*2010 Ill. Wrk. Comp. LEXIS 311, **

10IWCC 0283

WILMA L. KLOEPPING, PETITIONER, v. HONEYWELL INTERNATIONAL INC., RESPONDENT.

NO: 08WC 24251

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

2010 Ill. Wrk. Comp. LEXIS 311

March 19, 2010

CORE TERMS: elbow, pain, arbitrator, arm, medical treatment, job duties, injection, surgery, recommended, cortisone, symptom, lateral, causal connection, epicondylitis, prescribed, diagnosis, suitcase, broach, oven, claimant, temporary total disability, physical therapy, matter of law, compensable, performing, causation, weighed, roller, hired, quota

JUDGES: Barbara A. Sherman; Kevin W. Lamborn; James F. DeMunno

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2009, is hereby affirmed and adopted.

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

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

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

DATED: MAR 19 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, **[*2]** and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George J. Andros**, arbitrator of the Commission, in the city of **Rockford**, on **4/21/09, 5/20/09 & 6/16/09**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for temporary total disability?
N. Other **Is Respondent liable for prospective medical treatment of Petitioner**

FINDINGS

. On **November 9, 2007**, the respondent **Honeywell International, Inc.** ***was*** operating under and subject to the provisions of the Act.

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

. On this date, the petitioner ***did*** not sustain injuries that arose out of and in the course of employment.

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

[*3] . In the year preceding the injury, the petitioner earned $ **21160.36**; the average weekly wage was $ **406.93**.

. At the time of injury, the petitioner was **40** years of age, ***single*** with **1** children under 18.

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

. To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **271.29**/week for **0** weeks, from **0** through **0**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

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

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

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

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

. In no instance shall this award **[*4]** be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

Respondent is entitled to 8() credit for $ 8578.21. Respondent herein is not liable for propective medical treatment as no accident manifested in the case at bar.

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

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

Signature of arbitrator

August 24, 2009

Date

August 26, 2009

STATEMENT OF FACTS & CONCLUSIONS O F LAW

08 WC 19453 & 08 WC 24251

The above two cases were tried simultaneously yet separate Awards are issued for each filing against the two different Respondents. **[*5]** The key issue is what manifestation date is determined to be correct as a matter of fact and as a matter of law. This determination will resolve the choice of liability and ultimately the determination of who is responsible for prospective medical treatment between Respondent Manpower, a temporary agency for Sauer Danfoss in 08 WC 19453 (alleged DA 12/14/06) or Respondent Honeywell, Inc in 08 WC 24251 (alleged DA 08/11/07)

FINDINGS OF FACT

The material findings of fact are as follows: The petitioner, Wilma Kloepping, testified that she was employed as a manager for Gilly's Tan Spa for eight years. (T. 10) She would check in customers, clean beds, sell customers tanning sessions, lotions and perform minor bed maintenance. (T. 10) She held this job until March 6, 2006. (T. 11) Ms. Kloepping next worked for Wal-Mart until August, 2006. (T. 12) She was hired as a greeter and worked in the garden center. (T. 11) She would take care of flowers, provide customer service and work the register. (T. 11) She would also move flats of plants. (T. 70) Up until that time, she did not have problems with either of her arms. (T. 11-12, 71)

In August, 2006 she was hired by Manpower, a temporary **[*6]** work agency, and sent to work at Sauer-Danfoss. (T. 12) Manpower is in the business of hiring temporary employees and sending them to other business entities to perform work for those other entities. Manpower was a loaning employer in 08 WC 19453 and Sauer Danfoss was the borrowing employer in that case although unnamed in that Application. (T. 13) The Petitioner explanation of her work in both cases is deemed credible given her detail, articulate speech and detailed yet repeated cross examination by defense counsels.

Ms. Kloepping's first job at Manpower was in the saw room. She would take 16 foot steel bars that ranged from 1/4 inch to 2 1/4 inches in diameter and put them on a rack. She would take two of them at a time and put them on a roller to feed into a machine. (T. 13-14) The bars weighed up to 50 lbs. (T. 14) She would get the bars onto the roller by pushing down on one end to get the far end to come up over the bar and on to the roller (T. 14) She would use both arms to perform this activity. (T. 15, 74-75) Once the bars were on the roller, she made sure they were even and then cut them into lengths that varied from 3 to 8 inches. (T. 16) Ms. Kloepping stated that she would **[*7]** consider these job duties to be physically heavy. (T. 72)

Once the bar was cut into pieces, she would deburr the end of each piece. (T. 18) A round sander disk was used to deburr the bars. She would hold the bar with her right hand and spin it with her left hand in a circle to deburr it. (T. 18-19, 78) Ms. Kloepping stated that her quota was 900 to 950 bars per day. (T. 20) However, she could not meet the quota and was able to do 300 to 400 bars in a day. (T. 20)

She performed those job duties for approximately two months or until October 2006. She had pain in her left arm after performing this process. (T. 78) Ms. Kloepping stated that she could feel pain in her left arm during the deburring process. (T. 79) She never felt pain like this in her left arm before working at Sauer-Danfoss. (T. 79)

Ms. Kloepping testified that as she was performing the job duties in the saw room for Sauer-Danfoss, her left elbow began to hurt. (T. 21) She advised her supervisor at Sauer-Danoff, Diane Olsen, that her arm was hurting. (T. 22) Ms. Olsen advised her to ice it and to take ibuprofen. (T. 22)

She then switched jobs at Sauer-Danfoss. Her new position was the broach job. (T. 22) She moved into **[*8]** the broach job because the saw department was hurting her left arm. (T. 80) Ms. Kloeppings job duties in the broach department required her to take three cylinder blocks and put them into a drill. She would then drill the center holes in the blocks. After the parts came out of the drill, she would place six of them into a basket. She would lift the basket and dip it into a cleaning solution. (T. 83-84) The cylinders weighed anywhere from 5 to 20 lbs. She stated the thickness of each block was about 3 to 4 inches. (T. 23) Her quota was 300 to 350 parts per day. Ms. Kloepping stated that she was able to meet this quota. (T. 24) In fact, she was able to complete 900 to 1500 parts per day. (T. 24) She would use both hands and arms to put the parts into the broach. (T. 24)

The move from the saw room to the broach position did not improve Ms. Kloeppings left arm. She was still having problems with it. (T. 25) This included pain in the left elbow that would come halfway down the forearm. She described the pain as being "sharp" and "bad." (T. 25) Ms. Kloepping did not have this pain when not at work for Sauer-Danfoss. (T. 25-26) The pain in the left arm caused her problems sleeping. (T. 26) **[*9]** The left arm became worse in December 2006. (T. 26) At that time, she was moved back to the saw room. (T. 26) She reported the renewed elbow pain to Anita of Manpower. (T. 27)

Ms. Kloepping advised Anita that she wanted to see a doctor. (T. 28) She stated that Anita indicated she would make an appointment for her. (T. 28) Ms. Kloepping received a phone call from Joyce of Manpower advising her that an appointment was set at Healthworks. (T. 29)

She saw Kerry Wright at Healthworks. (T. 30, Px # 3) Ms. Kloepping believed that Ms. Wright was a doctor. She was prescribed anti-inflammatories and physical therapy. Ms. Wright explained to Ms. Kloepping the diagnosis of left lateral epicondylitis. (T. 91) She continued to see Ms. Wright in December 2006. (Px # 3) During this time, Ms. Kloepping was restricted to light duty work. Sauer-Danfoss did not have light duty work available. (T. 32) She was provided with light duty work at the Manpower office. (T. 32) Her job duties involved stapling pamphlets and computer work. She was not using her arm repetitively. (T. 33) The work at Manpower was much lighter then her job duties at Sauer-Danfoss. (T. 88) After being off work from Sauer-Dantfoss, **[*10]** she noticed improvement in her arm. (T. 33) Ms. Kloepping still had pain in the left arm, but it was not constant. (T. 33)

Ms. Kloepping was referred by Ms. Wright to Phil Stiles, a physician's assistant. (Px # 4) Ms. Kloepping initially believed Mr. Stiles to be a physician. The purpose of the referral was for a cortisone injection. (T. 34) Following the injection, she followed up with Ms. Wright and Mr. Stiles. On February 1, 2007, she advised the physical therapy assistant that she had no complaints of left elbow pain or left hand numbness. (T. 59, Px # 4, Manpower Rx # 5) On February 5, 2007, she advised the nurse practitioner that she was doing very well and was symptom free. (T. 60, Px # 4, Manpower Rx # 6) She denied pain associated with the elbow or forearm. (T. 60) She was released from care on February 5, 2007 and given a full duty release. (T. 37, 61, Px # 4, Manpower Rx # 7) On February 7, 2007, she advised Mr. Stiles that she had no pain in her left elbow and was happy with her progress. (T. 61, PX # 4, Manpower Rx # 8)

Ms. Kloepping stated that she was pain free following the steroid injection only until the end of February 2007. (T. 107) The injection provided her **[*11]** only with short-term relief of her left elbow pain. (T. 107)

Her arm had improved but still hurt once in a while. (T. 37) Activity such as holding the phone up to her ear for too long would aggravate the arm. (T. 37).

On February 12, 2007, Manpower placed Ms. Kloepping with Honeywell. (T. 38) She began working in department 244 making turbo sensors. (T. 38) The job would start from soldering and move through testing and boxing. (T. 40) Ms. Kloepping testified that her main job was called the end of the line. It involved testing parts and putting them into the oven. (T. 40) The parts she worked with weighed a couple of pounds at the most. (T. 40) She stated that groups of 18 to 20 employees were required to produce 2000 parts per day. (T. 41)

Ms. Kloepping testified that she had occasional sharp left elbow pain at the joint from the time that she started at Honeywell in February 2007. (T. 41, 89) The pain was not as often as when she worked at Sauer-Danfoss. (T. 41-42) Ms. Kloepping stated that she called off work to Manpower for jury duty and swollen ankles in the Spring of 2007. She did not call off work due to her left elbow. (T. 67)

Ms. Kloepping stated that she had pain in her **[*12]** left elbow in March, April and May 2007. She attributed this pain to be left lateral epicondylitis based upon what she was told by Ms. Wright in December 2006. (T. 91) The pain in the left elbow would come and go. (T. 90) The pain would be triggered by household activities such as vacuuming, sweeping or dusting. (T. 93)

She never had any of the problems before working at Sauer-Danfoss. (T. 94) Her left elbow was never pain free after the initial onset of pain working at Sauer-Danfoss in the fall of 2006. (T. 90).

