "R.C." (R. 282).

Dr. Leestma's records show that although Plaintiff had numerous appointments with him after the September 20, 2002 injection, the first notation about shoulder pain appeared in the July 1, 2003 notes. That note states: "R shoulder pain from WC injury March 2, 2002." (R. 257). Then, through the late summer of 2003 and early 2004, Dr. Leestma's records contain a number of references to Plaintiff's right shoulder. For example, on August 14, 2003, Dr. Leestma completed an insurance form and identified Plaintiff's symptoms as "right shoulder pain with limited mobility" and the diagnosis as a rotator cuff tear. (R. 315). For another example, on October 2, 2003, Dr. Leestma noted that an injection helped some and that swelling had decreased. Later that month, Dr. Leestma referred to an arthritic right shoulder, and in January 2004, he referred to bursitis in Plaintiff's right shoulder.

Plaintiff testified that he was seeing Dr. Leestma for shoulder pain from about June of 2003 until he returned to Dr. Thoma in February, 2004. On April 2, 2004, two days before the

arbitrator's hearing, Dr. Thoma performed surgery to repair the rotator cuff of Plaintiff's right shoulder.

Dr. Thoma's records indicate that prior to the surgery, the doctor was not certain of the exact cause of Plaintiff's symptoms and wanted a colleague's input to evaluate options. His notes recite Plaintiff's account of the injury. According to Plaintiff, he was injured at work in March 2002. He reported that Dr. Leestma gave him steroid injections with increasing frequency after treating with Dr. Diveris. Dr. Thoma noted that x-rays showed degenerative change in the shoulder and also expressed concern for the presence of pigmented villonodular synovitis. The February 23, 2004 MRI report states that the age of the rotator cuff tear is "uncertain" due to a history of prior surgeries. (R. 402). Ultimately, Dr. Thoma concluded that surgical repair of the rotator cuff was the appropriate course.

As far as Plaintiff is aware, none of his doctors have released him to work. In addition, he testified that aside from the motorcycle accident, he has not suffered any other accidents or injuries to the right shoulder or low back since March 2, 2002.

Proceedings Before the Commission

The Commission affirmed and adopted the arbitrator's decision. The arbitrator concluded that Plaintiff's condition of ill being was not causally related to the March 2, 2002 work accident because the subsequent motorcycle accident constituted an independent intervening cause. The arbitrator found significant the facts that Plaintiff refused light duty work on April 12, 2002 because taking Oxycontin medication impaired his ability to drive, and yet, days later, he drove a Harley-Davidson motorcycle. According to the arbitrator, the record did not contain any restriction on Plaintiff's ability to work until after the motorcycle accident. In contrast, the evidence showed Plaintiff sustained serious injuries from the motorcycle accident.

The arbitrator concluded that given that accident, it was “difficult to find any of the effects of the March 2, 2002 work event remained.” (R. 590). He characterized the motorcycle accident as the “classic example of an intervening and superceding event.” (R. 590).

With regard to the back injury, the arbitrator recited the history of treatment for back pain immediately following the motorcycle accident and the fact that Plaintiff had not returned to see Dr. Bernstein, his back surgeon, until after that accident. Based on this evidence, as well as the treating physicians’ opinions finding the motorcycle accident aggravated Plaintiff’s back, the arbitrator found: “The undisputed medical evidence suggests Petitioner’s condition was measurably worsened by this event; so much so that it is impossible to weigh any lasting impact of the work event of March 2, 2002.” (R. 590, back).

With regard to the shoulder, the arbitrator found that no medical expert opinion linked Plaintiff’s April 2004 surgery with the work accident. In addition, he found that Dr. Diveris had released Plaintiff to full duty with no restrictions on May 16, 2002 and that for over one year, Plaintiff did not complain of work-related shoulder pain. In his concluding remarks, the arbitrator determined that Plaintiff’s right clavicle fracture supported the notion that the motorcycle accident significantly worsened his shoulder condition.

ISSUE ON APPEAL

Whether the Commission’s decision finding that Plaintiff’s April 14, 2002 motorcycle accident was an intervening accident sufficient to break the chain of causation between the March 2, 2002 work accident and Plaintiff’s condition of ill being was against the manifest weight of the evidence.

STANDARD OF REVIEW

Whether a causal connection exists between a claimant's current condition and a work accident is a question of fact for the Commission. A reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence. *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807 (2nd Dist. 2005). The test is whether there is sufficient evidence to support the Commission's finding. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66 (1st Dist. 2002). In order for the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion was clearly the proper result. *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d at 786.

ANALYSIS AND DISCUSSION

Plaintiff contends that, based on Illinois case law, a claimant need not show that a work-related injury was the sole or principal cause resulting in a condition of ill being so long as it was a causative factor. *Sisbro v. Industrial Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003). Plaintiff argues that although the motorcycle accident may have contributed to the condition of ill being, the work accident also remained a causative factor. Therefore, the Commission's decision on causation should be reversed.

To support its argument, Plaintiff principally relies on a recent case, *Vogel v Industrial Comm'n*. 354 Ill. App. 3d 780. In *Vogel*, the Commission limited a claimant's award to a period of time that followed a work accident but preceeded the first of three non-work related car accidents. The basis for the decision was the finding that the car accident further aggravated the claimant's work-related injury and resulted in additional medical treatment and lost time. Thus,

the Commission determined that the car accident broke the chain of causation between the work accident and the claimant's current state of ill-being.

On appeal, the Circuit Court reversed, and the Appellate Court in turn affirmed the Circuit Court. Contrary to the finding of the Commission, the Appellate Court ruled that "when the claimant's condition is weakened by a work-related accident, a subsequent accident that aggravates the condition does not break the causal chain." 354 Ill. App. 3d at 787. The Appellate Court reviewed a number of cases, including cases cited by this Plaintiff, in concluding that the rule was well established and that its application required reversal of the Commission's decision where no evidence established that the second accident changed the nature of the injury except to aggravate it.

The other cases on which Plaintiff relies, *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 640 N.E.2d 1 (1st Dist. 1994), and *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 612 N.E.2d 77 (4th Dist. 1993), apply the same rule. In these cases, as in *Vogel*, the claimants suffered a work accident, the injury from which had begun to resolve, and then suffered an intervening accident. In each case, the Appellate Court held that where a non-employment related event contributed along with the compensable event to the injury or disability, the accident did not constitute an intervening cause sufficient to break the causal connection between the employment and the claimant's condition of ill being. *Teska*, 266 Ill. App. 3d at 742; *Mendota Township High School*, 243 Ill. App. 3d at 837.

Conversely, Defendant cites cases wherein Illinois courts have found that the intervening accident was sufficient to break the chain of causation between the work accident and the condition of ill being. Generally, those cases involve claimants who had returned to work or who suffered an injury to a different part of the body as a result of the intervening accident. *Lee*

v. Industrial Comm'n, 167 Ill. 2d 77, 656 N.E.2d 1084 (1995); *Ditola v. Industrial Comm'n*, 216 Ill. App. 3d 531, 576 N.E.2d 379 (1st Dist. 1991).

With regard to this issue, the Illinois Supreme Court has instructed:

An “independent intervening cause” has been held to be one which breaks the chain of causation between a work-related injury and an ensuing disability or injury....Where the work injury itself causes a subsequent injury, however, the chain of causation is not broken.

International Harvester Co. v. Industrial Comm'n, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970).

The Supreme Court went on to state that compensation is appropriate “whenever, but only whenever, the existing employment-connected condition is a causative factor in producing either the subsequent injury or the subsequent disability.” *International Harvester*, 46 Ill. 2d at 247.

In this case, upon examination of the precedents cited by the parties, the Court concludes that regarding Plaintiff’s back injury, *Vogel*, *Teska* and *Mendota Township* require that the Commission’s decision be reversed. However, with regard to the shoulder injury, the evidence permits two different inferences to be drawn and, therefore, the record contains sufficient facts to support the Commission’s finding that Plaintiff’s 2004 shoulder surgery and underlying condition was not caused by the work accident.

Plaintiff’s Low Back Condition

With respect to the back injury, here, as in *Vogel*, *Teska* and *Mendota Township*, Plaintiff was recovering from a work injury when he was involved in a non-work accident. The motorcycle accident affected the same part of his body – his back – as was involved in the work accident and his earlier laminectomy and fusion. As in those cases, here, the medical evidence established that the motorcycle accident aggravated Plaintiff’s back condition. Furthermore, as in *Vogel* and *Teska*, where the Commission’s finding of intervening cause is based solely on evidence that the injury was aggravated by the non-work accident, the finding is against the manifest weight of the evidence.

