*354 Ill. App. 3d 780, *; 821 N.E.2d 807, **;*
*2005 Ill. App. LEXIS 8, ***; 290 Ill. Dec. 495*

BRIAN **VOGEL,** Appellee, v. THE ILLINOIS **WORKERS' COMPENSATION COMMISSION** et al. (Hogan's Plumbing, Inc., Appellant). HOGAN'S PLUMBING, INC., Appellant, v. THE ILLINOIS **WORKERS' COMMISSION** et al. (Brian **Vogel,** Appellee).

Nos. 2-04-0291WC, 2-04-0293WC cons.

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, INDUSTRIAL **COMMISSION** DIVISION

354 Ill. App. 3d 780; 821 N.E.2d 807; 2005 Ill. App. LEXIS 8; 290 Ill. Dec. 495

January 4, 2005, Filed

SUBSEQUENT HISTORY: [*1]** As Corrected January 24, 2005. As Corrected February 1, 2005. Released for Publication February 4, 2005.

PRIOR HISTORY: Appeal from the Circuit Court of Du Page County. No. 02--MR--0368. Honorable Bonnie M. Wheaton, Judge, Presiding.

DISPOSITION: Affirmed and remanded to Industrial **Commission.**

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer challenged a decision from the Circuit Court of Du Page County (Illinois), which confirmed a decision by appellee Illinois Industrial **Commission** awarding appellee **worker** 85 weeks of total temporary disability (TTD) benefits and medical expenses and ordering the employer to authorize surgery prescribed by the **worker's** treating physician.

OVERVIEW: The **worker** sustained injuries while working for the employer. His initial award was for 45 weeks of TTD on a finding that injuries from three automobile accidents broke the causal chain and his subsequent ill-being was not causally related to the work injury. On judicial review, the trial court found that the decision was against the manifest weight of the evidence and remanded to the **commission.** On remand, the **commission** awarded the **worker** 85 weeks of TTD benefits. The trial court confirmed the **commission's** decision. The employer appealed, arguing the trial court erred in holding that the initial decision was against the manifest weight of the evidence. The court found that the trial court appropriately applied the causation principle that because the **worker's** condition was weakened by a work-related accident, the subsequent accidents aggravating the condition did not break the causal chain. The **worker's** first auto accident clearly aggravated his condition, the same analysis applied to the subsequent auto accidents, and there was no evidence that the accidents changed the nature of the injury other than to aggravate it. Reversal of the **commission's** initial decision was proper.

OUTCOME: The court affirmed the award in favor of the **worker** and remanded the matter to the **commission** for further proceedings.

CORE TERMS: claimant, auto accident, surgery, fusion, pseudoarthrosis, pain, work-related, ill-being, manifest, graft, causative, chain, neck, arbitrator, causal connection, current condition, experienced, aggravated, broke, brace, ray, underwent, arm, initial decision, intervening, causation, sneezing, episode, causal, struck

LEXISNEXIS® HEADNOTES Hide

Administrative Law > Judicial Review > Standards of Review > General Overview
Civil Procedure > Appeals > Standards of Review > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 Where a trial court reverses the Illinois Industrial **Commission's** initial decision and the **Commission** enters a new decision on remand, an appellate court must decide whether the **Commission's** initial decision was proper. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN2 To obtain **compensation** under the **Workers' Compensation** Act, 820 Ill. Comp. Stat. 305/2, 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. The "arising out of" component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. A claimant need prove only that some act or phase of his or her employment was a

causative factor in the ensuing injury. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries
HN3 Every natural consequence that flows from an injury that arose out of and in the course of a claimant's employment is compensable unless caused by an independent **intervening** accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury. That other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
HN4 Whether a causal connection exists is a question of fact for the Illinois Industrial **Commission** and a reviewing court will overturn the **Commission's** decision only if it is against the manifest weight of the evidence. It is the **Commission's** duty to resolve conflicts in the evidence, particularly medical opinion evidence. The test is whether the evidence is sufficient to support the **Commission's** finding, not whether the appellate court or any other tribunal might reach an opposite conclusion. For the **Commission's** decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Course of Employment > Recreational Activities
HN5 When a **workers' compensation** claimant's condition is weakened by a work-related accident, a subsequent accident that aggravates the condition does not break the causal chain. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Hogan's Plumbing, Inc., Appellant (2-04-0291WC, 2-04-0293WC): Paul W. Pasche, Brady, Connolly & Masuda, P.C., Attorneys at Law, Chicago, IL.

For Industrial **Commission** of Illinois, Appellee (2-04-0291WC, 2-04-0293WC): Industrial **Commission** of Illinois, Dennis R. Ruth, Chairman, Chicago, IL.

For Brian **Vogel,** Appellee (2-04-0291WC, 2-04-0293WC): James J. Marszalek, Marszalek & Marszalek, Attorneys at Law, Chicago, IL.

JUDGES: JUSTICE CALLUM delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

OPINION BY: CALLUM

OPINION

[808]** **[*781]** JUSTICE CALLUM delivered the opinion of the court.

I. INTRODUCTION

Claimant, Brian **Vogel,** sustained cervical injuries while working for employer, Hogan's Plumbing, Inc. An arbitrator awarded claimant 45 weeks of temporary total disability (TTD) benefits and $ 32,987.80 in medical expenses. The arbitrator found that injuries claimant received as a result of three automobile accidents broke the causal chain and therefore that **[**809]** his current condition of ill-being was not causally related to his work injury. The Industrial **Commission** [1] **(Commission)** adopted the arbitrator's findings. On judicial review, the trial court found that the **Commission's** decision was against the manifest weight of the evidence and contrary to law. On remand, the **Commission** **[***2]** awarded claimant 85 weeks of TTD benefits and $ 36,915 in medical **[*782]** expenses and ordered employer to authorize surgery prescribed by claimant's treating physician. The trial court confirmed the **Commission's** decision on remand. On appeal, employer argues that the trial court erred in holding that the **Commission's** decision was against the manifest weight of the evidence. We affirm.

FOOTNOTES

1 The name of the Industrial **Commission** was changed to the Illinois **Workers' Compensation Commission** on January 1, 2005. However, for the sake of consistency, we will continue to use the name "Industrial **Commission**" in this case.

II. BACKGROUND

The arbitration hearing took place on August 23, 2001. Claimant began working for employer on June 22, 1998. On July 10, 1998, he was delivering a whirlpool tub to a customer's home. While dragging the tub, which weighed 275 to 300 pounds, he tripped over some debris. Claimant felt pain in his neck that radiated down his right arm and into his fingers. Claimant reported the accident upon returning to employer's office. He continued working until July 26, 1998, when he went to the emergency room at Central Du Page Hospital.

Claimant saw Dr. Harb Boury, a neurosurgeon, on July 29, 1998. Dr. Boury diagnosed herniated discs at C4-C5 and C5-C6 and a bulging disc at C6-C7 and also noted his impression that claimant had a congenitally narrow cervical spinal canal. Dr. Boury ordered claimant off **[***3]** of work.

Claimant underwent surgery on March 12, 1999. Dr. Boury performed an anterior cervical discectomy and fusion at C4-C5 and C5-C6. During his deposition, Dr. Boury testified that claimant's fusion had been progressing nicely. According to Dr. Boury, a person with a job like claimant's typically would not be able to return to work until about six months after the surgery. On April 26, 1999, Dr. Boury reported that X rays showed that the graft height and alignment were well maintained. The bone graft was beginning to fuse but was not yet solid. On June 7, 1999, Dr. Boury reported that an X ray taken on June 4, 1999, showed that the alignment was good and the height of the graft was maintained, but the fusion was not completely solid. He advised claimant to wean himself off of his rigid neck brace over the next 7 to 10 days and, after that period, to continue to wear the brace while driving.

Claimant testified that he "was doing fine" and was experiencing no pain until he was involved in an automobile accident on June 9, 1999. Another car hit claimant's vehicle from behind while claimant was traveling to his first session of physical therapy. Claimant was wearing a soft brace **[***4]** at the time. After the accident, claimant experienced pain in his neck, shoulder, and arm.

Claimant saw Dr. Boury on June 10, 1999, and informed him about the auto accident. Dr. Boury reviewed the X rays taken at the emergency room and determined that the bone graft remained in **[*783]** place and the alignment remained satisfactory. He advised claimant to wear a rigid neck brace for another six weeks.

[810]** Claimant saw Dr. Boury again on June 14, 1999. Claimant complained of pain in the upper part of his right arm. The pain radiated downward but not all the way into his hand. Dr. Boury testified that claimant's symptoms were "almost like a throw back to" what claimant experienced before the surgery. On July 12, 1999, claimant informed Dr. Boury that he had taken a job delivering pizzas. Dr. Boury advised claimant that such work was appropriate because it was "not a physical job." An X ray taken on July 24, 1999, showed that the graft was in a good position and the alignment was satisfactory.

A functional capacity evaluation conducted on August 16, 1999, concluded that claimant was able to lift 50 pounds occasionally and could function in a job requiring a medium physical demand level. Claimant's **[***5]** job with employer was rated at the very heavy physical demand level. Claimant underwent two weeks of work hardening but was unable to achieve any physical or functional gains. On August 30, 1999, Dr. Boury authorized claimant to return to work within the restrictions prescribed in the functional capacity evaluation.

Claimant remained symptomatic, and, in September 1999, Dr. Boury referred claimant to Dr. Steven Baker, an orthopaedic surgeon. In his referral letter to Dr. Baker, Dr. Boury related claimant's complaint that "ever since the car accident, my shoulder never felt the same." Dr. Baker noted that claimant's condition failed to improve with physical therapy and referred claimant back to Dr. Boury.

On October 5, 1999, claimant underwent a myelogram and postmyelogram CT scan. These studies showed a slight narrowing of the neuroforamina on the right side at C5-C6. Dr. Boury advised claimant that he probably would develop pseudoarthrosis, or a failed fusion, at that level and referred him to Dr. Fred Geisler, a neurosurgeon. Dr. Geisler examined claimant. A CT scan performed at Dr. Geisler's behest on November 5, 1999, revealed a failed fusion, at C5-C6.

Dr. Boury testified that **[***6]** he wanted to attempt conservative treatment before considering surgery. He advised claimant to wear a neck brace in the hope that the external fixation would help the fusion to become solid. Also, he prescribed physical therapy. When the conservative treatment concluded, Dr. Boury believed that claimant required a second surgery, including an additional graft and plating.

Dr. Boury opined that the problems claimant experienced after the auto accident were caused primarily by the auto accident and not claimant's work accident. According to Dr. Boury:

> "The accident clearly played a major role in his worsening clinical **[*784]** condition. And *** what's unfortunate is the timing of the accident, that the accident happened not quite three months *** from the anniversary of his surgery; that a fusion is not solid by that time, *** and, therefore, the accident clearly will set back the fusion and sometimes may lead into a pseudoarthrosis, which [proved] to be the case."

Thus, Dr. Boury believed that, if claimant had not been involved in the auto accident, he probably would not have developed pseudoarthrosis. He explained that pseudoarthrosis "is a very specific term used to describe **[***7]** the *** lack of a bony fusion. In and of itself, it implies a pre-existing operation."

Claimant was involved in a second automobile accident on April 7, 2000. Again, he was struck from the rear. Claimant complained of pain in his left shoulder and arm, pain in his lower back, pain in his right upper arm, and numbness in his **[**811]** right middle finger and right ring finger. X rays taken at the emergency room showed the incomplete fusion at C5-C6 and the narrowing of the neural foramina at C4-C5 and C5-C6.

Claimant was involved in a third accident on June 18, 2000, when he struck a vehicle that had pulled out in front of him. Claimant's head struck the windshield. Emergency room X rays revealed the incomplete fusion at C5-C6, effusion at C4-C5, and narrowing at C6-C7. Dr. Boury opined that "all these accidents are aggravating the pre-existing condition which is pseudoarthrosis at [C]5-[C]-6. The pseudoarthrosis is *** a result of the first accident of 6-9-99."

Claimant acknowledged that he exercised at a health club regularly from March 1, 2000, until May 31, 2000. He rode a stationary bicycle and did some weight training, mostly using his legs. He did upper body work to the extent he **[***8]** could tolerate it and lifted no more than 25 to 50 pounds. Claimant worked full time as a driver for Black Gold Septic from March 13, 2000, until April 24, 2001. Claimant injured his ankle while working for Black Gold Septic and, at the time of the hearing, was receiving TTD benefits for that injury. At the time of the hearing, claimant had lawsuits pending against the other drivers involved in claimant's first and third auto accidents.

At employer's request, Dr. Gary Skaletsky, a neurosurgeon, examined claimant on March 8, 2001, and reviewed claimant's medical records. He opined that the graft at C5-C6 failed to fuse "for inherent biological reasons" and that the June 9, 1999, auto accident did not contribute to claimant's pseudoarthrosis. According to Dr. Skaletsky, the auto accident at most would have delayed the fusion but would not have prevented the fusion from occurring. He added that the postaccident studies showing that the bone graft remained properly aligned **[*785]** indicated that the accident did not contribute to claimant's condition. Accordingly, he opined that the automobile accidents did not contribute in any way to claimant's current condition. Dr. Skaletsky believed that **[***9]** one cause

contributing to claimant's pseudoarthrosis was his failure to comply with Dr. Boury's directive to wear a rigid brace while driving. He explained that any activity that causes hypermobility of the neck while fusion is occurring could delay the fusion and lead to pseudoarthrosis. Also, he believed that claimant's work at Black Gold Septic was inappropriate given claimant's work restrictions and was probably a factor contributing to claimant's condition.

The arbitrator awarded claimant TTD benefits from July 28, 1998, until June 9, 1999, or 45 weeks, and $ 32,987.80 in medical expenses. Relying on Dr. Boury's opinion, the arbitrator found that the auto accidents "further aggravated [claimant's] medical condition and resulted in the need for additional medical treatment and lost time." Accordingly, claimant's current condition of ill-being was not causally related to the July 10, 1998, work injury. The **Commission** adopted the arbitrator's decision.