In June 2007, Ms. Kloepping was hired full time as an employee of Honeywell. (T. 42) She performed the same job duties after being hired for Honeywell as when she was employed by Manpower. (T. 42) The only change in job duties was that she would also load the oven. (T. 43) The task of loading the oven was performed by taking suitcases of parts and putting them into six different spots. Each suitcase weighed 20 lbs. (T. 43) She used both hands to grab the suitcase and put it into the oven. (T. 44) The six oven slots were divided into two at waist, two at chest, and two above the head. (T. 44) Her left arm would be underneath the suitcase taking the brunt of the weight. (T. **[*13]** 46) She would load the suitcases from top to bottom. (T. 46)

Ms. Kloepping agreed that one of her medical notes referenced left elbow pain while lifting two-gallon jugs of milk. (T. 57, Px # 9, Manpower Rx # 10) This incident occurred in September 2007. It was after she already felt the left elbow pain while working at Honeywell. (T. 57)

As time progressed, Ms. Kloepping noticed the sharp pain in her left arm was becoming worse. (T. 47) She noticed pain in her left elbow towards the beginning of August or September, 2007. (T. 62) By November of 2007, Ms. Kloepping believed that she needed more medical treatment. (T. 48) She initially called Manpower requesting additional medical treatment. However, they would not authorize medical treatment. She asked Manpower to authorize treatment to her left elbow and her arm as it had not felt better since the original accident when she worked at Manpower. (T. 94-95) Ms. Kloepping then asked Honeywell for authorization of medical treatment. (T. 48) She notified her Honeywell supervisor, Kathy Jackson, that she was having problems with her left arm. (T. 49)

Honeywell scheduled Ms. Kloppeing to see Dr. Gaertner on November 9, 2007. (T. 49, Px # **[*14]** 5, Manpower Rx # 9). She had not seen any other physician since being released on February 7, 2007. (T. 104) Dr. Gaertner examined Ms. Kloepping on November 9, 2007 and performed a cortisone injection into her left elbow and prescribed physical therapy. (T. 49, Px # 5, Manpower Rx # 9) The treatment prescribed was similar to the treatment she received in December, 2006. (T. 95) The cortisone injection helped and Ms: Kloepping was released without restrictions by Dr. Gaertner on January 2, 2008. (T. 96, Px # 5, Rx. # 11) She continued to work at Honeywell until March, 2008. (T. 50)

Ms. Kloepping came under the care of an orthopedic surgeon, Dr. Gluscic. (T. 51, Px # 6) She was referred to him by her primary physician, Dr. Schilich. (T. 52) On November 17, 2008, she advised Dr. Gluscic she had left elbow pain for the last year. (T. 67, Px # 6) She underwent an MRI of the left elbow. (T. 53) The impression was positive for left lateral epicondylitis. (Px # 6) Dr. Gluscic recommended surgery for the left elbow. (T. 53, Px # 6, Manpower Rx # 12) Ms. Kloepping stated the pain in her left elbow has waxed and waned since December 15, 2006, but has never gone away. (T. 98)

Ms. Kloepping has **[*15]** not worked anywhere since March, 2008. (T. 54) Dr. Gluscic has given her restrictions of no lifting or pulling over 5 lbs. (T. 54, Px # 10)

She has not been able to find an employer, including Honeywell that can accommodate those restrictions. (T. 54) She received short-term disability benefits through October 2008. (T. 56)

CONCLUSIONS ON OF LAW:

WITH REGARDING TO ISSUE "D. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds as a matter of fact and law the Petitioner sustained an accident under the law on December 14, 2006. The Arbitrator further finds as a matter of fact and law petitioner failed to prove she suffered an accident that arose out of and in the course of her employment with the respondent, Honeywell, on November 9, 2007. The case of Durand v. Industrial Commission, 224 Ill.Dec. 53, 862 N.E.2d 918, 308 Ill.Dec. 715 (2007) suggests three options for establishing date of accident:

1.) The date of diagnosis.

2.) The first date of disablement.

3.) The date a reasonable person would have **[*16]** known that their condition of ill-being was work related.

In the case at bar, the petitioner first sought medical treatment on December 15, 2006 while employed by Manpower. The Arbitrator finds that was the first date of diagnosis and thus the proper accident date per Durand. The petitioner alleged an accident date of November 9, 2007 against Honeywell. There was no evidence showing more probably true than not that 11/06/07 was the first date of her disablement or accident by law.

Furthermore, there was no evidence presented that was the first date a reasonable person would have known the condition was work related. It also was not the first date of diagnosis.

The petitioner was diagnosed with left lateral epicondylitis on December 15, 2006. That is the proper date of accident. On that date she was employed by Manpower, not Honeywell. Therefore the Arbitrator adopts the above findings of fact in concluding as a matter of law she sustained an accident on December 14, 2006 while working in the course and scope of her employment for Manpower, the lending employer, at Sauer Danfoss, the borrowing employer, an unnamed respondent.

WITH REGARD TO ISSUE "F. IS THE PETITIONER'S PRESENT [*17] CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has already found that petitioner sustained a compensable accident on December 14th, 2006 and not on November 9, 2007.

Ms. Kloepping was released from care on February 7, 2007. (Px # 4, Manpower Rx # 8) This was following treatment related to her work injury at Manpower on December 14, 2006. She did not seek treatment again November 9, 2007. By that time, she had been a full time employee of Honeywell since June, 2007.

Ms. Kloepping testified she had a cortisone injection that provided her with temporary relief That led to her release from medical care on February 7, 2007. However, her left elbow pain returned by the end of February 2007. (T. 37) She testified that her elbow was painful in March, April, May and June of 2007. (T. 91) The pain could be caused by simply performing household activities. (T. 93)

She also stated that after her initial onset of pain while working at Sauer-Danfoss in 2006, her left elbow was never pain free after that. (T. 90) Her testimony establishes that despite the release from medical care in February, 2007, her left elbow remained symptomatic. **[*18]**

On November 9, 2007, Ms. Kloepping again sought medical treatment. (Px # 5, Manpower Rx # 9) She initially sought authorization of medical treatment from Manpower. (T. 94-95) Only when they denied this request did she turn to Honeywell. The records of Dr. Gaertner on November 9, 2007 indicate that he could not definitely state what caused the condition but it was definitely being

aggravated at work. (Px # 5, Manpower Rx # 9) The course of treatment recommended was similar to the treatment prescribed in December, 2006. This involved physical therapy and one cortisone injection. Ms. Kloepping testified that she again had temporary relief from this course of treatment. She was released from care on January 2, 2008. (Px # 5, Manpower Rx # 11) There were no restrictions or discussion concerning surgery.

By March of 2008, Ms. Kloepping's symptoms returned. This time she was referred to Dr. Gluscic, an orthopedic surgeon. On March 24, he stated that her left elbow condition might be the direct result from her work injury of December, 2006. (Px # 6) That timeframe would establish causal connection with her employment at Manpower. Dr. Gluscic subsequently recommended the left lateral epicondylectomy. **[*19]** (Px # 6, Manpower Rx # 12) Dr. Gluscic has not provided any additional statement or opinions addressing causation. His sole opinion on causation was against Manpower. (Px # 6)

Honeywell offered a record review report from Dr. Carroll. (Honeywell Rx # 1) He did not find a causal connection between Ms. Kloepping's left lateral epicondylitis and her work duties at Honeywell. Manpower offered a record review report from Dr. Neal. (Manpower Rx # 1) He found no causal connection between her current left elbow diagnosis and her job duties with either Manpower or Honeywell.

The Arbitrator finds adopts the medical opinion of Dr. Gluscic being the most probative opinion and only opinion from the surgeon recommending surgery attributing causal connection to Manpower under 08 WC 19453. There is no evidence that suggests the need for her surgery is causally related to her job duties with Honeywell under 08 WC24251. The Arbitrator finds this causation finding is the basis for concluding that Manpower under 08 WC 19453 is responsible for prospective medical treatment recommended by Dr. Gluscic in his records adopted in total regarding his recommendations for treatment therein.

Furthermore, the Arbitrator **[*20]** finds in making these decisions the following case is especially instructive: **Vogel** v. Industrial Commission 354 Ill.App.3d 780, 821 N.E.2d 807; 290 Ill.Dec. 495 (2nd Dist. 2005). In **Vogel**, the claimant suffered a compensable work accident that resulted in a lumbar fusion. The claimant was progressing well from the surgery and fusion was taking place. Unfortunately, the claimant was involved in three subsequent auto accidents that were not work related. This resulted in the necessity for revision surgery. The Appellate Court held that the auto accidents were not intervening incidents breaking the causal chain. The Court found that the claimant was in a weakened position due to his original accident. Thus, the need for surgery was related to his original work injury.

The same logic applies to the above two cases at bar for which different Awards are being issued. Ms. Kloepping never had problems with her left elbow prior to working at Sauer-Danfoss through Manpower, loaning employer. She was released from care on February 7, 2007. However, she stated that her symptoms waxed and waned thereafter. Her left elbow **[*21]** pain was aggravated by performing household activities, such as vacuuming. She did not seek treatment again until November of 2007 after becoming a Honeywell employee. The treatment prescribed was the same as following the injury at Manpower. It appears the cortisone injection temporarily masked the symptoms, but did not cure the condition. If there was an exacerbation of symptoms at Honeywell, it was only due to the weakened condition of the elbow due to Ms. Kloepping's employment at Manpower and the accident found infra on December 14th, 2009.

The Arbitrator concludes that Ms. Kloepping proved by a preponderance of the evidence a causal connection between her present conditions of ill being requiring future treatment against Manpower in 08 WC 19453. She did not prove the same against Honeywell. In review, she failed to prove a compensable accident against Honeywell in 08 WC 24541. Second, the medical records of Dr. Gluscic, the physician recommending surgery, attributes causation to the date of accident (December, 14th 2006) when she worked at Manpower. Third, the case of **Vogel** v. Industrial Commission is instructive in concluding that any aggravation of symptoms at Honeywell **[*22]** would not have been enough to break the causal chain against Manpower.

WITH REGARD TO ISSUE "K. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the above findings of material facts in support of his conclusions on this issue. The Arbitrator concludes as a matter of law that Respondent Manpower in case 08 WC 19453 is liable for the TTD Awarded in that case. The petitioner did not suffer a compensable accident on November 9, 2007 or show that her job duties were causally related to her employment at Honeywell. She is not entitled to TTD benefits in 08 WC 24251. Respondent in 08 WC 24251 is entitled to 8j credit per the trial stipulations in the amount of $ 8528.71.

WITH-REGARD TO ISSUES "J. WAS THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?" and "N" IS THE RESPONDENT IN EITHER CASE REPONSIBLE FOR PROSPECTIVE MEDICAL TREATMENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the above findings of material fact as a basis for the conclusions of law herein.

The Arbitrator finds as a matter of law all the treatment to date has been reasonable and necessary under **[*23]** 8(a). Said treatment and payment therefore shall be the responsibility of Manpower under 08 WC 19453. See the finding of 8(j) credit in 08WC 04541 above.

The prospective medical treatment as recommended by the treating orthopedic surgeon is the responsibility of Manpower. Respondent Manpower under 08 WC 19453 is ordered to authorize in writing and pay for under the terms of section 8 including the fee schedule the prospective medical treatment recommended by Dr. Gluscic as contained in Px 1 in both cases. Said record is adopted as finding of fact by the Arbitrator in making this conclusion of law.

01 Arbitrator George J. Andros

Legal Topics:

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

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

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

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

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*2010 Ill. Wrk. Comp. LEXIS 312, **

WILMA L. KLOEPPING, PETITIONER, v. MANPOWER, RESPONDENT. 10 IWCC 0284

NO: 08WC 19453

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WINNEBAGO

2010 Ill. Wrk. Comp. LEXIS 312

March 19, 2010

CORE TERMS: elbow, pain, arbitrator, arm, medical treatment, job duties, injection, surgery, causal connection, recommended, cortisone, symptom, lateral, temporary total disability, epicondylitis, prescribed, diagnosis, suitcase, broach, oven, temporary, claimant, physical therapy, matter of law, compensable, performing, causation, weighed, roller, hired

JUDGES: Barbara A. Sherman; Kevin W. Lamborn; James F. DeMunno

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2009, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 12,300.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: MAR 19 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George J. Andros**, arbitrator of the Commission, in the city of **Rockford**, on **4/21,5/20 & 6/16/09 [*3]** . After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for temporary total disability?
N. Other **Prospective medical treatment**

FINDINGS

. On **December 14th, 2006**, the respondent **Manpower *was*** operating under and subject to the provisions of the Act.

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

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

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

. In the year preceding the injury, the petitioner earned **$ 5776.34**; the average weekly wage was **$ 339.78**.

. At the time of injury, the petitioner was **40** years of age, ***single*** with **1** children under 18.

. Necessary medical services ***have not*** **[*4]** been provided by the respondent.

. To date, **$ 0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 226.52**/week for **53&6/7ths** weeks, from **4/08/08** through **4/21/09**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

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

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

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

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

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

Respondent Manpower under 08 WC 19453 is liable for prospective [*5] medical treatment per recommendations of Dr. Gluscic per PX. 1 through 3.