Turning to the evidence in this case, the medical evidence uniformly supports a finding that the motorcycle accident aggravated but did not change the nature of the low back injury. Dr. Leestma, Plaintiff's treating physician, testified that although it may have waxed and waned, Plaintiff's lower back condition was constant. He characterized it as a condition of ongoing complaints of low back pain. Dr. Leestma also testified that although the motorcycle accident involved injuries to the chest and ribs, there was no doubt that such an accident in a patient having already undergone a fusion would have a significant negative result on his pain. Given that, Dr. Leestma went on to state that the work injury certainly contributed to Plaintiff's pain problem. When asked specifically about his causation opinion, he testified that the motorcycle accident was not sufficiently traumatic to remove the work injury from the equation of Plaintiff's condition of ill being.

Medical records bear out that Plaintiff was still recovering from his fusion at the time of the motorcycle accident. Plaintiff continued to complain of low back pain when he treated at Suburban Heights Medical Center in March of 2002. As late as April 4, 2002, ten days before the motorcycle accident, Plaintiff complained of low back pain when treating at Orthopedic Centers. Dr. Leestma's notes dated April 11, 2002 reference Plaintiff's lumbar dysfunction, as well as his complaints of lumbar pain. Finally, the evidence reveals that Dr. Leestma did not release Plaintiff to work due to his back injury any time before the motorcycle accident. In fact, a few days before, on April 11, 2002, Dr. Leestma noted that Plaintiff was seeing his back surgeon, Dr. Bernstein, for his back problem.

At his deposition, Dr. Bernstein testified that even considering the motorcycle accident, the work accident was responsible for Plaintiff's low back pain and for the chronic persistent complaints of pain in that area. He further stated that he typically saw patients for six months to

a year following the fusion, depending on how quickly they recovered. In this case, Plaintiff's work accident and motorcycle accident occurred within six and seven months, respectively, of his back surgery.

In addition to his testimony, Dr. Bernstein wrote to Plaintiff's attorney, stating that Plaintiff's symptoms of low back pain were directly the result of the work-related incident on March 2, 2002. In that letter, he stated that although the motorcycle accident may have served as an aggravating factor, it appeared to be a temporary aggravation and not materially significant. In his May 2, 2002 records, Dr. Bernstein also noted that Plaintiff suffered severe worsening of his low back condition after the work accident but only a mild aggravation after the motorcycle accident. Dr. Bernstein's opinion is supported by his previously noted testimony that Plaintiff suffered his motorcycle accident within seven months of the surgery and was recovering from the fusion at the time it occurred. Thus, according to evidence of the treating physicians, Plaintiff's condition from the work accident had not yet resolved at the time of the motorcycle accident and was aggravated by it.

Furthermore, Plaintiff consulted with Dr. Marc Levin, seeking a second opinion on Dr. Bernstein's suggestion. Although Dr. Marc Levin expressed concern about Plaintiff's motorcycle driving, wondering why Plaintiff was driving a motorcycle if in fact he was in continued pain from his work accident, he nonetheless concluded: "the accident he had on his motorcycle quite aggravated his lower back and leg condition." (R. 482). Thus, even this doctor did not believe that the motorcycle accident could be seen as medically unrelated to the work accident and Plaintiff's condition.

Defendant's independent medical examiner, Dr. Mark Levin, did not make specific findings concerning the cause of Plaintiff's low back injury. In his report of June 6, 2002, he

volunteered to review “all records regarding this patient’s motorcycle accident which would be an intervening occurrence which also could be *contributing* to giving him discomfort and not related to the work injury.” (R. 477, emphasis added). In his October 8, 2002 report, he simply referred to Plaintiff’s records containing “a report of some mild aggravation of his low back situation” from the motorcycle accident. (R. 473).

The overwhelming evidence indicates that Plaintiff did not suffer an intervening accident that broke the chain of causation between his work accident and the low back condition, as that term has been defined in the case law. All of Plaintiff’s treating doctors attribute his condition to the March 2, 2002 work accident and consistently categorize the motorcycle accident as an aggravation of the low back condition. Even Defendant’s IME does not contradict this conclusion and indeed notes the motorcycle accident as a contributing factor.

Plaintiff’s Shoulder Condition

Plaintiff’s shoulder injury requires a somewhat different analysis. The arbitrator’s decision, which the Commission adopted, suggests two alternate grounds for finding no causal connection. On the one hand, the arbitrator found no medical evidence to support the causal relation between Plaintiff’s earlier shoulder injury and his April 2004 shoulder operation. This finding could be interpreted to be a straightforward causation finding, regardless of the occurrence of the motorcycle accident. On the other hand, in the conclusion portion of the decision, the arbitrator noted that Plaintiff’s fractured clavicle, which resulted from the motorcycle accident, would support “the contention that the right shoulder was significantly worsened in the crash.” (R. 592, back). This finding clearly derives from the intervening cause theory discussed above and is subject to the same analysis concerning subsequent non-work accidents that aggravate an existing work-related injury.

Despite the ambiguity, the Court can resolve this issue. “[A] reviewing court can affirm the Commission’s decision if there is any legal basis in the record to support its decision, regardless of the Commission’s findings and reasoning.” *USF Holland, Inc. v. Industrial Comm’n*, 357 Ill. App. 3d 798, 829 N.E.2d 810 (1st Dist. 2005). With regard to the shoulder injury, the evidence easily supports the general finding that Plaintiff has not established that his current shoulder condition, including the 2004 surgery, was the result of the work injury. Indeed, the evidence concerning the shoulder injury is subject to different inferences, and there is no error in drawing the inferences against causation where, as here, the finding is not against the manifest weight of the evidence. *Anderson v. Industrial Comm’n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339 (5th Dist. 2001).

During the first several months after the March 2, 2002 work accident, Plaintiff described his fall from the truck in similar terms. He reported that he fell from the hood, hitting his neck on the fender and landing on his feet. It was not until his consultation with Dr. Marc Levin in December, several months after the incident, that any statements recount the accident’s mechanics in such a way as to account for a shoulder injury. During that consultation, Plaintiff told Dr. Marc Levin that while slipping off the hood of the truck, he grabbed and held himself by his arm. No other medical records contain this account.

The medical records from the immediate aftermath of the accident focus on Plaintiff’s back injury. Complaints of shoulder pain appear for the first time toward the end of March 2002, just after Plaintiff returned to work in Defendant’s AWP. Shortly afterwards, Dr. Leestma referred Plaintiff to Dr. Diveris.

As the arbitrator found, Dr. Diveris treated Plaintiff’s shoulder in April and May 2002, both before and after the motorcycle accident. On May 16, 2002, Dr. Diveris discharged

Plaintiff, with no restrictions, because the doctor found Plaintiff to be “virtually symptom free.” (R. 324). Although the arbitrator did not recite further facts concerning Plaintiff’s shoulder history after this time frame, his findings 1) that Plaintiff did not complain of shoulder problems for one year before seeing Dr. Thoma for treatment and 2) that no medical expert provided a causation opinion linking Plaintiff’s current condition with the work accident find support in the record.

With respect to his shoulder, Dr. Diveris treated Plaintiff on April 11, 2002. Dr. Diveris’ notes from that date state, based on review of the MRI, Plaintiff did not have a condition that could be repaired through surgery. Dr. Diveris’ notes also state that Plaintiff’s description of a very large tear in the back “versus what they had to do for the second repair for his shoulder” was something Dr. Diveris did not understand. (R. 325). The report went on to note that although there was a significant amount of fluid through the space of his shoulder joint that could be a V-shaped injury to the supraspinatus tendon, Plaintiff’s strength was excellent. The doctor also noted that an injection he had given Plaintiff resulted in marked improvement in his symptoms. Dr. Diveris’ follow up report dated May 16, 2002 indicated that Plaintiff was “virtually completely symptoms free after his subacromial injection.” (R. 324). Therefore, Dr. Diveris did not recommend any further treatment. Plaintiff returned to Dr. Diveris in September 2002. At that time, the doctor administered a subacromial space injection and recommended physical therapy and return for reevaluation in a week.

From the May 2002 and September 2002 visits with Dr. Diveris, Plaintiff had a number of appointments with Dr. Leestma. On the whole, those consultations addressed Plaintiff’s back pain and medication needs. A number of appointments reflect that plaintiff had a stiff neck and required an adjustment. In June 2002, the records note shoulder stiffness only, not pain. In

addition, from September 2002 until July 2003, Dr. Leestma's records indicate only back and medication related problems. On July 1, 2003, the notation regarding his shoulder first appears: "R shoulder pain from WC injury 3/2/02." (R. 257). Those records then indicate that after the morphine pump was installed, Plaintiff's complaints of pain and swelling in his shoulder recur consistently through late September 2003 and early 2004. Thus, from late September 2002 until July 2003, the medical records do not show any treatment for Plaintiff's right shoulder.

Furthermore, shortly after receiving the injection from Dr. Diveris, a physician examined Plaintiff in connection with Social Security disability benefits. Although that physician recorded Plaintiff's complaints of pain in the shoulder area, the examination disclosed no anatomic abnormality, cyanosis, clubbing or edema.