Claimant sought judicial review. On October 7, 2002, the trial court ruled that the **Commission's** decision was "contrary to law and [against] the manifest weight of the evidence in that the 6/9/99 auto accident and subsequent **[***10]** auto accidents did not break the chain of causation between [claimant's] 7/10/98 work accident and his pseudoarthrosis, in that the work and auto accidents were concurrent causes." The trial court remanded the cause to the **Commission** with instructions to enter an award consistent with the court's ruling. Employer appealed the trial court's ruling, but this court dismissed the appeal be cause **[**812]** a final judgment had not yet been entered. ***Vogel*** *v. Industrial Comm'n*, No. 2-02-1211 (2003) (unpublished order under Supreme Court Rule 23).

On remand, the **Commission** awarded claimant TTD benefits from July 28, 1998, through March 13, 2000, or 85 weeks, and $ 36,915 in medical expenses and found that claimant was entitled to the second surgery that Dr. Boury had recommended. The trial court confirmed the **Commission's** decision, and employer timely appealed.

III. DISCUSSION

On appeal, employer argues that the trial court erred in setting aside the **Commission's** original decision that the auto accidents were **intervening** events that broke the causal connection between claimant's work injury and his current condition of ill-being. HN1 Where, as here, the trial court reverses the **Commission's [***11]** initial decision and the **Commission** enters a new decision on remand, this court must **[*786]** decide whether the **Commission's** initial decision was proper. *Inter-City Products Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 185, 196, 759 N.E.2d 952, 259 Ill. Dec. 891 (2001).

HN2 To obtain **compensation** under the **Workers' Compensation** Act (820 ILCS 305/2), 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. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). The "arising out of" compone nt addresses the causal connection between a work-related injury and the claimant's condition of ill-being. *Sisbro*, 207 Ill. 2d at 203. A claimant need prove only that some act or phase of his or her employment was a causative factor in the ensuing injury. *Twice Over Clean, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 638, 643, 809 N.E.2d 778, 284 Ill. Dec. 212 (2004), *appeal allowed* 211 Ill. 2d 617, 823 N.E.2d 979, 2004 Ill. LEXIS 1473, No. 98748. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting **[***12]** condition of ill-being. *Sisbro*, 207 Ill. 2d at 205.

HN3 Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent **intervening** accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1, 203 Ill. Dec. 574 (1994). That other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant. *Lasley Construction Co. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5, 211 Ill. Dec. 345 (1995); see also *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970) (where the work injury itself causes a subsequent injury, the chain of causation is not broken).

HN4 Whether a causal connection exists is a question of fact for the **Commission,** and a reviewing court will overturn the **Commission's** decision only if it is against the manifest weight of the evidence. *Navistar International Transportation Corp. v. Industrial Comm'n*, 331 Ill. App. 3d 405, 415, 771 N.E.2d 35, 264 Ill. Dec. 631 (2002). **[***13]** It is the **Commission's** duty to resolve conflicts in the evidence, particularly medical opinion evidence. *Navistar*, 331 Ill. App. 3d at 415. The test is whether the evidence is sufficient to support the **[**813]** **Commission's** finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002). For the **Commission's** decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729-30, 734 N.E.2d 482, 248 Ill. Dec. 554 (2000).

The trial court appropriately applied the causation principles discussed above in ruling that the **Commission's** original decision was **[*787]** against the manifest weight of the evidence. This court has recognized repeatedly that, HN5 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. See *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 87, 656 N.E.2d 1084, 212 Ill. Dec. 250 (1995). For example, in *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 612 N.E.2d 77, 183 Ill. Dec. 820 (1993), **[***14]** the claimant injured his lower back while playing basketball in connection with his duties as an athletic coach. Less than one month later, the claimant aggravated his condition while playing racquetball. The claimant underwent conservative treatment, but his condition worsened. Several months later, the claimant suffered a sneezing episode while attending a high school football game. Immediately, he experienced excruciating lower-back pain that radiated down his leg. There was medical evidence that the basketball injury probably resulted in a tear of the posterior longitudinal ligament or of the annulus fibrosis, which weakened and ruptured during the sneezing episode.

The court noted that, although there was no dispute that the sneezing episode was the immediate cause of the rupture, it was not necessarily the sole cause. *Mendota*, 243 Ill. App. 3d at 837. "Had it not been for the original basketball injury, in all probability claimant's back problems would not have reached the stage they did in such a short period of time." *Mendota*, 243 Ill. App. 3d at 837. The court held that the **Commission's** finding that the racquetball injury and the sneezing **[***15]** episode were only contributing, not **intervening**, causes was not against the manifest weight of the evidence. *Mendota*, 243 Ill. App. 3d at 837-38; see also *International Harvester*, 46 Ill. 2d at 247 (evidence supported **Commission's** finding that claimant was suffering from a continuing condition of traumatic neurosis that resulted from a work-related head injury and that the existence of the condition was a causative factor in the total and permanent disability that occurred four years later when claimant's wife struck him); *Fermi National Accelerator Lab v. Industrial Comm'n*, 224 Ill. App. 3d 899, 908, 586 N.E.2d 750, 166 Ill. Dec. 792 (1992) (second fall involving use of crutches was not an **intervening** accident that broke the causal connection between condition of ill-being and first fall where claimant would not have been using the crutches but for the first injury).

This court has applied the above principles to overturn a **Commission** finding that a second accident broke the causal connection between the claimant's work injury and his subsequent condition of ill-being. In *Teska*, the claimant sustained a cervical injury while at work. He underwent **[***16]** surgery and was released to work about two months later. The claimant continued to experience numbness and pain. An MRI taken several months after the surgery revealed a recurrent **[*788]** herniated disc at the same level upon which the surgery was **[**814]** performed. About one year after the surgery, the claimant experienced sharp pain while bowling and did not return to work thereafter.

The court reasoned that merely because the claimant experienced an upsurge of neck pain while bowling did not mean that the causal connection was broken. *Teska*, 266 Ill. App. 3d at 742-43. According to the court, the claimant's condition would not have progressed to the point it did but for his original work-related accident. *Teska*, 266 Ill. App. 3d at 742. Because the claimant's work-related accident played a causative role in his current condition of ill-being, the **Commission's** decision to the contrary was against the manifest weight of the evidence. *Teska*, 266 Ill. App. 3d at 743.

Here, claimant's first auto accident clearly aggravated his condition resulting from his work-related injury. There is no dispute that, when claimant was involved in the first auto accident, **[***17]** he had not fully recovered from his surgery. Just before the first auto accident, Dr. Boury reported that the fusion was progressing nicely but was not complete. Claimant had not yet been released to full-duty work. Even if the accident was responsible for the failed fusion, such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of claimant's work injury.

The evidence that appears to support the **Commission's** initial decision is illusory. Claimant testified that he "was doing fine" and was experiencing no pain until he was involved in the first auto accident. This testimony about a lack of symptoms does nothing to change the fact that claimant was still recovering from the surgery and therefore was susceptible to complications such as pseudoarthrosis. The **Commission** relied on Dr. Boury's opinion that the first auto accident played a "major" role in claimant's worsening clinical condition. Dr. Boury's opinion, however, does nothing to eliminate claimant's work-related injury as a causative factor in his current condition of ill-being. Dr. Boury recognized that the timing of the auto accident shortly after the surgery, while claimant **[***18]** was still recovering, was a crucial factor. Also, he explained that the existence of pseudoarthrosis implies a previous surgery. Although Dr. Boury testified that the pseudoarthrosis would not have occurred but for the auto accident, it is equally true that the pseudoarthrosis would not have occurred but for claimant's work injury. Therefore, Dr. Boury's opinion merely established that the auto accident was a concurrent cause, along with the work injury.

The same analysis applies to the subsequent auto accidents. There was no evidence that the accidents changed the nature of the injury other than to aggravate it, and the need for the second surgery became **[*789]** apparent before the second auto accident. Therefore, the inescapable conclusion is that claimant's work-related injury was a causative factor in his resulting condition.

We note that the arbitrator and the **Commission** never expressly found that the auto accidents broke the causal chain, but instead found merely that they "further aggravated [claimant's] medical condition." The law is clear, however, that the fact that other nonwork-related accidents may have aggravated claimant's condition is irrelevant.

In *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 114, 609 N.E.2d 974, 182 Ill. Dec. 440 (1993), **[***19]** and *Ditola v. Industrial* **[**815]** *Comm'n*, 216 Ill. App. 3d 531, 535-36, 576 N.E.2d 379, 159 Ill. Dec. 710 (1991), the courts upheld **Commission** decisions finding that the second accidents broke the causal chains. Those decisions are distinguishable. The claimants in those cases had returned to work after receiving treatment for their work injuries and had been working for several months at the times of their second accidents. Here, claimant was still recovering from surgery and had not yet been released to return to full-duty work.

IV. CONCLUSION

For the foregoing reasons, the trial court properly ruled on October 7, 2002, that the **Commission's** initial decision was against the manifest weight of the evidence and remanded the cause so that the **Commission** could enter an award consistent with the court's ruling. The parties do not take issue with any aspects of the **Commission's** decision on remand.

Therefore, the judgment of the circuit court of Du Page County is affirmed and the cause is remanded for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Affirmed and remanded to Industrial **Commission.**

McCULLOUGH, P.J., and **[***20]** HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

*2 IIC 267; 2002 Ill. Wrk. Comp. LEXIS 301, **

Brian Vogel, Petitioner, vs. Hogan **Plumbing,** Respondent.

No. 98WC 42870

INDUSTRIAL COMMISSION OF ILLINOIS

STATE OF ILLINOIS, COUNTY OF KANE

2 IIC 267; 2002 Ill. Wrk. Comp. LEXIS 301

April 3, 2002

CORE TERMS: motor vehicle accident, pain, fusion, cervical, temporary total disability, surgery, right arm, pseudoarthrosis, follow-up, shoulder, motor vehicle, causally, stenosis, surgical, bulging, doctor, brace, neck, physical therapy, written request, car accident, spinal canal, contributed, recommended, compression, aggravated, herniated, numbness, pounds, pizzas

JUDGES: Douglas F. Stevenson; Diane Dickett Smart; Barbara A. Sherman

OPINION:

[*1] DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notices given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical, prospective medical, 19(b)1 dismissal, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 10, 2001 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 42,800.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

NOTICE OF DECISION OF ARBITRATOR

Brian Vogel, Petitioner, vs. Hogan **Plumbing,** Respondent.

CASE NO. 98 WC 42870

Take notice that on OCT 10 2001, there was filed with the Industrial Commission, at Chicago, Illinois, the Decision of the Arbitrator in the above entitled matter, a copy of which Decision is enclosed to you herewith.

DECISION MAILED TO:

0479

98 WC 42870

SERKLAND & MUELHAUSEN **[*3]**

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98 WC 42870

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BEFORE THE ILLINOIS INDUSTRIAL COMMISSION

STATE OF ILLINOIS

COUNTY OF KANE

BRIAN VOGEL Petitioner v. **HOGAN PLUMBING** Respondent

CASE NUMBER: 98 WC 42870

DECISION OF THE ARBITRATOR

An Application for Adjustment of Claim was filed in this matter and notice of hearing mailed to each party. The matter was heard by an Arbitrator designated by the Commission in the City of Geneva, said County and State, on August 23, 2001. After hearing the proofs and allegations of the parties and having made careful inquiry in this matter, the Arbitrator concludes that the parties have stipulated to the following facts: (Arbitrator's Exhibit 1)

1.) On July 10, 1998, the Respondent, Hogan Plumbing, was operating under and subject to the provisions of the Illinois Workers' Compensation Act; and on this date the relationship of employee and employer existed between the Petitioner, Brian Vogel, and said Respondent; on the above mentioned date the Petitioner sustained accidental injuries which arose out of and in the course of the employment [*4] by the Respondent; timely notice of this accident was given the Respondent.

2.) The earnings of the Petitioner during the year next preceding the injury were $ 18,720.00 and that the average weekly wage was $ 360.00.

3.) Petitioner at the time of the injury was 36 years of age, single, and had no children under 18 years of age.

4.) The Respondent has paid $ 1,200 in temporary total disability benefits.

THE ARBITRATOR RENDERS FINDINGS ON THE FOLLOWING DISPUTED ISSUES:

(I) Reasonableness or necessity of medical, surgical, or hospital bills or service;

(J) Amount of compensation due for temporary total disability;

(N) Whether Petitioner's present condition of ill-being is causally related to the injury;

19(b)(1) Dismissal

The Petitioner brought the instant case under section 19(b)(1) of the act. In a pre trail conference, Petitioner's counsel stated that the Petitioner was off of work, receiving temporary total disability for an accident regarding a different employer. The Arbitrator concluded that under *Kaplan v Industrial Commission*, relief under section (b)(1) was inappropriate, and the Arbitrator dismissed the petition *instantor*. However, the **[*5]** parties and the Arbitrator agreed that the case could proceed as a petition under section 8(a) of the Act, requesting future medical payments. The case proceeded.

Accident

The Petitioner, **Brian Vogel,** testified that he was working as a driver/material handler for the Respondent, Hogan's **Plumbing,** Inc. since June 22, 1998, approximately 18 days prior to the date of injury of July 10, 1998. He testified that on July 10, 1998 he was dragging a whirlpool weighing approximately 100 to 200 pounds from his truck into a garage at a job site when he pulled a muscle in his right arm. He was working alone at the time and there were no witnesses to the injury. The Arbitrator notes that accident is undisputed.