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

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

Signature of arbitrator

August 24, 2009

Date

AUG 26 2009

STATEMENT OF FACTS & CONCLUSIONS O F LAW

.08 WC 19453 & 08 WC 24251

The above two cases were tried simultaneously yet separate Awards are issued for each filing against the two different Respondents. The key issue is what manifestation date is determined to be correct as a matter of fact and as a matter of law. This determination will resolve the choice of liability and ultimately the determination of who is responsible for prospective medical treatment between **[*6]** Respondent Manpower, a temporary agency for Sauer Danfoss in 08 WC 19453 (alleged DA 12/14/06) or Respondent Honeywell, Inc in 08 WC 24251 (alleged DA 08/11/07)

FINDINGS OF FACT

The material findings of fact are as follows: The petitioner, Wilma Kloepping, testified that she was employed as a manager for Gilly's Tan Spa for eight years. (T. 10) She would check in customers, clean beds, sell customers tanning sessions, lotions and perform minor bed maintenance. (T. 10) She held this job until March 6, 2006. (T. 11) Ms. Kloepping next worked for Wal-Mart until August, 2006. (T. 12) She was hired as a greeter and worked in the garden center. (T. 11) She would take care of flowers, provide customer service and work the register. (T. 11) She would also move flats of plants. (T. 70) Up until that time, she did not have problems with either of her arms; (T. 11-12, 71)

In August, 2006 she was hired by Manpower, a temporary work agency, and sent to work at Sauer-Danfoss. (T. 12) Manpower is in the business of hiring temporary employees and sending them to other business entities to perform work for those other entities. Manpower was a loaning employer in 08 WC 19453 and Sauer Danfoss was **[*7]** the borrowing employer in that case although unnamed in that Application. (T. 13) The Petitioner explanation of her work in both cases is deemed credible given her detail, articulate speech and detailed yet repeated cross examination by defense counsels.

Ms. Kloepping's first job at Manpower was in the saw room. She would take 16 foot steel bars that ranged from 1/4 inch to 2 1/4 inches in diameter and put them on a rack. She would take two of them at a time and put them on a roller to feed into a machine. (T. 13-14) The bars weighed up to 50 lbs. (T. 14) She would get the bars onto the roller by pushing down on one end to get the far end

to come up over the bar and onto the roller (T. 14) She would use both arms to perform this activity. (T. 15, 74-75) Once the bars were on the roller, she made sure they were even and then cut them into lengths that varied from 3 to 8 inches. (T. 16) Ms. Kloepping stated that she would consider these job duties to be physically heavy. (T. 72)

Once the bar was cut into pieces, she would deburr the end of each piece. (T. 18) A round sander disk was used to deburr the bars. She would hold the bar with her right hand and spin it with her left hand in **[*8]** a circle to deburr it. (T. 18-19, 78) Ms. Kloepping stated that her quota was 900 to 950 bars per day. (T. 20) However, she could not meet the quota and was able to do 300 to 400 bars in a day. (T. 20)

She performed those job duties for approximately two months or until October 2006. She had pain in her left arm after performing this process. (T. 78) Ms. Kloepping stated-that she could feel pain in her left arm during the deburring process. (T. 79) She never felt pain like this in her left arm before working at Sauer-Danfoss. (T. 79)

Ms. Kloepping testified that as she was performing the job duties in the saw room for Sauer-Danfoss, her left elbow began to hurt. (T. 21) She advised her supervisor at Sauer-Danoff, Diane Olsen, that her arm was hurting. (T. 22) Ms. Olsen advised her to ice it and to take ibuprofen. (T. 22)

She then switched jobs at Sauer-Danfoss. Her new position was the broach job. (T. 22) She moved into the broach job because the saw department was hurting her left arm. (T. 80) Ms. Kloeppings job duties in the broach department required her to take three cylinder blocks and put them into a drill. She would then drill the center holes in the blocks. After the parts **[*9]** came out of the drill, she would place six of them into a basket. She would lift the basket and dip it into a cleaning solution. (T. 83-84) The cylinders weighed anywhere from 5 to 20 lbs. She stated the thickness of each block was about 3 to 4 inches. (T. 23) Her quota was 300 to 350 parts per day. Ms. Kloepping stated that she was able to meet this quota. (T. 24) In fact, she was able to complete 900 to 1500 parts per day. (T. 24) She would use both hands and arms to put the parts into the broach. (T. 24)

The move from the saw room to the broach position did not improve Ms. Kloeppings left arm. She was still having problems with it. (T. 25) This included pain in the left elbow that would come halfway down the forearm. She described the pain as being "sharp" and "bad." (T. 25) Ms. Kloepping did not have this pain when not at work for Sauer-Danfoss. (T. 25-26) The pain in the left arm caused her problems sleeping. (T. 26) The left arm became worse in December 2006. (T. 26) At that time, she was moved back to the saw room. (T. 26) She reported the renewed elbow pain to Anita of Manpower. (T. 27)

Ms. Kloepping advised Anita that she wanted to see a doctor. (T. 28) She stated that Anita **[*10]** indicated she would make an appointment for her, (T. 28) Ms. Kloepping received a phone call from Joyce of Manpower advising her that an appointment was set at Healthworks. (T. 29)

She saw Kerry Wright at Healthworks. (T. 30, Px # 3) Ms. Kloepping believed that Ms. Wright was a doctor. She was prescribed anti-inflammatories and physical therapy. Ms. Wright explained to Ms. Kloepping the diagnosis of left lateral epicondylitis. (T. 91) She continued to see Ms. Wright in December 2006. (Px # 3) During this time, Ms. Kloepping was restricted to light duty work. Sauer-Danfoss did not have light duty work available. (T. 32) She was provided with light duty work at the Manpower office. (T. 32) Her job duties involved stapling pamphlets and computer work. She was not using her arm repetitively. (T. 33) The work at Manpower was much lighter then her job duties at Sauer-Danfoss. (T. 88) After being off work from Sauer-Danfoss, she noticed improvement in her arm. (T. 33) Ms. Kloepping still had pain in the left arm, but it was not constant. (T. 33)

Ms. Kloepping was referred by Ms. Wright to Phil Stiles, a physician's assistant. (Px # 4) Ms. Kloepping initially believed Mr. Stiles to be a physician. **[*11]** The purpose of the referral was for a cortisone injection. (T. 34) Following the injection, she followed up with Ms. Wright and Mr. Stiles. On February 1, 2007, she advised the physical therapy assistant that she had no complaints of left elbow pain or left hand numbness. (T. 59, Px # 4, Manpower Rx # 5) On February 5, 2007, she advised the nurse practitioner that she was doing very well and was symptom free. (T. 60, Px # 4, Manpower Rx # 6) She denied pain associated with the elbow or forearm. (T. 60) She was released from care on February 5, 2007 and given a full duty release. (T. 37, 61, Px # 4, Manpower Rx # 7) On February 7, 2007, she advised Mr. Stiles that she had no pain in her left elbow and was happy with her progress. (T. 61, PX # 4, Manpower Rx # 8)

Ms. Kloepping stated that she was pain free following the steroid injection only until the end of February 2007. (T. 107) The injection provided her only with short-term relief of her left elbow pain. (T. 107)

Her arm had improved-but still hurt once in a while. (T. 37) Activity such as holding the phone up to her ear for too long would aggravate the arm. (T. 37).

On February 12, 2007, Manpower placed Ms. Kloepping with Honeywell. **[*12]** (T. 38) She began working in department 244 making turbo sensors. (T. 38) The job would start from soldering and move through testing and boxing. (T. 40) Ms. Kloepping testified that her main job was called the end of the line. It involved testing parts and putting them into the oven. (T. 40) The parts she worked with weighed a couple of pounds at the most. (T. 40) She stated that groups of 18 to 20 employees were required to produce 2000 parts per day. (T. 41)

Ms. Kloepping testified that she had occasional sharp left elbow pain at the joint from the time that she started at Honeywell in February 2007. (T. 41, 89) The pain was not as often as when she worked at Sauer-Danfoss. (T. 41-42) Ms. Kloepping stated that she called off work to Manpower for jury duty and swollen ankles in the Spring of 2007. She did not call off work due to her left elbow. (T. 67)

Ms. Kloepping stated that she had pain in her left elbow in March, April and May 2007. She attributed this pain to be left lateral epicondylitis based upon what she was told by Ms. Wright in December 2006. (T. 91) The pain in the left elbow would come and go. (T. 90) The pain would be triggered by household activities such as vacuuming, **[*13]** sweeping or dusting. (T. 93)

She never had any of the problems before working at Sauer-Danfoss. (T. 94) Her left elbow was never pain free after the initial onset of pain working at Sauer-Danfoss in the fall of 2006. (T. 90)

In June 2007, Ms. Kloepping was hired full time as an employee of Honeywell. (T. 42) She performed the same job duties after being hired for Honeywell as When she was employed by Manpower. (T. 42) The only change in job duties was that she would also load the oven. (T. 43) The task of loading the oven was performed by taking suitcases of parts and putting them into six different spots. Each

suitcase weighed 20 lbs. (T. 43) She used both hands to grab the suitcase and put it into the oven. (T. 44) The six oven slots were divided into two at waist, two at chest, and two above the head. (T. 44) Her left arm would be underneath the suitcase taking the brunt of the weight. (T. 46) She would load the suitcases from top to bottom . (T. 46)

Ms. Kloepping agreed that one of her medical notes referenced left elbow pain while lifting two-gallon jugs of milk. (T. 57, Px # 9, Manpower Rx # 10) This incident occurred in September 2007. It was after she already felt the left **[*14]** elbow pain while working at Honeywell. (T. 57)

As time progressed, Ms. Kloepping noticed the sharp pain in her left arm was becoming worse. (T. 47) She noticed pain in her left elbow towards the beginning of August or September, 2007. (T. 62) By November of 2007, Ms. Kloepping believed that she needed more medical treatment. (T. 48) She initially called Manpower requesting additional medical treatment. However, they would not authorize medical treatment. She asked Manpower to authorize treatment to her left elbow and her arm as it had not felt better since the original accident when she worked at Manpower. (T. 94-95) Ms. Kloepping then asked Honeywell for authorization of medical treatment. (T. 48) She notified her Honeywell supervisor, Kathy Jackson, that she was having problems with her left arm. (T. 49)

Honeywell scheduled Ms. Kloeppeing to see Dr. Gaertner on November 9, 2007. (T. 49, Px # 5, Manpower Rx # 9). She had not seen any other physician since being released on February 7, 2007. (T. 104) Dr. Gaertner examined Ms. Kloepping on November 9, 2007 and performed a cortisone injection into her left elbow and prescribed physical therapy. (T. 49, Px # 5, Manpower Rx # 9) The treatment **[*15]** prescribed was similar to the treatment she received in December, 2006. (T. 95) The cortisone injection helped and Ms. Kloepping was released without restrictions by Dr. Gaertner on January 2, 2008. (T. 96, Px # 5, Rx # 11) She continued to work at Honeywell until March, 2008. (T. 50)

Ms. Kloepping came under the care of an orthopedic surgeon, Dr. Gluscic. (T. 51, Px # 6) She was referred to him by her primary physician, Dr. Schilich. (T. 52) On November 17, 2008, she advised Dr. Gluscic she had left elbow pain for the last year. (T. 67, Px # 6) She underwent an MRI of the left elbow. (T. 53) The impression was positive for left lateral epicondylitis. (Px # 6) Dr. Gluscic recommended surgery for the left elbow. (T. 53, Px # 6, Manpower Rx # 12) Ms. Kloepping stated the pain in her left elbow has waxed and waned since December 15, 2006, but has never gone away. (T. 98)

Ms. Kloepping has not worked anywhere since March, 2008. (T. 54) Dr. Gluscic has given her restrictions of no lifting or pulling over 5 lbs. (T. 54, Px # 10)

She has not been able to find an employer, including Honeywell that can accommodate those restrictions. (T. 54) She received short-term disability benefits through **[*16]** October 2008. (T. 56)

CONCLUSIONS ON OF LAW:

WITH REGARDING TO ISSUE "D. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds as a matter of fact and law the Petitioner sustained an accident under the law on December 14, 2006. The Arbitrator futher finds as a matter of fact and law petitioner failed to prove she suffered an accident that arose out of and in the course of her employment with the respondent, Honeywell, on November 9, 2007. The case of Durand v. Industrial Commission, 224 Ill.Dec. 53, 862 N.E.2d 918, 308 Ill.Dec. 715 (2007) suggests three options for establishing date of accident:

1.) The date of diagnosis.