With regard to medical expert opinions connecting the condition of Plaintiff's shoulder in 2004, the time of the hearing, there are none. An inference could be drawn from Dr. Leestma's records and testimony that he felt that the shoulder condition never resolved since the date of accident. In addition, Dr. Leestma wrote to Respondent's carrier, Pennsylvania Life Insurance Company. In a September 9, 2002 letter, Dr. Leestma indicated that Plaintiff's shoulder condition was an aggravation of a preexisting condition. Additionally, in an October 18, 2002 letter, he disagreed with the insurance company's assessment that the shoulder injury would have fully resolved from June to September of 2002, notwithstanding any contributing conditions. Instead, Dr. Leestma felt that the time for recovery from the shoulder condition of March 2, 2002 was through October 31, 2002. These opinions, of course, shed no light on the ultimate decision here, whether the evidence established that Plaintiff's shoulder condition a year and a half later, after treatment and a period of months without complaint, was caused by the work accident. Moreover, the Commission was not obliged to adopt one expert's opinion in the face of other

more convincing evidence. *Grischow v. Industrial Comm'n*, 228 Ill. App. 3d 551, 560, 593 N.E.2d 720 (2nd Dist. 1992).

Here, Plaintiff's most recent treater, Dr. Thoma, did not provide an opinion as to the cause of the shoulder condition in 2004. Although his records mention the 2002 accident in outlining Plaintiff's history, they also note a fall in 2003 that could have contributed to Plaintiff's shoulder condition. In addition, they refer to degenerative changes. The 2004 MRI report could not determine the age of the rotator cuff tear due to the prior surgeries.

As to earlier treatment, Dr. Diveris' records indicate that Plaintiff was to return for further treatment if the September 2002 injection was ineffective. No evidence demonstrates that he returned, and Dr. Leestma's subsequent records reveal no significant shoulder problem until almost one year later.

Other evidence also permits an inference against a finding of causation. For example, unlike the back surgery, Plaintiff's last shoulder surgery occurred a year and a half before the work accident. Thus, the Commission was not obliged to view that injury as fresh when Plaintiff fell from his truck or crashed on his motorcycle. In short, a review of the evidence reveals no error in the Commission's conclusion that the Plaintiff failed to establish that the work accident was the cause of his current shoulder condition.

Section 19(d)

Defendant's final argument is that the Commission should have denied Plaintiff benefits under section 19(d) of the Act in any event. Defendant vigorously argues that Plaintiff's riding a motorcycle before his back surgery had fully healed and while he was on pain medication warrants denial of an award under the Act.

Section 19(d) gives the Commission discretion to “reduce or suspend the compensation” of an employee who, among other things, persists in “injurious practices which tend to either imperil or retard his recovery.” 820 ILCS 305/19(d). Significantly, in this case, Defendant did not give the Commission an opportunity to exercise its discretion. No section 19(d) argument was presented. The argument is therefore waived. *Service Adhesive Co. v. Industrial Comm’n*, 226 Ill. App. 3d 356, 370; 589 N.E.2d 766 (1st Dist. 1992). How the Commission would have exercised its discretion in this case is unclear. The Court notes in passing, however, that in analogous circumstances, the Commission refused to bar an award. *See Pruchnicki v. City of Chicago*, 2004 Ill. Wrk. Comp. LEXIS 546, (July 1, 2004)(rejecting section 19(d) argument where claimant with carpal tunnel syndrome beat his daughter’s former boyfriend with both fists and/or a tire thumper).

In summary, the Court reverses the Commission’s decision concerning the back injury, confirms the decision concerning the shoulder injury and remands the case to the Commission for a determination of what benefits Plaintiff should receive in connection with his back injury.

IT IS THEREFORE ORDERED:

The decision of the Commission is confirmed in part, reversed in part and remanded to the Commission for proceedings consistent with this order.

JUDGE RITA M. NOVAK

MAR 24 2006

Circuit Court-174

Date: _____

Enter: _____

Rita M. Novak
Associate Judge

37 5/11

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

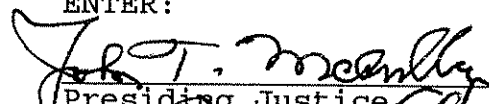
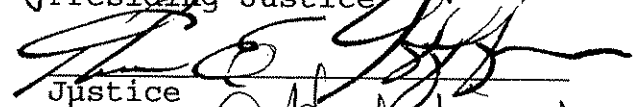
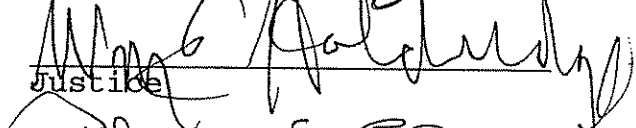
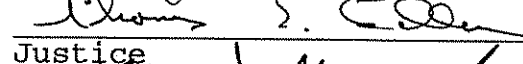
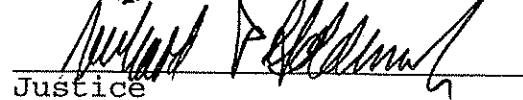
ABF FREIGHT SYSTEMS, INC.,)
)
Appellant,)
)
VS.) No. 1-06-1072WC
)
THE INDUSTRIAL COMMISSION, et al.)
(RONALD CONKLIN)
)
Appellee).)

ORDER

This cause having come on for hearing on the Court's set call; the court having considered the issue of its jurisdiction to entertain this appeal and having concluded that the appellant has attempted to appeal from a non-final order; and the Court being otherwise advised in the premises:

IT IS HEREBY ORDERED THAT THIS APPEAL IS DISMISSED FOR WANT OF JURISDICTION.

ENTER:


Presiding Justice

Justice

Justice

Justice

Justice

ORDER ENTERED
DEC 06 2006
APPELLATE COURT, FIRST DISTRICT

March 23, 2002 through August 19, 2003, a total of 74 5/7 weeks, with Respondent receiving credit for the \$54,479.63 it paid prior to said hearing. Arb Exh 1. The Commission remands this case to the Arbitrator for additional proceedings for a determination of a further amount of temporary total disability benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 47-year-old over-the-road truck driver, testified that he started working for Respondent on October 9, 1989. T. 7.

2. Petitioner acknowledged that he had back and right shoulder problems prior to his undisputed work accident of March 2, 2002. He underwent lumbar spine surgery in 1984, a right rotator cuff repair in December 1998, a second right shoulder surgery in October 2000 and a second lumbar spine surgery in September 2001. T. 9-10. PX 8. The 2001 surgery did not stem from any work-related injury. PX 2 at 5.

Petitioner's records show that he first saw Dr. Avi Bernstein in June 2001 and that the doctor diagnosed a spondylolisthesis and severe degenerative disc disease at that time. The records also show that Dr. Bernstein performed a laminectomy and fusion with instrumentation on September 4, 2001. PX 8. The doctor testified that Petitioner obtained an "excellent result" from this surgery and that X-rays taken on November 26, 2001 showed the fusion to be almost healed. PX 2 at 6. As of November 26, 2001 he felt that Petitioner could work but that he should avoid loading and unloading for another three months. PX 2 at 6. He instructed Petitioner to return in three months for repeat X-rays. PX 2 at 6. Petitioner did not return at that time.

3. Petitioner testified that he resumed his regular driving duties on December 4, 2001 and that he only saw his family physician, Eric Leestma, D.O., between that date and March 2, 2002. Petitioner further testified that Dr. Leestma monitored his medication and performed some adjustments to his upper and middle back during this three-month interval. T. 11. Dr. Leestma confirmed that he saw Petitioner several times between December 17, 2001 and January 21, 2002 and that he did not specifically treat Petitioner's lower back during this time. PX 1 at 5-6.

4. On March 2, 2002 Petitioner climbed onto the hood of his truck in order to de-ice his wiper blades. As he started to descend, he "hit the rail" and fell about six feet to the ground, landing on his back and buttocks. T. 13-14. After he fell he experienced pain in his neck, back and right shoulder but was able to drive back to his base territory. T. 14. He went to the Emergency Room at St. Margaret Mercy Hospital in Dyer, Indiana later that day and indicated that he had fallen from his truck ten hours earlier. He also indicated that he had undergone back surgery five months earlier. The records reflect that he complained of pain in his neck, mid-back, lower back and pelvis. Lumbar spine

X-rays demonstrated evidence of the previous fusion but no recent fractures. Petitioner was diagnosed with acute cervical and lumbosacral strains and was given an injection of Toradol for pain. He was instructed to remain off work for five days and to follow up with Dr. Leestma. PX 3.

5. On March 6, 2002 Petitioner saw a nurse practitioner at Suburban Heights Medical Center and gave a history of his work accident and prior fusion. T. 15-16, PX 4. On examination, the nurse practitioner noted a limited range of head and neck motion, a steady gait and negative straight leg raising. She prescribed medication and therapy and placed Petitioner on restrictions of no heavy lifting, pushing or pulling and no repetitive bending. PX 4. Petitioner attended therapy on March 11 and 14, 2002. On March 11th the therapist recommended work restrictions and usage of a TENS unit. PX 4.