In support of the Arbitrator's decision relating to (N) Whether Petitioner's present condition of ill-being is causally related to the injury; the Arbitrator finds the following facts:

The Petitioner was seen initially at Central DuPage Hospital on July 26, 1998 where he reported numbness going down his right arm. He denied any back pain. He was given a soft cervical collar and recommended to follow-up with Dr. Boury. An MRI scan performed on July 28, 1998 revealed evidence **[*6]** of spinal stenosis at C5-6 and C6-7 and a probable small bulging or herniated disc at the right of the midline level at C5-6 and a bulging disc at C6-7. (Pet. Ex. 1) It was also noted that Mr. **Vogel** has a congenitally small

spinal canal which contributed to the level of spinal stenosis that was seen. There was borderline compression of the spinal cord at C5-6 and no significant compression of the spinal cord at C6-7. (Id)

A follow-up with Dr. Boury on July 29, 1998 revealed a similar history of the alleged injury. He reported radiating pain down the right arm. There was occasional numbness and tingling at the distribution of the right middle finger and the right ring finger. Dr. Boury diagnosed a herniated disc at C5-6 with cord compression and mild deformity, bulging disc at C6-7 and congenital cervical spinal canal stenosis along with right sided C6 and/or C7 radiculopathy.

The Petitioner underwent further studies involving a myelogram which was noted in Dr. Boury's November 12, 1998 evaluation. Dr. Boury suggested that surgery was indicated involving an anterior cervical discectomy and fusion at C4-5 and C5-6. Dr. Boury also stated that a neuro foraminotomy at C3-4 would be **[*7]** needed at a later date on the right side.

The surgery was performed on March 13, 1999. The Petitioner continued to follow-up with Dr. Boury and on April 26, 1999, Dr. Boury noted that the x-rays showed the beginning of the fusion, but clearly the fusion was not solid as of yet. Dr. Boury continued Petitioner in a back brace for six weeks. He followed up with the doctor on June 7, 1999 where it was noted the fusion was progressing nicely and there was excellent alignment. (Res. Ex. 4) The fusion was not totally solid at that point according to the notes. Dr. Boury advised Petitioner to gradually wean himself off the brace and advised Petitioner to wear the brace when driving. He was started in a physical therapy program for six weeks. (Id)

On June 10, 1999 the Petitioner advised his doctor that he was involved in a motor vehicle accident on June 9, 1999 when he was rear ended by another vehicle (Res. Ex. 6) He was wearing a soft cervical collar. Dr. Boury testified this was not in compliance with his earlier recommendation to wear the hard brace while driving. (Pet. Ex. 1, page 47, Res. Ex. 4)

The emergency room doctor noted that Petitioner complained of right neck pain and shoulder **[*8]** pain. (Res. Ex. 7) He continued to follow-up with Dr. Boury and advised his doctor on June 14, 1999 that the pain was exactly like before the surgery except that he had pain now going into his right hand, index and middle finger.

Dr. Boury testified that the symptoms were almost like a throw back to what he had before the operation (Pet. Ex. 1, page 11) The physical therapy records noted also that Petitioner advised that since the motor vehicle accident he had pain in the right upper trapezius area (Res. Ex. 8)

Petitioner was placed in a work hardening program and it was noted on July 12, 1999 that he had two full-time jobs, one involving the delivery of pizzas. Dr. Boury testified that the Petitioner could return to delivering pizzas in July, 1999. (Pet. Ex. 1, pages 12 and 23) Petitioner testified that he continued to collect temporary total disability benefits through September, 1999 even after he returned to work delivering pizzas. On July 26, 1999 it was noted that the Petitioner's right hand numbness was pain free although he continued to complain of pain in the right shoulder. A functional capacity evaluation was performed on August 30, 1999 and Dr. Boury released the Petitioner **[*9]** to according to the recommendations of lifting up to 50 pounds which was medium physical level. It was noted his job as a material handler was very heavy lifting with up to 125 pounds.

The Petitioner was discharged from Dr. Boury's care at that time relating to the cervical condition, however, referred to Dr. Baker for a shoulder evaluation (Pet. Ex. 1, page 13) Dr. Boury testified that he attributed the shoulder problem to the motor vehicle accident as Petitioner did not have the symptoms after the work injury and they developed after the motor vehicle accident. (Id, page 15) Dr. Boury's referral letter to Dr. Baker referenced the change in condition in that Petitioner advised "ever since the car accident, my shoulder never felt the same," despite extensive physical therapy (Res. Ex. 9)

Petitioner continued to complain of radiating right arm pain and in September, 1999, Dr. Boury questioned whether or not Petitioner may have herniated a disc at a different level, possibly C3-4 or C6-7 as there was evidence of prior stenosis and the bulging disc prior to the surgery for fusion at the other levels. An MRI scan was performed on September 22, 1999 which ruled out a herniation at **[*10]** those levels. The Petitioner was recommended to undergo a CT scan and myelogram.

Dr. Boury then referred the Petitioner to see Dr. Giesler at CINN for further studies relating to his ongoing right arm and cervical pain. On November 15, 1999, Dr. Giesler reported a history that the Petitioner advised that three months after his cervical fusion he was rear-ended and the car impact made it quite worse in both the neck pain and the pain going down the right side (Res. Ex. 12)

The intake sheets from Dr. Giesler's office noted that on October 27, 1999 the Petitioner stated that after the surgery his neck and arm were doing fine "till he got rear-ended". Since then he had pain going down his right arm, especially if picking up things. (Res. Ex. 12) On November 5, 1999 the information sheet showed that Petitioner stated that the June 9, 1999 car accident "made it worse" (Res. Ex. 13)

The Petitioner continued to follow-up with Dr. Boury and it was noted on February 14, 2000 that there was lack of fusion and Dr. Boury indicated that "the car accident clearly set this patient back" (Pet. Ex. 1, page 25) Dr. Boury testified Petitioner had pseudoarthrosis and recommended surgery to redo the level **[*11]** at C5-C6 due to the non-fusion at that level (Res. Ex. 25)

The Petitioner was examined on two occasions by Dr. Gary Skaletsky, a neurosurgeon. Dr. Skaletsky opined that the Petitioner's fusion did not take because of "inherent biological reasons" and that the motor vehicle accident did not cause or contribute to the non fusion. (Res. Ex. 26, pages 27 and 2*)

Dr. Boury testified that the motor vehicle accident aggravated the Petitioner's condition and contributed to the pseudoarthrosis (Res. Ex. 25) He testified that the motor vehicle accident clearly played a major role in Petitioners worsening physical condition (Pet. Ex. 1, page 25) He testified that the Petitioner was not only three months post operative from the fusion but he also has a congenitally very narrow spinal canal which makes him at much higher risk of injury because he has hardly any room to spare. Finally, Dr. Boury testified that there probably would not have been a pseudoarthrosis had there not been the auto accident (Res. Ex. 1, page 33)

The Arbitrator concludes that the opinion of Dr. Boury should be given greater weight as he was the Petitioner's treating physician, had performed the operation, and treated the **[*12]** Petitioner before and after the accident.

Petitioner testified that he was involved in a second motor vehicle accident on April 7, 2000 wherein he was rear ended by a big truck and struck his head on the windshield (Res. Ex. 17, pages 22-25) He was taken via ambulance to Delnor Hospital where he complained of neck, back and left shoulder and arm complaints (Res. Ex. 17, page 22) He continued to treat with Dr. Boury who

continued to recommend the surgical redo at C5-C6.

Petitioner was in yet a third motor vehicle accident on June 18, 2000 when he hit a car that pulled out in front of him (Res. Ex. 27) He testified he struck his head on the windshield at that time and his car was totaled. He testified he has continued to have ongoing medical problems relating to the cervical condition and arm complaints and that all three motor vehicle accidents further aggravated his condition.

CONCLUSIONS

The Arbitrator concludes that Petitioner was involved in three subsequent motor vehicle accidents dated June 9, 1999, April 7, 2000 and June 18, 2000 all of which further aggravated his medical condition and resulted in the need for additional medical treatment and lost time. The Arbitrator **[*13]** notes that Petitioner testified he has two pending lawsuits against the drivers in the first and third motor vehicle accidents. (Res 14, 15 & 16) Per the complaint filed after the first motor vehicle accident of June 9, 1999 Petitioner has alleged that his medical condition relating to the non-fusion and the need for further surgery is related to that accident.

Dr. Boury testified that prior to the first motor vehicle accident there was no evidence of pseudoarthrosis present at the fusion site. Dr. Boury also testified that at the time of the June 9, 1999 motor vehicle accident the Petitioner's condition was not at maximum medical improvement and as a result of this accident there was the development of pseudoarthrosis. He further testified that although the documentation of the pseudoarthrosis became evident after the first motor vehicle accident, all three motor vehicle accidents contributed to its development. (Pet. Ex. 1, page 52)

The Arbitrator finds that the Petitioners current condition of ill being is not causally related to the July 10, 1998 work injury.

In support of the Arbitrator's decision relating to (J) Amount of compensation due for temporary total disability; [*14] the Arbitrator finds the following facts:

The Arbitrator's findings under "N" are adopted herein.

The Petitioner testified in agreement with the records which show that he was working out regularly at Powerhouse Gym and Tan from March 1, 2000 through May, 31, 2000 (Res. Ex. 18) He also testified that he began working for Black Gold Septic in March, 2000 and was still employed by them at the time of arbitration. The records show he was earning about $ 640.00 per week for this company (Res. Ex. 19)

Consistent with the Arbitrator's findings under causal connection, the Arbitrator concludes that the Petitioner is entitled to temporary total disability from July 28, 1998 through June 9, 1999 or 45 weeks.

The Arbitrator finds that Petitioner is entitled to have and receive from said Respondent the sum of $ 240.00 per week for a period of 45 weeks, that being the period of temporary total incapacity for work, for which compensation is payable.

In support of the Arbitrator's decision relating to (I) Reasonableness or necessity of medical, surgical, or hospital bills or service; the Arbitrator finds the following facts:

The Petitioner submits unpaid medical bills as Petitioner's **[*15]** Exhibit 2. Consistent with the Arbitrator's findings under "N", the Arbitrator awards medical bills up until the accident of June 9, 1999.

	Pet. Request	Awarded
Central Dupage Hospital:	17,925.19	17,493.31
(Emergency room visit of 6/9/99 not awarded)		
Dr. Boury	15,485.00	14,512.00
(Office visits from 6/9/99- 2/14/00 not awarded)		
Fox Valley Orthopedics:	436.00	436.00
Midwest Pathology	268.00	268.00
Sports Medicine	2,957.00	0.00
(All treatment after 6/9/99)		
Family Pharmacy	214.21	214.21
Skaletsky Visit	136.95	64.28
(3 hr at 16.00 per hour + 47.2 miles at .345 was awarded)		

The Petitioner's request an award for future medical treatment.

The Arbitrator finds that this care and treatment is not causally related to the Petitioner's work related injury of July 10, 1998 and are, therefore, is denied.

The Arbitrator finds that the Petitioner is entitled to have and receive from Respondent the sum of $ 32,987.80 for necessary first aid, medical, surgical and hospital services as provided in paragraph (a) of Section 8 of the Act, as amended.

The Arbitrator further finds that the respondent shall have credit for all amounts paid, if [*16] any, to and on behalf of Petitioner on account of said accidental injury.

The Arbitrator finds that Petitioner is entitled to receive from Respondent compensation that has accrued from July 26, 1998 through August 23, 2001, and the remainder, if any, of the award to be paid by Respondent in weekly payments.

This order shall in no instance be a bar to a further hearing in determination of the nature and extent of the Petitioner's

injury.

You are further notified that unless a Petition for Review is filed with the Industrial Commission within thirty (30) days after receipt of this decision, and a Review perfected in accordance with the Workers' Compensation Act and the Rules of the Industrial Commission, the Decision of the Arbitrator shall be entered as the decision of the Industrial Commission. Subject to 19(n) of the Illinois Workers' Compensation Act, the interest rate for purposes of an appeal in this case is 2.15%. However, should an Employee's appeal of this case result in either no change or a decrease in this award, interest shall not further accrue from the date of such appeal.

Dated and Entered: September 19, 2001

Peter Akemann, Arbitrator

Legal Topics:

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

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements
Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > General Overview

*3 IIC 743; 2003 Ill. Wrk. Comp. LEXIS 907, **

BRIAN VOGEL, PETITIONER, v. HOGAN **PLUMBING,** RESPONDENT.

NO. 98WC 42870

INDUSTRIAL COMMISSION OF ILLINOIS

STATE OF ILLINOIS, COUNTY OF KANE

3 IIC 743; 2003 Ill. Wrk. Comp. LEXIS 907

October 22, 2003

CORE TERMS: recommended, cervical, pseudoarthrosis, surgery, fusion, motor vehicle accident, totally disabled, temporarily, herniated, spine, brace, pain, physical therapy, motor vehicle, underwent, therapy, doctor, wear, neck, redo, site, temporary total disability, written request, return to work, right sided, strengthening, radiculopathy, consisting, myelogram, diagnosed

JUDGES: Jacqueline A. Kinnaman; Paul W. Rink

OPINION: [*1]

DECISION AND OPINION ON REMAND

This cause comes before the Commission pursuant to the Order of the Circuit Court of Dupage County entered on October 7, 2002, which found that the auto accident of June 9, 1999 and subsequent auto accidents did not break the chain of causation between Petitioner's July 10, 1998 work accident and his pseudoarthrosis in that the work and auto accidents were concurrent causes of that pseudoarthrosis. The Circuit Court further remanded to the Commission to enter an award of medical and temporary total disability benefits consistent with the Court's order. Pursuant to the direction of the Circuit Court, and after considering the entire record, the Commission finds that Petitioner was temporarily totally disabled for a total of 85 weeks, from July 28, 1998 through March 13, 2000 pursuant to section 19(b) of the Act, that Petitioner is entitled to receive $ 36,915.00 for reasonable and necessary medical expenses under § 8(a) of the Act, entitled to surgery as prescribed by Dr. Boury, that Respondent is entitled to a credit of $ 12,500.00 under § 8(j) of the Act and remands this case to the Arbitrator for a determination of a further amount of temporary **[*2]** total compensation or of compensation for permanent disability, if any, and for further proceedings 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. On July 10, 1998, Petitioner, a 36 year old driver, tripped over some debris while delivering a jaccuzzi to a house. Petitioner testified that after tripping he felt pain going from his neck down through his arm into his fingers. Accident is undisputed.