2.) The first date of disablement.

3.) The date a reasonable person would have known that their condition of ill-being was work related.

In the case at bar, the petitioner first sought medical treatment on December 15, 2006 while employed by Manpower. The Arbitrator finds that was the first date of diagnosis and thus the proper accident date per Durand. The petitioner alleged **[*17]** an accident date of November 9, 2007 against Honeywell. There was no evidence showing more probably true than not that 11/06/07 was the first date of her disablement or accident by law.

Furthermore, there was no evidence presented that was the first date a reasonable person would have known the condition was work related. It also was not the first date of diagnosis.

The petitioner was diagnosed with left lateral epicondylitis on December 15, 2006. That is the proper date of accident. On that date she was employed by Manpower, not Honeywell. Therefore the Arbitrator adopts the above findings of fact in concluding as a matter of law she sustained an accident on December 14, 2006 while working in the course and scope of her employment for Manpower, the lending employer, at Sauer Danfoss, the borrowing employer, an unnamed respondent.

WITH REGARD TO ISSUE "F. IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has already found that petitioner sustained a compensable accident on December 14 th, 2006 and not on November 9, 2007.

Ms. Kloepping was released from care on February 7, 2007. (Px # 4, Manpower **[*18]** Rx # 8) This was following treatment related to her work injury at Manpower on December 14, 2006. She did not seek treatment again November 9, 2007. By that time, she had been a full time employee of Honeywell since June, 2007.

Ms. Kloepping testified she had a cortisone injection that provided her with temporary relief That led to her release from medical care on February 7, 2007. However, her left elbow pain returned by the end of February 2007. (T. 37) She testified that her elbow was painful in March, April, May and June of 2007. (T. 91) The pain could be caused by simply performing household activities. (T. 93)

She also stated that after her initial onset of pain while working at Sauer-Danfoss in 2006, her left elbow was never pain free after that. (T. 90) Her testimony establishes that despite the release from medical care in February, 2007, her left elbow remained symptomatic.

On November 9, 2007, Ms. Kloepping again sought medical treatment. (Px # 5, Manpower Rx # 9) She initially sought authorization of medical treatment from Manpower. (T. 94-95) Only when they denied this request did she turn to Honeywell. The records of Dr. Gaertner on November 9, 2007 indicate that he **[*19]** could not definitely state what caused the condition but it was definitely being aggravated at work. (Px # 5, Manpower Rx # 9) The course of treatment recommended was similar to the treatment prescribed in December, 2006. This involved physical therapy and one cortisone injection. Ms. Kloepping testified that she again had temporary relief from this course of treatment. She was released from care on January 2, 2008. (Px # 5, Manpower Rx # 11) There were no restrictions or discussion concerning surgery.

By March of 2008, Ms. Kloepping's symptoms returned. This time she was referred to Dr. Gluscic, an orthopedic surgeon. On March 24, he stated that her left elbow condition might be the direct result from her work injury of December, 2006. (Px # 6) That timeframe would establish causal connection with her employment at Manpower. Dr. Gluscic subsequently recommended the left lateral epicondylectomy. (Px # 6, Manpower Rx # 12) Dr. Gluscic has not provided any additional statement or opinions addressing causation. His sole opinion on causation was against Manpower. (Px # 6)

Honeywell offered a record review report from Dr. Carroll. (Honeywell Rx # 1) He did not find a causal connection **[*20]** between Ms. Kloepping's left lateral epicondylitis and her work duties at Honeywell. Manpower offered a record review report from Dr. Neal. (Manpower Rx # 1) He found no causal connection between her current left elbow diagnosis and her job duties with either Manpower or Honeywell.

The Arbitrator finds adopts the medical opinion of Dr. Gluscic being the most probative opinion and only opinion from the surgeon recommending surgery attributing causal connection to Manpower under 08 WC 19453. There is no evidence that suggests the need for her surgery is causally related to her job duties with Honeywell under 08 WC24251. The Arbitrator finds this causation finding is the basis for concluding that Manpower under 08 WC 19453 is responsible for prospective medical treatment recommended by Dr. Gluscic in his records adopted in total regarding his recommendations for treatment therein.

Furthermore, the Arbitrator finds in making these decisions the following case is especially instructive: **Vogel** v. Industrial Commission 354 Ill.App.3d 780, 821 N.E.2d 807, 290 Ill.Dec. 495 (2nd Dist. 2005). In **Vogel**, the claimant suffered a compensable **[*21]** work accident that resulted in a lumbar fusion. The claimant was progressing well from the surgery and fusion was taking place. Unfortunately, the claimant was involved in three subsequent auto accidents that were not work related. This resulted in the necessity for revision surgery. The Appellate Court held that the auto accidents were not intervening incidents breaking the causal chain. The Court found that the claimant was in a weakened position due to his original accident. Thus, the need for surgery was related to his original work injury.

The same logic applies to the above two cases at bar for which different Awards are being issued. Ms. Kloepping never had problems with her left elbow prior to working at Sauer-Danfoss through Manpower, loaning employer. She was released from care on February 7, 2007. However, she stated that her symptoms waxed and waned thereafter. Her left elbow pain was aggravated by performing household activities, such as vacuuming. She did not seek treatment again until November of 2007 after becoming a Honeywell employee. The treatment prescribed was the same as following the injury at Manpower. It appears the cortisone injection temporarily masked the **[*22]** symptoms, but did not cure the condition. If there was an exacerbation of symptoms at Honeywell, it was only due to the weakened condition of the elbow due to Ms. Kloepping's employment at Manpower and the accident found infra on December 14th, 2009.

The Arbitrator concludes that Ms. Kloepping proved by a preponderance of the evidence a causal connection between her present conditions of ill being requiring future treatment against Manpower in 08 WC 19453. She did not prove the same against Honeywell. In review, she failed to prove a compensable accident against Honeywell in 08 WC 24541. Second, the medical records of Dr. Gluscic, the physician recommending surgery, attributes causation to the date of accident (December, 14th 2006) when she worked at Manpower. Third, the case of **Vogel** v. Industrial Commission is instructive in concluding that any aggravation of symptoms at Honeywell would not have been enough to break the causal chain against Manpower.

WITH REGARD TO ISSUE "K. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?" - THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the above findings of material facts in support of his conclusions on this **[*23]** issue. The Arbitrator concludes as a matter of law that Respondent Manpower in case 08 WC 19453 is liable for the TTD Awarded in that case. The petitioner did not suffer a compensable accident on November 9, 2007 or show that her job duties were causally related to her employment at Honeywell. She is not entitled to TTD benefits in 08 WC 24251. Respondent in 08 WC 24251 is entitled to 8j credit per the trial stipulations in the amount of $ 8528.71.

WITH REGARD TO ISSUES "J. WAS THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?" and "N" IS THE RESPONDENT IN EITHER CASE RESPONSIBLE FOR PROSPECTIVE MEDICAL TREATMENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the above findings of material fact as a basis for the conclusions of law herein.

The Arbitrator finds as a matter of law all the treatment to date has been reasonable and necessary under 8(a). Said treatment and payment therefore shall be the responsibility of Manpower under 08 WC 19453. See the finding of 8(j) credit in 08WC 04541 above.

The prospective medical treatment as recommended by the treating orthopedic surgeon is the responsibility of Manpower. Respondent Manpower under **[*24]** 08 WC 19453 is ordered to authorize in writing and pay for under the terms of section 8 including the fee schedule the prospective medical treatment recommended by Dr. Gluscic as contained in Px 1 in both cases. Said record is adopted as finding of fact by the Arbitrator in making this conclusion of law:

Legal Topics:

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

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

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

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: vogel (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, July 9, 2010 - 9:20 AM EDT

*2010 Ill. Wrk. Comp. LEXIS 238, **

10WC0209

AMY K. BIEGLER, PETITIONER, v. PROFESSIONAL THERAPY SERVICES, RESPONDENT.

NO: 09WC 2329, 09WC 7460

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF PEORIA

2010 Ill. Wrk. Comp. LEXIS 238

February 26, 2010

CORE TERMS: pain, patient, therapy, dog, started, pool, temporary total disability, notice, average weekly wage, returned to work, written request, experienced, supervisor, injection, causative, doctor, broke, permanent disability, causal connection, medical evidence, temporary, immediate supervisor, chain of causation, attending, disabling, episodes, symptoms, removal, contest, annual

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 7, 2009 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of **[*2]** 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 $ 23,800.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: FEB 26 2010

Findings

. On **December 8, 2008 and February 4, 2009**, the respondent **PROFESSIONAL THERAPY SERVICES** operating under and subject to the provisions of the Act.

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

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

. Timely notice of this **[*3]** accident given to the respondent.

. In the year preceding the injury, the petitioner earned $ **37,926.20**; the average weekly wage was $ **649.05**.

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

. Necessary medical services been provided by the respondent.

. To date, $ **-0-** has been paid by the respondent for TTD and/or maintenance benefits.

Order

. The respondent shall pay the petitioner temporary total disability benefits of $ **432.70**/week for **14 5/7** weeks, from **December 9, 2008 through February 2, 2009 and February 6, 2009 through March 24, 2009**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **17,316.18** for medical services, as provided in Section 8(a) of the Act.

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

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

. The respondent shall pay $ **0** in **[*4]** attorneys' fees, as provided in Section 16 of the Act.

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

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

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

7-2-09

JUL 7 2009

ATTACHMENT:

The Arbitrator makes the following findings of fact and conclusions with regard to all disputed issues in the consolidated cases as follows.

C. Accident

On December 8, 2008, Petitioner was employed as a physical therapist by Respondent. She was working that day and experienced two episodes with patients during **[*5]** therapy that caused pain in her low back on the right side. She had never experienced back pain before that date, had no prior back injury and had never been treated for any problem with her back. She worked throughout the rest of her shift but noticed constant pain in her back that did not stop. When she left work and drove home she still had the same pain. When she arrived home, as per her normal routine, she squatted to leash her dog and felt an increase in her back pain. She stated that it was severe enough that she rested on the couch for some time but the pain got better and she was able to get up and move around her house and take care of her dog. She continued to have pain in the same location in her low back that started when she was helping a patient at work.

The following day she reported to her supervisor what had taken place the prior day at work and the pain she experienced when attending to her dog which she described as a four pound Yorkshire terrier. On December 10 she saw Dr. Agarwal and gave a consistent history of the incident at work and at home. Dr. Agarwal reported that Petitioner's symptoms "started while working with patient." Pet. Ex. 1 and 2. He diagnosed **[*6]** mechanical low back pain with muscle spasm and prescribed medication.

Within a few days of her reported injury, Respondent sent Petitioner to Dr. Thomas Szymke who saw Petitioner on December 16, 2008. Again, the history of injury at work and at home are consistent with Petitioner's testimony. Pet. Ex. 3. Dr. Szymke found myospasm in Petitioner's low back, discomfort with bending and flexion and restricted motion. His diagnosis was right facet arthropathy at L5-S1. He ordered medication and started her on therapy.

Dr. Szymke's report acknowledges that the December 8 work incident was a factor in Petitioner's back condition. Neither he nor any other doctor, including Respondent's examining doctor, has differentiated Petitioner's symptoms between her work injury and possible aggravation with her dog. Since it is clear that her work incident was a causative factor in her need for treatment I find that under the Act she sustained an injury arising out of and in the course of her employment. Respondent has not met its burden of showing that some other event broke the chain of causation so as to deny covera ge to Ms. Biegler.