6. Petitioner saw Dr. Leestma on March 7, 2002 but the note concerning this visit is not in the record. At his deposition, Dr. Leestma testified that Petitioner provided a history of his work fall at the March 7, 2002 visit and that he complained of pain in his neck and lower back. The doctor also testified that he changed Petitioner's pain medication from Lortab to Oxycontin on that date. He described Oxycontin as a "stronger narcotic". PX 1 at 7. Under cross-examination, he acknowledged that he described Petitioner as a "chronic pain patient" in his March 7th note. PX 1 at 18. Petitioner acknowledged that he was taking Hydrocodone at Dr. Leestma's direction before the work accident. T. 38. The doctor further testified that at the next visit, on March 16, 2002 he again increased Petitioner's pain medication and instructed him to avoid driving. PX 1 at 7. The doctor testified that he next saw Petitioner on March 21, 2002 and prescribed a muscle relaxant. PX 1 at 7-8. The notes of March 16 and 21, 2002 are not in the record. The doctor testified that on March 26, 2002 Petitioner saw his nurse practitioner and complained of right shoulder pain. The note of March 26, 2002 is also missing. Petitioner saw the doctor two days later, at which time the doctor ordered a shoulder MRI and referred Petitioner to Dr. Diveris, an orthopedic surgeon. PX 1 at 8. RX 1. Petitioner also saw Dr. Leestma on April 2, 2002 for gastritis. PX 1 at 9, 28.

7. Petitioner testified that he was off work following the March 2, 2002 accident until March 12, 2002, when he resumed light office duties pursuant to Respondent's "alternative work program". T. 35. Petitioner testified that he continued performing these duties until March 22, 2002, at which time his shoulder "swelled up like a ball" at work and an assistant manager directed him to stop working. T. 55.

Petitioner first saw Dr. Diveris for his shoulder problem on April 4, 2002. T. 17. He provided a written account of his work accident on a patient history form. He indicated that his "chief complaint" was right shoulder pain but also stated that he was experiencing neck and lower back pain. Dr. Diveris injected the shoulder and released Petitioner to restricted duty with no lifting using the right arm. Petitioner saw Dr. Leestma on April 8 and 11, 2002, at which time the doctor manipulated his upper back. PX 1 at 10-11. The doctor's note of April 8, 2002 reflects that Petitioner indicated the injection had helped his right shoulder but that he was still experiencing lower back pain. RX 1. Petitioner also saw Dr. Diveris on April 11, 2002. At this visit, the doctor

compared an "old" shoulder MRI with the recent one. He released Petitioner to restricted duty and told him to avoid lifting more than ten pounds with his right arm. PX 6.

Respondent's sole witness, Chris Dimopoulos, testified that he reviewed Petitioner's "alternative work program" file and that Respondent would have been able to accommodate the shoulder-related restrictions imposed by Dr. Diveris. T. 62. Dimopoulos also testified that an attempt was made to bring Petitioner back to light duty as of April 12, 2002 and that Petitioner's file did not contain any note from Dr. Leestma indicating that Petitioner was totally disabled as of that date. T. 65. The Commission notes, however, that Dr. Leestma's note of March 28, 2002 (RX 1) reflects that Petitioner was unable to resume light duty due to a "right shoulder tear" and that Dr. Leestma testified he never released Petitioner to full duty.

7. Petitioner testified that he experienced lower back pain between his accident of March 2, 2002 and early April 2002. On April 14, 2002 he picked up a full-size Harley Davidson motorcycle in Peotone, Illinois, in connection with a small rental business he operated with his wife. As he was riding this motorcycle on a rural highway outside of Kankakee, Illinois a motorist pulled out of a driveway in front of him. He "threw the bike hard" while trying to avoid a ditch. The motorcycle then "slid out" and "went down". T. 22. Petitioner acknowledged bringing a lawsuit against the motorist but denied claiming a reinjury to his back in this suit. T. 22.

Following the motorcycle accident Petitioner was seen in the Emergency Room at Provena St. Mary's Hospital, where personnel took a history of a "slide crash going approximately fifty miles an hour". Petitioner complained of pain in his right chest, right leg, high thoracic area and lower back. He indicated he had undergone back surgery in 1983 and in the fall of 2001. He was diagnosed with a right rib fracture and a right clavicle fracture. A lumbar spine MRI demonstrated evidence of a grade 1 spondylolisthesis of L5 and S1 and instrumentation at L4-S1. RX 3.

Petitioner testified that he experienced a "small" increase in his lower back pain after the motorcycle accident (T. 24) but his hospital records show he complained of severe lower back pain on April 16 and 18, 2002 and that he was discharged on April 19, 2002 with the understanding that he would follow up with Dr. Bernstein for his back. RX 3. He saw Dr. Leestma on April 22, 2002 and provided a history of the motorcycle accident. The doctor noted that Petitioner had been hospitalized due to rib and clavicular fractures as well as back pain. He started Petitioner on a new narcotic pain medication, Tylox. PX 5. PX 1 at 11. On April 25, 2002 Petitioner complained of rib and collarbone pain and told Dr. Leestma he was not able to tolerate the Tylox. The doctor told him to take Lortab and Oxycontin instead. PX 5. He also wrote a note indicating that Petitioner was "unable to return to alternate work program due to back problem". RX 1. His chart reflects that this note was sent to Respondent's safety representative by facsimile. RX 1.

8. Petitioner saw Dr. Bernstein on May 2, 2002. The doctor's note of that date reflects that Petitioner stated he had done "reasonably well" and had resumed working following the 2001 fusion but that he had developed "severe worsening low back pain"

after falling from his truck on March 2, 2002. The doctor also noted that Petitioner had experienced "severe discomfort" since the work accident and that he had sustained rib and clavicular fractures and had mildly aggravated his lower back in a motorcycle accident two and a half weeks earlier. On examination, the doctor noted some diffuse tenderness over the lumbar spine and negative straight leg raising. He obtained X-rays and described them as showing a healed fusion along with mild degenerative changes. He prescribed therapy and asked Petitioner to obtain the lumbar spine MRI that had been taken at the hospital. PX 8. Petitioner attended therapy between May 7 and June 5, 2002 but reported no improvement in his back pain during that time. PX 8.

9. Petitioner returned to Dr. Diveris on May 16, 2002 and the doctor described him as virtually symptom-free following the subacromial injection. The doctor did not recommend any additional shoulder treatment. PX 6. RX 5.

10. Petitioner brought his cervical, thoracic and lumbar spine MRI scans of mid-April 2002 (PX 8) to Dr. Bernstein on June 6, 2002 and complained of pain in his neck, mid-back and lower back. The doctor described the lower back pain as Petitioner's "chief complaint". He interpreted the lumbar spine scan as showing diffuse degenerative changes and recommended a trial of epidural injections. PX 8. T. 23. Petitioner testified that he subsequently underwent three injections, a myelogram and an EMG at Dr. Bernstein's recommendation. T. 23. He further testified that following these tests Dr. Bernstein prescribed a discogram but that he never underwent this procedure due to lack of authorization. T. 25-26, 28. Dr. Bernstein testified that he last saw Petitioner on November 15, 2002 and that Petitioner complained of chronic low back pain along with severe right groin and hip pain at that time. He opined that Petitioner was unable to resume his regular driving duties as of that visit and testified that he told Petitioner to obtain a second opinion from Dr. Ronald Pawl, a neurosurgeon and pain specialist. PX 2 at 8.

11. At Respondent's request, Petitioner was examined by Dr. Mark Levin on June 6, 2002. T. 24. Dr. Levin's report of the same date reflects that Petitioner provided a history of his 2001 fusion, work fall and subsequent care. Dr. Levin also noted that Petitioner had undergone back surgery in 1984 and right shoulder surgeries in 1998 and 2000 and that he had been involved in a motorcycle accident a couple of weeks before seeing Dr. Bernstein on May 2, 2002. Petitioner complained of mid to low back pain, numbness and tingling in both buttocks, pain radiating to both legs and difficulty walking. On examination, Dr. Levin noted a markedly antalgic gait, pain in the scapulae and entire thoracic and lumbar spine. He described inconsistent sensation "with multiple testing". Lumbar spine X-rays showed intact hardware and a fusion mass. He reviewed spinal MRI scans as well as records from various providers. He described Petitioner's complaints as disproportionate and questioned how Petitioner could have been operating a motorcycle while experiencing severe back pain. He found Petitioner capable of performing transitional duties as a supervisory assistant and recommended a functional capacity evaluation. RX 4.

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12. On September 20, 2002 Petitioner returned to Dr. Diveris due to right shoulder pain and swelling. On examination, the doctor noted a markedly diminished range of shoulder motion. He administered a second subacromial injection and prescribed therapy. PX 7.