2. On July 26, 1998, Petitioner sought medical care at Central DuPage Hospital with complaints of right sided neck and shoulder pain. Petitioner was given a soft cervical collar and recommended to see Dr. Harb Boury.

3. On July 28, 1998, Petitioner underwent an MRI of the cervical spine. The MRI revealed spinal stenosis at C5-6 and C6-7, a small bulging or herniated disc at C5-6 and a bulging disc at C6-7 as well as a congenitally small spinal canal which contributed to the spinal stenosis at C5-6 and C6-7.

4. On July 29, 1998, Petitioner was seen by Dr. Boury with pain radiating down his right arm. Dr. Boury **[*3]** diagnosed Petitioner with a herniated disk at C5-6, either a bulging or a herniated disk at C6-7, right sided cervical nerve radiculopathy of either C6 and/or C7 and a congenital narrowing cervical spinal canal. After examining Petitioner, Dr. Boury recommended that Petitioner obtain a diagnostic myelogram and a CT scan.

5. On November 11, 1998, Petitioner underwent a myelogram which noted spinal stenosis at C5-6 and C6-7 as well as herniated discs at C5-6 and C6-7.

6. On November 12, 1998, Petitioner returned to Dr. Boury still clearly symptomatic. After examining Petitioner, Dr. Boury decided to proceed with physical therapy and conservative treatment in the nature of surgical traction, diathermy and massages. Dr. Boury felt that if therapy failed, he would recommend surgery.

7. On December 10, 1998, Petitioner was seen by Dr. Boury after his discharge from therapy due to the severity of his symptoms. Dr. Boury, in light of Petitioner's discharge from therapy recommended surgery for Petitioner.

8. On January 14, 1999, Dr. Lawrence Lieber, Respondent's section 12 doctor, examined Petitioner who continued to complain of neck, right shoulder and arm discomfort. Dr. Lieber found that **[*4]** Petitioner showed evidence of an aggravation of a pre-existing

condition within his cervical spine which occurred on July 10, 1998 and required surgical intervention. Dr. Lieber thought that the treatment recommended by Dr. Boury was reasonable and that Petitioner was able to return to work with a lifting restriction of 50 pounds with minimal bending and stooping as well as sitting and standing as tolerated.

9. On March 4, 1999, Petitioner returned to see Dr. Boury with symptoms that were still right sided. Dr. Boury recommended an anterior cervical diskectomy and fusion which was done on March 12, 1999.

10. On April 26, 1999, Petitioner was seen by Dr. Boury who reviewed the x-ray of April 22, 1999 and noted that the fusion was beginning but not yet solid. Dr. Boury recommended that Petitioner should wear a brace for an additional six weeks.

11. On June 7, 1999, Dr. Boury noted that the fusion was progressing fairly nicely and that the alignment was still excellent. He advised Petitioner to gradually wean himself out of the brace. Dr. Boury ordered physical therapy followed by a functional capacity evaluation.

12. On June 9, 1999, Petitioner was involved in a motor vehicle accident **[*5]** in which he was struck from behind on his way to therapy. Petitioner sought medical care at Central DuPage Hospital on June 9, 1999 where he was diagnosed with cervical strain with complaints of right neck and shoulder pain.

On June 10, 1999, Dr. Boury noted that the emergency room doctor told him that Petitioner was neurologically intact and there was no dramatic change to the fusion site. Dr. Boury informed Petitioner that he should wear the Somi brace for a six week period and only take it off when he performed his work hardening program.

13. Dr. Boury testified that the motor vehicle accident played a major role in the worsening of Petitioner's clinical condition. Dr. Boury testified that the motor vehicle accident happened at which time the fusion is not solid. He testified that the motor vehicle accident led to pseudoarthrosis, and damaged the bone graft, which was not fully healed.

14. On June 14, 1999, Dr. Boury saw Petitioner who was still complaining about symptoms of discomfort and/or pain in his right upper extremity. Dr. Boury recommended that Petitioner resume his work hardening program and wear the brace for an additional six weeks.

15. On July 12, 1999, Petitioner **[*6]** told Dr. Boury that he was working delivering pizza. Dr. Boury felt that such duties were consistent with Petitioner's condition.

16. On August 30, 1999, Dr. Boury released Petitioner to return to work with restrictions of lifting up to 50 pounds after a functional capacity evaluation was performed. Dr. Boury testified that Petitioner's release did not allow him to return to work as a driver for Respondent.

17. On September 13, 1999, Petitioner was seen by Dr. Boury and was still symptomatic. Dr. Boury recommended an MRI and x-rays of the cervical spine. The MRI of the cervical spine done on September 22, 1999 showed no herniated discs at the levels that had been operated upon and at C3-4 or C6-7. Dr. Boury recommended that Petitioner undergo a cervical myelogram and CT scan, which was done on October 5, 1999. Dr. Boury testified that the study showed problems of the fusion at C5-6 due to the degeneration of the height of the graft. On October 20, 1999, Petitioner underwent an EMG and nerve conduction study which Dr. Boury testified showed bilateral carpal tunnel syndrome but no evidence of cervical radiculopathy. Dr. Boury concluded that there was something wrong at the level of C5-6 **[*7]** and that Petitioner would probably have pseudoarthrosis at that level. Dr. Boury recommended that Petitioner see Dr. Geisler for a second opinion.

18. On November 5, 1999, Petitioner was seen by Dr. Geisler. Dr. Boury testified that Dr. Geisler informed him that he felt that Petitioner did have pseudoarthrosis at C5-6 and that Petitioner would benefit from a redo surgery and plating. Dr. Boury recommended further testing. On November 20, 1999, Petitioner underwent lateral flexion and extension x-rays and an CT of the cervical spine. Dr. Boury testified the CT scan showed a fibrous union at C6, that being a pseudoarthrosis. Dr. Boury recommended Petitioner wear a Somi brace and a Miami-J collar and attend physical therapy.

19. Dr. Boury testified that upon the conclusion of Petitioner's physical therapy he concluded that Petitioner needed a redo surgery at C5/C6 consisting of a regraft and an additional strengthening of the fusion site using a plate. He continued to see Petitioner, noting his complaints and desire for surgery. On April 24, 2000, Dr. Boury saw Petitioner after Petitioner was involved in a motor vehicle accident on April 7, 2000. Dr. Boury noted that Petitioner was still **[*8]** in need of the proposed surgery. On June 26, 2000, Dr. Boury saw Petitioner after Petitioner was involved in a motor vehicle accident on June 18, 2000. Dr. Boury noted that since the accident of June 18, 2000 Petitioner's left upper extremity had been hurting him.

20. On March 8, 2001, Dr. Gary Skaletsky, Respondent's Section 12 doctor, examined Petitioner and diagnosed pseudoarthrosis at C5-6 with clinical evidence of a right cervical radiculopathy. Dr. Skaletsky testified that conservative management had not been helpful and that a reexploration at C5-6 and fusion would be appropriate. Dr. Skaletsky opined that the C5-6 level did not fuse for inherent biological reasons. Dr. Skaletsky testified that the June 9, 1999 motor vehicle accident did not cause or influence the development of pseudoarthrosis. Dr. Skaletsky testified further that Petitioner's multiple motor vehicle accidents played no role in Petitioner's current condition.

Based upon the credible testimony of Petitioner, the opinions of Dr. Boury and Dr. Skaletsky and the sequence of events, the Commission finds that a causal relationship exists between the injuries sustained on July 10, 1998 and Petitioner's condition of **[*9]** ill-being. Dr. Skaletsky, Respondent's section 12 doctor, opined that Petitioner's multiple motor vehicle accidents played no role in Petitioner's current condition while Dr. Boury testified that the June 9, 1999 motor vehicle accident led to a pseudoarthrosis and injured only the unhealed bone graft. The Commission finds in light of the opinions of Dr. Boury and Dr. Skaletsky that the June 9, 1999 auto accident and subsequent motor vehicle accidents did not break the chain of causation between Petitioner's July 10, 1998 work related accident and Petitioner's pseudoarthrosis in that the July 10, 1998 work related accident and multiple motor vehicle accidents were concurrent causes of Petitioner's pseudoarthrosis.

The parties have agreed in their briefs upon remand that Petitioner, as a result of the injuries sustained on July 10, 1998, was temporarily totally disabled from June 10, 1999 through March 13, 2000 when Petitioner started working for Black Gold Septic. The Commission notes that Respondent did not dispute the Arbitrator's finding that Petitioner was temporarily totally disabled from July 28, 1998 through June 9, 1999. On April 24, 2001 Petitioner ceased working for Black **[*10]** Gold Septic due to a work related injury

he suffered there. Petitioner testified that since he ceased working for Black Gold Septic he has received temporary total disability benefits. The Commission finds that Petitioner is not entitled to temporary total disability benefits for the period of April 24, 2001 through August 23, 2001 as he was not temporarily totally disabled due to the injuries he sustained on July 10, 1998. The Commission finds that as a result of the injuries sustained on July 10, 1998, Petitioner was temporarily totally disabled for a total of 85 weeks, from July 28, 1998 through March 13, 2000, pursuant to section 19(b) of the Act.

The parties have agreed that Petitioner has unpaid medical bills of $ 3,928.00. Furthermore, the parties have not disputed the Arbitrator's finding that Petitioner was entitled to $ 32,987.80 for reasonable and necessary medical expenses under § 8(a) of the Act which did not include the $ 3,928.00 in unpaid medical bills. The Commission finds that Petitioner proved that he is entitled to $ 36,915.00, that being the medical bills awarded by the Arbitrator plus the unpaid medical bills in the amount of $ 3,928.00, of reasonable and necessary **[*11]** medical expenses under § 8(a) of the Act.

Dr. Boury recommended that Petitioner undergo a redo surgery at C5/C6 consisting of a regraft and an additional strengthening of the fusion site using a plate. Dr. Skaletsky testified that conservative management had not been helpful and that a reexploration at C5-6 and fusion would be appropriate. The Commission finds that Petitioner is entitled to a redo surgery at C5/C6 consisting of a regraft and an additional strengthening of the fusion site using a plate and that Respondent is liable for the reasonable and necessary cost of surgery. Plantation Manufacturing Co. v. Industrial Commission, 294 Ill.App.3d 229, Ill.Dec. 77, 691 N.E.2d 13(1998).

The parties have stipulated that Respondent is entitled to a credit of $ 12,500.00 under § 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision filed on October 10, 2001 is modified.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 240.00 per week for a period of 85 weeks, from July 28, 1998 through March 13, 2000, that being the period of temporary total incapacity **[*12]** for work under § 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent pay to Petitioner the sum of $ 36,915.00 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent authorize the surgery prescribed by Dr. Boury pursuant to § 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent is entitled to a credit in the amount of $ 12,500.00 under § 8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

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

Bond for the **[*13]** removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 45,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

DATED: OCT 22 2003

Jacqueline A. Kinnaman

Paul W. Rink

CONCURBY: JAMES F. DeMUNNO

CONCUR: SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on August 27, 2003 before a three member panel of the Commission including members Jacqueline A. Kinnaman, Paul W. Rink and Douglas F. Stevenson, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of member Stevenson on September 5, 2003, a majority of the panel members had reached agreement as to the results set forth in this Decision and Opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued while former member Stevenson still held his appointment.

Although I was not a member of the panel in question at the time Oral Arguments **[*14]** were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet which shows that former member Stevenson dissented from the decision of the majority.

Legal Topics:

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

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Review

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

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

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*387 Ill. App. 3d 297, *; 900 N.E.2d 360, **;*
*2008 Ill. App. LEXIS 1257, ***; 326 Ill. Dec. 724*

PATRICK WEYER, Appellant, v. THE ILLINOIS **WORKERS' COMPENSATION COMMISSION** et al. (Wagner Heating and Ventilation, Appellee).

No. 1-08-0784WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, **WORKERS' COMPENSATION COMMISSION** DIVISION

387 Ill. App. 3d 297; 900 N.E.2d 360; 2008 Ill. App. LEXIS 1257; 326 Ill. Dec. 724

December 16, 2008, Filed

SUBSEQUENT HISTORY: As Corrected December 25, 2008. Released for Publication January 29, 2009.

PRIOR HISTORY: [*1]**
APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 07 L 50652. HONORABLE SHELDON GARDNER JUDGE PRESIDING.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant applied for adjustment of claim under the Illinois **Workers' Compensation** Act, 820 ILCS 305/1 et seq. (2004). An arbitrator awarded the claimant temporary total disability benefits. The Illinois **Workers' Compensation Commission** affirmed and remanded to the arbitrator. At another hearing, the arbitrator denied additional benefits. The **Commission** and then the Circuit Court of Cook County (Illinois) affirmed. The claimant appealed.

OVERVIEW: The claimant sought benefits for work-related injuries to his left shoulder and lower back. At an arbitration hearing under 820 ILCS 305/19(b), the arbitrator found that the claimant's shoulder injuries were causally related to a work-related accident, but that his lower back condition was not. The arbitrator awarded temporary total disability benefits. The claimant received additional medical treatment to his left shoulder, including surgery, while review was pending before the **Commission.** A second hearing before the arbitrator was held because the claimant requested additional benefits. At this hearing the arbitrator found that the claimant failed to meet his burden of proving a causal relationship between his left shoulder condition, as it existed at the second arbitration hearing, and the work-related accident. On appeal, the court found that (1) the **Commission** did not err by considering the issue of causation at the second arbitration hearing, and (2) the **Commission's** finding that the claimant's left shoulder condition, as it existed at the second arbitration hearing, was not causally related to the work-related accident was not against the manifest weight of the evidence.

OUTCOME: The judgment of the circuit court, which confirmed the **Commission's** decision, was affirmed.