After Ms. Biegler returned to work on restricted duty in February, **[*7]** she was instructed by her supervisor Eric Sparks to assist in land therapy with a patient even though Ms. Biegler's restrictions at that time did not allow her to perform therapy other than water therapy in a pool. On February 4, 2009, a patient she was ordered to assist started to fall and Ms. Biegler instinctively tried to reach for the patient to keep her from falling. Although she did not grab the patient her act of suddenly reaching caused her to experience greater pain in the same location in her low back. After attending to the patient who fell and required emergency medical care and removal to the hospital, Ms. Biegler attempted to finish her day by performing water therapy in the pool for another patient because she thought the pool time would help her own back. It did not help and the following morning Petitioner contacted her supervisor, Cindy, the company's human relations manager in the home office in Belleville and the office where she was expected to work on February 5. She reported what had happened the previous day.

Eric Sparks testified for Respondent that he was Petitioner's immediate supervisor and she did not report either the December 8 or February 4 accidents **[*8]** to him. Petitioner does not claim that she reported to Sparks, but she did promptly report both episodes to supervisory personnel. Respondent does not contest notice so Mr. Sparks testimony on that point is irrelevant. Mr. Sparks was not present when Ms. Biegler was injured in December and was not in the same room where she was injured in February although he was in the area. Sparks said that PTS employees are instructed to report all work injuries to their immediate supervisor but Ms. Biegler testified that she was never instructed on when or to whom she was to report injuries. Sparks stated that Ms. Biegler would have

been told how to report at her annual evaluations, but was unable to state whether Ms. Biegler ever had any annual evaluation during the period she worked for Respondent Regardless of which manner Respondent would prefer employees to use, there is no doubt that timely and complete reporting took place in this case.
F. Causal Connection

Based on the medical information contained in Pet. Ex. 2, 3, 4 and 5, and Resp. Ex. 1, it is clear that Petitioner's low back condition was causally related to both incidents at work. There is no proof that the dog incident contributed **[*9]** any lasting effect and Respondent has the burden or proving its effect if it claims the event broke the causal chain. ***Vogel*** *v. The Illinois Workers' Compensation Commission*, 354 Ill. App. 3d 780, 290 Ill. Dec. 495 (2nd Dist. 2005). As the court found in **Vogel,** an intervening accident which aggravated a condition tat arose at work does not end Petitioner's claim under the Act since the work injury was a causative factor in the condition of ill-being. 290 Ill. Dec. at 502. There is no competent medical evidence in this case which claims the dog incident broke the chain of causation. I find that it did not.
G. Earnings

At the hearing the patties agreed that they would review the Petitioner's wage statement and attempt to agree on an average weekly wage. The parties did inform the Arbitrator that they agree the proper average weekly wage is $ 649.05 which then yields annual earnings of $ 33,750.60. I accept the stipulation of the parties on this issue.
J. Petitioner's Ex. 6 lists the medical expenses incurred by Petitioner. I find that the expenses are reasonable and necessary for Petitioner's treatment. **[*10]** Respondent did not contest the amount of the bills. Although it appears that Respondent is the one who referred Petitioner to Dr. Szymke for treatment, it failed to pay his bills as well as the others for all of Petitioner's tests and treatment. Respondent's examining doctor agreed that Petitioner needs additional therapy and at least one injection, Respondent is ordered to authorize and pay for that additional treatment.
K. TTD

Petitioner was unable to work from December 9, 2008, until she returned to work on restricted duty on February 3, 2009. Her work injury of December 8 was a causative factor in her need for treatment and time off work so I find that she is entitled to TTD benefits for that period. After she returned to work with restrictions, she re-injured her back when she attempted to prevent injury to a patient in her care. On February 5, Dr. Hippler issued a restriction with no lifting and no working in pool. When Petitioner presented those restrictions to Respondent she was told there was no work available and none has been offered to date. She continues under the care of Dr. Hippler and has seen Dr. Sureka for therapy at the Institute of Physical Medicine and Rehabilitation **[*11]** as ordered by Dr. Hippler. As recently as March 16 Dr. Hippler ordered her to remain completely off work.

Dr. Pineda, who examined Petitioner under Section 12 of the Act on March 10, agreed that she needed additional therapy for one to two months along with an injection. Ms. Biegler received an epidural injection from Dr. Marshall at the pain clinic shortly before the hearing. Since there is no real disagreement between physicians on the need for more care and the fact that Petitioner is restricted and Respondent has not offered any work within her restrictions, she is entitled to TTD from February 5 through the date of hearing.
L. Penalties

Based on the medical evidence before me, I find that penalties are not warranted.

Legal Topics:

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

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: vogel (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, July 9, 2010 - 9:20 AM EDT

*2010 Ill. Wrk. Comp. LEXIS 185, **

10 WC 0156

JOY MCNIFF, PETITIONER, v. MCDONALD'S, RESPONDENT.

No. 07WC 34090

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF LASALLE

2010 Ill. Wrk. Comp. LEXIS 185

February 17, 2010

CORE TERMS: arbitrator, knee, tear, symptom, pain, symptomatic, walking, medical treatment, left knee, recommended, manager, surgery, bag, drive, thru, notice, supervisor, deposition, temporary total disability, food, emergency room, twisting, customer, temporary, arthroscopic surgery, orthopedic surgeon, medical evidence, occurrence, ill-being, causally

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission clarifies and modifies the Decision of the Arbitrator in several respects.

The Arbitrator awarded $ 4,170.52 in medical expenses. The Commission reduces this award by $ 70.00. Petitioner offered Dr. Bernal's $ 70.00 bill relating to an office visit **[*2]** of February 13, 2008 (PX 1) but did not offer any records relating to that visit. The Commission clarifies that the modified medical award of $ 4,100.52 is subject to the fee schedule.

The Arbitrator awarded temporary total disability benefits from July 3, 2007 through June 25, 2009, the date of hearing. The Arbitrator noted that Petitioner had not worked since July 3, 2007, that Dr. Bernal took Petitioner off work on August 29, 2007, pending left knee surgery, and that Dr. Perona recommended a left knee arthroscopy on November 20, 2007. The Commission views the evidence differently and awards temporary total disability benefits from August 29, 2007 through February 13, 2008. Petitioner saw Dr. Bernal on two occasions in July of 2007 but there is no evidence that the doctor took her off work until August 29, 2007. PX 4. While Dr. Perona recommended knee surgery on November 20, 2007, he did not see Petitioner thereafter. At his deposition, on November 25, 2008, he indicated that Petitioner would need surgery only "if she continue[d] to be symptomatic." As stated previously, Petitioner did not offer Dr. Bernal's office visit note of February 13, 2008. Thus, the last treatment note in **[*3]** evidence is Dr. Perona's note of November 20, 2007. The Commission views Petitioner's condition as unstable as of November 20, 2007, based on Dr. Perona's surgical recommendation, but declines to award benefits after February 13, 2008 because there is no medical evidence that Petitioner's left knee continued to be symptomatic on that date. The modified temporary total disability award totals 24 1/7 weeks.

The Arbitrator awarded prospective care in the form of the surgery recommended by Dr. Perona. Because Dr. Perona qualified his surgical recommendation during his deposition, the Commission modifies the Decision by awarding a return visit to Dr. Perona rather than the surgery.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 173.32 per week for a period of 24-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner **[*4]** the sum of $ 4,100.52 for medical expenses under § 8(a) of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical treatment in the form of left knee arthroscopic surgery as recommended by Dr. Paul Perona is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for a return visit by Petitioner to Dr. Paul Perona for

examination of her left knee injury.

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

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

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

Bond for the removal of this cause to **[*5]** the Circuit Court by Respondent is hereby fixed at the sum of $ 8,400.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Dated: FEB 17 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **James J. Giordano**, arbitrator of the Commission. in the city of **Ottawa**, on **June 25, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
E. Was timely notice of the accident given to the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided **[*6]** to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
N. Other Prospective medical treatment pursuant to Section 8 (a) of the Act.

FINDINGS

. On **3/9/2007**, the respondent **McDonald's *was*** operating under and subject to the provisions of the Act.

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

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

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

. In the year preceding the injury, the petitioner earned $ **834.10**; the average weekly wage was $ **208.53**.

. At the lime of injury, the petitioner was **44** years of age ***single*** with **0** children under 18.

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

. To date $ **0** has been paid by the respondent for TTD and/or maintenance benefits:

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **173.32** /week for **103** weeks, from **7/3/2007** through **6/25/2009**, as provided in Section 8(b) **[*7]** of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

. The respondent shall pay $ **4,170.52** for medical services, as, provided in Section 8(a) of the Act.

. **Petitioner is entitled to and Respondent shall pay for prospective medical treatment in the form of left knee arthroscopic surgery as recommended by Dr. Paul Perona, orthopedic surgeon.**

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

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

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

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

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision **[*8]** shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of*

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

James J. Giordano - Arbitrator

07/06-2009

Date

JUN 9 2009

ADDENDUM

JOY LEE MCNIFF V. MCDONALD'S

CASE NO. 07 WC 34090

FINDINGS OF FACT - DISPUTED ISSUES:

GENERAL FACT RELATING TO ALL ISSUES:

Petitioner, Joy McNiff, testified that she was employed by McDonald's in Peru, Illinois near Interstate 80 on March 9, 2007. She worked as a cashier and assisted with the drive-thru area. She began her employment with McDonald's in January 2007.

Ms. McNiff stated that prior to March 9, 2007 she had not had any injury to her left knee and did not have any symptoms of left knee pain. The record contains no evidence of prior medical treatment to her left knee.

Petitioner testified that on March 9, 2007 she was working in the front cashier area. She indicated that on that date the drive **[*9]** thru was competing with other McDonalds' drive-thrus as to the number of customers served. She stated that Sara Maubach was the acting manager on that date. She stated that she was in the front of the restaurant taking orders and Sara handed her a bag to bring to a customer in the drive thru area.

Ms. McNiff indicated that she went through the customer wait line area to run the bag out to the drive thru area. The floor was wet and her foot skidded. She stated that she caught herself on the order counter and pulled herself up. She twisted her left knee and noticed a sharp pain in her knee. She stated that at the time know the extent of her injury and continued to work. She testified that the floor was wet because a co-worker had recently mopped the area.

Petitioner indicated that Sara witnessed, the event and asked her whether she was "okay." Petitioner at the time thought that she would be fine and continued to work.

Ms. McNiff's recollection of the events of March 9, 2007 was corroborated by the testimony of Barbara Frey. Ms. Frey testified that she did not know Ms. McNiff prior to the date of occurrence other than her interactions with Ms. McNiff at McDonald's where Ms. Frey was **[*10]** a frequent customer.

Ms. Frey testified that on March 9, 2007 she was at the Peru McDonald's during the lunch hour. She ordered her food from Ms McNiff, the cashier, at the front counter and while she was waiting for her food order at the counter, she recalls Petitioner being asked to run a bag to the drive thru. She also recalled Petitioner slipping, twisting, and catching herself on the counter.

Ms. Frey also testified that she did view Ms. McNiff return from delivering the bag to the outside drive thru area and that she remembered her limping. She did not remember ever seeing Ms. McNiff limp prior to this date.

Respondent offered the testimony of Sara Maubach, a manager at McDonald's in March 2007. She testified that she did not think she worked on March 9, 2007 but did not recall who would have been the manager on duty that day. Ms. Maubach admitted that the competitions with other McDonald's restaurants such as the competition that Ms. McNiff described would occur. However, she did not recall whether there was a competition on this particular date.

Ms. Maubach also testified that she would work with Petitioner a couple of times a week. She further testified that in her position **[*11]** as manager she would a couple of times a day request that a worker run a food bag to the drive thru area. She admitted that she could not testify that she never asked Ms. McNiff to run a food bag out to the drive thru. However, she further testified that she did not ask her to run a food bag to the drive thru on this particular day.

Petitioner testified that after her shift on the date of accident, she had a conversation with a shift supervisor, Jenna, regarding the slipping occurrence. She testified that this conversation took place at Jenna's additional place of employment and that Jenna was not working as shift supervisor on this particular date at that time.