13. On October 8, 2002, after reviewing additional records, Dr. Levin issued a second report. He noted that Dr. Bernstein had described the September 9, 2002 myelogram as a "benign study" and that he had then recommended a discogram and EMG. Dr. Levin described the myelogram and post-myelogram CT scan as showing no evidence of nerve impingement. He agreed that Petitioner should undergo an EMG but did not feel a discogram was warranted. He again recommended a functional capacity evaluation. RX 4.

14. At Respondent's request, Petitioner underwent another Section 12 examination on December 19, 2002. The Commission notes that this examination was conducted by Dr. Marc Levin and that this is a different Dr. Levin than the physician who examined Petitioner on June 6, 2002. Petitioner provided a history of his prior fusion and his work and motorcycle accidents. He complained of severe lower back, right groin and radiating right leg pain and indicated he had obtained no relief from epidural injections or narcotic pain medication. Dr. Levin described Petitioner's gait as "very abnormal" and "almost pathologic". He noted normal motor and sensory examinations and positive straight leg raising bilaterally, right greater than left. He interpreted the MRI as showing an intact fusion, spondylolisthesis and degenerative discs at L5-S1. He recommended that Petitioner see Dr. Ronald Pawl at Lake Forest Hospital and that he undergo a psychological evaluation, including MMPI testing. He also indicated that it might be necessary to proceed with a discogram "at the L2 and L3 discs, two spaces above his fusion . . . in the long run". He doubted that Petitioner could return to work. He expressed concern as to how Petitioner could have been riding a motorcycle in April 2002 and stated that he had no doubt the motorcycle accident "quite aggravated [Petitioner's] lower back and leg condition". RX 4A.

15. Petitioner testified that Respondent's nurse case manager recommended that he see Dr. Pawl but that he never saw this physician due to the distance between his home and the doctor's office in Lake Forest, Illinois. T. 25-26. Eventually, he saw Dr. Stanos at the Rehabilitation Institute, again at the direction of the nurse case manager. T. 26. Dr. Stanos' report of April 18, 2003 reflects that he is director of the Chronic Pain Care Center at the Institute. His report also reflects that he felt Petitioner "would not benefit from an interdisciplinary chronic pain management program until all surgical options have been exhausted". PX 9.

16. Petitioner continued seeing Dr. Leestma in early 2003. The doctor's notes from this period reflect that Petitioner complained of chronic back pain during this time and that he was wearing a brace on April 22, 2003. The doctor's note of April 22, 2003 reflects a diagnosis of "failed back syndrome" and a recommendation of surgery. PX 5.

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On April 28, 2003 Petitioner underwent a functional capacity evaluation at Illiana Surgery & Medical Center. The evaluator described the results as invalid and stated that Petitioner "failed 15 out of 28 objective validity criteria". He also noted positive Waddell signs. He stated that the evaluation showed Petitioner to be functioning at a minimal level but, due to the inconsistencies, opined that Petitioner was in fact "capable of functioning at a higher work category than he demonstrated". He noted that Petitioner exhibited a decreased stride length and right "foot drop" while walking on a treadmill but that these symptoms disappeared after he got off the treadmill and began relying on a cane. PX 5.

On May 15, 2003 Dr. Leestma referred Petitioner to Dr. Rifai, a neurosurgeon, for evaluation of his chronic lower back pain. PX 5. Dr. Rifai examined Petitioner on June 5, 2003 and noted an abnormal gait, decreased range of motion in the cervical and lumbar spine and negative straight leg raising bilaterally. He reviewed Petitioner's lumbar spine MRI and recommended that he undergo a trial dose of an intrathecal morphine pump. He saw "no indication for open surgery". PX 10. After the trial proved to be successful, he implanted an intrathecal morphine pump at Methodist Hospital on July 11, 2003. PX 10. On August 19, 2003 Dr. Leestma issued a report in which he acknowledged receipt of the functional capacity evaluation and opined that Petitioner remained disabled due to his chronic pain condition. He also noted that Petitioner had reported improvement after undergoing implantation of the morphine pump. PX 5. He continued to prescribe Lortab and Vicodin thereafter. PX 5. Petitioner testified that he regularly took four 40-milligram doses of Oxycontin per day before obtaining the implant and that he no longer took this medication afterward. He also testified that he has to have the implant serviced every eight to ten weeks. T. 29-30. He had undergone right shoulder surgery by Dr. Thoma on April 2, 2004, three days before the 19(b) hearing, and was occasionally taking Lortab for flare-ups of back pain. T. 34. He denied being involved in any accidents other than the motorcycle accident since March 2, 2002. T. 36.

At his deposition, taken on August 19, 2003, Dr. Leestma opined that, given Petitioner's prior fusion, the motorcycle accident complicated and added to Petitioner's back pain. When asked whether the motorcycle accident was sufficiently traumatic to remove the work injury from the equation, he indicated that it "certainly won't remove it" and that it was "additive" in nature. PX 1 at 14-15. He also testified that he had not released Petitioner to gainful employment since the work accident. PX 1 at 17.

Under cross-examination, Dr. Leestma reviewed records from Provena St. Mary's. While he acknowledged that these records showed severe low back pain to be a significant reason for Petitioner's April 2002 hospitalization he saw no objective evidence that the motorcycle accident had permanently injured Petitioner's back. PX 1 at 24. He viewed both the work and the motorcycle accidents as having aggravated Petitioner's back condition and indicated that Petitioner's level of pain following both incidents implied that the aggravations were permanent rather than temporary in nature. PX 1 at 25. In light of the fact that he did not record complaints of lower back pain between March 28 and April 22, 2002 he agreed that Petitioner's back condition worsened after the motorcycle accident. PX 1 at 27.

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On redirect, Dr. Leestma indicated that Petitioner's low back pain was a longstanding complaint. He did not view his notes of March 28-April 22, 2002 as reflecting that this pain had resolved. Rather, he viewed them as showing that he was focusing on other, more acute complaints. PX 1 at 29. He opined that Petitioner's current low back condition stemmed from multiple causes, including the work accident. He did not view the role of the work accident as insignificant. PX 1 at 29-30.

17. At his deposition, taken on January 21, 2004, Dr. Bernstein opined that the work accident was responsible for the lower back pain for which he saw Petitioner on May 2, 2002. PX 2 at 10.

Under cross-examination, Dr. Bernstein acknowledged that he did not see Petitioner between November 2001 and the work accident. He noted that Dr. Leestma recorded a complaint of lumbar pain on April 8, 2002 but mentioned only thoracic and shoulder pain three days later. PX 2 at 13, 16-17. In his view, Petitioner's April 2002 hospitalization was due to multiple injuries, including trauma to the lower back. He acknowledged that it would be unusual for a clavicular fracture alone to require a four-day hospital stay. PX 2 at 21-22. He admitted that Petitioner's objective studies (specifically, the lumbar spine, pelvic and hip X-rays and EMG) were negative and that he was unable to explain some of the severe complaints that Petitioner had voiced at his last visit on November 15, 2002. PX 2 at 23-25. He had recommended that Petitioner seek a second opinion. PX 2 at 24.

On redirect, Dr. Bernstein indicated that nothing in Dr. Leestma's or the hospital records caused him to change his opinion that the work accident aggravated Petitioner's lumbar spine condition. PX 2 at 25-26.

The Commission notes that Dr. Bernstein was recertified in orthopedic surgery in 2003 and that he has published numerous articles concerning spinal surgery.

18. In conformance with the Circuit Court's remand directives, and noting that the records (in evidence) following the work accident do not reflect any complaints of shoulder pain until March 28, 2002, the Commission finds that Petitioner failed to prove a causal connection between his undisputed work accident of March 2, 2002 and his right shoulder condition of ill-being.

In conformance with the remand directives, and in reliance on Vogel, the Commission finds that Petitioner established a causal connection between his undisputed work accident of March 2, 2002 and his lumbar spine condition of ill-being and that the intervening motorcycle accident of April 14, 2002 did not sever the chain of causation. As the Circuit Court noted, Petitioner's treating physicians viewed the work accident as one of several factors contributing to the lower spine condition and neither of Respondent's examiners discounted the work accident.

Consistent with the foregoing, and based on the parties' stipulation (Arb Exh 1), the Commission finds that Petitioner was temporarily totally disabled from March 3,

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2002 through March 11, 2002 and from March 23, 2002 through April 11, 2002, a period of four weeks. In reliance on Petitioner's testimony and treatment records, along with Dr. Marc Levin's report (RX 4A), the Commission finds that Petitioner was also temporarily totally disabled from April 12, 2002 through August 19, 2003, a period of 70 5/7 weeks. In the Commission's view, Dr. Leestma's note of April 8, 2002 (reflecting lumbar spine complaints), along with his testimony that he never released Petitioner to full duty, show that Petitioner was still experiencing back pain shortly before the motorcycle accident and support an award after April 11, 2002. Respondent's witness, Chris Dimopolous, testified that Respondent could have accommodated Dr. Diveris' April 11, 2002 restrictions but these restrictions pertained only to Petitioner's right shoulder condition. The Commission acknowledges the inconsistency between Petitioner's complaints and his motorcycle usage on April 14, 2002 but does not view this usage as defeating Petitioner's claim for ongoing benefits. The Commission notes the results of the functional capacity evaluation and declines to award temporary total disability benefits after August 19, 2003, the date of Dr. Leestma's report and evidence deposition. The Commission places little weight on Dr. Leestma's written opinion that Petitioner remained totally disabled despite the invalid evaluation. PX 5. The Commission also notes that Dr. Rifai saw no need for surgery when he examined Petitioner on June 5, 2003. PX 10. In accordance with the parties' stipulations (Arb Exh 1), Respondent is entitled to credit for the \$54,479.63 in benefits it paid prior to arbitration.