CORE TERMS: claimant, shoulder, arbitrator, pain, lesion, arbitration hearing, scan, causally, labrum, work-related, diagnostic, glenoid, causation, causal, surgery, rotator, cuff, disability, diagnosed, lifting, temporary, manifest, opined, aggravation, underwent, returning, overhead, intact, persistent, anterior

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HN1 An appellate court will look to the Illinois **Workers' Compensation Commission's** findings whenever a circuit court confirms a decision of the **Commission.** More Like This Headnote

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

HN2 Under the law-of-the-case doctrine, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. Principles underlying the law-of-the-case doctrine should be applied to matters resolved in proceedings before the Illinois **Workers' Compensation Commission.** More Like This Headnote

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HN3 Section 19(b) of the Illinois **Workers' Compensation** Act states that an arbitrator may find that a disabling condition is temporary and may order the payment of **compensation** up to the date of a hearing, which award shall be reviewable

and enforceable in the same manner as other awards, and in no instance be a bar to a further hearing and determination of a further amount of temporary total **compensation** or of **compensation** for permanent disability. 820 ILCS 305/19(b) (1998). Each § 19(b) proceeding is a separate proceeding, limited to a determination of temporary total disability up to the date of the hearing, and each § 19(b) decision is a separate and appealable order. More Like This Headnote

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HN4 Even if an arbitrator's award for an earlier period of temporary disability has been affirmed on appeal, an employer is not obligated to pay temporary total disability benefits for a subsequent period absent a final determination for that period where the employer has a reasonable belief that a claimant's condition has stabilized. One of the ways that an employer may provide itself with an objectively reasonable belief that an employee's condition has stabilized is through an employer-requested medical examination under § 12 of the Illinois **Workers' Compensation** Act, 820 ILCS 305/1 et seq. (2004). More Like This Headnote

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HN5 Whether a causal connection exists is a question of fact for the Illinois **Workers' Compensation Commission,** and a reviewing court will overturn the **Commission's** decision only if it is against the manifest weight of the evidence. In resolving questions of fact, it is the function of the **Commission** to judge the credibility of the witnesses and resolve conflicting medical evidence. A factual finding by the **Commission** will not be set aside on review unless it is against the manifest weight of the evidence. For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. If there is sufficient factual evidence in the record to support the **Commission's** determination, it will not be set aside on appeal. More Like This Headnote

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Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses

HN6 It is the function of the Illinois **Workers' Compensation Commission** to judge the credibility of the witnesses and resolve conflicting medical evidence. More Like This Headnote

COUNSEL: For Appellant: Capron & Avgerinos, of Chicago, IL, Daniel F. Capron, of counsel, Chicago, IL.

For Appellees: Rusin Maciorowski & Friedman, of Chicago, Michael C. Milstein and Daniel R. Egan, of counsel, Chicago, IL.

JUDGES: Honorable Robert E. Gordon, J., with Honorable John T. McCullough, P.J., Honorable R. Peter Grometer, J., Honorable William E. Holdridge, J., and Honorable James K. Donovan, J., concur. JUSTICE ROBERT E. GORDON delivered the opinion of the court.

OPINION BY: ROBERT E. GORDON

OPINION

[362]** **[*298]** JUSTICE ROBERT E. GORDON delivered the opinion of the court:

Claimant, Patrick Weyer, filed an application for adjustment of claim pursuant to the **Workers' Compensation** Act (Act) (820 ILCS 305/1 et seq. (West 2004)), seeking benefits for injuries to his left shoulder and lower back allegedly received while in the employ of respondent, Wagner Heating & Ventilation (Wagner). Following a section 19(b) hearing, an arbitrator, on July 24, 2003, found that claimant suffered an accidental injury on June 3, 2002, arising out of and in the course of his employment with Wagner. In her decision, the arbitrator concluded **[***2]** that claimant's left shoulder injuries were causally related to a June 3, 2002, work-related accident, but that his lower back condition was not. The arbitrator further found claimant to be wholly and temporarily incapable of work and awarded temporary total disability benefits for the periods of June 4, 2002, to July 15, 2002, and from October 8, 2002, to February 26, 2003, representing 20 2/7 weeks TTD in the sum of $ 885.06 per week, and $ 779 in medical expenses.

Both parties sought a review of the arbitrator's decision before the **Commission.** Claimant received additional medical treatment to his left shoulder, including surgery, while review was pending before the **Commission.** On December 30, 2004, the **Commission** affirmed and adopted the arbitrator's July 24, 2003, decision and remanded the cause to the arbitrator pursuant to *Thomas v. Industrial Comm'n,* 78 Ill. 2d 327, 329, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). Neither party sought judicial review of the **Commission's** December 30, 2004, decision.

While review of the initial section 19(b) hearing was pending before the **Commission,** claimant filed for a subsequent section 19(b) hearing on January 21, 2004, seeking temporary total disability benefits from July 24, **[***3]** 2003, the date of the initial section 19(b) hearing. The cause was heard before the same arbitrator on July 25, 2005. The arbitrator found that claimant failed to meet his burden of proving a causal relationship between his left shoulder condition, as it existed at the July 25, 2005, arbitration hearing, and the June 3, 2002, accident. Claimant sought a review of the arbitrator's decision before the **Commission.** On June 25, 2007, the **Commission** affirmed and adopted the arbitrator's July 25, 2005, decision. Claimant sought judicial review of the **Commission's** decision in the circuit court of Cook County. On February 28, 2008, the circuit court confirmed the **Commission's** decision, and this appeal followed. On appeal, claimant argues that (1) the **Commission** erred by considering the issue of causation at the second section 19(b) arbitration hearing, and (2) the **Commission's** finding that claimant's left shoulder condition, as it existed **[*299]** at the July 25, 2005, section 19(b) hearing, was not causally related to the June 3, 2002, work accident, was against the manifest weight of the evidence. We affirm.

BACKGROUND

The following factual recitation is taken from the evidence presented at the section 19(b) **[***4]** arbitration and review hearings. A review of the facts presented at the initial section 19(b) hearing is necessary for an understanding of the **Commission's** July 25, 2005, decision. As noted, petitioner filed an application for adjustment of claim pursuant to the Act, seeking benefits for injuries to his left shoulder and lower back allegedly received while in the employ of Wagner on June 3, 2002.

Since about 1975, claimant has worked as a union sheet metal **worker** for various employers. In 1997, claimant began working for Wagner as a sheet metal **worker.** **[**363]** This required claimant to unload sheet metal and duct work, move it around, position it, put it together, and install it. Claimant testified that his work for Wagner required him to lift at least 100 to 150 pounds on a constant basis.

Claimant had lower back and left shoulder problems prior to his June 3, 2002, incident. In addition to injuries from non-work-related activities, claimant had suffered a number of work-related injuries in his employment as a sheet metal **worker** for various employers and in other factors of his life.

The history of these prior injuries, noted below, is relevant to the issue of causation as treatment for these **[***5]** injuries extended up to the time of claimant's alleged work-related injuries in this case.

Claimant's lower back ailments began when he was involved in a motor vehicle accident while serving as a naval officer for the United States Navy, in the early 1970s. As a result of that accident, claimant suffered fractures to his thoracic and lumbar spine. Claimant testified that he was medically treated for one year as a result of the accident, including the use of a back brace. Claimant was also involved in a non-work-related motor vehicle accident on September 13, 1993. Claimant injured his left shoulder and reinjured his lower back at that time and sought ongoing treatment from Dr. Lloyd Blakeman, claimant's family physician. X-rays performed at the time of the September 13, 1993, accident revealed wedging of claimant's vertebrae at T12, L1, and L3.

Claimant again injured his left shoulder and his lower back on September 13, 1995, when he fell from a ladder at work for another employer. At this point, Dr. Blakeman referred claimant to Dr. Richard Beaty, an orthopedic surgeon, who diagnosed claimant's condition as **[*300]** either brachial plexopathy, which means a decreased movement or sensation in **[***6]** the arm and shoulder, caused by impaired function of the brachial plexus (a bundle of nerves that control sensation and movement of the arm), or anterior capsule subluxation, which means an anterior shoulder dislocation. Claimant continued to treat with Dr. Beaty, obtaining physical therapy treatment every four to eight weeks throughout 1996 and 1997.

On July 5, 1997, claimant returned to Dr. Blakeman complaining of left shoulder pain. Dr. Blakeman's notes indicate that claimant complained of left shoulder impingement through 1999.

On September 2, 1999, claimant reported another work-related accident while working for Que Bar. He sought medical care again from Dr. Beaty that same day. Dr. Beaty diagnosed claimant with a myofascial strain with associated muscle spasm. On September 9, 1999, claimant was released to return to work without restrictions. Claimant continued to work and complained of lower back pain. He underwent an MRI scan, which revealed fractures of the L1 and L3 vertebrae with a fragment at L3 impinging on the anterior aspect of the spinal canal. The MRI scan also revealed a small central disc protrusion at L5, S1. Dr. Beatty prescribed a series of epidural injections. **[***7]** The epidurals were administered by Dr. Ira Goodman, a pain specialist. Dr. Goodman authorized claimant to be off work during the administration of the series of injections. A functional capacity examination (FCE) was performed on March 30, 2000, which indicated that claimant was capable of returning to work only with light or medium duty.

On April 13, 2000, claimant reported decreased pain to Dr. Beaty and was released to return to full work duty. In his notes, Dr. Beaty noted:

> **[**364]** "I suspect [claimant] is going to have problems long term. I'm referring him to Dr. Gunnar Andersson for an opinion as to whether or not there is anything that can be done to improve this patient's ability to work at a heavy level. If there is not and I believe it is probably going to be the answer then [claimant] eventually will have to find lighter work ***."

Claimant returned to Dr. Beaty in May 2000, indicating that he was not performing heavy work after returning to work for Wagner. At that time, claimant expressed a desire to undergo surgery to his left shoulder. On July 6, 2000, claimant reported to Dr. Beaty that he continued to experience back pain as well as shoulder pain. In August 2000, Dr. Beaty noted **[***8]** an increase in claimant's back pain after he resumed heavier labor.

Dr. Gunnar Andersson, an orthopedic surgeon, examined claimant on September 26, 2000. At that time, claimant complained of pain on **[*301]** both sides of his lower back in the lumbar area. He also complained of radiating pain down his right leg. Dr. Andersson ordered an MRI scan. After reviewing the MRI, Dr. Andersson noted "old fractures of the vertebral bodies of L1 and L3 with a posterior displaced fragment of L3 impinging upon the anterior aspect of the thecal sac. There is a small central disc protrusion at L5, S1." Dr. Andersson administered an epidural injection to claimant's lower back, which provided initial relief with a subsequent return of pain. Claimant suspended his treatment with Dr. Andersson in October 2000. On October 10, 2000, Dr. Beaty noted that claimant reported difficulty performing his work due to back pain.

On January 19, 2001, claimant underwent a diagnostic arthroscopy, arthrotomy, open acromioplasty and rotator cuff repair by Dr. Beaty in the left shoulder. On August 29, 2001, claimant complained to Dr. Beaty of "recurrent problems in his back." Dr. Beaty recommended that claimant return to Dr. Andersson's **[***9]** treatment, but released claimant to work with a ten pound weight restriction based upon the condition of his left shoulder.

Claimant returned to work following the surgery on September 4, 2001. Claimant worked for about five months before returning to Dr. Andersson complaining of lower back pain. Dr. Anderson diagnosed claimant with spinal stenosis.

As noted, on June 3, 2002, the day of the alleged work-related accident pertaining to claimant's instant claims; claimant was working on a rooftop air conditioning unit. Claimant and two other **workers** were required to lift and attach, what was referred to at the June

24, 2003, arbitration hearing as a pipe cabinet, weighing approximately 250 pounds, to the side of one of the air conditioning units. Claimant claimed he suffered injuries to his left shoulder and lower back while in the process of lifting the pipe cabinet. Claimant sought treatment for his left shoulder pain from Dr. Beaty on June 4, 2002, the day after the June 3, 2002, work accident. Dr. Beaty's records show that he diagnosed claimant with left shoulder strain. Dr. Beaty ordered an MRI scan of claimant's left shoulder, which was performed on June 8, 2002. The MRI scan revealed **[***10]** that claimant's left shoulder had postoperative changes stemming from the January 19, 2001, rotator cuff repair. However, the MRI also revealed that the glenoid labrum was intact. The bicep tendon was located normally within the bicipital groove. No joint effusion was noted. Dr. Beaty prescribed claimant with Darvocet for pain, and restricted claimant to light duty work. Claimant's pain persisted, and on June 18, 2002, he began physical therapy.

[365]** Claimant also returned to Dr. Andersson on July 25, 2002. An **[*302]** MRI of claimant's lower back ordered by Dr. Andersson, revealed nerve root compression at L5, S1. Dr. Andersson noted that surgery may be necessary. Dr. Andersson released claimant to light duty work, but recommended claimant undergo a spinal fusion.

Meanwhile, claimant's left shoulder pain seemed to improve with time off from heavy work. On July 15, 2002, Dr. Beaty noted, "As far as his shoulder is concerned, [claimant] could return to work." On August 20, 2002, Dr. Beaty again noted claimant's left shoulder improvement with time off from heavy work.

In September 2002, claimant underwent a myelogram and CT scan previously ordered by Dr. Andersson to claimant's lower back. At the arbitration **[***11]** hearing, claimant testified that he was required to place his left hand behind his head during the CT scan. Claimant testified that that maneuver caused him to experience "burning" in his left shoulder and that the pain was "real, real bad." Claimant demanded that medical personnel pull him out of the CT scan machine.

On November 5, 2002, claimant returned to Dr. Beaty complaining of pain in his left shoulder associated with overhead lifting. Dr. Beaty noted claimant's lower back treatment with Dr. Andersson and noted "[i]f [claimant] is not going back to work, with regards to his back, he probably does not need much more done with regards to his shoulder."