Respondent offered the testimony of Lori Mahan, store manager, who testified via evidence deposition by agreement of the parties on April 22, 2009. Ms. Mahan stated that during her orientation she advised Ms. McNiff that it was the policy of the store that if one suffers a work accident it is to be reported to a manager or shift supervisor so that it could be properly documented. Ms. Mahan testified that she did not work on March 7, 2009. The policy would be that an accident would be reported to the supervisor or assistant **[*12]** manager who would then report to her. Ms. Mahan testified that she was not notified the injury to Petitioner's left knee.

Sara Maubach, assistant manager and daughter of Ms. Mahan, testified that she first became aware of the accident **the date after the occurrence**. She testified that she had a conversation with Shauna Wilcox, another manager, who inquired whether she had heard what happened to Ms. McNiff. She further testified that Ms. Wilcox indicated that what had occurred was that Ms. McNiff had fallen. She admitted that she did not report this incident to her mother, the manager, nor did she question Ms. McNiff about the incident.

Sara Maubach testified that in her training as an assistant manager she learned that the policy regarding accidents was that an

employee would report to a manager or shift supervisor and the manager or shift supervisor would then fill out the documentation for the injury. She admitted that, it would be the manager or supervisor who did all of the documentation and that the only role of the worker in reporting the accident would be to orally report it.

Petitioner testified that she cannot recall specific dates but that she made several attempts to **[*13]** contact Lori Mahan at the McDonald's management telephone to discuss the injury and request approval for treatment but was unsuccessful. She recalls leaving a message with one of the managers. Ms. Mahan testified that the management telephone would be answered by any of the managers and that there was not voice mail for that particular line.

Ms. McNiff testified that she did notice swelling and pain in her left knee in the days immediately following the accident and that she would ice the knee. Eventually, the pain would subside. Within a couple of weeks of the accident she was terminated from McDonald's. She stated that she spent most of her time at home the weeks following her termination and was not doing any activities that required significant use of the left leg. She further testified that she did not have medical insurance or an income at the time and did not seek medical treatment as her attempts to contact Lori Mahan at McDonald's to discuss treatment were unsuccessful.

Petitioner obtained other employment at a mushroom factory. She testified that upon using the knee again it became sore but that her job would predominately require standing and that she did not suffer any **[*14]** type of reinjury through her employment at the factory. She testified that upon returning to the workforce and utilizing her leg again on a frequent basis, she noticed pain and eventually sought treatment on June 28, 2007 at St. Margaret's Hospital. (P2)

Ms. McNiff reported to the emergency room with a history on June 28, 2007 of walking and hearing a crunching sound and "noted redness, swelling and limited mobility and weight bearing since (previous injury)." (P2) X-rays were performed which revealed a moderate suprapatellar effusion. She was prescribed Vicodin. (P2)

Petitioner followed up with Dr. Alejandro Bernal at St. Margaret's Health Clinic on July 3, 2007. (P4) He noted a history of an injury to the left knee about three months ago. He indicated internal derangement of the knee and sent her for an MRI. (P4)

An MRI was performed on July 5, 2007 at St. Margaret's Hospital. (P2) The history noted "44-year-old female with slip and fall in March 2007 presenting with anterior pain and lateral popping." The MRI revealed:

1. Radial tear of the posterior horn of the medial meniscus with a 5 mm gap;
2. Large effusion;
3. Mild thinning of articular cartilage from the patellar surface;
[*15] 4. Mild prepatellar bursitis." (P2)

On July 23, 2007, Ms. McNiff returned to the care of Dr. Bernal. He noted an initial injury in March 2007 with reinjury in June 2007 while walking. He recommended that Petitioner follow-up with Dr. Perona. His records indicate prescriptions for Ultram. (P4)

Petitioner returned to Dr. Bernal on August 29, 2007 with continued complaints of pain and giving out of the knee. He noted '"this supposedly from McDonalds and is having problems with insurance to see an orthopedic surgeon." He prescribed Vicodin and again recommended follow-up with an orthopedic surgeon. Ms. McNiff had another follow-up appointment on October 9, 2007 where Dr. Bernal again recommended Ibuprofen and Vicodin and orthopedic surgeon care. (P4)

On November 6, 2007, Petitioner returned to the care of Dr. Bernal with complaints of pain from the left buttock down the back of the thigh and then the front of the shin. Dr. Bernal indicated that through the assistance of the hospital she was going to see Dr. Perona on November 20, 2007. (P4)

Ms. McNiff appeared for a consultation with Dr. Paul Perona, orthopedic surgeon, on November 20, 2007. He noted a history of March 2007 when Petitioner **[*16]** was "running on a wet floor at McDonald's to take a food order out. Her hands were full of food. She twisted, to the left and felt a burning pain to her left knee. She had no treatment. She did not work for a few months and the pain decreased. Then in June she went back to work at Monterey Mushroom, did a lot of standing, was working 12-15 hours per day, and she had increased pain." (P5)

Dr. Perona reported symptoms of pain in the medial and patellar areas of the knee and locking, grinding and catching. He also noted that she reported giving out of the knee and weakness. (P5)

Based upon his physical examination of Ms. McNiff, Dr. Perona recommended arthroscopic surgery of the left knee. (P5)

Ms. McNiff testified that she has not been able to return to Dr. Perona since her visit of November 20, 2007 and that it is her desire to proceed with surgery but that she does not have insurance or an income.

Petitioner testified at hearing that she would like to proceed with surgery with Dr. Perona. She stated that in a normal day she notices that her leg will go out on her or hyperextend. She also notices difficulty bending or kneeling. She will no longer participate in activities such as walking. **[*17]** She testified that, she still has pain in the knee and she does have frequent swelling.

In support of the Arbitrator's decision relating to Disputed Issue C - Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds the following facts:

Though the parties presented conflicting testimony, the Arbitrator finds that the testimony of Petitioner was completely consistent with the testimony of the frequent customer, Barbara Frey, who witnessed the slipping and twisting occurrence and thus finds that Petitioner met her burden of proving accident.

Further, the Arbitrator finds the testimony of Sara Maubach to be vague and gives little weight to her testimony regarding the events of this particular date. Ms. Maubach admitted that she may have asked Ms. McNiff to run a drive thru bag to a customer on occasion and further testified that it was a common practice multiple times per day to request that a worker run a bag out to a customer. Yet she denied handing a bag to Ms. McNiff on this particular date and did not remember whether she was working on this particular date.

The Arbitrator finds that Ms. Maubach's recollection **[*18]** of this date is unreliable and finds it unlikely that Ms. Maubach would recall each and every date and which particular worker she would have requested to run a food bag to the drive thru.

The Arbitrator also notes that the medical treatment records support the onset of -Petitioner's left knee pain to be a twisting incident at work in March 2007.

In support of the Arbitrator's decision relating to Disputed Issue E - Was timely notice of the accident given to the respondent, the Arbitrator finds the following facts:

Petitioner testified that Ms. Maubach was present when the slip occurred and that she acknowledged the occurrence. Petitioner also testified as to discussing the incident with a shift supervisor, Jenna, and that she attempted on several occasions to contact Ms. Mahan via telephone to discuss the incident.

The Arbitrator recognizes that even disregarding the testimony of Ms. McNiff, the Respondent would have had sufficient notice under the Act. Sara Maubach admitted to a conversation the day after the incident that occurred between her and another assistant manager, Shauna Wilcox, regarding the occurrence. It is clear from this testimony that at least two persons in **[*19]** a position of authority were aware that Petitioner was alleging that she had slipped or "fallen" at work with a day of the accident. Thus, even if the Arbitrator were to ignore the testimony of Ms. McNiff that she orally reported the accident or that it was witnessed by a supervisor, the Respondent had notice of the accident. The Court has consistently held that the notice requirements of the Act shall be liberally construed. See Westin Hotel v. IWCC, 372 Ill.App.3d 527 (1st Dist., 2007)

In support of the Arbitrator's decision relating to Disputed Issue F -- Is the petitioner's present condition of ill-being causally related to the injury, the Arbitrator finds the following facts:

The Arbitrator notes that the only testimony provided at hearing regarding causation for Ms. McNiff's current condition was the testimony of Dr. Perona.

Petitioner relies upon the testimony of Dr. Perona to arrive at the conclusion that Petitioner's present condition of ill being is causally related to her alleged accident of March 9, 2007 and contends as follows:

Petitioner testified without rebuttal that she had no prior left knee treatment or symptoms. She first **[*20]** became symptomatic on March 9, 2007 after the slipping and twisting incident. After her termination from McDonald's a few weeks after the work injury she testified to a rather sedentary lifestyle at home until her employment with the mushroom factory which required standing and walking. Her symptoms in her left knee then increased in severity.

The evidence is clear that the increase in activities whether by walking, standing, or general every day weight bearing at her second job caused an increase in her pain and symptoms which precipitated her treatment in the emergency room in June 2007.

Dr. Perona testified by evidence deposition on November 25, 2008. He testified that it was possible for symptoms from a meniscal tear to wax and wane-and that it may produce few symptoms if the person were not active during a period of time. (P6, p.15) He further testified that walking is not the type of activity that would cause this type of tear. (P5, p.16)

Dr. Perona also stated that a twisting injury is the type of mechanism of injury that is consistent with a meniscal tear. He further indicated that if it were merely walking that caused an increase pain and "crunching" sensation, that the tear **[*21]** could have pre-existed the walking. (P5, p.17)

With regards to causation, Dr. Perona specifically testified:

"Q: If one were to suffer a meniscal tear, could they not have the crunching or the catching type symptoms until they have an increased activity level? Is that possible?"

A: Well, again I would probably reiterate the fact that if you're saying that you injured the meniscus and then it became asymptomatic and then you've increased your activity and then it became symptomatic and it stayed symptomatic for a long period of time, my view or my opinion would be that something happened that second time to make that tear significant."

Q: However, whatever happened the second time 'may not have actually initially caused the tear?

A: I would say that the most likely scenario is that she probably tore the meniscus and had a small tear initially. There are a lot of people that have meniscal tears that actually can function and can do most activities without having any problems. It's the second injury that I would say probably extended the tear or completed the tear to the point where it now is symptomatic all the time.

Q: And as far as we know, the second injury was just merely her walking? **[*22]**

A: Yes, that's my understanding. That's what's in my notes." (P5, p.17-18)

Dr. Perona further testified that if one's activity level were to increase and one were to have more weight bearing on her knees than she could be more symptomatic than if she were in a more sedentary lifestyle. (P5, p.20)

Respondent also relies upon the testimony of Dr. Perona to arrive at the conclusion that Petitioner's present condition of ill being is not causally related to her alleged accident of March 9, 2007 and contends as follows:

Dr. Perona testified by deposition. Dr. Perona addressed the issue of causal relationship on direct examination on pages 11-14 of his evidence deposition. When asked to assume that Petitioner had no symptoms in her left knee between a few days after the incident on March 9, 2007, and her visit to the emergency room on June 28, 2007, Dr. Perona testified, "I

mean if it completely resolved and she was basically asymptomatic, I would say that even if she had injured the knee initially in March, it had improved to the point where it would potentially be fine and it sounds like in your hypothetical that in June when she re-injured it that it either tore it more to the point **[*23]** where it became constantly symptomatic or something happened in June that it made it symptomatic, constantly symptomatic." When asked whether it would be his opinion, based upon such facts, that the incident in June caused her need for medical treatment and not the described accident of March 9, 2007, Dr. Perona testified, "I would probably say that is correct."

On cross examination, Dr. Perona admitted that symptoms related to a torn meniscus can wax and wane. Dr. Perona testified that he felt that a waxing and waning of symptoms was distinctly different in terms of symptom presentation than a sustained period of time without any symptoms. Dr. Perona testified, "well, again I would probably reiterate the fact that if you're saying that you injured the meniscus and then it became asymptomatic and then you've increased your activity and then it became symptomatic and it stayed symptomatic for a long period of time, my view or my opinion would be that something happened that second time to make that tear significant. [...] It's the second injury I would say probably extended the tear or completed the tear to the point where it is now symptomatic all the time."