Consistent with the remand directives and the foregoing analysis, the Commission further finds that Petitioner is entitled to reasonable and necessary medical expenses in the amount of \$1,898.76. These expenses include various prescription costs and costs associated with the morphine pump. PX 12. The Commission relies on Dr. Rifai's records and the testimony of Petitioner and Dr. Leestma in awarding these expenses. While several physicians questioned the veracity of Petitioner's complaints, Petitioner indicated that the morphine pump permitted him to discontinue taking oral narcotic medication and improved his function.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$834.48 (based on the stipulated average weekly wage of \$1,251.72, Arb Exh 1) per week from March 3, 2002 through March 11, 2002 and from March 23, 2002 through August 19, 2003, a total of 74 5/7 weeks, that being the period of temporary total disability under Section 19(b) of the Act, with Respondent receiving credit for the \$54,479.63 in benefits it paid prior to arbitration. Arb Exh 1.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$1,898.76 in reasonable and necessary medical expenses pursuant to Section 8(a) of the Act and PX 12.

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

08IWCC 0150

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$9,900.00. The probable cost of the record to be filed as return to Summons is the sum of \$35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: FEB 7 2008

Molly C. Mason

Molly C. Mason

Paul W. Rink

Paul W. Rink

Nancy Lindsay

Nancy Lindsay

MCM:bjg

0-2/5/08

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NOTICE

Decision filed 02/09/10. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

Workers' Compensation
Commission Division
Filed: February 9, 2010

No. 1-08-3074WC

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ABF FREIGHT SYSTEMS, INC.,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY
)
Appellant,)
)
v.) Nos. 05 L 50373 and
) 08 L 50243 (Consolidated)
)
ILLINOIS WORKERS')
COMPENSATION COMMISSION, et)
al.) HONORABLE
(RONALD CONKLIN,) RITA NOVAK and
) SHELDON GARDNER,
Appellee).) JUDGES PRESIDING.

O R D E R

ABF Freight Systems, Inc., (ABF) appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Ronald Conklin, benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2002)). For the reasons which follow, we affirm and remand the matter back to the Commission for further proceedings.

The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 5, 2004.

The claimant worked for ABF as an over-the-road truck driver

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since October 9, 1989. Prior to the work injury on March 2, 2002, the claimant had a history of treatment for problems with his lower back and right shoulder. Specifically, he underwent lumbar spinal surgery in 1984, a right rotator cuff repair in December 1998, a second surgery on his right shoulder in October 2000, and a second lumbar spinal surgery in September 2001.

Prior to the most recent lumbar surgery in 2001, Dr. Avi Bernstein diagnosed a spondylolisthesis and severe degenerative disc disease, and he performed a laminectomy and fusion, with instrumentation placement, on September 4, 2001. At his evidence deposition, Dr. Bernstein testified that the surgery produced an "excellent result." According to Dr. Bernstein, X-rays taken on November 26, 2001, showed that the fusion was almost healed, and the claimant was able to return to work, as long as he avoided loading and unloading for three months.

The claimant resumed his regular driving duties on December 4, 2001, and continued treatment with his family physician, Dr. Eric Leestma. Dr. Leestma monitored the claimant's pain medication and performed some minor adjustments to his upper and middle back. Dr. Leestma confirmed that he saw the claimant several times from December 2001 through February 2002 and that he did not specifically treat the claimant's lower back during that time.

During a trip for ABF on March 2, 2002, the claimant climbed onto the hood of his truck in order to remove ice from the

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windshield wiper blades. As he was descending, he hit a rail and fell about six feet to the ground, landing on his back and buttocks. After he fell, the claimant experienced pain in his neck, back, and right shoulder, but was able to drive several hours to return home. The claimant immediately went to the emergency room at St. Margaret Mercy Hospital, where he complained of severe pain in his low back, as well as pain in his neck, mid-back, and pelvis. The claimant informed hospital personnel that he had undergone back surgery five months earlier, and lumbar spine X-rays revealed evidence of the previous fusion, but no recent fractures. The claimant was diagnosed with acute cervical and lumbosacral strains and was given an injection of pain medication. He also was instructed to remain off work for five days and to follow up with Dr. Leestma.

The claimant was off work for 10 days after the March 2, 2002, accident until March 12, 2002, when he was assigned light office duties in accordance with ABF's "alternative work program." He continued performing these duties until March 22, 2002, when he experienced significant swelling in his shoulder and was directed by an assistant manager to stop working.

When the claimant saw Dr. Leestma on March 7, 2002, he described the circumstances of his work-related accident and complained of pain in his neck and lower back. Dr. Leestma prescribed a different pain medication than that which the claimant had taken previously. Dr. Leestma saw the claimant

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three more times during March 2002, adjusting his pain medication on each occasion. Dr. Leestma ultimately ordered an MRI for the right shoulder and referred the claimant to Dr. Diveris, an orthopedic surgeon, for evaluation of his right shoulder.

The claimant first saw Dr. Diveris on April 4, 2002. During that visit, he provided a written account of his work-related accident and indicated that he was experiencing neck and lower-back pain in addition to the pain in his right shoulder. Dr. Diveris administered a subacromial injection to reduce swelling and inflammation in the claimant's right shoulder. On April 11, 2002, Dr. Diveris released the claimant to perform restricted work duty involving lifting no more than 10 pounds with his right arm.

The claimant continued to experience lower-back pain from the date of the employment accident on March 2, 2002, until early April 2002. On April 8 and April 11, 2002, the claimant saw Dr. Leestma, who manipulated his upper back. On April 8th, the claimant advised Dr. Leestma that the injection administered by Dr. Diveris had helped his right shoulder, but he was still experiencing lower-back pain. On April 11, 2002, Dr. Leestma referred the claimant to Dr. Bernstein for further treatment of his low-back condition.

Upon receiving the work release issued by Dr. Diveris, ABF contacted the claimant on April 12, 2002, to arrange for his return to restricted work duties. However, the claimant declined

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to return to work, citing as grounds the fact that Dr. Leestma had not given him a medical release and that he did not believe he should be driving to and from work due to the pain medication he was taking.

On April 14, 2002, the claimant retrieved a full-size Harley Davidson motorcycle that had been leased to a customer through the motorcycle rental business he operated with his wife. On the return trip, the claimant was riding the motorcycle on a highway and traveling at approximately 50 miles per hour when another driver pulled out in front of him. The claimant swerved quickly to avoid a collision, but the motorcycle slid out from under him.

Following the motorcycle accident, the claimant was taken to the emergency room at Provena St. Mary's Hospital, where he complained of pain in his right chest, right leg, high thoracic area, and lower back. He was diagnosed with a right rib fracture and a right clavicle fracture. A lumbar spine MRI demonstrated evidence of a grade-1 spondylolisthesis of L5 and S1 and instrumentation at L4-S1.

Though the claimant testified that he experienced a "small" increase in his lower-back pain after the motorcycle accident, the hospital records reflect that he complained of severe lower-back pain on April 16 and April 18, 2002, and that he was discharged on April 19, 2002, with the understanding that he would follow up with Dr. Bernstein for treatment of his back.

The claimant saw Dr. Leestma on April 22, 2002, and

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described the circumstances of the motorcycle accident. Dr. Leestma noted that the claimant had been hospitalized due to rib and clavicle fractures, as well as back pain, and prescribed pain medication. When the claimant returned three days later, Dr. Leestma altered his pain medication and specifically noted that he was "unable to return to alternate work program due to back problem."

Based on Dr. Leestma's April 11, 2002 recommendation, the claimant saw Dr. Bernstein on May 2, 2002. During that visit, Dr. Bernstein noted that the claimant had done "reasonably well" and had resumed working after the September 2001 lumbar fusion, but had developed "severe worsening low back pain" after falling from his truck on March 2, 2002. Dr. Bernstein also noted that the claimant had experienced "severe discomfort" since the work accident and that he had sustained rib and clavicle fractures and mildly aggravated his lower back in the subsequent motorcycle accident. Dr. Bernstein noted some diffuse tenderness over the lumbar spine and negative straight leg raising, and he prescribed physical therapy. Though the claimant attended physical therapy between May 7 and June 5, 2002, he reported no improvement in his back pain during that time.