In December 2002, claimant underwent another FCE. The FCE evaluator noted three times that "material handling limited by back pain with spasm" or "back pain with fatigue." No mention of shoulder pain was made in the report.

Pursuant to section 12 of the Act, Wagner requested claimant to be examined by Dr. Gary Skaletsky, a neurosurgeon. Dr. Skaletsky noted that he agreed with Dr. Andersson that spinal fusion was necessary, but opined that claimant's back injury was attributable to a preexisting condition, namely claimant's fractured **[***12]** vertebrae suffered as a result of the motor vehicle collision during his service with the United States Navy, while claimant's shoulder injury was attributable to the work accident of June 3, 2002.

Dr. Beaty continued to note claimant's complaints of left shoulder pain. On January 29, 2003, Dr. Beaty opined that, although claimant was not able to return to work as a result of his back condition, he was not convinced that claimant was able to return to work with regard to his left shoulder injury either. Dr. Beaty began a series of epidural injections to claimant's left shoulder in an attempt to eliminate some of claimant's pain.

In February 2003, Dr. Beaty imposed a 70-pound lifting restriction, and a 50-pound overhead lifting restriction, for claimant's left shoulder. Dr. Beaty noted, "It is becoming apparent that [claimant] is **[*303]** borderline for returning to work unless it is primarily as a supervisor. If he has to go back working regular, unrestricted, in his very heavy work, I believe that he is probably not going to be able to do it." In accordance with his findings, Dr. Beaty released claimant to restricted work.

On June 5, 2003, at Wagner's request and pursuant to section 12 of the **[***13]** Act, claimant was examined by Dr. Mark Levin, an orthopedic surgeon. After reviewing the records that were provided to him, Dr. Levin opined that there was no new pathology demonstrated as a result of the work accident of June 2, 2002, to claimant's left shoulder. However, Dr. Levin withheld additional opinions until he was **[**366]** given an opportunity to review the December 2002 FCE.

Dr. Beaty continued to treat claimant for shoulder pain through the initial July 24, 2003, section 19(b) hearing. On June 18, 2003, Dr. Beaty noted that claimant complained of increased pain as a result of washing his father's automobile.

As noted, on July 24, 2003, an arbitrator determined at the first section 19(b) arbitration hearing that claimant suffered a work accident injury on June 3, 2002, and awarded TTD from June 4, 2002, to July 15, 2002, and from October 8, 2002, to February 26, 2003. TTD for the **intervening** periods was not awarded due to the arbitrator's finding that claimant did not look for work within the medically prescribed restrictions. As noted, the arbitrator determined that claimant's left shoulder injury was causally related to the June 3, 2002, accident and that his lower back ailments **[***14]** were not. With regard to claimant's left shoulder, the arbitrator based her findings on Dr. Beaty's and Dr. Skaletsky's medical notes, which indicated that claimant's left shoulder injury was caused by the June 3, 2002, accident. With regard to claimant's lower back, the arbitrator found that no documentary evidence demonstrated that claimant's lower back ailments were causally related to the June 3, 2002, work accident. Both parties filed for review of the arbitrator's decision.

Claimant sought further medical treatment after the initial section 19(b) arbitration hearing. On October 30, 2003, Dr. Beaty noted that he reviewed the July 2003 arbitration decision and commented that he never released claimant to regular-duty work. He noted, "Patient has been off work since the initial date that I saw him which was June 4, 2002, until today's date because of his left shoulder pain. He was capable of returning to work light duty *** and I state that in my notes in February 26, 2003." Dr. Beaty reiterated claimant's work restrictions, ordering claimant to stay off work unless light duty work with no overhead lifting was available.

On January 5, 2004, claimant was again examined by Dr. Levin. **[***15]** **[*304]** Although Dr. Levin found some minor limitations in claimant's left shoulder range of motion, the doctor found that claimant's rotator cuff strength was normal bilaterally. Additionally, Dr. Levin found that claimant was capable of performing full, functional work activity, including overhead activity and lifting. Dr. Levin also found that claimant required no further medical treatment as he reached maximum medical improvement.

In March 2004, Dr. Beaty noted that claimant complained of a persistent burning sensation in his left shoulder. In April 2004, Dr. Beaty prescribed Neurontin to ease the burning in claimant's shoulder.

As noted, on December 30, 2004, the **Commission** affirmed and adopted the arbitrator's decision of July 24, 2003. Neither party sought judicial review of the **Commission's** decision. Dr. Beaty examined claimant again on January 12, 2005, eight months after his last examination. On that date, Dr. Beaty noted, "[Claimant] continues to have pain in the superior arc and I am questioning whether

or not he has torn the rotator cuff or glenoid labrum." Dr. Beaty ordered an MR-arthrogram to better investigate claimant's persistent left shoulder pain. Dr. Beaty testified that **[***16]** he ordered the MR-arthrogram because it is a superior diagnostic exam tool for SLAP lesions. A SLAP ("Superior Labrum from Anterior to Posterior") lesion is an injury to the glenoid labrum, a part of the shoulder.

The MR-arthrogram, administered January 19, 2005, revealed a SLAP lesion of **[**367]** claimant's left shoulder glenoid labrum. In reviewing the results of the MR-arthrogram on January 26, 2005, Dr. Beaty opined that the SLAP lesion had been the cause of claimant's persistent left shoulder problems since the June 3, 2002, work accident. Dr. Beaty noted, "[i]t is possible that when [claimant] lifted the 250 lb. cabinet that [the glenoid labrum] had shifted. [Claimant] tore the glenoid labrum in 2002 and this is what has caused the persistent pain [claimant] has been exhibiting since that time." Dr. Beaty also noted that claimant's difficulty with overhead lifting since June 3, 2002, was consistent with a SLAP lesion. Dr. Beaty recommended surgery to correct the SLAP lesion.

On February 8, 2005, claimant was examined by Dr. Charles Bush-Joseph, an orthopedic surgeon. Claimant sought a second opinion regarding Dr. Beaty's recommendation of surgery to correct the SLAP lesion. Claimant reported **[***17]** chronic back and left shoulder pain as a result of a work injury on June 3, 2002. Claimant denied any pain following his 1999 shoulder injury and surgery. Based on the history provided by claimant and his review of a single diagnostic scan, presumably the MR-arthrogram (the doctor's report does not indicate **[*305]** the date of the diagnostic scan he reviewed), Dr. Bush-Joseph agreed with Dr. Beaty's recommendation of surgery to correct the SLAP lesion.

Dr. Levin examined claimant for a third time pursuant to section 12 of the Act on February 7, 2005, on behalf of Wagner. Dr. Levin reviewed claimant's medical records in relation to his left shoulder treatment. He reviewed a June 8, 2002, MRI and the January 18, 2005, MR-arthrogram. Dr. Levin released two reports as a result of his examination, one on February 7, 2005, and a second on March 11, 2005. Dr. Levin noted that the labral tear "could have occurred over the past several years and does not relate back to the alleged work injury of June 3, 2002. There is the MRI report that shows the labrum was intact right after the alleged work injury." Dr. Levin was referring to the MRI taken a few days after the June 3, 2002, work-related accident, **[***18]** which demonstrated that claimant's left shoulder glenoid labrum was intact.

In a narrative written report of April 14, 2005, Dr. Beaty reiterated that claimant had been disabled since his shoulder injury on June 3, 2002. Dr. Beaty opined that the SLAP lesion, revealed by the MR-arthrogram, explained the biciptial tendon pain and pain in the subacromial area that claimant reported the day after the June 3, 2002, accident. Dr. Beaty also noted that the SLAP lesion was "consistent with [claimant] tearing the glenoid labrum while he was trying to catch a 250 lb. cabinet as it tilted with his left arm," which occurred on the day of the June 3, 2002, accident.

Dr. Beaty noted that the SLAP lesion was revealed by the MR-arthrogram, and not an MRI, because the MR-arthrogram is diagnostically superior to an MRI scan for the purpose of identifying labral tears. Dr. Beaty opined that "based on the patient's persistent pain, the injury that caused the pain is the June 3, 2002, injury."

As noted, on July 25, 2005, at the second section 19(b) hearing the arbitrator found that claimant failed to meet his burden of proving a causal relationship between the SLAP lesion and the June 3, 2002, work accident. **[***19]** The arbitrator believed Dr. Levin over Dr. Beaty. The arbitrator noted that the SLAP lesion was first diagnosed in January 2005, more than two years after the date of the accident. In making her findings, the arbitrator noted that the MRI of claimant's left shoulder, taken a few days after claimant's injury, revealed **[**368]** that the glenoid labrum was intact. The arbitrator also relied on Dr. Levin's January 2004 finding of full shoulder strength. The arbitrator also noted that Dr. Beaty's explanation that the failure to discern the lesion prior to the date of the MR-arthrogram because the arthrogram is a vastly superior diagnostic test was unrebutted. However, the **[*306]** arbitrator also noted that Dr. Beaty released claimant to work without restrictions in July 2002, one month after the June 3, 2002, accident. The arbitrator also took note of the FCE performed in December 2002, which did not indicate any problems with claimant's left shoulder. The arbitrator also noted that Dr. Levin found full strength in claimant's left shoulder/rotator cuff in January 2004. The arbitrator found it improbable that claimant could be released to work, initially at full duty and later at restricted duty, not have **[***20]** his shoulder tested during an FCE, and exhibit full rotator cuff strength upon physical examination had he suffered from a SLAP lesion on June 3, 2002. The arbitrator found that while claimant had suffered some form of aggravation to his preexisting left shoulder condition, justifying the TTD benefits awarded after the first arbitration hearing, the aggravation had resolved by January 2004.

The arbitrator discounted Dr. Bush-Joseph's causal findings as it contained a history of claimant's "excellent result with a full recovery" following claimant's 1999 shoulder injury. The arbitrator noted that Dr. Beaty's records rebutted Dr. Bush-Joseph's history, as Dr. Beaty's medical notes showed claimant's complaints of pain through October 2001. Further, the arbitrator noted that it appeared that Dr. Bush-Joseph reviewed a single diagnostic scan and that the doctor did not provide the date of that diagnostic scan in his report.

As noted, claimant sought a review of the arbitrator's second 19(b) decision before the **Commission.** On June 25, 2007, the **Commission** affirmed and adopted the arbitrator's July 25, 2005, decision. claimant sought judicial review of the **Commission's** decision in the circuit **[***21]** court of Cook County. On February 28, 2008, the circuit court confirmed the **Commission's** decision, and this appeal followed.

ANALYSIS

On appeal, claimant first argues that the circuit court erred by confirming the **Commission's** June 25, 2007, decision affirming and adopting the arbitrator's July 25, 2005, decision finding that the SLAP lesion was not causally related to the June 3, 2002, work accident at issue in the case at bar. Specifically, claimant argues that the circuit court erred by allowing the parties to "re-litigate" the issue of causation. Claimant contends that the issue of causation was resolved by the **Commission's** July 24, 2003, finding that claimant was entitled to TTD benefits up until the date of the first section 19(b) hearing on July 24, 2003. HN1 We look to the **Commission's** findings whenever the circuit court confirms a decision of the **Commission.** *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002).

Claimant argues that the causation finding was final, as neither **[*307]** party sought judicial review of the **Commission's** July 24, 2003, decision. Although not stated in exact terms, claimant appears to argue that the arbitrator's July 25, 2005, finding that the SLAP lesion **[***22]** was not causally related to the June 3, 2002, work accident was precluded by the law of the case doctrine.

HN2 Under the law-of-the-case doctrine, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent **[**369]** stages of the suit. *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 374,

878 N.E.2d 171, 315 Ill. Dec. 945 (2007). This court has held that principles underlying the law-of-the-case doctrine should be applied to matters resolved in proceedings before the **Commission.** *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 786 N.E.2d 218, 271 Ill. Dec. 960 (2003).

The July 25, 2005, section 19(b) arbitration hearing involved different legal and factual issues than the July 24, 2003, section 19(b) arbitration hearing, and the law of the case doctrine did not prohibit the litigation of those new issues. The first section 19(b) arbitration hearing addressed claimant's entitlement to TTD benefits from the June 3, 2002, work accident up to the July 24, 2003, arbitration hearing. The second section 19(b) arbitration hearing addressed claimant's entitlement to TTD benefits after the July 24, 2003, arbitration hearing. HN3 Section 19(b) of the Act states that "'[t]he arbitrator may find **[***23]** that the disabling condition is temporary * * * and may order the payment of **compensation** up to the date of the hearing, which award shall be reviewable and enforceable in the same manner as other awards, and in no instance be a bar to a further hearing and determination of a further amount of temporary total **compensation** or of **compensation** for permanent disability.'" *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 407, 830 N.E.2d 584, 294 Ill. Dec. 172 (2005), quoting 820 ILCS 305/19(b) (West 1998). "Each section 19(b) proceeding is a separate proceeding, limited to a determination of temporary total disability up to the date of the hearing, and each 19(b) decision is a separate and appealable order." *R.D. Masonry, Inc.*, 215 Ill. 2d at 408, citing *Elmhurst-Chicago Stone Co. v. Industrial Comm'n*, 269 Ill. App. 3d 902, 905, 646 N.E.2d 961, 207 Ill. Dec. 127 (1995).

Contrary to claimant's assertion, the arbitrator did not "reverse herself" on her causation finding of July 24, 2003. On July 24, 2003, the arbitrator found that the injuries to claimant's left shoulder and the ailments he suffered, up to the date of the July 24, 2003, section 19(b) arbitration hearing, were causally related to the June 3, 2002, work accident. On July 24, 2003, the arbitrator **[***24]** also found claimant wholly and temporarily incapable of work and awarded temporary total disability benefits for the periods of June 4, 2002, to July 15, 2002, and October 8, 2002, to February 26, 2003. That decision **[*308]** remains undisturbed. As noted, that decision was affirmed and adopted by the **Commission** on December 30, 2004. The **Commission's** decision was not appealed from, and it became final.