Petitioner did not testify **[*24]** or describe any waxing or waning of symptoms in her knee. She explained that she felt an initial pain with some swelling for a few days after her described twisting incident at work on March 9, 2007. She then explained that she had no symptoms of any kind through the end of her employment with McDonald's on March 24, 2007, and over the next several months until shortly before she presented to the emergency room on June 28, 2007, giving a history that her pain had resolved for several months but that she had an onset of pain in the day prior to going to the emergency room that was associated with hearing and experiencing' a "crunching sound" while walking.

The Arbitrator notes that Dr. Perona does opine that her activities in June 2007 which resulted in her presenting to the emergency room either worsened the tear or caused the tear to become more symptomatic. However, at no point during his deposition does Dr. Perona eliminate the first injury, the March 2007 twisting incident at McDonald's, as a contributing cause of the knee condition. He further admits during his deposition that merely walking would not cause this type of tear and that it was his understanding that was all that **[*25]** Ms. McNiff was doing when her symptoms became severe. He was aware of her work with the mushroom factory as described in his office notes.

The Arbitrator finds that the record contains no evidence that an event or activity in June 2007 rose to the level of an intervening accident which would break the chain of causation between her original work injury and the current condition of her left leg. Having found such the Arbitrator concludes that the testimony of Dr. Perona can lead to only two logical conclusions -- either the activity in June 2007 worsened the tear which was already present or the activity in June 2007 caused the tear to become more symptomatic due to Petitioner's increased activity level and weight bearing and further notes that with either conclusion the Petitioner has met the burden of proving a causal connection between her work accident of March 9, 2007 and her current condition of ill-being. Whether the second incident may have contributed to the severity of the injury and to the resulting surgery recommendation is irrelevant as that fact alone does not eliminate the contribution of the first accident which based upon the testimony of Dr. Perona and the medical **[*26]** evidence likely caused some type of tear of the meniscus. See **Vogel** v. Industrial Commission, 354 Ill.App.3d 780 (2nd Dist., 2005)

In **Vogel**, the Appellate Court found a causal connection between the original work injury and Petitioner's current condition of ill-being despite two subsequent auto accidents which medical evidence supported aggravated Mr. **Vogel's** condition to the extent that he required further surgery. However, the Court concluded that, but for the original work injury, Mr. **Vogel's** condition would not have progressed to the extent that it progressed. The Court rejected the argument of the Respondent that the auto accidents caused the need for the surgery and found it irrelevant to the issue of whether the work accident was still a contributing factor.

Similarly, in the case at bar, the evidence has shown that the activity performed by Petitioner in June 2007 likely worsened her condition or at least worsened her symptoms. However, regardless of the contribution of the June 2007 activities that prompted the ER visit, Ms. McNiff consistently reported that problems with her left knee began on March 9, 2007. The fact that the activities **[*27]** of June 2007 when she was walking or standing frequently with this other job may have contributed to the overall need for surgery does not lead to the conclusion that the first accident did not also contribute. Dr. Perona clearly testified that the history described to him of walking and her work at the mushroom factory did not reveal the type of mechanism that in and of itself would cause a tear. He opined that her tear began in March 2007.

Based upon the preponderence of the evidence, the Arbitrator finds that although the June 2007 activities by Petitioner may have contributed to her symptoms, there is no evidence that would rise to the level of an intervening accident. The Arbitrator finds that based upon the consistent medical treatment records, the testimony of Petitioner, and the opinion of Dr. Paul Perona, the only medical expert testimony offered, the work accident of March 9, 2007 was a causative factor in Petitioner's condition of ill-being.

In support of the Arbitrator's decision relating to Disputed Issue J - Were the medical services that were provided to petitioner reasonable and necessary, the Arbitrator finds the following facts:

Petitioner testified that Petitioner's **[*28]** Exhibit # 1 represented medical expenses related to her left knee treatment after her work accident of March 9, 2007. Each of the medical bills is supported by the records of St. Margaret's Hospital, Dr. Bernal, and Dr. Perona.

Based upon the greater weight of the evidence and the Arbitrator's finding as to liability, the Arbitrator awards Petitioner $ 4,170.52 as and for her medical expenses: These expenses shall be limited to medical fee schedule provisions of Section 8.2 of the Act.

In support of the Arbitrator's decision relating to Disputed Issue K - What amount of compensation is due for Temporary Total Disability, the Arbitrator finds the following facts:

Petitioner testified that she remained off work under the care of Dr. Bernal and Dr. Perona. She had not worked since July 3, 2007. This testimony is supported by an off work slip from Dr. Bernal dated August 29, 2007 confirming that she remained off work pending left knee surgery. (P3)

Dr. Perona testified that as of his visit with Ms. McNiff on November 20, 2007 she was in need of arthroscopic surgery to repair her tear.

Based upon the greater weight of the medical evidence which indicates that Petitioner has not yet **[*29]** reached maximum medical improvement, Petitioner was temporarily totally disabled from July 3, 2007, her first appointment with Dr. Bernal who recommended that she remain off work through the date of hearing, June 25, 2009 as she was still off work awaiting surgery.

Thus, the Arbitrator awards TTD from 7/3/07 through 6/25/09, or a period of 103 weeks, at a rate of $ 173.32 per week, the minimum rate allowed under the Act, for a total of $ 17,851.96.

In support of the Arbitrator's decision relating to Disputed Issue N - Prospective medical treatment pursuant to Section 8 (a) of the Act, the Arbitrator finds the following facts:

The only medical evidence offered at hearing were the medical treatment records of St. Margaret's Hospital, Dr. Bernal, and Dr. Perona as well as Dr. Perona's testimony. The MRI contained in the medical treatment records supports the tears diagnosed by both Dr. Bernal and Dr. Perona. Further, Dr. Perona recommended during the orthopedic consultation of November 20, 2007 that Petitioner proceed with arthroscopic surgery of her left knee.

Dr. Perona further testified in his deposition as to the need for surgery. Neither party offered medical evidence to the **[*30]** contrary.

BASED UPON THE ABOVE FINDINGS OF FACT AND CONSIDERATION OF THE PREPONDERANCE OF THE EVIDENCE, THE ARBITRATOR ARRIVES AT THE FOLLOWING CONCLUSIONS:

Disputed Issues C and F - The accident of March 9, 2007 arose out of and in the course of Petitioner's employment and Petitioner's present condition of ill-being is causally related to the injury sustained on that date.

Disputed Issue E - Timely notice of the accident was given to the respondent.

BASED UPON THE ABOVE FINDINGS OF FACT AND CONSIDERATION OF THE PREPONDERANCE OF THE EVIDENCE, THE ARBITRATOR ISSUES THE FOLLOWING ORDER:

Disputed Issue J - The outstanding medical bills in the amount of $ 4,170.52 as set forth above shall be paid by Respondent in accordance with Section 8 (a) of the Act.

Disputed Issue K - The Respondent shall pay the Petitioner Temporary Total Disability benefits of $ 173.32/week for 103 weeks, from 07/03/2007 through 06/25/2009, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the Petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19 (b) of the Act.

Disputed [*31] Issue N - Petitioner is entitled to prospective medical treatment in the form of left knee arthroscopic surgery as recommended by Dr. Paul Perona, orthopedic surgeon.

Petitioner is now entitled to receive from Respondent compensation that has accrued from 03/09/2007 through 06/25/2009 and the remainder, if any, of the award to be paid to Petitioner by Respondent in weekly payments.

This award in no instance shall be a bar to a further hearing, and determination of a further amount of temporary total compensation or of compensation for permanent disability.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision finding a causal connection between Petitioner's work accident and her left leg/knee condition. I do agree that Petitioner sustained an accident on March 9, 2007; however, I believe any injury she may have sustained resolved within a reasonable time thereafter. Petitioner continued to work for Respondent through March 24, 2007. During that time she lost no time from work on account of the injury nor did she seek any medical treatment. She then "did nothing" until she went to work at the Mushroom Factory. She testified that the constant standing at that job **[*32]** resulted in her need to seek medical treatment.

Petitioner went to St. Margaret's emergency room on June 28, 2007, over three months after her accident. According to the history she gave medical providers, her pain from the fall at work three months earlier had "resolved" but flared up in the previous 24 hours. The triage note states she was "walking and heard 'crunching sounds'". She also indicated she had "hurt [left] knee cap last year". On July 3, 2007, Petitioner was seen by Dr. Bernal. She related injuring her left knee three months earlier and "reinjur[ing] it about two weeks ago while walking." Unlike the claimant in **Vogel**, Petitioner herein was asymptomatic before she presented to the hospital seeking treatment and Dr. Perona clearly testified that it was the event in June which brought about the need for treatment. Petitioner had not been undergoing any type of treatment for her knee prior to June 28, 2007. Had something not happened within the 24 hours preceding that visit she never would have gone to the hospital as she clearly indicated it was the recent event(s) that prompted her to seek medical care. Petitioner failed to prove her current condition in her left knee **[*33]** is causally related to her work injury in March and I, therefore, dissent.

Legal Topics:

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

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

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: vogel (Edit Search | Suggest Terms for My Search)
View: Full

Date/Time: Friday, July 9, 2010 - 9:20 AM EDT

*2009 Ill. Wrk. Comp. LEXIS 1267, **

PATRICK NAUGHTON, PETITIONER, v. CITY OF CHICAGO, DEPARTMENT OF AVIATION, RESPONDENT.

NO: 05WC 50546

09 IWCC 1390

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 1267

December 28, 2009

CORE TERMS: right knee, arbitrator, knee, pain, surgery, arthroscopy, temporary total disability, meniscectomy, anterior, partial, doctor, medial, right leg, causation analysis, causal connection, present condition, reconstruction, underwent, causally, lateral, stairs, leg, supervisor, entitled to credit, amounts paid, light duty, replacement, synovectomy, outstanding, debridement

JUDGES: Molly C. Mason; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission modifies the Decision of the Arbitrator by finding, pursuant to the parties' post-arbitration stipulation, that Respondent is entitled to credit in the amount of $ 37,608.85 rather than $ 31,108.85 for temporary total disability benefits it paid to Petitioner.

The Commission also clarifies the Decision of the Arbitrator and cites additional evidence and authority in support of the Arbitrator's causation analysis. While acknowledging that the treating surgeon, Dr. Sclamberg, described Petitioner as "doing great" following the first knee surgery of October 27, 2004, the Arbitrator nevertheless found causation as **[*2]** to Petitioner's subsequent surgeries and current condition. In making this finding, he relied on the extensive nature of the initial surgery, Petitioner's testimony concerning his persistent postoperative complaints and the testimony of Petitioner's supervisor, Mario Guerrero. The Commission also relies on Dr. Bleier's notes. Dr. Bleier, a physician associated with MercyWorks, the company clinic, described Petitioner as "making very slow progress" after the October 27, 2004 surgery. On March 15, 2005, only three weeks before Dr. Sclamberg described Petitioner as "doing great," Dr. Bleier noted that Petitioner's knee was stiff and warm to the touch. He prescribed Celebrex and instructed Petitioner to apply ice three to four times per day. Although he detected some improvement at the next visit, on March 29, 2005, he noted a pain level of "3" and dispensed additional Celebrex. PX 3. Dr. Bleier's notes support Petitioner's testimony that his knee continued to bother him after he resumed fully duty in April of 2005. T.17-18. The Commission also finds the Arbitrator's causation analysis to be fully consistent with the Appellate Court's reasoning in **Vogel** v. Industrial Commission, 354 Ill.App.3d 780 (2nd Dist. 2005). **[*3]**

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 1,034.56 per week for a period of 69-5/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act, with Respondent receiving credit for the $ 37,608.85 in benefits it paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 567.87 per week for a period of 130 weeks, as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the loss of use of Petitioner's right leg to the extent of 65%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding unpaid balance directly to the providers pursuant to the medical fee schedule, and pay the Petitioner's group carrier for amounts paid. The Respondent shall hold the Petitioner harmless regarding these medical bills. Respondent is entitled to credit for amounts it may have paid.