On May 16, 2002, the claimant returned to Dr. Diveris, who described his right shoulder as virtually symptom-free following the subacromial injection in April. Dr. Diveris did not recommend any additional treatment for the claimant's right

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shoulder.

During a visit with Dr. Bernstein on June 6, 2002, the claimant complained of pain in his neck, mid-back, and lower back. According to Dr. Bernstein, the lower-back pain was the claimant's "chief complaint." Dr. Bernstein reviewed the MRI scans of the claimant's cervical, thoracic, and lumbar spine, taken in mid-April 2002, and interpreted the lumbar spine scan as showing diffuse degenerative changes and recommended a trial of epidural steroid injections. The claimant subsequently underwent three such injections, as well as a myelogram, and an EMG. Following this treatment and testing, Dr. Bernstein prescribed a discogram, but the claimant did not schedule this procedure because it had not been authorized by ABF's workers' compensation insurance provider.

Dr. Bernstein prepared a written report on November 3, 2002, in which he stated that the claimant's symptoms of low-back pain directly resulted from the work-related injury on March 2, 2002. Dr. Bernstein further stated that, although the subsequent motorcycle accident "may have served as an aggravating factor, it appears to be a "temporary aggravation and not materially significant."

The claimant last saw Dr. Bernstein on November 15, 2002. During that visit, the claimant complained of chronic low-back pain, along with severe pain in the right groin and hip. Dr. Bernstein opined that, as of that date, the claimant was unable

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to resume his regular driving duties, and he recommended that the claimant obtain a second opinion from a neurosurgeon and pain specialist.

The claimant returned to Dr. Diveris on September 20, 2002, complaining of pain and swelling in his right shoulder. Upon examination, Dr. Diveris noted a markedly diminished range of shoulder motion, and he administered a second subacromial injection and prescribed physical therapy.

At ABF's request, the claimant was examined by Dr. Mark N. Levin on June 6, 2002. In his written report of that examination, Dr. Mark N. Levin stated that the claimant complained of mid- to low-back pain, numbness and tingling in both buttocks, pain radiating to both legs, and difficulty walking. After conducting a physical examination, Dr. Mark N. Levin noted that the claimant had a markedly antalgic gait and pain in the scapulae and entire thoracic and lumbar spine. Dr. Mark N. Levin described inconsistent results of multiple sensory examinations. Upon review of the claimant's prior diagnostic and treatment records, Dr. Mark N. Levin stated that he believed the claimant's subjective complaints were disproportionate to the objective findings and consistent with symptom magnification. In addition, Dr. Mark N. Levin questioned how the claimant could have operated a motorcycle on April 14, 2002, while experiencing severe back pain. Dr. Mark N. Levin further stated that he believed the claimant was capable of performing transitional

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duties as a supervisory assistant, and he recommended a functional capacity evaluation (FCE) with validity measurement.

After reviewing additional treatment records and test results, Dr. Mark N. Levin prepared a second written report, in which he noted that the diagnostic tests showed no evidence of nerve impingement. Dr. Mark N. Levin concurred in Dr. Bernstein's recommendation that the claimant should undergo an EMG, but he did not agree that a discogram was warranted. Dr. Mark N. Levin again recommended an FCE with validity measurement. Finally, Dr. Mark N. Levin noted that the claimant reported mild aggravation of his lower-back condition as a result of the motorcycle accident.

The claimant sought a second opinion from Dr. Marc A. Levin on December 19, 2002. During this visit, the claimant complained of pain in the low back and in the right buttock, hip and leg, and he indicated that he experienced little relief from the epidural injections and pain medication. Upon examination, Dr. Marc A. Levin described the claimant's gait as "very abnormal" and "almost pathologic." Concluding that the claimant suffered from low-back pain and lumbar radiculopathy, Dr. Marc A. Levin recommended that the claimant consult a comprehensive pain clinic and that he undergo a psychological evaluation, including an MMPI test. Dr. Marc A. Levin also indicated that it might be necessary to proceed with a discogram, and he doubted that the claimant could return to work. After expressing concern as to

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how the claimant could have ridden a motorcycle in April 2002, Dr. Marc A. Levin stated that he had no doubt that the motorcycle accident "quite aggravated [the claimant's] lower back and leg condition."

On April 28, 2003, the claimant underwent an FCE. According to the evaluator, the results of that test showed the claimant to be functioning at a minimal level. However, due to certain inconsistencies, the evaluator believed that the claimant was "capable of functioning at a higher work category than he demonstrated."

In May 2003, Dr. Leestma referred the claimant to Dr. Rifai, a neurosurgeon, for evaluation of his chronic lower-back pain. Dr. Rifai examined the claimant on June 5, 2003, and noted an abnormal gait, decreased range of motion in the cervical and lumbar spine and negative straight leg raising bilaterally. He reviewed the claimant's lumbar spine MRI and did not find any indication that surgery was required. Dr. Rifai recommended that the claimant undergo a trial of an intrathecal morphine pump, and after the trial proved to be successful, he implanted an intrathecal morphine pump on July 11, 2003.

On August 19, 2003, Dr. Leestma issued a written report in which he expressed his opinion that, although the claimant had reported improvement after the implantation of the morphine pump, he remained disabled due to his chronic pain condition.

At his evidence deposition, Dr. Leestma opined that the

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motorcycle accident complicated and added to the claimant's preexisting back pain. When asked whether the motorcycle accident was sufficiently traumatic to remove the work injury from the equation, he indicated that it "certainly won't remove it" and that it was "additive" in nature. Dr. Leestma further stated that the records documenting the claimant's hospital stay after the motorcycle accident did not reflect any objective evidence that the motorcycle accident had permanently injured the claimant's back. According to Dr. Leestma, both the work accident on March 2, 2002, and the subsequent motorcycle accident aggravated the claimant's back condition, and he opined that the claimant's current low-back condition stemmed from multiple causes, including the work accident. Dr. Leestma also testified that he had not released the claimant to return to work since the March 2, 2002, employment accident.

Dr. Bernstein testified at his evidence deposition that the work-related accident was responsible for the lower-back pain for which he saw the claimant on May 2, 2002. In Dr. Bernstein's opinion, the claimant's April 2002 hospitalization was due to multiple injuries, including trauma to the lower back. Dr. Bernstein further testified that nothing in the hospital records or in Dr. Leestma's treatment notes caused him to change his opinion that the work accident aggravated the claimant's lumbar spine condition.

The parties stipulated that the claimant sustained a work-

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related accident on March 2, 2002, that his average weekly wage was \$1,251.72, and that ABF had paid a total of \$54,479.63, including TTD benefits and medical expenses. In addition, the claimant presented evidence of unpaid medical bills totaling \$1,898.76.

Upon consideration of the evidence presented and the parties' stipulations, the arbitrator found that the claimant sustained a work-related accident on March 2, 2002, but that the claimant's current condition of ill-being in his lower back and right shoulder was not causally connected to that accident because it resulted from the April 14, 2002, motorcycle accident, which constituted an independent, intervening cause. After finding that ABF had previously paid a total of \$54,479.63 as a result of the injury, including temporary total disability (TTD) benefits and medical expenses, the arbitrator found that the claimant was not entitled to additional benefits under the Act.

The claimant sought review of the arbitrator's decision before the Commission. In a unanimous decision dated March 17, 2005, the Commission affirmed and adopted the findings of the arbitrator.

The claimant filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court reversed that portion of the Commission's decision finding that the condition of ill-being in the claimant's lower back was not causally connected to his employment accident and

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remanded the cause to the Commission for a decision regarding the plaintiff's entitlement to further benefits in connection with the injury to his lower back. The circuit court confirmed the Commission's decision in all other respects.

ABF filed a notice of appeal challenging the circuit court's decision, but the appeal was dismissed for lack of jurisdiction based on the fact that the circuit court's order did not constitute a final and appealable judgment.

On remand, the Commission found that the claimant had established a causal connection between the employment accident of March 2, 2002, and the current condition of ill-being in his lower back. In particular, the Commission determined that the claimant's subsequent motorcycle accident on April 14, 2002, had not severed the chain of causation stemming from the work injury. This conclusion was based on the opinions of the claimant's treating physicians, who stated that the work accident was one of several factors contributing to the claimant's lower-back condition, and on the fact that ABF's examiner had not discounted the employment accident as a cause of the condition of ill-being in the claimant's lower back. Yet, the Commission found that the claimant was no longer temporarily totally disabled after August 19, 2003. The Commission also acknowledged the inconsistency between the claimant's physical complaints and his motorcycle usage on April 14, 2002, but specifically found that such usage did not defeat his claim for ongoing benefits.

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Based on the evidence presented and the stipulations of the parties, the Commission found that the claimant was entitled to TTD benefits for a period of 74 5/7 weeks, representing the periods of March 3, 2002 through March 11, 2002, and March 23, 2002 through August 19, 2003. The Commission awarded the claimant \$1,898.76 for reasonable and necessary medical expenses and found that ABF was entitled to a credit in the amount of \$54,479.63 for payments made prior to the arbitration hearing. The Commission also remanded the cause for further proceedings for a determination of a further amount of TTD or permanent disability benefits pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980). ABF filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision on remand, and this appeal followed.