The second section 19(b) arbitration hearing, held on July 25, 2005, addressed the issue of whether the SLAP lesion, first diagnosed in January 2005, more than two years after the date of the June 3, 2002, work accident, was causally related to the work accident, and whether claimant was entitled to TTD benefits from the time of the first arbitration hearing up to the time of the second. In finding that claimant failed to prove a causal relationship between the SLAP lesion and the June 3, 2002, work accident, the arbitrator noted that evidence introduced at the July 25, 2005, arbitration hearing indicated that while claimant had suffered some form of aggravation to his preexisting left shoulder condition on June 3, 2002, the aggravation had resolved by January 2004. Clearly, the arbitrator did **[***25]** not "reverse" her July 24, 2003, causation finding.

Claimant cites to ***Vogel*** *v. Industrial Comm'n*, 354 Ill. App. 3d 780, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005), to support his contention that the circuit court erred by **[**370]** confirming the **Commission's** June 25, 2007, decision. In ***Vogel***, the **Commission** found that the claimant suffered a work-related injury while delivering a whirlpool tub in the course of his employment for the employer. ***Vogel*** *v. Industrial Comm'n*, 354 Ill. App. 3d 780, 782, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005). The claimant was then involved in two automobile accidents. ***Vogel***, 354 Ill. App. 3d at 783-84. The claimant was awarded TTD benefits up until the date of the first accident because the **Commission** found that the auto accidents "'further aggravated [the Claimant's] medical condition and resulted in the need for additional medical treatment and lost time.'" ***Vogel***, 354 Ill. App. 3d at 785. As a result, the **Commission** found that the claimant's condition of ill-being on the date of the arbitration hearing was not causally related to the July 10, 1998, work accident. ***Vogel***, 354 Ill. App. 3d at 785. On review, the circuit court ruled that the **Commission's** decision was against the manifest weight of the evidence because the two automobile **[***26]** accidents did not break the chain of causation between the claimant's work accident and his injuries, as the work and automobile accidents were "concurrent causes," under the evidence presented in that case. ***Vogel***, 354 Ill. App. 3d at 785, 789. In affirming, this court reiterated the oft-cited principles that a work-related injury need not be the sole or principal causative factor of a the claimant's injuries, as long as it was a causative factor in the resulting condition of ill-being, and that other incidents, whether work related or not, may have aggravated the claimant's condition is irrelevant. ***Vogel***, 354 Ill. App. 3d at 786, citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003), and **[*309]** *Lasley Construction Co. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5, 211 Ill. Dec. 345 (1995).

Vogel is inapposite to the case at bar. As is evident from the foregoing, ***Vogel*** addressed the issue of **intervening** causes and reaffirmed the principle that "every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent **intervening** accident that breaks the chain of causation between a work-related injury **[***27]** and an ensuing disability or injury." ***Vogel***, 354 Ill. App. 3d at 786, citing *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1, 203 Ill. Dec. 574 (1994). As noted, the arbitrator in the case at bar determined at the second section 19(b) hearing that claimant failed to prove a causal relationship between the SLAP lesion and the June 3, 2002, work accident, after determining that the aggravation of claimant's preexisting injuries had resolved by January 2004. The arbitrator in the case at bar did not determine that a subsequent injury to claimant's left shoulder broke the causal chain between claimant's work-related injury and claimant's shoulder condition on the date of the second section 19(b) arbitration hearing.

The course pursued here finds support in section 12 of the Act. The Illinois Supreme Court has held that HN4 "even if an arbitrator's award for an earlier period of temporary disability has been affirmed on appeal, an employer is not obligated to pay TTD for a subsequent period absent a final determination for that period where the employer has a reasonable belief that claimant's condition has stabilized." *R.D. Masonry*, 215 Ill. 2d at 408. "One of the ways that an employer may provide itself **[***28]** with an objectively reasonable belief that an **[**371]** employee's condition has stabilized is through an employer-requested medical examination under section 12." *R.D. Masonry*, 215 Ill. 2d at 409. That is precisely what occurred here. Claimant was examined by Dr. Levin pursuant to section 12 of the Act. Dr. Levin found that the SLAP lesion was not casually related to the June 3, 2002, work accident. At the second section 19(b) arbitration hearing, Wagner challenged its liability pertaining to claimant's SLAP lesion, where it was determined that the SLAP lesion was not casually related to the work accident and that any injury that claimant suffered as a result of the work accident had resolved in January 2004. Based on the foregoing, we find that the **Commission** did not wrongfully reach the question of whether the SLAP lesion was causally related to the June 3, 2002, work accident.

Claimant then argues that the **Commission's** June 25, 2007, decision, finding that the SLAP lesion was not causally related to the June 3, 2002, work accident was against the manifest weight of the **[*310]** evidence. HN5 Whether a causal connection exists is a question of fact for the **Commission,** and a reviewing court will overturn **[***29]** the **Commission's** decision only if it is against the manifest weight of the evidence. *Navistar International Transportation Corp. v. Industrial Comm'n*, 331 Ill. App. 3d 405, 415, 771 N.E.2d 35, 264 Ill. Dec. 631 (2002). In resolving questions of fact, it is the function of the **Commission** to judge the credibility of the

witnesses and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). A factual finding by the **Commission** will not be set aside on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72, 303 Ill. Dec. 174 (2006). If there is sufficient factual evidence in the record to support the **Commission's** determination, it will not be set aside on appeal. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450, 657 N.E.2d 1196, 212 Ill. Dec. 851 (1995).

Here, the factual evidence presented at the July 25, 2005, arbitration hearing was sufficient to support the **Commission's** determination that claimant's SLAP lesion was not causally related to the June **[***30]** 3, 2002, work accident. As noted, the arbitrator noted that the SLAP lesion was first diagnosed in January 2005, more than two years after the date of the accident. The arbitrator also noted that the MRI of claimant's left shoulder, taken a few days after the June 3, 2002, work accident, revealed that the glenoid labrum was intact. Although the arbitrator noted that Dr. Beaty's explanation that the failure to discern the SLAP lesion prior to the date of the MR-arthrogram because the arthrogram is a vastly superior diagnostic exam was unrebutted, she also noted that Dr. Beaty released claimant to work without restrictions in July 2002, one month after the work accident. The arbitrator also noted that claimant underwent an FCE in December 2002, which did not indicate any problems with claimant's left shoulder. The arbitrator also credited Dr. Levin's findings of full strength in claimant's left shoulder/rotator cuff in January 2004. Finally, the arbitrator found it improbable that claimant could be released to work, not have his shoulder tested during the December 2002 FCE, and exhibit full rotator cuff strength upon physical examination had he suffered from a SLAP lesion on June 3, **[***31]** 2002. Furthermore, the arbitrator **[**372]** discounted Dr. Bush-Joseph's causal findings as it contained a history of claimant's "excellent result with a full recover" following claimant's 1999 shoulder injury. The arbitrator noted that Dr. Beaty's records rebutted Dr. Bush-Joseph's history, as his medical notes showed claimant's complaints of pain through October of 2001. Further, the arbitrator discounted Dr. Bush-Joseph's causal findings **[*311]** because it appeared that he only reviewed a single diagnostic scan and did not provide the date of that diagnostic scan in his report. The arbitrator and later the **Commission,** when adopting the findings of the arbitrator, believed Dr. Levin over Dr. Beaty. As noted, HN6 "it is the function of the **Commission** to judge the credibility of the witnesses and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253.

Based upon the foregoing, we find that the record contains a sufficient evidentiary basis for the **Commission's** determination that the claimant was not entitled to TTD benefits from the date of the first section 19(b) arbitration hearing to the date of the second section 19(b) arbitration hearing, because claimant failed to prove that the SLAP lesion **[***32]** was causally related to the June 3, 2002, work accident.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court which confirmed the **Commission's** July 25, 2007, decision.

Affirmed.

R.E. GORDON, J., with McCULLOUGH, P.J., and GROMETER, HOLDRIDGE, and DONOVAN, JJ., concurring.

*392 Ill. App. 3d 408, *; 911 N.E.2d 1042, **;*
*2009 Ill. App. LEXIS 352, ***; 331 Ill. Dec. 812*

GLOBAL PRODUCTS, Plaintiff-Appellant, v. THE **WORKERS' COMPENSATION COMMISSION** and JOHN HALL, JR., Defendants-Appellees.

No. 01-08-1914WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, **WORKERS' COMPENSATION COMMISSION** DIVISION

392 Ill. App. 3d 408; 911 N.E.2d 1042; 2009 Ill. App. LEXIS 352; 331 Ill. Dec. 812

June 9, 2009, Filed

SUBSEQUENT HISTORY: Released for Publication July 27, 2009.

PRIOR HISTORY: [*1]**
Appeal from the Circuit Court of Cook County. No. 07-L-50557. Honorable Elmer Tolmaire, Judge, Presiding.

DISPOSITION: Reversed in part and affirmed in part; cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee **workers' compensation** claimant's application for adjustment of claim was granted by an arbitrator. Appellee Illinois **Workers' Compensation Commission** adopted the decision of the arbitrator and remanded for possible further proceedings pursuant to Thomas v. Industrial Comm'n. The Circuit Court of Cook County (Illinois) confirmed the **Commission's** decision. Appellant employer appealed.

OVERVIEW: The appellate court held that the claimant's smoking was not an **intervening** cause of his disability. The **Commission** could find that there was a but-for relationship between the claimant's at-work injury and his condition. The claimant was a smoker and was one prior to his first surgery. The claimant had had problems healing from surgery because he was a smoker. However, the employer did not show that the claimant smoked cigarettes for the purpose of retarding his recovery. Here, the claimant smoked in spite of its potential impact on his recovery, not because of it. The claimant also made an unsuccessful attempt to quit smoking. A reasonable person could conclude that the claimant should not be penalized when he made a good-faith attempt to prevail over his addiction. The **Commission's** decision that the claimant did not engage in an 820 ILCS 305/19(d) (1998) practice was not an abuse of discretion. However, the **Commission's** decision to award 820 ILCS 305/19(k), 19(l), and 16 (1998) penalties against the employer was an abuse of discretion as the employer could rely upon its expert, whose testimony that smoking was impeding the claimant's recovery was relatively compelling.

OUTCOME: The trial court's decision was reversed as to the imposition of fees and penalties upon the employer. In all other respects, the decision was affirmed. The case was remanded for further proceedings, if any, pursuant to Thomas.

CORE TERMS: claimant's, smoking, surgery, injurious, intervening cause, arbitrator, cigarette, fusion, causation, manifest, doctor, wheel, buffs, medical expenses, medical opinion, reasonable person, distinguishable, retard, abused, smoker, quit, case law, attorney fees, decision to impose, reasonable basis, standard of review, current condition, sole cause, abuse of discretion, work-related

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Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN1 Causation, including the existence of an **intervening** cause, is a question of fact subject to the manifest-weight standard of review. Conversely, § 19(d) (820 ILCS 305/19(d) (1998)) of the Illinois **Workers' Compensation** Act, 820 ILCS 305/1 et seq. (1998), by its plain terms, vests the Illinois **Workers' Compensation Commission** with discretion to reduce an award where a **workers' compensation** claimant engages in an injurious or unsanitary practice. § 19(d). If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the **Commission** may, in its discretion, reduce or suspend the **compensation** of any such injured employee. More Like This Headnote

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HN2 For an employer to be relieved of liability by virtue of an **intervening** cause, the **intervening** cause must completely break the causal chain between the original work-related injury and the ensuing condition. Employment need only remain a cause, not the sole cause or even the principal cause, of a **workers' compensation** claimant's condition. So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. More Like This Headnote

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Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct
HN3 Unlike an **intervening** cause, there is no requirement that an injurious practice be the sole cause of a **workers' compensation** claimant's condition of ill being for the Illinois **Workers' Compensation Commission** to reduce or deny **compensation.** 820 ILCS 305/19(d) (1998). Rather, the **Commission** may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. Section 19(d) vests the **Commission's** discretion on this subject, so the appellate court will only overturn its decision if that discretion is abused. An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the **Commission.** More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employees
HN4 An employer takes his employees as he finds them. More Like This Headnote

Administrative Law > Agency Adjudication > Decisions > Stare Decisis
HN5 Decisions of the Illinois **Workers' Compensation Commission** are not precedential and thus should not be cited. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees
HN6 Whether to award penalties and fees presents a factual question. The appellate court will not disturb the decision of the Illinois **Workers' Compensation Commission** on these matters unless it is contrary to the manifest weight of the evidence. Penalties and fees under 820 ILCS 305/19(k), 19(l), and 16 (1998) are appropriate where an employer's decision to delay payment of benefits is unreasonable or vexatious. Generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed. The relevant question is whether the employer's reliance was objectively reasonable under the circumstances. More Like This Headnote

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees
HN7 820 ILCS 305/19(l) (1998), which is more in the nature of a late fee, allows an award upon a lesser showing, applying when an employer neglects, or refuses to make payment or unreasonably delays payment without good and just cause. An employer bears the burden of showing that it had a reasonable belief that the delay was justified. More Like This Headnote

COUNSEL: For Appellant: Robert M. Harris, Adrian T. Cherikos/Knell & Poulos, PC, Chicago, IL.

For Appellee: Neal K. Wishnick, Sostrin & Sostrin, PC, Chicago, IL.

JUDGES: JUSTICE HUDSON delivered the opinion of the court. McCullough, P.J., and Hoffman, and Holdridge, JJ., concur. Justice Donovan, concurring in part and dissenting in part.