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 **[*4]** Petitioner on account of said accidental injury.

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

DEC 28 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, arbitrator of the Commission, in the city of **Chicago**, on **2/24/2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

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

FINDINGS

. On **9/9/2004** the respondent **City of Chicago *was*** operating under and subject to the **[*5]** provisions of the Act.

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

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

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

. In the year preceding the injury, the petitioner earned $ **83,512.00**; the average weekly wage was $ **1606.07**

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

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

. To date, $ **31,108.85** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **1,034.56**/week for **69-5/7** weeks, from **9/10/2004** through **4/5/2005** and **11/13/2006** through **8/19/2007**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **567.87**/week for a further period of **130** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained **[*6]** caused **65% loss of use of the right leg**.

. The respondent shall pay the petitioner compensation that has accrued from **9/10/04** through **2/24/09**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

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

. The respondent shall pay $ **0.00** in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.
STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease **[*7]** in this award, interest shall not accrue.

Signature of arbitrator

March 12, 2009

Date

Rider

FINDINGS OF FACT:

The Petitioner is an engineer for the City of Chicago. His job involves maintaining and fixing mechanical machinery at O'Hare International Airport. He has held this job for twelve years. He described his job a labor intensive position in which he is involved and a lot of walking, climbing, bending, twisting, etc...

On September 9, 2004 he reported to work feeling physically fine, specifically he had no problems with his right knee. He testified that he had had a prior right knee surgery approximately twenty years previously but that it was not bothering him at that time, and had not bothered him for years. In fact he was able to fulfill his job requirements and pass a City of Chicago physical in order to get the job.

On September 9, 2004 the Petitioner was going down some stairs in a sump pump area. He describes the stairs as being narrowed in

step, approximately half the size of his foot, which is a size twelve. The Petitioner was going the stairs at an angle and his knee buckled and gave way. He was taken by ambulance to Resurrection Hospital. He followed **[*8]** up the next day with Mercy Works as required by Respondent. He was referred for an MRI. The MRI revealed a meniscus tear and he went to see Dr. Sclamberg for treatment.

The medical records from Dr. Sclamberg reflect a history consistent with that given at trial including the Petitioner going down stairs and his knee giving way. The Petitioner testified to a stairway that would be different than that to which the general public is exposed and there is no dispute that he suffered an accident within the meaning of the Act.

Dr. Sclamberg performed surgery on his right knee October 27, 2004. PX # 4, pgs. 58 & 59. The operative report shows: Arthroscopy, right knee, with anterior cruciated ligament reconstruction with anterior tibialis allograft; Arthroscopy, right knee, with partial medial meniscectomy; Arthroscopy, right knee with partial lateral meniscectomy; and Arthroscopy, right knee with synovectomy and debridement.

The Petitioner had a number of follow up visits with Dr. Sclamberg. He was released full duty on March 1, 2005 but actually ended up returning to work on April 4, 2005 due to City of Chicago procedures for return to work.

The Petitioner testified that due to the extent **[*9]** and nature of the surgery he understood that he would continue to have right knee pain for sometime. Over the summer of 2005 he would notice his knee catching and causing pain while he performed his work activities. He elevated his leg at work and took over the counter medication to relieve the symptoms. This was confirmed by his supervisor Mario Guerrero.

Mr. Guerrero testified that he has worked for the City of Chicago for twenty five years. He is currently assistant chief engineer and has been since 1999. He testified that he did not know the Petitioner prior to him joining his crew in April 2005 and had never worked with the Petitioner at any time. He testified the Petitioner was somebody he considered a work colleague but was not a social friend and the only time he would see him out side work activities would be at union meetings.

Mr. Guerrero was a credible witness. He testified that the Petitioner always favored his right knee while working. He would drag it, he would limp, and from time to time he would need assistance in performing his work activities in 2005 and 2006. The Petitioner testified that he would require assistance while performing activities and particularly **[*10]** for jobs on the ground that required bending. The Petitioner testified that this condition continued throughout 2005 and into 2006. He did not return to his treating doctor as he believed that this was part of the recovery from his ACL reconstruction.

On November 6, 2006 the Petitioner reported to Dr. Sclamberg, his treating physician, stating that he had been doing relatively well but that he had pain in his knee and developed some swelling the previous night when he was flexing and rotating his knee to put wart creme on his foot. The Petitioner demonstrated what he was doing for the Arbitrator. It was a minor flex of the leg. The doctor gave him an injection of lidocaine and kenalog with good relief of the pain. He asked him to take Aleve and told him to follow up.

The Petitioner returned to see Dr. Sclamberg on November 13, 2006 with continuing complaints and underwent surgery. The impression was that he had a locked right knee. Dr. Sclamberg performed surgery. The post op diagnosis was: Right knee anterior cruciate ligament insufficiency, Right knee medial meniscus tear, Right knee lateral meniscus tear, Right knee tibial and medial femoral condyle grade III and IV chondromalacia. **[*11]** The procedure performed was: Arthroscopy, right knee, with anterior cruciated ligament reconstruction with anterior tibialis allograft; arthroscopy, right knee, with partial medial meniscectomy, arthroscopy, right knee with partial lateral meniscectomy, arthroscopy, right knee with synovectomy and debridement. PX # 11.

The Petitioner followed up and had physical therapy over the next few months. Dr. Sclamberg had released him to light duty but the Petitioner stated the Respondent did not have any light duty and the witness, Mario Guerrero confirmed the Respondent did not have any light duty.

The Petitioner continued to have pain in his right knee and on February 1, 2007 Dr. Sclamberg recommended a right knee replacement which the Petitioner underwent on April 11, 2007. He was diagnosed with degenerative arthritis, right knee and underwent a right total knee arthroplasty, rotating platform, posterior stabilized. The Petitioner was off work from November 13, 2006 through August 19, 2007.

Petitioner testified to continuing complaints of right knee pain from the point of release through the point of the increase in pain in November 2006. The Petitioner testified to the pain in his right **[*12]** knee never fully going away following the work related injury of September 9, 2004. Dr. Sclamberg testified at length in this matter. He provided a causal connection for the replacement knee stating that the September 9, 2004 injury that the accident of the date accelerated the Petitioner's condition to the point where he then required a knee replacement. PX # 5, pgs. 4 & 5, PX # 6, pgs. 26 - 27.

CONCLUSIONS OF LAW:

The Arbitrator renders decision on the following issues:

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

The Petitioner testified that his right leg was pain free prior to September 9, 2004. He described a labor intensive job for which he was required to pass a company physical. Petitioner suffered a work related injury on September 9, 2004 and testified that his leg pain has continued since that time including the period throughout 2005 and 2006 when he had returned to work full duty. While the Arbitrator notes that there are progress notes that indicate that the Petitioners leg was "doing great," the Arbitrator understands that that is in the context of the injury itself and the extensive nature of the surgery which **[*13]** Petitioner initially underwent on October 27, 2004.

It is not unreasonable and in fact more probably true than not true that Petitioner's right knee remained painful throughout 2005 and 2006 given the extensive nature of the surgery which was essentially a rebuilt knee. The treating physician, who had the benefit of looking inside the knee itself agreed. The Petitioner under went an ACL reconstruction with anterior tibialis allograft; partial medial meniscectomy, arthroscopy, right knee with partial lateral meniscectomy, arthroscopy, right knee with synovectomy and debridement. The Arbitrator finds that it more probably true than not true that the Petitioner continued to experience pain in his knee throughout this period. The Arbitrator also finds the testimony of the Petitioner's supervisor Mario Guirrero to be credible and

persuasive on this issue.

Based on the foregoing, the Arbitrator finds a causal connection between the Petitioners present condition of ill being and the work related injury of September 9, 2004 including the subsequent surgeries in November 2006 and April 2007.

J. Where the medical services provided to the Petitioner reasonable and necessary?

It appears that **[*14]** all medical provided to the Petitioner was reasonable and necessary and pursuant to the stipulation of the parties, the Respondent shall pay the outstanding unpaid balance directly to the providers and pay the Petitioners group carrier for amounts paid. The Respondent shall hold the Petitioner harmless regarding these medial bills. The parties have agreed that all outstanding medical bills were incurred under the medical fee schedule. Respondent is entitled to credit for all amounts it may have paid.

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

The Arbitrator finds that Petitioner was temporarily totally disabled for a period of 69-5/7 weeks, from September 10, 2004 through April 5, 2005 and from November 13, 2006 through August 19, 2007.

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

The Arbitrator, based on the above, and after considering the entire record, finds that Petitioner has permanently lost 65% of the use of his right leg under section 8(e) of the Act.

DISSENTBY: NANCY LINDSAY

DISSENT: I respectfully disagree with the Majority's Decision affirming and adopting the Arbitrator's Decision finding that Petitioner's present condition of ill-being in his right **[*15]** leg is causally related to the accident of September 9, 2004. A critical issue in this case was whether Petitioner's right knee was painful during 2005 and 2006. In finding that it was "more probably true than not true" that Petitioner continued to experience pain in his knee throughout 2005 and 2006, the Arbitrator relied upon the testimony of Mario Guirrero which he found persuasive and credible. The Majority appears to have adopted this reasoning. Unfortunately, the facts the Majority and the Arbitrator has relied upon to support that conclusion are not in the record. The Arbitrator's Decision states that Mr. Guerrero testified that Petitioner "always favored his right knee while working [and] [h]e would drag it, he would limp, and from time to time he would need assistance in performing his work activities in 2005 and 2006." That is not what Mr. Guerrero testified to. He never stated that Petitioner "always" favored his right knee. He did not testify that he would drag it nor did he testify that he would sometimes need assistance performing work activities. Mr. Guerrero was a friend and co-worker of Petitioner. The Arbitrator stated Mr. Guerrero was not a social friend and that **[*16]** the only time they saw each other outside of work was at union meetings. Actually, Mr. Guerrero did not deny that he and Petitioner socialized. Rather, he testified they did so "not often" (T. p.44) The bottom line is that the credibility finding of Mr. Guerrero is based upon an inaccurate statement of his testimony. Mr. Guerrero's testimony did not corroborate Petitioner's testimony regarding any complaints he may have had in 2005 and 2006 nor did it credibly rebut a significant gap in treatment or Petitioner's recorded statement to his doctor that his knee is "doing great" (a description given to the doctor both in 2005 and in 2006).

In affirming and adopting the Arbitrator's causation analysis the Majority has cited additional evidence in support of the Arbitrator's causation analysis, including Dr. Bleier's treatment notes. These notes, however, pre-date Dr. Sclamberg's last office visit with Petitioner on April 4, 2005. Therefore, they do nothing to undermine or contradict Dr. Sclamberg's statement of Petitioner's condition on April 4, 2005 -- i.e., "[Petitioner] is doing great. He is having no pain; no instability. He is very pleased with his results." Petitioner had resumed **[*17]** full duty work on March 1, 2005. When Petitioner returned to Dr. Sclamberg in November of 2006, he provided no information which would have corroborated his arbitration testimony. While he testified he would sometimes feel a catch at work but could loosen it up by walking, he never mentioned that to Dr. Sclamberg. He made absolutely no mention of any ongoing difficulties. Instead, he told the doctor his knee had "been doing very well" until the night before. He then provided a specific account of an incident having occurred the night before. There is nothing to suggest that Petitioner would have seen the doctor but for the incident at home. The Majority's findings on causal connection are unsupported by the credible evidence in the record. Petitioner failed to prove that his current condition of ill-being in his right knee is causally connected to his work accident of September 9, 2004. Contrary to the Majority's assertion, this is not a situation akin to that of **Vogel**. In **Vogel**, the claimant was still recovering from his first surgery at the time of the first alleged intervening automobile accident. In this case, Petitioner had been released and at maximum medical improvement. **[*18]** He had undergone no treatment for over eighteen months. He then reported a new accident with no mention of the one. It is for these reasonss, I dissent.

Legal Topics:

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

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

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

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