On appeal, ABF argues that the circuit court erred in setting aside the Commission's original decision which found that the motorcycle accident was an intervening cause that broke the causal connection between the claimant's work injury and his current condition of ill-being. Where, as here, the trial court reverses the Commission's initial decision and the Commission enters a new decision on remand, this court must decide whether the Commission's initial decision was proper. Vogel v. Industrial Commission, 354 Ill. App. 3d 780, 785-86, 821 N.E.2d 807 (2005).

Whether a causal relationship exists between a claimant's

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employment and his condition of ill-being is a question of fact to be resolved by the Commission. Certi-Serve, Inc. v. Industrial Commission, 101 Ill. 2d 236, 244, 461 N.E.2d 954 (1984). Factual determinations of the Commission will be overturned only if they are against the manifest weight of the evidence. Franklin v. Industrial Commission, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 689 (2004). A finding is contrary to the manifest weight of the evidence where the opposite conclusion is clearly apparent. Teska v. Industrial Commission, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1 (1994). While courts of review are reluctant to set aside a Commission's decision on a factual question, we will not hesitate to do so where the clearly evident, plain and indisputable weight of the evidence compels an apparent, opposite conclusion. Teska, 266 Ill. App. 3d at 742. Moreover, it is firmly established that the Commission's findings must be based on the evidence introduced in the record. See Cook County v. Industrial Commission, 68 Ill. 2d 24, 30, 368 N.E.2d 1292 (1977); Paoletti v. Industrial Commission, 279 Ill. App. 3d 988, 999, 665 N.E.2d 507 (1996).

To obtain compensation under the Act, a claimant must show by a preponderance of the evidence that he or she has suffered a disabling injury arising out of and in the course of his or her employment. 820 ILCS 305/2 (West 2004); Sisbro, Inc. v. Industrial Commission, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). The "arising out of" component addresses the causal

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connection between a work-related injury and the claimant's condition of ill-being. Sisbro, 207 Ill. 2d at 203; Vogel, 354 Ill. App. 3d at 786. An employment injury need not be the sole or principal cause of the disability as long as it constitutes a causative factor in the resulting condition of ill-being. Sisbro, 207 Ill. 2d at 205; Vogel, 354 Ill. App. 3d at 786.

In general, every natural consequence that flows from an injury arising out of and in the course of a claimant's employment is compensable unless an independent intervening act breaks the causal connection between the work-related injury and an ensuing disability or injury. Vogel, 354 Ill. App. 3d at 786; Teska, 266 Ill. App. 3d at 742. An independent, intervening accident is one which breaks the chain of causation between a work-related injury and an ensuing disability or injury. International Harvester Co. v. Industrial Commission, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970); Teska, 266 Ill. App. 3d at 742; Mendota Township High School v. Industrial Commission, 243 Ill. App. 3d 834, 836, 612 N.E.2d 77 (1993). A nonemployment-related factor which is a contributing cause with the compensable injury in an ensuing injury or disability, however, does not constitute an intervening cause sufficient to break the causal connection between the employment and the claimant's condition of ill-being. International Harvester Co., 46 Ill. 2d at 247; Teska, 266 Ill. App. 3d at 742; Mendota Township High School, 243 Ill. App. 3d at 837. It is irrelevant that other incidents, whether or not they

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are work-related, may have aggravated the claimant's condition. Vogel, 354 Ill. App. 3d at 786; Lasley Construction Co. v. Industrial Commission, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5 (1995). Thus, where the claimant's condition is weakened by an employment injury, a subsequent accident that aggravates the condition does not break the causal chain. Vogel, 354 Ill. App. 3d at 786.

In this case, the evidence presented at the arbitration hearing established that, following the employment injury on March 2, 2002, the claimant experienced pain in his lower back and was still being treated for that condition as of April 14, 2002, the date on which he was involved in the motorcycle accident. In addition, both Dr. Leestma and Dr. Bernstein testified that the work-related injury aggravated the claimant's lumbar spinal condition and constituted a cause of the current condition of ill-being in his lower back. Moreover, all of the doctors who examined the claimant, including Dr. Mark N. Levin, ABF's examiner, reported that the work-related injury to the claimant's lower back had been aggravated by the subsequent motorcycle accident. Thus, the undisputed medical evidence established that the claimant's lower-back condition resulting from the March 2, 2002, work-related injury persisted as of mid-April and that the motorcycle accident merely exacerbated and contributed to the condition and symptoms resulting from the employment injury. There was no evidence that the motorcycle

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accident changed the nature of the claimant's lower-back injury, other than to aggravate it, and ABF presented no evidence indicating that the employment injury did not play a causative role in claimant's current condition of ill-being. Based upon the record before us, we conclude that the Commission's original decision, finding no causal relationship between the claimant's work injury and the condition of ill-being in his lower back, is against the manifest weight of the evidence.

In reaching this conclusion, we find that ABF's reliance on the decisions in Zion-Benton Township High School District 126 v. Industrial Commission, 242 Ill. App. 3d 109, 609 N.E.2d 974 (1993), and Ditola v. Industrial Commission, 216 Ill. App. 3d 531, 576 N.E.2d 379 (1991), is misplaced. In both of those cases, the claimants had returned to work for several months and were no longer receiving substantial treatment for their initial work injuries when the subsequent accidents occurred. See Zion-Benton Township High School District 126, 242 Ill. App. 3d at 114; Ditola, 216 Ill. App. 3d at 535. Here, unlike in Zion-Benton Township High School District 126 and Ditola, there was no circumstantial evidence from which the Commission reasonably could have inferred that the claimant's employment-related low-back injury had been resolved and that the subsequent motorcycle accident constituted an independent, intervening cause that broke the chain of causation stemming from the earlier injury. In particular, the record does not contain any evidence that the

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claimant's lower-back condition had been resolved or that he had been released to return to full duty at the time the motorcycle accident occurred. To the contrary, the record affirmatively established that the claimant was still being treated for the work-related injury to his lower back when the motorcycle accident occurred and aggravated that condition. Consequently, we find Zion-Benton Township High School District 126 and Ditola to be factually distinguishable and not controlling here.

We next address ABF's assertion that the claimant's workers' compensation benefits should have been reduced or suspended, pursuant to section 19(d) of the Act, based on his alleged injurious behavior. Specifically, ABF claims that the claimant's conduct in riding a motorcycle long distance and at high speed while he was taking pain medication constituted injurious behavior justifying the denial of benefits under the Act.

Initially, we observe that ABF's argument focuses primarily on the fact that the first circuit court decision, which reversed in part and remanded the cause for a determination of the claimant's entitlement to further benefits for his low-back condition, erroneously stated that the section 19(d) argument had been waived because ABF failed to raise it before the Commission. While we agree that the circuit court's finding of waiver was incorrect, we conclude that the error is of no import where the Commission, in issuing its revised decision after remand, specifically found that the claimant's motorcycle usage did not

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defeat his claim for ongoing benefits and where that decision was affirmed by the circuit court on judicial review.

Under section 19(d) of the Act, the Commission may, in its discretion, reduce or suspend the compensation of any employee who persists in injurious practices tending to imperil or delay recovery. 820 ILCS 305/19(d) (West 2004); Keystone Steel & Wire Co. v. Industrial Commission, 72 Ill. 2d 474, 481, 381 N.E.2d 672 (1978); Global Products v. Workers' Compensation Commission, 392 Ill. App. 3d 408, 412, 911 N.E.2d 1042 (2009). Because a decision to suspend or reduce benefits under section 19(d) is within the discretion of the Commission, we will overturn its decision only where the record demonstrates that the Commission abused its discretion. Global Products, 392 Ill. App. 3d at 412. An abuse of discretion occurs where no reasonable person could agree with the position adopted by the Commission. Global Products, 392 Ill. App. 3d at 412; Certified Testing v. Industrial Commission, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602 (2006).

Here, both Dr. Mark N. Levin and Dr. Marc A. Levin questioned how the claimant could have operated a motorcycle on April 14, 2002, while experiencing severe back pain, but neither doctor expressed the opinion that such conduct, in and of itself, would have threatened or delayed his recovery. Moreover, though the claimant declined to return to light-duty work on April 12, 2002, in part, because he did not believe he should be driving to

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and from work due to the pain medication he was taking, there is no evidence in the record establishing that any of the claimant's doctors had ordered him to refrain from riding a motorcycle while on pain medication. Considering the record presented, we cannot say that the Commission abused its discretion in rejecting ABF's contention that the claimant should be disqualified from receiving additional compensation based on his alleged injurious conduct.

Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the Commission's decision after remand, and remand the cause for further proceedings.

Affirmed and remanded to the Commission.

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