OPINION BY: HUDSON

OPINION

[1044]** **[*409]** JUSTICE HUDSON delivered the opinion of the court:

Claimant, John Hall, Jr., filed an application for adjustment of claim pursuant to the **Workers' Compensation** Act (Act) (820 ILCS 305/1 *et seq.* (West 1998)). He alleged that he sustained an employment-related injury to his lower back when he slipped and fell at work. The arbitrator awarded claimant 327 3/7 weeks temporary total disability (TTD) at $ 213.34 per week, $ 53,177.91 for medical expenses, as well as certain penalties and attorney fees. The **Workers' Compensation Commission (Commission)** adopted the decision of the arbitrator and remanded for possible further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). The circuit court **[***2]** of Cook County confirmed the **Commission's** decision. Respondent, Global Products, now appeals, arguing that the **Commission's** decision was contrary to the manifest weight of the evidence in that it did not find that claimant had engaged in an injurious practice such that **compensation** should be denied (see 820 ILCS 305/19(d) (West 1998)). Respondent also contends that the imposition of fees and penalties was inappropriate under the circumstances of this case. For the reasons that follow, we affirm in part and reverse in part.

I. BACKGROUND

Claimant testified that he had been employed as a laborer by respondent. His job required him to lift 100-pound bags of wax and animal fat and pour them into a mixer. At other times, claimant worked making "wheel buffs." In the course of performing this task, claimant would have to carry 15 of wheel buffs at a time. On August 31, 1999, claimant was carrying a group of wheel buffs, and he

slipped and fell. The wheel buffs landed on him. Claimant initially thought **[*410]** that he was not hurt. The next day when he awoke, he could not get out of bed, so he sought medical treatment. After a period during which claimant received conservative treatment, **[**1045]** an operation **[***3]** was performed on claimant's back on December 2, 1999.

Following the surgery, claimant continued to experience pain in his leg. Records show claimant experienced some improvement over the next few months. On two occasions, he tripped and nearly fell. Claimant underwent a lumbar myelogram and began treating with Dr. Stanley of the Chicago Institute of Neurosurgery. In June 2000, claimant experienced another fall. Claimant then came under the care of Dr. Mark Levin. Levin initially prescribed physical therapy. Subsequently, Levin ordered an MRI and then performed a fusion. Eventually, on October 11, 2002, a second lumbar surgery--a fusion--was performed on claimant for a recurrent herniation of the L5 disk.

Claimant testified that no doctor had advised him to stop smoking cigarettes. During cross-examination, he acknowledged the Dr. Mather (respondent's independent medical examiner) did raise the subject of smoking during their final visit. Levin's records indicate that he did tell defendant to cease smoking. Both Levin and Mather testified that they instructed claimant to quit smoking prior to surgery. Indeed, Mather opined that claimant's smoking resulted in the failure of his first spinal **[***4]** fusion.

The arbitrator found that claimant's condition ofill being was causally related to his on-the-job accident. According to the arbitrator, both claimant and Dr. Levin were credible. The arbitrator also noted that all doctors testifying in this case agreed that the surgeries performed upon claimant were necessary and that a third surgery is indicated. However, respondent refused to authorize a third surgery due to fact that claimant continued to smoke cigarettes. Regarding this issue, the arbitrator found that "Dr. Levin has taken [claimant's] smoking history into account in developing a treatment plan" and that "[t]he fact that [claimant] smokes cigarettes is not a reasonable basis to deny [claimant] his need for revision surgery." Moreover, the arbitrator expressly found that "the need for a third surgery to [claimant's] back is related to [claimant's work-related] accident."

The **Commission** adopted the opinion of the arbitrator in full. The circuit court of Cook County determined that the **Commission's** decision was not contrary to the manifest weight of the evidence. This appeal followed.

II. ANALYSIS

Respondent raises two main issues in this case. First, it argues that claimant's **[***5]** use of cigarettes constitutes an injurious practice such **[*411]** that the **Commission** should have denied claimant recovery for medical expenses and time off work following his second surgery. Actually, respondent's argument meanders between smoking being an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d) (West 1998)) and it being an **intervening** cause that severed the causalrelationship between claimant's injury and employment (see ***Vogel** v. Ill. **Workers'** Comp. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005)). Respondent makes two additional arguments regarding TTD and medical expenses that are wholly dependent on this first claim. As we reject respondent's first argument, these two derivative claims must fail as well. Second, respondent argues that it should not be subject to penalties and fees (see 820 ILCS 305/16, 19(k), 19(l) (West 1998)) because claimant's continued smoking was a reasonable basis for it to deny benefits to claimant.

A. Injurious Practice and Causation

We first turn to respondent's claim that the **Commission** should have **[**1046]** denied **compensation** due to claimant's smoking. Respondent cites section 19(d) of the Act (820 ILCS 305/19(d) (West 1998)), which suggests it is raising **[***6]** an injurious practice defense. At other times, respondent makes assertions like "[claimant's] self-inflicted behavior broke any chain of causation back to the original work injury." Such claims sound like respondent is asserting that claimant's smoking is an **intervening** cause. See ***Vogel***, 354 Ill. App. 3d at 786. These are principles of law governed by different standards. One difference is the standard of review. HN1 Causation, including the existence of an **intervening** cause, is a question of fact subject to the manifest-weight standard of review. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 293, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992). Conversely, section 19(d), by its plain terms, vests the **Commission** with discretion to reduce an award where a claimant engages in an injurious or unsanitary practice. 820 ILCS 305/19(d) (West 1998) ("If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the ***Commission** may, in its discretion*, reduce or suspend the **compensation** of any such injured employee" (emphasis added)); *Bailey v. Industrial Comm'n*, 286 Ill. 623, 626, 122 N.E. 107 (1919).

Another **[***7]** difference involves the relationship between a claimant's current condition of ill being and the accident. HN2 For an employer to be relieved of liability by virtue of an **intervening** cause, the **intervening** cause must completely break the causal chain between the original work-related injury and the ensuing condition. *Boatman v.* **[*412]** *Industrial Comm'n*, 256 Ill. App. 3d 1070, 1074, 628 N.E.2d 829, 195 Ill. Dec. 365 (1993). Employment need only remain a cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v. Industrial Comm'n*, 361 Ill. App. 3d 673, 682, 838 N.E.2d 55, 297 Ill. Dec. 568 (2005). So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 87, 656 N.E.2d 1084, 212 Ill. Dec. 250 (1995); *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970). In this case, the **Commission** could have quite reasonably determined that there is clearly a but-for relationship between claimant's at-work injury and his current condition. Quite simply, if claimant had not had the surgery necessitated by his on-the-job fall, there would have been no fusion to fail as a result of claimant's smoking. See ***Vogel***, 354 Ill. App. 3d at 788 ("Even if the **[***8]** accident was responsible for the failed fusion, such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of claimant's work injury"). Employment remains a cause of claimant's condition. Thus, smoking is not an **intervening** cause that would relieve respondent from liability.

HN3 Unlike an **intervening** cause, there is no requirement that an injurious practice be the sole cause of a claimant's condition of ill being for the **Commission** to reduce or deny **compensation.** See 820 ILCS 305/19(d) (West 1998). Rather, the **Commission** may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. *Keystone Steel & Wire Co. v. Industrial Comm'n*, 72 Ill. 2d 474, 481, 381 N.E.2d 672, 21 Ill. Dec. 345 (1978). Section 19(d) vests the **Commission's** discretion **[**1047]** on this subject, so we will only overturn its decision if that discretion is abused. See *Yocum v. Industrial Comm'n*, 297 Ill. App. 3d 813, 817-18, 697 N.E.2d 766, 232 Ill. Dec. 24 (1998). An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the **Commission.** *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).

We cannot say that the **[***9] Commission** abused its discretion here. We begin with the well-established principle that HN4 "an

employer takes his employees as he finds them." *Bocian v. Industrial Comm'n*, 282 Ill. App. 3d 519, 528, 668 N.E.2d 1, 217 Ill. Dec. 816 (1996). Claimant is a smoker and, apparently, was one prior to his first surgery, as his doctor advised him to quit. Given the testimony of Dr. Mather (respondent's expert), it is clear that problems healing after a surgery are part of being a smoker. Respondent asserts that claimant has "engage[d] in deliberate actions to retard recovery from a work related accident" and that it should not be held liable for expenses "associated with such injurious practices." We see no evidence (and respondent provides no record citation to such evidence) that claimant smoked cigarettes for the **[*413]** purpose of retarding his recovery. In fact, *Gallego v. Industrial Comm'n*, 168 Ill. App. 3d 259, 268-69, 522 N.E.2d 692, 119 Ill. Dec. 30 (1988), which respondent cites, is distinguishable on this basis, for in that case there was evidence that the claimant was binding his hand in a deliberate attempt to impair circulation and prolong recovery. In this case, it appears the claimant smoked in spite of its potential impact on his recovery, not because **[***10]** of it.

Respondent cites *Beebe v. Transport Leasing Contract*, No. 99WC66951 (September 20, 2005), a decision of the **Commission,** in support of its position. HN5 Decisions of the **Commission** are not precedential and thus should not be cited. See *S & H Foor Coverings, Inc. v. Industrial Comm'n*, 373 Ill. App. 3d 259, 266, 870 N.E.2d 821, 312 Ill. Dec. 377 (2007). Morever, that case, in any event, is distinguishable. In *Beebe*, two doctors instructed the claimant "repeatedly to stop smoking, to exercise, to lose weight, and to stop wearing the CAM boot." *Beebe*, No. 99WC66951 at . The claimant disregarded all of this advice. The **Commission** determined that the claimant's "persistence in so many injurious practices *** compels the **Commission** to invoke the sanctions of section 19(d)." *Beebe*, No. 99WC66951 at . However, in so holding, the **Commission** expressly stated, "We recognize that an employer takes an employee as it finds him, in this case, an overweight smoker, and that these factors alone generally would not justify suspension or reduction of **compensation.**" *Beebe*, No. 99WC66951 at . Respondent fails to acknowledge this limitation on *Beebe's* reasoning.

Furthermore, claimant did make an unsuccessful attempt to quit smoking. **[***11]** Nothing indicates that this was not a *bona fide* attempt, and, as respondent states, "it is commonly accepted by the medical community that smoking is an addiction." Areasonable person could certainly conclude that claimant should not be penalized when he made a good-faith attempt to prevail over his addiction.

In short, neither the law nor the facts support responde nt's position. Claimant's smoking does not rise to the level of an **intervening** cause, and the **Commission** did not abuse its discretion in determining that claimant should not be denied recovery beca use of it. Accordingly, we affirm the **Commission's** decision on this issue as well **[**1048]** as on the two derivative issues that respondent has raised.

B. Penalties and Fees

Respondent also argues that the **Commission** erred when it imposed penalties (820 ILCS 305/19(k), 19(l) (West 1998)) and awarded attorney fees (820 ILCS 305/16 (West 1998)). HN6 Whether to award penalties and fees presents a factual question. *Greaney v. Industrial* **[*414]** *Comm'n*, 358 Ill. App. 3d 1002, 1024, 832 N.E.2d 331, 295 Ill. Dec. 180 (2005). We will not disturb the decision of the **Commission** on these matters unless it is contrary to the manifest weight of the evidence. *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209, 437 N.E.2d 617, 62 Ill. Dec. 929 (1982). **[***12]** Penalties and fees under sections 16 and 19(k) are appropriate where an employer's decision to delay payment of benefits is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 234 Ill. Dec. 205 (1998). Generally, "[w]hen the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed." *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810, 293 Ill. Dec. 885 (2005). The relevant question is "whether the employer's reliance was objectively reasonable under the circumstances." *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145, 190 Ill. Dec. 276 (1993). HN7 Section 19(l), which is more in the nature of a late fee, allows an award upon a lesser showing, applying when an employer "neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.'" *McMahan*, 183 Ill. 2d at 515, quoting 820 ILCS 305/19(l) (West 1992). The employer bears the "burden of showing that it had a reasonable belief that the delay was justified." *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579, 658 N.E.2d 838, 213 Ill. Dec. 89 (1995).

Respondent asserts that its denial of benefits was reasonable because it had set **[***13]** forth a meritorious defense "based on the medical opinion of Dr. Mather and existing case law." As we explain above, the "existing case law" upon which respondent relies--namely, *Gallego*, 168 Ill. App. 3d 259, 522 N.E.2d 692, 119 Ill. Dec. 30, and *Beebe*, No. 99WC66951--is clearly distinguishable. However, Mather's testimony was relatively compelling, even if it did not ultimately persuade the **Commission.** Accordingly, we hold that respondent could rely upon Mather, and that no reasonable person could conclude that respondent was not entitled to do so. Since an abuse of discretion occurs when no reasonable person could agree with the position taken by the **Commission** (*Certified Testing*, 367 Ill. App. 3d at 947), we are compelled to conclude that the **Commission** abused its discretion in imposing fees and costs. We reverse its decision in this respect.

III. CONCLUSION

In light of the foregoing, we reverse the circuit court of Cook County's decision confirming the decision of the **Commission** insofar as it imposed fees and penalties upon respondent and we affirm in all **[*415]** other aspects. We remand this cause for further proceedings, **if any**, pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794.

Reversed in part and affirmed in part; cause remanded.

McCullough, **[***14]** P.J., and Hoffman, and Holdridge, JJ., concur.

CONCUR BY: Donovan (In Part)

DISSENT BY: Donovan (In Part)

DISSENT

Justice Donovan, concurring in part and dissenting in part:

I concur in the majority's analysis of the issues of injurious practice and causation, **[**1049]** but I cannot concur in the majority's decision to reverse the **Commission's** decision to impose penalties and fees. The majority quite rightly determined that claimant's cigarette smoking constitutes neither an **intervening** cause that would relieve respondent from liability, nor an injurious practice under section 19(d) of the Act (820 ILCS 305/19(d)(West 2004)). Given that, Dr. Mather's opinions, which were offered in support of a position or theory that has no basis in existing law, are inconsequential. The respondent has failed to establish reasonable legal support for its decision to terminate TTD benefits and to deny medical expenses. Denying benefits without a legal basis is certainly unreasonable. The **Commission's** decision to impose penalties and fees is not against the manifest weight of the evidence. Accordingly, I would affirm the circuit court's decision to confirm the decision of the **Commission** in its entirety.